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Defense Digest

On The Pulse…

OUR FORT LAUDERDALE OFFICE

By Craig S. Hudson, Esq.*

Craig S. Hudson

"Time changes everything except something within us which is always surprised by change."

– Thomas Hardy

After practicing law in Philadelphia for 21 years, the last 13 with Marshall Dennehey, I relocated to the firm's Fort Lauderdale office in July 2006. In 2010, I wrote an article that appeared in *Defense Digest* describing this office. (*Defense Digest*, Vol. 16, No. 3, 2010). Now, five years later, I have been asked to again write about the Fort Lauderdale office. This opportunity caused me to reflect on the last nine years. In doing so, the above quote from Thomas Hardy describes the changes that have occurred over the last nine years and my reaction to these changes.

Marshall Dennehey opened an office in Fort Lauderdale 2002 with two attorneys. When I came to manage the office in 2006, I was the seventh attorney in the office. Of these seven, four remain: Rick Ravine, a shareholder, and Andrew Marchese and Jonathan Kanov (former associates who are now shareholders) and myself. By the time my article appeared in 2010, our office had grown to 11 attorneys. Key additions who are with us today are shareholders, Michael Packer and Jeannie Hanrahan, and associates, Danielle Robinson, Ryan Burns and Alan (A.C.) Nash. Today, we have grown to 20 attorneys, with six shareholders, two special counsel and 12 associates. Combined, we bring over 274 years of legal experience in a variety of defense and commercial litigation specialties. Proudly, the Fort Lauderdale office mirrors the rest of Marshall Dennehey in that we are currently a much more diverse group of attorneys. Eight of our attorneys are women, and we are proud that among our attorneys are African Americans, Cuban Americans and Southeast-Asian Americans.

When I joined the Fort Lauderdale office, we did not have an insurance coverage/bad faith practice. That all changed when Michael Packer joined us in 2007 with the desire to build this practice group. Today, Michael, working closely with Steve Poljak, who came from our Pittsburgh office, have grown our insurance

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PROFILE OF OUR ARCHITECTURAL, ENGINEERING & CONSTRUCTION DEFECT LITIGATION PRACTICE GROUP

By John H. Osorio, Esq.*

John H. Osorio

Marshall Dennehey's Architectural, Engineering & Construction Defect Litigation Practice Group is focused on defending litigation matters related to the construction industry. Whether it is a basement wall collapse in a 40-year-old private residence, a wrongful death or a catastrophic fire during the construction of a $400 million hotel, the practice group's attorneys have the experience, training and dedication to represent our clients' interests.

Our clients range from firms with national and international operations to regional solo practitioners. We routinely represent architects, engineers and other design professionals, as well as land surveyors, owners, developers, general contractors, construction managers, subcontractors, boards of directors, condominium associations, real estate agents, real estate appraisers and more.

We handle matters across the states of New Jersey, Pennsylvania, Delaware, New York, Florida, Ohio and West Virginia, and our attorneys are also requested to represent clients in other jurisdictions throughout the United States. Among the litigation matters we routinely defend are construction injuries, design copy rights infringement, delay damages claims, liquidated damages, wrongful death, design defect, construction defect, fire loss, fire loss with personal injury, surveying malpractice, negligence, condominium construction and design, building collapse, scaffolding collapse, mast climbing platform collapse, complex construction issues, roofs, windows, geotechnical, fire suppression, marine piles, marine bulkheads, OSHA claims, water infiltration and condominium construction.

With recognition that each client's litigation needs are distinctive, we avoid a cookie-cutter approach. We tailor our defense to the specific requirements of the litigation in an effort to control costs. In all engagements, we first develop an understanding of the

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A MESSAGE from the EXECUTIVE COMMITTEE

By Christopher E. Dougherty, Esq.
Chairman of the Board

Bruce Jenner is now Caitlyn. The Confederate Flag has been removed from the South Carolina capitol building. The United States and other world powers reached a nuclear arms agreement with Iran. These events typify the rapid—and significant—changes we are living through.

For society to remain orderly, our law necessarily must keep pace. Take 4th Amendment unreasonable search and seizure law as an example. Observations into long-recognized zones of privacy have been made readily observable by satellite/thermal imagery and other technologies. Our Supreme Court recently acknowledged that our Constitution guarantees a right to same-sex marriages. Employment discrimination laws expand at a breath-taking rate—*i.e.*, our Supreme Court recently decided that an employer must accommodate a prospective employee's religious obligations, even when that obligation is not revealed.

As the law strives to stay abreast of societal change, law firms necessarily must recognize that how they deliver legal services must evolve as well. Some legal scholars direfully predict that if law firms don't change, they will become obsolete.

Three drivers are cited for these predictions:

(1) Clients—large and small alike—desire more legal services for less;

(2) Internationally (not necessarily the U.S. yet), the increasing liberalization of law and regulation is expanding who may deliver legal services and from what type of business platform; and

(3) Information technology is growing at an unprecedented pace.

We are already experiencing the more-for-less challenge. Corporations, insurance companies, private businesses and individuals alike must do more with less. Thus, it is not inconsistent that they demand the same from the law firms they retain. General counsel and claims litigation managers feel strong pressure to reduce legal spend. Therefore, they seek more alternative fee arrangements, fixed/capped costs and creative billing arrangements from their law firms.

In England, laws were passed in 2004 and 2007 that effectively now permit non-lawyers to manage and take ownership interests in law firms. Investors may infuse law firms with private capital, and, as a result, they are increasingly being run in a more business-like fashion than ever before. Reducing inefficiencies, eliminating redundancies and finding less expensive ways to deliver legal services (*i.e.*, outsourcing to low-cost areas) are identified methods to meet the more-for-less challenge.

The expansion and growth of technology proceeds at an ever-increasing pace. Technology now enables: automated document assembly and review; an electronic marketplace so consumers can shop more readily for legal services; more effective workflow and project management; cheaper and more intelligent legal research; closed legal communities to enhance problem-solving without law firm input; free online legal guidance; online dispute resolution; and "Big Data" for more effective measurement of law firm performance.

CLM published a national litigation management study in March 2015. Among the many observations contained in the general report, I highlight the following:

(1) Pre-approved outside law firm panels continue to consolidate and shrink.

(2) 84% of executives believe the legal environment is more competitive than five years ago.

(3) More executives formally measure law firm performance with metrics and quantitative data.

(4) Opportunities exist for law firms to describe their value more effectively, *i.e.*, law firms should present their own metrics.

(5) 90% of insurance executives identified measuring law firm performance as their most important initiative over the next 12 months.

We are very attentive to the changes occurring in our defense industry. We have seen some fairly dramatic moves recently with Allianz/Fireman's Fund, XL/Catlin and ACE/Chubb, to name a few. While we have survived insurance panel reductions thus far—and we are grateful for the confidence our insurer partners have reposed in us—we are more committed than ever to improve as a law firm.

How is Marshall Dennehey responding to the industry trends?

First, we emphasize to every person in our law firm that we are a civil defense litigation firm. We believe that it is important for every employee—professional and administrative alike—to appreciate that commitment. It should influence how everyone approaches every task on any given day.

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OUR FORT LAUDERDALE OFFICE

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coverage and bad faith group to seven attorneys. This team of attorneys brings together a wide range of talents and subspecialties. They handle first-party claims, perform coverage opinion analyses and, if needed, litigate claims and bad faith cases. Watching Michael develop his skills as both an attorney and manager has been particularly satisfying to me.

Nine years ago, Jonathan Kanov and Andrew Marchese were associates. They were very bright and talented, but they were still learning the ropes. Several years ago they both were elevated to shareholders. They are now well-known, respected and sought-after attorneys. While both continue to handle professional liability matters, each has developed a special niche. Jonathan handles a wide variety of complex D&O cases, particularly those involving alleged wrongdoing of individual board members. He also focuses a good portion of his practice defending those involved in commercial and residential real estate. This includes attorneys, real estate agents, title agents, mortgage brokers and appraisers. In addition to representing attorneys and design professionals, Andrew, working with Jeannie Hanrahan, has a developed a thriving practice defending condominium and home owner associations and their boards of directors. Andrew and Jeannie combine their legal and personal skills to find creative solutions to a variety of problems while, at the same time, effectively defending their clients in the courts and before a variety of administrative agencies.

As in 2008, Rick Ravine continues to lead the Fort Lauderdale office's casualty practice group. The difference today, from just a few years ago, is that Ryan Burns and A.C. Nash are now seasoned attorneys who handle their own complex casualty cases. Both are frequently in court or at mediation. Both have been recognized by their peers as Florida Super Lawyer Rising Stars. The casualty group now contains five attorneys. They defend clients and work with a number of insurers in every type of casualty case imaginable, including wrongful death, trucking accidents, dram shop, product liability, negligent security and retail liability lawsuits. In addition, they handle PIP/SIU matters for a number of insurance companies.

Space precludes me from extolling the virtues of all the attorneys in our office. However, I would be remiss if I did not call attention to Danielle Robinson and Patrick DeLong. Danielle, also named in successive years as a Florida Super Lawyer Rising Star, not only handles insurance coverage matters, but she also represents a major automobile manufacturer in warranty litigation. Patrick DeLong, who joined our professional liability group in 2013 with 20 years experience as special counsel, has a thriving FDCPA and other consumer litigation practice in addition to a more traditional professional liability practice. The most recent addition to our Fort Lauderdale team is Zascha Blanco Abbott. Zascha has spent her entire 14-year career advising, guiding and, where necessary, representing employers in state and federal court against claims by current and former employees. I am very excited to add Zascha, who is working with our attorneys throughout Florida to defend employers. Zascha adds a wealth of employment law experience that will enhance the services we provide to our clients.

As for myself, after almost ten years of practicing in South Florida, I now consider myself a Florida lawyer, not an invader from Philadelphia. I am no longer a stranger to unique Florida laws and procedures. I know many Florida attorneys and judges, having had cases with them or appeared before them. I have taken several cases to trial with favorable results. My practice focuses primarily on professional liability, defending lawyers, design professionals and contractors. In addition, I continue to handle claims that don't fit squarely into any specific category. When I first moved to this office, I could tell that many attorneys and judges were not familiar with Marshall Dennehey. That is no longer the case. Now everyone knows who we are as a firm, and I know our lawyers are very well thought of by the bench and the bar.

After 13 years, our team of lawyers has the experience and capability to handle the same type of cases handled by our larger northern offices. We handle every type of professional liability case, including those involving lawyers, accountants, real estate agents, design professionals, funereal directors and debt collectors. We also litigate D&O and construction defect cases. We have an experienced team ready to handle every type of insurance coverage, first-party or bad faith case. Our casualty group stands ready to defend every personal injury claim imaginable.

In conclusion, I want to say thank you to the clients who have supported us over the years and the new clients who have decided to give us an opportunity to prove ourselves. If you already send cases to our other offices and have not yet sent a case to our Fort Lauderdale office, please consider doing so. Give me a call or send me an email, and I will make sure to connect you with the right attorney to fit your needs. ■

Delaware—General Liability

CAN PLAINTIFF BOARD THE AMOUNT OF MEDICAL EXPENSES BILLED OR MERELY THE AMOUNT PAID?

By Armand J. Della Porta Jr., Esq.*

KEY POINTS:

- What is the value of medical services in Delaware?
- Under a recent decision of the Delaware Supreme Court, a plaintiff can submit to the jury the amount Medicare paid for medical services, not the amount the medical providers originally charged.

Armand J. Della Porta Jr.

A plaintiff is injured, allegedly due to the defendant's negligence or defective product. The plaintiff seeks medical treatment for his injury and is billed by his medical provider. The amount paid by his insurance company is substantially less than the amount billed. The plaintiff files suit against the defendant and, at trial, wants to introduce the amount his medical provider billed him as an item of damages. The defendant counters and argues that the appropriate amount to be submitted to the jury should be the amount paid by his insurer. The answer to this issue will have an impact on the settlement and verdict value, as the total amount of the medical bills will affect how much the parties and the jury will value the plaintiff's case—particularly the plaintiff's pain and suffering. Which figure should be submitted to the jury, the amount billed or the amount paid?

Courts have struggled with this issue. The Delaware Supreme Court recently issued an opinion in *Stayton v. Delaware Health Corp.*, 2015 Del. LEXIS 288 (Del. June 12, 2015), which addresses it. In that case, the plaintiff sustained serious burn injuries while at a skilled nursing center. The burn hospital and medical providers who treated her billed $3,683,797.11. The plaintiff qualified for Medicare, which paid the providers $262,550.17 in full satisfaction of her medical bills. Medicare regulations required the write-off of the balance, and the providers could not pursue the plaintiff for the difference. The defendants moved for judgment on the pleadings, seeking judgment as a matter of law that the plaintiff's medical expense damages were limited to the amount actually paid by Medicare. The plaintiff opposed the motion, relying on the collateral source rule, which provides that, if an injured party is compensated for injuries from a source independent of the tortfeasor, the payment is not admissible to limit the damages paid by the tortfeasor. The trial court granted the defendants' motion, holding that the collateral source rule did not apply to amounts required by federal law to be written off by health care providers. The plaintiff appealed.

The Delaware Supreme Court has long recognized the collateral source rule as a "firmly embedded" principle of Delaware law. Under this rule, a tortfeasor cannot reduce its damages because of payment received by the plaintiff from an independent source based on the theory that the tortfeasor has no interest in and cannot benefit from funds received by the plaintiff from sources not related to the defendant. The rule recognizes that the plaintiff is receiving a windfall, but the court prefers that, if a windfall is to be awarded, it should be to the plaintiff instead of the defendant.

Most states recognize the collateral source rule, but when the issue is a write-off by the health care provider, states have taken various positions. Some states treat health care provider write-offs as they would any other third-party payments, such as those from insurers. Other states apply the rule only if the plaintiff bargained for the write-off. A third approach is to not apply the rule to provider write-offs at all.

The Delaware Supreme Court has applied the collateral source rule to provider write-offs in the same manner it has applied the rule to third-party payments. Where a provider reduced his bill to an uninsured plaintiff, the court upheld allowing the plaintiff to present to the jury the amount of the bill before it was reduced. *Onusko v. Kerr*, 880 A.2d 1022 (Del. 2005). Where Blue Cross, the plaintiff's private health insurer, paid less than the full amount of the plaintiff's invoices, the court held that the collateral source rule prohibited the tortfeasor from receiving the benefit of the health insurance contract for which the tortfeasor had paid no compensation. *Mitchell v. Halder*, 883 A.2d 32 (Del. 2006).

