LITIGATION UPDATE

April, 2017

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COVERAGE

Subrogation

Professional Flooring v. Bushar Corp., 152 A.3d 292 (Pa. Super. 2016), reargument denied, – A.3d – (Pa. Super. 2017)

Professional suffered damages in the conflagration which resulted in the Bridgeport Fire class action litigation. Brethren Mutual paid $32,502 in covered losses and agreed to subordinate its subrogation claim to Professional's claim in tort for $378,416 in total damages, with subrogation arising only when Professional was fully compensated for its losses. In settlement of the class action suit, a Claims Administrator valued Professional's claim at only $135,205, which it received plus interest. Brethren demanded reimbursement of its first party insurance payment, less a share of attorney fees and costs, which the trial court awarded. The Superior Court affirms. Professional was bound by the Claims Administrator's determination of loss, even though in an amount less than claimed. In addition, Brethren was required only to pay a *pro rata* share of the attorney fees and costs and was not, for instance, required to compensate Professional for its *pro rata* share of fees and costs.

Actual Cash Value and Replacement Cost

Brown v. Everett Cash Mutual, – A.3d – (Pa. Super. 2017)

Everett Cash insured the farm home of Brown and Scott (daughter and father) under a replacement cost policy. The residence burned to the ground. Everett Cash offered ACV based on a 35% depreciation factor, pending proof the residence was repaired or replaced. Brown and Scott disagreed on rebuilding plans so the ACV check was never cashed and no replacement cost check was ever issued. The trial court awards summary judgment to Everett Cash and the Superior Court affirms. Actual cash value is the repair or replacement cost of an entire structure before a fire, minus depreciation. Because the insured here failed to fulfill the condition precedent (i.e., the rebuilding of the residence), Everett Cash was required only to offer ACV. As to what constituted ACV, the Superior Court notes factual disagreement so remands for trial on that issue. The Superior Court directs attention to the policy definition of actual cash value to include consideration of:

> age, condition, deterioration, economic value, market value, obsolescence (both structural and functional), original cost, use and other circumstances that may reasonably affect values.

Assault and Battery Exclusion

QBE Insurance v. Walters, 148 A.3d 785 (Pa. Super. 2016)

OK Café bought a CGL policy from QBE subject to an assault and battery exclusion. Walters was shot outside the OK Café by another patron but in the presence of the bar's security personnel. Walters sued OK Café for failing to prevent the attack, for allowing the assailant in and out of the bar with a firearm, and for failing to properly train its security personnel. In the related DJ action, the trial court granted summary judgment to QBE based on the assault and battery exclusion. The Superior Court affirms. The assault and battery exclusion was broadly drafted to encompass claims based on negligence as well as intentional conduct.

Borrowed Employee/Leased Worker

Westfield Insurance Company v. Astra Foods, 134 A.3d 1045 (Pa. Super. 2016), appeal denied, –A.3d – (Pa. 2016)

Ramos, employed by BK Packaging, was hurt while working at a facility operated by Astra. Westfield wrote both CGL and WC coverage for Astra. In WC proceedings, the WC judge ruled that Ramos was not Astra's "borrowed employee," thereby eliminating any Westfield WC coverage for the injury. In tort litigation, a jury awarded over $760,000 against Astra for which Astra sought coverage under Westfield's CGL coverage. In a DJ action to determine coverage, Westfield obtained summary judgment on the theory that Ramos was a "leased worker" and thus an "employee" for purposes of a CGL exclusion. The Superior Court affirms. "Borrowed employee" for WC purposes is a matter of control. "Leased worker" for CGL purposes is a matter of contract. Astra was not entitled to coverage under either the WC or the CGL policies. A concurring opinion notes that Astra failed to develop or preserve any "reasonable expectation of coverage" argument.

WORKERS COMPENSATION

Borrowing Employer Immunity

Nagle v. Trueblue, Inc., 148 A.3d 946 (Pa. Cmwlth. 2016)

Bell (plaintiff's decedent) was hired by Labor Ready, an employment agency, to provide temporary services to its clients. Labor Ready contracted with Rye Township to furnish such temporary labor. Labor Ready sent Bell to Rye Township which assigned him trash truck duty. He fell from the back of a trash truck, suffering serious injuries which eventually led to his death. Not only did Labor Ready pay WC benefits, Bell filed a penalty petition identifying Labor Ready as the employer. Plaintiff later filed a tort suit against Labor Ready and Rye Township, both of which prevailed on motions for summary judgment based on WC immunity. The Superior Court affirms. Both the original employer (Labor Ready) and the "borrowing employer" which controlled work activities (Rye Township) are entitled to immunity.

