
# LITIGATION UPDATE

## April, 2016

Michael P. McKenna, Esquire

HARRISBURG OFFICE
3510 Trindle Road
Camp Hill, PA 17011
717-975-8114

PITTSBURGH OFFICE
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-695-5064

**MARGOLIS EDELSTEIN**
**Michael P. McKenna, Esquire**
**The Curtis Center, Suite 400E**
**170 S. Independence Mall W.**
**Philadelphia, PA 19106-3337**
**(215)922-1100**
**FAX (215)922-1772**
**mmckenna@margolisedelstein.com**

WESTERN PA OFFICE
983 Third Street
Beaver, PA 15009
724-774-6000

MT. LAUREL OFFICE
100 Century Parkway
Suite 200
Mount Laurel, NJ 08054
856-727-6000

BERKELEY HEIGHTS OFFICE
400 Connell Drive
Suite 5400
Berkeley Heights, NJ 07922
908-790-1401

WILMINGTON OFFICE
300 Delaware Avenue
Suite 800
Wilmington, DE 19801
302-888-1112

# COVERAGE

SUPREME COURT: WHERE INSURER WITH RESERVATION OF RIGHTS REFUSES REASONABLE SETTLEMENT, INSURED MAY SETTLE AND SEEK REIMBURSEMENT

In *Babcock & Wilcox Company v. American Nuclear Insurers*, 131 A.3d 445 (Pa. 2015), ANI provided defense of a class action tort case to B&W subject to a reservation of rights. During the course of the litigation, ANI refused consent to any settlement offers since it contended the case was defensible. B&W presented specific settlement offers which ANI refused so B&W settled the claims for $80,000,000, well below the $320,000,000 available coverage. ANI refused to reimburse B&W, citing the consent requirements in the policy. The trial court orders reimbursement and the Supreme Court agrees. Reimbursement is required where an insured accepts a settlement offer after an insurer breaches its duty by refusing a fair and reasonable settlement while maintaining a reservation of rights. Whether a settlement is "fair and reasonable" depends on the terms of the settlement, the strengths of the claims and defenses, and whether there is evidence of fraud or collusion. "Fair and reasonable" is determined from the perspective of a reasonably prudent person in the same position as the insured and in light of the totality of the circumstances.

SUPREME COURT: EMPLOYER'S LIABILITY EXCLUSION IN UMBRELLA POLICY NOT APPLICABLE TO LANDLORD ADDITIONAL INSURED

In *Mutual Benefit Insurance Company v. Politsopoulos*, 115 A.3d 844 (Pa. 2015), an employee of Leola Restaurant fell on property leased to the restaurant by Politsopoulos. Mutual Benefit provided umbrella coverage to the restaurant under which the landlord qualified as an insured. When the restaurant's employee sued the landlord, Mutual Benefit asserted its employer's liability exclusion to deny coverage. That exclusion applied to liability for injury to "an employee of the insured arising out of and in the course of employment by the insured." Since the policy made varied use of "the insured" and "any insured," application as to the landlord (who was an insured but did not employ the injured party) was ambiguous, thus coverage was required. The Supreme Court did ***not*** rely upon the separation-of-insureds clause or severability-of-interests provision, neither of which can subvert otherwise clear and unambiguous policy exclusions.

SUPERIOR COURT: HOMEOWNER POLICY AUTO LIABILITY EXCLUSION BARS COVERAGE FOR NEGLIGENT ENTRUSTMENT AND SOCIAL HOST LIQUOR EXPOSURES

In *Wolfe v. Ross*, 115 A.3d 880 (Pa. Super. 2015), appeal granted 125 A.3d 408 (Pa. 2015), Wolfe's underage decedent, after drinking alcohol provided by Ross, drove Ross' dirt bike, crashed, and suffered fatal injuries. Wolfe sought recovery under negligent entrustment and social host liquor theories. State Farm provided Ross' homeowners coverage subject to an exclusion for any "bodily injury . . . arising out of the . . . use" of any vehicle owned by any insured. Since the dirt bike qualified as such a vehicle and the fatal injuries arose out of use of that vehicle, State Farm denied coverage. The Superior Court, *en banc*, affirms judgment for State Farm in the ensuing garnishment proceeding. Wolfe urged, but the Superior Court refuses to adopt, a "concurrent causation" analysis of coverage under which coverage, though excluded for auto liability, would still be provided for non-excluded activity such as negligent entrustment and service of alcohol to minors. The Supreme Court has agreed to consider the "concurrent causation issue."

