LITIGATION UPDATE

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COVERAGE

***Wilcha v. Nationwide*, Pa. Super., 887 A.2d 1254 (2005)**

The 13-year-old son of Nationwide's homeowners insured operated a dirt bike on a public road and collided with a motor vehicle. Suit was brought on behalf of the minor against the motor vehicle driver who, in turn, joined the minor's parents as additional defendants on negligent entrustment and negligent supervision theories. All parties agreed the Nationwide homeowners' policy excluded coverage for accidents involving motor vehicles, including dirt bikes of the type operated by the minor. The parties disagreed as to whether Nationwide provided coverage to the parents on the negligent entrustment and negligent supervision claims. The Superior Court affirms the trial court determination that Nationwide afforded no coverage. Since operation of a motor vehicle was an essential element of any claim of negligent entrustment or negligent supervision, the Nationwide exclusion for claims "arising out of the ownership of, maintenance, or use of a motor vehicle" was triggered. The Superior Court distinguishes the earlier Pennsylvania Supreme Court decision in *Erie v. Transamerica* since there the vehicle was placed in motion by a 3 1/2 child incapable as a matter of law of owning, maintaining, or using a motor vehicle.

***Prudential v. Sartno*, Pa. Super., 874 A.2d 85 (2005)**

Sartno insured his personal auto through Prudential. He used that vehicle to deliver for a pizzeria. While doing so, he struck a pedestrian. The pizzeria did not charge for delivery. Sartno was paid an hourly wage by the pizzeria and also kept any tips he received from customers. The Prudential policy had a livery exclusion which denied coverage whenever the insured vehicle was used to carry people or property for a fee. The trial court denied Prudential's Motion for Summary Judgment. The Superior Court reverses. The focus of inquiry is not what the customer paid or what the pizzeria did or did not charge for delivery. The focus is on the benefit which accrued to Sartno for delivering pizza. He was not making deliveries gratuitously or as an incidental or isolated task. The exclusion was intended to limit Prudential's liability by excluding situations where an insured uses the auto in a commercial environment to carry persons or property for money. The exclusion is valid.

***Tuscarora Wayne Mutual Insurance Company v. Kadlubosky,* Pa. Super., 889 A.2d 557 (2005)**

The insured on a CGL policy owned dogs for personal pleasure but also for use as guard dogs at various properties. Tuscarora Wayne Mutual was the CGL carrier for one of the properties. The dogs escaped from a different property and attacked a pedestrian. For coverage to attach under the CGL policy, injuries must have arisen out of the ownership, maintenance, or use of the insured premises or operations necessary or incidental to the premises. The court finds the policy language unambiguous. Since the dogs did not escape from the insured premises and since their escape did not arise out of the ownership, maintenance, or use of the insured premises, the CGL policy afforded no coverage.

***Burks v Federal Insurance Company*, Pa. Super., 883 A.2d 1086 (2005)**

Burks fell in a PNC office. She sued PNC for tort damages but also brought a claim against Federal Insurance Company, the PNC CGL carrier, for medical payments. The Federal policy contained a standard med pay provision. The Superior Court affirmed the trial court determination Burks was not a third party beneficiary of the insurance contract between Federal and PNC and accordingly could state no cause of action for the medical payment benefits.

***401 Fourth Street v Investors Insurance Group*, Pa., 879 A.2d 166 (2005)**

The Pennsylvania Supreme Court interpreted a common, yet controversial, insurance policy provision which extends coverage for "damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of the building." Although agreeing earlier decisions interpreted "collapse" to require a falling down of a building, the Supreme Court finds the additional phrase "risks of direct physical loss involving collapse" expands coverage to other than total collapse situations. The Supreme Court finds the quoted phrase not clear and free from ambiguity but rather reasonably susceptible to different interpretations. Construed in favor of the insured, the quoted policy language provides coverage for damage caused by the falling down, or imminent falling down, of a building or part thereof.

