LITIGATION UPDATE

April, 2022

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PROCEDURE

UNAUTHORIZED PRACTICE OF LAW

Bisher v. Lehigh Valley Health, 265 A.3d 383 (Pa. 2021)

The Bishers, acting for themselves and for the estate of their adult son, filed a medical malpractice wrongful death and survival suit, unverified and without Certificates of Merit as to the physician and institutional defendants. The Bishers are not attorneys. The Superior Court affirmed dismissal of the action. The Supreme Court finds that the CM eventually filed were adequate. Of greater note, the Supreme Court addressed:

1. Whether a court could raise unauthorized practice of law *sua sponte* to retroactively dismiss an action on jurisdictional grounds. The Supreme Court rules not.
2. Whether a court could raise unauthorized practice of law *sua sponte* to prospectively prevent future conduct. The Supreme Court rules yes.
3. Whether the unauthorized practice of law results in a curable pleading, as opposed to a nullity, in a court's discretion. The Supreme Court rules yes.

CERTIFICATE OF MERIT

Green v. Trustee of U. of Pa., 265 A.3d 703 (Pa. Super. 2021)

Green, though attorney Jacobson, brought medical malpractice and intentional tort claims against a doctor, medical group, and hospital. Green eventually lost on all claims on summary judgment, after which the doctor demanded production of the written expert report supporting the Certificate of Merit which allegedly supported the claim, a demand Jacobson acknowledged he could not meet, having only received and relied upon an oral report. The trial court, treating the sanction petition as unopposed, awards $85,000 in sanctions against attorney Jacobson, including the doctor's defense attorney fees, costs, as well as increased insurance premiums. Since the trial court was obliged to analyze, rather than rubber stamp, alleged damage caused by the absence of a Certificate of Merit, the Superior Court remands, but does note that the case "is a cautionary tale for attorneys who venture outside their area of expertise."

FAILURE TO VERIFY A COMPLAINT

Alatrista v. Diamond Club, 267 A.3d 1257 (Pa. Super. 2022)

On the eve of expiration of the Statute of Limitations Alatrista filed, but failed to verify, a multi-count Complaint, rendering that pleading a nullity such that no responsive pleading was required and no default judgment could result. Still, the Superior Court rules the filed, unverified Complaint adequate to toll the Statute of Limitations, since, in fairness, Alatrista could have instituted suit by Summons without the need for a verification.

SERVICE BY USPS RATHER THAN SHERIFF

Harris v. Couttien, 261 A.3d 527 (Pa. Super. 2021)

Harris filed a Wrongful Use of Civil Proceedings action but served defendant by US Mail rather than by sheriff. The trial court granted Preliminary Objections seeking dismissal of the action. The Superior Court reverses. Where, as here, defendant acknowledges actual notice of the suit, the remedy for defective service, absent prejudice to defendant, is to set the improper service aside to allow plaintiff to reinstate the Complaint and effect proper service.

SERVICE OF PROCESS DURING THE PANDEMIC

Bella v. Penn Presbyterian Medical, –A3d– (Pa. Super. 2022)

Bella filed a timely suit against PPM for medical malpractice. Service was unsuccessful on PPM's general counsel when the lobby security guard said COVID restrictions closed the building with reopening not expected for months. Bella thereafter did not timely reinstate the complaint, investigate other means of service, seek court permission for alternate service, or file an affidavit of failure of service. Bella eventually asked the office of general counsel to accept service by email which it did. Relying on *Gussom v. Teagle*, 247 A.3d 1046 (Pa. 2021), the Superior Court affirms dismissal of Bella's suit due to failure to diligently pursue timely service. "His attempt to blame the COVID-19 pandemic as the cause of the lack of timely service is misplaced."

PERSONAL JURISDICTION VIA REGISTRATION TO DO BUSINESS

Mallory v. Norfolk Southern, 266 A.3d 542 (Pa. 2021)

A VA resident filed an action in PA against a VA corporation, alleging injuries in VA and OH. Plaintiff asserted that PA had general personal jurisdiction over the case based exclusively upon the foreign corporation's registration to do business in PA. The Supreme Court rules that imposing personal jurisdiction regardless of the lack of continuous and systematic affiliations within the state fails to comport with the Due Process Clause of the Fourteenth Amendment.