SUPERIOR COURT: WHEN PROVIDING DEFENSE SUBJECT TO RESERVATION OF RIGHTS, INSURER MUST TIMELY AND FAIRLY RAISE COVERAGE ISSUES TO EACH POTENTIALLY AFFECTED INSURED

In *Erie Insurance Exchange v. Lobenthal*, 114 A.3d 832 (Pa. Super. 2015), appeal denied 130 A.3d 1290 (Pa. 2015), Boyd was injured when Miller, under the influence of marijuana and Xanax, caused an auto accident. Boyd sued Miller but also sued the Lobenthals (parents and daughter), insureds under Erie's homeowner's policy, for providing controlled substances to Miller. Erie provided the Lobenthals a defense subject to two Reservation of Rights letters, one before and one after suit, both sent to the parents, not the adult daughter. Only the second letter raised a "controlled substance" exclusion. Neither letter referenced the daughter even after Boyd dismissed the parents, leaving her the only insured defendant. Erie's DJ action later sought, and through summary judgement obtained, a ruling that its "controlled substance" exclusion avoided all coverage. The Superior Court reverses. Insurers may preserve policy defenses even while providing a defense ***provided*** the insurer timely and fairly informs the insured of its coverage position. Here, prior to the DJ action, the adult daughter was never directly informed of any Reservation of Rights, and knowledge of same through parents or defense counsel would not be imputed. Absent any Erie communication to her, prejudice was presumed. In addition, any Reservation of Rights was untimely since even the Lobenthal parents were not advised of the "controlled substance" coverage issue until seven months after Boyd's Complaint.

SUPERIOR COURT: STATUTE OF LIMITATION FOR A COVERAGE DJ ACTION

In *Selective Way Insurance v. Hospitality Group Services*, 119 A.3d 1035 (Pa. Super. 2015), Selective received a suit against its insured in 2007 and promptly reserved rights and provided a defense. In 2012, Selective filed a DJ action to establish it had no duty to indemnify or even defend its insured. The DJ action was dismissed as beyond the four year statute of limitations. A split *en banc* Superior Court reverses, noting:

1. Since DJ actions are elective, Selective was under no obligation to file a DJ ever. Barring the DJ action due to the statute of limitations does not affect the substantive rights of the carrier or the insured. If Selective determined it had no coverage, it could at any time deny a duty to defend or indemnify even in the absence of a DJ.

2. A four year statute of limitations applies to DJ actions, with the statute starting to run when a cause of action for a DJ action first accrues.

3. Until a carrier has sufficient factual basis to deny defense (and thus indemnification), there is no justiciable controversy and thus no cause of action for a DJ.

The Superior Court remands to determine when Selective first had a factual basis to deny coverage.

COMMONWEALTH COURT: INSURED'S MISREPRESENTATION ABOUT CORRECTING PRE-EXISTING CONDITIONS QUALIFIES AS SUBSTANTIAL INCREASE IN HAZARD FOR POLICY CANCELLATION PURPOSES

In *Tighe v. Consedine*, 121 A.3d 569 (Pa. Cmwlth. 2015), Tighe used an independent insurance agent to get quotes for homeowner's coverage. His home had a deck without railings which the agent warned had to be remedied. The agent submitted an application to Donegal Mutual but failed to send photographs of the dangerous deck. Donegal Mutual issued a policy based on the application and thereafter inspected the property. Fifty five days after the policy was issued, Donegal Mutual advised Tighe he had to install a deck railing within a month to avoid policy cancellation. Despite a further extension of time, Tighe did not install the railing so Donegal Mutual cancelled the policy. The Unfair Insurance Practices Act permits cancellation of homeowner's policies within 60 days (which Donegal did not do) or if there is a substantial increase in hazards insured against by reason of willful or negligent acts or omissions by the insured. Though the condition of the dangerous deck did not change after issuance of the policy, Tighe's misrepresentation that he was going to install deck railing constituted a substantial increase in hazards insured against, justifying cancellation.

COMMONWEALTH COURT: UNDERAGE DRINKING NOT A PERMITTED BASIS FOR POLICY CANCELLATION

In *State Farm v. Commonwealth of PA*, 124 A.3d 775 (Pa. Cwmlth. 2015), Dougherty applied to State Farm for auto coverage, falsely stating that her license had not been suspended. State Farm issued a binder, discovered a license suspension due to underage drinking, then cancelled the policy within the first 60 days, citing the license suspension. The Insurance Department orders policy reinstatement since the Crimes Code at 18 Pa.C.S.A 6310.4(d) prohibits cancellation of coverage, instead imposing license suspension as the sole remedy. Though State Farm argued that it could also have cancelled due to misrepresentation, it had not stated that ground in its cancellation notice to Dougherty.

