MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 22 | NO. 1 | MARCH 2016

Defense Digest

On The Pulse...

PROFILE OF OUR JACKSONVILLE OFFICE

By Martin H. Sitler, Esq.*

Martin H. Sitler

I often boast to anyone who will listen that the Jacksonville, Florida office has the most beautiful view of any of our offices. Our fourteenth floor space is nestled in the center of downtown Jacksonville and overlooks the scenic St. Johns River. The sight from my window is absolutely gorgeous.

My spectacular view is complemented by the city where we are venued. Jacksonville, the largest city in area in the continental United States, is a rapidly growing metropolitan city. Jacksonville's riverine location facilitates two U.S. Navy bases and the Port of Jacksonville, Florida's third largest seaport, with a transportation network embracing port and air cargo facilities, and rail and trucking routes. A city that is a popular location for corporate expansions and relocations, it is also attractive to many because of its reasonable cost of living, diverse cultural and recreational opportunities, abundant natural resources and, of course, the awesome weather. With a growing population and strong economy, Jacksonville continues to distinguish itself as one of the nation's most dynamic and progressive cities.

However, it is not just the magnificent view and the vibrant setting that makes our office special; rather, like all of our offices, it is the people. We have a growing mix of extremely talented casualty and professional liability attorneys, supported by a cast of highly professional and skilled support staff. I will begin by introducing our newest attorneys.

In June 2015, the firm enhanced its Casualty Department with the additions of shareholder Dennis Dore, special counsel Jessica Lanifero and associate Chris Walsh in Jacksonville. Dennis, board-certified in Civil Trial Law by The Florida Bar Board of Legal Specialization since 1988, focuses his practice on defending product liability, first-party and third-party property insurance, complex coverage claims and bad faith matters.Having tried more than 150 jury trials in the state, he is well known and respected in the Florida

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THE RELATIONSHIP BETWEEN THE HANDLING ATTORNEY AND THE CLAIMS PROFESSIONAL IN AUTO LIABILITY

By John T. McGrath, Esq. & Michael R. Speer, Esq.*

John T. McGrath

Michael R. Speer

Marshall Dennehey Warner Coleman & Goggin's Automobile Liability Practice Group is the oldest and most storied practice area in our firm. It is made up of lawyers from each of our 20 offices. This group of seasoned lawyers dedicates a great majority of their time to automobile cases involving first- and third-party claims. Some of these lawyers have been working in this capacity for more than 30 years. The focus of the auto liability group is liability defense and the defense of automobile insurers in no-fault, UM and UIM disputes. We also work in concert with the attorneys in our firm who handle fraud and bad faith cases.

The experience within our Automobile Liability Practice Group is immense. Each of our 20 offices has seasoned trial attorneys who have tried numerous auto cases to verdict. Very rarely does an issue appear that we have not dealt with in the past. Traditional claims in the third-party auto liability portion of our practice vary from very simple—such as minor impact, soft impact tissue cases—to driving-under-the-influence cases, with punitive damages and bad faith implications. Cases differ greatly, and our attorneys are prepared to handle whatever scenario arises.

By working together, our attorneys and the claims professionals with whom they interact identify liability issues that need to be monitored closely. This relationship, once established, allows our attorneys to work with our clients in advance of suits that are filed and the case being assigned to our firm.

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** Jack McGrath and Michael Speer are co-chairs of our Automobile Liability Practice Group. Jack is a shareholder in our Scranton, Pennsylvania office. He can be reached at 570.496.4603 or jtmcgrath@mdwcg.com. Michael is a shareholder in our Roseland, New Jersey office who can be reached at 973.618.4108 or mrspeer@mdwcg.com.*

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PENNSYLVANIA

A MESSAGE from the EXECUTIVE COMMITTEE

By G. Mark Thompson, Esq.
Member, Executive Committee

"I have always thought that what is needed is the development of people who are interested not in being leaders as much as developing leadership in others."
– Ella Baker

This year Marshall Dennehey will celebrate its 54th year in business. During this span we have grown from a small office with 8 lawyers in Philadelphia to a firm of 20 offices in six states and over 500 lawyers.

Imagine all the change five decades represent, yet we have remained versatile and able to adapt, even to changes in leadership.

It is an impressive feat considering many law firms are unable to survive the transition from first to second generation management. When their founders step down, these organizations tend to unravel. This is particularly common in the archetype "eat what you kill" firm where compensation is based on origination, hoarding clients is the norm and stewardship a foreign concept.

Marshall Dennehey is different. On the few occasions senior management has changed at our firm, it has occurred in a deliberate, organized and well planned manner without any drama. As a result, we remain stable and intact. It is a testament to our lawyers and staff and to a culture of competence and trust that transcends any one person.

It also has much to do with our firm's middle management. While the title may conjure images of Dilbert or Steve Carell in The Office, our middle management is unlike either parody. These folks are essential to the firm's cohesion, its day-to-day operation and the delivery of legal services to our clients.

As the firm has grown we have naturally become a more layered organization. Senior management—consisting of the three-member Executive Committee, Board of Directors, Practice Department Directors and Assistant Directors—have all been the subject of previous columns in this publication. I am, therefore, focusing this message on the next tier.

Middle management at Marshall Dennehey consists of the managing attorneys of our Philadelphia and 19 regional offices spread across Pennsylvania, New Jersey, Delaware, Florida, Ohio and New York. It also includes the practice group supervisors who manage lawyers within the broad practice departments of Professional Liability, Casualty, Health Care and Workers' Compensation.

When you consider two-thirds of our lawyers practice out of one of our regional offices, you begin to appreciate how important this layer of management is to what we do. Even in Philadelphia, middle management is vital.

These men and women have all stepped up and answered the call to lead. They serve on the front lines of a busy defense litigation practice in an increasingly competitive market. Outstanding lawyers in their own right, they have all committed to improving the performance of others through teaching, evaluating and sharing opportunities with those they supervise. They don't just orchestrate, they lend perspective and establish trust. Both nurturing and perceptive, this group is often the first to discover hidden talents in our lawyers and is tireless in coaching them to distinction. To their credit, they are less interested in being leaders than in developing leadership in others. It is a virtue that contributes to our culture and internal stability.

To our clients, these managing attorneys and practice group supervisors serve as a familiar resource and point of contact within our firm. Clients know them as "go to" people for questions, file assignment and problem solving. They rely on them for tactical guidance, including putting the right case with the right lawyer in the right location. They benefit from their participation in roundtables, audits, seminars and command of the discipline in which they practice.

From the perspective of senior management, one of our most important responsibilities is growing our replacements. It's comforting to know we have in our middle management such a deep and talented pool from which to draw.

At present, upwards of 10% of our lawyers serve in middle management. I invite you to visit our website at MarshallDennehey.com, click on Practices and preview the list of 36 distinct practice groups within our four practice departments. There you will be directed to the chairs or supervisors of each group, provided a biography and contact information. Alternatively, you can click on Offices, chose one of our 20 different locations and obtain similar information about the managing attorneys in each.

As we look toward the future, these leaders and those they are developing ensure Marshall Dennehey will continue its long record of success. ■

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PROFILE OF OUR JACKSONVILLE OFFICE

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legal community. Jessica Lanifero and Chris Walsh work closely with Dennis. Jessica, who is active in many professional associations, including the Jacksonville Women Lawyers Association, focuses her practice on insurance defense in the areas of product liability, extra-contractual, premises liability, construction litigation, and first-party and third-party property insurance matters. Chris focuses his practice on a variety of casualty matters and has a unique background in which he practiced as a foreclosure litigation attorney throughout Florida.

The office gained another impact attorney in 2015 with Lauren Burnette. Lauren actually joined Marshall Dennehey in 2008 in our Harrisburg, Pennsylvania office. But with family ties in Jacksonville, she made the move to warmer weather. Lauren is a shareholder in the Professional Liability Department's Consumer Financial Services Litigation & Compliance Practice Group where she represents clients across a broad spectrum of the consumer financial services industry. She provides a range of compliance management services to clients across the country, including preparation and periodic review and revision of compliance management systems, risk assessment and remediation, third-party monitoring and auditing, training assistance, and litigation management and oversight. Lauren brings a unique practice to Florida that is quickly expanding.

In 2012, Jim Hanratty, a shareholder in our Casualty Department, joined the Jacksonville office. He began his practice with Marshall Dennehey in 2006 in Ohio, then transferred to Florida in 2012. Since coming to Florida, Jim has assumed the statewide supervision of matters for key clients focusing on retail and commercial premises liability cases. He continues to handle significant injury cases involving automobile and general liability claims with an emphasis on the defense of brain injury claims. One of the most active litigators in our office, Jim is highly experienced and has tried over 100 civil cases to verdict.

Although Amanda Ingersoll began her law practice with our office in 2014, her roots with the firm go back to 2012 when she worked in our office as a law clerk. It was then that we discovered her talents and skills, which have made her a valuable member of the Casualty Department. Amanda's primary areas of practice include general, automobile, premises, and trucking and transportation liability.

About a year before Amanda's arrival, we acquired the talents of James (Jamie) Gonzalez. Jamie is a member of the Professional Liability Department, where he regularly defends architectural, engineering and construction firms, as well as their professional employees, in professional negligence and contractual claims. Jamie also represents trucking and transportation clients in maritime and inland marine litigation. These cases, brought against insurance carriers and their insureds, involve cargo subrogation, hull recovery, and warehouse property damage subrogation and recovery. He recently expanded his practice in the area of Fair Debt Collection Practices Act (FDCPA) litigation, working closely with Lauren Burnette. In addition to his legal practice, Jamie is a passionate supporter of the Pancreatic Cancer Action Network and serves as its Jacksonville Affiliate Chair for North Florida.

The Jacksonville office was founded 12 years ago, and we are proud that three of the office's founding members remain with the firm. As background, on July 1, 2004, Marshall Dennehey acquired the long-standing and reputable Jacksonville defense litigation firm of Obringer, DeCandio & Oosting. It was an ideal merger. The Obringer DeCandio firm brought an established presence to Marshall Dennehey in the Jacksonville area, which has proven critical to the firm's growing market share in the northeastern region of Florida. Three of the five shareholders of the Obringer DeCandio firm remain a core presence in the Jacksonville office—Michael Obringer, Michael DeCandio and Tom Roberts.

Michael Obringer, a member of the Casualty Department, has been practicing law for over 35 years, and over the last 20 years, he has devoted his practice to insurance defense litigation. Michael focuses his time in two main practice areas; he tries complex product liability cases where there is catastrophic damage and/or serious injury or death, and he defends doctors, dentists, hospitals and their employees in malpractice suits. To date, Michael has tried over 300 cases to verdict and continues to thrive with an active litigation practice.

Michael DeCandio, a certified court mediator and former Jacksonville assistant state attorney, has also been practicing law in the Jacksonville area for over 35 years. He focuses on complex construction and design professional litigation, and he leads the Jacksonville construction defect litigation practice. He and Tom Roberts, who is also highly experienced in this area, have a significant market presence in handling such matters not only in the northeastern region of Florida, but throughout the entire state of Florida. Additionally, Tom's background and education as a civil engineer greatly benefits clients facing civil design lawsuits, including flooding and uneconomic design claims.

Although not a founding member, casualty attorney Pamela Lynde joined the Jacksonville office later in 2004. Pam has devoted her 25-year law career to litigation. She concentrates her practice in the areas of automobile, premises and product liability, which includes defending trucking companies and individuals in motor vehicle negligence actions, as well as supermarkets, grocery stores and other retailers in premises liability actions.