TORT

STATUTE OF LIMITATION IN CHILDHOOD SEXUAL ABUSE CLAIMS

Rice v. Diocese of Altoona-Johnstown, 255 A.3d 237 (Pa. 2021)

Rice brought suit for sexual abuse ending at least thirty-five years previously. The Supreme Court rules that straightforward application of existing Statute of Limitations law bars the claim. The Supreme Court also rejects application of the "discovery rule" (available when an injury or its cause are not reasonably knowable) and the "fraudulent concealment doctrine" (available when some extraordinary circumstance prevents a timely action).

PRIVATE CAUSE OF ACTION UNDER MEDICAL MARIJUANA ACT

Palmiter v. Commonwealth Health Systems, 260 A.3d 967 (Pa. Super. 2021)

Palmiter's employer terminated her employment when a scheduled employment-related drug test revealed marijuana use. Palmiter was prescribed medical marijuana due to chronic pain, migraines, and fatigue. She sued her employer, alleging violation of the Medical Marijuana Act and wrongful discharge in violation of public policy. On interlocutory appeal, the Superior Court affirms that both causes of action survive Preliminary Objections. Since the MMA itself contains no enforcement provisions, a private cause of action is a proper method to address violations.

IN PARI DELICTO DOCTRINE BARS NEGLIGENCE ACTION

Albert v. Sheeley's Drug Store, 265 A.3d 442 (Pa. 2021)

Albert overdosed on Fentanyl illegally obtained from Sheeley's by a friend. Under the *in pari delicto* doctrine, no court will lend aid to a party grounding his action on his own illegal or immoral acts, here the illegal possession and use of a controlled substance. When applying this equitable doctrine, courts should inquire as to the extent of plaintiff's wrongdoing vis-a-vis the defendant and as to the connection between plaintiff's wrongdoing and the claims asserted. Albert's claim, for instance, could be easily distinguished from an unlicensed driver plaintiff injured by a negligent drunk driver. The illegal unlicensed status did not cause the accident. The Supreme Court, like the Superior Court, affirms grant of summary judgment to Sheeley's.

EXCULPATORY CLAUSE IN COMMERCIAL LEASE

Keystone Specialty Services v. Ebaugh, 267 A.3d 1250 (Pa. Super. 2021)

Keystone stored commercial property in space it leased from Ebaugh. The lease stated that the landlord was not liable for loss of or damage to such stored property, making no reference to negligence as the cause of any loss. While an indemnification clause does not cover claims arising out of the indemnitee's own negligence unless it expressly so states, no similar rule applies to exculpatory clauses. Summary judgment for the landlord was affirmed.

"NO FELONY CONVICTION RECOVERY" RULE

Dinardo v. Kohler, –A.3d– (Pa. Super. 2022)

The mother of a confessed murderer sued medical providers for negligent psychiatric treatment in the months leading up to the murders. Alleged damages included criminal defense costs and indemnification against civil suits. Son was convicted of four first degree murders. PA has a "no felony conviction recovery" rule enunciated in *Holt v. Navarro*, 932 A.2d 915 (Pa. Super. 2007). Application of that rule required dismissal of the action. The court distinguishes earlier cases where felonies were alleged but no convictions obtained.

PIERCING CORPORATE VEIL UNDER "ALTER EGO" THEORY

Brown v. End Zone, Inc., 259 A.3d 473 (Pa. Super. 2021)

Brown, an exotic dancer at Club Onyx, and Dean, a Floor Host, claimed injuries after a large fight broke out at the club. Brown obtained a $1,400,000 award against the club owner but not against the parent company. Dean, an employee, couldn't claim against the club but did claim, unsuccessfully, against the landlord-out-of-possession. On appeal, the Superior Court rules:

1. To pierce the corporate veil under the "alter ego" theory, Brown had to prove that the parent company exercised such dominion and control over the club owner that injustice would result if the corporate fiction is maintained, proof rendering the subsidiary a mere instrumentality. Brown did not meet this burden.
2. Though a landlord-out-of-possession is generally not liable for injuries incurred on the leased premises, Dean should have been given the chance to prove that landlord consented to activity on the leased premises and had reason to know it would unavoidably involve unreasonable risk absent special precautions.