SUPERIOR COURT: "NAMED DRIVER ONLY" POLICIES VALID IN PA

In *Byoung Suk An v. Victoria Fire & Casualty*, 113 A.3d 1283 (Pa. Super. 2015), appeal denied 130 A.3d 1285 (Pa. 2015), Walker purchased a low cost auto liability policy from Victoria Fire & Casualty which provided coverage only when a listed driver (on this policy, only Walker) operated the vehicle. At the time of the accident, the insured vehicle was driven by a friend of Walker's son with the son's permission. Victoria Fire & Casualty denied coverage to the driver and also to Walker on the negligent entrustment count. The Superior Court affirms summary judgment for the carrier. Neither the MVFRL nor public policy prohibit "named driver only" policies.

# LIABILITY

SUPERIOR COURT: PARKING VALET SERVICE NOT LIABLE FOR RETURNING CAR TO INTOXICATED DRIVER

In *Moranko v. Downs Racing LP*, 118 A.3d 1111 (Pa. Super. 2015), appeal denied – A.3d – (Pa. 2016), driver's estate sued a casino, alleging that the casino's valet parking service negligently returned a car to the visibly intoxicated driver who was then killed in an auto accident. A split *en banc* Superior Court affirms summary judgment for the casino, ruling that the driver and valet service entered into a mutual bailment under which the valet service was required to surrender the car to the driver upon demand regardless of the driver's intoxication. The majority, however, refuses to address the estate's claims under Section 323 of the Restatement (Second) of Torts (duties to another under a voluntarily assumed undertaking) as waived on appeal. The dissent finds no waiver of the issue and would apply Section 323 due to the casino's internal patron safety procedures, thus preventing summary judgment.

SUPERIOR COURT: COURT STRIKES PLAINTIFF'S VOLUNTARY DISCONTINUANCE AND PROCEEDS TO TRIAL

In *Becker v. M.S. Reilly*, 123 A.3d 776 (Pa. Super. 2015), Becker sued Reilly for negligently creating or maintaining a drainage swale, causing water damage to his property. On Thursday before the scheduled Monday trial, Becker, apparently not prepared to proceed, filed a voluntary discontinuance under Pa.R.C.P. 229(a) which Reilly immediately moved to strike under Pa.R.C.P. 229(c). On Monday, with Becker not present, the court granted the motion to strike, conducted trial, and found for Reilly. The Superior Court affirms. While plaintiff may file a discontinuance prior to the start of trial, the court, weighing equities, may strike the discontinuance. Here, Reilly was ready to proceed and Becker did not even appear in court to contest the motion to strike.

SUPERIOR COURT: COUNSEL MAY NOT BE PRESENT DURING NEUROPSYCHIATRIC IME

In *Shearer v. Hafer*, – A.3d – (Pa. Super. 2016), Shearer claimed cognitive harm from an accident so defendant Hafer scheduled a neuropsychological exam. Plaintiff counsel insisted pursuant to Pa.R.C.P. 4010 that he would be present for the entire exam, to which the IME physician objected. At a discovery hearing, the IME physician explained why the presence of counsel would necessarily interfere with the testing process. The trial court ordered that counsel could be present only during the preliminary interview stage of the IME but thereafter could neither record nor be present for the standardized testing. The Superior Court affirms. Pa.R.C.P. 4012 permits protective orders upon cause shown to achieve justice.

SUPERIOR COURT: DISCOVERY ORDER REJECTING FIFTH AMENDMENT PRIVILEGE AND REQUIRING TESTIMONY IS INTERLOCUTORY, THUS NON-APPEALABLE

In *Veloric v. Doe*, 123 A.3d 781 (Pa. Super. 2015), Mrs. Veloric received an anonymous phone call, followed by anonymous email, purportedly from Mr. Veloric's mistress. The Velorics suspected the false communications came from the Hefflers, former neighbors with whom they shared a litigious history. When Mr. Heffler was noticed for deposition, he invoked the Fifth Amendment to virtually every question. After the trial court ordered that he answer some of the questions, he still invoked the Fifth Amendment and appealed. As a general rule, discovery orders are deemed interlocutory and not immediately appealable. Heffler contended that the order was a collateral order, and thus immediately appealable, because it was separable from the main cause of action, involved rights too important to be denied review, and delaying review would cause rights to be irreparably lost. The Superior Court disagrees and quashes the appeal, leaving the trial order requiring testimony intact. The Fifth Amendment privilege applies only to specific testimony, not as blanket protection to any testimony. Heffler identified no specific testimony to which the privilege applied, nor was it clear he had any reasonable apprehension of prosecution should he appear and testify. The offending phone call and email did not appear to violate any criminal statute. Heffler failed to meet the second prong of the collateral order rule.