Scalia v Erie Insurance Exchange, Pa. Super., 878 A.2d 114 (2005)

The Scalias suffered fire damage to their residence. They sought recovery from Erie as the homeowner's carrier. Erie denied the claim, citing arson and misrepresentation of repair costs. In a criminal action, Mrs. Scalia pled guilty to insurance fraud for submitting to Erie home repair costs unrelated to fire damage. In the civil trial on the Scalia claim, the jury found for Erie. Erie filed a Petition for Attorney's Fees against the Scalias, resulting in an award of approximately $48,500. On appeal, the Superior Court affirms the award. By statute, the Court had the authority to order the Scalias to pay Erie's attorney's fees if the Scalias' conduct had been vexatious, obdurate, or in bad faith. A party has acted in bad faith by filing a lawsuit for purposes of fraud, dishonesty, or corruption. A party's conduct is vexatious by bringing or continuing a lawsuit without legal or factual grounds. When Erie prevailed in the Scalia civil litigation, the jury necessarily determined the Scalias were engaged in arson and/or in misrepresentation of losses. Such conduct justified the attorney fee award to Erie.

MVFRL

***L.S. v. Eschbach*, Pa., 874 A.2d 1150 (2005)**

L.S., a minor, resided with her mother, owner of a registered motor vehicle insured by State Farm under a limited tort policy. As a pedestrian, L.S. was struck by a motor vehicle. She agreed her injuries did not rise to the level of a "serious injury" for purposes of an exception to limited tort. L.S. contended, however, her mother's limited tort option was inapplicable because L.S. was a pedestrian at the time of the accident, not an operator or occupant of a motor vehicle. The Pennsylvania Supreme Court agrees, ruling since the MVFRL is silent as to application of limited tort status to pedestrians, the status of pedestrians defaults to full tort. The Court notes "restricting an innocent pedestrian's right to recovery based upon a provision in his or her automobile insurance policy would do little to promote financial responsibility."

***Holland v. Marcy*, Pa., 883 A2d 449 (2005)**

Although a parent/owner of a currently registered uninsured motor vehicle is deemed to have selected limited tort, the children of the parent/owner have full tort rights (reversing *Hames v. PHA*, Pa. Cmwlth., 696 A.2d 880 (1997)).

***Wirth v. Aetna U.S. Healthcare*, 137 Fed. Appx. 455 (3d Cir., 2005)**

HMO subrogation rights granted by the HMO Act are not preempted by the Section 1720 MVFRL ban on subrogation. The Third Circuit, having predicted how the Pennsylvania Supreme Court would rule on this issue, then certified the issue to the Pennsylvania Supreme Court for resolution.

***Swords v. Harleysville Insurance Company, Pa.*, 883 A.2d 562 (2005)**

Swords, the owner of a currently registered but uninsured motor vehicle, was operating his father's insured vehicle at the time of an accident. The Pennsylvania Supreme Court confirms that Swords, an "ineligible claimant" as the owner of a currently registered but insured motor vehicle, is ineligible to receive first-party benefits from **any** source. That Swords was not in the uninsured vehicle at the time of the accident does not alter his ineligible status. The Supreme Court distinguishes a claim for first-party benefits from a claim for UM/UIM benefits where the owner of a currently registered but uninsured motor vehicle might still be eligible for UM/UIM benefits if not occupying the uninsured vehicle at the time of the accident. *Henrich v. Harleysville Insurance Company, Pa.*, 620 A.2d 1122 (1993).

***Wilson v. Transport Insurance Company*, Pa. Super, 899 A.2d 563 (2005)**

Wilson was a passenger in a Pennsylvania insured vehicle involved in an accident in New Jersey. Wilson had MVFRL FPB coverage through Transport, his son's carrier. Transport paid its $5,000 medical limit. Just within four years of the last Transport payment, Wilson filed suit to obtain additional medical coverage under the New Jersey "deemer" statute. Transport, licensed to conduct business in New Jersey, was subject to the "deemer" law. While the MVFRL has a four year statute of limitations on claims for further benefits, the pertinent New Jersey statute has a two year limitation. Claims against Pennsylvania policies for additional benefits under the New Jersey "deemer" statute incorporate the New Jersey statute of limitations as an implied endorsement to the policy. The Wilson claim was time barred by the shorter New Jersey statute of limitations.

UM/UIM

***Allstate Insurance Company v. DeMichele*, Pa. Super., 888 A.2d 834 (2005)**

DeMichele suffered fatal injuries in an accident with a UM tortfeasor. DeMichele was insured by Allstate and many years before the accident signed a proper Rejection of Uninsured Motorists Protection form. Allstate was not, however, able to produce a signed copy of a Section 1791 Important Notice. Claimant asserted Allstate's failure to produce the signed Section 1791 Notice resulted in stacked UM coverage on the policy even though such coverage had never been requested or purchased. The Superior Court rules the absence of a Section 1791 Notice, though perhaps a violation of the MVFRL, creates no remedy for DeMichele. The Superior Court reaches the same conclusion with regard to the alleged deficiency in the Allstate policy which fails under Section 1731 to advise of the absence of UM coverage "in prominent type." There is no remedy for a violation of the prominent notice requirement. The DeMichele claim for UM benefits was denied.