In sum, Brown held a verdict but with likely collection issues. Dean obtained a new trial.

REDRESS FOR CRIMINAL RESTITUTION SENTENCE

Clark v. Peugh, 257 A.3d 1260 (Pa. Super. 2021), appeal denied –A.3d– (Pa. 2021)

Clark, his sister, and an "extremely intoxicated" Peugh were at the Brick House Bar when Peugh insulted several female patrons, including Clark's sister, for which Clark physically ejected Peugh from the premises, causing injury. Clark was convicted for the attack and part of his sentence involved payment of $27,000 lost wage restitution to Peugh. Clark, claiming that the lost wage claim was bogus, thereafter sued Peugh for unjust enrichment and fraudulent misrepresentation. The Superior Court affirms dismissal since the Crimes Code and the Sentencing Code provided Clark's exclusive remedies to challenge the restitution sentence.

EMPLOYER AS SOCIAL HOST NOT LIABLE FOR DRUNK DRIVER

Klar v. Dairy Farmers of America, 268 A.3d 1115 (Pa. Super. 2021)

Williams, a DFA employee, attended a DFA golf outing for which he contributed money to cover greens fees, food, and alcohol. He consumed alcohol excessively, including while visibly intoxicated, and thereafter while driving intoxicated hit Klar on his motorcycle. The trial court granted DFA's motion on the pleadings that it was a social host and thus not liable for Williams' actions. Citing *Manning v. Andy*, 310 A.2d 75 (Pa. 1973), the Superior Court notes that the phrase "any other person" in the Liquor Code cannot be used to create civil liability on non-licensed entities such as DFA. Nor did DFA attain licensed status by soliciting contributions for outing expenses, including alcohol. Under *Klein v. Raysinger*, 470 A.2d 507 (Pa. 1983), the consumption of alcohol, rather the furnishing of it, is the proximate cause of any resulting occurrence.

INSURANCE

INSURER SUBROGATING AGAINST INSURED

Arlet v. W.C.A.B, (Flagship Niagara), –A.3d– (Pa. 2022)

Flagship had either WC or Jones Act exposure (one or the other was the exclusive remedy) to Arlet due to an injury suffered at work. Acadia as Jones Act insurer paid Arlet on the theory he was a covered seaman. Ensuing WC litigation, however, determined that Arlet was not a Jones Act seaman but rather an employee covered by WC, his exclusive remedy. Acadia sought to subrogate against Flagship for whatever WC benefits it owed Arlet, in effect allowing it to recoup its mistaken payments. At the Supreme Court, the issue of first impression was the general equitable proposition that an insurer may never subrogate against its own insured. While endorsing that general rule, the Supreme Court also creates an exception known in other jurisdictions as the "no coverage exception." Where the insurer is ultimately determined not to have provided coverage for a loss, it may seek to recover from its insured. The decision lists examples such as:

> An insurer may sue to recover payment made for bodily injury where a general liability policy excluded bodily injury to employees.
>
> An insurer may sue to recover payment made for damage caused by arson where a policy excluded intentional acts.
>
> An insurer may sue to recover payment made for damage caused by a subcontractor's negligence where a general contractor's policy covered subcontractors for property damage, but not liability.

Acadia could subrogate against Flagship because it did not owe Jones Act payments it made on Flagship's behalf.