As for me, I joined Marshall Dennehey in 2004 after my retirement from the U.S. Marine Corps. I began my career with the firm as a member of the Casualty Department in the Akron, Ohio office, where I became involved in all types of civil litigation. In January 2010, the Executive Committee offered me the opportunity to serve as the managing attorney for the Jacksonville office. After much deliberation, support from my family and the minor detail of passing the Florida bar exam, in July 2010, we relocated to Jacksonville, and I had the privilege of becoming part of this office. In Florida, my practice focuses on admiralty liability and maritime litigation, cargo and transportation litigation, premises and automobile liability,

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Florida—Property Litigation

SOLVING ONE OF THE GREATEST MYSTERIES OF FLORIDA PROPERTY LAW— FLORIDA'S VALUED POLICY LAW

By Michael A. Packer, Esq.*

KEY POINTS:

- Florida's Valued Policy Law provides that when any building or structure sustains a total loss as a result of covered peril or a partial loss as a result of fire, the liability for said loss shall be the amount of money for which the property was insured.
- The purpose of Florida's Valued Policy Law is to fix the measure of damages payable to the insured in case of total loss.
- The insurer does not lose its right to deny coverage for applicable exclusions to the loss, and if the structure is destroyed as a result of an excluded cause, Florida's Valued Policy Law does not apply.

Michael A. Packer

Florida Statute 627.702 is one of the least known and least understood property damage laws in Florida. Yet, it is the statute that can impose the greatest liability on an insurer, especially in times of catastrophic events or when a fire destroys or damages an insured structure. Claims professionals handling fire or catastrophic losses in Florida must be aware of this statute when adjusting claims. Florida Statute 627.702, better known as Florida's Valued Policy Law, in a nutshell, provides that when any building or structure sustains a total loss as a result of covered peril or a partial loss as a result of fire, the liability for said loss shall be the amount of money for which the property was insured. Florida Statute 627.702 provides in part:

> (1)(a) In the event of the total loss of any building, structure, mobile home as defined in s. 320.01(2), or manufactured building as defined in s. 553.36(13), located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, the insurer's liability under the policy for such total loss, if caused by a covered peril, shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.

§ 627.702, Fla. Stat. (2008). In *Freeman v. Amer. Integ. Ins. Co. of Fla*., 2015 Fla.App. LEXIS 18553 (Fla.Dist.Ct. App. Dec. 11, 2015), the First District Court of Appeals explained the purpose of the Florida Valued Policy Law:

> The purpose of Florida Valued Policy Law "is to fix the measure of damages payable to the insured in case of total loss," and the statute's plain language "requires an insurer to pay that amount listed on the face of the policy in the event of a total loss without the necessity of any additional proof of the actual value of the loss incurred." *Ceballo*, 967 So. 2d at 813-14. As the Florida Supreme Court has explained:
>
> > [T]he Valued Policy Law was intended only to set the valuation of the insured property: "The statute requires the insurer to fix the insurable value of the building, and to specify such value in the policy, and the measure of damages in case of total loss is fixed at the amount mentioned in the policy upon which a premium is paid. The statute does not undertake to deprive the insurer of any proper defense it may have to an action upon the policy, except in respect to the measure of damages and the authority of certain agents. Its principal object and purpose is to fix the measure of damages in case of loss total, or partial; and, to this end, it requires the insurer to ascertain the insurable value at the time of writing the policy, and to write it therein."
>
> *Cox*, 967 So. 2d at 820 (quoting *Hartford Fire Ins. Co. v. Redding*, 37 So. 62 (Fla. 1904)); see also *Fla. Farm Bureau Cas. Ins. Co. v. Mathis*, 33 So. 3d 94, 97 (Fla. 1st DCA 2010) ("In short, the Valued Policy Law is simply a valuation statute.").

Freeman, supra, 2015 Fla.App. LEXIS 18553, at *8-9.

So, how does the Valued Policy Law operate in practice? By way of an example, lets assume a dwelling in Miami, Florida was completely destroyed as a result of a tornado and the Coverage A (or dwelling) limits were $750,000. Pursuant to the statute, the value

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New Jersey—Environmental & Toxic Torts

NEW JERSEY APPELLATE COURT APPROVES INSURANCE POLICY ASSIGNMENTS TO FUND POLLUTION CLAIMS

By Lila T. Wynne, Esq.*

KEY POINTS:

- Assignment of insurance policies was allowed despite the fact that there were "no assignment" clauses in the policies and the insurers did not consent.
- Once a loss occurs, a policy may be assigned without an insurer's consent.

Lila T. Wynne

In *Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co., et al*, 120 A.3d 959 (App. Div. 2015), the New Jersey Appellate Division held that an assignment of rights under numerous insurance policies issued between 1964 and 1986 was enforceable and valid. The court reasoned that the insurer defendant's obligations to insure the risk under the policies was not altered by the assignment to a successor company.

The New Jersey Appellate Division was faced with a complicated corporate history. Incorporated in 1924, Burton T. Bush, Inc. manufactured flavors, fragrances and other chemicals in Clifton, New Jersey and other locations. On September 15, 1965, the company was renamed the Givaudan Corporation. During the 1960s and 1980s, the Givaudan Corporation purchased insurance policies from the defendants. These policies, which identified the Givaudan Corporation as the named insured, provided primary, umbrella and excess coverage. The policy periods ranged from November 16, 1964, to January 1, 1986.

In 1987, the New Jersey Department of Environmental Protection determined that the Guivadan Corporation's manufacturing activities at the Clifton site contaminated the soils and groundwater with hazardous materials. The Guivadan Corporation and the NJDEP entered into various Administrative Consent Orders in 1987 and 1988, which directed the company, among other things, to remediate damages caused by the contamination and to pay certain costs. These Administrative Consent Orders stated that they were binding upon not only the Guivadan Corporation, but also its successors and assigns.

Later in the 1990s, a series of very complex corporate mergers, transfers and re-formations began. The Guivadan Corporation merged with another company and became known as the Guivadan Roure Corporation. Separate and apart from that 1997 merger, the Guivadan Roure Fragrance Corporation was formed.

The Guivadan Roure Corporation decided to close its plant in Clifton, New Jersey in 1997. As part of its obligations under the Industrial Site Recovery Act, N.J.S.A. 13:1K-6T0-14, the Guivadan Roure Corporation and the NJDEP entered into a remediation agreement effective January 1, 1988. That agreement required both the Guivadan Roure Corporation and the Guivadan Roure Fragrance Corporation to continue their efforts to fulfill the terms of the Administrative Consent Orders, as well as to maintain a remediation funding source. The facility was closed in July 1998.

The Guivadan Roure Corporation transferred the assets and liabilities of its fragrances division to the Guivadan Roure Fragrance Corporation on January 1, 1998. The liabilities the latter corporation assumed did not exclude the Guivadan Roure Corporation's environmental liabilities. Also, none of the assets transferred included the insurance policies issued by the defendants to the Guivadan Corporation.

Also in 1998, the Guivadan Roure Fragrance Corporation changed its name and in 2000 merged into the newly formed Guivadan Fragrances Corporation. There was no dispute that the Guivadan Fragrances Corporation (Fragrances) was the successor-by-merger to the Guivadan Roure Fragrance Corporation.

In January 1998, the Guivadan Roure Corporation merged into what is now known as the Guivadan Flavors Corporation (Flavors). It was undisputed that Guivadan Flavors Corporation was the successor-by-merger to the Guivadan Corporation. It was undisputed that Fragrances and Flavors were affiliated companies and each was owned by the same parent company, Guivadan Flavors and Fragrances, Inc.

The United States Environmental Protection Agency in August 2004 notified Fragrances that it was potentially liable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. 9601-9675, for hazardous discharges that had emanated from the Clifton site. In January 2006, the NJDEP also filed suit against Fragrances for damages caused by discharges from the Clifton site.

The NJDEP commenced an action in 2005 against several companies that had operated sites within a contaminated area known as the Newark Bay Complex. On February 4, 2009, two of the defendants in the NJDEP action, Maxus Energy Corporation and Tierra Solution, Inc., filed third-party contribution claims against more than 300 entities that had also conducted activities in the area. Fragrances was one of the 300 third-party defendants named.

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NEW JERSEY APPELLATE COURT

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Fragrances claimed that it was an insured under the insurance policies the defendants had issued to the Guivadan Corporation between 1964 and 1986. The defendants took the position that Fragrances was not an insured under any of their policies. Thereafter, Fragrances filed a declaratory judgment action in 2009. In that declaratory judgment action, Fragrances sought a ruling that it was an insured under the defendants' policies and that they were obligated to defend and indemnify Fragrances in the third-party contribution action, as well as the related EPA and NJDEP cost recovery actions.

On March 25, 2010, Flavors assigned to Fragrances all of Flavor's insurance rights under various policies the defendants had issued to the Guivadan Corporation from November 16, 1964, to January 1, 1986. The assignment stated that Flavors "sells, transfers, assigns, conveys, grants, sets over and deliveries to Guivadan Fragrances Corporation ('Assignee') all rights to insurance coverage under the insurance policies described on Schedule A hereto for all occurrences, accidents, events, laws, injuries, damages, and liabilities arising out of the conduct of the business of Assignor, Assignee or any affiliate or predecessor of Assignor or Assignee prior to January 1, 1998, and relating to liabilities and/or assets transferred from Assignor to Assignee on or about January 1, 1998, including but not limited to any environmental liabilities."

None of the insurer defendants consented to the assignment. In addition, the defendants refused to recognize the assignment on the basis that their respective insurance policies prohibited policy assignments without the insurer's consent. The defendants also argued that Fragrances was not an insured or an additional insured or included within the definition of insured in any of the policies.

Fragrances argued that the assignment was valid and binding upon the defendants. Fragrances also argued that it was an insured under those policies that defined the named insured as "Guivadan Corporation and any subsidiary or affiliated companies which may now exist or hereafter be created." Fragrances contended that it was an affiliate of Flavors (the successor-by-merger to the Guivadan Corporation) because Fragrances and Flavors were both owned and controlled by the same parent, Guivadan Flavors and Fragrances, Inc.

Thereafter, Fragrances moved for partial summary judgment, and the defendants cross-moved for summary judgment. The trial court denied Fragrances' motion, granted the defendants' motions and dismissed Fragrances' complaint with prejudice. The court found the assignment invalid because there was assignment of more than a single claim and single insurance rights.

> ....[T]his assignment is not simply [an] assignment of a particular claim or even limited claim – insurance claims. It seems to be a rather global assignment. And I think there's no other way that I can read that assignment, even though it doesn't say it's the assignment of a policy. For all intents and purposes, it is [an] assignment of policies....it's simply not the assignment of a [chose in] action.

It was also held that Fragrances was not an affiliate of Guivadan Corporation and, therefore, not an insured, even though the definition of an insured under most of the policies included "affiliated companies which may now exist or hereafter be created." The court interpreted this language to mean that only those affiliates that were created during a policy period could be an insured. The trial court also indicated that Fragrances was not an insured affiliate because of the corporate structure involved.

On appeal, Fragrances contended the trial court erred when it concluded that the assignment from Flavors to Fragrances was invalid. It was not disputed that the subject policies at issue required the insurer's consent in order for the insured to assign the policy to a third person, citing *Kase v. Hartford Fire Ins. Co.*, 32 A. 1057 (N.J. 1895) (holding that an insurance policy cannot be transferred to a third person without the insurer's consent). However, the Appellate Division noted that once a loss occurs, an insured's claim under a policy may be assigned without the insurer's consent, citing *Flint Frozen Foods v. Fireman's Ins. Co*., 79 A.2d 739, 741 (Law Div. 1951), rev'd on other grounds, 86 A.2d 673 (N.J. 1952). The trial court in *Flint* noted that, after a loss covered by a policy has happened, "the prohibition of assignments without the consent of the insurer [ceases]. Its liability [has] become fixed and like any other chose in action [is] assignable regardless of the conditions of the policy in question."

