LITIGATION UPDATE

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Michael P. McKenna, Esquire

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

PITTSBURGH OFFICE
The Oliver Building
535 Smithfield Street
Suite 1100
Pittsburgh, PA 15222
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

BAD FAITH

Burden of Proof

Rancosky v. Washington National, 170 A.3d 364 (Pa. 2017)

Rancosky purchased an employer-sponsored cancer insurance policy. She was later diagnosed with ovarian cancer, underwent surgery and chemotherapy, and suffered periods of disability from employment. Rancosky relied upon the policy's Proof of Disability and Waiver of Premium provisions to obtain benefits but her claim was negligently mishandled by the carrier. She sued for benefits and for bad faith damages. A jury awarded the breach of contract damages but the trial judge dismissed the bad faith claim. Although Rancosky proved the carrier lacked a reasonable basis to deny benefits, she failed to prove that the carrier acted out of some motive of self-interest or ill will. The Supreme Court reverses, adopting the *Terletsky v. Prudential*, 649 A.2d 680 (Pa. Super. 1994), test that a plaintiff must present clear and convincing evidence (1) that the insurer did not have a reasonable basis for denying benefits under the policy, and (2) that the insurer knew of or recklessly disregarded its lack of a reasonable basis. Proof of an insurer's self-interest or ill will is not a prerequisite to prevailing in a bad faith case, though it might be probative on the second *Terletsky* prong.

COVERAGE

Unlisted Resident Driver Exclusion

Safe Auto Insurance Co. v. Oriental-Guillermo, 170 A.3d 1170 (Pa. Super. 2017)

Dixon drove a car insured by Safe Auto and owned by named insured, live-in boyfriend Oriental-Guillermo. After an accident, she was sued by a passenger in the other car. Safe Auto denied coverage under an Unlisted Resident Driver Exclusion which excluded coverage for drivers who lived with Oriental-Guillermo, were not related to him, and were not specifically listed on the policy. The MVFRL at 75 Pa.C.S.A. 1786(f) places the burden on the owner of a vehicle, not on an insurer, to provide financial responsibility. Oriental-Guillermo could have met that burden by listing Dixon on the Safe Auto policy or by assuring she had her own coverage. The exclusion was valid and judgment for Safe Auto was affirmed.

Delinquent Taxes

Park Restoration, LLC v. Erie Insurance Exchange, 855 F.3d 519 (3rd Cir. 2017)

Under 40 Pa.C.S.A. 638, an insurer may not pay fire insurance proceeds to a "named insured" unless the local municipality certifies that no delinquent taxes are owed on the property where the structure is located. The Trustees of Conneaut Lake Park, Inc. owned Conneaut Lake Park within which Park Restoration, LLC operated and insured the Beach Club. After a fire at the Beach Club, Park sought the $611,000 policy limits, which Erie did not dispute, but from which the local taxing authorities claimed almost $480,000 in taxes going back 20 years. The taxes were not owed by named insured Park Restoration, LLC, but rather were levied against the property. The Court of Appeals rules that the named insured's rights were by statute subordinate to those of the taxing authorities.

Federal Jurisdiction

Rarick v. Federated Service Ins. Co., 852 F.3d 223 (3rd Cir. 2017)

Rarick was in a company car for which his employer had waived UM coverage. He was injured in an accident allegedly caused by a phantom vehicle. After Federated denied his UM claim, he sued in state court both for class action declaratory relief and for UM damages. Federated removed to federal court. Federal courts are required to accept diversity suits for damages but may exercise discretion on whether to accept DJ matters. The trial court determined that "the heart of the matter" here was DJ and declined jurisdiction. The Court of Appeals reverses, adopting the "independent claim" test, rather than "the heart of the matter" test. If the legal claims are independent of the DJ claims, the court must retain jurisdiction. If the legal claims are dependent on the DJ claims, the court can exercise discretion on jurisdiction. This "independent claim" test prevents plaintiffs from evading federal jurisdiction through artful pleading.

Asbestos Exclusion

General Refractories v. First State Ins. Co., 855 F.3d 152 (3rd Cir. 2017)

General Refractories had excess coverage subject to an Asbestos Exclusion for losses "arising out of asbestos," a phrase General Refractories attempted to distinguish from "arising out of asbestos-containing products." While General Refractories sold products that sometimes contained asbestos components, it never mined, produced, or sold asbestos in its raw form. The trial court found the exclusion ambiguous and ruled in favor of coverage. The Court of Appeals reverses. Under PA law interpreting insurance contracts, "arising out of" equates to "but for" causation, a test the exclusion meets regardless of whether raw asbestos or asbestos-containing products are involved.