NO EPL COVERAGE FOR NON-EMPLOYEE CLAIMS

Penn Psychiatric v. U.S. Liability Insurance, 257 A.3d 1241 (Pa. Super. 2021), appeal denied, –A.3d– (Pa. 2021)

Two patients sued Penn Psychiatric and its employee therapist, alleging sexual assault and improper disclosure of HIPAA protected materials. The patients also alleged PP negligently supervised its therapist. PP sought coverage from U.S. Liability, its EPL insurer. PP contended that the policy covered "wrongful acts," defined to include harassment, and also covered "third party discrimination," which extended coverage beyond employee claims. PP further contended the policy covered all negligent supervision claims even when brought by non-employees. The Superior Court affirms dismissal of the PP action on preliminary objections. The "wrongful act" definition clearly limited application to claims by present, former, or prospective employees. The "third party discrimination" clause, while extending coverage to non-employee claims, still required alleged discrimination, not present here.

CONTROLLED SUBSTANCE EXCLUSION

Kramer v. Nationwide, –A.3d– (Pa. Super. 2021)

In the underlying action, Cruz alleged that the Kramers allowed their son to use their home to provide drugs to her son from which he overdosed. Nationwide, Kramers' homeowners carrier, denied coverage under an exclusion applicable to "bodily injury" claims "resulting from use . . . of a controlled substance." The Superior Court notes that part of the Cruz claim involved emotional or mental distress, not falling within "bodily injury," thus potentially stating claims beyond the exclusion, requiring provision of a defense.

INTERVENING

INSURER SPECIAL JURY INTERROGATORIES IN TORT CASE

Bogdan v. American Legion Post 153, 257 A.3d 751 (Pa. Super. 2021)

Decedent was beaten then shot by an assailant who was visibly intoxicated both before and after being served alcohol at American Legion. US Underwriters was the liquor liability insurer for American Legion, subject to firearms and punitive damage exclusions. In the tort trial, Underwriters sought to intervene for the purpose of securing a special jury verdict form since a general jury verdict would prevent it from determining whether and to what extent damages were insured. The trial court denied Underwriters' petition. The Superior Court reverses. Underwriters' request in no way delayed trial of the matter. In addition, the trial court's conclusion that special interrogatories would cause confusion was premature, and should be addressed at a time when specific special interrogatories are proposed.

INTERVENING TO PROTECT LIEN RE CONSORTIUM ALLOCATION

Gleason v. Alfred I. DuPont Hospital, 260 A.3d 256 (Pa. Super. 2021)

Gleason was injured in the course of employment, causing Hartford to pay about $1,000,000 in WC benefits for which it sought subrogation. Gleason settled tort claims for $1,450,000 but allocated $580,000 to himself and $870,000 to his wife on consortium. The trial court denied Hartford's attempt to intervene in the tort case to protect its lien by challenging the allocation between Gleason and his wife. The Superior Court remands to permit Hartford to intervene. In *Thompson v. W.C.A.B. (USF&G)*, 781 A.2d 1146 (Pa. 2001), the court recognized the potential for abuse in such matters since the consortium award is not subject to WC subrogation. Intervention is the proper procedure for Hartford to protect its interests.

INTERVENING TO FILE COMPLAINT TO PROTECT LIEN

Loftus v. Decker, –A.3d– (Pa. Super. 2022)

Loftus was injured in a work-related MVA caused by Decker. She thereafter initiated suit against Decker by Summons. Eastern Alliance presented a WC lien of about $200,000. Unless Eastern agreed to compromise its lien, Loftus refused either to accept Decker's $25,000 offer or to file a Complaint against Decker. Eastern sought to intervene to protect its lien. The Superior Court affirms dismissal of the intervention. Absent a Complaint, Eastern had no factual basis to assert a lien. In addition, Eastern had no legal basis either to file a Complaint or to force Loftus to file a Complaint.

VENUE

COORDINATION UNDER Pa.R.C.P. 213.1

HTR Restaurants v. Erie Insurance Exchange, 260 A.3d 978 (Pa. Super. 2021)

On application by two Allegheny County plaintiffs, the trial court pursuant to Pa.R.C.P 213.1 ordered coordination in Allegheny County for discovery and trial of all pending and future suits against Erie related to COVID-19 insurance claims. The Superior Court reverses. Coordination is possible only as to existing suits, not future suits. As to existing suits, all affected parties must have the right to respond *before* coordination is ordered, not, as here, after.