SUPERIOR COURT: COMPROMISE JURY VERDICTS PERMITTED EVEN UNDER FAIR SHARE ACT

In *Kindermann v. Cunningham*, 110 A.3d 191 (Pa. Super. 2015), appeal denied 119 A.3d 351 (2015), Kindermann suffered a broken ankle, resulting surgery, medical expenses, and lost earnings due to a fall allegedly caused by Cunningham's negligence. The stipulated "special damages" were over $37,000 and the admitted disability from employment was over three months. Liability, however, was hotly contested. The jury found Kindermann 50% at fault, awarded only $10,000 in damages (reduced to $5,000 due to comparative negligence), and awarded no consortium damages. A split Superior Court panel affirms. The trial judge, noting an obvious compromise verdict due to contested liability, found the monetary award "low enough to raise an eyebrow" but not so low as to be "shocking." Though compromise verdicts were common, and upheld, under the old contributory negligence tort system, they remain valid today under the comparative negligence system.

SUPERIOR COURT: IN PUNITIVE DAMAGE PHASE OF TRIAL, EVIDENCE OF WEALTH MAY BE PRESENTED CONTEMPORANEOUSLY WITH EVIDENCE OF CULPABILITY

In *Dubose v. Quinlan*, 125 A.3d 1231 (Pa. Super. 2015), the Dubose estate brought Wrongful Death and Survival actions against a nursing home and related entities following Dubose's death from malnutrition, dehydration, bed sores, and infections. A jury awarded $125,000 for Wrongful Death, $1,000,000 for Survival and $875,000 in punitive damages. The trial court bifurcated the trial, addressing punitive damages only after the jury first found tort liability and compensatory damages. In the punitive damage phase, however, the trial court would not further bifurcate by separating evidence of culpability from evidence of wealth. Since wealth is a factor the jury is permitted to consider in awarding punitive damages, the trial court did not err.

SUPERIOR COURT: INDEMNIFICATION AND OBLIGATION TO PROVIDE ADDITIONAL INSURED COVERAGE AWAIT FACT DETERMINATIONS BY JURY

In *Burlington Coat Factory v. Grace Construction*, 126 A.3d 1010 (Pa. Super. 2015), Grace entered into a contract to renovate a Burlington store. The contract had two indemnification provisions in Burlington's favor, one referencing its own negligence, the other not, and also required Grace to purchase additional insured coverage for Burlington. An employee of Grace's subcontractor was injured by a closing elevator door and sued Burlington and the elevator company, but not Grace or its subcontractor. Burlington settled with the plaintiff and then sued Grace for contractual indemnification and for breach of the contract to provide additional insured coverage. The trial court entered summary judgment for Grace. On appeal, the Superior Court reverses. Burlington presented issues of fact as to whether Grace or even the underlying plaintiff were negligent in causing the accident, thus possibly triggering indemnification. Since the contract had conflicting indemnification clauses, only the narrower clause – the one not referencing Burlington's own negligence – could apply. Summary judgment on the contract to purchase insurance was similarly premature, since the duty to provide coverage might be triggered if Grace or the underlying plaintiff were negligent.

SUPERIOR COURT: NO LEGAL MALPRACTICE ACTION BASED ON SETTLEMENT

In *Silvagni v. Shorr*, 113 A.3d 810 (Pa. Super. 2015), appeal denied 128 A.3d 1207 (Pa. 2015), Silvagni, represented by Shorr, settled his WC claim and thereafter pursued and settled a third party claim through different counsel. Silvagni then sued Shorr for legal malpractice on the theory that incorrect legal advice caused him to enter into the WC compromise and release. Citing the 1991 Supreme Court *Muhammad* decision disfavoring "settling and suing," the Superior Court affirms summary judgment in favor of Shorr. To prevail in any legal malpractice action, Silvagni had to plead, and ultimately prove, that Shorr fraudulently induced him to settle, that Shorr failed to explain the effect of the settlement, or that the settlement itself was legally deficient.