Dual Capacity

Neidert v. Charlie, 143 A.3d 384 (Pa. Super. 2016), appeal denied, – A.3d – (Pa. 2016)

Neidert worked at Riley's Pub, fell through a "door in the floor" in the course of employment, and received WC benefits. Since his employer was also the owner of the premises, he sued his employer in tort, alleging that WC immunity did not apply due to the "dual capacity" exception. The trial court entered a compulsory non-suit and the Superior Court affirms. Under the "dual capacity" doctrine, an employer may be liable in tort to an employee if it occupies, in addition to its capacity of employer, a second capacity that imposes obligations independent of those imposed on an employer. PA appellate courts have taken an unfavorable view of the "dual capacity" doctrine. The Supreme Court has stated that the "dual capacity" exception does not exist where the employee was actually engaged in the performance of his job at the time of injury.

Subrogation "On Behalf Of" Employee

Hartford Insurance Group ex rel. Chen v. Kamara, – A.3d – (Pa. Super. 2017)

Chen, in the course of employment, was struck by Kamara's vehicle. Hartford as WC carrier paid benefits to Chen. Hartford sued Kamara, identifying the plaintiff as "Hartford Insurance Group on behalf of Chen," attempting to distinguish from the impermissible "as subrogee of" language in *Domtar Paper*. The trial court sustained preliminary objections based on *Domtar Paper* and based on a verification signed not by Chen but by a Hartford representative. The Superior Court reverses. Hartford complied with *Domtar Paper* by suing in Chen's name for all damages to which Chen was entitled. In addition, since Hartford was a party to the suit, a verification from a Hartford representative was proper.

Credit for Third Party Recovery

Whitmoyer v. WCAB (Mt. Country Meats), – A.3d – (Pa. Cmwlth. 2016)

Whitmoyer suffered a work injury causing right arm amputation. He received specific loss payments but also continued to receive medical benefits. In a third party action, Whitmoyer recovered $300,000 from which his employer recovered its lien for payments to date, leaving a balance of about $190,000 from the tort action recovery. For years thereafter employer paid continuing medical expenses without using the $190,000 tort recovery balance as a credit or offset. The employer eventually filed a modification petition to assert that credit and prevailed before the ALJ and WCAB, affirmed by the Commonwealth Court. Section 319 grants a credit against future "compensation," a word that encompasses both indemnity payments and medical expenses.

ATTORNEYS

Suing the Wrong Party

Heldring v. Lundy, Beldecos & Milby, 151 A.3d 634 (Pa. Super. 2016)

Subcontractor retained defendant law firm to pursue a collection action for payment due on a construction project. Subcontractor prevailed in the suit but only against a trade name, not against a legal entity, rendering the judgment worthless. Subcontractor's suit against the law firm for malpractice was dismissed on preliminary objections. In an apparent case of first impression, the Superior Court rules that failure to sue the correct party may be a viable basis for a legal malpractice cause of action.

Malpractice and Proximate Cause of Harm

412 N. Front St. Assocs. v. Spector Gadon & Rosen, P.C., – A.3d –, (Pa. Super. 2016)

Debtor and Guarantors on a real estate loan hired Law Firm to assist in discussions to restructure the loan and, failing that, to represent them in loan-related litigation. Restructure discussions were unsuccessful so the bank confessed judgment against Debtor and Guarantors. Although Law Firm opined that all the confessions were flawed and that it would take steps to open same, Law Firm in fact only sought to open judgments against Guarantors, not Debtor, effectively leaving Debtor and Guarantors exposed and without recourse. Debtor and Guarantors sued for legal malpractice and Law Firm counterclaimed for unpaid fees. Since Debtor, having admittedly defaulted on the loan, had no basis to open the confessed judgment, Debtor and Guarantors could not, and did not, allege facts essential to establishing that Law Firm caused their losses. Though alleging that Law Firm said it would move to open all the confessed judgments and failed to do so, Debtor and Guarantors failed to allege proximately caused damage. Debtor and Guarantors also alleged a Law Firm breach of contract based on overbilling but failed to present proper expert testimony, resulting not only in dismissal of that claim but in granting of the counterclaim for unpaid fees.

Malpractice Claim Following Settlement

Kilmer v. Sposito, 146 A.3d 1275 (Pa. Super. 2016)

Kilmer sued Sposito, her attorney, for giving bad advice, particularly advice to file an election to take against her husband's will. As a result, she was entitled to 33 1/3% of the estate when by pure operation of law she would have been entitled to 50%. Litigation amongst the beneficiaries ensued and Kilmer settled at 41.5%. Relying on precedent that a dissatisfied litigant may not sue an attorney for malpractice following a settlement to which the litigant agreed, the trial court sustained preliminary objections. The Superior Court reverses. The precedent applies to prohibit cases where a litigant seeks to second-guess an attorney's judgment as to settlement amounts. Those cases must be distinguished from a challenge to an attorney's failure to advise a client about well established principles of law.