INSURANCE POLICY FORUM SELECTION CLAUSE

Van Divner v. Sweger, 257 A.3d 1254 (Pa. Super. 2021)

Van Divner and Collins alleged injuries from a car accident caused by Sweger in Perry County. They filed a tort action against Sweger in Perry County but included Progressive, their own insurer, on a contractual UIM claim. Citing the policy's forum selection clause, Progressive filed preliminary objections and sought transfer of the UIM claims to Juniata County where plaintiffs lived at the time of the accident. On appeal, the Superior Court enforces the forum selection language but notes that the trigger date is filing suit, not date of accident, thus sending Van Divner's UIM claim to Juniata County and Collins' to Dauphin County.

VENUE FOR INTERNET DEFAMATION CLAIMS

Fox v. Smith, 263 A.3d 555 (Pa. 2021)

Fox and Smith were candidates in the 2017 Chester Heights (in Delaware County) mayoral election eventually won by Smith. Fox sued Smith (in Phila County) for internet defamation based on allegedly false statements that Fox had a criminal record. Plaintiff in a defamation action may set venue in any county in which publication and injury occurred, even where multiple counties may so qualify. In short, venues rules previously in effect for paper publications remain in effect for internet publications.

VENUE TRANSFERRED FROM PHILADELPHIA TO READING

Doe v. Bright Horizons, 261 A.3d 1065 (Pa. Super. 2021)

Doe brought suit in Philadelphia for sexual abuse allegedly occurring at a daycare center in Berks Co. The trial court transferred venue to Berks Co based on *forum non conveniens*. Defendant presented evidence that its business could not maintain state-mandated teacher/student ratios if its employees had three hour daily commutes to testify in Philadelphia. As a result, the daycare would either close or violate regulations if venue remained in Philadelphia, which the trial court concluded was an oppressive burden. Doe could not establish an abuse of discretion so the transfer of venue was affirmed.

VENUE TRANSFERRED FROM PHILADELPHIA TO MONTGOMERY COUNTY

Hausmann v. Bernd, –A.3d– (Pa. Super. 2022)

Plaintiff and the individual defendant resided in Montgomery County, place of the auto accident. Plaintiff contended, however, that corporate defendants regularly conducted business in Philadelphia, justifying venue there. The corporate defendants produced evidence of minimal business and receipts from Philadelphia, upon which the trial court transferred venue to Montgomery County. The *Hangey v. Husqvarna*, 247 A.3d 1136 (Pa. Super. 2021) decision did not require otherwise. The trial court acted within its discretion in transferring venue.

UM/UIM

INTER-POLICY STACKING

Donovan v. State Farm, 256 A.3d 1145 (Pa. 2021)

While operating his motorcycle, Donovan was injured by a UIM driver. He collected the liability limits of the UIM driver and then collected the UIM coverage on his motorcycle. He then sought to collect further UIM benefits from his mother's non-stacked policy as a relative resident in the household. The stacking waiver clearly prohibited intra-policy stacking on the mother's policy but did *not* prohibit inter-policy stacking. Under *Craley v. State Farm*, 895 A.2d 530 (Pa. 2006), waiver of inter-policy stacking is effective only if the policy insures a single vehicle.

HOUSEHOLD EXCLUSION

Erie Insurance Exchange v. Mione, 253 A.3d 754 (Pa. Super. 2021), appeal granted –A.3d– (Pa. 2021)

While operating his motorcycle, Father was injured by a UIM driver. He collected the liability limits of the UIM driver and then sought to collect UIM benefits on Erie policies issued to Father/Mother and to Daughter. Father had rejected UIM coverage on the Progressive policy for the motorcycle. Because Father had no UIM coverage on the motorcycle, stacking was not an issue: there was no underlying coverage on which Erie coverage could stack. In addition, the household exclusion is invalid only to the extent it seeks to circumvent rules on stacking, not implicated here. Judgment for Erie was affirmed. The Supreme Court granted allocatur, undoubtedly to address application of *Donovan v. State Farm*, decided three months after *Erie v. Mione*.