SUPERIOR COURT: NO SUMMARY JUDGMENT FOR PROPERTY OWNER OR TENANT WHEN DUI DRIVER JUMPS CONCRETE WHEEL STOP AND HITS SIDEWALK PEDESTRIAN

In *Truax v. Roulhac*, 126 A.3d 991 (Pa. Super. 2015), appeal denied 129 A.3d 1244 (2015), Roulhac, DUI on alcohol and cocaine, drove her van over a 5" concrete wheel stop and into Truax , a sidewalk pedestrian. Truax sued Roulhac and also Vitiello (property owner) and Wildwood (tenant), for not installing additional safety measures, such as vertical bollards, to prevent vehicles from jumping over wheel stops and into pedestrian walkways. The trial court granted summary judgment to Vitiello and Wildwood, noting that Roulhac's conduct was not foreseeable and that wheel stops in any event met code requirements. The Superior Court, *en banc*, reverses. Vitiello and Wildwood owed Truax, a business invitee, a duty to exercise reasonable care to protect her from any reasonably foreseeable harm. Since Truax presented some evidence that vehicles may have jumped wheel stops in the past, the question of foreseeability should have been presented to the jury. As for code compliance, such compliance protects the owner and tenant from negligence *per se* but does not establish as a matter of law that due care was exercised.

SUPERIOR COURT: POLICE OFFICERS ARE LICENSEES AND WHEN RESPONDING TO INTOXICATION CALLS DO NOT FALL WITHIN DRAM SHOP PROTECTION

In *Juszcczyszyn v. Taiwo*, 113 A.3d 853 (Pa. Super. 2015), plaintiff, a police officer, responded to a disturbance call about an unruly patron at Taiwo's bar who was groping female patrons, drinking other people's drinks, and being physically confrontational. The unruly patron then assaulted and injured plaintiff who sued Taiwo under negligence and Dram Shop theories. The trial court sustained preliminary objections and the Superior Court affirms. Though the "fireman's rule" has not been formally adopted in PA, courts have generally considered police and fire personnel to be licensees when entering another's land in an official capacity and thus are entitled to be warned only of dangerous hidden conditions. As a licensee, the police officer could not state a negligence cause of action against Taiwo. The Dram Shop action also failed since police officers responding to disturbance calls from a liquor establishment do not fall within the class of individuals the Dram Shop Act was designed to protect.

COMMONWEALTH COURT: THOUGH PRISON INMATES ARE INVITEES, CLAIM FAILS UNDER "HILLS AND RIDGES" DOCTRINE AND SOVEREIGN IMMUNITY

In *Moon v. Dauphin County*, 129 A.3d 16 (Pa. Cmwlth. 2015), Moon, a resident of the county work release center, fell on a fenced-in walkway, allegedly due to icy conditions. He sought recovery based on negligence (i.e., failure to salt or clear) and design flaw (i.e., not providing an alternate walkway), claiming that the "real estate" exception to sovereign immunity applied. He further alleged, and the court agreed, that though an inmate, he was an "invitee" for duty of care purposes. The Superior Court affirms summary judgment for Dauphin County. To avoid the bar of immunity, Moon had to prove both a valid common law action and a valid statutory exception. He proved neither. His common law claim failed under the "hills and ridges" doctrine since he had no evidence of a visible accumulation of snow and ice. The alleged dangerous condition, in any event, was a condition ***on*** the walkway rather than ***of*** the walkway, thus falling short of the statutory "real estate" exception to immunity.

SUPERIOR COURT: JURY DECIDES WHETHER SIDEWALK DEFECT IS TRIVIAL

In *Reinoso v. Heritage Warminster SPE*, 108 A.3d 80 (Pa. Super. 2015), appeal denied 117 A.3d 298 (Pa. 2015), Reinoso, a business invitee, tripped when the toe of her shoe caught on an elevated part of the sidewalk, a 5/8" difference in height. The trial court granted summary judgment to Heritage, ruling the alleged defect so trivial as to preclude negligence. A divided Superior Court *en banc* reverses. A defect can be trivial as a matter of law only when it would be completely unreasonable, impractical, and unjustifiable to hold a defendant liable for its existence. Here, defendant's maintenance employee conceded that the gap constituted a tripping hazard and Reinoso's expert opined that the height differential exceeded safety standards and codes. Under such circumstances, determination of whether the defect was trivial was for the jury.