Fee Claim of Discharged Attorney

Angino & Rovner v. Lessin & Associates, 131 A.3d 502 (Pa. Super. 2016), appeal granted, 138 A.3d 610 (Pa. 2026), appeal dismissed as improvidently granted, – A.3d – (Pa. 2017)

Client hired Angino to pursue claims arising out of an auto accident. The fee agreement stated that if Client terminated the representation and sought other counsel, Angino would still receive 20% of any recovery. After the liability case resolved for the $100,000 policy limits, Angino started to pursue a UIM claim but was fired in favor of Lessin who tried that case to a net award of over $585,000. When neither Client nor Lessin agreed to pay Angino a 20% fee, Angino sued for breach of contract based on the fee agreement. The trial court granted summary judgment against Angino and the Superior Court affirms. Angino's only remedy is for *quantum meruit* damages (for which he had not sued) based on principles of fairness.

Fee Claim of Discharged Attorney

Meyer Darragh v. Law Firm of Malone Middleman, 137 A.3d 1247 (Pa. 2015), appeal granted on cross petition for allowance of appeal (2/22/17)

Attorney Weiler represented Eazor for damages arising out of an auto accident. Weiler thereafter joined Meyer Darragh as an associate subject to a written employment agreement which gave the firm rights to fees on any work performed by or originated by Weiler. Meyer Darragh worked on the Eazor claim but Weiler resigned and took the file before completion, agreeing to split any eventual fee with two-thirds for the firm. After Weiler became affiliated with Malone Middleman, Eazor discharged Meyer Darragh and hired Malone Middleman. The Eazor claim settled for $235,000, generating a $67,000 fee from which Meyer Darragh demanded two-thirds by contract or, in the alternative, an amount based on *quantum meruit.* Malone Middleman refused any payment. The trial court denied the contract claim but awarded fees in *quantum meruit*. The Superior Court reversed on both grounds, denying the *quantum meruit* claim but directing judgment for Meyer Darragh on the contract claim. Malone Middleman appealed. The Supreme Court reverses, holding that prior precedent involving a departing partner (which created a "winding up business" scenario) did not apply a departing associate. With an associate, the original firm has no contract claim against the successor firm. The original firm may have a *quantum meruit* claim (as the trial court ruled but the Superior Court reversed) but that issue was not before the Supreme Court. The Supreme Court has since permitted and then granted Meyer Darragh's petition for allowance of appeal *nunc pro tunc*.

COORDINATE JURISDICTION RULE

Summary Judgment Overturned

Bates v. Delaware County Prison Employees Union, 150 A.3d 121 (Pa. Cmwlth. 2016)

Bates sued Employer and Union after she was terminated, allegedly for cause. Employer's preliminary objections were overruled and Employer's motions for summary judgment and for reconsideration of summary judgment, both filed while discovery was open, were also denied, all by Judge Proud. Employer's second motion for summary, filed after discovery closed, was granted by Judge Angelos. Bates appealed, relying on the coordinate jurisdiction rule which commands that upon transfer of a matter between trial judges, a transferee trial judge may not alter resolution of a legal question previously decided by a transferor judge. The rule does not apply when the motions are of different types, so denial of the preliminary objections did not preclude rulings on later motions for summary judgment. Denial of the first motion for summary judgment, however, precluded a ruling on a second motion for summary judgment unless (1) the controlling law changed (and it did not), or (2) there was a substantial change in facts or evidence (and, despite additional discovery, there was not), or (3) the prior ruling was clearly erroneous and, if followed, would create manifest injustice. As for that last exception, manifest injustice requires more than just delay or being forced to trial but instead requires considerable substantive harm resulting in a situation that is plainly intolerable, a burden Employer did not meet. The case was remanded for trial.

Summary Judgment Affirmed

Nobles v. Staples, 150 A.3d 110 (Pa. Super. 2016)

Nobles claimed injuries when his desk chair, allegedly supplied by Staples, collapsed. Staples countered that Nobles could not prove it supplied the chair and moved for summary judgment. Judge Rizzo denied summary judgment, noting that discovery was ongoing. At the close of discovery, Staples filed a second motion for summary judgment which was denied without explanation by Judge Messiah-Jackson. At trial Judge Collins granted Staples' motions in limine to bar experts and testimony which then led to a motion to dismiss, treated as a third motion for summary judgment, which Judge Collins granted. On appeal, Nobles argued that the coordinate jurisdiction rule prevented Judge Collins from granting the third motion for summary judgment. Under that rule, however, a trial court may reconsider a summary judgment motion already decided by a different judge if the motion contains new evidence or facts of record. In this case, rulings on the motions in limine constituted such new information such that the coordinate jurisdiction rule did not apply.