***Motorist Mutual v. Durney*, 2005 U.S. Dist. LEXIS 33752 (E.D. Pa. 2005)**

Durney was involved in a 1997 automobile accident and the BI settlement, with agreement of the UIM carrier, was reached in 1999. After that settlement, Durney continued to send medical records and reports to the UIM carrier but never selected an arbitrator, demanded arbitration, or filed a petition to compel selection of arbitrators. Motorist Mutual filed a Declaratory Judgment Action to establish any UIM claim was barred by the four year statute of limitations. Judge Rufe concluded the UIM claim was not yet time barred. The statute of limitations does not even start to run until there has been a breach of contract, in this case, the denial of coverage by Motorist Mutual. This analysis of UIM statute of limitations has since been adopted by Judge Kauffman in *State Farm v. Rosenthal*, 2006 U.S. Dist. LEXIS 20052 (E.D. Pa. 2006).

***State Farm v. Foster*, Pa., 889 A.2d 78 (2005)**

Foster, working as a flagger on a highway project, jumped out of the way of a UM vehicle, suffering injuries. She filed a UM claim with State Farm, her auto carrier. She also sent State Farm a copy of the incident report she received from her employer. Foster never reported the accident to the police. The Pennsylvania Supreme Court addressed whether State Farm in order to deny the claim had to prove prejudice caused by the absence of a report to the police. The Supreme Court notes the purpose behind the requirement of reporting to the police is protection of the public's interest in affordable auto insurance. Police are charged with reporting and investigating accidents and are in a unique position to prevent fraud. Foster's claim was properly barred regardless of whether State Farm had suffered prejudice.

***Ricks v. Nationwide,* Pa. Super., 879 A.2d 796 (2005)**

Claimant was injured in a motor vehicle accident in the course of employment in the employer's car. Claimant received workers' compensation benefits from his employer and also recovered the UM limits from the policy on the employer's vehicle. Claimant then sought additional UM benefits from his personal coverage. At issue in the trial of that claim was whether claimant could plead, prove, and collect damages already covered by workers' compensation benefits, particularly in light of Pennsylvania precedent denying compensation carriers' subrogation claims against personal auto carrier UM benefits. Since the revised version of Section 1722 of the MVFRL no longer prohibits pleading, proving, and recovering amounts paid by workers' compensation, there is no legal bar to claimant doing so at arbitration. Since subrogation is also barred as noted above, claimant collects twice or "double dips" on damages covered both by workers' compensation and by personal UM coverage.

***Insurance Federation of Pennsylvania v. Department of Insurance,* Pa., 899 A.2d 550 (2005)**

Overruling the earlier intermediate Appellate Court decision in *Prudential v. Muir,* Pa. Cmwlth., 513 A.2d 1129 (1986), the Supreme Court rules the Insurance Department does not possess authority to require mandatory binding arbitration for UM/UIM coverage disputes.

***Alderson v Nationwide*, Pa. Super., 884 A.2d 288 (2005)**

Alderson suffered injuries while driving his motorcycle insured by Nationwide. He collected the liability limits of the tortfeasor and the UIM limits on the Nationwide policy covering the motorcycle. Alderson then sought to recover additional UIM benefits from Nationwide policies covering other vehicles in the Alderson household. Those other Nationwide policies had standard "household exclusions" denying coverage when bodily injury was suffered "while occupying a motor vehicle owned by you or a relative but not insured for UIM coverage under this policy." The Superior Court dismissed Alderson's arguments that the exclusion should not apply when the motorcycle coverage and the household coverage were provided by the same carrier.

***Racicot v Erie Insurance Exchange*, Pa. Super., 881 A.2d 871 (2005)**

Racicot, a Pennsylvania Erie insured, was injured in an automobile accident in Ohio with an Ohio tortfeasor. After exhausting the liability limits, Racicot sought UIM benefits from Erie. Under Ohio law, the UIM award would be reduced by FPB payments. Racicot contended that Pennsylvania law applied. Using the Pennsylvania "most significant interest" rule for resolving conflicts of law issues, the Superior Court ruled Pennsylvania law applied. Since the Racicot policy was issued in Pennsylvania to a Pennsylvania insured for a Pennsylvania registered vehicle, Pennsylvania had the most significant relationship to disputes arising out of the UIM claim.