In *Stayton*, the Delaware Supreme Court faced the issue of whether to apply the collateral source rule to Medicare write-offs. The court did not view provider write-offs, in the case of Medicare, as payments made to or benefits conferred upon the plaintiff. Rather, the benefit of the provider write-off was conferred on federal taxpayers due to the tremendous purchasing power of Medicare. Therefore, the court held that the collateral source rule did not apply.

Because the collateral source rule did not apply, the next issue was how to determine the reasonable value of the medical services provided. Some states that face this issue hold that the amount paid after the write-off is the reasonable value of those services. Other courts hold that neither the amount charged nor the amount paid constitutes the reasonable value. Instead, both sides must present expert testimony as to what the reasonable value is, and the jury must make that determination based on that testimony.

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Florida—Construction Defect

CHAPTER 558 NOTICE AND THE DUTY TO DEFEND

By Lindsay G. McCormick, Esq.*

KEY POINTS:

- The rules of insurance contract interpretation continue to be primary considerations for construction defect claims.
- A 558 Notice does not constitute a "suit" for Florida insurance terms.
- Depending on policy language, the duty to defend may not arise at the 558 Notice stage.

Lindsay G. McCormick

For those of us who immerse ourselves in the world of construction law, we know that liability and coverage is far too intertwined for anyone to completely practice in only one realm. Many times, the issues of liability and coverage overlap and require expertise and knowledge of both areas to adequately represent the client and the insurer. This important intersection of efforts and issues starts at a very early stage. Under Florida law, prior to any construction defect claim being asserted in litigation, the owner must serve the contractors with a Chapter 558 compliant notice. This notice has specific requirements under Florida Statute § 558.004. These include notice of the alleged defects with detail sufficient to allow the recipient to determine the general nature of the claim and a description of the alleged resulting damage or loss. The 558 Notice is a pre-requisite to an owner's suit and provides parameters for pre-suit inspections and the opportunity to potentially cure the issues without litigation. We often see that a 558 Notice is properly sent, but the insured fails to pass this document along. Therefore, we regularly counsel that it is in the insured's best interest to immediately provide any and all 558 Notices and accompanying documents to its insurance carrier in order to keep the carrier apprised of the issues. However, this raises the question of what obligations the insurance carrier has at the 558 stage.

Recently, the Southern District of Florida endeavored to provide clarity on the obligations of an insurance carrier after a 558 Notice has been received. In *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co*., 2015 U.S. Dist. LEXIS 72466 (S.D. Fla. June 4, 2015), Altman Contractors served as the general contractor of a condominium tower being built in Broward County, Florida and had an insurance policy with Crum & Forster that was applicable to the project. Subsequent to completion, the condominium tower discovered alleged defects and served Altman with a Notice of Claim and Supplemental Notices of Claim under Florida Statute 558. In response to the 558 Notices, Altman sent a demand letter to Crum & Forster providing notice of the condominium tower's claims and demanding that Crum & Forster defend and indemnify Altman. Crum & Forster denied the demand on the basis that the matter was not yet in suit and, therefore, did not trigger the duty to defend. Altman subsequently filed a declaratory judgment action against Crum & Forster that sought a determination that the insurer owed Altman a duty to defend and indemnity relative to the 558 Notice.

In considering opposing motions for summary judgment, the U.S. District Court for the Southern District of Florida focused on the rules for insurance contract interpretation and the specific policy language at issue. The court found no ambiguity within the applicable policy terms and relied on the plain language of the terms at issue. Specifically, the Crum & Forster policy included an obligation to pay damages to which the policy applied and to defend against any "suit" seeking those damages. The term "suit" was further defined in the policy as meaning a "civil proceeding." Therefore, the court focused on the plain meaning of the term "civil proceeding." In looking at various sources, both in place at the time of the ruling and in place at the time of the applicable policies, the court determined that a "civil proceeding" must include some sort of forum or the involvement of a decision maker, such as litigation or arbitration. As such, it was determined that the 558 Mechanism, including the actions surrounding a 558 Notice of Claim, does not constitute a "suit," and the court held that Crum & Forster had no obligation to defend or indemnify Altman with respect to the 558 Notice under the terms of the applicable policies.

The implication of this ruling is that, so long as the policy language at issue has similar terms, a 558 Notice does not trigger the insurance carrier's obligation to defend and indemnify an insured. However, under the terms of many policies, this does not relieve the carrier of the obligation to investigate the claims being made. Therefore, despite the ruling in *Altman*, it is still in the best interest of the carrier and the insured for the carrier to retain counsel, even during the early stages of a 558 Notice. This allows for an effective investigation, which the carrier is obligated to perform under many policies. Further, the involvement of counsel allows for early legal analysis and potential resolution without the necessity of prolonged litigation. The 558 Notice, and its associated actions, remain an important aspect of construction defect claims and litigation, which, with proper representation, can lead to a much more efficient and effective handling of claims. ■

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PROFILE OF OUR ARCHITECTURAL, ENGINEERING & CONSTRUCTION DEFECT

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litigation issues, the contract documents, the facts of the litigation and the scope of the client's exposure. We pride ourselves on our ability to identify key issues early in the litigation, which allows us to develop the principled defense strategies required to defend the matter.

Our practice group's litigation experience includes initial negotiations, complex mediations, arbitration proceedings and jury trials involving all phases of construction litigation. Our attorneys and firm are dedicated to defending the simplest claims to catastrophic, high-risk exposure matters with the same attention to detail, knowledge of the facts, construction industry standards and the law. We follow precise procedures required to obtain favorable and controlled results.

We maintain open communication with our clients and the decision makers throughout the litigation process. Client objectives are a priority, and we collaborate with clients in strategizing the best course of action for the matter at hand, be it a trial track or an early settlement track. The application of this strategy is carried out by a team of experienced shareholders, associates and paralegals, all of whom are capable of handling highly sophisticated, complex construction litigation matters. We pride ourselves in our ability to present the relevant facts and available options to the client and decision makers so they can make the best decisions possible.

Collectively, the attorneys in our Architectural, Engineering & Construction Defect Litigation Practice Group are active in numerous industry organizations including the Professional Liability Underwriting Society, Defense Research Institute, and numerous state and local bar associations. Noted for their knowledge and experience, our attorneys are often sought after to present educational seminars focusing on instructing design and construction professionals alike in the nuances of construction litigation. Recent speaking engagements include the Engineers and Surveyors Association, the Chartered Property Casualty Underwriter Society, the American Institute of Architects and many client presentations.

Our practice group is available to assist you in your litigation requirements. We are also available to give presentations or to conduct training seminars. A representative sample of our clients is available upon request. ■

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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Flowing naturally from our self-identity, we stress to our attorneys that they must be committed to following insurer litigation guidelines closely. Our dedicated and talented internal auditors grade our attorneys on how well they follow insurer guidelines. That compliance is a critical performance area measured by management for year-end purposes.

We will not only maintain our internal training program, we will improve it. A high level of training will yield high-quality legal services, and it will give our clients cost savings in the process.

Our director of professional development and training, Larry Schempp, is an attorney. Larry was a full-time faculty member at the University of Pennsylvania prior to joining Marshall Dennehey, and he is an adjunct professor at the Temple University School of Law. Under Larry's direction, all associates receive initial orientation training. That training continues for new associates over the next two years—18 seminars that provide substantive and practical skills.

As our attorneys mature professionally, we provide advanced training and trial skill development courses. Last year, we conducted over 90 discrete training sessions for our attorneys. These programs keep our attorneys abreast of technology and current legal issues, and they sharpen litigation skills so our attorneys problem-solve more efficiently for our clients.

We are acutely mindful that more and more insurers stress early resolution of cases. Our insurer partners want cases promptly investigated, discovered, and sized up quickly so they can be properly reserved and resolved through mediation, settlement or otherwise.

To that end, we committed to assemble a group of seasoned attorneys who will identify and chart early resolution "best practices." We will be expanding our training curriculum to include programs to advance the early resolution objectives of our business partners.

Twenty years ago, we had perhaps a handful of paralegals. Currently, we employ approximately 100 paralegals. They are managed under the direction of an attorney, Linda Barron. We are very proud of this dedicated group. Tom Brophy, our president and CEO, began his career here as a paralegal, so no greater commitment exists for the continuing enhancement of our paralegal program.

Linda crisscrosses our firm throughout the year, presenting seminars to our paralegals so they can provide best practice litigation support to our clients. We enhance their sophistication with computer software search and find technology. We expose them to trial technology to better support our attorneys in the courtroom. All of our efforts are geared to furnishing quality legal services at a value cost.

Fully appreciating that technology is a key driver in our ability to manage "legal spend," our director of information technology, Roger Bonine, is developing several initiatives which should yield further value for our clients. By the fourth quarter of this year, Roger expects that he will have improved our existing central matter diary system so that every clients' individual guidelines will be entered into a database. Relevant requirements and deadlines for each client will be automatically applied to new matters as they are opened. The system will provide our attorneys with state-of-the-art ability to follow an insurer's guidelines. It will also afford management an ability to monitor and enforce that compliance.

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New Jersey—Long-Term Care Litigation

NEW JERSEY'S APPELLATE DIVISION ALTERS THE LANDSCAPE OF NURSING HOME LITIGATION

By Frank P. Leanza, Esq. and Ryan T. Gannon, Esq.*

KEY POINTS:

- No cause of action exists in nursing home negligence cases based on a defendant's "responsibilities" under the state and federal nursing home statutes.
- Based on the holding in *Ptaszynski v. Atlantic Health Systems*, defense counsel should aggressively litigate, during pretrial stages and discovery, any alleged violation of state and federal nursing home statutes.
- Under *Ptaszynski*, a plaintiff may not obtain a double recovery, but must present evidence at trial that the injuries suffered are different when claiming both negligence and violations of the Nursing Home Act.

Frank P. Leanza

Ryan T. Gannon

In New Jersey, the number of nursing home malpractice lawsuits filed has been on the rise. The "blue print" followed by many plaintiffs' attorneys is to engage in extensive written discovery, make document production requests and pursue numerous depositions on the issue of whether the defendant complied with the New Jersey Nursing Home Act, N.J.S.A. 30:13-1- 30:13-17, and the federal Omnibus Budget Reconciliation Act (OBRA). The focus of discovery regarding compliance with the New Jersey Nursing Home Act and OBRA is an attempt to establish a violation of one of the hundreds of regulations in the state and federal statutes. By establishing a violation of the New Jersey Nursing Home Act or OBRA, a plaintiff may argue he or she is entitled to attorneys' fees, costs of the lawsuit and treble (triple) damages.

In 1976, the legislature enacted the New Jersey Nursing Home Act to provide rights to residents and regulations to be followed by nursing homes in the state of New Jersey. The regulations governing nursing homes under the New Jersey and federal statutes are extensive. Under the New Jersey statute, residents have certain "rights" delineated by N.J.S.A. 30:13-5a-n. Also under the New Jersey statute, nursing homes have certain "responsibilities" pursuant to N.J.S.A. 30:13-3a-j, including N.J.S.A. 30:13-3(h), which requires a nursing home to ensure compliance with all applicable New Jersey and federal statutes, rules and regulations. The federal statutes contain hundreds of regulations that a nursing home could potentially be in violation of.

Complaints against nursing homes often contain various counts, including claims that the nursing home violated the New Jersey Nursing Home Act and OBRA regulations and, also, general nursing or medical negligence claims. Relying on N.J.S.A. 30:13-3(h) of the New Jersey statute, plaintiffs often allege that the nursing home defendants failed to ensure compliance with all applicable state and federal statutes. If they prove a violation of one of the hundreds of New Jersey and federal statutory regulations, plaintiffs would potentially be entitled to attorneys' fees and costs.

Recently in *Ptaszynski v. Atlantic Health Systems*, 111 A.3d 111 (N.J.Super. App. Div. 2015), the Appellate Division changed the landscape of nursing home litigation. It reversed a jury verdict for the plaintiffs and remanding the case back to the trial court for a new trial based on several issues. At the trial level, the jury had found that the defendant was negligent and liable under the Nursing Home Act for violating one or more of the rules, regulations, or state or federal regulations applicable to the plaintiff's care.

In reversing the jury's award, the Appellate Division held that the provisions of the New Jersey Nursing Home Act did not provide a cause of action to the plaintiff to enforce the nursing home's "responsibilities" as defined by the law, including the defendant's obligation to comply with all applicable state and federal statutes, rules and regulations. Rather, the statute provides the Department of Health with the right to ensure that nursing homes are in compliance with their "responsibilities" under the statute. The New Jersey statute still permits plaintiffs to bring a cause of action for alleged violations of residents' "rights" under the statute, including the often-cited violation of N.J.S.A. 30:13-5(j)—the right to "a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident." However, the decision in *Ptaszynski* should narrow the causes of action available to plaintiffs in nursing home negligence cases.

The *Ptaszynski* court also reversed the jury verdict on the basis that the plaintiff's evidence failed to distinguish injuries and harm caused by the defendant's violations of the Nursing Home Act and those caused by its alleged negligent nursing care.

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New Jersey—Workers' Compensation

APPELLATE DIVISION APPROVES, BUT LIMITS, SANCTIONS IN NEW JERSEY WORKERS' COMPENSATION PROCEEDINGS

By Robert J. Fitzgerald, Esq.*

KEY POINTS:

- The court will uphold an imposition of sanctions for failure to comply with orders for medical and temporary benefits.
- While the amount of a sanction is limited to $5,000, the court will also allow an assessment of counsel fees (which are not specifically limited) on top of a 25% penalty on the benefits due.
- In addition to monetary sanctions, the court may allow almost any penalty imaginable to enforce an order for medical and temporary disability benefits.

Robert J. Fitzgerald

In its latest decision on the subject, the New Jersey Appellate Division has approved the imposition of sanctions against an employer under the rules governing workers' compensation proceedings. In *Deborah S. Pschunder-Haaf v. Synergy Home Care of South Jersey*, 2015 N.J.Super. Unpub. LEXIS 1199 (N.J.Super. App. Div. May 22, 2015), as with most cases involving issues for sanctions, the underlying facts were extensively detailed by the court. The petitioner was a home health aide who was injured when her patient fell onto her, causing injuries to her lower back, spine, neck and head. The compensation judge ordered her employer to provide medical and temporary wage benefits and required that the petitioner be evaluated by Dr. Luis Cervantes.

