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

ATTORNEY ISSUES

SUPERIOR COURT: $1,200,000 "LEGALLY FRIVOLOUS AND ON THE VERGE OF LUDICROUS" FEE CLAIM REDUCED TO $405,000

Carmen Enterprises v. Murpenter, LLC, 185 A.3d 380 (Pa. Super. 2018), appeal denied, – A.3d – (Pa. 2019)

Carmen sold its travel business assets to Murpenter in 2001 for $15,000, subject to penalties, including costs and attorney fees, should non-payment force a collection action. Carmen, owned and represented by attorney Chasan, sued Murpenter which aggressively defended for years, then filed a bad faith bankruptcy petition, then finally lost at trial for $45,000. Carmen sought attorney's fees of $1,200,000 which the trial court initially denied on the theory that Chasan was an owner, not outside counsel, thus precluding a fee award. The Superior Court reversed and remanded with instructions to determine a reasonable fee. The trial court then awarded $405,000, rejecting many hours and the hourly rate as straining credulity. Determining a reasonable fee is a judicial function, with the court considering the work performed, the difficulty of issues, the importance of the litigation, the amount in dispute, the skill of counsel, and the end result. Any award is within the sound discretion of the trial judge, reviewable only for abuse of discretion. Here, the award was affirmed. The amount was justifiably less than Carmen claimed because of obvious excesses, yet was still far more than the compensatory award due to Murpenter's unreasonable litigation tactics.

THIRD CIRCUIT: $950,000 "EXCESSIVELY OUTRAGEOUS" FEE CLAIM COMPLETELY DENIED

Clemens v. New York Central Mutual, 903 F.3d 396 (3rd Cir. 2018)

Clemens brought a combined UIM and bad faith claim. The UIM claim settled for $25,000 and a jury awarded $100,000 in punitive damages in the bad faith claim. Clemens then submitted a petition for about $950,000 in attorney fees. The trial court ruled that at least 87% of the hours claimed had to be disallowed as vague, duplicative, unnecessary, or inadequately supported, thus rendering the fee request "excessively outrageous" and thus causing the trial court, exercising its discretion, to award no fee at all. The Court of Appeals affirms, noting that complete denial of a fee is unusual but not unique, citing other circuits for the proposition that "outrageously excessive" fee claims can have harsh consequences.

SUPERIOR COURT: MID-TRIAL ATTORNEY/CLIENT PRIVILEGE WAIVER REQUIRES MISTRIAL, PRECLUSION, OR DISCOVERY

Gregury v. Greguras, 169 A.3d 619 (Pa. Super. 2018)

Greguras dies, leaving behind a second wife, two adult children from his first marriage, and a step-daughter from the second wife. His will appears to divide his estate among these survivors, yet in fact virtually all assets are owned jointly with the second wife such that nothing passes through the estate. The two adult children sue the second wife and the estate lawyer, alleging fraud, breach of contract, and professional negligence. The second wife and the estate lawyer raise attorney-client privilege throughout discovery but then in a surprise move during opening statements at trial waive the privilege and reveal testimony detrimental to the Gregury claims. The trial court denied a mistrial, preclusion of testimony, or a continuance to permit discovery. A split Superior Court *en banc* rules that such a late waiver creates unfair surprise and prejudice which the trial court should prevent by reasonable means. Here, the trial court should have either precluded the testimony or interrupted trial to permit discovery.

SUPERIOR COURT: DRAGONETTI CLAIM AGAINST LAWYER RESULTS IN $2,300,000 VERDICT

Brown v. Halpern, – A.3d – (Pa. Super. 2018)

Two sisters engaged in prolonged, contentious estate litigation involving the testamentary intentions of a very rich aunt. One of the sisters, represented by Halpern, lost at every stage of the multiple proceedings. The other sister was represented by Brown, her husband. When the final suit concluded, Brown brought a Dragonetti claim under the Wrongful Use of Civil Proceedings statute against the losing sister and Halpern. A jury returned an award of $250,000 in compensatory damages and $2,050,000 in punitive damages. On appeal, Halpern failed to preserve issues such as the constitutionality of the Dragonetti statute, the propriety of Brown's closing argument, the trial court's admonishing of defense counsel in front of the jury, and denial of Halpern's request for a continuance due to health issues. Halpern did preserve arguments that his voluntary dismissal of a suit avoided a favorable termination for defendant required by the Dragonetti law (the Superior Court disagrees) and that Brown could not support his claim for emotional distress without expert testimony (the Superior Court again disagrees).