SUPERIOR COURT: FAILURE TO PRODUCE MAINTENANCE LOGS PREVENTS DEFENSE SUMMARY JUDGMENT IN SLIP AND FALL CASE

In *Rodriguez v. Kravco Simon Company*, 111 A.3d 1191 (Pa. Super. 2015), Rodriguez, a business invitee at a shopping mall, slipped in a puddle of dark liquid, wet in the center but dry and sticky at the edges. Since Rodriguez could establish neither actual nor constructive notice of the dangerous condition, the trial court ordered summary judgment for Kravco. The Superior Court agrees that not even the alleged "dry and sticky" edges of the puddle avoided summary judgment since, absent identification of the substance, "dry and sticky" does not create an inference of how long the substance was on the floor, an inference necessary to proving constructive notice. The Superior Court nevertheless reverses the summary judgment since Kravco in discovery failed to produce maintenance records for the date of accident, thereby creating at least an argument for spoliation of evidence, including a sanction of imputed constructive notice of the dangerous condition.

# WORKERS COMPENSATION

SUPREME COURT: WC CARRIER MAY NOT SUE TORTFEASOR "AS SUBROGEE OF" INJURED EMPLOYEE

In *Liberty Mutual v. Domtar Paper Co.*, 113 A.3d 1230 (Pa. 2015), Liberty Mutual, the WC carrier, sued alleged tortfeasor Domtar Paper, claiming to do so "as subrogee of" the injured worker to whom it had paid $34,000 in WC benefits. The injured employee had not sued Domtar Paper, was not party to the Liberty Mutual suit, and had assigned no rights to Liberty Mutual. Liberty Mutual relied upon section 319 of the WC Act to proceed in this fashion. The Supreme Court disagrees and affirms dismissal of the Liberty Mutual suit on preliminary objections. Only the injured employee has rights against the tortfeasor. The Supreme Court, however, confirms that the employer/WC carrier has subrogation rights, disagreeing only on the procedural mechanism. An employer/WC carrier might sue based on an assignment of rights, or by naming the injured employee in its suit, or by suing in the employee's name as a "use plaintiff."

COMMONWEALTH COURT: COMMON LAW MARRIAGE

In *Elk Mountain Ski Resort v. WCAB (Tietz, dec'd)*, 114 A.3d 27 (Pa. Cmwlth. 2015), the alleged common law wife of the deceased employee sought WC benefits, claiming a 6/12/04 common law marriage performed in Native American fashion (i.e., without witnesses, official license, etc, but with exchange of husband and wife vows). PA by appellate decision had prospectively abolished common law marriage in 2003 but later conformed the bar date to match the 1/1/05 Marriage Law bar date. Since claimant proved the necessary elements of a common law marriage entered into before the statutory bar date, benefits were granted.

COMMONWEALTH COURT: EMPLOYEE BEARS BURDEN OF PROVING AMOUNT OF THIRD PARTY SETTLEMENT

In *Reed v. WCAB (Allied Signal)*, 114 A.3d 464 (Pa. Cmwlth. 2015), appeal denied 128 A.3d 222 (2015), the estates of now deceased employee and spouse sought WC benefits, payment of which had been suspended pending disclosure of amounts received in a third party settlement. The third party settlement release listed a nominal $1 payment, consistent with bulk asbestos settlements where plaintiff counsel had discretion to divide bulk settlement payments among his clients in return for such releases. The WCJ placed the burden of proving the actual settlement amount on claimant, rather than on the employer/WC carrier seeking subrogation or setoff. The WCJ ruled that claimant failed to prove the actual settlement amount and thus payments remained suspended. The Commonwealth Court affirms. The burden of proof is properly placed on the employee, rather than on the employer, a non-party to the settlement. In a footnote, the Commonwealth Court disparages claimant's counsel for ignorance of the rules of appellate procedure, alleged deplorable record keeping, and possible failure to adhere to Rules of Professional Conduct on diligence, meritorious claims, and candor to the tribunal.