Summary Judgment Affirmed

Valentino v. Phila. Triathlon, LLC, 150 A.3d 483 (Pa. Super. 2016)

Valentino electronically registered for a triathlon, a process which included an electronically executed liability waiver form. He drowned in the Schuylkill during the first portion of the race. Valentino's widow sued the race organizer which prevailed on a second motion for summary judgment. Valentino claimed that the coordinate jurisdiction rule barred this result since a first motion for summary judgment had been denied by a different judge. The Superior Court *en banc* rules "the completion of discovery and the development of a more complete record" qualified as an exception to coordinate jurisdiction. Further, while noting that a decedent may not compromise a wrongful death claimant's right of action without consent, the wrongful death claimant nevertheless remains subject to substantive defenses, including, in this case, the waiver of liability.

RELEASES AND LIABILITY WAIVERS

Waiver of Liability Forms

Hinkal v. Pardoe, 133 A.3d 738 (Pa. Super. 2016), appeal denied, 141 A.3d 481 (Pa. 2016)

Hinkal was injured at Gold's Gym while using a piece of exercise equipment under the direction of personal trainer Pardoe. Gold's Gym and Pardoe raised the Waiver of Liability provision in Hinkal's signed membership agreement as a bar to any claims. A split Superior Court *en banc* agrees. Since Hinkal never read the Waiver of Liability clause (which the majority calls "supine negligence"), she was in no position to complain about font size, location of clause, etc. If there was no contract of adhesion and if the clause did not violate public policy, the waiver was effective to bar any claims. The dissent notes that "contracts that involve "health and safety" fall within an exception to the general rule permitting liability waivers.

Waiver of Liability Forms

***Toro v. Fitness International*,** 150 A.3d 968 (Pa. Super. 2016)

Toro, a paid member at LA Fitness, allegedly slipped in the locker room on an "unusual buildup" of "soapy water" which was "cloudy." The trial court granted summary judgment to LA Fitness based on a liability waiver clause in the membership agreement. Toro claimed that the liability waiver violated public policy because his contract for personal training services implicated health and safety concerns. Violations of public policy are usually limited to employer-employee relationships, public service, public utilities, common carriers, and hospitals. The Superior Court affirms dismissal of the suit.

Waiver of Liability Forms

Feleccia v. Lackawanna College, – A.3d – (Pa. Super. 2017)

Plaintiffs suffered injuries while participating in tackling drills at football practice. Each had signer a waiver which prohibited suits against the college for injuries arising out of the athletic activities. The waivers did not specifically reference negligence by College. College originally intended to provide "Athletic Trainers" (a defined term under the Medical Practice Act, requiring certification) at practice but instead hired individuals who failed the certification test, so instead referred to them in some documents as "First Responders" (an undefined term, but not requiring certification). The trial court grants summary judgment to College based on the waiver and on assumption of risk. The Superior Court reverses. The waiver did not specifically address possible negligence by College itself and would not, in any event, apply to claims of gross negligence and recklessness.

Release Obtained by Fraud

Pielago v. Orwig, – A.3d – (Pa. Super. 2016)

Pielago claimed injuries from an automobile accident with Orwig. Progressive insured both Pielago and Orwig. Twelve days after the accident Orwig, who later alleged he did not understand English, signed a release of claims in return for $2,851 plus Orwig/Progressive's promise to pay up to $7,000 for medical or wage losses incurred within 45 days of the accident. In Pielago's later action for full tort damages, Orwig raised the release, Pielago claimed the release was obtained by fraud, and the trial granted summary judgment to Orwig. The Superior Court reverses. Whether a release was obtained by fraud or misrepresentation is a fact issue for the jury

DRIVING UNDER THE INFLUENCE

Failure to Provide Alcohol Treatment

Casteel v. Tinkey, 151 A.3d 261 (Pa. Cmwlth. 2016)

Tinkey caused a serious MVA for which he was imprisoned, subject to a later work-release if he refrained from all use of alcohol and drugs, obtained a drug and alcohol evaluation, and successfully completed any recommendations for counseling. On work-release, he drove DUI and struck and killed plaintiff's decedent. Plaintiff sued the Commonwealth for failing to actually provide Tinkey with treatment for alcohol abuse while imprisoned as provided in the Drug and Alcohol Abuse Control Act. The trial court awarded summary judgment to the Commonwealth. The Commonwealth Court affirms because failure to provide alcohol treatment does not fall within the medical-professional exception to immunity and because the public duty doctrine prevents any cause of action where the government activity in question is designed solely for the benefit of the general public.