***Blood v. Old Guard Insurance Company*, Pa. Super. (2006 Pa. Super. LEXIS 146)**

Blood purchased $500,000 in liability coverage and requested in writing lower UM/UIM limits of $35,000. Later, Blood requested a reduction in the liability limits from $500,000 to $300,000 but made no reference to the $35,000 UM/UIM limit. Because the coverage selection form used to lower the liability limits also had a section for selecting UM/UIM limits, and since Blood did not complete that UM/UIM section or otherwise repeat the earlier request for $35,000 in UM/UIM limits, the statutory presumption that UM/UIM limits will equal BI limits was in effect. The Superior Court suggests, but does not directly hold, that had the coverage selection form either repeated the existing $35,000 UM/UIM limit or made no reference to UM/UIM limits at all, the $35,000 UM/UIM limit would have remained in effect.

Generette v. Donegal Mutual Insurance Company, Pa. Super., 884 A.2d 266 (2005)

Generette recovered the $25,000 BI limits and then the $50,000 primary UIM limits. She sought excess UIM limits from Donegal Mutual, her carrier. She had purchased $35,000 in non-stacked UIM coverage from Donegal Mutual. Generette contended her waiver of stacking applied only to intrapolicy stacking (i.e., stacking vehicles within a policy), not to interpolicy stacking (i.e., cumulating coverages from different policies). The Superior Court disagreed. The MVFRL contemplates both interpolicy stacking and intrapolicy stacking, both of which are waived by use of the statutory waiver of stacking form. Because Generette had already recovered UIM benefits in an amount greater than the coverage purchased from Donegal Mutual, Generette was not entitled to any additional UIM recovery.

Sackett v. Nationwide, Pa. Super., 880 A.2d 1243 (2005)

Sackett purchased UIM coverage from Nationwide for each of his two vehicles. He rejected stacking. Later, he added a third vehicle to the same policy. No new stacking waiver was signed, or even provided, at that time. Sackett argued adding the third vehicle to the policy triggered anew Nationwide's obligation to obtain a waiver of stacking. The Superior Court disagreed. A properly executed waiver of stacking remains in effect even if vehicles are over time added to or removed from the policy.

Nationwide v. Schneider, Pa. Super. (2005 Pa. Super. LEXIS 3452)

Schneider was injured in his employer's vehicle while in the course of employment. He settled the BI claim for the tortfeasor's $15,000 limits. He sought UIM benefits from the $1 million coverage on the employer's vehicle, eventually settling for $750,000. He then sought excess UIM benefits from his own $200,000 coverage with Nationwide, offering Nationwide a credit against damages in the amount of $1,015,000, the full coverage available from the BI and primary UIM policies. Since Schneider failed to advise Nationwide of any potential excess UIM claim before settling either the BI claim or the primary UIM claim, the *Nationwide v. Lehman* decision (requiring the UIM carrier to establish prejudice caused by late notice) was not applicable. The Superior Court similarly refused to follow the *Boyle v. Erie* line of cases (forgiving failure to exhaust if credit for the full limits is given), again noting factual differences between the BI/UIM and primary UIM/excess UIM situations. Schneider's excess UIM claim was properly denied due to violations of the "consent to settle" and "exhaustion" clauses in the Nationwide policy.

***Progressive Northern Ins. Co. v. Gondi*, 2006 U.S. App. LEXIS 2847 (3d Cir. 2006)**

Stopping at a restaurant to pick up some food, Gondi parked his car and left it running and unattended. He saw someone stealing the car and, while attempting, unsuccessfully, to stop the theft, he was run over by his own vehicle. He brought a UM claim against Progressive Northern, the carrier on his car. Since the identity of the thief could not be determined, Gondi reasoned that he had been injured by an uninsured motorist. The Progressive Northern policy, however, defined "uninsured motor vehicle" to exclude any vehicles owned by Gondi or family members. The Court of Appeals upheld the policy language and entered judgment in favor of Progressive Northern.

LIABILITY

***Pennock v. Lenzi*, Pa. Cmwlth., 882 A.2d 1057 (2005)**

Eight years after the death of their son, plaintiffs filed a complaint alleging his death was caused by prolonged exposure to sewage sludge from a neighboring farm. Plaintiffs asserted they could not have reasonably known about the connection between the sewage sludge and the death until shortly before the lawsuit was filed. The trial court dismissed the suit based on the statute of limitations. The Commonwealth Court affirms. The statute of limitations for wrongful death or survival actions cannot be tolled or extended by the discovery rule.