SUPERIOR COURT: AFTER $946,195 SANCTION VACATED, DRAGONETTI CLAIM AGAINST COUNSEL MAY PROCEED

Raynor v. D'Annunzio, – A.3d – (Pa. Super. 2019)

Following conclusion of the tortured underlying medical malpractice action which resulted in a $946,195 sanction order, reversed on appeal, Raynor sued plaintiff counsel in the underlying suit under the Dragonetti Act for pursuing the since vacated sanctions without a reasonable foundation in law or fact. The Superior Court rules that initiation of contempt proceedings does represent "procurement, initiation, or continuation of civil proceedings" under the Dragonetti Act. The Superior Court further rules that Raynor, though not a party to the underlying medical malpractice action, nevertheless had standing to pursue a Dragonetti claim.

SUPERIOR COURT: JUDGE AS A WITNESS IN PROCEEDINGS ALLEGING EX PARTE COMMUNICATIONS

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

McCullough, an attorney and spouse of Commonwealth Court Judge McCullough, was charged with theft from a 90 year old multi-millionaire client. Following his conviction at a non-jury trial, McCullough sought a new trial and delay of a sentencing hearing due to *ex parte* communications between his own lawyer and the trial judge, communications he believed forced him to waive a jury trial. Where fabricated, frivolous, or scurrilous charges are raised against a judge during proceedings, the court may summarily dismiss them without hearing if satisfied that the complaint is wholly without foundation. The trial judge here instead referred the Motion for Recusal to another judge but refused to testify at the resulting hearing, citing Pa.R.E. 605 under which a judge is not competent to testify at any proceeding over which he presides. Having relinquished his position as presiding judge, the trial judge was competent to testify. A divided Superior Court panel remands for a further recusal hearing.

SUPERIOR COURT: LEGAL MALPRACTICE STATUTE OF LIMITATIONS USING THE DISCOVERY RULE

Communications Network International v. Mullineaux, 187 A.3d 951 (Pa. Super. 2018)

In 2001, CNI retained Mullineaux to defend it in a commercial suit, which he did by filing an Answer and Counterclaim. Plaintiff in that suit later declared bankruptcy and the CNI Counterclaim was dismissed in 2006 in that venue for pleading deficiencies, a result upheld on appeal to the trial court in 2010. In 2013, a further appeal to the Circuit Court of Appeals was dismissed as untimely filed since Mullineux had changed his email address without notifying the court and did not learn of the trial court order in time. In 2014, CNI sued Mullineaux for malpractice. Under the occurrence rule used to determine when the statute of limitations begins to run in legal malpractice actions, the statutory period commences upon the happening of the alleged breach of duty. The discovery rule is an exception to the general rule under which commencement is delayed until discovery of the injury is reasonably possible. Here, the malpractice occurred in 2001 so the legal malpractice action was barred under the occurrence rule. The discovery rule would have extended commencement until only 2006 or 2010, also barring the claim. The late appeal to the Circuit Court did not create a new limitations period since the statute of limitations period is triggered by the first act of malpractice, not the last.

SUPERIOR COURT: DISCOVERY OF STATEMENTS TAKEN BY INVESTIGATOR HIRED BY COUNSEL

McIlmail v. Archdiocese of Phila., 189 A.3d 1100 (Pa. Super. 2018)

The parties exchanged discovery requests seeking information about or from potential witnesses. Defendant refused to produce materials from the investigator hired by defense counsel to interview witnesses, asserting that the privilege applicable to counsel extended to those hired by counsel. Citing Pa.R.C.P. 4003.3, the Superior Court notes that the protection afforded "a party's attorney" is broader than that afforded a "representative of a party other than the party's attorney" and that the statements obtained by the investigator had to be produced.