The compensation judge then entered an order on September 7, 2010, permitting treatment of the petitioner with Dr. Cervantes and continuing temporary wage benefits until either Dr. Cervantes cleared the petitioner to return to work or until her employer provided a light-duty work option authorized by Dr. Cervantes. The employer failed to pay the petitioner's medical bills and terminated temporary wage benefits. The petitioner then filed motions to enforce the September 2010 order. The compensation judge entered orders requiring the employer to provide temporary wage benefits, medical care and counsel fees to the petitioner.

The petitioner then underwent fusion surgery, suffering post-surgical complications related to her left shoulder. The employer did not provide for post-surgical treatment, so the petitioner filed another motion seeking to enforce the September 2010 order, requesting sanctions and counsel fees. The compensation judge entered an order compelling the employer to provide treatment related to the post-surgical complications. The petitioner subsequently filed amended claim petitions to include the derivative injury to her left shoulder and a purported derivative injury to her left knee.

The employer again failed to authorize certain medical care and temporary wage benefits, and the petitioner filed another motion to enforce the September 2010 order. The compensation judge, again, entered an order requiring the employer to provide medical treatment and temporary wage benefits pending a hearing.

The compensation judge heard testimony from the petitioner, her medical expert, Dr. Craig Rosen, and the employer's medical expert, Dr. Gregory Maslow. The compensation judge issued an oral decision compelling the employer to provide medical treatment for the petitioner's primary and derivative injuries related to the incident and temporary wage benefits. The compensation judge denied the employer's motion for reconsideration and entered an order in February 2014 that required the continuation of medical care and temporary wage benefits; imposed sanctions on the employer in the amounts of $5,000 and $10,000; and awarded the petitioner $7,500 in counsel fees and $5,654.10 in reimbursement for other expenses.

On appeal, the employer argued that the petition regarding the derivative injuries was procedurally deficient. The employer also asserted that the February 2014 order went against the weight of the evidence and that the imposition of sanctions and award of fees were erroneous.

The court quickly rejected the employer's contention that the claim petition for derivative injuries was procedurally deficient. The court stated that "[the Petitioner] filed an amended petition as it related to her knee and shoulder thus putting Synergy on notice of her claim. [The Petitioner's] counsel requested a hearing; she was examined by multiple doctors, including [the employer's] expert; and [the employer] had the opportunity to review the reports prior to the hearing."

The court, likewise, quickly rejected the employer's contention that the last order for medical treatment and disability benefits went against the weight of the evidence. In analyzing the compensation judge's credibility findings, the court stated that, "[w]e find no reason to disturb the compensation judge's findings which were aptly stated in her amplified decision. The compensation judge considered the evidence presented, and her conclusions that the left knee was a derivative injury and that the left shoulder required medical care are supported by credible evidence in the record."

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Ohio—Insurance Coverage/Bad Faith

LIMITING OR DISPOSING OF INSURANCE CLAIMS AND LAWSUITS BY UTILIZING BANKRUPTCY RECORDS AND THE DOCTRINE OF JUDICIAL ESTOPPEL

By David J. Oberly, Esq.*

KEY POINTS:

- The doctrine of judicial estoppel precludes parties from taking differing positions on the same issue in separate legal proceedings.
- Where an individual undervalues his or her property in bankruptcy, judicial estoppel may limit a later property damage claim/lawsuit.
- Judicial estoppel may also completely bar a cause of action that a party failed to disclose in prior bankruptcy proceedings.

David J. Oberly

Judicial estoppel precludes a party from assuming inconsistent positions in separate legal actions. If a party takes one position in a prior legal action, he or she cannot take a different position on the same issue in a subsequent action. The doctrine of judicial estoppel is intended to guard the judicial system against improper use. However, it also serves as a potential weapon that can be used to limit, or completely defeat, a wide variety of insurance-oriented claims and lawsuits. Unfortunately, it is an often overlooked tool that many claims professionals and defense attorneys fail to utilize in the course of their practices.

Judicial estoppel is an equitable doctrine governed by equitable principles. The doctrine "protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." Judicial estoppel is applied in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite in another suit. Under the doctrine of judicial estoppel, a party may not take a position in a court proceeding that is inconsistent with that party's position in a previous court proceeding that he successfully advanced under oath. In Ohio, judicial estoppel applies where a plaintiff: (1) asserted a contrary position, (2) under oath in a prior proceeding, and where (3) the prior position was accepted by a court. However, judicial estoppel does not apply when the party's prior inconsistent position was a result of mistake or inadvertence.

The United States Bankruptcy Code and the Federal Rules of Bankruptcy Procedure impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims. Once the debtor initiates bankruptcy proceedings, the debtor's assets, including legal claims, become the properiate basis for the imposition of judicial estoppel.

Judicial estoppel has been applied by Ohio courts in a variety of contexts. Importantly, judicial estoppel may be applied to foreclose a plaintiff from litigating a claim he or she failed to disclose as an asset in a prior bankruptcy proceeding. A longstanding tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, for the benefit of creditors, all his interests and property rights. "It has been specifically held that a debtor must disclose any litigation likely to arise in a non-bankruptcy context." Moreover, "the debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information (*i.e.*, the material facts) prior to confirmation to suggest that he may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed." Such a cause of action is property of the bankruptcy estate, whether or not the cause of action is substantively valid. In the context of the bankruptcy system and the duty to disclose all claims, even contingent ones:

> The rationale for *** decisions [invoking judicial estoppel to prevent a party who fails to disclose a claim in a bankruptcy proceeding from asserting that claim after emerging from bankruptcy] is that the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when disclosure provided by the debtor is incomplete.

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A MESSAGE FROM THE EXECUTIVE COMMITTEE

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We are implementing a new billing system, which should roll out in early 2016. This system will improve our compliance with our clients' guidelines, and we are optimistic that the system will reduce the time and effort expended by everyone involved in the invoice review process.

We are installing hardware at each regional office to provide a secondary route to our Philadelphia data center. This will ensure that attorneys can continue to access documents and e-mail in the event their office's primary data connection is interrupted. Also, we are updating our firm's document management system to give us an enhanced level of data security for HIPAA files and other sensitive documents. Later this year, we will review our IT infrastructure and software with a view toward improving resiliency and availability of our key systems in the event of a disaster or long duration power outage. All of these IT commitments will yield efficiencies, security and operability for the benefit of our clients.

CLM's March 2015 study also identified the most important metrics when measuring litigation management success: average cost per case, average case cycle time and the ratio of cost to indemnity. If these areas of performance are important to our business partners, they are important to us. We have the ability to measure these metrics. We intend to include these metrics in the evaluations of our professionals and to determine how these metrics can be meaningfully shared with our clients.

Times will continue to evolve, and change will be our constant companion. But there are some things at Marshall Dennehey that will never change. We remain committed to being a civil defense litigation firm. We commit to be fully synchronous with our clients' goals and objectives. We commit to be attentive to the needs of our insurer partners. We commit to add more value to our relationships with them, and we invite constructive criticism when we do not. We commit to being the best defense law firm in every line of business and geographical location where we are positioned. We will strive to live up to our commitments and exceed client expectations, one matter at a time and each and every day. ■

CAN PLAINTIFF BOARD THE AMOUNT

(continued from page 5)

The Delaware Supreme Court followed the first approach. It found that the fact that the medical providers agreed to provide their services to Medicare patients for the amount Medicare pays for their services suggested that, that amount was their reasonable value. This approach has an attractive simplicity and negates the need for expensive expert testimony. Thus, in the case of provider write-offs for Medicare patients, Delaware now holds that the proper measure of damages for the medical services the plaintiff received is the amount Medicare paid for those services, not what the providers originally charged. ■

APPELLATE DIVISION APPROVES

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The court then went into a more detailed analysis of sanctions, fees and costs that were ordered as allowable under Section 64, Section 28.1 and the Special Rules. On the issue of sanctions, the court referred to Rule12:235-3.16(h) and particularly emphasized the following limitation under paragraph 2.:

> Levy fines or other penalties on parties or case attorneys in an amount not to exceed $5,000 for unreasonable delay or continued noncompliance.

The court affirmed imposition of the $5,000 sanction, the attorney's fees and other costs on the employer as not excessive and within the compensation judge's discretion. However, the court remanded the case as to the $5,654.10 award related to Dr. Rosen's $800 and $4,500 fees since expert fees are specifically limited by the Rules. Finally, the court vacated the $10,000 sanction, finding that the compensation judge abused her discretion in awarding a sanction in excess of the Rules, but essentially remanded to see if there is another type of sanction that is allowable.

The court's decision again shows its acceptance of harsher financial penalties against employers who fail to comply with orders for medical and temporary disability benefits. While this decision confirms there are limitations on the assessment of expert fees and sanctions, it also shows that the court will give as much leeway as possible to compensation judges when it comes to enforcing orders for benefits. Employers should know that failure to comply with orders for medical and temporary benefits could dramatically increase their financial exposure and litigation costs, and they should take extreme caution to avoid expensive proceedings such as these. The financial ramifications could be, literally, almost endless. ■

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Eric Weiss, **Eric Yun**, **Shane Haselbarth** and **John Hare** (Philadelphia, PA) obtained summary judgment on behalf of a large Japanese equipment manufacturer in a catastrophic brain injury case in a product liability action in Armstrong County, Pennsylvania. A front-end loader was being operated on a public highway and was making a left turn while a vehicle operated by a co-defendant was attempting to pass. The passing vehicle struck the raised bucket of the front-end loader, sheering off the top of the vehicle and, unfortunately, causing significant skull shattering and loss of brain tissue to the plaintiff, resulting in profound neurological defects and cognitive and physiologic disabilities. The plaintiff, 27 years old at the time of the accident, is totally dependent. The plaintiff claimed that the lighting array on the front-end loader was defectively designed because the "hazard" or "flashing lights" had been incorporated into the directional lighting such that when the vehicle's hazard lights were turned on, the directionals were overridden by the hazard lights. We filed a motion for summary judgment contending that the operator of the passing vehicle unequivocally testified that he only observed red lights illuminated, not amber lights, and, thus, the purported defect could not have been a cause of the accident. The lower court granted summary judgment. The plaintiff's motion for reconsideration was denied, and the case was appealed. The Superior Court denied a petition for appeal, and John and Shane were able to prevail at each level of the appeal.

Walter Klekotka (Cherry Hill, NJ) won a defense verdict in Monmouth County, New Jersey. The case involved a 90-year-old plaintiff who fell while walking to a seat in a darkened movie theater. She fractured her right dominant shoulder and elbow, requiring open reduction and internal fixation. Walt was successful in getting counsel to agree to an expedited trial in which the medical expert reports were submitted to the jury without the need for live testimony. This was done to limit the potential downside exposure as both experts agreed that the plaintiff was severely and permanently disabled as a result of the fall and necessary surgeries. The case involved a Medicare lien of $51,333, which counsel also agreed would not be submitted to the jury but would be added on to any potential verdict at the end of the plaintiff's case. After a little over an hour, the jury returned a verdict in favor of our client.

George Helfrich and **Gregory Speier** (Roseland, NJ) won a defense verdict following a six-day jury trial in the Superior Court of New Jersey, Bergen County. The plaintiff alleged a slip and fall accident on snow and ice at the defendant's commercial property in Westwood, New Jersey. The plaintiff alleged that she sustained an aggravation of prior cervical herniated discs; torn labrum in both shoulders necessitating bilateral surgeries; aggravations of certain bilateral TMJ issues; as well as aggravation of certain pre-existing anxiety disorders. George and Gregory were able to significantly limit the medical testimony of the plaintiff's medical experts in regard to the aggravation claims due to the experts' failure to provide a comparative analysis of the pre-existing conditions to the injuries actually sustained in this accident. In addition, they were able to significantly limit the medical expense issues presented to the jury and the alleged lost wage claim in their cross examination of the plaintiff's experts. As to liability, the defense not only produced the owner and managing agent for the building, but George and Gregory also elicited testimony about the development and construction of the sidewalk to rebut the plaintiff's allegations concerning defects. Also, two representatives of the tenant who occupied the building were presented to testify about the foot traffic at the building that day. The jury returned a No Cause verdict in 12 minutes, finding no negligence as to the owner or the managing agent.

John Tucci, **Douglas Kent**, **Nicolai Schurko** and **Shivaun Rashid** (Philadelphia, PA) won a defense verdict in a property damage case where a fire gutted the interior of a restaurant. The plaintiff, the owner of the restaurant, sought damages in excess of $2.5 million, and there was also a subrogated insurance claim of $450,000. The plaintiff alleged that our client, a fire suppression company, was negligent in its bi-annual inspection and maintenance of the kitchen fire suppression system. The other defendants in the case included a duct cleaning company and, somewhat bizarrely, the plaintiff's own companies and employees on theories of improper management and failure to activate the fire protection system manually on the date of the fire. The key issue in the case was the cause and origin of the fire. The plaintiff asserted that the fire occurred as a result of heat transfer or a flare up on the cooking surface, which caused the ignition of grease or grease vapors in the exhaust ducts. The plaintiff presented evidence that our client had failed to inspect and service three fire suppression nozzles that were located in a remote section of the restaurant's ductwork. However, the defendants were able to prove through the testimony of various lay and expert witnesses that there were at least five potential causes of the fire and that the origin of the fire was not the cooking surface. Accordingly, while the jury did find that the defendants were negligent, they found that there was no causal connection between the negligence of the defendants and the fire.

Matthew Schorr and **Gregory Speier** (Roseland, NJ) won a defense verdict following a two-week trial in Camden County, New Jersey. Our client, a stevedore company responsible for discharging cargo ships, had off-loaded telephone pole-sized pillars of solid steel, known as "blooms," from a ship at a marine terminal port and stacked them on the pier. The plaintiff was a supervisor for the port owner, whose company was responsible for subsequently

** Prior Results Do Not Guarantee A Similar Outcome*

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loading the blooms by forklift onto trucks for delivery to the end user. During the truck loading process, the forklift operator and our client's "checker" (responsible for insuring that the correct inventory was being loaded and shipped) experienced difficulty loading the last of three blooms onto a truck. The plaintiff, as supervisor of the forklift operator, stopped to assist. While attempting a routine repositioning procedure, the bloom, which weighed approximately seven tons, inadvertently rolled off the forklift blades, crushing the plaintiff's right leg and necessitating an above-the-knee amputation. The plaintiff alleged that the accident and injury resulted from our client's negligence with improperly stacking the blooms after discharge, as well as the checker's involvement during the repositioning procedure. The plaintiff's demand was $3.5 million. The jury ultimately concluded that any negligence of our client did not proximately cause the accident but, rather, the accident was caused by the conduct of the forklift operator and the plaintiff himself.