Proof of Intoxication

Rohe v. Vinson, – A.3d– (Pa. Super. 2016)

Rohe, operating a motorcycle, was injured in a collision with a tractor-trailer. Before the accident, Rohe by his own admission had stopped at six bars over a period of hours, drinking at least one beer at each stop. At the hospital post-accident, Rohe's BAC was 0.0706%, though Vinson produced an expert toxicologist who via "relation back" calculations put time-of-accident BAC between 0.085% and 0.010%, above the legal limit and at a level which would render Rohe incapable of safe driving. At trial of Rohe's BI suit, the court permitted the evidence of drinking and "relation back" opinions against him. The jury returned a defense verdict. The Superior Court reverses. Evidence of drinking, being unfairly prejudicial, is not admissible unless it establishes a degree of intoxication which proves unfitness to drive. Objective criteria usually includes staggering, stumbling, aimless wandering, glassy eyes, or incoherent mumbling. BAC may also be relevant but not without other supporting evidence. If the BAC is above the legal limit, that evidence can the opinion of an expert toxicologist. Here, however, the BAC was below the legal limit and no other evidence of intoxicated conduct was offered.

DUI Guilty Plea Admission Against Interest

Vetter v. Miller, – A.3d – (Pa. Super. 2017)

Vetter, admittedly DUI by blood alcohol level, exited his car to confront the driver of a following vehicle, who, trying to escape, dragged Vetter about 100'. Witness testimony confirmed Vetter's odd appearance, unusual and combative behavior, and smell of alcohol. Vetter's DUI guilty plea and evidence of intoxication were properly admitted at trial since his recklessness and carelessness were at issue in determining comparative fault.

MISCELLANEOUS LIABILITY CASES

Data Breaches

Dittman v. UPMC, – A.3d – (Pa. Super. 2017)

UPMC suffered a data breach which released personal information of 62,000 present and former employees, leading to fraudulent tax refund claims and to other monetary damage the employees incurred to protect themselves and their information. The trial court sustained preliminary objections to the class action complaint, ruling that UPMC owed no duty of care in the collection and storage of employee information. A split Superior Court panel affirms. No judicially created duty of care is needed to incentivize companies to protect confidential information. In addition, UPMC had no duty to guard against criminal acts of third parties unless it realized, or should have realized, the likelihood of such conduct. While data breach might be generally foreseeable, plaintiffs had not alleged specific threats, problems, or notice of actual or potential security breaches.

Duty to Invitee on Adjoining Roadway

Newell v. Montana West, – A.3d – (Pa. Super. 2017)

Newell parked his car on private property across the highway from the Montana West restaurant/bar since its small parking lot was already full. Newell later exited Montana West, attempted to cross the highway, and was struck and killed by a car. In plaintiff's suit against Montana West, the trial court granted summary judgment to the defendant. The Superior Court affirms. A landowner owes no duty to an invitee injured on an adjoining roadway. A pedestrian who walks on a public highway places himself at risk of injury from vehicles on the highway. Any duty of care owed to that pedestrian belongs to those who maintain the road or to motorists driving on it. The duty does not extend to landowners who have premises adjacent to the roadway.

Duty to Install Smoke Detectors

Echeverria v. Holley, 142 A.3d 29 (Pa. Super. 2016), rehearing denied, – A.3d – (Pa. Super. 2016), appeal denied – A.3d – (Pa. 2017)

A fire in a rental residential property without smoke detectors resulted in three fatalities. The trial court denied plaintiffs' motion to amend the complaint to add negligence *per se* claims based on the PA Uniform Construction Code, noting that the proposed amendment would add an otherwise time-barred new cause of action. On the original negligence claims, the trial court granted summary judgment to the property owner, noting no duty to install smoke detectors. The Superior Court affirms on the motion to amend but reverses on summary judgment. Landlords owe a duty to protect tenants from injury or loss arising out of a negligent failure to maintain rental property in a safe condition, a duty sufficiently broad to include smoke detection devices.

Parent/Subsidiary

Barnes v. Alcoa, Inc., 145 A.3d 730 (Pa. Super. 2016)

Barnes, a Kawneer employee, fell on snow and ice in the company parking lot, suffering injuries leading to leg amputation. Kawneer is a wholly owned subsidiary of Alcoa. Kawneer, using Alcoa standard terms and conditions, contracted with G&M for parking lot snow and ice removal. Barnes sued G&M (for negligent work) and Alcoa (for negligent hiring and supervision of G&M) and obtained a $1,300,000 verdict against G&M only. The trial court granted Alcoa's motion for compulsory nonsuit. On appeal, the Superior Court affirms as to Alcoa. The witnesses who testified they hired and supervised G&M also testified they were Kawneer, not Alcoa, employees. Though the Alcoa name was on the witnesses' paychecks, that fact is not evidence that the witnesses are employed by the parent company instead of the subsidiary. Barnes needed to show that Alcoa had the power and authority to control their actions.