PROCEDURE AND JURISDICTION ISSUES

SUPERIOR COURT: JUDGE VIEWING VIDEO DESCRIBED IN BUT NOT ATTACHED TO PRELIMINARY OBJECTIONS

Weirton Medical Center v. Introublezone, Inc., 193 A.3d 967 (Pa. Super. 2018)

Weirton employed Oser as a plastic surgeon. Oser attempted to create a reality TV show called "Drastic Plastic" which would highlight the most salacious elements of his practice, including labiaplasty and vaginal reconstruction for which he was dubbed "The Vagician." He filmed a promo reel at Weirton without obtaining permission to use the premises. The video was posted on several online sites, including Oser's website and Facebook page. Weirton sued for trespass, for defamation, and for false designation/false advertising under the Lanham Act. Before ruling on preliminary objections, the trial court requested a copy of the offending video which had been described in but not provided with Weirton's Complaint. After viewing the video, the trial court found it offensive but not actionable and dismissed the defamation and Lanham Act counts. Since the video should have been attached to the Complaint in the first instance, the trial court did not err by requesting and then viewing it. Weirton was not identified in the video and thus could not prove the defamation or Lanham Act claims. The trespass claim for unauthorized use of Weirton offices for filming created fact issues that could not be resolved by preliminary objection so the case was remanded.

SUPERIOR COURT: VENUE CANNOT BE BASED SOLELY ON ACTIVITIES OF A SISTER CORPORATION

Anthony v. Casino, 190 A.3d 605 (Pa. Super. 2018)

In a suit filed in Philadelphia, Anthony alleged trip and fall injuries in Bucks County at Parx Casino, a corporation owned by Greenwood Gaming. Greenwood does business in Philadelphia, but Parx does not. The trial court transferred venue to Bucks County. A corporation is not subject to venue based solely on the business activities of a sister corporation.

SUPERIOR COURT: REGISTRATION AS A FOREIGN CORPORATION DOING BUSINESS IN PA CREATES JURISDICTION BY CONSENT

Webb-Benjamin, LLC v. International Rug, 192 A.3d 1133 (Pa. Super. 2018)

WB entered into a contract with IR, a foreign corporation, for work to be performed in Canada. IR subsequently registered to do business in PA as a foreign corporation. WB sued for non-payment under the contract but the trial court dismissed for lack of jurisdiction, reasoning that IR was not subject to jurisdiction when the contract was formed. The Superior Court reverses. Registration as a foreign corporation in PA creates jurisdiction by consent at the time suit is started even though the events causing the litigation preceded the registration.

SUPREME COURT: TRIAL JUDGE RETIRES MID-APPEAL, SO NO NEW TRIAL, SUPERIOR COURT MUST DECIDE BASED ON RECORD

Dolan v. Hurd Millwork, 195 A.3d 169 (Pa. 2018)

At a non-jury trial by a homeowner against a contractor for defective construction, the trial court in a non-jury trial awarded $500,000 plus delay damages. The trial court opinion was inadequate for appellate review so the case was remanded for a supplemental opinion on specific issues. Upon learning the trial judge had retired, the Superior Court ordered a new trial. The Supreme Court disagrees. The Superior Court must review the record for legal errors and, as for fact issues, must determine whether competent evidence supports findings in favor of the verdict holder.