***McCreesh v City of Philadelphia*, Pa., 888 A.2d 664 (2005)**

The Pennsylvania Supreme Court addresses service and statute of limitations issues related to the *Lamp v Heyman* decision issued 30 years ago. In order to avoid the bar of the statute of limitations, plaintiff, after filing suit, must make a good faith effort to effect service. Where the defendant, however, has actual notice of the commencement of litigation and is not otherwise prejudiced by improper service, the statute of limitations is tolled.

***O'Hara v Randall*, Pa. Super., 879 A.2d 240 (2005)**

When computing the 60 days within which plaintiff must file a Certificate of Merit in a professional liability case, the filing of an amended complaint does not renew, interrupt, or extend the 60-day period.

***LaRue v McGuire*, Pa. Super., 885 A.2d 549 (2005)**

Following an appeal from compulsory arbitration, LaRue agreed to cap damages at $15,000 at trial in return for admission of expert medical testimony by report. The jury, unaware of the stipulation, awarded damages in excess of $600,000. LaRue sought PRCP 238 delay damages upon the $600,000 award, not on the $15,000 cap. Because LaRue's damages, by his own choice, could not exceed $15,000, there could be no delay in receiving amounts in excess of that cap. If there is no delay, there is no basis to award delay damages. The basis upon which the Court is to calculate delay damages in such a case is $15,000, the stipulated cap on damages.

***Raymond v. Park Terrace Apartments*, Pa. Super., 882 A.2d 518 (2005)**

Raymond fell into a bathtub filled with scalding water in his apartment in Delaware County. He sued his landlord and the manufacturer of the water heater. Defendants objected to venue in Philadelphia County and the trial court transferred the matter to Delaware County. On appeal, the Superior Court reverses. The trial court improperly applied a balancing test to determine venue. The trial court, instead, should have required defendants to establish Philadelphia County venue was oppressive rather than merely inconvenient. To discourage similar venue challenges in the future, the Superior Court notes travel from Delaware County, Bucks County, Montgomery County, or Chester County to Philadelphia is not particularly onerous. In addition, defendants cannot assert the chosen venue will be inconvenient to plaintiff's witnesses. The proper inquiry is whether venue is oppressive to the defendant.

***Merithew v Valentukonis*, Pa. Super., 869 A.2d 1040 (2005)**

In a motor vehicle accident lawsuit, plaintiff served interrogatories seeking information on defendant’s financial worth. There was no claim for punitive damages. Since defendant’s personal financial wealth has no relevance to defendant’s alleged negligence or plaintiff’s alleged injuries, defendant could not be forced to answer the interrogatories.

***Lovelace v. Pennsylvania Property and Casualty Insurance Guaranty Association*, Pa. Super., 874 A.2d 661 (2005)**

Medical malpractice plaintiffs settled their claims against a hospital insured by PHICO. After the parties executed the settlement agreement, PHICO became insolvent before paying the $200,000 settlement. Plaintiffs then sued PPCIGA to recover the settlement amount. The trial court granted preliminary objections based on improper venue and on failure to plead exhaustion of other insurance benefits. On appeal, the Superior Court reverses on the venue issue, finding venue proper in the county where the original settlement agreement was signed. On the failure to plead exhaustion of other insurance benefits, the Superior Court agrees pleading same is an essential element of any claim against PPCIGA. The case is remanded to allow plaintiff to amend the complaint to include such an allegation.

***Hutchison v. Luddy*, Pa., 870 A.2d 766 (2005)**

A minor sued a priest for molestation and sued a diocese for negligent hiring, supervision, and retention of the priest. A jury awarded both compensatory and punitive damages against the priest and the diocese. The diocese challenged the propriety of any punitive damage award in a case of negligent supervision. The Supreme Court reviewed Pennsylvania law applicable to such punitive damage claims. Punitive damages may be awarded for conduct that is outrageous, because of either the defendant's evil motive or his reckless indifference to the rights of others. A punitive damage claim must be supported by evidence the defendant had a subjective appreciation of the risk of harm to which plaintiff was exposed and the defendant acted, or failed to act, as the case may be, in conscious disregard of that risk. The Supreme Court notes that while it may generally be more difficult to sustain a claim for punitive damages in a negligent supervision context, Pennsylvania imposed no legal bar to such a recovery.