Occurrence or Aggregate Limit

Westport Ins. Corp. v. Mylonas, 704 Fed.Appx. 127 (3rd Cir. 2017)

Papadopoulos sued Mylonas for legal malpractice in connection with formation of a corporation. An expert at trial claimed at least five separate breaches of the professional standard of care. A jury awarded $525,000. The Westport professional liability policy had $500,000 per claim/$1,000,000 aggregate limits, both eroded by cost of defense, here about $420,000. Westport conceded the remaining per claim limit (i.e., about $80,000) but Mylonas sought the aggregate limit (i.e., payment of the $525,000 verdict). The trial court rules for Westport and the Court of Appeals affirms. The policy provided that "two or more claims arising out of a single wrongful act . . . or a series of related or continuing wrongful acts, shall be a single claim." That definition of claim controlled whether the per claim or aggregate limit applied.

Back Up of Water or Sewage

Windows v. Erie Ins. Exchange, 161 A.3d 953 (Pa. Super. 2017)

Citing its homeowner's policy general exclusion for water damage, Erie denied Windows' claim after raw sewage infiltrated his home. In dispute was the exclusionary language which applied to "water or sewage which backs up through sewers or drains," and, more particularly, the phrase "backs up." Erie contended that any water or sewage entering the premises through a sewer or drain pipe has "backed up," triggering the exclusion. Windows contended that water or sewage only "backed up" when it was his sewage, returning from whence it came. The Superior Court finds the exclusion ambiguous and remands for resolution of the ambiguity by parol evidence or by law and then, if relevant, for determination of the source of the sewage.

Shooting

Erie Ins. Exchange v. Moore, 175 A.3d 999 (Pa. Super. 2017)

McCutcheon went to the home of his former wife, killed her, and then committed suicide. Before McCutcheon killed himself, Carly arrived at the home, struggled with McCutcheon, and was injured by shots fired from McCutcheon's gun. In his suit against McCutcheon, Carly alleged that the discharge of the gun causing his injuries was unintentional. Erie, McCutcheon's Homeowner's and Excess Liability carrier, filed a DJ Action to establish that McCutcheon expected or intended Cary's injuries, thus excluding coverage. The trial court granted summary judgment to Erie. The Superior Court reverses. While Cary's use of "negligent" and "careless" in his complaint admittedly do not control the coverage determination, the factual allegations of how the incident occurred, if true, establish that the injuries may have been unintentionally inflicted. Erie had a duty to defend.

LIABILITY

Shooting

Kote v. Bank of N.Y. Mellon, 169 A.3d 1103 (Pa. Super. 2017)

As the result of a phone order, Kote delivered Chinese food to a foreclosed and vacant property where he was shot and robbed by unknown assailants. Mellon owned the property. The trial court granted Mellon judgment on the pleadings. The Superior Court affirms. Kote was not a business invitee because he was not invited to the property for a purpose related directly or indirectly with the business dealings of Mellon. The unsecured dwelling was a fortuitous factor in the crime and the unknown assailant was a superseding cause of harm.

Hills and Ridges Doctrine

Collins v. Phila. Suburban Development Corp., – A.3d – (Pa. Super. 2018)

During a blizzard, Collins fell on property owned by PSDC, suffering severe injuries. The trial court granted summary judgment to PSDC based on the "hills and ridges" doctrine. The Superior Court affirms. The "hills and ridges" doctrine is a clarification of the duty owed by a possessor of land in a single type of dangerous condition, i.e., ice and snow. A landowner has no obligation to correct conditions until a reasonable time after the winter storm has ended, and thus has no duty to salt, sand, or clear before, during, or even immediately after a winter storm. Here, the winter storm was admittedly in progress at the time of Collins' fall.

Wrongful Death

Brittain v. Hope Enterprises, 163 A.3d 1029 (Pa. Super. 2017)

Barbara suffered fatal injuries from an accident while a passenger in a Hope Facilities vehicle. Brittain, the administratrix, brought suit for wrongful death and survival damages. The jury awarded over $2,000,000 for wrongful death to the benefit of Sharon (purported to be Barbara's mother), $1,000,000 for survival damages to the estate, and $100,000 in punitive damages. The estate sought a new trial limited to the amount of punitive damages.