The Appellate Court noted that the purpose behind a no-assignment clause is to protect the insurer from having to provide coverage for a risk different from what the insurer had intended. The court noted that a no-assignment clause guards an insurer against any unforeseen exposure that may result from the unauthorized assignment of a policy before a loss. But if there has been an assignment of the right to collect or to enforce the right to proceed under a policy after a loss has occurred, the insurer's risk is the same because the liability of the insurer becomes fixed at the time of the loss. The court held that, thereafter, the insurer's risk is not increased merely because there has been a change in the identity of the party to whom a claim is to be paid.

In *Guivadan Fragrances*, Flavors assigned to Fragrances all of its rights to the coverage provided by specific insurance policies, all of which were clearly identified in a schedule attached to the assigning document. The schedule showed that the last of these policies expired on January 1, 1986. If any loss occurred during the policy period of any of these policies, the loss clearly occurred long before the assignment in 2010. Therefore, the court held that Flavors did not require the insurer's consent to assign its rights under the policies. Furthermore, the court held that the assignment of the rights to the policies specified in the assigning document could not have increased the risk to any of the defendant insurers because all losses occurred before the assignment.

The defendants argued that the assignment obligated them to provide coverage for both Fragrances and Flavors and, thus, improperly increased their risk. The Appellate Division disagreed,

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New Jersey—Health Care Liability

BOOTSTRAPPING EXPERT TESTIMONY – RESTRICTIONS ON USING RECORDS FROM A TREATING PHYSICIAN TO CHALLENGE PLAINTIFF'S EXPERT AT TRIAL

By Michael S. Levenson, Esq.*

KEY POINTS:

- Medical records are generally admissible under the business records exception to the hearsay ban.
- Under N.J.R.E. 808, opinions of treating doctors are considered "expert opinions" and are generally excluded from evidence unless the doctor is present to testify.
- As a result, "facts and data" contained in medical records are generally admissible, while complicated medical diagnosis/opinions are generally not admissible unless the treating doctor who formed those opinions testifies in court.

Michael S. Levenson

The opinions of a treating physician can be persuasive evidence on causation and damages, often carrying great weight with a jury. However, even treating doctors are considered "experts," and limits are placed on using their "reports" at trial in the absence of live testimony.

As a general proposition, in New Jersey, medical records are considered hearsay documents and are, therefore, inadmissible. However, the law provides exceptions for **certain parts** of medical records which are deemed reliable and, consequently, admissible. Yet, other information within medical records is still excluded in New Jersey.

A hearsay statement is an out-of-court statement offered to prove the truth of what it asserts. N.J.R.E. 801(c). Hearsay is not admissible, except as provided by the rules of evidence. This general prohibition, subject to various exceptions, reflects that hearsay is presumptively deemed to be untrustworthy and unreliable, as statements made out-of-court and not under oath or not subject to cross-examination may suffer infirmities of perception, memory and narration. *James v. Ruiz*, 111 A.3d 123, 131-132 (App. Div. 2015).

Medical records are hearsay documents that contain statements made outside of the courtroom by declarants, often doctors, who are not under oath. For example, if a plaintiff tells his doctor, "[m]y arm has hurt ever since my neighbor hit me with his car," the doctor's note in the chart would be a hearsay statement.

However, many medical records fall under an exception to the hearsay rule. Most often used is the Business Records Exception, which allows the admission of:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

N.J.R.E. 803(c)(6).

It is readily apparent that medical records are created in the normal course of a physician's business. However, the analysis does not end there because physicians, even treaters, are considered experts. Therefore, N.J.R.E. 808 also applies. This rule decrees that expert opinions that are part of an admissible hearsay statement are inadmissible if the declarant has not been produced as a witness, unless the trial judge finds that the circumstances involved in rendering the opinion, such as the motive, duty and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter and the likelihood of accuracy of the opinion, tend to establish its trustworthiness.

This principle was clarified in the recent case of *James v. Ruiz*, in which the plaintiff was involved in a car accident. He underwent a CT scan and was diagnosed with a bulging disc by a treating doctor. The defense expert reviewed the same CT scan and opined that the plaintiff did not have a bulging or herniated disc. The treating doctor did not testify at trial. However, the plaintiff retained his own expert to comment on the CT scan.

At trial, plaintiff's counsel asked the defense expert about the report by the treating doctor, which found a herniation. The court ruled that such questions were impermissible because a complex opinion, such as a diagnosis, contained in a medical record is inadmissible hearsay, even if the remainder of the medical record is admissible. The Appellate Division affirmed and elaborated that, while a testifying expert can refer to the records of a treating doctor, reference cannot be made to a complex medical diagnosis unless that treating doctor actually testifies in court.

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New Jersey—Workers' Compensation

MORE THAN 100% DISABLED? THE NEW JERSEY APPELLATE DIVISION'S LATEST ANALYSIS OF PERMANENT/TOTAL DISABILITY BENEFIT AWARDS

By Robert J. Fitzgerald, Esq.*

KEY POINTS:

- A petitioner who cannot return to work may be eligible for permanent/total disability benefits.
- The Second Injury Fund pays benefits when pre-existing conditions partly contribute to a petitioner's permanent/total disability.
- A petitioner cannot receive an award of more than 100% total disability for a single injury.

Robert J. Fitzgerald

In the recent decision *Domenick Catrambone v. Bally's Park Place, et al*., 2015 N.J.Super. Unpub. LEXIS 2601 (App.Div. Nov. 12, 2015), the New Jersey Appellate Division addressed the issue of whether there can be an increase in permanency benefits for a workers' compensation petitioner who has already received an award of permanent/total disability benefits. By way of background, the petitioner initially sustained a low back work injury on March 18, 2006. That claim was settled in 2008 for an award of 27.5 percent permanent partial-total disability (minus an *Abdullah* credit of 7.5 percent partial-total disability for a pre-existing disability).

On June 14, 2008, the petitioner sustained a second work injury involving his neck, left shoulder and left wrist. The petitioner filed a claim petition and a Second Injury Fund Petition for the 2008 injury and a Re-Opener Petition for the 2006 injury. The second round of petitions were settled in 2010. Specifically, the Re-Opener Petition for the 2006 injury was settled for a new award of 30 percent partial-total disability (minus a credit for the earlier award of 27.5 percent partial-total disability), and the petitioner was then awarded permanent/total disability benefits for the 2008 injury. The award of permanent/total disability required the employer, Bally's, to pay 33.3 percent of the overall award, while the Second Injury Fund paid the remaining 66.6 percent. Thereafter, the Second Injury Fund would pay ongoing disability benefits for the remainder of the petitioner's life. The portion of the award of permanent/total disability benefits paid by the Second Injury Fund specifically referenced the petitioner's award of 30 percent partial-total disability for the 2006 injury.

In 2011, the petitioner filed a new Re-Opener Petition for the 2006 injury, seeking an increase in the award of 30 percent partial-total disability. Bally's opposed the Re-Opener on the basis that the petitioner was already receiving permanent/total disability benefits for the second 2008 injury, which included any disability from the 2006 injury. However, the judge entered a new award of 35 percent partial-total disability, minus a credit of 30 percent partial-total disability for the prior award. Since the petitioner was already receiving permanent/total disability benefits, the order required Bally's to pay an additional $16,054 to the petitioner on top of the ongoing permanent/total disability benefits. Bally's was also required to reimburse the Second Injury Fund part of the amount of the permanent/total disability benefit contribution.

On appeal, both Bally's and the Second Injury Fund argued that the petitioner was barred from receiving any increase in permanency from the 2006 injury based on the subsequent award of permanent/total disability benefits. Bally's also argued that the doctrines of res judicata and collateral estoppel barred the second Re-Opener Petition for the 2006 injury.

The court first referenced *Taylor v. Engelhard Industries*, 553 A.2d 361 (App. Div. 1989), in which the court determined that an award of 100 percent total permanent disability precluded any further award or increase in permanency for the effects of the same injury. However, the court went further and determined that the increase of permanency was related only to the 2006 low back injury, not to the 2008 shoulder injury. Therefore, the new award was not overlapping. The court noted that there was no case law to the contrary and that, somehow, this did not constitute a windfall or double recovery.

The *Catrambone* decision is extremely troubling for New Jersey employers. Under an award of permanent/total disability, petitioners are already receiving a full weekly disability benefit for the rest of their lifetime. Under this decision, there would be no limits on permanency benefits until the petitioner receives an award of permanent/total disability benefits for each and every injury he or she has ever had (assuming timely Re-Opener Petitions have been filed). Now a petitioner can receive more than 100 percent of their disability benefit entitlement.

Moreover, since the permanent/total disability award here specifically referenced and included the 30 percent partial-total disability award as part of a finding of 100 percent disability, how is

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New York—General Liability

THE PURSUIT OF THE TRIVIAL—IS THIS HOW THE NEW YORK COURT OF APPEALS HAS BEEN SPENDING ITS TIME? WELL, YES (BUT WITH A PURPOSE)

By Robert A. Faller, Esq.*

KEY POINTS:

- A trivial defect in a walking surface is generally not actionable.
- Since facts and circumstances dictate the outcome, a defendant must develop the record.
- "In sum, there are no shortcuts to summary judgment."

Robert A. Faller

An issue of consistent significance in trip and fall cases involving walking surfaces is whether the mechanism of the fall—a hole, a protrusion, an uneven surface—constitutes a defect so trivial as to render the claim not actionable. The Court of Appeals, New York's highest court, recently reaffirmed that there would be no bright-line test for this finding, however tempting it might be to adopt a clear-cut rule. This is not to say, however, that there is no pathway to a fair degree of predictability of result. It becomes a matter of thorough investigation and discovery.

Hutchinson v. Sheridan Hill House Corp., 41 N.E.3d 766 (N.Y. 2015) comprises three separate cases involving falls on a sidewalk or stairway. In each case, the issue was whether the intermediate appellate court (the Appellate Division) correctly found that the defendant was entitled to summary judgment because the defect was too trivial to create a valid cause of action. The Court of Appeals affirmed one finding and reversed the other two. The court's focus was not on measurements (although that was one factor), rather, it was on overall circumstances.

The plaintiff in the first case tripped on a sidewalk when his foot caught, allegedly due to a screw or the like that was protruding from the sidewalk, which was argued to have been present since the sidewalk was replaced two years before. A defense attorney visited the site 20 months after the accident, took photographs, and measured the protrusion as between one eighth of an inch and one fourth of an inch above the sidewalk and five eighths of an inch in diameter. The defendant sought summary judgment on the dual grounds that it did not have actual or constructive notice of the defect and, in any event, that the defect was too trivial to be actionable. The lower court granted summary judgment, the Appellate Division affirmed in a 3-2 decision and the Court of Appeals affirmed. To illustrate the different perspectives that courts—and individual judges—bring to these cases, note that the lower court dismissed on the ground of no notice, while the Appellate Division affirmed but added the additional ground of triviality of the defect. Meanwhile, two judges dissented, believing that issues of fact existed on both grounds. The Court of Appeals then took the case.

The court first looked at *Trincere v. County of Suffolk*, 688 N.E.2d 489 (N.Y. 1997), in which the court held that in New York there is no per se rule regarding minimum height or depth that supports or rejects what is actionable and, therefore, a grant of summary judgment based exclusively on the dimensions of the defect cannot be supported. Rather, a court must consider all facts and circumstances presented. Against this background, the overall theme of the holding in *Hutchinson*, collectively and in the three individual cases, is that the more detail that a defendant (or a plaintiff) can present as to facts and circumstances to support his position, the better the chance of prevailing, often by way of summary judgment. Thus, in the first case, the Court of Appeals affirmed summary judgment in favor of the defendant. One factor was, of course, the seemingly trivial dimensions, but the court also considered that the protrusion was in a well-illuminated location, in the middle of the sidewalk, and a place where a pedestrian would not have to look only ahead, since there was an absence of crowds. The object was not hidden, its edge was not jagged and the surrounding surface was not uneven. All of this was sufficient to lead the court to conclude that the defect was trivial as a matter of law. There appears little doubt that, had the defendant not developed and argued these factors to the Court of Appeals, the result would have been different.