"REGULAR USE" EXCLUSIONS INVALID

Rush v. Erie Insurance Exchange, 265 A.3d 794 (Pa. Super. 2021)

Police officer Rush was injured in a motor vehicle accident while occupying his city-owned patrol car. After collecting liability coverage from the tortfeasors and primary UIM from coverage on the patrol car, he sought excess UIM benefits from his Erie personal policies. Erie denied coverage, citing its "regular use" exclusions, applicable when the insured is injured while occupying a regularly used vehicle Erie does not insure. The Superior Court, apparently reversing prior precedent, rules the "regular use" exclusions unenforceable as violating the MVFRL. The Superior Court reasons that the Supreme Court in *Gallagher v. GEICO*, 201 A.3d 131 (Pa. 2019) abrogated earlier decisions upholding "regular use" exclusions.

DELETING VEHICLE DOES NOT REQUIRE NEW STACKING WAIVER

Franks v. State Farm, 263 A.3d 1169 (Pa. Super. 2021), appeal granted –A.3d– (Pa. 2022)

Franks purchased coverage from State Farm for two vehicles with non-stacked UIM coverage. Franks added a third vehicle and again waived UIM stacking. Franks thereafter removed a vehicle but did not execute another waiver of UIM stacking. The Superior Court *en banc* rules that removal of a vehicle is not a "purchase" of coverage and thus does not require a new waiver of stacking.

EVIDENCE

DEAD MAN'S RULE

Frazer v. McEntire, 265 A.3d 777 (Pa. Super. 2021)

Father died testate, naming Son, Daughter, and Granddaughter in his will. Son told Daughter and Granddaughter he was holding $130,000 in Father's cash assets in a safe for later distribution pursuant to the will. Son dies before any distribution and without accounting for or documentation of any $130,000 cash asset. Daughter and Granddaughter sue Son's estate for conversion and fraud, seeking to use Son's statement as proof of the $130,000 cash asset. The Superior Court affirms application of the Dead Man's Rule to render the statement admissible.

RES IPSA LOQUITUR

Lageman v. Zepp, 266 A.3d 572 (Pa. 2021)

In a medical malpractice case, Lageman produced direct evidence that Zepp was negligent but also sought a *res ipsa loquitur* instruction under Section 328D of the Restatement (Second) of Torts. The trial court declined and the jury returned a defense verdict. The Superior Court reversed and granted a new trial. The Supreme Court agrees. Plaintiff can proceed simultaneously with a negligence claim based on direct evidence and with a claim based on Section 328D, essentially an evidence rule which shifts the burden of proof. Plaintiff is entitled to such an instruction when the event is of a kind which does not occur in the absence of negligence, other responsible causes are eliminated, and the indicated negligence is within the scope of the defendant's duty to plaintiff.

ATTORNEYS

ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES

Brandywine v. Brandywine Village, 260 A.3d 179 (Pa. Super. 2021)

Plaintiff sued for breach of contract, interference with existing contractual relationships, and abuse of process. Defendants, including counsel to the group, raised reliance on advice of counsel as a defense. Plaintiff sought discovery of attorney-client and attorney work product documents. The trial court deemed any claims of privilege waived and ordered full disclosure of all documents. The Superior Court affirms in part and reverses in part, holding:

1. The order to disclose documents was ripe for appellate review,
2. Defendants properly invoked privileges,
3. Defendants waived attorney-client privilege with regard to documents reflecting the advice of counsel on which they relied,
4. Blanket production of *all* privileged material is not required, and
5. Requiring production of work product privileged material was not required.

The trial court on remand was tasked with extensive *in camera* review to determine which documents remained privileged.