Post-trial, Hope Enterprises discovered:

1. Brittain, represented in probate pleadings to be Barbara's sister was, in fact, her aunt.
2. Sharon, represented at trial to be Barbara's mother, was in probate pleadings identified as her sister.
3. Leslie and Marcella, represented in probate pleadings to be Barbara's sisters, were, in fact, her aunts.
4. Edward, represented in probate proceedings as Barbara's brother, was, in fact, her uncle.
5. Barbara's maternal grandmother, now deceased, adopted Barbara, thus terminating any parental rights of Barbara's mother.
6. Without court approval, counsel took a 48% fee out of the recovery.

Since an action for wrongful death exists only for the benefit of the spouse, children, or parents of the deceased, and since the evidence above indicated that no one qualified, and thus that a fraud may have been perpetrated upon the court, the case was remanded to resolve the potential fraud issues before addressing the merits of the original appeal.

Breach of Fiduciary Duties

Yenchi v. Ameriprise Financial, Inc., 161 A.3d 811 (Pa. 2017)

Yenchi hired an Ameriprise financial advisor who recommended purchase of some life insurance products. Yenchi later learned that the purchased insurance products were not as represented. Yenchi sued Ameriprise on various theories, including breach of fiduciary duties. A fiduciary duty is the highest duty implied by law. The party in whom trust and confidence are reposed must act with scrupulous fairness and good faith and must refrain from acting to the other's detriment and his own advantage. When a confidential relationship exists, the burden shifts to the fiduciary to demonstrate that there has been no breach of trust. In some types of relationships, a fiduciary duty exists as a matter of law (e.g., principal/agent, attorney/client, guardian/ward, partners). In other relationships, there must be proof of undue influence such that the parties do not deal on equal terms but that on one side there is overmastering influence or, on the other, weakness, dependence, or justifiable trust to the extent that an individual has lost the ability to make an independent decision. Here, Yenchi never ceded decision making authority to Ameriprise, instead accepting some recommendations and rejecting others, and thus could not state a claim for breach of fiduciary duties.

Duty to Protect Against Harmful Third Party Conduct

Reason v. Kathryn's Korner Thrift Shop, 169 A.3d 96 (Pa. Super. 2017)

Reason, a customer at Korner Thrift Shop, was attacked by the cashier's daughter, an assault that started inside and continued outside. The mentally ill daughter with no prior history of violence had failed to take her medication, a fact known to the cashier. The trial court granted summary judgment to the property owner and to Korner. The claim against the assailant daughter resulted in a $40,000 award. Reason appealed the summary judgments. The appeal was timely filed measured not from the entry of summary judgment but from the entry of judgment against the daughter assailant. The appeal, however, nevertheless fails. Reason produced no evidence that the landlord or Korner should have reasonably anticipated harmful third party conduct. Knowledge of mental illness does not, without more, constitute knowledge of violent propensities. Nor were the landlord or Korner required to intervene in the attack to act as policemen. Summoning help, which they did, suffices.

Venue: Conducting Business in a County

Wyszynski v. Greenwood Gaming, 160 A.3d 198 (Pa. Super. 2017)

Wyszynski, alleging injury in a slip and fall at Parx Casino in Bucks County, filed suit in Philadelphia CCP and opposed Preliminary Objections on venue by arguing that defendant through a massive advertising campaign met the "regularly conducts business" venue test of Pa.R.C.P. 2179(a). The Superior Court disagrees and affirms the transfer of venue. Advertising is merely incidental to the purpose of a business. Solicitation of business in a county does not amount to conducting business in that county.

Bankruptcy: Violation of Automatic Stay
Lansaw v. Zokaites, 853 F.3d 657 (3rd Cir. 2017)

As their landlord/tenant relationship deteriorated, Zokaites filed a Notice of Distraint, claiming a lien against Lansaw's personal property. Lansaw filed for bankruptcy, triggering an automatic stay. In violation of the stay, Zokaites entered the leased business property (a daycare center) without permission, behaved in a threatening manner, later padlocked the property, and also contacted Lansaw's prospective new landlord, attempting to interfere with that relationship. In addition to violations of the automatic stay, the trial court found "actual damages," as required by statute, in the form of $2,600 in attorney fees, $7,500 in emotional distress, and $40,000 in punitive damages. The Court of Appeals affirms. "Actual damages" can include emotional distress even when supported only by plaintiff's own testimony. The violations of the automatic stay were so egregious that a reasonable person could be expected to suffer some emotional harm.