***Neal v. Bavarian Motors*, Pa. Super., 882 A.2d 1022 (2005)**

Neal purchased a vehicle from Bavarian Motors and financed the purchase through Mercury. Neal later learned the vehicle was stolen. Neal sued Bavarian Motors and Mercury claiming they knew or should have known the vehicle was stolen. The suit was based on several legal theories including violation of the Unfair Trade Practices and Consumer Protection Law. Following a jury verdict in favor of Neal, the court under the UTPCPL trebled damages and awarded over $42,000 in counsel fees. On appeal, the Superior Court addresses calculation of counsel fee awards under the UTPCPL. The trial court in awarding such fees must link the attorney fee award to the amount of damages the plaintiff sustained under the UTPCPL and must eliminate from the attorney fee award payment for the efforts of counsel to recover under other theories. In the *Neal* case, for example, Neal stated six separate causes of action, only one of which was under the UTPCPL. Proceeding under multiple theories, while defensible as a strategy, substantially added to the complexity of the case, requiring counsel for all parties to prepare for and be acquainted with questions of law that could arise under each separate theory. The case is remanded to the trial court with the suggestion, but not the order, that fees be awarded in the same percentage (21.6%) that the UTPCPL damages bear to the entire verdict.

***Grimminger v Maitra*, Pa. Super., 887 A.2d 276 (2005)**

Grimminger treated with Maitra for left arm complaints. Maitra wrote a "to whom it may concern" letter recommending Grimminger refrain from any strenuous activity with his left arm. Grimminger's employer thereafter requested a completed work restriction evaluation form from Maitra which Maitra provided. The employer's representative thereafter visited Maitra to discuss the work limitations and to show Maitra a surveillance film of Grimminger, causing Maitra to alter his opinions. Grimminger sued Maitra for breach of confidential relationship and slander. By statute, Pennsylvania provides:

> No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without the consent of said patient, except in civil matters brought by such patient, for damages on account of personal injuries.

Cases interpreting the statute, however, have drawn a distinction between information learned by a physician through communication to him by a patient and information acquired through examination and observation. Since Grimminger failed to establish that Maitra exposed a confidential communication which blackened his character, summary judgment in favor of Maitra was affirmed.

***Hospodar v. Schick*, Pa. Super., 885 A.2d 986 (2005)**

Schick suffered fatal injuries caused by Smith, a patient of Hospodar. Smith "blacked out" immediately prior to the accident and had previously been involved in two other accidents under similar circumstances. Prior to the Schick accident, Hospodar filled out a PennDOT form inquiring "Do you consider Smith physically and/or medically competent to operate a motor vehicle?" Hospodar answered, "I do not know." Later, on follow-up by PennDOT, Hospodar stated it was safe for Smith to operate a motor vehicle. Hospodar's obligation to answer the PennDOT questions arises under 75 P.S. § 1518(b) of the Motor Vehicle Code. Citing the Pennsylvania Supreme Court decision in *Witthoeft v. Kiskaddon*, the Superior Court holds the Motor Vehicle Code does not create, explicitly or implicitly, a private cause of action against a physician for an accident caused by a patient because the physician failed to comply with the notification requirements of the Code.

***Reutzel v. Douglas*, Pa., 870 A.2d 787 (2005)**

In the course of settlement negotiations, plaintiff's counsel left the following voice mail message with a defense attorney:

> "You guys get us a hundred, contribute what you want, I will make it go away. I don't have client consent, but I'm not going to come back to you and say $125,000, I can guarantee you that. A hundred and it all goes poof!"

On the strength of this voice mail message, defendant offered $100,000, taking the position the case had been settled. The trial court and Superior Court agreed. The Supreme Court, however, reverses. Under Pennsylvania law, an attorney must have express authority in order to bind a client to a settlement agreement. The very words of the voice mail message indicated such client authority was lacking. The Supreme Court distinguishes its earlier decision in *Rothman v. Fillette*, since there the lawyer absconded with the settlement money. The issue in *Rothman* was not apparent authority but rather who had to bear the burden of loss between innocent parties where counsel for one of the parties acted beyond the scope of authority and misappropriated funds. Those equitable principles were not involved in the present case.