FIRM DISQUALIFIED DUE TO LATERAL ATTORNEY CONFLICT

Darrow v. PPL Electric, 266 A.3d 1105 (Pa. Super. 2021)
Rudalavage v. PPL Electric, 268 A.3d 470 (Pa. Super. 2022)

Mulcahey for years defended PPL while an attorney at Lenahan & Dempsey. He moved to Munley Law and filed suits against PPL on behalf of Darrow and Rudalavage, injured in utility pole/downed wire incidents. PPL moved to disqualify both Mulcahey and Munley Law from the litigation due to Mulcahey's conflict of interest with a former client, imputed to the rest of the Munley Law firm. The trial court disqualifies Mulcahey but not Munley Law. The Superior Court reverses, outlining the controlling factors:

1. The substantiality of Mulcahey's relationship with PPL favors disqualification.
2. Time lapse between PPL and Darrow/Rudalavage representations does not favor disqualification.
3. Small size of Munley Law favors disqualification.
4. Nature of Mulcahey's involvement in Darrow/Rudalavage claims favors disqualification.
5. Timing of Munley's protective wall (i.e., only after ordered) heavily favors disqualification.
6. Features of screening protocol (i.e., not even in writing) favors disqualification.

CHARGING LIENS

Austin v. Thyssenkrupp Elevator, 254 A.3d 760 (Pa. Super. 2021)

Austin, represented by attorney Schneider, entered into a bodily injury settlement with Thyssenkrupp during a mediation. The pending suit was dismissed based on the settlement. Austin thereafter recanted and refused to sign a release. A court granted Thyssenkrupp' motion to enforce the settlement but Austin still refused to sign a release. Schneider filed a motion to impose an attorney's charging lien for his earned fee plus advanced litigation costs. The trial court denied that motion, reasoning that the settlement had not yet been paid so there was no fund to which the lien could attach. The Superior Court reverses, outlining the five requirements for a charging lien, all met by Schneider:

1. A fund in court or otherwise available for distribution,
2. Services by the attorney creating the fund,
3. Attorney seeking payment from the fund rather than the client,
4. Lien limited to fees and costs related to the underlying claim, and
5. Equitable considerations necessitate application of charging lien.

WORKERS' COMPENSATION

TOW TRUCK OPERATOR AN EMPLOYEE, NOT AN INDEPENDENT CONTRACTOR

Berkebile Towing v. W.C.A.B. (Migut), 254 A.3d 783 (Pa. Cmwlth. 2021)

Berkebile provided decedent with a tow truck, with Berkebile signage, and with Berkebile paying for registration, inspections, insurance, and fuel. The truck could only be used for Berkebile business and was fully equipped with needed tools for the work. Berkebile uniforms were available for purchase but not required. Decedent signed an agreement that he was a contractor, not an employee, and was paid in cash with no tax withholding. Decedent received 40% of receipts on a job, with Berkebile getting 50% plus 10% for use of the truck. Relying on *Sarver Towing v. W.C.A.B. (Bowser)*, 736 A.2d 61 (Pa. Cmwlth. 1999), the Commonwealth Court, after outlining the numerous factors considered in employee/independent contractor cases, affirms employee status.

REASONABLE CONTEST AND AWARD OF ATTORNEY FEES

Lorino v. W.C.A.B. (Commonwealth), 266 A.3d 487 (Pa. 2021)

Lorino received medical treatment for a work-related injury. The WC carrier eventually sought to terminate benefits based on an IME. The WC judge denied termination but also denied Lorino's request for an award of attorney fees, finding the carrier had presented a reasonable contest. The Supreme Court remands for reconsideration of the attorney fee question based on a corrected interpretation of the WC statute. When a claimant prevails in a contested WC matter, an award of attorney fees is mandatory (i.e., the general rule) which may be forgiven if the employer presents a reasonable contest (i.e., the discretionary exception to the general rule).

TRAVELING EMPLOYEE COURSE OF EMPLOYMENT

Peters v. W.C.A.B. (Cintas Corp.), 263 A.3d 275 (Pa. 2021)

Peters, a traveling salesman, was injured in a car accident after leaving an employer-sponsored event at a pub. Testimony conflicted as to whether attendance at the event was mandatory or voluntary and whether work matters were or were not discussed. Testimony also conflicted as to whether Peters was on his way home directly from the event or from some other intervening event. The WCJ denied course of employment, affirmed by the Commonwealth Court. The Supreme Court reverses and remands. Traveling employees are presumed to remain in the course of employment absent proof that employment was abandoned by conduct foreign to and removed from regular employment. Here, the only evidence of such abandonment was in the conflicting testimony of whether Peters attended an intervening non-employer sponsored event before the accident. That unresolved fact determination was remanded to the WCJ.