James Cole (Doylestown, PA), **David Krolikowski** (King of Prussia, PA), **John Hare** and **Bruce Morrison** (Philadelphia, PA), **Thomas Specht** (Scranton, PA) and **Katharine Mooney** (Doylestown, PA) won a unanimous jury verdict after a four-week trial in Bucks County, Pennsylvania. The plaintiffs' demand never moved from $9 million throughout the trial. The plaintiff family (mother, father and adult daughter) claimed that their house was contaminated by a common disinfectant solution with the same active chemical composition as Chloraseptic throat spray. The product was applied during a water mitigation by a contractor referred by their homeowners' insurance company. The family claimed a myriad of injuries, including "chemical desensitization," with symptoms ranging from heart palpitations to bleeding gums to bowel incontinence. The family abandoned their home, claiming it needed to be torn down, the foundation ripped out of the ground and all of the personal property disposed of. Jim and his team represented the homeowners' insurance carrier in claims for breach of contract, promissory estoppel, bad faith, and violations of the Unfair Trade Practices and Consumer Protection Law. The plaintiffs' theory was that, because the insurance company referred the contractor, the insurance policy was transformed from a policy of insurance to an irrevocable contract of construction, thereby making the insurer liable for any consequential damages resulting from the contractor's work. Legal and evidentiary issues abounded, but ultimately the jury returned a unanimous defense verdict on the breach of contract claim, and the judge entered a verdict in favor of our clients on the bad faith and UTPCPL claims.

Jennie Philip (Doylestown, PA) won her first trial before in the Philadelphia Court of Common Pleas. Jennie represented the homeowners' insurance carrier in a claim for breach of contract. The plaintiffs' theory was that a storm caused interior and exterior water damage to their home to the extent that the entire exterior stucco of the home required replacement. The plaintiffs presented testimony that the damage was "sudden and accidental" within the terms of the insurance policy. Jennie was able to establish, through testimony of expert witnesses, that the sheathing behind the stucco of the plaintiffs' home was rotted and had been deteriorating for a significant period of time and, therefore, was properly excluded pursuant to the terms of the insurance policy. The judge found in favor of the defense.

David Wolf (Philadelphia, PA) achieved a defense verdict in a non-jury trial in Philadelphia Common Pleas Court. The plaintiff slipped and fell on liquid soap in our client's store and claimed to have sustained a torn shoulder labrum. David argued that the plaintiff failed to prove that the store had ample constructive notice of the liquid, which was bolstered by the store's "clean sweep" inspection program logs, which showed that the floor area was last checked five minutes earlier. Plaintiff's counsel argued that an adverse inference was warranted due to our client's alleged spoliation of video depicting the prior inspection, despite production of video showing the plaintiff's movements within the store. The judge ruled that any such video depicting the activities of the floor inspector would not be probative on the issue of notice. Further, she ruled that, despite the admitted occurrence of the accident, based on the plaintiff's description of the liquid as fresh, our client was not on sufficient notice of the hazard.

HEALTH CARE DEPARTMENT

Candy Barr Heimbach and **Wendy R.S. O'Connor** (Allentown, PA) achieved a defense verdict on behalf of our client, an orthopedist, with respect to claims that surgical screws used during surgery to repair a fracture of the right forearm were excessively long. The plaintiff had sustained a fracture as a result a car accident. After our doctor casted him, the plaintiff neglected to return for treatment, removed his cast and sutures himself, and was generally non-compliant such that the surgery was needed. The plaintiff continued to be non-compliant during the post-operative period and never told his doctor that he was experiencing unusual pain or crepitus until four months after the surgery. Eventually, the plaintiff sought treatment with another physician, who testified as his expert at trial. The jury returned a unanimous defense verdict.

Lynne Nahmani and **Matthew Rydzewski** (Cherry Hill, NJ) obtained their client's dismissal at trial. The active, 36-year-old plaintiff claimed that the defendant podiatrist improperly used a modified Youngswick surgical technique to correct her first metatarsal and, instead, suggested that a fusion should have been performed. The plaintiff claimed permanent disability, pain and suffering, and an unsteady gait that resulted in multiple subsequent injuries. Additionally, the plaintiff claimed that the surgery was performed below the standard of care and that the physician did not obtain informed consent. Surveillance found the plaintiff at a local beach, walking blocks in the sand, carrying beach gear and later gingerly walking in flip flops without difficulty. Once the plaintiff's expert was aggressively deposed, motions in limine were carefully crafted to limit the expert's testimony, thereby reducing the matter so significantly that a dismissal was granted at trial.

Sharon Suplee (Cherry Hill, NJ) won a defense verdict in a jury trial in Middlesex County, New Jersey. The plaintiff claimed that our client, a podiatric surgeon, failed to diagnose osteomyelitis in a patient who had initially presented with a gangrenous left toe

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and cellulitis in the leg. Three days after his last visit to our client, the decedent plaintiff was hospitalized with bacteremia, developed septic shock and died. The plaintiff asserted that, had the diagnosis been made sooner, the plaintiff could have been treated more aggressively, thereby preventing his death. The case was defended on the standard of care in that the patient had already been on an antibiotic prescribed by his personal physician, had shown signs of improvement and, ultimately, resolution of the cellulitis. The case was further defended on causation through an infectious disease expert, who opined that the blood stream infection was not related to the osteomyelitis (which was later confirmed) but, rather, to a soft tissue infection of the toe. The infectious disease expert further testified that there was no reason to suspect such an infection was occurring during the time our client saw the patient. The jury found that our client did not deviate from the standard of care and was not negligent.

Robert Evers, **Nicholas Rimassa** (Roseland, NJ) and **Walter Kawalec** (Cherry Hill, NJ) won a victory in the New Jersey Appellate Division. Our client is a surgeon whose patient had multiple procedures involving cardiac catheters, some done by our client. One of the catheters broke and lodged in the plaintiff's heart. When it was discovered and removed, our client told the plaintiff and his wife that he was taking full responsibility and noted it as much in the medical record. The plaintiffs' attorney did not file suit against our client but attempted to build a product case against the manufacturers of one of the catheters. The plaintiffs were convinced that the catheter piece was from a surgery other than the one our client performed. By the time they learned they were wrong, the statute of limitations had run. The plaintiffs argued that the discovery rule applied, but the Appellate Division rejected that argument, finding that the plaintiffs were on notice sufficiently from at least the time when our client stated he was taking responsibility. Bob and Nick prevailed on the summary judgment motion. On appeal, Walt drafted the brief, and Nick argued the matter before the Appellate Division.

Candy Barr Heimbach and **Michelle Wilson** (Allentown, PA) won a defense verdict in favor of our client, a hospital, which was sued as a result of a non-employee radiologist's interpretation of films taken due to pain post-total knee replacement. The plaintiff claimed that the radiologist, who was not sued, failed to note a femur fracture that allegedly then progressed to a more complex fracture throughout the course of the plaintiff's inpatient rehabilitation. The plaintiff also sued the operating orthopedic surgeon for his review of the films or, alternatively, for his failure to clinically diagnose an occult fracture and to make the patient non-weight bearing while following up further. Finally, she sued two physiatrists and the rehabilitation hospital to which she was admitted under that alternative theory. The plaintiff alleged she required three subsequent surgeries to address the more complex fracture and its sequelae, underwent longer and more extensive inpatient and outpatient rehabilitation, lost additional time from work, and continues to have pain, loss of function and diminishment of activities. After a two-week trial against all defendants, the jury quickly returned a verdict of no negligence against all defendants, finding that the radiological interpretation and clinical were appropriate.

Candy Barr Heimbach and **Michelle Wilson** (Allentown, PA) won a defense verdict in favor of our client, a radiologist, who was sued for his interpretation of the x-ray study of a hip for hip pain. The plaintiff claimed that the x-ray showed evidence to suggest the start of avascular necrosis (AVN) and that the failure to diagnose and immediately treat the patient allowed death of the bone to the point where a hip replacement was required. The case was defended on the propriety of the interpretation, which had been criticized only by the plaintiff's orthopedic expert. Our expert and client pointed out to the jury the lack of any evidence of AVN, which, instead, was apparent on an x-ray and MRI taken over four months later for which the plaintiff still did not have treatment for another four months. The jury quickly returned a unanimous verdict of no negligence as to our client.

Sharon Suplee (Cherry Hill, NJ) won a defense verdict in a jury trial in Gloucester County, New Jersey. Our client was a podiatric surgeon who performed a lapidus procedure on the plaintiff. The 44-year-old plaintiff claimed the surgery was inappropriate and a deviation from the standard of care, which caused an imbalance in the structure of her foot that will cause her problems for the rest of her life and require additional surgeries. The plaintiff further claimed a lack of informed consent, asserting she was never advised that this procedure was being performed and she was not aware that plates and screws would be used. The defendant doctor died prior to trial, so he was not deposed, and no testimony was ever taken from him. The plaintiff's case included claims for spoliation of evidence and punitive damages related to billing and recordkeeping issues. The case was defended through expert testimony supporting the surgery as appropriate and the preferred procedure for this patient. Informed consent was defended by challenging the credibility of the plaintiff. The plaintiff's demand going into trial had been $750,000.

Fredric Roller, **Michelle Moses** (Philadelphia, PA) and **Michele Primis** (Pittsburgh, PA) won a defense verdict in Allegheny County, Pennsylvania. The plaintiff claimed she underwent unnecessary foot surgery that not only exacerbated ongoing complex regional pain syndrome (CRPS) but also resulted in the amputation of a toe. The plaintiff claimed the doctor failed to recognize ongoing CRPS following a fracture and several months of conservative care and had mistakenly attributed her chronic pain to a malunion of the fracture site, which the doctor maintained was causing nerve compression. He performed two surgeries over the course of nine months, after which she left the practice and, ultimately, underwent three more surgeries, as well as being treated for CRPS. Facebook pictures showed a different story about her activity level over a 16-month period prior to her toe amputation. The jury returned with a unanimous defense verdict.

Stacy Delgros (Cleveland, OH) received a defense verdict in a case involving a delay in the diagnosis of lung cancer in a 55-year-old non-smoker. A lung nodule was found coincidentally on a CAT scan of the plaintiff's chest after he was involved in a bicycle crash, which occurred sometime after a cardiac event. The plaintiff was

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admitted to the hospital where he underwent a catheterization. He was sent home without being told of the finding and claimed he was not told until seven months later, after which he waited another four months to see a physician. Stacy represented the Emergency Medicine physician who ordered the test, who admitted that he did not tell the plaintiff about the finding. After a seven-day trial, the jury found that the physician acted properly in not telling the patient about the finding. There were co-defendants who settled the case the week before the trial, in addition to a cardiologist who was also found to have acted properly in not telling the patient. Although they were not required to make this determination, the jury answered the interrogatories in which they found the patient 100% responsible for the delay, causing his cancer to go from a curable stage to terminal.

Robin Snyder and **Mark Kozlowski** (Scranton, PA) won a defense verdict after a nine-day trial in Wayne County, Pennsylvania. The 52-year-old plaintiff presented to the emergency department with chest pain and stroke-like symptoms. She was administered 25 mg Phenergan IV in her hand, twice. When her symptoms resolved and the MRI was clean, she was discharged. She returned two days later complaining of swelling in her hand and was diagnosed with infiltration. The plaintiff claimed she developed Complex Regional Pain Syndrome and that she was disabled and unable to continuing working. Phenergan carries a Black Box warning that subcutaneous injection or perivascular extravasation may cause necrotic tissue. The jury found that the doctor, nurse and hospital did not breach the standard of care.

Rasheen Davis and **William Banton** (Philadelphia, PA) won a defense verdict in a medical malpractice case involving a nursing home in a jury trial in the Philadelphia Common Pleas Court. The case involved a 64-year-old woman who suffered a severe CVA with hemiparalysis. The plaintiffs asserted claims of professional malpractice based on the theories of corporate and vicarious liability. The plaintiffs alleged that the nursing home failed to monitor and adjust as necessary the administration of Coumadin and Lovenox, which allegedly caused several injuries, including acute hypotension, disseminated intravascular coagulopathy, cardiovascular arrest and severe dehydration, which ultimately led to the patient's death. The plaintiff also alleged that the defendant failed to promptly identify and treat the plaintiff's sepsis. After two days of deliberations, the jurors returned with a defense verdict.

PROFESSIONAL LIABILITY DEPARTMENT

Thomas Gerard and **Art Aranilla** (Wilmington, DE) won an appellate victory before the Delaware Supreme Court in their representation of a Maryland government agency. The matter had been dismissed at the trial court level based on lack of personal jurisdiction. On appeal, the plaintiffs reasserted personal jurisdiction in Delaware on several bases, but primarily because they were injured in Delaware and were allegedly covered by our client's insurance policy. Tom and Art argued that, while the Delaware Long Arm Statute confers personal jurisdiction on Delaware courts when tortious injury occurs in Delaware, the plaintiffs had asserted no tort; rather, the plaintiffs had brought a no-fault PIP claim. Accordingly, the Delaware Supreme Court found no cognizable basis for personal jurisdiction in Delaware and affirmed the lower court's decision.

Ray Freudiger and **Matthew Hamm** (Cincinnati, OH) obtained dismissal of a putative class action lawsuit in the Hamilton County Court of Common Pleas. Ray and Matt were local counsel on behalf of a national supermarket chain, and they worked with a defense team that had previously settled similar cases in New Jersey, Florida and California. The plaintiffs' claims arose as a result of allegedly false, deceptive and/or misleading labels/packaging on poultry products in violation of state statute and common law. The defense moved to dismiss on the basis of federal preemption. The trial court agreed that it had no subject matter jurisdiction and that the plaintiffs had failed to state a claim. The court dismissed all of the plaintiffs' claims with prejudice. Our firm's knowledge of and experience in the local forum was instrumental in the formulation and ultimate success of the defense strategy.

Gregory Fox (Philadelphia, PA) obtained summary judgment in favor or our client, a large mortgage lender, in a complex mortgage foreclosure proceeding in Berks County, Pennsylvania. The borrower challenged our client's standing to foreclose, arguing that it could not prove standing since it did not produce the original promissory note that had been signed over to it. In addition, the borrower contended that the foreclosure was improper because: (1) the Assignment of the mortgage to our client was signed by a person purporting to be a representative of the prior mortgagee (when, in fact, she was really an employee of our client); and (2) our client allegedly violated the National Mortgage Settlement and the directives under the federal Home Affordable Modification Program by failing to consider loss-mitigation alternatives to foreclosure. Although the borrower cited authority supporting its standing argument, Greg was able to distinguish the cases, arguing that, unlike in those matters, the borrower had produced absolutely no evidence to create an issue of fact as to whether our client held her promissory note. Greg was able to defeat the borrower's other arguments because: (1) although the Assignment of the mortgage to our client was actually signed by our client's own employee, he showed that the employee was also authorized by corporate resolution to execute such assignments on behalf of the prior mortgagee; and (2) although violation of the National Mortgage Settlement and Home Affordable Modification Program directives can be an equitable defense to a "quick foreclosure" that only applies when the lender makes no effort to explore alternatives to foreclosure, Greg showed the court that our client had actually worked with the borrower for years in an effort to avoid foreclosure. The judge signed the summary judgment order from the bench following the oral argument.