***Hooker v State Farm*, Pa. Cmwlth., 880 A.2d 70 (2005)**

Hooker brought suit against the City, a demolition contractor, and her own homeowner carrier seeking damages caused by demolition of an adjacent building. Her complaint broadly alleged property damage. Under Pennsylvania law, damages are either general or special. General damages are the usual and ordinary consequences of the wrongful act and may be proven at trial without specifically pleading them. Special damages are not the usual and ordinary consequences of the wrongful act but depend on special circumstances. Special damages may not be proved at trial unless special facts giving rise to the damages are averred in the complaint. At trial, Hooker sought to prove a claim for additional living expenses. Her first complaint did not reference such damages and her second amended complaint referenced the damages but did not allege specific expenses or values. Hooker should have been precluded from pressing the additional living expense claim at trial since such a claim involves "special damages."

***Kinley v. Bierly*, Pa. Super., 876 A.2d 419 (2005)**

Kinley was bitten by Bierly's horse while Kinley was feeding her own horse in a barn the animals shared. Under Pennsylvania law, liability for the bite of an animal attaches only when the owner knew or should have known the animal would display vicious tendencies. Kinley argued that stallions, despite being legally characterized as domestic animals, should be considered as a matter of law to have vicious propensities. The Superior Court refused to so find and since Kinley could not otherwise prove the owner's prior knowledge of vicious tendencies, her claim was dismissed.

***Continental Insurance Company v. Schneider*, Pa., 873 A.2d 1286 (2005)**

Continental, an unsecured creditor, sued Schneider under the successor liability doctrine as an entity which had purchased the debtor's assets from secured creditors. Continental was seeking payment of overdue insurance premiums. The Pennsylvania Supreme Court allows the successor liability claim to proceed. The Court reviews Pennsylvania law on the issue. When one company sells or transfers all of its assets to another company, the purchasing company is not responsible for the debts and liabilities of the selling company simply because it acquired the seller's property. This general rule of non-liability, however, can be overcome by establishing the purchaser expressly or implicitly agreed to assume liability, the transaction amounted to a consolidation or merger, the purchasing corporation was merely a continuation of the selling corporation, the transaction was fraudulently entered into to escape liability, or the transfer was without adequate consideration and no provisions were made for creditors of the selling corporation. Finally, Pennsylvania recognizes a "product line" exception to the general rule against successor liability under which successor liability is imposed for injuries caused by defective products manufactured by a predecessor if the successor continues to manufacture the product.

***Loughran v. The Phillies*, Pa. Super., 888 A.2d 872 (2005)**

Loughran was injured when a Phillies' centerfielder, after catching a ball for the last out, threw the ball into the stands. The thrown ball hit plaintiff in the face. In affirming dismissal of the suit, the Superior Court notes that even a first time spectator at a baseball game is imputed with the common or "neighborhood knowledge" of the risks of the game. Players tossing balls into the stands is one such risk.

***Murtha v. Joyce*, Pa. Super., 875 A.2d 1154 (2005)**

Joyce allowed Murtha to use his vacation property in Lackawanna County. The 150 acre property was partially improved with a house, swimming pool, tennis court, and some outbuildings. The house was at the top of a hill. Murtha and others were snow-tubing down the hill, riding over a small ramp created with some snow covered lumber. Murtha collided with a fence post at the bottom of the hill, sustaining injuries. Joyce had been reimbursed a small amount for use of the property to cover payment of utilities. The trial court dismissed Murtha's claim, citing the Recreational Use of Land and Water Act. On appeal, the Superior Court reverses. The RULWA protects landowners from liability by expressly negating ordinary common law duties to keep land safe or to warn of its dangerous conditions. RULWA protection is available to property owners who make unimproved land and water areas available to the public for recreational purposes. The RULWA was not applicable to Joyce because he had not donated the land exclusively for recreational use but, instead, continued to use it as a personal vacation home and occasional rental property. In addition, the property had been at least partially improved and such hybrid recreational land (i.e. partially developed or improved) is not always entitled to RULWA immunity. Summary judgment in favor of Joyce was vacated.

***Fritz v. Wright*, Pa. Super., 872 A.2d 851 (2005)**

The jury returned a verdict in a negligence case by answering seven jury interrogatories. At least ten of the twelve jurors agreed on the answer to each interrogatory although not the same ten agreed on every answer. All of the jurors agreed defendant was negligent and the negligence was a substantial factor in producing the harm. All twelve also agreed plaintiff was contributorily negligent. All jurors agreed on the consortium award. On the questions of whether plaintiff’s contributory negligence was a substantial factor in causing harm and on the amount of damages, only ten jurors agreed and not the same ten in each answer. In a case of first impression, the Superior Court ruled the “verdict” upon which 5/6 of the jurors must agree is comprised of all interrogatory responses. Since only nine of the jurors agreed on the answers to all questions, judgment was vacated and the case remanded for a new trial.