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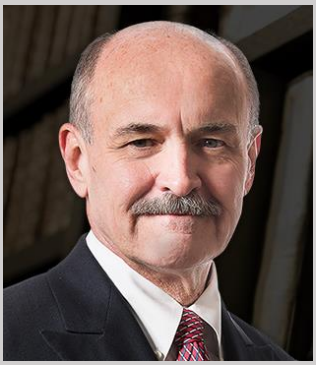

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Insurance Litigation
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Insurance Contracts and Coverages
Uninsured/Underinsured Motorist Law

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Michael McKenna has been a partner in Margolis Edelstein since 1983 and has served as the firm's Managing Partner since 1995. Before joining Margolis Edelstein in 1982, Michael was Assistant General Counsel for the Pennsylvania Manufacturers' Association Insurance Company. He handles files, publishes, and speaks on a broad array of insurance and tort topics.

As Managing Partner, Michael oversees all operations in a firm which has grown during his tenure from two to nine offices.

Michael has tried hundreds of jury, non-jury, and UM/UIM arbitration trials with subject matter ranging from auto to premises to fire to products to insurance coverage. He has appeared pro hac vice in Delaware, Kentucky, Maryland, New Jersey, New York, and Puerto Rico. He has also defended or prosecuted appeals before the Pennsylvania Commonwealth Court, Superior Court, and Supreme Court and before the Third Circuit Court of Appeals.

In addition to frequent speaking engagements before insurance industry groups, Michael also publishes, annotates, and updates the Pennsylvania Motor Vehicle Financial Responsibility Law Booklet, a comprehensive guide to auto law in the Commonwealth.

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Speaking Engagements and Presentations

- Pennsylvania Unfair Insurance Practices Act and Regulations, PAMIC, Harrisburg, PA
- Employer's Liability Insurance: A Port Depending on the Storm, Risk and Insurance Management Society, Dallas, TX
- Insurance Coverage for Underground Storage Tanks, PAMIC, Lancaster, PA
- Annual Presentation of Litigation Update to Pennsylvania Association of Mutual Insurance Companies, 1984 to present

Articles and Publications

- Pennsylvania Motor Vehicle Financial Responsibility Law Booklet
- Annual Litigation Update

Representative Matters

- Represented the plaintiff insurer in *Penn National v. St. John*, establishing that "first manifestation" trigger for CGL coverage against property damage claims applies even when exposure, manifestation of harm, and discovery of cause extend over multiple policy periods, thus rejecting extension of the *J.H. France* asbestosis multiple or continuous trigger of coverage. The favorable Chester County trial result was upheld in the Superior Court and thereafter in the Supreme Court.
- Represented the plaintiff insurer in *Nationwide v. Tambone*, establishing the validity and applicability of its personal auto policy livery exclusion where the named insured's son, living elsewhere, occasionally used the covered auto to transport casual acquaintances for pocket money. The favorable Chester County trial result was upheld in the Superior Court, the Supreme Court thereafter denying a Petition for Allowance of Appeal.
- Represented prime defendant The Sheraton Corporation, the original owner and designer of the subject hotel, in the *San Juan Dupont Plaza Fire Litigation* in Puerto Rico, described by the Second Circuit Court of Appeals as a "litigatory monster" involving 264 separate lawsuits with 2,400 plaintiffs seeking total damages of over $1,800,000,000 for 98 deaths and over 140 severe burn injuries.
- Represented prime defendant Halprin Supply in the *One Meridian Plaza Fire Litigation* in Philadelphia against claims by the building owners, the owners of surrounding damaged buildings and businesses, and the estates of three firefighters killed in a blaze which destroyed this 38 story high-rise office building.
- Represented prime defendant Trident Mechanical Systems in the *Central Synagogue Fire Litigation* in Federal Court in Manhattan against claims of extensive damage to this historically certified building, the oldest extant synagogue in the United States, obtaining a defense verdict following a six week trial.