Sharon O'Donnell (Harrisburg, PA) was successful in defending a local non-profit organization whose dual purpose is to rehabilitate persons newly released from prison, by providing them with education and jobs in food service, and to make and distribute fully-prepared nutritious meals to 600 disadvantaged public school

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children in the Harrisburg area. The plaintiff, a former employee, filed a Whistleblower complaint with OSHA, alleging he was terminated for reporting improper food service safety practices. We prevailed by convincing OSHA that his unprofessional conduct was the real basis for his termination.

Lila Wynne and **Kevin Bright** (Cherry Hill, NJ) won summary judgment in a toxic tort case involving claims of mold exposure. Our client was hired to perform a post-remediation inspection of the plaintiffs' basement following a sewage backup that resulted in several inches of raw sewage entering their home. The plaintiffs argued that our client was negligent for failing to test the basement for mold as part of its post-remediation inspection and that the failure to do so constituted consumer fraud. The court granted our motion on the basis that there was no evidence that our client was hired to test for mold and that the only evidence of mold following the incident was the plaintiffs' expert report, which was based on an inspection that occurred four years after the sewage backup. Regarding the fraud claims, the court found that, because our client was hired by the remediation company, not the plaintiffs, there were no representations to the plaintiffs and, thus, no basis to allege fraud.

Gabriella Garofalo-Johnson (Roseland, NJ) won a defense verdict on behalf of our insurer client following a bench trial in the Superior Court of New Jersey, Passaic County. The plaintiff filed suit against our client alleging breach of contract and bad faith, among other counts, after our client denied coverage on the basis of fraud and material misrepresentations. The plaintiff alleged that his vehicle was hit while left parked in a vacant lot in Paterson, New Jersey. After conducting a thorough investigation using a collision analyst expert, our client determined that the damage to the vehicle occurred while the vehicle was in motion, not parked. Gabriella was able to demonstrate that the plaintiff lacked credibility, since he failed to present any witnesses to the accident, failed to file a police report and became hostile during a recorded statement conducted by our client's claims professional. Further, Gabriella utilized a damage appraiser and a collision analyst expert to present testimony proving that the vehicle was damaged while it was in motion. The judge denied every count of the plaintiff's complaint, finding no bad faith as our client had a reasonable basis to deny coverage.

Arthur "Terry" Lefco, **Wilhelm Dingler** and **Kimberly Boyer-Cohen** (Philadelphia, PA) successfully defended a Montgomery County Court of Common Pleas entry of a non-suit for failure of the plaintiff to prosecute the matter. This accounting malpractice action had been pending since June 2001. When the motion was filed in November of 2012, the plaintiff had not taken any action of record for over five years. The court was persuaded that we had demonstrated sufficient prejudice to warrant entry of *non pros*. During the delay, the director of the client accounting firm had passed away, as did his successor a year later; our client was diagnosed with a degenerative neuromuscular disease; and our expert "retired," leaving no forwarding address. The trial court concluded that the plaintiff's delay caused sufficient prejudice and that the plaintiff had no reasonable explanation for the delay. The Superior Court affirmed.

Claudia Costa (Roseland, NJ) won a defense jury verdict in a legal malpractice action in the Superior Court of New Jersey, Morris County. The plaintiffs alleged that our defendant clients, an attorney and his law firm, committed legal malpractice during a real estate closing. At the closing, the plaintiffs sold a fitness facility and, at the same time, entered into a five-year lease for that facility with the purchasers of the business. The tenant defaulted at the end of the first year, and the plaintiffs retained possession of the premises and terminated the lease. It was at that time that the plaintiffs allege they first learned that no personal guarantees had been procured and there was no lien against the gym equipment. The plaintiffs never procured another tenant, and the property went into foreclosure. The plaintiffs insisted that they would have not gone through with the transaction without the protection of the personal guarantees and the lien, and they brought claims for $1.5 million for loss of the facility. The defense demonstrated that the plaintiffs had signed a series of agreements at closing that waived any requirements and the attorney had reviewed the closing documents with the plaintiffs. The court dismissed the $1.5 million claim, and the jury found no liability on the part of the attorney or the law firm.

Jeffrey Chomko and **Allison Livezey** (Philadelphia, PA) won a defense verdict after a five-day trial in Delaware County, Pennsylvania. They successfully argued that a real estate appraiser owed no legal duty to the purchasers of a bank-owned property when the appraisal failed to reveal that the house straddled two separate tax parcels, and the plaintiffs took title to only a portion of the house. Plaintiffs' counsel unsuccessfully argued that the mortgage lender, the realtors and the appraiser should have discovered the title defect, accepting instead the defense argument that only a survey of the property would have revealed the defect.

Gregory Fox and **Alesia Sulock** (Philadelphia, PA) secured the dismissal of a disciplinary matter against our client, a lawyer, brought by his former client. The claimant filed a complaint with the Office of Disciplinary Counsel (ODC), alleging that our client coerced and forced her into agreeing to a settlement she never wanted to accept. The ODC issued a formal request for our client's position on the complaint, suggesting that the allegations, if true, would constitute a violation of RPC 1.2(a), which mandates that matters of settlement are ultimately up to the client. Greg and Alesia argued that, while our client had certainly recommended the settlement, he properly left the ultimate decision to her, as evidenced by both his correspondence to her and her testimony before the judge as to her understanding of, and agreement to, the settlement. The ODC agreed and dismissed the complaint after receiving our response.

Joseph Santarone (Philadelphia, PA) won the granting of a motion to dismiss after oral argument in the U.S. District Court for the Eastern District of Pennsylvania. Joe represented a Bucks County, Pennsylvania school district, its superintendent and assistant superintendent. The case arose out of the elementary school

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restricting the father of a student from coming within 50 feet of the entrance of the school that his children attended. The restriction was put in place following complaints that had been made about him by teachers. The plaintiff's case alleged a violation of the equal protection clause, of substantive due process and of procedural due process. Evidence established that the plaintiff had a six-year history of stalking claims arising out of a very acrimonious divorce. The court dismissed the equal protection claim, noting that, unlike the plaintiff, his ex-wife and her current husband did not have a history of stalking. The court further ruled there was a rational basis for the school's imposition of the 50-foot rule and that the plaintiff was owed no procedural due process.

Sharon O'Donnell (Harrisburg, PA) and **Thomas Specht** (Scranton, PA) obtained summary judgment on behalf of a regional hospital that was sued for age discrimination by a 30-year veteran radiology technician. The plaintiff opposed the motion by arguing that corrective action information contained in her personnel file was hearsay and, therefore, inadmissible and unavailing to support a decision in favor of the hospital. The judge, in rendering his decision in a 20+ page opinion, disagreed, borrowing poignant language from a Second Circuit opinion that, "[i]n a discrimination case, we are decidedly not interested in the truth of the allegations against the plaintiff. We are interested in what motivated the employer [citations omitted]; the factual validity of the underlying imputation against the employee is not at issue.... Plaintiff's personnel file was offered to explain the reason for the discharge, and as such, is admissible."

Edwin Schwartz and **Nicole Ehrhart** (Harrisburg, PA) obtained a non-suit at the close of the plaintiffs' case in a legal malpractice jury trial in York County, Pennsylvania. The plaintiffs' claims arose from our client's drafting of a will that divided the decedent's estate among his wife (a half share) and his two children from a prior marriage (a quarter share each). The plaintiffs argued that the decedent's intentions were that their share of any jointly owned accounts (approximately $400,000) would be included in the estate and available for distribution to the plaintiffs. The plaintiffs argued that a prior 1983 Deed evidenced the decedent's intentions to include jointly-owned property. We argued that the Pennsylvania Multiple Party Accounts Act specifically precluded this finding and that the parole evidence rule precluded the plaintiffs' ability to argue the existence of verbal communications of the decedent that occurred after the drafting of the will by our client. After three days of trial, the court agreed that, despite the presentation of very contentious arguments by the plaintiffs, their witnesses and their expert, the plaintiffs had not satisfied their burden of proof.

WORKERS' COMPENSATION DEPARTMENT

Tony Natale (Philadelphia, PA) successfully defended a Philadelphia-based chemical mixing company in an appeal arising out of a workplace injury in Lancaster, Pennsylvania. The claimant sustained a large disc herniation at the L5-S1 level of his spine while lifting company property. Ultimately, the claimant developed severe right-sided radiculopathy and was given a surgical recommendation. The diagnosis and mechanism of injury were never disputed by the employer/insurer. However, Tony was able to uphold the underlying dismissal of the claim petition based on the claimant's failure to give notice of any injury within the meaning of the Pennsylvania Workers' Compensation Act. The claimant's appeal centered on the perceived violation that the notice provision of the Act had on the "humanitarian perspectives" of the legislation. Tony argued that the letter of the law can be harsh at times but, nonetheless, fair. The Workers' Compensation Appeal Board agreed and dismissed the claimant's appeal.

Tony Natale (Philadelphia, PA) successfully defended a well known decorative home furnishings supply company based in Allentown, PA. The claimant injured her lower back and left shoulder during the course and scope of employment due to repetitive lifting. She ultimately returned to work earning her pre-injury wages. The claimant then alleged that her work duties became so unbearable that she was forced to leave work, and she requested resumption of work-related disability benefits. Tony uncovered medical treatment records that documented a material intervening non-work-related accident involving the claimant's use of her motor vehicle which caused the alleged disability. The claimant vehemently denied that an "auto accident" had taken place. However, she was forced to admit on cross examination that, even if an actual "accident" did not occur, her non-work-related physical activities that were being performed in her car on the date in question caused her disability. Tony then was able to cross examine the claimant's medical expert and force him to admit that those non-work-related activities could lead reasonable minds to agree that causation for the claimant's disability was not work related. The judge dismissed the claimant's request for reinstatement of benefits.

Michele Punturi (Philadelphia, PA) received a favorable decision in a workers' compensation claim petition case. The claimant alleged work-related injuries to the neck and left shoulder. The claimant's testimony was taken by deposition, and also live, and was submitted with the deposition testimony of his medical expert. Michele presented three fact witnesses from the employer who were very familiar with the claimant's job duties and interacted often with the claimant, along with the testimony from the employer's Independent Medical Expert (IME) for the defense. The judge found the employer's witnesses' testimony credible and noted the lack of complaints made to them by the claimant, as well as the claimant's lack of reporting a work injury. Further, the testimony of the defense medical expert was found more credible than the testimony of claimant's medical expert on the basis that the defense's expert clearly addressed all of the prior medical records. The claimant's medical expert did not have the opportunity to review and analyze all of the medical records and relied upon the claimant's present history, which was inconsistent with the prior medical records. This decision emphasizes the importance of submitting medical records and diagnostic films to the IME for review and analysis.

Tony Natale (Philadelphia, PA) successfully defended a large

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transportation authority in litigation surrounding an alleged lumbar spine disc aggravation injury during the course and scope of employment. The claimant originally sustained a low back injury in 1999. He eventually returned to work to a lighter-duty position and worked more than a decade before leaving work and collecting an employer-sponsored pension. Two years into his receipt of the pension, the claimant alleged a new workplace injury dating back to one of the last days he physically worked. The claimant presented a medical expert who opined that the claimant "aggravated" the 1999 low back condition by "sitting on a stool," among other things, at work, causing debilitating lumbar radiculopathy and worsened two pre-existing disc herniations. On cross-examination, Tony established that the "expert" medical opinions offered on direct were contrary to the opinions contained in the medical notes in the doctor's file. The claimant admitted on cross-examination that no new injury took place prior to his retirement and receipt of pension. The judge dismissed the claim petition summarily.

Tony Natale (Philadelphia, PA) successfully prosecuted a termination petition on behalf of the Educational Commission for Foreign Medical Graduates. The claimant sustained an injury in her role as a standardized patient for the Commission. A student rigorously examined her, causing injuries to her abdomen, among other areas. The claimant treated for years while collecting partial disability payments for reduced work hours, allegedly due to the injury. Tony presented a Board Certified internal medicine expert who specializes in traumatically induced abdominal injuries and sports injuries, including sports hernias. Tony then cross examined the claimant and established that her current treatment regimen for the injury was basically non-existent except for two doctor visits after the termination petition was filed. The judge found the claimant to be fully and completely recovered from the work injury and terminated her right to all benefits. ■

On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

John Hare and **Shane Haselbarth** (Philadelphia, PA) convinced the Superior Court of Pennsylvania to affirm the entry of summary judgment in favor of a large Japanese equipment manufacturer in a catastrophic brain injury case in a product liability action. The unanimous ruling adopted the argument made by Shane in the brief and John at the oral argument that there was no evidence of record that the driver of a vehicle passing the front-end loader saw its amber turn signal illuminated. The front-end loader turned left as the vehicle was passing, causing the loader's bucket to sheer off the top of the vehicle and cause catastrophic injury to the vehicle's passenger. The theory of defect was that the amber-colored turn signals and hazard lights were defective, but the court ruled that no element of the lighting array caused any injury because the driver saw only red brake lights. The Pennsylvania Supreme Court denied review, thus allowing the case to proceed back in the trial court without the lone deep pocket. *Williams v. Komatsu American Corporation*, 2014 Pa. Super. Unpub. LEXIS 2333 (Pa. Super. Oct 7, 2014), *app. den'd*, 2015 Pa. LEXIS 908 (Pa. Apr. 28, 2015).

Shane also successfully defended an appeal from a trial court dismissal of a case for the plaintiff's failure to timely serve original process on the defendants. The Superior Court rejected the plaintiff's argument that it demonstrated good faith and that a mere mistake ought not to bar claims, concluding instead that the expiration of the statute of limitations without any notice to the defendant of the pendency of the claim, and without properly reissuing the writ of summons and serving it in accord with the rules, does not toll the running of the statute of limitations. *Smash PA, Inc. v. Lehigh Valley Restaurant Group, Inc*., 2015 Pa. Super. Unpub. LEXIS 958 (Pa. Super. April 14, 2015).