SUPERIOR COURT: ARBITRATION LIMITATIONS NOT TOLLED BY DISMISSED SUIT, ISSUE TO BE DECIDED BY ARBITRATOR

Morse v. Fisher Asset Management, – A.3d – (Pa. Super. 2019)

In 2009, Morse sued Fisher under various theories for mismanagement of her account. Fisher filed preliminary objections, citing the arbitration clause in its contract. The trial court dismissed the Complaint and Morse did not appeal. In 2016, Morse filed an Arbitration Statement of Claim with JAMS, the arbitration provider required under the contract. The JAMS arbitrator, without a hearing, dismissed Morse's claims based on the statute of limitations. On appeal, Morse contended that the original suit tolled the statute and that the arbitrator, in any event, should have held a hearing. The Superior Court dismisses the appeal. If Fisher had responded to the original suit with a petition to compel arbitration instead of preliminary objections, the statute would have been tolled. Instead, the original suit was dismissed and did not preserve any claims. Although neither the contract nor the JAMS rules referenced any statute of limitations, resolving such issues was within the authority of the arbitrator.

SUPERIOR COURT: ABSENT PREJUDICE OR INTENT TO STALL JUDICIAL MACHINERY, SERVICE BY FEDEX ALLOWED

American Interior Construction v. Benjamin's Desk, – A.3d – (Pa. Super. 2019)

After AIC was not paid for work, AIC purported to serve by FedEx a notice of intent to file a mechanics' lien. The trial court sustained BD's preliminary objections challenging service. AIC asserted that service may be made in Philadelphia County by a "competent adult," a phrase that includes a courier employed by FedEx. BD relied on ***Lin v. UCBR***, 735 A.2d 697 (Pa. 1999), for the proposition that a private postmark was inadequate to effect service. The Superior Court reverses. Delivery by FedEx is readily distinguished from a private postage meter where the date can be manipulated. Technical non-compliance with the rules for service of original process may be excused absent either "intent to stall the judicial machinery" or actual prejudice, neither of which were evident here.

TORT ISSUES

SUPREME COURT: "OPERATION OF VEHICLE" REFLECTS CONTINUUM OF ACTIVITY ENTAILING SERIES OF DECISIONS AND ACTIONS

Balentine v. Chester Water Authority, 191 A.3d 799 (Pa. 2018)

Medina-Flores was struck and killed by an unoccupied CWA vehicle which was rear-ended while parked at least partially on the highway. The trial court granted summary judgment to CWA on the theory that the claim did not fall within the motor vehicle exception to governmental immunity since the CWA vehicle was not in operation. The Commonwealth Court affirms. The Supreme Court reverses. Operation of a vehicle reflects a continuum of activity, entailing a series of decisions and actions which transport an individual from one place to another, including decisions of where and whether to park.

SUPERIOR COURT: RESIDENT OF COMMUNITY A LICENSEE, NOT AN INVITEE, IN COMMON AREA

Hackett v. Indian King Residents Association, 195 A.3d 248 (Pa. Super. 2018)

On her way to her home in the Indian King Community, Hackett tripped over branches in a common area. At trial, Hackett contended she was an invitee in the common area but the trial court ruled she was a licensee. A possessor of land owes a higher duty of care to an invitee than to a licensee. Hackett appeals the defense verdict. The Superior Court affirms. As a resident of the community, Hackett was on the property by permission, not invitation.

SUPERIOR COURT: CO-POSSESSOR OF LAND QUALIFIES AS NEITHER LICENSEE NOR INVITEE ON THE PROPERTY

Cholewka v. Gelso, 193 A.3d 1023 (Pa. Super. 2018)

Gelso leased residential property to Mr. and Mrs. Cholewkas, their daughter, and her boyfriend, with all four signing the lease and accepting the property "as is." The boyfriend installed a gravel parking pad. Mrs. Cholewkas tripped at the gravel parking pad edge and sought damages from Gelso and the boyfriend on the theory that she was either a licensee or an invitee on property and thus the owner owed a duty to protect her from dangerous conditions. The trial court grants summary judgment to Gelso and the boyfriend and the Superior Court affirms. As a co-possessor of the land, Mrs. Cholewkas could not qualify as either a licensee or invitee and thus the owner owed no special duty.