Intentional Infliction of Emotional Distress Proof of Damages

Gray v. Huntzinger, 147 A.3d 924 (Pa. Super. 2016)

Following a reprimand incident at work, Gray sued for assault, battery, and intentional infliction of emotional distress, seeking both compensatory and punitive damages. A jury denied the assault and battery claims but awarded compensatory and punitive damage claims for intentional infliction of emotional distress. At trial, Gray offered no expert testimony on damages. The gravamen of the tort of intentional infliction of emotional distress is outrageous conduct on the part of the tortfeasor. Since the definition of outrageous conduct is subjective and nebulous, recovery for intentional infliction of emotional distress is highly circumscribed and objective proof of an injury is required. In short, Gray was required to present expert medical confirmation that he suffered the claimed severe emotional distress.

Dead Man's Statute

Davis v. Wright, – A.3d – (Pa. Super. 2016)

Davis was injured in an auto accident involving Wright. Wright later died pre-suit. Davis sued and defendant filed an Answer with New Matter which did not raise the Dead Man's Statute as an affirmative defense. Defendant also cross-examined a police office during a discovery deposition. Defendant, relying on the Dead Man's Statute, moves for summary judgment which the trial court grants and the Superior Court affirms. Affirmative defenses must be raised in New Matter but the Dead Man's Statute is not an affirmative defense. In addition, while the Dead Man's Statute can be waived by engaging in discovery against an adverse party (e.g., taking a deposition or requiring answers to interrogatories), participation in depositions or discovery of non-adverse witnesses or parties does not constitute such a waiver.

Death of Party

Grimm v. Grimm, 149 A.3d 77 (Pa. Super. 2016)

In 2006, grandfather struck grandson in the face with a shovel handle, stating his lawyer told him he could do anything he wanted because he was 70 years old. In 2007, grandson started suit by summons. In 2009, the court issued a notice of intent to terminate the suit due to inactivity, to which grandson responded with a notice of intent to proceed. In 2011, grandson filed a complaint. In 2013, grandfather died but no notice of death was filed and no personal representative substituted as defendant. Later in 2013, the court again issued a notice of intent to terminate, to which grandson again filed a notice of intent to proceed. In 2015, grandfather's counsel filed a motion for *non pros* which was granted. On appeal, the Superior Court *sua sponte* notes that neither it nor the trial court had subject matter jurisdiction over the case since the death of grandfather in 2013. The judgment of *non pros* was a nullity. The case was remanded for the trial court to either dismiss for want of jurisdiction or to permit substitution of a personal representative.

Loss of Consortium

Young v. Estate of Young, 138 A.3d 78 (Pa. Cmwlth. 2016)

Nephew sued the estates of Aunt and Uncle after the bulk of their estates was left to charity. Nephew, proceeding *pro se*, faced insurmountable procedural and substantive obstacles, so the court affirmed dismissal of his complaint on preliminary objections. Of note, however, the Commonwealth Court addressed the nephew's claim for "loss of consortium and the loss of support, cooperation, aid, companionship and loving and interactive relationship critical in the last days of" Aunt and Uncle. PA recognizes loss of consortium claims only for spouses. Not even children have a cause of action for loss of parental consortium caused by tortious interference of a third party.

Unfair Trade Practices and Consumer Protection Law

Dixon v. Northwestern Mutual, 146 A.3d 780 (Pa. Super. 2016)

Agent and Insurer sold a "vanishing premium" life insurance policy but in the later stages of the 12 year contract failed to advise Insured of annual premium increases, which, when not timely paid, reduced the death benefit. Insured brought various claims, including an UTPCPL catchall claim under the "fraudulent or deceptive conduct" provision at 73 P.S. 201-2(4)(xxi). The trial court sustained preliminary objections to the complaint but the Superior Court reverses. Prior to 1996, the UTPCPL catchall clause applied only to "fraudulent conduct." The 1996 amendment expanded application to deceptive conduct, making negligent misrepresentations (such as alleged by Insured) actionable as well.