Audrey Copeland (King of Prussia, PA) persuaded the Superior Court to affirm the entry of summary judgment for the defendant, a whitewater rafting company, in an appeal and cross-appeal involving the plaintiff's claim of injury while chaperoning a school rafting trip. The court agreed with our defense and affirmed the trial court's order in the plaintiff's appeal, which held that Pennsylvania, not New York, law applied to the release signed by the New York resident/plaintiff, who was allegedly injured in Pennsylvania while rafting on the Lehigh River. The court acknowledged that the release was signed in New York, that the plaintiff's state of residence had an interest in recouping her medical expenses and wage loss, and that New York did not enforce exculpatory clauses as a matter of public policy, unlike Pennsylvania. However, Pennsylvania law applied because the release protected the defendant, a Pennsylvania business, for an accident occurring in Pennsylvania, which had the right to expect that the exculpatory clause would be enforced under Pennsylvania law. The court also stated that the defendant should not be placed in jeopardy exceeding that created by Pennsylvania law just because the plaintiff was visiting from New York. The court further reversed the trial court's order denying summary judgment to the defendant, rejecting the plaintiff's argument that she was economically compelled to sign the release by her employer, the school (a non-party to the contract). The court noted

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that there was no evidence that the defendant economically compelled the plaintiff to sign the release and declined to expand a doctrine traditionally invoked between contracting parties to compulsion by a non-party under these facts. The court also found the release to be valid and enforceable and that it barred the plaintiff's claims. *McDonald v. Whitewater Challengers, Inc.*, 2015 Pa. Super. LEXIS 232 (Pa.Super. April 29, 2015).

Audrey also convinced the Commonwealth Court to affirm the decisions of the Workers' Compensation Judge and Pennsylvania Workers' Compensation Appeal Board that the employer's initiation of a second utilization review relating to treatment provided to the claimant by a dentist did not constitute an unreasonable contest and that the original penalty awarded should not be increased to a greater percentage. The court also affirmed the determination that the claimant's ongoing chiropractic treatment was not reasonable or necessary. The court acknowledged that palliative relief may be deemed reasonable and necessary, even when it only alleviates a claimant's symptoms, but it found that the employer's medical expert's opinion regarding the lack of progression of pain improvement constituted substantial evidence supporting the decision that the treatment was not reasonable or necessary. *Troutman v. Workers' Comp. Appeal Bd. (Norristown Ford)*, 2015 Pa. Commw. Unpub. LEXIS 254 (Pa. Commw. Ct. April 10, 2015). ■

On The Pulse…

OTHER NOTABLE ACHIEVEMENTS*

The Maritime Litigation Practice Group in our New York City office has once again been recognized among the top national maritime practices in the 2015 edition of *Chambers USA: America's Leading Lawyers for Business*. Recognized in the Nationwide: Transportation: Shipping: Litigation (New York) category, the firm was called out for "offering services across the gamut of admiralty and marine insurance law work, spanning product claims, cargo claims and property subrogation." **Daniel McDermott**, co-chair of this practice, and **Edward Radzik**, shareholder within the group, were cited as "notable practitioners" in the Chambers ranking. While both attorneys have received Chambers recognition in this area several times before, this year Dan was specifically cited for his industry knowledge and representation of vessel owners and public authorities in the defense of maritime construction projects. Ed was cited as an "experienced and knowledgeable technician" in his handling of cargo damage and loss, collision and pollution claims.

David Wolf (Philadelphia, PA) was elected to the position of President-Elect at the recent annual meeting of the Philadelphia Association of Defense Counsel for the organization's upcoming year.

Terry Sachs (Philadelphia, PA) was awarded the William J. O'Brien Distinguished Service Award as Defense Lawyer of the Year by the Philadelphia Association of Defense Counsel (PADC). Terry was honored at the organization's annual meeting. The William J. O'Brien award is given annually to a PADC member who demonstrates outstanding legal service and contributions to PADC, and the greater legal community. It is named after William J. O'Brien, a past president of the PADC who was one of the pre-eminent Philadelphia trial lawyers of his generation.

Brigid Alford (Harrisburg, PA) was honored by the *Central Penn Business Journal* as a "Woman of Influence." She was selected for her professional accomplishments and contributions to her community.

Frank Wickersham (King of Prussia, PA) spoke at the CLM Medical Legal Conference in Chicago on the topic of *Medical Marijuana in Workers' Compensation*. Frank was part of a panel that included a physician and a claims professional. They discussed the medical and legal challenges that employers and workers' compensation insurance carriers could face with the coming legalization of medical marijuana.

Paul Lees (Allentown, PA) and **Samuel Casolari** (Cincinnati, OH) were featured speakers at the University Risk Management Insurance Association Mid-Atlantic Regional Conference. Paul and his co-presenter, William DeWalt, Assistant General Counsel at Lehigh University, presented *But We Had a Contract! Understanding Contractual Risk Transfer and Drafting Effective (and Enforceable) Indemnification Clauses*. Sam and Richard Jewell, former president of Grove City College, presented *A View From the Board: Are Your Trustees Doing Their Duty?*

Michael Karaffa (Pittsburgh, PA) participated as a panel instructor at an Advanced Tort Class at the University of Pittsburgh School of Law. The presentation was based upon a fatal accident claim litigated and then settled on the eve of trial. The presentation included all counsel discussing their thoughts regarding liability, evidentiary, expert and damage issues.

Lauren Burnette (Harrisburg, PA) and **Danielle Vugrinovich** (Pittsburgh, PA) presented *Recent Litigation Trends and How to Avoid Them* at the National Association for Retail Collection Attorneys Spring Convention.

David Henry (Orlando, FL) presented *Big Bombs Need a Long Fuse: Effective Mediation for E&O Claims Professionals* at the 9th annual E&O Insurance ExecuSummit. ■

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Ohio—Insurance Coverage/Bad Faith

OHIO PRECLUDES INSURANCE COVERAGE FOR EMPLOYER INTENTIONAL TORTS

By David J. Oberly, Esq.*

KEY POINTS:

- Ohio Supreme Court holds that "an insurance provision that excludes coverage for acts committed with the deliberate intent to injure an employee precludes coverage for employer intentional torts, which require a finding that the employer intended to injure the employee."
- Ohio Supreme Court clarifies that, under R.C. § 2745.01, Ohio's employer intentional tort statute, employers cannot be legally obligated to pay damages for an intentional tort except based upon a finding that they acted with the intent to injure their employee.
- The court's decision effectively eliminates insurance coverage for employer intentional tort claims in Ohio.

David J. Oberly

In the recent case of *Hoyle v. DTJ Enterprises (In re Hoyle)*, 2015 U.S. Dist. LEXIS 595 (Ohio 2015), the Ohio Supreme Court effectively eliminated insurance coverage for employer intentional torts. It held that insurance policies that preclude coverage for acts committed with a deliberate intent to injure do not provide coverage for employer intentional tort claims.

Duane Hoyle was injured when he fell from a ladder-jack scaffolding while working on a construction project in the course and scope of his employment for DTJ Enterprises and Cavanaugh Building Corporation. Hoyle was working on the scaffold when the platform "lifted up like a teeter totter" and collapsed, bringing both the scaffolding and Hoyle crashing to the earth. Importantly, when Hoyle assembled the ladder-jack scaffold on this project, he did not have the bolts or pins to secure the ladder jacks to the vertical side ladders because his employers refused to provide him and his co-workers with the bolts, which the companies claimed were unnecessary and took too much time to use.

Both companies had obtained commercial general liability policies from Cincinnati Insurance Company and had also purchased additional employer liability coverage. The additional coverage extended to injuries to employees caused by intentional acts that were "substantially certain to cause injury," but it excluded coverage for intentional acts committed "with the deliberate intent to injure." Hoyle filed suit against DTJ and Cavanaugh, alleging statutory claims of employer tort. Cincinnati Insurance then intervened and filed a complaint for declaratory judgment, claiming it had no obligation to indemnify the employers for their employees' injuries. In its declaratory judgment action, Cincinnati Insurance argued that, even if Hoyle prevailed on his employer intentional tort claims, any liability would be excluded from coverage since it necessarily had to be based on the employers' deliberate intent to injure him.

R.C. § 2745.01, which now governs employer intentional torts in Ohio, took effect in 2005 and provides:

> **(A)** In an action brought against an employer by an employee *** for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
>
> **(B)** As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
>
> **(C)** Deliberate removal by an employer of an equipment safety guard *** creates a rebuttable presumption that the removal *** was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

At issue on appeal was Hoyle's reliance on R.C. § 2745.01(C)'s presumption of an intent to injure resulting from a showing of the deliberate removal of a safety guard by the employer. Hoyle argued that, because subsection (C) of R.C. § 2745.01 permits employees to prevail by demonstrating a presumption, claims under that particular portion of the employer intentional tort statute do not require actual proof of a "deliberate intent to injure" and, therefore, are not barred from coverage. The Ohio Supreme Court disagreed. It found that, even if an injured worker only established intent via the presumption, he or she was still required to establish deliberate intent as an essential element of a R.C. § 2745.01 claim. As such, whether Hoyle proved that intent with direct evidence under R.C. § 2745.01(A) or with an unrebutted presumption under R.C. § 2745.01(C), intent to injure was an essential element of his claim for employer intentional tort. Thus, the court concluded, although Hoyle might prevail without direct evidence of a deliberate intent to injure, he could not recover without a finding that DTJ and Cavanaugh acted with the intent to injure. As a result of the Cincinnati Insurance policy excluding from coverage "liability for

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LIMITING OR DISPOSING OF INSURANCE CLAIMS

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Thus, when a plaintiff fails to list a cause of action in sworn bankruptcy filings and then files a lawsuit to recover money damages in connection with that cause of action, courts will invoke the doctrine of judicial estoppel. Invocation of the doctrine will prevent the plaintiff from taking inconsistent positions in two court proceedings.

In *Greer-Burger v. Temesi*, 879 N.E.2d 174 (Ohio 2007), the Ohio Supreme Court invoked judicial estoppel to bar a civil action from being pursued after the plaintiff-debtor was found to have concealed her potential civil action throughout the course of her bankruptcy proceeding. Greer-Burger was judicially estopped from pursuing the civil action because her claim was not listed on her bankruptcy schedule in her bankruptcy petition. The Ohio Supreme Court found that Greer-Burger's concealment violated the goal of the bankruptcy proceeding. Noting, "the disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge," the Ohio Supreme Court concluded that Greer-Burger undermined the bankruptcy trustee's ability to perform his duties because the performance of those duties was contingent on an accurate and complete disclosure. Because "[a] discharge in bankruptcy is sufficient to establish a basis for judicial estoppel, even if the discharge is later vacated," the court found Greer-Burger's actions sufficient to support the application of judicial estoppel.

In making the determination that judicial estoppel was applicable, the Ohio Supreme Court in *Greer-Burger* relied on two main lines of reasoning to support the application of judicial estoppel to preclude the civil action from proceeding after the civil claim had been concealed from the bankruptcy court. First, the court examined whether the traditional elements of judicial estoppel were present. Answering this question in the affirmative, the Ohio Supreme Court found that the plaintiff-debtor took an inconsistent, yet successful, position in the prior bankruptcy proceeding.

Second, the court looked to determine if the inconsistent position was "inadvertent." A disclosure may be deemed inadvertent where the debtor lacks factual knowledge of the undisclosed claim or the debtor has no motive for concealing the claim. The Ohio Supreme Court determined that it could be inferred that the failure to disclose the claim was not inadvertent because: (1) the plaintiff-debtor was aware of the claim when she filed for bankruptcy; (2) a motive to conceal the claim could be inferred because of the possibility of personally profiting from the claim; and (3) there was a lack of evidence that she timely took "affirmative action to fully inform the court and the trustee of the asset's existence." Thus, the Ohio Supreme Court found that Greer-Burger should not be able to receive the benefit of a discharge and subsequently obtain a windfall by recovering an award that flowed from the undisclosed asset.

Property value inconsistencies between bankruptcy cases and insurance claims also represent sufficient grounds to invoke the doctrine of judicial estoppel. In *Brown v. Nationwide Property & Casualty Insurance Company*, 2014 Ohio App. LEXIS 4906 (Ohio App. Nov. 10, 2014), the court ruled that debtors/litigants who undervalued items of property in their bankruptcy petitions were judicially estopped from claiming a higher value in subsequent litigation. In that case, vandals broke into the home of Mark and Kathleen Brown and caused extensive damage to the interior structure of their residence and their personal property. At the time of the incident, the Browns had a homeowner's policy issued by Nationwide Property and Casualty Insurance Company. The insureds made a claim under the policy. The Nationwide adjuster estimated the damage to the insureds' property at $155,678.65. However, it was later determined, during an examination under oath, that the Browns had listed the value of their personal property at $3,100.00 in a bankruptcy petition they had filed a year before the vandalism incident. As a result, Nationwide sent the Browns a reservation of rights letter stating that, due to judicial estoppel, they were unable to collect on some or all of the personal property they claimed for the loss. In response, the insureds filed suit. However, the court barred the insureds from taking a different position regarding the value of their property than they had in their prior bankruptcy. On appeal, the appellate court concurred that the Browns were judicially estopped from claiming in the case *sub judice* that the same property that they previously claimed was worth $3,100.00 in their bankruptcy was now worth $155,678.65.

Both claims professionals and defense attorneys should make it a habit to always investigate whether claimants/plaintiffs have filed bankruptcy close to the time that a claim or cause of action arose. In this respect, the applicability of this potentially game-changing affirmative defense should be fully explored and evaluated during both the pre-suit investigation of the claim, as well as throughout all stages of discovery process. To maximize the likelihood of success in invoking judicial estoppel, in addition to obtaining the individual's bankruptcy application and other files, a copy of the transcript of the debtor's meeting of the creditors—which ordinarily includes the debtor's testimony that he or she understands the bankruptcy process and that his or her bankruptcy petition is accurate—should also be obtained. This transcript is vital to the success of asserting the affirmative defense because it can be utilized to defeat any attempt by the plaintiff to avoid judicial estoppel by claiming mistake or inadvertence. Armed with this evidence, where a plaintiff has undervalued his or her property in bankruptcy, any property damage claim or lawsuit filed by that individual can be limited to the value of the property claimed in the prior proceeding. And where the plaintiff has failed to disclose his or her legal claim altogether in bankruptcy, any lawsuit filed thereafter can be completely disposed of via a well-drafted motion for summary judgment. ■

Pennsylvania—General Liability

NOW YOU SEE IT! NOW YOU DON'T! SELF-DELETING APPS & SPOLIATION*

By Brad E. Haas, Esq.**

KEY POINTS:

- Self-deleting applications create many questions for attorneys and clients with respect to spoliation.
- Counsel and clients must evaluate the risks associated with the use of such apps once a preservation obligation arises.