SUPERIOR COURT: RECKLESS CONDUCT PREVENTS REDUCTION FOR COMPARATIVE NEGLIGENCE, BUT NOT CONTRIBUTION

Straw v. Fair, 187 A.3d 966 (Pa. Super. 2018), appeal denied, – A.3d – (2019)

Straw had problems with his car hood not properly latching. The hood popped open on a highway, he stopped his car in a lane of travel, then put on his emergency flashers. Fair rear-ended the Straw car at a high rate of speed, injuring three occupants and killing a fourth. Fair was admittedly distracted and perhaps under the influence and later pleaded guilty to reckless driving and vehicular homicide. The Straws sued Fair and companies which serviced the hood latch. After the companies were dismissed, a jury awarded in excess of $35,000,000 against Fair. Fair appealed dismissal of the service companies and of his contribution crossclaim against Straw. A split Superior Court panel awards a new trial. Factual issues precluded dismissal of the companies. In addition, even though Fair admitted reckless conduct via the criminal proceedings, the Uniform Contribution Among Tortfeasors Act and the Comparative Negligence Act permit contribution and apportionment between reckless and negligent co-defendants. Fair's admitted reckless conduct, however, would preclude any reduction of Straw's plaintiff claims due to his own negligence.

SUPERIOR COURT: SPOLIATION OF EVIDENCE REQUIRES NEW TRIAL WHERE ONLY SOME VIDEO RETAINED DESPITE REQUEST

Marshall v. Brown's IA, – A.3d – (Pa. Super. 2019)

ShopRite maintains a video surveillance system which preserves video for thirty days after which time it is automatically overwritten. In the event of a slip and fall incident, the store's "rule of thumb" is to save the video for twenty minutes before and after the event. ShopRite also uses the Gleason electronic monitoring system to document employees walking through the store every hour to check for hazardous conditions. Marshall claimed she slipped on water about fifty minutes after the last alleged inspection. Her fall was captured on video, but no water was visible on the floor. About two weeks after the incident her attorney asked that ShopRite retain video for six hours before and three hours after Marshall's fall. ShopRite instead saved only the video for thirty-seven minutes before and twenty minutes after the event, without explanation as to why it deviated from its "rule of thumb." Marshall, though permitted to argue adverse inference due to spoliation of relevant evidence, did not receive the requested jury instruction on adverse inference due to spoliation. The Superior Court awards a new trial, finding an abuse of discretion in denying the requested jury charge. The requested hours of video might have shown whether employees actually checked the area hourly, whether the source of water could be identified, whether others slipped before or after Marshall, whether remedial steps were taken, etc.

JURY ISSUES

SUPERIOR COURT: TRIAL JUDGE MUST PERSONALLY OBSERVE VOIR DIRE TO ADDRESS CHALLENGES FOR CAUSE

Trigg v. Children's Hospital, 187 A.3d 1013 (Pa. Super. 2018), appeal granted, – A.3d – (Pa. 2019)

Following a defense verdict, Trigg appealed based on the jury selection process conducted by a court clerk without a judge present. Trigg raised challenges for cause which were later denied by a judge who reviewed a transcript of the potential juror interrogations. While appellate courts must give deference to trial court rulings on jury selection, such deference applies only when the trial judge personally observes the original *voir dire*. Since Trigg had to use peremptory challenges after the trial court denied challenges for cause, harm is presumed and a new trial required.

SUPREME COURT: TO PRESERVE ISSUES FOR APPEAL, OBJECT BEFORE THE JURY IS DISMISSED

Stapas v. Giant Eagle, Inc., 197 A.3d 244 (Pa. 2018)

Stapas tried unsuccessfully to defuse an argument between convenience store staff and a banned customer. The argument continued outside the store where Stapas was shot. He sued the convenience store for injuries, pain and suffering, past wage loss for six weeks, but no future wage loss. Though instructing the jury to return a single lump sum award for damages if they found for Stapas, the trial court, without objection, also gave the jury a verdict slip with blank spaces for individual possible components of damages, including future wage loss for which no claim had been made. In addition to other smaller amounts, the jury awarded $500,000 for pain and suffering, $250,000 for loss of life's pleasures, and, incredibly, $1,300,000 for future wage loss for which no claim had been made and no evidence presented. The trial court polled the jurors and then dismissed the jury without objection by defendant. The Supreme Court rules that Giant Eagle waived its challenge to the jury's verdict by failing to object to the verdict before the trial court dismissed the jury. Giant Eagle also had not requested a point for charge limiting wage loss, did not object to the jury interrogatory, and did not object to the jury instructions.