The second case involved a fall on an interior staircase in which there was a chip, a missing piece, near or on the outer edge of a step. The Appellate Division found the defect to be trivial because the chip was not on the walking surface, but the Court of Appeals reversed. The court found that there was evidence, including expert evidence, advanced by the plaintiff which allowed the conclusion that the walking surface extended to the edge of the step and, thus, the location of the chip. The court found this to be sufficient to create a triable issue of fact, precluding summary judgment.

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PROFILE OF OUR JACKSONVILLE OFFICE

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toxic tort litigation, and construction and design professional negligence. In addition, I have oversight of the day-to-day office operations, as well as a supervisory role over the casualty practice group for Florida.

Complementing our 12 talented attorneys are three highly qualified paralegals—Meredith Elmgren, Gloria Alford and Landor R. (Lenny) Angulo. Meredith began her tenure with Marshall Dennehey as a secretary. Her interests in paralegal duties were quickly recognized, and she soon became qualified to serve in such a capacity. Gloria joined us in 2015. Meredith and Gloria support the entire office in paralegal matters and from time to time are called upon to assist our other Florida offices.

Lenny, who was a paralegal with the Obringer DeCandio firm, joined Marshall Dennehey in 2004 with the merger. As a result of his background, both academically and professionally, Lenny brings a unique dimension to the defense of construction and design claims that enhances our in-house service to clients and carriers. With a Bachelors Degree in Construction Management, Lenny has special expertise in analyzing plans and specifications, scheduling and jurisdictional requirements in multiple disciplines. His presence and capabilities allow us to provide expert quality analysis and focus on a given file prior to retention of more expensive outside experts. While Lenny's office is in Jacksonville, he serves as a valuable resource to the entire firm.

The attorneys and paralegals in the Jacksonville office are supported by an incredible and dedicated staff, which is managed by Michelle (Missy) Winstead. Missy is a long-time resident of Jacksonville and active in the local administrative law community. Her skills and experiences make her an invaluable asset to our team.

Jacksonville's stature in the national and international marketplace promises to be an exciting and expanding market for Marshall Dennehey. The Jacksonville office practices aggressive, well prepared, defense litigation by lawyers who are accessible, practical and highly experienced. Like all of the firm's regional offices, we gain from the support and synergism of a large and diverse defense litigation firm, but we particularly benefit from the culture and best practices espoused by Marshall Dennehey. As the economic outlook for northeastern Florida shows promise of strength and growth, so, too, does the Jacksonville office.

I encourage you to visit marshalldennehey.com for more information about the Jacksonville office and in-depth descriptions of each attorney's background and experiences. I welcome you to call me or any of the attorneys in this office if you have questions or need assistance. Our office is located at 200 West Forsyth Street, Suite 1400, Jacksonville, FL 32202. My direct telephone number is 904.358.4234 and my email is mhsitler@mdwcg.com. And, if nothing else, stop by and enjoy the view—it truly is spectacular! ■

SOLVING ONE OF THE GREATEST MYSTERIES

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of the dwelling is set at $750,000, and, absent any applicable coverage defenses or exclusions, the insurer will be liable in the amount of $750,000. The purpose or intent of the statute is to relieve the insured of the burden of not only establishing the value of the dwelling, but the cost to replace or rebuild the structure.

Rest assured, the insurer does not lose its right to deny coverage based upon applicable exclusions. If the structure is destroyed as a result of an excluded cause, Florida's Valued Policy Law does not apply. Further, if the building is partially destroyed by a covered peril and partially by a non-covered peril, Florida's Valued Policy Law will only apply if the covered peril in and of itself would have caused a total loss. By way of example, if the aforementioned $750,000 dwelling sustained significant damage due to the tornado which caused $500,000 in damage, but then ultimately became a total loss due to a non-covered water event, the insurer's liability would only be $500,000 for the damages caused by the covered tornado.

The only time Florida's Valued Policy Law will apply to a partial loss is when the cause of loss is fire or lightning. Pursuant to subsection (2) of Florida's Valued Policy Law, the insurer's liability (assuming coverage is afforded) for a partial loss caused by fire or lightning will be the actual amount of such loss, but it shall not exceed the amount of insurance in the policy. Arguably, depreciation should not be withheld pending proof of repairs under these circumstances. Lastly, generally speaking, Florida's Valued Policy Law will not apply to personal property claims. ■

NEW JERSEY APPELLATE COURT

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noting that the assignment itself disproved this premise. According to the court, Flavors assigned to Fragrances all of its rights to insurance coverage under the specific insurance policies listed in the schedule for all occurrences, accidents, events, losses, injuries, damages and liabilities arising out of the conduct of Flavors, Fragrances or an affiliate or predecessor of Flavors or Fragrances before January 1, 1998.

Therefore, the Appellate Division reversed the trial court's grant of summary judgment to the carriers. The court found that once a loss occurs, an insured's claim under a policy may be assigned without the carrier's consent. Based upon the valid assignment, the Appellate Division reversed and remanded for further proceedings. ■

Ohio—Insurance Coverage & Bad Faith

OHIO SUPREME COURT SIGNALS NARROW APPLICATION OF OHIO'S INFERRED INTENT DOCTRINE

By David J. Oberly, Esq.*

KEY POINTS:

- Inferred intent doctrine infers intent of insured to cause harm in certain limited circumstances.
- Where inferred intent doctrine applies, coverage is precluded under intentional acts exclusion.
- In Ohio, inferred intent doctrine has limited applicability.

David J. Oberly

In *Granger v. Auto-Owners Insurance*, 40 N.E.3d 1110 (Ohio 2015), the Ohio Supreme Court was afforded its first opportunity since *Allstate Insurance Company v. Campbell*, 942 N.E.2d 1090 (Ohio 2010) to clarify the reach of Ohio's inferred intent doctrine, which automatically triggers an insurance policy's intentional acts exclusion to preclude an insured from obtaining coverage as a matter of law. While the court failed to provide a bright-line rule as to the applicability of the doctrine, the decision is significant nonetheless, as it provides a strong signal that the court is willing to apply the doctrine only in a very limited scope of cases involving conduct that, without question, could not have been engaged in without causing harm or injury.

Steve Granger and Paul Steigerwald owned and operated a rental property in Akron that they rented on a month-to-month basis. Valerie Kozera called Granger in June 2010 to inquire about renting a unit at the complex for her and her son. According to Kozera, during their phone conversation, Granger told Kozera that he did not rent to people with children and ended the phone call. Kozera contacted the Fair Housing Contact Service, Inc. (FHCS), which investigated her claims by using trained testers to interact with Granger. Kozera and FHCS filed suit against Granger and Steigerwald. Based on information from Kozera and the testers, FHCS contended that Granger had discriminated against Kozera, an African-American, on the basis of familial status and race in violation of federal and state law. Kozera claimed that she had "experienced out-of-pocket costs and emotional distress as a result of Defendants' conduct."

Granger and Steigerwald were covered under an insurance policy that defined "personal injury" to include "humiliation." However, the policy excluded coverage for intentional acts, stating, "We do not cover . . . [p]ersonal injury or property damage expected or intended by the insured." The insurer denied coverage.

At issue on appeal was the insurer's duty to defend under the policy. After concluding that Kozera's claim for "emotional distress" damages fell within the policy's coverage for humiliation, the court turned its attention to determining whether any potential duty to defend was obviated by the policy's intentional acts exclusion.

Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts. Consequently, most insurance contracts contain an "intentional acts exclusion" stating that the insurer will not be liable for harm intentionally caused by the insured.

An intentional acts exclusion relieves the obligation of an insurance company to provide coverage when the harm alleged is intentionally caused by the insured. The inferred intent doctrine applies when there is no evidence of direct intent to cause harm and the insured denies the intent to cause any harm. Under the doctrine, the insured's intent to cause harm is inferred as a matter of law in certain instances so as to exclude insurance coverage under the intentional act. The doctrine of inferred intent is based on the principle that the insured's commission of a particular, deliberate act may, as a matter of law, give rise to an inference of intent, *i.e.*, that the insured intended to cause the resulting harm. The rule applies to those cases in which the insured's testimony on harmful intent is irrelevant because the intentional act could not have been done without causing harm.

Until recently, the Ohio Supreme Court had only applied the doctrine in cases involving murder and sexual molestation of a minor. However, in *Campbell*, the court held that the doctrine of inferred intent invokes an insurance policy's intentional act exclusion when the intentional act of an insured and the resulting harm are intrinsically linked—the insured's action necessitates the harm. However, while the *Campbell* court extended the scope of the doctrine, it also cautioned the courts to avoid applying the doctrine in cases where the insured's intentional act does not necessarily result in the harm caused by that act. Rather, the court held that for an act to fall within the doctrine, the harm must be the inherent result of an intentional act.

The insurer sought application of the inferred intent doctrine in *Granger*. The insurer argued that discriminatory intent is inferred as a matter of law for purposes of an intentional act exclusion on a claim for pre-leasing housing discrimination. The Ohio Supreme Court disagreed. In its analysis, the court framed the question as whether Granger expected or intended Kozera to be humiliated by his conduct. The court answered the question in the negative, finding that humiliation was not so intrinsically tied to pre-leasing discrimination that Granger's act necessarily resulted in the harm suffered by Kozera.

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THE RELATIONSHIP BETWEEN

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One question we are repeatedly asked by claims professionals is whether or not an individual breaches limited tort. Each of our offices deal with the many and diverse counties in their states. The makeup of the juries in each of these counties varies greatly. What breaches limited tort in some counties would not in others. Many of these counties border one another, and in most instances, the courthouses are less than 40 miles away from one another. That being said, the jury makeup and verdicts in these counties can be worlds apart. Local knowledge is a valuable resource, especially when working with a claims professional who may not be familiar with the jurisdictions. This knowledge is instrumental in deciding with the claims professional whether to resolve a claim pre-litigation or see it through trial.

Knowledge of experts is also invaluable. Our attorneys know when they are dealing with a professional witness and how to deal with plaintiffs' experts who are overreaching. The knowledge and working relationship with the claims professionals, who also are often aware of some experts' tendencies, allows for a claim to be evaluated properly, efficiently and in a timely manner.

Another way our attorneys assist claims professionals is by fielding questions pre-suit in an effort to eliminate problems down the road. Our goal is always to address developing or potential problems early. To do this, we encourage our clients to get us involved whenever they feel it is necessary.

Our attorneys also have a vast field of knowledge in dealing with first-party PIP, UM and UIM defense of automobile insurers. In dealing with first-party claims, it is critical that defense counsel understand their jurisdiction as the law on PIP, UM and UIM vary greatly from state to state. Our attorneys can provide this multi-jurisdictional knowledge. We can as easily answer a New Jersey or Pennsylvania PIP question as we can one involving Florida, Ohio or Delaware UM/UIM.

We routinely defend auto insurers in complicated first-party disputes involving medical necessity of treatment, particularly in those states with high PIP policy limits. We work closely with claims professionals and experts in addressing treatment plans and defending post-treatment disputes. We are intimately familiar with defense strategies for disputes relating to usual and customary billing rates, CPT coding, NCCI edits, and the assessment of Medicare and workers' compensation liens.

Our attorneys are also experienced in defending disputes that are made in non-traditional ADR settings; for example, no-fault arbitrations. The amount of litigation in these areas has increased dramatically. We are on the cutting edge in defending in these jurisdictions, and we take advantage of the relaxed rules of evidence and other unique rules. We have handled hundreds of thousands of such disputes and have worked closely with claims professionals in developing complicated strategies for defending this field of litigation. These defenses often involve novel, unique issues related to excessive billing, correct coding initiatives, billing for services not rendered and the use of fee databases.