MISCELLANEOUS PROCEDURE CASES

Insurer Represented by Non-Attorney at Administrative Hearing

Skotnicki v. Insurance Dep't, 146 A.3d 271 (Pa. Cmwlth. 2016)

Phoenix issued a Homeowner's Policy to Skotnicki covering his Camp Hill residence. Skotnicki thereafter acquired a dog which bit a neighbor. Phoenix accepted liability and Phoenix settled the neighbor's bodily injury claim. Phoenix then cancelled the policy due to a substantial change or increase in hazard, in particular a pet on the premises with dangerous propensities. Skotnicki countered that the dog was provoked, an exception to the "increase in hazard" rule. At the administrative hearing which ultimately permitted cancellation,, Phoenix was represented by a non-attorney employee. As a general rule, corporations may not act pro se in court, not even through officers, directors, or shareholders. Under the General Rules of Administrative Procedure and Practice, however, an agency may in a specific case permit non-attorney representation, and had done so in this case. The Commonwealth Court further notes that the Insurance's Department's apparent widespread practice of allowing non-attorney representation without a case by case ruling is unlawful.

UC Claimant Represented by Suspended Attorney at Administrative Hearing

Powell v. UC Board of Review (Krentzman & Sons), – A.3d – (Pa. 2017)

Powell designated suspended attorneys to represent him in UC proceedings, citing the UC statute allowing claimants to be represented by "attorneys" or "other representatives." Powell also cited the earlier *Harkness* decision which allowed employers to be represented by non-attorneys in UC proceedings. The Supreme Court, however, prohibits representation of claimants (and presumably employers as well) by suspended attorneys who qualify as neither "attorneys" nor "other representatives" but rather are "formerly admitted attorneys" who remain subject to Disciplinary Enforcement Rules and the terms of their suspensions.

Damages Limit Under Pa.R.C.P. 1311.1

Grimm v. Universal Medical, – A.3d – (Pa. Super. 2017)

Grimm sued his employer for damages under the PA Wage Payment Act. After losing at compulsory arbitration, Grimm appealed for a trial *de novo* but elected to proceed under Pa.R.C.P. 1311.1 which, in return for relaxed evidentiary standards at trial, limits monetary recovery to $25,000. Grimm prevailed in the jury trial and was awarded about $15,000. In a subsequent hearing to determine any award of counsel fees under the Wage Payment Act, Grimm was awarded an additional $28,500 in attorney fees and costs, bringing the total award to about $43,500, far in excess of the Pa.R.C.P. 1311.1 $25,000 limit. The Superior Court affirms the entire award, ruling that costs and statutory attorney fee awards, similar, for instance, to delay damages, are permitted even when the total award then exceeds a cap on compensatory damages**.**

Opposition to Motion for Summary Judgment

Welsh v. AMTRAK, – A.3d – (Pa. Super. 2017)

In this FELA action, AMTRAK filed a motion for summary judgment which Welsh opposed by filing an answer with general denials and with three unsworn witness statements. The trial court granted summary judgment for AMTRAK, disregarding the unsworn witness statements and treating Welsh's general denials as admissions. The Superior Court affirms. The manner of opposing a motion for summary judgment is governed by local rule Phila.Civ.R. 1035.2. Affidavits may be submitted in opposition but unsworn witness statements do not qualify as affidavits. Denials must be specific with citations to the record. Though state rule Pa.R.C.P. 1029(e) allows general denials to pleadings in actions for bodily injury, a motion for summary judgment is not a pleading so that rule was not applicable.

Discovery Admissions

Discover Bank v. Repine, – A.3d – (Pa. Super. 2017)

Discover sued Repine to collect on an overdue credit card account and served requests for admissions to establish the monthly statements, Repine's receipt of same, the terms of the card-member agreement, that Repine made or authorized the purchases, and that Repine had not disputed any charges within the time permitted. Repine responded with "denied" or "after reasonable investigation, the defendant is without sufficient information to admit or deny the truthfulness of this request." Discover moved for summary judgment, granted by the trial court, contending that Repine's bad faith responses created admissions. The Superior Court affirms. Though Pa.R.C.P. 1029 (which prohibits general denials in certain pleadings) did not apply, Pa.R.C.P. 4014 (which governs answers to requests for admissions) did apply. Pa.R.C.P. 4014 allows general denials, on not, based on whether the response is in good faith or in bad faith. Here, Repine's responses were made in bad faith.

Defaults and Judicial Admissions

Century Surety Company v. Essington Auto Center, 140 A.3d 46 (Pa. Super. 2016)

Century's Garage Liability Policy reduced applicable limits to minimum amounts if the covered driver is under age 21. Century filed a DJ Action to establish these lower limits, defaulted the driver, and obtained judgment on the pleadings against Essington. In new matter, Essington had pleaded that lower limits were not applicable because "the accident in question did not involve 'garage operations' as defined in the policy of insurance," an allegation the trial court deemed to be a judicial admission. The Superior Court reverses the judgment on the pleadings and also opens the default judgment. The quoted new matter used against Essington to obtain judgment on the pleadings was not a judicial admission because it involved a conclusion of law, not facts. The default was opened because Century, aware the driver was represented in the underlying tort litigation, nevertheless certified, incorrectly, that it "conducted a thorough search for the whereabouts of" the driver, thus justifying alternate service.