SUPREME COURT: REQUESTING POINT FOR CHARGE, WITHOUT MORE, INSUFFICIENT TO PRESERVE ISSUES FOR APPEAL

Jones v. Ott, 191 A.3d 782 (Pa. 2018)

Ott rear-ended Jones' car, causing her injury. Before the case went to the jury, the court held a charging conference without a court stenographer. Jones requested negligence *per se* charges which the court ultimately did not give. Jones at trial did not object to the charge given. Following a defense verdict, Jones filed post-trial motions and thereafter an appeal based on failure to give the negligence *per se* charge. A clear majority of the Supreme Court rules that failure to object at trial to the charge given waives the issue for appellate review. As to whether submission of requested points for charge, without more, is enough to preserve the issue for appellate review, a clear majority rules against, but only prospectively.

EXPERT ISSUES

SUPERIOR COURT: IF CROSS-EXAMINING EXPERT VIA LEARNED TREATISES, FIRST CONFIRM TREATISE IS STANDARD WORK IN FIELD

Pledger v. Janssen Pharmaceuticals, 198 A.3d 1126 (Pa Super. 2018)

Pledger took Risperdal for autism symptoms, with both he and his treating physician unaware that it may cause growth of female breast tissue in males, which Pledger alleged it did. A jury awarded $2,500,000. Mid-trial, Janssen objected to Pledger's expert because he was a Missouri physician not licensed in Alabama where the examination took place. The court granted Pledger leave to substitute a new expert, in part because Janssen had delayed presenting its objection in order to maximize harm to Pledger. Janssen objected to the late expert and further alleged that cross-examination of the replacement expert was improperly limited with regard to learned treatises which contained articles the expert admitted he had not read. Janssen, however, failed to ask the expert whether the treatise was a standard work in the field, a prerequisite to further cross-examination. The award was affirmed.

SUPERIOR COURT: CERTIFICATE OF MERIT NOT REQUIRED ON CROSSCLAIM IF NEGLIGENCE RELATED TO ORIGINAL CLAIM

Kelly Systems, Inc. v. Leonard S. Fiore, Inc., 198 A.3d 1087 (Pa. Super. 2018)

Fiore contracted with Kelly to install exterior walls on a building project. Fiore separately contracted with OGP for architectural designs. Kelly claimed that the OGP designs were impossible to construct and thereafter modified the plans at a cost of $225,000 which Fiore refused to pay. Kelly sued Fiore for $225,000 and Fiore joined OGP as an additional defendant. At issue was whether Fiore by joining OGP as an additional defendant was required to file a Certificate of Merit under Pa.R.C.P. 1042.3. The Superior Court notes that Pa.R.C.P. 1042(a) states the general rule requiring Certificates of Merit but that Pa.R.C.P. 1042© states an exception applicable to joinders or cross-claims "unless the joinder or cross-claim is based on acts of negligence that are unrelated to the acts of negligence that are the basis for the claim against the joining or cross-claiming party." Here, the joinder claims were related to the Kelly claims such that no Certificate of Merit was required.

SUPERIOR COURT: IME REPORT NOT USED AT TRIAL NOT AN ADMISSION OF CAUSATION SINCE REPORT IS OPINION, NOT FACT

Koziar v. Rayner, – A.3d – (Pa. Super. 2018)

Koziar, a house cleaner, alleged injury caused by a condition of customer Rayner's premises but also gave conflicting versions to several medical service suppliers, at least one of which did not involve the Rayner premises at all. Rayner presented no medical evidence. The jury found Rayner negligent but not the factual cause of Koziar's injury. The trial court awarded a new trial on damages on the theory that the jury, having found Rayner negligent, had to award something. The Superior Court reverses. The jury could have believed a version of the accident that did not involve Rayner as the cause or could have believed that Koziar was the cause of her own fall. The Superior Court also rejects Koziar's attempt to treat Rayner's IME expert report, not used at trial, as an admission, since the report conceded causation. IME reports state opinions, not clear and unequivocal statements of fact, and thus do not create admissions.