In closing, we at Marshall Dennehey are extremely proud of our Automobile Liability Practice Group and the relationships we have developed in 54 years of working closely with our clients. The relationships not only benefit Marshall Dennehey but our clients as well and have led to friendships that, in many instances, have lasted decades. ■

BOOTSTRAPPING EXPERT TESTIMONY

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Moreover, while it would seem that the opinions of a treating doctor could be used to impeach the credibility of an expert and, therefore, avoid the hearsay ban, the Appellate Division ruled that an expert may **not** be asked "consistency/inconsistency" questions. For example, an expert may not be asked questions regarding whether the expert's opinions are consistent with those of the treating doctor. This proscription was put in place to prevent slipping complex opinions of a non-testifying doctor through the proverbial "back door."

This ruling reinforced the holding in *Nowacki v. Comm. Med. Ctr.*, 652 A.2d 758 (App. Div. 1995). In that medical malpractice case, the plaintiff fell off of an operating table, breaking several bones. The hospital records indicated that the factures were non-traumatic and not caused by the fall. While the hospital records were admitted into evidence, the part regarding the cause of the fracture was redacted, and no testimony was allowed about the "complex medical diagnosis" pertaining to the cause of the fractures.

As clarified by the court in *James*, "facts or data" in medical records are generally admissible and can be commented upon by testifying experts. However, complex medical diagnoses, such as the cause of an injury, are to be excluded from trial unless the treating physician actually testifies. For example, a medical record reflecting that a patient has arm pain is likely admissible. However, the doctor's opinion that the arm pain is from a comminuted elbow fracture is non-admissible hearsay, unless the treating doctor actually testifies.

What qualifies as "facts or data" rather than a complex medical diagnosis is often unclear and dependent upon the injury at issue. This recent ruling underscores the importance of retaining appropriately qualified experts to put forth opinions on causation and damages. ■

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Tony Michetti (Doylestown, PA) obtained a defense verdict at arbitration in a slip and fall matter where the plaintiff was a tenant in an 89-unit apartment complex who claimed that the defendant owner failed to properly maintain bushes along a common sidewalk in the complex. The bushes were trimmed in the fall and spring but had grown to a point where they covered half the sidewalk. Also, the plaintiff claimed that the sidewalk itself was defective because there was an 11 degree pitch/slope to the side and a drop of three or four inches along the edge of the sidewalk. As the plaintiff walked around the bushes, she claimed that the pitch/slope caused her to move even closer to the sidewalk's edge. Her foot landed on the edge, and because of the drop off, she fell and twisted her ankle. She sustained an ankle fracture that required surgery. The plaintiff also claimed a rotator cuff tear. The plaintiff acknowledged that she was very familiar with the conditions described above since she had lived at the complex for over a year and had used the sidewalk on a daily basis. Also, the plaintiff admitted that there was an alternative route. Tony argued that the property owner had no duty to protect the plaintiff from a known, obvious or apparent condition.

In a second slip and fall case, **Tony Michetti** (Doylestown, PA) obtained a defense verdict in a jury trial in Bucks County, Pennsylvania. The plaintiff claimed that she fell on ice and snow in a common area in a residential community where she lived. Tony represented the homeowners association and the management company retained by the association. The plaintiff suffered sacral fractures and a foot fracture, and she underwent surgery to remove sacral Tarlov Cysts, which she claimed were asymptomatic prior to the fall. There were a number of interesting issues in the case, including a factual determination as to when the accident occurred, causation and identification of the plaintiff's status on the defendant's property. At the charging conference, there was a discussion regarding whether the plaintiff was an invitee or a licensee. The judge agreed with Tony that the plaintiff was merely a licensee, and he so charged the jury. Ultimately, the jury determined that the plaintiff's accident occurred more than two years prior to suit being filed and, therefore, the claim was barred.

Allison Krupp (Harrisburg, PA) obtained two defense verdicts from a Lancaster County arbitration panel in two separate neighbor dispute cases involving the same parties. In the first case, the plaintiff claimed that the insureds damaged his concrete driveway while using a boom lift on his property to install an air conditioning unit on the roof of their home. The plaintiff sued for trespass. At the arbitration, pre-loss photos established that the cracks in the driveway were pre-existing and were not caused by the boom lift. The arbitration panel unanimously ruled in favor of the insureds. In the second case, the plaintiff claimed that the insureds had trespassed and damaged his wooden fence that separates the two properties when tree stumps were being removed and a retaining wall was being installed on their property. Pre-loss photos and testimony from the landscaper established that there was no trespass and that the damage to the fence was pre-existing. The arbitration panel unanimously ruled in favor of the insureds with respect to this case as well.

HEALTH CARE DEPARTMENT

In a medical malpractice action against our client, a bariatric surgeon, **Frank Leanza** and **Ryan Gannon** (Roseland, NJ) obtained a defense verdict. The plaintiff had initially named the anesthesia and nursing teams as defendants; however, they were all dismissed before trial. Our client had performed a second revision gastric bypass procedure on the plaintiff. Following the 12-hour operation, the plaintiff was diagnosed with a brachial plexus injury that left her with deficits in her left arm and hand. Through her experts, the plaintiff alleged that the brachial plexus injury was caused by the plaintiff's arms being overextended or stretched during the 12-hour procedure. The plaintiff's experts alleged that our client had a duty to position the patient for the surgery or confirm proper propositioning prior to the operation. These experts further alleged that our client should have released the arms during the 12-hour operation to avoid the potential stretching of the brachial plexus. Through the testimony of our client and our experts, Frank and Ryan defended the case on both standard of care and proximate causation. They established that positioning the patient prior to a bariatric procedure is the role of the anesthesia and nursing teams and is not the function of the surgeon. They also established that the patient was positioned properly for the procedure. The claim that her arms should have been released during the lengthy operation was also challenged by our client and experts as not being within accepted standards of care. The jury returned a defense verdict in favor of our client and found that he did not deviate from accepted standards of care.

Vicky Scanlon (Scranton, PA) obtained a defense verdict at a non-jury trial on behalf of a student nurse anesthetist. The plaintiff alleged that the student nurse anesthetist used excessive force when intubating the patient, herniating the patient's jaw. The plaintiff alleged that, as a result, she developed a TMJ disorder that required jaw surgery. Additionally, the plaintiff contended that, because her jaw had locked closed, she was unable to brush her teeth and her teeth rotted. She further asserted that, as a result, she required extraction of all remaining teeth and had upper and lower dentures placed. The plaintiff denied a pre-existing history of TMJ and poor dentition. However, medical records did not support her position. There were

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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19 trial experts disclosed. The judge found that the plaintiff was not credible and, because her experts had based their opinions on the plaintiff's faulty assertions, the plaintiffs' experts also were found not credible.

A defense verdict was obtained by **Kevin Ryan** (Long Island, NY) in a medical malpractice case involving an 82-year-old female admitted for aortic valve replacement. The plaintiff was discharged to a sub-acute rehab (SAR) facility but was readmitted seven days later for dehiscence of the sternal incision and anemia. During this admission, she developed Incontinence Associated Dermatitis (IAD) of the buttocks and later wounds in the gluteal cleft, described by the nursing staff as Stage 2 pressure ulcers. She adamantly refused discharge to another SAR, opting to return home with a visiting nurse service and physical therapy every other day. One of the wounds resolved. The other deteriorated to Stage 4, required two flap graft procedures and 40 sessions of hyperbaric therapy, finally closing after nine months. The plaintiff's experts claimed various deviations in charting skin breakdown prevention, which proximately resulted in the wounds developing and deteriorating. Our expert, a wound care nurse, testified that the wounds were caused by IAD, not pressure, as the nursing staff had mistakenly characterized them. Our geriatric expert testified that the wounds would have healed sooner and not required flap grafts or hyperbaric therapy had the plaintiff accepted transfer to SAR, where she would have received a higher level of care. The jury was asked to award $1.5 million for past and $500,000 for future pain and suffering for the 87 year old. The jury found the hospital had deviated from accepted standards, but determined that proximate cause had not been established. The hospital offered a high-low arrangement of $100,000/$750,000 during trial, but the plaintiff would not accept less than $250,000/$950,000 in light of a $106,000 Medicare lien. The settlement demand prior to trial was $300,000 and, after jury selection, was increased to $650,000. When the jury indicated it had a verdict after 90 minutes, the plaintiff's attorneys "agreed" to accept the hospital's high/low offer, which the hospital chose to honor (even though it previously refused), but only if the plaintiff agreed to be responsible for the Medicare lien.

Stacy Delgros (Cleveland, OH) obtained a defense verdict in a case where she defended a surgeon who resected a sigmoid volvulus (long, twisted segment of the sigmoid colon) on an otherwise healthy 59-year-old woman. Ten days after the procedure, the woman died of septic shock as a result of a small defect in the surgical anastomosis (connection), which had allowed fecal contents to contaminate the woman's abdominal cavity. The primary allegation against the surgeon was that he failed to perform an air or fluid leak test during the surgery to ensure that the anastomosis was intact, meaning there were no holes or defects. There were other allegations about post-operative follow-up and surgical management once the leak was discovered. Another surgeon was also party to the lawsuit, as he was covering for Stacy's client over the weekend, and there were calls between him and the patient about which there was significant dispute. The jury found in favor of Stacy's client and the other surgeon, finding that they met the standard of care in all respects.

Following a four-day trial in the Court of Common Pleas of Philadelphia County, **Daniel Krebbs** (Philadelphia, PA) obtained a defense verdict in a pharmacy malpractice case. The plaintiff was given the wrong medication by the pharmacy defendant and claimed that it caused him to develop Serotonin Syndrome, which affects the central nervous system and causes severe tremors and ataxia. The plaintiff claimed that the tremors and ataxia caused him to fall and aggravate his pre-existing myelomalacia, resulting in an emergency cervical fusion. The plaintiff has a permanent gait dysfunction and now uses a walker. The plaintiff introduced projected future medical expenses of $1.5 million. As the pharmacy admitted it provided the wrong medication to the plaintiff, liability was admitted, and the only issues for the jury were causation and damages. The jury found in favor of the defendant pharmacy and against the plaintiff on the issue of causation.

PROFESSIONAL LIABILITY DEPARTMENT

John Hare (Philadelphia, PA) filed an *amicus curiae* brief for the Pennsylvania Defense Institute in a case in which the Pennsylvania Supreme Court unanimously upheld the reversal of a multimillion dollar verdict against an electric company on the basis that the plaintiff had not satisfied the "retained control" exception to the general rule of non-liability for independent contractors. The decision resulted in a judgment notwithstanding the verdict for the electric company. *Nertavich v. PPL Electric Utilities*, No. 21 EAP 2015 (October 27, Pa. 2015).

In a civil rights case, **Don Carmelite**, **Lauren Burnette** (Harrisburg, PA) and **Kim Boyer-Cohen** (Philadelphia, PA) obtained dismissal of the plaintiff's claim against a local bank. The plaintiff alleged that his lender violated his civil rights when it foreclosed on his property. The bank initiated foreclosure proceedings, and three times the plaintiff filed for bankruptcy protection, staying the foreclosure. However, the plaintiff never followed through with the bankruptcy and obtained a discharge. Eventually, the bank foreclosed on the property and obtained a judgment for the outstanding loan amount, plus costs and accruing interest. The plaintiff alleged that he offered to satisfy the judgment, but the bank unilaterally increased the amount owed in violation of his due process rights. The property was sold at a Sheriff's sale for tens of thousands of dollars less than the judgment. We filed a motion to dismiss, arguing that the plaintiff received all the process he was due under the foreclosure. We also established that the plaintiff obtained notice of the Sheriff's sale and, thus, could have satisfied the judgment. The U.S. District Court granted our motion to dismiss and, on appeal, the Third Circuit upheld the dismissal.