Defamation: Burden to Prove Falsity
Menkowitz v. Peerless Publishing, 176 A.3d 968 (Pa. Super. 2017)

Menkowitz, a doctor, sued Peerless, a newspaper publisher, for an article stating he had been suspended by a hospital and that his "sudden absence from the hospital has spawned rampant rumors of professional misconduct regarding his treatment of an older female patient." Menkowitz had been suspended, his brusque manner had upset an elderly female patient, and rumors were in fact rampant. Menkowitz claimed that the article was either defamation *per se* or defamation by innuendo by insinuating sexual misconduct. The jury awarded compensatory and punitive damages. The Superior Court *en banc* reverses, holding that Menkowitz as a matter of law proved neither defamation nor damages. Menkowitz failed to meet his burden of proving the falsity of the article. The lengthy lead and concurring opinions provide a thorough overview of PA defamation law.

Psychiatric IME
Shearer v. Hafer, 177 A.3d 850 (Pa. 2018)

Shearer claimed cognitive impairment due to an auto accident. Hafer hired a neuropsychologist to perform an IME. Shearer demanded that any exam be audiotaped and that counsel be present. The neuropsychologist objected and the trial court ruled that counsel could be present only for the initial interview and that the evaluation would not be audiotaped. The Superior Court affirmed. The Supreme Court raises, *sua sponte*, whether the discovery order met the three prong collateral order doctrine under which a non-final collateral order can be appealed only if it meets the requirements of separability, importance, and irreparability. Since the second and third prongs had not been met, the appeal was quashed.

Pedestrian Negligence

Grove v. Port Authority, – A.3d – (Pa. Cmwlth. 2018)

A Port Authority bus struck pedestrian Grove, causing a leg amputation. A witness claimed that Grove, not within a crosswalk, stepped into the path of the bus. The Port Authority requested, and the trial court denied, a jury instruction on Grove's negligence *per se* based on duties of pedestrians under the Vehicle Code. The Commonwealth Court reverses and awards a new trial.

Informed Consent

Shinal v. Toms, 162 A.3d 429 (Pa. 2017)

Toms met with Shinal to explain the risks and benefits of proposed surgery. Later, Tom's physician assistant answered more questions and obtained the signed consent form. The jury returned a defense verdict. A physician's duty to provide information to a patient sufficient to obtain informed consent is non-delegable. A physician cannot rely upon a subordinate to disclose the information. Without direct dialogue and a two-way exchange between the physician and the patient, the physician cannot be confident that the patient comprehends the risks, benefits, likelihood of success, and alternatives. The Supreme Court awarded a new trial.

Affidavit

Finder v. Crawford, 167 A.3d 40 (Pa. Super. 2017)

Finder and Crawford were unneighborly neighbors litigating a private criminal complaint, the withdrawal of which resulted in a suit for malicious prosecution. Crawford filed for summary judgment which Finder opposed via an electronically filed "certification" of facts. The trial court granted summary judgment and ruled that Finder's "certification" did not qualify as an affidavit because the electronically filed document was not signed. The Superior Court disagrees with that analysis (Pa.R.C.P. 205.4 allows e-filing without signatures as long as signed originals are available for inspection) but still finds that the "certification" was not an affidavit. It did not contain an assertion that the statement was made subject to the penalties of 18 Pa.C.S.A. 4904, but rather referenced 18 Pa.C.S.A 4909. Although this may have been a mere typo, "sometimes the practice of law requires strict compliance."

Arbitration Agreement

Fellerman v. PECO Energy, 159 A.3d 22 (Pa. Super. 2017)

Fellerman hired Historic Home to perform a pre-purchase home inspection which allegedly failed to reveal the rotted condition of a utility pole on the premises. The pole fell, power lines started a fire, and Fellerman suffered severe injuries while trying to extinguish the fire. The Historic Home contract had both a clause requiring arbitration of claims through Constructive Dispute Resolution Services, LLC and a clause limiting any damages to the fee paid for the service (i.e., $780). The trial court denied Historic Home's preliminary objections based on the arbitration clause. The Superior Court reverses. Public policy favors agreements to arbitrate. The limitation of liability clause did not render the agreement unconscionable because it was severable and arbitrators may or may in due course enforce it.