COMMONWEALTH COURT: COSTS AND ATTORNEY FEES AWARDED *SUA SPONTE* AGAINST WC CLAIMANT AND COUNSEL FOR FRIVOLOUS APPEAL

In *Smith v. WCAB (Consolidated Freightways)*, 111 A.3d 235 (Pa. Cmwlth. 2015), appeal denied 128 A.3d 1208 (Pa. 2015), Smith in 1996 sought WC benefits for injuries from a chemical spill in the course of employment. After hearings, his claim was denied on the merits. Over the next 20 years, Smith filed an additional 17 claim and review petitions, five appeals to the Commonwealth Court, five petitions to the PA Supreme Court, and two to the US Supreme Court, all unsuccessful. All issues were foreclosed by res judicata and collateral estoppel. After rejecting the captioned appeal, the Commonwealth Court *sua sponte* awards costs and attorney fees against Smith ***and*** his attorney, jointly and severally, noting "flagrant abuse" and "obdurate and vexatious prosecution of a frivolous appeal.".

# UM/UIM

SUPERIOR COURT: NO NEW STACKING WAIVER REQUIRED WHEN VEHICLE ADDED TO SINGLE VEHICLE NON-STACKED POLICY

In *Toner v. Travelers*, – A.3d – (Pa. Super. 2016), Toner purchased auto coverage from Travelers for a single vehicle with non-stacked UM/UIM and thereafter added two more vehicles, one at a time, without signing new UM/UIM waiver of stacking forms. The trial court denied Toner's claim for stacked benefits and the Superior Court affirms. Though the *Sackett* trilogy of decisions involved vehicles added to a multi-vehicle policy, the holdings were nonetheless instructive. If the "newly acquired vehicle" clause in the policy offers coverage finite in scope, new waiver forms are required. The "notify within 30 days" language found in all "newly acquired vehicle" clauses does ***not*** make coverage finite. Automatic expiration of coverage or a requirement to apply for a new policy are examples of finite coverage.

SUPERIOR COURT: AFTER REACHING MAJORITY, FORMER FOSTER CHILD CAN BE A "WARD" ENTITLED TO UIM COVERAGE UNDER FOSTER PARENTS' POLICY

In *Rourke v. Pennsylvania National Mutual Casualty Insurance Company*, 116 A.3d 87 (Pa. Super. 2015), appeal denied 128 A.3d 201 (Pa. 2015), the Penn National personal auto policy defined "insured" to include a named insured's resident "ward or foster child," terms not further defined. The MVFRL, in contrast, defines "insured" to include, if resident, only "a minor in the custody of the named insured.". Rickard, when a minor, was adjudicated dependent and placed with the Rourkes as a foster child. After reaching majority and aging out of the foster care program, Rickard still lived with the Rourkes who, as before, supported and treated him like family. Penn National denied Rickard's UIM claim under the Rourkes' policy, stating he was by the time of the accident neither a "ward or foster child" entitled to coverage. The Superior Court reverses judgment for Penn National, holding that the policy definition of "insured," unlike the MVFRL definition, did not require that Rickard be a minor and that "ward," undefined in the policy and construed against Penn National, includes a former foster child still living in the household.

SUPERIOR COURT: CAN UIM RESULT BE VACATED DUE TO ARBITRATOR'S PRIOR INVOLVEMENT IN TORT SUIT

In *State Farm Mutual v. Dill,* 108 A.3d 882 (Pa. Super. 2015), appeal denied 116 A.3d 605 (Pa. 2015), Dill, a minor, was injured in an auto accident. Represented by a later disbarred lawyer, Dill sued and settled with the UIM tortfeasor who was briefly represented by lawyer McNulty. Through new counsel, Dill then sought UIM benefits from State Farm which named McNulty as its arbitrator. Dill did not object to McNulty as arbitrator during the UIM proceedings, which ended in a defense verdict. Dill appealed based on McNulty serving as defense counsel in the tort case and then defense arbitrator in the UIM case. A split Superior Court *en banc* affirms the defense award, the majority ruling that Dill waived any objections to McNulty by failing to raise same at arbitration. Concurring and dissenting opinions disagree on the waiver issue (since Dill was a minor, the lawyer in the tort case was later disbarred, and there was no evidence Dill himself knew of McNulty's prior involvement) but split on whether McNulty as arbitrator was permissible.

SUPERIOR COURT: PA MVFRL NOT APPLICABLE TO OH RESIDENT INJURED IN OH ACCIDENT IN OH REGISTERED VEHICLE

In *Peters v. National Interstate Insurance*, 108 A.3d 38 (Pa. Super. 2015), appeal denied 124 A.3d 309 (Pa. 2015), Peters, an OH resident driving his PA employer's OH registered and garaged vehicle, was injured by a UIM vehicle in OH and thereafter sought PA UIM benefits under the employer's policy with National Interstate. The trial court rules in favor of coverage but the Superior Court reverses. First, the Superior Court *sua sponte* raises lack of jurisdiction over an OH claim to which the PA MVFRL – which covers only vehicles registered or principally garaged in PA – does not apply. The Superior Court, in dicta, next notes that the employer, in any event, properly rejected UIM coverage. Finally, since UIM was properly rejected, the Superior Court rejects Peters' attempt to create coverage ambiguity via analysis of policy premiums. Ambiguity in one part of a policy cannot create coverage in another part of the policy.