WRONGFUL USE OF CIVIL PROCEEDINGS

Damages

Miller v. St. Luke's University Health Network, 142 A.3d 884 (Pa. Super. 2016), appeal denied, – A.3d – (Pa. 2016)

Serial-killer Charles Cullen, a nurse, confessed to killing patients at various medical institutions, including St. Luke's. Miller sued St. Luke's for the death of a relative, also filing the required Certificate of Merit. St. Luke's eventually obtained summary judgment due to Miller's lack of expert testimony. St. Luke's then sued Miller, his attorneys, and the Certificate of Merit expert, all for wrongful use of civil proceedings. After some discovery, St. Luke's dismissed Miller but continued as to the attorneys and the expert. Miller then sued St. Luke's and its attorneys for wrongful use of civil proceedings. At trial, the jury found a Dragonetti violation by St. Luke's but awarded no damages. All parties appealed. The Superior Court rejected Miller's contention that the jury should have been instructed that damages are presumed to flow from a Dragonetti violation. Miller had the burden of proving damages. The Superior Court also rejected St. Luke's demand for JNOV. Damages are not an essential element of the Wrongful Use of Civil Proceedings statutory cause of action so the jury finding of a Dragonetti violation stands.

New Matter

P.J.A. v. H.C.N., – A.3d – (Pa. Super. 2017)

The parties, once married, were engaged in a decade long series of legal actions about divorce and custody, litigation the trial court described as "extraordinarily contentious." Plaintiff sued for abuse of process and for statutory wrongful use of civil proceedings. The trial court sustained preliminary objections. The abuse of process claim was time barred. The Dragonetti claim, with a later limitation date, was timely but was based on allegedly improper New Matter in response to a Complaint. Dragonetti claims must arise out of "the procurement, initiation or continuation of civil proceedings," none of which apply to New Matter which is simply part of an Answer which raises affirmative defenses.

Judicial Immunity

Freundlich & Littman v. Feierstein, – A.3d – (Pa. Super 2017)

Plaintiff sued law firm for both common law abuse of process and for statutory wrongful use of civil proceedings allegedly arising out of a baseless counterclaim filed on behalf of the law firm's client in earlier litigation. In the present suit, the law firm prevailed on preliminary objections on the basis of judicial privilege, also known as judicial immunity. Under that doctrine, an attorney is generally entitled to absolute immunity for actions taken in the course of representing a client in judicial proceedings. The Superior Court reverses, holding that judicial immunity does not apply to either common law abuse of process or statutory Dragonetti claims.

UM/UIM CASES

Waiver Form Language

Petty v. Federated Mutual, – A.3d – (Pa. Super 2016)

Petty occupied a McQuillen Chevrolet vehicle when injured in a collision with a UIM vehicle. McQuillen Chevrolet, however, had rejected UIM coverage on its Federated Mutual policy. The Federated Mutual rejection form varied from the MVFRL section 1731 required form "because federated added the phrase 'Option 2' to the heading, replaced the term 'protection' with the term 'coverage' in the heading, added an 's' to the end of 'motorist' and changed the proximal relationship of the statutory language by 'boxing' a portion of the form." The trial court granted judgment on the pleadings and the Superior Court affirms. The deviations from the MVFRL required form were hyper-technical, did not cause confusion, and did not result in an uninformed waiver.

Waiver Form Language

Ford v. American States Ins. Co., – A.3d – (Pa. 2017)

Ford's mother had auto insurance through American States but subject to signed a UIM coverage rejection form. Ford was in an accident and sought UIM benefits from American States. The MVFRL at 1731(c.1) requires that a carrier's rejection form must "specifically comply" with the form found at 1731(c). The American States form deviated from the statutory form by referencing "motorists" instead of "motorist" and by injecting the word "motorists" between "underinsured" and "coverage." The trial court, the Superior Court, and the Supreme Court rule that "specifically comply" is not the same as "verbatim." Forms that differ from the statutory forms in an inconsequential manner with *de minimis* deviations meet statutory requirements

Waiver Forms When Vehicle Added

Toner v. Travelers, 137 A.3d 583 (Pa. Super. 2016), appeal granted, – A.3d – (Pa. 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. The Supreme Court granted a petition for allowance of appeal.