COVERAGE ISSUES

SUPERIOR COURT: FORMULA TO DETERMINE TOTAL LOSS OF VEHICLE PERMITTED, VIGOROUS EXPENSE NOT BAD FAITH

Berg v. Nationwide, 189 A.3d 1030 (Pa. Super. 2018)

In 1996, Berg's vehicle was damaged in an accident. An initial appraisal indicated the vehicle was a total loss, Nationwide demanded a second appraisal, and the vehicle was found to be repairable, theoretically saving Nationwide money. Berg claimed the repairs were defective. Nationwide did later declare the vehicle a total loss. Berg sued the repair facility and Nationwide for compensatory damages and Nationwide also for bad faith and violation of the UTPCPL. The first trial resulted in compensatory damage awards of $1,925 against the repair facility (which was dismissed after payment) and $295 against Nationwide. After two trips to the Superior Court and one to the Supreme Court, Berg obtained a new trial on the bad faith claim. The trial judge awards $18,000,000 in punitive damages and $3,000,000 in attorney fees. A split Superior Court panel reverses and directs judgment for Nationwide. An insurer may employ a formula to determine whether a damaged auto, based on ACV, is an economic total loss. In addition, neither Nationwide's alleged discovery abuses nor its vigorous, expensive defense of the bad faith litigation are evidence supporting a bad faith award.

SUPERIOR COURT: "VEHICLE DISMANTLING" EXCLUSION AMBIGUOUS, NOT APPLICABLE TO FUELING BUSINESS VEHICLES

Tuscarora Wayne Ins. Co. v. Hebron, Inc., 197 A.3d 267 (Pa. Super. 2018)

Tuscarora issued a CGL policy to Hebron which excluded coverage for designated ongoing operations identified as "vehicle dismantling," a phrase not further defined. After dismantling operations ended for the day, a Hebron employee accidentally started a fire while pumping gas into a truck at the loading dock. While the employee was indirectly involved in the vehicle dismantling business since the truck was used to haul vehicles, he was not directly involved in dismantling activities when the fire occurred. When the ambiguous policy language is narrowly construed in favor of the insured, the exclusion does not apply and Tuscarora is required to provide coverage.

SUPREME COURT: "HOUSEHOLD VEHICLE" EXCLUSION NOT A SUBSTITUTE FOR PROPER WAIVER OF STACKING

Gallagher v. GEICO, – A.3d – (Pa. 2019)

Gallagher bought two policies from GEICO, one with $50,000 UIM for his motorcycle and the other with $100,000 UIM each on two autos. Both policies provided for stacked UIM coverage but the policies also had "household vehicle" exclusions which excluded coverage if Gallagher at the time of the accident was occupying an owned vehicle not insured under the policy. Here, Gallagher was on his motorcycle at the time of the accident so the UIM on that policy applied but the UIM on the other policy was excluded under the "household vehicle" exclusion. The Supreme Court rules that stacking is the default under the MVFRL, avoided only if the named insured completes statutorily mandated waiver forms which Gallagher clearly had not done, so stacking was required. In short, a carrier cannot avoiding stacking via an exclusion. In a footnote, arguably *dicta*, the court notes that the same result would obtain even if different carriers were involved "since an insurer can require disclosure of all household vehicles and policies as part of its application process."