# MVFRL

SUPREME COURT: NO ATTORNEY FEE AWARD PERMITTED EVEN WHEN PRO IS FATALLY FLAWED

In *Doctor's Choice Physical Medicine v. Travelers*, 128 A.3d 1183 (Pa. 2015), the treating chiropractor sued the First Party Benefit carrier after payment for services was denied based on a PRO. The trial court deemed the PRO fatally defective since the reviewing chiropractor failed to ground his analysis in national norms, regional norms, or pre-established written standards. The trial court awarded benefits and also $39,000 in attorney fees. The Superior Court affirmed. The Supreme Court reverses. Attorney fees can be awarded only when First Party Benefit carriers unsuccessfully deny payment without first seeking PRO review. Here, Travelers challenged bills through a PRO and thus was protected from attorney fees. The MVFRL requires only a PRO challenge, not a valid completed PRO.

SUPERIOR COURT: PRECEDENT ON STATUTE OF LIMITATIONS FOR LIMITED TORT PLAINTIFFS JUST PLAIN WRONG?

In *Varner-Mort v. Kapfhammer*, 109 A.3d 244 (Pa. Super. 2015), limited tort plaintiff Varner-Mort did not file suit until 6/27/11, more than two year after the 5/6/09 accident and start of medical treatment. The trial court granted summary judgment to Kapfhammer based on statute of limitations. On appeal, the Superior Court reverses, reluctantly following *Walls v. Scheckler*, 700 A2d 532 (Pa. Super. 1997), which it describes as "just plain wrong." Under *Walls*, the tort statute of limitations for a limited tort plaintiff does not start to run until plaintiff is aware or reasonably should be aware of a "serious injury." Here, Varner-Mort presented evidence that she filed suit within two years of when she was first aware of a serious impairment of bodily function.

SUPERIOR COURT: LIMITED TORT PLAINTIFF PROVED "SERIOUS INJURY" AND WAS ENTITLED TO $85,000 PAIN AND SUFFERING AWARD

In *Brown v. Trinidad*, 111 A.3d 765 (Pa. Super. 2015), Brown, subject to "limited tort," alleged permanent injuries from an auto accident. Post accident, he returned to work but sustained an injury there, and then stopped treatment for the auto accident injuries after about five months. The Superior Court affirms the $85,000 jury award for pain and suffering. Brown's medical expert opined that the injuries caused "quite a significant problem" and that Brown would "have varying degrees of symptoms into the indefinite future." Brown himself testified that he could no longer ice skate, bowl, run, jump, play basketball, or even play with his daughter as he did before the accident. This testimony, obviously accepted by the jury, sufficed to escape "limited tort" status. The Superior Court also dismisses Trinidad's complaint that he could not have his medical expert testify that on occasion he also provided expert services to the law firm representing Brown. Such evidence was neither relevant nor probative and, in any event, would have been outweighed by the danger of prejudice to Brown.

# BAD FAITH

THIRD CIRCUIT: INSURER NEED NOT CONSIDER PUNITIVE DAMAGE EXPOSURE TO INSURED WHEN NEGOTIATING THIRD PARTY SETTLEMENT

In *Wolfe v. Allstate*, 790 F.3d 487 (3rd Cir. 2015), Wolfe obtained judgments for compensatory and punitive damages against Zierle, Allstate's insured, after Allstate failed to settle the case pre-trial. Allstate paid the compensatory award only. With an assignment of bad faith rights from Zierle, Wolfe sued Allstate seeking, in part, to recover the earlier punitive damage award on the theory that the underlying case would not have proceeded to trial, and exposed Zierle to punitive damages, but for Allstate's bad faith settlement negotiations. The trial court in the bad faith suit permitted Wolfe to prove the earlier punitive damage award. On appeal, the Court of Appeals reverses, predicting that the PA Supreme Court would rule that, in an action by an insured against his insurer for bad faith, the insured may not collect as compensatory damages the punitive damages awarded in the underlying suit. In addition, an insurer has no duty to consider its insured's potential exposure to punitive damages when negotiating settlement of the case.