Limited Tort

Oliver v. Irvello, 165 A.3d 981 (Pa. Super. 2017)

Limited tort Oliver sued Irvello for injuries from a car accident. The jury found negligence, factual cause of harm, but no serious impairment of a body function. The trial court entered a verdict in favor of Irvello which prevented Oliver from recovering costs. The Superior Court affirms. By failing to prove an exception to limited tort, Oliver's cause of action failed and he thus, despite prevailing on liability and damage causation, could not qualify as a verdict winner.

STATUTE OF LIMITATIONS

Claims By/For Minors

S.J. v. Gardner, 167 A.3d 136 (Pa. Super. 2017)

Gardner pled guilty to charges of indecent assault of a minor. The minor's parents filed a civil suit on her behalf more than three years after first discovering the molestation. The trial court granted Gardner summary judgment based on the two year statute of limitations for intentional torts. The trial court held that the Minority Tolling Statute applied only to actions brought by a minor after reaching majority. The Superior Court reverses. The Minority Tolling Statute delays the running of the Statute of Limitations until the minor turns eighteen, regardless of whether an action is brought by the minor upon reaching majority or by guardians before then.

UM/UIM

Erie Insurance v. Bristol, 174 A.3d 578 (Pa. 2017)

Bristol sought UM benefits from Erie arising out of a "phantom vehicle" accident. The parties each selected an arbitrator, some discovery took place, but resolution of the claim stalled for years when Bristol was incarcerated. Erie filed a DJ Action, successfully contending that any UM claim was barred since the statute of limitations started to run at the time of the "phantom vehicle" accident (i.e., when Bristol knew he had a UM claim) and expired four years later during which time Bristol never filed a savings action in a court of competent jurisdiction. The Supreme Court reverses, overruling *Boyle v. State Farm*, 456 A.2d 156 (Pa. Super. 1983), and holds that the four year contract statute of limitations on UM (and presumably UIM) claims does not start to run until there has been a breach of contract, i.e., denial of a claim or refusal to arbitrate. Since Erie had neither denied the claim nor refused to arbitrate, the statute of limitations had not even started to run. The Supreme Court does not reach the issue of what is needed to toll the statute of limitations, for now leaving intact *Hopkins v. Erie*, 65 A.3d 452 (Pa. Super. 2013), which requires commencement of an action.

Survival Action in Medical Malpractice Claim

Dubose v. Quinlan, 173 A.3d 634 (Pa. 2017)

Survival and wrongful death actions were filed within two years of the death of Dubose. The pattern of negligent conduct which allegedly caused the death started more than two years earlier. In a non-medical malpractice context, the statute of limitations on a survival claim would start to run at the time of injury, not the time of death. Under 1303.513 of the Medical Care Availability and Reduction of Error Act, however, MCARE establishes a specific two year statute of limitations from date of death for survival and wrongful death actions in medical professional liability cases. That specific statute of limitations prevails over the general statute of limitations for personal injury actions.

EVIDENCE

Bad Conduct

Crespo v. Hughes, 167 A.3d 168 (Pa. Super. 2017)

Crespo brought a medical malpractice action following improper treatment of chemical burns. The total jury award was in excess of $4,600,000. On appeal, the Superior Court reviewed numerous evidentiary pre-trial and trial rulings:

1. Crespo could present a future wage loss claim even though he never filed tax returns reporting the alleged prior income as a musician used to calculate future losses.
2. Defendants could not raise Crespo's use of marijuana to treat pain since any probative value was outweighed by potential unfair prejudicial effect.
3. Defendants could not raise Crespo's pre-injury failure to comply with child support orders to impeach claims of earnings as a musician.
4. Though not identified as experts, treating physicians could testify since their opinions were not formulated in anticipation of litigation.
5. Defendants' expert psychiatrist could not testify about Crespo's history of being molested by an uncle since any probative value about other stressors to his mental state was outweighed by unfair prejudice.
6. Defendants should have been permitted to prove Crespo's conviction for receiving stolen property and the court should have given the requested *crimen falsi* jury instruction.

Because of the *crimen falsi* jury instruction error, the Superior Court awards a new trial limited to damages.