Jack Slimm, **Jeremy Zacharias** and **Walter Kawalec** (Cherry Hill, NJ) prevailed on appeal in the Third Circuit, which affirmed a dismissal Jack had obtained in the District Court in favor of a matrimonial attorney who, along with her firm and client, were the subject of claims for legal malpractice, conversion and misappropriation of trust funds arising out of an order in an underlying matrimonial action. The case

** Prior Results Do Not Guarantee A Similar Outcome*

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spanned 25 years and invoked the jurisdiction of several state and federal courts. In the district court action, the claimant brought common-law fraud and § 1983 claims against our client, the matrimonial attorney, and her client, the plaintiff's ex-wife. The Third Circuit affirmed and held that, under the Rooker-Feldman Doctrine, the District Court was divested of jurisdiction. In addition, the Third Circuit found that the plaintiff had previously litigated in the District Court for the District of Montana, which had found that the matrimonial orders were final and, thus, that the plaintiff was collaterally estopped from bringing the action. Moreover, the Third Circuit agreed that the dismissal of the District Court action was proper because the claims were barred by New Jersey's statute of limitations. The plaintiff had been alleging fraud and misrepresentation of trust funds against the attorneys and their clients since at least 2002 in various jurisdictions. The plaintiff even made the allegations in the underlying matrimonial case in 2006. Therefore, the Third Circuit agreed that all of the claims were time-barred and affirmed the District Court's order of dismissal.

Jack Slimm (Cherry Hill, NJ) obtained the dismissal of a complex legal malpractice action in the U.S. District Court for the District of New Jersey. The plaintiff alleged that our client, an attorney from Pennsylvania, as well as various other defendants, was involved in a transaction involving the plaintiff's acquisition of a 50 percent ownership in an LLC that owned and operated apartment buildings in Pennsylvania. The plaintiff agreed to the purchase, and the plaintiff and the seller visited our client's office in Pennsylvania and hired him to draft the contract. The plaintiff alleged that our client breached a fiduciary duty when he failed to disclose his knowledge of several pending lawsuits against the LLC and its owners. In addition, the plaintiff alleged that, because of the attorney's breach of fiduciary duty, he was defrauded of funds and proceeds paid to the LLC. Jack moved to dismiss for lack of jurisdiction because the plaintiff did not prove that the attorney had sufficient minimum contacts in the state of New Jersey; the plaintiff and the principal owner of the LLC unilaterally approached our client at his offices in Pennsylvania to draft the contract; the attorney never met with the plaintiff in New Jersey; and the plaintiff could not show that the attorney had any ties to New Jersey. The contract the attorney drafted pertained solely to property within the Commonwealth of Pennsylvania. Accordingly, the plaintiff could not demonstrate a basis for the court to exercise personal jurisdiction over the Pennsylvania attorney.

In a three-week trial in Montgomery County Pennsylvania, **Arthur "Terry" Lefco** and **Alesia Sulock** (Philadelphia, PA) obtained a defense verdict in a malpractice trial in which we represented one of the largest law firms in the country. The plaintiffs—automobile dealerships, related entities and their owners—discovered in the summer of 2005 that they were $7 million out of trust with their bank as a result of an alleged fraud perpetrated by their chief financial officer. The plaintiffs claimed that their CFO tricked the bank's third-party car counter into verifying inventory that the plaintiffs believed did not actually exist. The plaintiffs claimed that our client breached its contract with them by failing to preserve their claims against that third party during the negotiation of loan workout documents with the plaintiffs' bank. The plaintiffs alleged that, had our client properly preserved those claims, they would have prevailed against the third party in the underlying lawsuit and recovered nearly $20 million in damages. The jury credited the testimony of our client that the effect of the documents signed by the plaintiffs was fully explained and understood. After two hours of deliberation, the jury found that our client had not breached its contract with the plaintiffs and did not even reach the merits of the underlying lawsuit.

David Henry (Orlando, FL) obtained summary judgment in Charlotte County, Florida for a private club, supported by recorded declarations and covenants, that obligated communities within the planned development to pay dues. The plaintiff, a homeowner's association (HOA) in one of the originally planned communities, sought to permanently withdraw from club membership and the dues obligation. David was able to convince the court that the dues obligation was mandatory as created by the developer and was not modifiable by the HOA because the dues obligation ran with land directly to the lot owners, not through the HOA or HOA membership.

Paul Krepps and **Estelle McGrath** (Pittsburgh, PA) obtained summary judgment for a police officer accused of malicious prosecution. A municipal police officer received a complaint that an unknown male attempted to lure a 15-year-old female into his car. A day later, the victim and her mother went to the police department and advised the same officer that the victim saw the suspect's car and followed it to a local business. When the driver exited the vehicle, the victim viewed him and was adamant that he was the individual who attempted to lure her into the same car the previous day. The officer prepared a photo array that contained a photograph of the owner of the vehicle, which the victim immediately identified. The officer obtained a warrant and arrested the suspect. Several months later at his criminal trial, criminal defendant produced cellular telephone evidence that he was 35 miles away at the time the alleged crime was committed. He was acquitted and subsequently sued the officer for malicious prosecution and a Fourteenth Amendment claim to be free from prosecution based upon false or fabricated evidence. Summary judgment was granted after the court "corrected" the affidavit of probable cause to the criminal complaint and determined that "no reasonable jury could find facts that would lead to the conclusion that the reconstructed affidavit lacked probable cause."

Estelle McGrath (Pittsburgh, PA) obtained a defense verdict at arbitration for a Pennsylvania borough in a slip and fall case. After falling on a sidewalk, the plaintiff sued the Borough under a negligence theory for failing to properly inspect and maintain the sidewalk. Estelle successfully argued that the Tort Claims Act insulated the Borough from immunity as the Borough was not on notice of the allegedly dangerous condition of the sidewalk.

In a Title VII race discrimination and hostile work environment case filed in the U.S. District Court for the Eastern District of Pennsylvania by a former correctional officer at a county prison, **John Gonzales**, **Tom Szymanski** and **David Salazar** (Philadelphia, PA) persuaded the court to grant reconsideration of an earlier order denying summary

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judgment. The plaintiff was terminated after it was determined that he obtained the personal bank account information of an inmate and took money from the account. The court originally denied summary judgment, concluding there were issues of fact concerning the existence of a hostile work environment based on evidence that images of a noose had been circulated at the prison. After a detailed investigation and analysis, we uncovered new evidence that undermined these allegations and filed a motion for reconsideration, which the court granted on the eve of trial.

Christopher Conrad and **Nicole Ehrhart** (Harrisburg, PA) prevailed on a motion to dismiss in a civil rights case. As set forth in a claim under 42 U.S.C. § 1983 for the deprivation of her Fourth Amendment rights, the 16-year-old plaintiff alleged that her rights were violated when she was physically restrained, shocked with a Taser, placed into handcuffs and forcibly removed from the public school premises by a police officer. Further, the plaintiff alleged that our client, the school district, was liable as the proximate cause of the constitutional tort alleged since the school district, through its principal, failed to advise its staff that the plaintiff was supposedly permitted to have a cell phone on school property, and because the school district "permitted and became a willing accomplice to the illegal and unconstitutional acts which then transpired" when the officer was called to the school in response to a dispute that the plaintiff was having with a hall monitor who was attempting to relieve her of her phone. We filed a motion to dismiss on behalf of the school district, asserting that the plaintiff failed to state a claim against the school district for which relief could be granted. The Magistrate Judge agreed, and his report found that there were no allegations in the complaint that came close to alleging an actual policy, custom or practice necessary to expose the school district to Monell liability for the principal's alleged failure to notify school staff about the plaintiff's use of a cell phone. The judge further recommended that, despite having been granted an opportunity to articulate facts to support this claim, the plaintiff had been unable to do so, and her claims remained conclusory and speculative, and the claim against the school district should be dismissed. Upon receipt of the judge's report and recommendation, the plaintiff voluntarily withdrew her complaint.

Joe Santarone (Philadelphia, PA) recently had a Rule 50(a) motion granted in federal court in the Eastern District of Pennsylvania at the close of the plaintiffs' case. Joe represented the Pennsylvania SPCA and six of its humane officers who were sued by a husband and wife who were selling dogs out of their 1,350 square foot house. At the time the search warrant was executed, there were 26 dogs, 8 family members, 3 cats, and 1 parrot in the house. The plaintiffs alleged malicious prosecution based on the animal cruelty charges brought against them. They also alleged a Fourth Amendment violation, arguing that the search warrant was executed before it was approved by the Magistrate Judge. A discrepancy regarding the time that the inventory was removed from the house had led to the underlying criminal charges against both plaintiffs being dismissed.

Phillip Harris (Tampa, FL) obtained a dismissal from the Florida Commission on Human Relations. The complainant was a teacher at an exclusive Tampa charter school, our client. The complainant alleged that the school discriminated against him due to his alleged disability. Specifically, the complainant argued that he was diagnosed with sleep apnea and that the school failed to provide a reasonable accommodation for his abnormal sleep patterns during school hours. Students had video-recorded the complainant sleeping during class, and the videos were later published to YouTube. After both parties extensively briefed the issues, the Florida Commission on Human Relations issued a Determination of No Cause, finding that no discrimination had occurred as there was no evidence that the school had violated the Florida Civil Rights Act.

WORKERS' COMPENSATION DEPARTMENT

Tony Natale (Philadelphia, PA) successfully defended a local university in an alleged work-related case involving a serious fall from heights. The claimant alleged he was working on a loading dock and accidentally fell off the dock, dropping six feet into a dumpster. He alleged serious injuries, including herniated discs in the neck, traumatic brain injury, concussion, post-concussion syndrome, blurred or lost vision, aggravation of lumbar degenerative disc disease, herniations and a plethora of strains, sprains and muscular injuries. The university questioned the incident based primarily on the position the claimant was found inside the dumpster when the rescue squad arrived. Tony presented an accident reconstruction witness who developed an opinion (based on the physics of the alleged fall coupled with the co-efficient of friction assigned to the loading dock) that the claimant could not possibly have slipped and fallen off the dock. Tony was able to aggressively cross-examine the claimant and established a previous history of injury and disc herniations in the claimant's neck that were not revealed to the claimant's treating physician. The judge determined that, at most, the claimant sustained only minor strains that had fully recovered. The traumatic brain injury, cervical disc herniations, lumbar disc herniations, concussion syndrome and loss of vision were found to be non-work-related.

Tony Natale (Philadelphia, PA) successfully defended two appeals before the Workers' Compensation Appeal Board. In the first appeal, Tony represented a local credit union on the issue of whether alleged workplace abnormalities (including allegations of harassment and racial bias) rose to the degree of a mental injury under the Pennsylvania Workers' Compensation Act. After arguing the case, the Board upheld the original dismissal of the claimant's petition, holding that the evidence of record did not meet the standard of a workplace injury within the meaning of the Act. In the second appeal, Tony represented a prominent university on the issue of whether the Workers' Compensation Judge improperly terminated a claimant's right to benefits by failing to give greater credence to the opinions of a treating physician over those of an independent medical examiner. The Board held that the judge is not bound to accept opinions of the treating physician over that of an independent examiner despite the humanitarian objectives of the Act. ■

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On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

In this first-party breach of contract case against an insurer, **Shane Haselbarth** (Philadelphia, PA) succeeded in obtaining a unanimous victory in the Pennsylvania Superior Court, affirming the judgment for Marshall Dennehey's client. The corporate plaintiff, who sells antique lighting fixtures, alleged smoke and soot damage from a nearby fire. It made a claim for insurance benefits for the remediation of its inventory, and the insurer issued a check for the whole loss. The plaintiff then sued for several hundred thousand dollars more in unpaid damages, supporting its case at trial with the testimony of its corporate owner, who explained his process of cleaning every light fixture by hand. The witness could only estimate his labor and material remediation costs, in contrast with the expert restoration witness the insurer relied on at trial, who explained a state-of-the-art, efficient method of cleaning the inventory, the cost for which was easily calculable. The trial court found in favor of the insurer, and Shane successfully briefed and orally argued the case before the Superior Court, resulting in an order affirming the judgment for the insurer. *The Classic Lighting Emporium, Inc. v. Erie Insurance Exchange*, 2015 Pa.Super. Unpub. LEXIS 4248 (Pa.Super. Nov. 17, 2015).