EMPLOYMENT

Harkness v. Unemployment Compensation Board, Pa. Cmwlth., 867 A.2d 728 (2005)

Harkness was employed by Macy's as a beauty advisor in the Estee Lauder department. Harkness told an allegedly rude claimant "get your fat ass out of here." Harkness was terminated and filed for unemployment compensation. At the hearing, Macy's was represented by a non-employee non-attorney. That individual conducted cross-examination and made decisions regarding evidentiary matters. He made a closing argument. The Commonwealth Court ruled corporations, with very limited exceptions, may act before a court only through an agent duly authorized to practice law. Since Macy's was not so represented, the hearing was tainted, the ruling against Harkness was vacated, and the matter was remanded for a new hearing.

Rothrock v Rothrock Motor Sales, Pa., 883 A.2d 511 (2005)

The case involves the Rothrock family business. Bruce was the owner, Theodore (his brother) was a supervisor, and Douglas (Theodore's son) was an employee. Douglas presented a workers' compensation claim. Bruce told Theodore to force Douglas to withdraw the claim or both Theodore and Douglas would be fired. Douglas nevertheless pursued the compensation claim and was awarded benefits. Bruce fired Theodore in retaliation for failing to get Douglas to withdraw the compensation claim. Theodore brought an action for wrongful discharge. The Pennsylvania Supreme Court creates a new exception to the "employment at will" general rule. When a supervisor is discharged for failing to persuade an employee to withdraw a workers' compensation claim, the supervisor has a valid claim for wrongful discharge. Other public policy exceptions to "employment at will" include discharge for filing an unemployment compensation claim, discharge for refusing to submit to a polygraph test as a condition of employment, discharge for reporting violations of law involving nuclear materials, discharge for serving on a jury, or discharge for filing a workers' compensation claim.

***Weaver v. Harpster*, Pa. Super., 855 A.2d 1073 (2005)**

Weaver alleged she was subjected to continual sexual harassment at work. The employer, advised of the problem, failed to take appropriate remedial action. Weaver quit, alleging constructive termination. Her complaint to the Pennsylvania Human Relations Commission was denied because the employer, having less than four employees, did not meet the statutory definition of "employer." Weaver asserted that, in the absence of a statutory remedy, she had a valid common law cause of action for wrongful discharge of an at-will employee based on allegations of sexual harassment. The Superior Court agrees. Where an employee is prevented from bringing a sexual discrimination suit under the PHRA only because the employer has less than four employees, a public policy exception to the at-will employment doctrine allows a direct suit.

WORKERS COMPENSATION

***Monessem v WCAB*, Pa. Cmwlth., 875 A.2d 415 (2005)**

Fleming, receiving workers' compensation benefits for asbestosis, effected a recovery in third party litigation. The compensation carrier asserted a lien, resulting in a suspension of disability benefits while the lien was recouped. The WCAB, noting a complete interruption of disability benefits would cause a hardship on claimant, reduced the rate at which the lien was recouped and also required the carrier to maintain payment of disability benefits, albeit at a lower rate. The Commonwealth Court reverses. The employer and its compensation carrier have an absolute right to immediate payment of the past due lien through a total suspension of benefits until the lien is satisfied. Alleged economic hardship on the claimant is not relevant to the lien reimbursement process.

***Superior Lawn Care v WCAB*, Pa. Cmwlth., 878 A.2d 936 (2005)**

Hoffer alleged that, while in the course of employment, he was chased by a dog and injured when, to avoid attack, he ran and jumped into his truck. SWIF, the compensation carrier, notified Hoffer it asserted a lien against any recovery in Hoffer's third party action. Hoffer, through counsel, advised SWIF subrogation was barred by the MVFRL. Hoffer settled the third party case without notice to SWIF and refused to honor the subrogation claim. A Workers' Compensation Judge determined Hoffer's injury did not arise out of the maintenance or use of a motor vehicle. Thus there was no MVFRL bar, thus subrogation was permitted. The WCAB, however, noting the ten-year delay between the date of injury and the date SWIF filed a review petition to force subrogation, precluded subrogation due to laches. The Commonwealth Court reverses and awards subrogation to SWIF. An employer's right to subrogation is absolute and automatic in the absence of deliberate, bad faith conduct on the part of the employer.