Social Media

Commonwealth v. Mangel, – A.3d – (Pa. Super. 2018)

Mangel was charged with aggravated assault at a graduation party. The victim did not know Mangel but identified him from pictures from a Facebook account. The Commonwealth filed a Motion in Limine to introduce screenshots of a Facebook account in Mangel's name associated with a phone number traced to Mangel's address. The trial court denies the motion and the Superior Court, on an abuse of discretion review, affirms. The screenshots were not properly authenticated. Authentication of electronic communications requires more than mere confirmation that a name, number, or address belong to a particular person. Since anyone with the right password can gain access to another's account and send or post messages ostensibly from that person, circumstantial evidence which tends to corroborate the identity of the sender is required. Such evidence could come from the person who sent or received the communication or could be contextual clues tending to reveal identity.

Intoxication

Coughlin v. Massaquoi, 170 A.3d 399 (Pa. 2017)

Massaquoi, a motorist, struck and killed pedestrian Coughlin whom she did not see before impact. Coughlin's autopsy revealed a .313 BAC. At trial, Massaquoi introduced the BAC results as well as expert testimony that any pedestrian with such a BAC could not safely cross a street. A divided Supreme Court affirms the defense verdict. Evidence of alcohol consumption is permitted only if it reasonably shows a degree of intoxication which proves unfitness to engage is a certain activity. Independent corroborating evidence (e.g., slurred speech, unsteady gait, etc) is not always available (and was not in this case) and is not mandatory. Instead, the admissibility of BAC evidence is within the trial court's discretion based on general rules governing the admissibility of evidence.

Intoxication

Partlow v. Gray, 165 A.3d 1013 (Pa. Super. 2017)

Gray attempted a left turn in front of motorcyclist Wilson. The resulting accident killed Wilson. A jury awarded a total of $3,100,000 in the survival/wrongful death action. Gray denied alcohol consumption prior to the accident but the investigating police officer noticed his bloodshot, watery eyes and his lethargic behavior. BAC after the accident was .073 with an expert "relation back" opinion of .104 at the time of the accident. A trial court may not admit evidence of alcohol consumption, without more, because it is unfairly prejudicial. Here, corroborating evidence was presented which justified admission of intoxication.

EMPLOYMENT

Right to Inspect Personnel File

Thomas Jefferson Hospital v. Pa. Dep't of Labor & Industry, 162 A.3d 384 (Pa. 2017)

One week after termination, Haubrich sought to review her personnel file pursuant to the Personnel Files Act (43 Pa.C.S.A. 1321-24). That statute gives an "employee" the right to review a personnel file but defines "employee" as "any person currently employed, laid off with re-employment rights or on leave of absence." The Dep't used a "within a reasonable time after termination" test which the Supreme Court rejects, instead interpreting the definition literally and concluding that Haubrich does not qualify and thus cannot review her personnel file.

ERISA Lien

Rickard v. American National, 173 A.3d 299 (Pa. Super. 2017)

Rickard, already in bankruptcy, was injured in a motor vehicle accident and received medical benefits through an employer sponsored ERISA plan. He tried to settle his UIM claim for $250,000 but the bankruptcy court refused to approve settlement or distribution absent satisfaction of the ERISA lien. Rickard died from his injuries, the bankruptcy case was dismissed without any approval of a settlement, and the widow and minor child presented a UIM wrongful death claim, instead of a survival claim, which Orphans Court also refused to approve. The Superior Court reverses. Rickard's obligation to repay the ERISA lien did not transfer to the distinct wrongful death recovery of the widow and minor child.

Waiver of WC Subrogation

Kalmanowicz v. WCAB (Eastern Industries), 166 A.3d 508 (Pa. Cmwlth. 2017)

Kalmanowicz, injured in a motor vehicle accident in the course of employment, filed a claim petition for WC benefits. While that petition was pending, he settled with the tortfeasor for $15,000. His claim petition was then granted but the WC carrier sought credit for the tort action settlement. The Commonwealth Court grants subrogation even though the WC carrier had not paid benefits or sought subrogation before the settlement.

Intentional Injury

Wilgro Services v. WCAB (Mentusky), 165 A.3d 99 (Pa. Cmwlth. 2017)

Mentusky used another contractor's ladder to access a roof to do his work. By the time he finished his work, the other contractor and the ladder were gone. He made some attempts to alert others to his predicament but then decided, incorrectly, he could safely jump to the ground. He suffered severe injuries. Wilgro opposed WC benefits on the theory that Mentusky's intentional, high-risk conduct was so extreme as to remove him from the course of employment. The Commonwealth Court affirms the award of benefits. Though Mentusky's actions may have been unwise, they were not so foreign to and removed from his employment as to constitute abandonment of employment.