EMPLOYMENT ISSUES

SUPERIOR COURT: "NO HIRE" RESTRICTIVE COVENANT VOID AS AGAINST PUBLIC POLICY

Pittsburgh Logistics v. BeeMac Trucking, – A.3d – (Pa. Super 2019)

Pittsburgh Logistics (PL) is a facilitator between those who need items shipped and those who are shippers, by determining routes, trucks, costs, etc. PL's contract with BeeMac (BM) had a "no-hire" clause, prohibiting BM from hiring or soliciting for employment any PL employees. BM hired four PL employees. A majority of the Superior Court *en banc* finds the no-hire restrictive covenant void as against public policy because it essentially forces a non-compete agreement on employees without their consent, knowledge, or compensation.

SUPREME COURT: EMPLOYEES CAN SUE EMPLOYER FOR DATA BREACH ECONOMIC LOSS DOCTRINE WILL NOT BAR DAMAGES

Dittman v. UPMC, 196 A.3d 1036 (Pa. 2018)

UPMC suffered a data breach which released the names, dates of birth, social security numbers, bank information, and tax forms of its 62,000 employees. The employees alleged that the data breach allowed either fraudulent tax returns with related damages or an increased risk of future identity theft. The trial court sustains preliminary objections and the Superior Court affirms. The Supreme Court reverses, holding:

1. UPMC, having collected and stored employee data on an internet accessible system, owed a duty of care to protect against a data breach,
2. Criminal conduct causing the data breach does not necessarily amount to a superseding cause if UPMC realized or should have realized the likelihood of a data breach, and
3. The "economic loss" doctrine (under which monetary damages cannot be awarded in a tort case absent BI or PD) does not apply in a case alleging breach of a duty that arises independently of any contractual duty.

SUPREME COURT: ABSENT ASSIGNMENT, EMPLOYER MAY NOT SEEK WC SUBROGATION "ON BEHALF OF" INJURED EMPLOYEE

Hartford Ins. Group v. Kamara, 199 A.3d 841 (Pa. 2018)

While in the course of employment, Chen was struck by Kamara's vehicle, causing Hartford to spend about $60,000 in WC benefits. Chen did not pursue a tort action, assign any rights to Hartford, or join in the suit Hartford filed against Kamara. Hartford sued as "The Hartford Group on behalf of Chunli Chen." The Complaint was verified by a Hartford employee. Hartford relies on ***Liberty Mutual Ins. Co. v. Domtar Paper***, 113 A.3d 1230 (Pa. 2015) for the propriety of its suit. Kamara relies on the same decision to support dismissal. The Supreme Court agrees with Kamara, stating that any prior references to a carrier pursuing subrogation as a "use plaintiff" contemplated the *carrier* joining an action *already brought by the injured employee*. The injured worker retains the cause of action. Absent assignment of the cause of action or the employee's voluntary participation as a plaintiff, the insurer may not pursue subrogation.

RELEASE ISSUES

SUPERIOR COURT: FITNESS CLUB WAIVER OF LIABILITY NOT CONTRARY TO PUBLIC POLICY

Vinson v. Fitness & Sports Clubs, LLC, 187 A.3d 253 (Pa. Super. 2018)

Vinson claimed she and tripped and fell on a wet floor mat at Fitness, suffering serious injuries. Her Member Agreement contained a Release and Waiver of Liability and Indemnity. Fitness raised the exculpatory clause in defense of Vinson's suit. The Superior Court rules that the exculpatory clause was enforceable and not contrary to public policy.

SUPERIOR COURT: SKIER'S RESPONSIBILITY ACT APPLIES TO ATV-CAUSED UNEXPECTEDLY ENCOUNTERED TRENCHES

Kibler v. Blue Knob Recreation, 184 A.3d 974 (Pa. Super. 2018)

While switching from one ski slope to another, Kibler unexpectedly encountered trenches caused by the facility's all-terrain-vehicle. The trenches caused him to fall and suffer broken bones. The PA Skier's Responsibility Act, 42 Pa.C.S.A. 7102 recognizes inherent risks in skiing which the skier must be deemed to have assumed. The Superior Court, relying on NY precedent for guidance, finds that wheel ruts in the terrain are an inherent risk in the sport of downhill skiing.