Audrey Copeland (King of Prussia, PA) convinced the Pennsylvania Commonwealth Court to affirm the decisions of the Workers' Compensation Appeal Board and the Workers' Compensation Judge that granted the employer's termination petition as the employer met its burden in proving a full recovery from the work injury. The court found no error in denying a petition to review because: (1) the claimed disc herniation was not work-related; and (2) the judge issued a reasoned decision finding the employer's expert more credible than the claimant's expert, having explained the former's superior qualifications and thorough physical examination. The judge did not err in finding the employer's termination of the claimant to be reasonable as the judge did not credit the testimony of the claimant and his physician that the claimant's contentious and threatening conduct was the result of a prescription drug prescribed for the work injury. Finally, the judge did not err in denying penalties as the notice stopping temporary compensation payable was timely filed and the claimant relied upon a "due" date that fell on a Sunday. *Gower v. WCAB* (*Haines & Kibblehouse*), 2015 Pa.Commw. Unpub. LEXIS 847 (Pa.Commw.Ct. Nov. 17, 2015).

Audrey also persuaded the Commonwealth Court to affirm the decision in the employer's favor in *Tipton v. WCAB (Pleasant Township)*, 2015 Pa.Commw. Unpub. LEXIS 876 (Pa.Commw.Ct. Dec. 7, 2015), which upheld the calculation of the employee's wages as a volunteer firefighter based on an average weekly wage of $836. The court found that the statewide average weekly wage used to calculate benefits for volunteer firefighters was the same as the maximum compensation payable. Because the claimant earned less than the statewide average weekly wage, she was entitled to use that wage to calculate her compensation rate and, thus, received the proper compensation rate equal to two-thirds of the statewide average weekly wage. The court agreed with the employer that the claimant was **not** entitled to the maximum compensation payable as her compensation rate.

Carol VanderWoude (Philadelphia, PA) succeeded in obtaining a published affirmance by the Pennsylvania Superior Court of a non-jury verdict in favor of our client. The plaintiff alleged that a faulty drainage swale on the defendant's property caused water damage to his property. The trial court listed the matter for trial on Monday, December 16, 2013. On Thursday, December 12, 2013, four days before trial was scheduled to commence, the plaintiff filed a praecipe to discontinue the case in an apparent effort to re-file the case at a later date since the alleged harm to his property was on-going. Because the plaintiff was unprepared for trial and intended to file another lawsuit at a later date, the defendant promptly moved to strike off the discontinuance in order to maintain its strategic advantage at trial. The defendant informed the plaintiff that it would present the motion on December 16, 2013. The plaintiff did not appear for argument on the motion. In the plaintiff's absence, the trial court granted the defendant's motion to strike off the discontinuance and proceeded immediately to a trial on the merits. At the conclusion of the trial, at which we presented expert testimony and other evidence, the trial court found in favor of the defendant. On appeal, the plaintiff argued that the trial court erred in entertaining and granting the defendant's motion to strike off his discontinuance and proceeding with trial in his absence. The Superior Court rejected the plaintiff's arguments and affirmed, finding no abuse of discretion in striking off the discontinuance given the plaintiff's "apparent lack of diligence in prosecuting the matter, the eleventh hour discontinuance, and [defendant's] preparedness." The court also agreed with Carol's contention that the plaintiff had waived his argument that the trial court erred in immediately proceeding to trial after striking off the discontinuance because no case law was cited in support of this argument. *Becker v. M.S. Reilly, Inc.*, 123 A.3d 776 (Pa.Super. 2015).

Carol also successfully defended several other appeals before Pennsylvania's intermediate appellate courts. In *Ulmer v. L.F. Driscoll, Co.*, 2015 Pa.Super. Unpub. LEXIS 2968 (Pa.Super. Aug. 17, 2015), the plaintiff appealed the trial court's denial of his motion to assert a direct claim against our client, a third-party defendant joined outside the applicable statute of limitations. The plaintiff argued that Rule 2255(d) of the Pennsylvania Rules of Civil Procedure authorized the filing of a direct claim. The Superior Court rejected this argument, holding that "Rule 2255(d) does not apply … when the applicable statute of limitations for the plaintiff to file suit has run at

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the time the third party defendant is joined to the action." Although the plaintiff attempted to argue that he was prejudiced by the trial court's ruling, the Superior Court concluded that Carol, on behalf of her client, "persuasively argue[d] that it would have likewise been prejudiced if the trial court had not corrected its January 9, 2013, order that erroneously permitted the filing of a direct claim beyond the expiration of the statute of limitations." The Superior Court also accepted Carol's argument that the plaintiff had waived his right to argue that the discovery rule applied to toll the statute of limitations because he "has not raised (or even mentioned) the discovery rule on appeal."

In *Johnson v. Ridley Twp.*, 2015 Pa.Commw. Unpub. LEXIS 853 (Pa.Commw.Ct. Nov. 18, 2015), **Carol** obtained an affirmance by the Commonwealth Court of a dismissal as a matter of law for the defendant borough. The plaintiff was injured on March 8, 2010, when a vehicle fleeing from police collided with his vehicle. Although media reports of the accident noted that multiple police jurisdictions were involved in the police chase, the plaintiff did not identify the borough defendants or file suit against them until after the statute of limitations had expired. The plaintiff argued that the discovery rule applied to toll the statute of limitations, but the trial court rejected this argument. The plaintiff's investigation of the multi-car accident was limited to hiring a private investigator who investigated the matter in the month following the accident. No other investigation was undertaken by the plaintiff. On appeal, the plaintiff argued that a jury question existed as to whether his reliance on an investigator's efforts constituted reasonable diligence warranting application of the discovery rule. The Commonwealth Court was not persuaded by this argument and affirmed the grant of summary judgment.

Lastly, **Carol** succeeded in obtaining an affirmance by the Court of Appeals for the Third Circuit of a dismissal for failure to prosecute. The plaintiff represented himself at trial against his former employer on claims of employment discrimination and retaliation. On the second day of trial, the plaintiff failed to appear. He claimed car trouble prevented him from getting to court, and he was not sure when he could next make it to court. The district court declared a mistrial and ordered the plaintiff to show cause why the case should not be dismissed for failure to prosecute. The plaintiff was specifically directed to show proof of his car trouble. Although he submitted some materials to the court in an effort to substantiate his claimed car trouble, the district court determined that those materials were insufficient to substantiate his claim and, thus, dismissed the case for failure to prosecute. On appeal, the plaintiff asserted that this dismissal constituted an abuse of discretion. The Third Circuit rejected that contention and affirmed the District Court's ruling that dismissal was warranted in light of the plaintiff's conduct and because of the prejudice to the defense. *LeBoon v. Alan McIlvain Co.*, 2015 U.S. App. LEXIS 1426 (3d Cir. Oct. 5, 2015). ■

On The Pulse…

OTHER NOTABLE ACHIEVEMENTS*

Colleen Bannon (Philadelphia, PA), shareholder and director of Legal Information Resources, has been appointed a Vice-Chair of the Philadelphia Bar Association's Federal Courts Committee. The committee serves as an informational liaison between the federal courts covering the Eastern District of Pennsylvania and members of the bar and organizes the federal Bench/Bar conference held each spring. Colleen's term on the committee is effective January 1, 2016.

We are pleased to announce that the firm received the 2015 "Vision Award" from the Young Lawyers Division (YLD) of the Philadelphia Bar Association, presented annually to a law firm that supports the professional development of young lawyers, as well as the YLD in its philanthropic mission and public service works. Throughout 2015, our associates participated in various Philadelphia Bar Association and YLD initiatives, including Law Week activities, the YLD school supply drive, "Legal Line" coordination, "Harvest for the Homeless" and the Guest Chef program supporting Ronald McDonald House. "We are very proud of our associates and the commitment they have made to the great works of the Young Lawyers Division," said Butler Buchanan, III, managing attorney of our Philadelphia office. "Their enthusiasm and dedication to the leadership and wide scope of YLD volunteer activities is inspiring and very much encouraged and appreciated by our firm."

Niki Ingram (Philadelphia, PA), director of the Workers' Compensation Department, **Eric Fitzgerald** (Philadelphia, PA), assistant director of the Professional Liability Department, and **Claudia Costa** (Roseland, NJ), a member of the Professional Liability Department, are speaking at the 2016 CLM Annual Conference in Orlando, Florida. Niki joins a panel of distinguished workers' compensation professionals in "The First 48 Hours: CSI," which focuses on the essential information to be gathered through an incident report from both the claims and litigation perspectives, as well as how this information affects the path of a claim. Claudia is a member of the panel discussing "Are You Ready for Ms. Cox? Transgender Individuals and the EPL Issues Facing Employers." This session examines potential EPL issues likely to face employers of transgender individuals, including common pitfalls and their potential ramifications.

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In "Quicksand! Eroding Limits Professional Liability Policies," Eric joins a panel to discuss the ethical pitfalls that claims professionals and defense attorneys can encounter when defending claims under eroding limits professional liability policies.

Niki Ingram (Philadelphia, PA) will be a featured speaker at the 13th Annual National Workers' Compensation Insurance ExecuSummit. In her presentation, "Exploring the Rising Use and Costs of Compounded Medications in Workers' Compensation," Niki will address the recent trend of utilizing compounded medication as a reasonable alternative to traditional prescription care. This ala carte drug preparation is being billed as the treatment du jour for injured workers nationwide. But for those footing that bill, the result is often not what the doctor ordered, with otherwise manageable claims seeing swift and steep increases in exposure to medical expenses. With many unanswered questions surrounding the efficacy, regulation, consistency, and overall utilization of compounded medication, what is the payers' remedy for cost control? Discussion topics will include what compounded medications are and how they are impacting the workers' compensation system, best practices in identifying compounded medications claims exposures, how the legislature and judiciary are responding to such claims, and how the Affordable Care Act is impacting pharmacy and compounded medication costs. The Worker's Compensation Insurance ExecuSummit is specifically designed for worker's compensation insurance professionals. The summit producers are at the forefront of the workers' compensation insurance industry, monitoring and researching emerging issues and trends and conveying this strategic intelligence as it is developing.

Robin Romano (Philadelphia, PA) and **Jacqui Canter** (Philadelphia, PA) are speaking at the National Retail and Restaurant Defense Association 2016 Annual Conference in Florida. Robin is part of the panel discussion "Employers, Carriers and Workers' Comp Defense Counsel – Winning as a Team," which brings together defense counsel, claim administrators and employers to discuss winning strategies for handling workers' compensation cases. Jacqui is a member of the panel discussion "Use Your Sunscreen – Avoid Getting Burned: Assessing the Pros and Pitfalls of Conflict Waivers," in which industry professionals and attorneys will address the pros and pitfalls of conflict waivers in retail and restaurant litigation.