Effect of WC Compromise and Release

Zuber v. Boscov's,871 F.3d 255 (3rd Cir. 2017)

After a work injury, Zuber received WC benefits, eventually signing a Compromise & Release Agreement (C&R). He thereafter sued Boscov's for FMLA violations (a statutory claim) and for retaliation after bringing a WC claim (a common law claim). Boscov's interposed the C&R as a bar. The Court of Appeals disagrees. The C&R provided "a full and final resolution of all aspects of the 8/12/14 alleged work injury claim and its sequela whether known or unknown." The Court of Appeals relies on the arcane legal definition of "sequela" as "suit" rather than the more common definition as "consequence." As a result, the C&R barred only a new suit for WC benefits.

ATTORNEYS

Quantum Meruit Fees

Meyer, Darragh, Buckler, Bebenek & Eck v. Law Firm of Malone Middleman, – A.3d – (Pa. 2018)

Meyer Darragh associate Weiler left the firm and went to Middleman. Eazor, a client Weiler brought to Meyer Darragh, later discharged Meyer Darragh and hired Weiler and his new firm. Middleman settled the Eazor case and received a $67,000 attorney fee from which Meyer Darragh sought to recover a share under either contract or *quantum meruit* theories. The trial court awarded a share based on *quantum meruit.* The Supreme Court affirms. Predecessor counsel may recover *quantum meruit* damages against successor counsel where successor counsel received a benefit from predecessor counsel which would be unjust to retain without payment. A similar *quantum meruit* claim may also be brought against the client.

Dragonetti Exposure

Villani v. Seibert, 159 A.3d 478 (Pa. 2017)

Schneider represented plaintiffs in an unsuccessful quiet title action and was thereafter sued under the Dragonetti Act for wrongful use of civil proceedings. The trial court granted Schneider's preliminary objections that the Dragonetti Act unconstitutionally invaded the Supreme Court's exclusive power to supervise attorneys. The Supreme Court reverses. Schneider failed to establish that the Dragonetti Act palpably violates the Pennsylvania Constitution or that the Supreme Court should immunize attorneys from that statute.

Discipline

Office of Disciplinary Counsel v. Pozonsky, 177 A.3d 830 (Pa. 2018)

Pozonsky was a magisterial district judge for 13 years and then a Washington County Court of Common Pleas Judge for 14 years, in the latter position also creating that county's Drug Court. He ordered state troopers and court personnel to bring seized drugs to his courtroom to be stored in an evidence locker in his chambers. He then stole those drugs for personal use. Caught, he pleaded to second degree misdemeanors, served the one month minimum sentence, and completed his term of probation. The Office of Disciplinary Counsel recommended, and the Supreme Court ordered, disbarment rather than suspension from the practice of law. While not mandatory, disbarment is an appropriate remedy for lawyers who hold judicial or public office and then betray the public trust. While drug addiction might have been a mitigating factor, Pozonsky failed to produce expert testimony establishing addiction and a causal connection between addiction and the criminal acts.

Discipline

Office of Disciplinary Counsel v. Cardoni, – A.3d – (Pa. 2017)

Cardoni, a lawyer, sought to influence Toole, a judge, in selecting a particular arbitrator by giving Toole items of value, including use of a beach house. The arbitration resulted in a $1,000,000 award. Toole was indicted, convicted, disbarred, and sent to prison, with Cardoni cooperating as a government witness. Cardoni sought to convert his own temporary suspension order into a retroactive 5 year suspension, thus avoiding disbarment. The Supreme Court, following the Disciplinary Board recommendation, agrees.

Good Fake Lawyer

Commonwealth v. Kitchen, 162 A.3d 1140 (Pa. Super. 2017)

Kitchen, without college or law school degrees, without taking a bar exam or obtaining a license, nevertheless practiced as a lawyer for 10 years, rose to partner in her firm, and even served as president of the Huntingdon County Bar Association. To achieve this, she forged many documents about her education, bar exam results, and payment of attorney registration fees. She was convicted of forgery, tampering with public records, and the unlawful practice of law. In addition to fines and costs, she was sentenced to 2 to 5 years in prison. On appeal (wisely, albeit unsuccessfully, filed by a real attorney), she sought to reduce her sentence because she was honest with her clients' money, provided service, and was "a good fake lawyer." Judgment of sentence was affirmed.