Brad E. Haas

As a litigator in this world of constantly emerging technology, it can be impossible to predict what the future may hold. Imagine handling a case in which an opposing party has admitted to sending hundreds of relevant pictures, emails and text messages, all of which have since been deleted, not through any affirmative act of the opposing party, but through the normal course of use of a computer application. Welcome to the world of self-deleting applications, where facts similar to those presented above are already beginning to create problems for practitioners and courts alike.

Two of the more popular self-deleting applications available today are SnapChat and Cyber Dust. SnapChat is a social media application which allows users to send photos or video messages that disappear forever within 10 seconds of being opened. The company has been valued at $15 billion, with users sending over 700 million photographs and videos each day. Cyber Dust was founded by entrepreneur Mark Cuban following his 2013 defense on allegations of insider trading. The application allows users to send "self-destructing" messages and markets itself as a product to be used by people "in a business with a lot of lawsuits" as a means to "save a lot of time and money because nothing sent or received on [Cyber Dust] is discoverable." (Aaron Timms, "Mark Cuban's Plan for Limiting Scope of Discovery in Lawsuits," Inst. Inv., Sept. 10, 2014, http://www.institutionalinvestor.com/article/3378986/banking-and-capital-markets-trading-and-technology/mark-cubans-plan-for-limiting-scope-of-discovery-in-lawsuits.html#.VJg65QAY.)

Initially, self-deleting applications were largely directed at the younger generation hoping to increase privacy from parents. However, these applications are increasingly being used by businesses and adults, rather than traditional forms of electronic communication, such as text messaging and email. These applications are now being directly marketed towards the business community for their benefits in protecting sensitive information. The applications promise to provide users with the type of privacy and confidentiality which could have previously only been accomplished through oral conversation.

In the litigation context, these applications create many questions for attorneys and clients with respect to spoliation. Spoliation is a serious issue for attorneys and clients and can lead to sanctions, adverse inferences or other penalties. A party's duty to preserve potential evidence arises at the start of a lawsuit, but may arise even sooner if a party knows or should have known that the evidence may be relevant to future litigation. Spoliation issues are much simpler when dealing with regular correspondence, photographs or traditional emails. However, with the advent of self-deleting applications, the question becomes whether an attorney's or a client's mere usage of a self-deleting application can be considered spoliation.

The legal ramifications of self-deleting applications are difficult to forecast as there is very little guidance for courts to base decisions on. Prior cases dealing with spoliation of electronic communication have all dealt with an affirmative act on the part of an individual or entity to delete relevant information. Self-deleting applications are clearly distinguishable as there is no act required for deletion other than the usage of the program. The time and manner in which these applications are used may be a key factor in assessing future spoliation claims.

Prior to a lawsuit commencing or being reasonably anticipated, the use of self-deleting applications would arguably not be violating any duty to preserve. Further, the issue of intent would certainly be considered. There are many companies that could benefit from the use of an application such as Cyber Dust to protect confidential consumer information. Courts may inquire as to whether a party's intent was to destroy potentially relevant information. If a company or individual could demonstrate good faith arguments for its use of a self-deleting application, it would make it difficult for an opponent to argue for spoliation sanctions.

Once litigation has commenced or is foreseeable, the analysis becomes more complicated and unclear. Take, for example, a personal injury proceeding. Once litigation has commenced, a plaintiff, upon advice from counsel, sends all electronic communication through a self-deleting application. These include photographs and text messages which could potentially mitigate the plaintiff's alleged damages. These types of messages would likely fall under Fed. R. Civ. P. 26(b)(1), permitting discovery of electronically stored information "regarding any non-privileged matter that is relevant to any

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Pennsylvania—Health Law

THE SHRINKING SCOPE OF THE PEER REVIEW PROTECTION ACT

By Brett C. Shear, Esq.*

KEY POINTS:

- The Pennsylvania Peer Review Protection Act provides confidentiality protection for peer review records, proceedings and findings.
- The confidentiality provisions of the Act continue to be eroded.

Brett C. Shear

The Peer Review Protection Act is an important Pennsylvania statute that aims to provide an incentive for health care providers, practice groups and hospitals to police themselves by seeking peer review when something goes wrong. The statute provides that the proceedings and records of a review committee shall not be subject to discovery or introduction into evidence in any civil action against the health care provider, practice group or hospital. It further provides that no person who was in attendance at a peer review committee meeting shall be permitted or required to testify in any civil action as to the proceedings of the committee or as to any findings, recommendations, evaluations, opinions or other actions of the committee.

Since it became effective more than 40 years ago, the Peer Review Protection Act's confidentiality protections for peer review records, proceedings and findings has been under continuous attack by lawyers seeking to use that information against providers in litigation. In many respects, those efforts have been successful as the courts continue to narrow the protections of the Act. For example, the courts have refused to apply the Act's protections to the findings of an insurer's credentialing committee and certain HMOs. Pennsylvania's courts have also found that the privilege may be waived where a health care provider supplies materials obtained through the peer review process to the United States Attorney's Office or a state medical board. The courts have further refused to protect investigation findings and incident reports that are not generated by or for a peer review committee as part of a quality assurance assessment. It has also been our experience that courts will not uphold the confidentiality of materials that are generated in the normal course of business regardless of whether the provider entitles or refers to those materials as "peer review." A three-judge panel of the Pennsylvania Superior Court issued an opinion on June 5, 2015, in *Yocabet v. UPMC Presbyterian, et. al.*, 2015 Pa. Super. LEXIS 325 (Pa.Super. June 5, 2015), which limited the protections of the Act even further.

The *Yocabet* case involved a kidney transplant where pre-surgical blood tests revealed that the donor was positive for Hepatitis C. Before the transplant, at least four medical professionals and the transplant selection committee documented review of the donor's lab results and approved her as an acceptable donor. After all of this came to light, the Pennsylvania Department of Health (DOH), on behalf of the Centers for Medicare and Medicaid Services, conducted an investigation of the hospital's transplant program. In order to conduct the investigation, DOH engaged doctors and nurses to obtain and review documents and interviews from hospital personnel. In the litigation, the plaintiffs' attorneys sought the communications that the hospital submitted to DOH in connection with the investigation. The hospital objected, arguing that the communications were protected peer review materials.

The Pennsylvania Superior Court held that the communications were not protected. In reaching its decision, the court noted that the purpose of the peer review protection is to facilitate self-policing in the health care industry and only applies to proceedings and records of a review committee. Further, the court indicated that a peer review is limited to an evaluation by professional health care providers of the quality and efficiency of services rendered by other health care providers.

Applying these limitations, the court held that the hospital's communications with DOH were not protected peer review materials because the DOH, itself, was not a professional health care provider and did not become one merely because it hired doctors and nurses to conduct the investigation. Additionally, the DOH investigation did not constitute self-policing by the health care industry. Based on these findings, the court held that DOH was not conducting peer review.

Furthermore, even if the investigation were a peer review, the Act only protects the proceedings and records of a review committee; it does not protect information or documents submitted to a committee that are otherwise available from their original source. The documents requested in the litigation were not generated as a result of the peer review process and, therefore, were not entitled to protection.

Yocabet is yet another reminder that Pennsylvania's courts often narrowly construe the protections provided by the Peer Review Protection Act. It is clear that the courts will strictly apply the Act's definition of peer review. It is important to recognize that not every post-event investigation constitutes protected peer review. Furthermore, not every document reviewed by a peer review committee or generated after an event will be protected. Nor are documents or interviews provided to government agencies necessarily going to be protected as peer review.

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Pennsylvania—Insurance Coverage/Bad Faith

ARE YOUR RIGHTS RESERVED?

By Margaret M. Jenks, Esq.*

KEY POINTS:

- A reservation of rights letter sent to a named insured will not be adequate to reserve rights against an additional insured.
- In a timely fashion, a reservation of rights letter must properly and adequately reserve the carrier's rights to deny defense and indemnification.
- *Erie Ins. Exch. v. Lobenthal* stresses an insurer's duty to issue a reservation of rights letter to any and all insureds, including additional insureds and potential insureds, as quickly as possible, to avoid a presumption of prejudice.

Margaret M. Jenks

On April 15, 2015, in the case of *Erie Ins Exch. v. Lobenthal*, 114 A.3d 832 (Pa. Super. 2015), the Pennsylvania Superior Court addressed the validity of a reservation of rights letter issued by the insurer. The Superior Court found that two separate reservation of rights letters were both ineffective: the first was improperly addressed, and the second was sent seven months after the underlying complaint was filed.

In the underlying case, the plaintiff filed suit against the parents of the driver, as well as the driver, of the insured vehicle. The defendant driver, who was a minor at the time, was involved in a motor vehicle accident while she was allegedly driving under the influence of a "controlled substance." The named insureds on the subject policy were the defendant driver's parents. The defendant driver was an additional insured by virtue of the fact that she resided with her parents. Initially, the defendant driver's parents were named defendants in the lawsuit but were dismissed after filing preliminary objections.

At some point after the accident, a reservation of rights letter had been sent to the defendant driver's parents only, and no reservation of rights had been initially issued to the minor driver. Thereafter, about three-and-one-half months after the dismissal of the defendant driver's parents, and about seven months after the filing of the complaint, the insurer issued a second reservation of rights letter directed only to the lawyer of the defendant driver.

Erie then filed a separate declaratory judgment action that sought a judicial determination regarding whether the "controlled substances" exclusion contained in the policy would bar defense and indemnification obligations. A further focus was whether Erie had properly preserved its right to challenge coverage and deny a defense to its insured through the reservation of rights letters sent out to the defendant driver.

On appeal from the trial court's order holding that Erie had no duty to defend and indemnify, the Superior Court held that the letter directed to the parents was insufficient notice since it was addressed to the named insureds, as opposed to the additional insured, who had since attained majority status. The Superior Court also noted that the first reservation of rights letter was inadequate in that it did not reference the controlled substances exclusion of the policy upon which the insurer was relying. In addition, in considering the letter subsequently sent to the defendant driver's counsel, the Superior Court held that Erie was required to give the defendant driver independent notice of Erie's reservation of its rights to disclaim liability, and, therefore, the notice sent to defense counsel was ineffective as to the defendant driver. Further, the court commented that the letter sent seven months after the complaint had been filed was untimely. Ultimately, the Superior Court reversed the trial court and held that liability coverage should be afforded by the insurer to the defendant driver because the insurer did not properly and timely reserve its rights.

Of significant importance was the court's statement that is was not impressed by Erie's argument that the defendant driver was not prejudiced by the so-called untimeliness of Erie's reservation of rights letter, given the fact that the defendant driver was defended by assigned counsel all the while. Rather, the court decided that, under these circumstances, where a liability carrier allegedly fails to issue a timely reservation of rights letter, prejudice was "presumed."

This decision may ultimately have a significant impact on establishing protocols for issuing reservation of rights letters. Clearly, the specific facts of *Lobenthal* dictated the outcome at the Superior Court. However, one senses an increase in judicial scrutiny applied to an insurer's reservation of rights. This case stresses that an insurer has a duty to issue a reservation of rights letter to any and all insureds, including additional insureds and potential insureds, as quickly as possible, or prejudice will be "presumed." An insurer must specifically address the reservation of rights letter to the individual or insured to whom it is directed—not merely the named insured on the policy—or, as in this case, to defense counsel retained by the carrier. In addition, this decision stresses the importance of specifically identifying the applicable exclusions and other insurance provisions relied upon by the insurer in the reservation of rights letter.

Are your rights preserved? Marshall Dennehey stands ready to assist insurers in answering that question and, more particularly, in interpreting the *Lobenthal* decision. ■

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NEW JERSEY'S APPELLATE DIVISION

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The Appellate Division found that the jury was not instructed that they could not award the plaintiff damages for the defendant's violations of the Nursing Home Act and damages for negligence based upon the same injuries or harm, and, therefore, there was potentially a double recovery awarded by the jury.

The Appellate Division's holding in *Ptaszynski* should change the way nursing home litigation is handled, including the discovery to which plaintiffs are entitled. As a practice tip, defense counsel should move to dismiss any counts in the plaintiff's complaint that allege the defendant(s) failed to comply with all applicable state and federal statutes, rules and regulations or that the defendant(s) violated any "responsibilities" under the New Jersey Nursing Home Act. Further, defense counsel should be objecting to discovery demands that are not related to the alleged violations of the resident's "rights." Discovery aimed at obtaining information or documentation related to the defendant facility's alleged violations of state and federal statutes should be contested. The holding in *Ptaszynski* will refocus nursing home negligence cases on the actual injury or harm alleged to have occurred to the nursing home resident, instead of the facility's conduct unrelated to the plaintiff's care, including its compliance with hundreds of state and federal nursing home regulations. ■

OHIO PRECLUDES INSURANCE COVERAGE

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acts committed by or at the direction of an insured with the deliberate intent to injure," there was no set of facts under which the employers could be legally liable to Hoyle that fell within the policy's coverage.

In other words, in Hoyle's case, regardless of whether he established intent through direct evidence or through an unrebutted presumption, he still could only prevail against his employers by proving intent to injure, the very claim expressly excluded by both the standard commercial general liability policy as well as the employers' liability endorsement. As a result, no facts could give rise to a duty upon Cincinnati Insurance to indemnify DTJ or Cavanaugh.

The results of the *Hoyle* decision are significant for employers, employees and insurers. For employers, *Hoyle* essentially eliminates insurance coverage for employer intentional tort claims in Ohio. For employees, insurance proceeds will no longer be available to compensate them for intentional tort claims brought against their employers, which will have the likely effect of producing a significant drop in the number of employer intentional tort claims filed in the state. With regard to insurers, as a result of the court's clarification that they are not required to indemnify their employer insureds for employment intentional tort claims, they may begin to move away from accepting coverage and defending such claims under a reservation of rights and transition towards denying Ohio employer intentional tort claim tenders and disclaiming all coverage from the outset of the claim. ■

NOW YOU SEE IT! NOW YOU DON'T!

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party's claim or defense." If a court finds that the plaintiff or attorney acted with sufficient culpability by choosing to utilize a self-deleting application, rather than a traditional SMS or MMS, for example, appropriate sanctions could follow.

Self-deleting applications appear to be the most recent platform where technology is outpacing the law. While the courts have yet to consider how to deal with them, the increase in their usage makes an upcoming confrontation inevitable. Litigators from all areas will need to become familiar with this new technology in order to properly handle clients or opponents who use them. With no current legal rulings or guidance on the matter, the use of these applications should be dealt with cautiously. Counsel and clients must evaluate the risks associated with the use of such apps once a preservation obligation arises in order to avoid the potential consequences that come with a spoliation finding. ■

THE SHRINKING SCOPE

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To ensure that documents and findings generated by the peer review committee are protected by outside eyes, hospitals and health systems need to have policies in place to ensure that peer reviews are conducted in accordance with the Act's requirements and that the protections are not waived. It is equally important to understand what does and does not constitute "peer review." In this way, hospitals and health systems may correctly discern whether information will be protected as confidential and avoid a court order that the information be turned over to an adversary. ■

Pennsylvania—Professional Liability

SETTLING PARTY BEWARE: A CLAIM FOR LEGAL MALPRACTICE CANNOT SURVIVE WHEN A PLAINTIFF KNOWINGLY SETTLES THE UNDERLYING CASE

By Nicole M. Ehrhart, Esq.*

KEY POINTS:

- Dissatisfaction is not a cause of action against one's legal counsel.
- A litigant who merely wishes to second guess a decision based upon speculation of a better deal will have no recourse.
- To maintain a claim for malpractice, a party must demonstrate fraudulent inducement to settle.

Nicole M. Ehrhart

It is well-established that Pennsylvania's courts "will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action. An action should not lie against an attorney for malpractice based on negligence or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable." *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991). The Pennsylvania Supreme Court has decided to:

> [d]isallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients in that to allow them will create chaos in our civil litigation system. Lawyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that "could have been done, but was not." We refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases. A long-standing principle of our courts has been to encourage settlements; we will not now act so as to discourage them.
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> Numerous commentators have addressed the problem of overcrowded courts and the importance of settlements to the efficient flow of justice. A fundament of those articles is that settlement of civil litigation is critical to the courts' management of caseloads. Without settlement of cases, litigants would have to wait years, if not decades, for their day in court. Nearly 90% of all matters in controversy end in settlement. Were we, as a court, to encourage litigation that would undermine the current rate of settlements, we would do a grave injustice and disservice to the citizens of the Commonwealth. "The settlement of cases before trial is one of the greatest potentials for assisting the courts to reduce their caseloads." As courts are fond of repeating, "[j]ustice delayed is justice denied."
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> Mindful of these principles, we foreclose the ability of dissatisfied litigants to agree to a settlement and then file suit against their attorneys in the hope that they will recover additional monies. To permit otherwise results in unfairness to the attorneys who relied on their clients' assent and unfairness to the litigants whose cases have not yet been tried. Additionally, it places an unnecessarily arduous burden on an overly taxed court system.

Muhammad, 587 A.2d at 1349-1351.

Litigants have tried to chisel away at the holding in *Muhammad*. However, the Pennsylvania Superior Court recently reinvigorated the policy concerns inherent in *Muhammad* and stated that *Muhammad* is still the law with regard to parties who settle their underlying dispute and then try to sue their counsel for malpractice. On March 27, 2015, in *Silvagni v. Shorr*, 113 A.3d 810 (Pa. Super. 2015), the Superior Court affirmed the trial court's entry of summary judgment in favor of an attorney-defendant because a client was barred from maintaining the claim absent evidence that the attorney-defendant fraudulently induced the client into signing a compromise and release agreement without explaining the ramifications of the settlement. The plaintiff, having settled his workers' compensation claim, was terminated from his medical coverage and any other benefits under the Workers' Compensation Act.

The plaintiff argued that the attorney-defendant offered him incorrect legal advice and his reliance upon that advice led to a compromise and release. The Superior Court applied the policy concerns set forth in *Muhammad* and determined that the plaintiff had entered into the settlement voluntarily. The plaintiff acknowledged, under oath, that he understood that, in return for the settlement, he would no longer receive medical benefits or any other benefits under the Workers' Compensation Act.

Silvagni reasserts that dissatisfaction is not a cause of action against one's legal counsel. A litigant who merely wishes to second guess a decision based upon speculation of a better deal has no recourse in Pennsylvania. If a party knowingly and intelligently enters into a settlement agreement, absent competent evidence of fraud, he or she will not be able to sue his or her attorney for malpractice. Defense counsel should keep this principle in mind when defending claims based on late-arising regrets to the decision to settle. ■

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Pennsylvania—Workers' Compensation

EMPLOYERS CHOKED BY COMMONWEALTH COURT PULMONARY CASE DECISION

By Ross A. Carrozza, Esq.*

KEY POINTS:

- Based on *Little*, in pulmonary cases it is important to determine if the claimant has a pre-existing condition that is aggravated by work exposure, or whether a new condition has developed as a result of the ongoing exposure to chemicals at the workplace, resulting in sensitization and possible future flare-ups.
- In the first instance, once the claimant's symptoms have resolved, termination is appropriate.
- In the second instance, if there is an ongoing sensitization and the claimant cannot return to his/her work environment, there is an ongoing disability exposure that should be recognized.

Ross A. Carrozza

On March 25, 2105, the Pennsylvania Commonwealth Court decided *Little v. WCAB (Select Specialty Hospital)*, 113 A.3d 1 (Pa. Cmwlth. 2015). This case impacts breathing cases in the defense community.

The facts of *Little* reflect that the claimant was a licensed registered nurse who performed nursing duties at a long-term acute care facility (first employer). After working there for four years, she began to experience breathing difficulties. She reported this to her supervisor and then went to the emergency room for treatment. Her condition improved, and she returned to work after a few days.

About a month later, she had another flare up, this time with sneezing and coughing. She noted, at the time, that housekeeping had been waxing the floors at her workplace. She again went to the emergency room, received treatment and was referred to a pulmonologist.

About three months after the second episode, the claimant experienced a third episode, in August of 2010, which was similar to the first two episodes. Again, she sought treatment in the emergency room. She received treatment and medications but did not return to work with the first employer.

The first employer issued a Notice of Compensation Payable, medical only, describing the injury as inflammation of lungs resulting from allergic reaction to floor wax. In her Claim Petition, the claimant alleged temporary total disability.

The claimant then sought and received a part-time position with a different employer. At her job interview with this new employer, the claimant explained the problem with the floor wax at the first employer, and the second employer immediately changed their floor wax. The claimant experienced no breathing problems while working for the second employer.

The claimant's medical expert testified that there was clearly an occupationally-induced asthma from her exposure to the chemicals in the floor wax. The Workers' Compensation Judge found the claimant's testimony to be credible and also found the claimant's medical expert to be credible. Therefore, it was determined that she sustained a disabling work-related injury resulting in her exposure to that chemical.

The first employer's expert also agreed that the claimant's asthma was directly related to her workplace exposure. However, that IME physician opined that the claimant had fully recovered from the work injury and had no pulmonary impairment or disability. Consequently, the Workers' Compensation Judge found that she had sustained an injury of occupationally-induced asthma from her exposure but had fully and completely recovered as of the time the IME.

At the Workers' Compensation Appeal Board level, the claimant argued that her benefits were improperly terminated because she could not return to her pre-injury position with the first employer due to her asthma and ongoing sensitivity to the chemicals used in the floor wax. Thus, she alleged an ongoing wage loss resulting from her lower paying position with the second employer. The Appeal Board denied the claimant's appeal, relying on the IME physician's opinion of recovery. The Appeal Board reasoned that the Workers' Compensation Judge determined that the claimant's injuries had resolved and her condition had returned to baseline.

On appeal to the Commonwealth Court, the claimant argued that it was error to terminate her benefits because she was incapable of returning to her pre-injury position due to her allergic sensitivity to the chemicals in the floor wax which resulted in a continuing loss of earnings. The claimant argued that she did not have any asthma until she was exposed to the floor wax chemical at her first employer's workplace. Both experts had agreed that the claimant should avoid exposure to that chemical in the future. Medical evidence reflected that a repeat exposure could result in a more severe and potentially life-threatening reaction. The employer relied on the IME physician's opinion of full recovery in their argument.

In analyzing the case, the Commonwealth Court noted that it differed from those cases where a pre-existing condition returns to baseline. In such an instance, the termination of benefits would have been appropriate. In *Little*, the claimant did not have a pre-existing asthmatic condition, or any work-related medical restrictions, prior to her work injury. Rather, the claimant had developed allergic asthma and an ongoing sensitivity to the floor wax chemical as a direct result of her job. Thus, despite normal pulmonary function, the claimant

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Pennsylvania—Workers' Compensation

YOU HAVE THE RIGHT TO AN ATTORNEY BUT NOT ADDITIONAL TIME: EXAMINING THE ROLE OF AN UNREPRESENTED CLAIMANT IN THE WORKERS' COMPENSATION PROCEEDING

By Ashley S. Talley, Esq.*

KEY POINTS:

- The unrepresented status of a claimant does not immediately afford additional time to present medical evidence.
- The denial of a request for continuance does not necessarily amount to a deprivation of due process rights and is within the discretion of a Workers' Compensation Judge.
- Lay testimony of a claimant is insufficient to sustain a compensable workers' compensation claim in the absence of unequivocal medical evidence obviously connecting an alleged injury and a work incident.

Ashley S. Talley

The Commonwealth Court of Pennsylvania recently held that a claimant is not afforded additional time based upon her unrepresented status alone. In *Deborah Roundtree v. WCAB (City of Philadelphia)*, 2015 Pa.Commw. LEXIS 203 (Pa.Commw. May 8, 2015), the claimant was employed as a forensic technician for the City of Philadelphia. During her employ, she was allegedly exposed to long-term harassment and a hostile work environment. According to a claim petition filed pro se, as a direct result of this exposure, the claimant suffered alleged psychiatric injuries in the form of a "severely depressed mood, loss of interest in normal activities, fatigue, agitation, very poor concentration, loss of appetite, difficulty initiating and maintain sleep, recurrent thoughts of death, nausea, diarrhea, fibromyalgia and extreme mental anguish." Payment of medical bills, attorneys fees and full disability benefits were requested, and an answer was filed on behalf of the employer.

Proceeding unrepresented in the litigation, the claimant failed to attend the initial hearing on the claim petition. At the relisted hearing, the claimant, appearing *pro se*, was instructed by the Workers' Compensation Judge to present testimonial and medical evidence within 30 days. Although she testified before the Judge at the 30-day listing, the claimant failed to present the required medical evidence. She was provided an additional 90 days to submit any such evidence in support of her claim.

When she attempted to submit medical records at the 90-day listing, the Workers' Compensation Judge sustained the objections of employer's counsel on the grounds of hearsay and directed the claimant to obtain a medical deposition within 30 days or limit her claim to 52 weeks.

A final hearing took place 30 days later with the claimant again failing to submit any medical evidence per the initial instructions of the Workers' Compensation Judge, and the record was closed. The employer's motion to dismiss the case without prejudice was granted, and the claimant appealed.

The Judge's decision was affirmed by the Workers' Compensation Appeal Board, who emphasized the Workers' Compensation Judge's discretion to dismiss a claim petition when a claimant fails to satisfy the initial deadlines established at trial. The Appeal Board specifically made mention of the time afforded by the Workers' Compensation Judge and numerous directives to obtain medical testimony, all of which were ignored by the claimant.

Upon appeal to the Commonwealth Court, the claimant presented two arguments for consideration. Pointing to the failure of the Workers' Compensation Judge to provide additional time for the submission of medical evidence in light of the her status as a "disabled lay person," the claimant first argued that the dismissal of her claim amounted to a deprivation of due process under the law. The Commonwealth Court, in rejecting this argument, emphasized the overarching principles of 34 Pa. Code § 131.13(b), which sets forth several factors for a Workers' Compensation Judge to consider in adjudicating a request for a continuance or postponement. A decision to grant or deny a request for a continuance is discretionary and one which may only be overturned based upon a "clear showing of an abuse of discretion." Considering these factors, the court concluded that there was no abuse in discretion in denying the claimant's request for continuance when the dismissal of her claim petition was solely the product of her repeated failures to adhere to the deadlines set forth by the Workers' Compensation Judge. The court noted that the claimant was given multiple opportunities to present medical evidence and, despite such directives, failed to submit any evidence to support her claim. As aptly noted by the Workers' Compensation Judge, the claimant failed to take any action to advance her case solely on the basis that she was unrepresented, a fact which was more than accounted for by the Workers' Compensation Judge. Thus, when applying the factors set forth in 34 Pa. Code § 131.13(b), all of which serve to ensure that medical evidence is scheduled promptly to avoid delay and postponement, the court found that the Workers' Compensation Judge did not abuse her discretion in denying further continuances of the claim.

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had ongoing sensitivity that prevented her from doing her pre-injury work and, therefore, supported the decision to award ongoing partial disability consistent with her earnings at the second employer.

Significantly, the court noted that, "[r]egardless of whether the claimant lacks current pulmonary symptoms or does not need current treatment, these are residual medical conditions that claimant did not have prior to her employment with first employer." The court went on to hold that, since both experts had agreed that the claimant developed allergic asthma and could not return to her pre-injury work environment as a result of cumulative occupational exposure to the floor wax chemicals, the Workers' Compensation Judge's determination that the claimant fully recovered without residual impairment was contrary to the credited evidence of record and was erroneous as a matter of law. Thus, termination was improper and required reversal with instructions to remand for an award of additional benefits.

Based on *Little*, in pulmonary cases it is important to analyze whether your facts indicate that the claimant has a pre-existing condition that is aggravated by work exposure, or whether a new condition developed as a result of the ongoing exposure over time to chemicals at the workplace, resulting in the claimant's sensitization that could cause future flare-ups. In the first instance, once the claimant's symptoms have resolved, termination is appropriate. However, if there is an ongoing sensitization and the claimant cannot return to his/her work environment, there is an ongoing disability exposure that should be recognized. ■

YOU HAVE THE RIGHT TO AN ATTORNEY

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The court likewise rejected the argument that lay testimony was sufficient on its face to support a compensable claim in the absence of medical evidence. Relying upon the well-established principles of Section 301(c) of the Workers' Compensation Act, the court reiterated the claimant's burden of establishing a causal connection through the presentation of unequivocal medical evidence. The court indicated that, while the requirement of such evidence could be waived in the event of an "obvious medical connection" between the alleged injury and symptoms, the present allegation of a psychiatric injury as a result of exposure to a hostile work environment was not "obvious to an untrained lay person." Therefore, the court concluded, medical evidence of a causal relationship was required and the Workers' Compensation Judge did not err in requiring the claimant to submit medical evidence in support of her claim. ■

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