At the firm's annual shareholders' meeting on December 6th, the following attorneys were elected as shareholders of the firm. From the Casualty Department: **Kimberly Abeel**, Wilmington, DE; **Christopher Block**, Roseland, NJ; **Joanna Buchanico**, Philadelphia, PA; **Ryan Burns**, Fort Lauderdale, FL; **John Heilman**, Tampa, FL; **Joshua Scheets**, Philadelphia, PA; **Rachel Snyder von Rhine**, Cherry Hill, NJ. From the Health Care Department: **Jason Bialker**, Philadelphia, PA; **Wendy O'Connor**, Allentown, PA. From the Professional Liability Department: **Lee Durivage**, Philadelphia, PA; **Maureen Fitzgerald**, King of Prussia, PA; **Ronald Metcho**, Philadelphia, PA; **Charlene Seibert**, Pittsburgh, PA; **Timothy Ventura**, Philadelphia, PA.

Ronda O'Donnell and **Lee Durivage** (Philadelphia, PA) presented a live webinar, "Best Practices in Handling Employment Issues," to members of the Motor Carrier Insurance Education Foundation. This webinar was attended by insurance representatives and brokers who specialize in insuring the trucking industry and was a part of the Foundation's multi-course continuing education program entitled, "Employer Practices Concerns Unique to Motor Carriers--Balancing Safety and Employee Selection and Discipline."

Buck Buchanan (Philadelphia, PA) spoke at the Philadelphia Diversity Law Group's Diversity & Inclusion Symposium. Held in conjunction with the Philadelphia Bar Association, the symposium theme was "Best Practices for Retaining & Promoting Diverse Talent." Buck addressed an audience of senior associates, new partners/shareholders and in-house counsel on the topic of achieving success as a diverse attorney.

Vicky Scanlon (Scranton, PA) presented at the American Academy of Child and Adolescent Psychiatry (AACAP) 62nd Annual Meeting. Vicky, along with attorneys from Boston and Denver, a vice president of risk management at Allied World and several psychiatrists, presented a three-hour risk management seminar to the AACAP membership concerning the deposition and trial of a psychiatrist arising out of the suicide of an adolescent patient. Vicky represented the defendant psychiatrist for both deposition and trial. Following the mock trial, the membership found in favor of the defendant and against the plaintiff-mother.

David Shannon (Philadelphia, PA) presented at the Defense Research Institute's Data Breach and Privacy Law Conference. David's presentation, "A Legislative Update from the Front Lines," addressed the 47 differing state data breach regulations and statutes, and the anticipation of federal legislation that would allow for a uniform federal solution.

Candace Embry (Philadelphia, PA) has been selected as a regular contributor of legal content to the Society for Human Resource Management's website. Her first federal "Court Report" article, "University Professor's Reverse Discrimination Claim Fails," was published on November 12, 2015. ■

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Ohio—Professional Liability

OVERVIEW OF INSURANCE AGENT PROFESSIONAL LIABILITY IN OHIO

By David J. Oberly, Esq.*

KEY POINTS:

- Insurance agent liability is on the increase.
- Insurance agents are now viewed as professionals and fiduciaries with insurance expertise.
- To combat claims against insurance agents, a close relationship with defense counsel is advisable.

David J. Oberly

In recent years, several factors have combined to cause a significant increase in the amount of litigation instituted against insurance agents. Greater competition from a range of sources has caused traditional agents to look for ways to add value, transforming their responsibilities from that of "order-takers" to the role of specialists and advisors in the field of insurance. At the same time, insurance policies have become much more diverse, intricate and complex. Combined, following the denial of coverage, these factors have led policyholders to file suit not only against their insurer, but against their insurance agent as well. As a result, the number of E&O suits filed against insurance agents has recently exploded, especially as it relates to negligence claims pertaining to an agent's alleged failure to acquire the coverage requested by the insured and/or the agent's alleged failure to advise his customer concerning the coverage being acquired.

In general, Ohio law imposes a duty to exercise reasonable care on insurance agents in two instances. First, an insurance agent owes his client a duty to exercise good faith and reasonable diligence in undertaking to acquire the coverage that his client requests. An agent will be held liable if, as a result of his negligent failure to procure insurance, the customer suffers a loss because of a want of insurance coverage contemplated by the agent's undertaking. If an agent negligently fails to procure the requested insurance and the client suffers a loss because of a want of insurance coverage contemplated by the agent's undertaking, the agent is liable to the client in the amount the client would have received if the coverage had existed.

Second, when an agent knows the client is relying upon his expertise, the agent owes a further duty to exercise reasonable care in advising the client. Thus, an insurance agent must not only obtain the insurance requested, but also advise a customer who is relying on his expertise. However, a duty to advise only arises if a fiduciary relationship exists between the agent and his insured. Ordinarily, the relationship between an insured and the agent who sells the insurance is, without proof of more, an ordinary business relationship, not a fiduciary one. A fiduciary relationship is one in which special confidence and trust is reposed in the fidelity and integrity of another, resulting in a position of superiority or influence, acquired by virtue of this special trust. Such a confidential relationship cannot be unilateral; it must be mutual, where both parties understand that a special trust or confidence has been reposed. To establish that a fiduciary duty is owed by an insurance agent, the party claiming breach must show evidence of some special trust or confidence placed in the agent by the insured and recognized by the agent. Where there is a special relationship between an insurance agent and an insured, so that the agent is more akin to a professional or expert advisor, there is a duty to see to it that the insured is fully informed.

At the same time, an insured possesses a corresponding duty to examine his policy, know the extent of his coverage and notify the agent if said coverage is inadequate. Stated differently, an insurance customer has a corresponding duty to examine the coverage provided and is charged with knowledge of the contents of his or her own insurance policy. An agent is not liable when the customer's own loss is due to the customer's own act or omission.

In Ohio, there is a split in authority as to whether an insured's failure to read the insurance policy precludes a negligence claim brought against an insurance agent. One line of cases holds that an insured's failure to read the insurance policy precludes a negligence claim as a matter of law. The other line of cases finds that a failure to read an insurance policy is not an absolute bar to recovery. Rather, an insured's failure to read the policy is properly submitted to the jury for a comparative negligence analysis. Contributory negligence is defined as any want of ordinary care on the part of the person injured, which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred. The issue of comparative negligence is a matter of law properly resolved by the court where evidence is so compelling that reasonable minds can reach but one conclusion. In this respect, issues of comparative and contributory negligence may be appropriately adjudicated by summary judgment where, after construing the evidence most strongly in the plaintiff's favor, a reasonable person could only conclude that the plaintiff's negligence was greater than the negligence of the defendant. If the defendant is not negligent, or if the plaintiff's negligence clearly outweighs any negligence of the defendant, the granting of summary judgment is entirely appropriate.

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Pennsylvania—Architects, Engineers & Construction Defect

THE PENNSYLVANIA SUPREME AND SUPERIOR COURTS CLARIFY THE "RETAINED CONTROL" EXCEPTION TO GENERAL RULE OF LANDOWNER'S NONLIABILITY FOR INDEPENDENT CONTRACTORS

By Michael A. Karaffa, Esq.*

KEY POINTS:

- Property owners and general contractors do not "retain control" over independent contractors by establishing detailed work specifications.
- Property owners' and general contractors' right to shut down construction projects due to safety violations does not establish actual control of the worksite.

Michael A. Karaffa

Pennsylvania has long embraced the general rule that a landowner who engages an independent contractor is not liable for the independent contractor's negligence. Plaintiffs can get around the rule, however, if the landowner kept sufficient control over the worksite under the "retained control" exception. By affirming *Nertavich v. PPL Electric Utilities* 124 3.Ad 734 (Pa. 2015) (per curiam), the Pennsylvania Supreme Court has made it clear that the degree of control must be considerable for this exception to apply.

The Pennsylvania Supreme Court upheld the Pennsylvania Superior Court decision without issuing an opinion. In *Nertavich v. PPL Elect. Utils*., 100 A.3d 221 (Pa.Super. 2014), the plaintiff worked for an independent contractor, QSC Painting, which was hired by the defendant, PPL, to paint its 90-foot tubular steel poles.

Working 40 feet above the ground, the plaintiff was attached to a ladder with a body harness when his harness became disconnected, and he plummeted to the ground. The plaintiff landed on his feet, bursting several disks in his lumbar spine and fracturing his feet, a knee, his right femur and his right hip. He sued PPL and the manufacturer of the ladder.

At trial, the jury found that the plaintiff was 49 percent causally liable for his injuries, PPL was 51 percent causally negligent, and the ladder design was not defective. A verdict in the amount of $2,494,542.35 was later entered against PPL.

PPL timely moved for judgment notwithstanding the verdict (j.n.o.v.) or a new trial. The trial court denied PPL's motions, and PPL appealed to the Superior Court.

Among other issues raised on appeal, PPL argued that it was not liable for injuries sustained by an employee of an independent contractor. The trial court had rejected this position because it found that the retained control exception kept PPL from avoiding liability.

In reviewing Pennsylvania case law, the Superior Court explained that the degree of control required to hold an owner liable for a subcontractor's injuries "must go beyond a general right to order, inspect, make suggestions, or prescribe alterations or deviations" but "must be such a retention" of control "that it renders the contractor not entirely free to do the work in his own way[.]" The court explained that control can be shown in one of two ways: (1) contractual provisions giving the owner control over the manner, method and operative details of the work; or (2) evidence that the owner exercised actual control over the work.

The Superior Court noted that PPL provided detailed specifications for the manner in which the painting was to be carried out. In addition, PPL assigned an "authorized representative," or field agent, to stay in daily contact with QSC and to provide oversight for safety on the job. This authorized representative had the authority to stop QSC's work for any violation.

The court then observed that PPL's specifications for painting did not include safety requirements. Instead, they related to the type of paint to be used, the method of applying a uniform finish and the method of making spot repairs. The court observed that none of these specifications were at play in the accident.

More specifically, PPL never "instructed or directed QSC workers how to tie off the pole, how to climb the pole, or which equipment to use." Notably, the contract with QSC expressly gave QSC the responsibility for "all climbing assist and rigging equipment necessary to complete this painting contract in an efficient manner."

As a result, the Superior Court found that PPL's contract with QSC did not establish that PPL retained control over the worksite. Likewise, the Superior Court rejected the plaintiff's argument that PPL retained actual control of the worksite through its authorized representative, who worked closely as liaison between QSC and PPL.

The court noted that PPL had the right to stop work due to any safety violation and to monitor the painting as it was carried out. By the terms of its contract, the authorized representative was to be the "daily source of contact to the Contractor in the areas of any questions, materials, quality assurance, general safety, work procedures and schedule."

In addition, the court acknowledged that PPL had supplied the ladders that were used on the jobsite. However, the court noted that

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Pennsylvania—General Liability

PENNSYLVANIA SUPREME COURT LIMITS ATTORNEYS' FEES IN PEER REVIEW CASES

By Katharine A. Mooney, Esq.*

KEY POINTS:

- If contested treatment has been submitted to a PRO, plaintiffs are not entitled to attorneys' fees, even if the peer review is later found to be non-compliant with insurance regulations.
- Supreme Court opinion leaves lingering questions about non-complaint peer reviews and what effect, if any, these have on the insurance companies that rely on them.

Katharine A. Mooney

In *Doctor's Choice Physical Medicine & Rehabilitation Center, P.C. v. Travelers Personal Ins. Co*., 2015 Pa. LEXIS 3010 (Pa. Dec. 21, 2015), the Pennsylvania Supreme Court addressed the availability of attorneys' fees in the first-party personal injury context. The court reversed the Superior Court's 2014 decision, which was being used by plaintiffs to assert that attorneys' fees were available under § 1797 of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) if an insurance company failed to submit the treatment to a valid peer review.

In Pennsylvania, the peer review process is the exclusive method by which an insurance company can contest its first-party medical obligations. In this context, Peer Review Organizations (PROs) are health care entities that engage in reviewing medical files for the purpose of determining that medical and rehabilitation services are medically necessary. Pursuant to § 1797 of the MVFRL, insurance carriers are required to submit contested treatment to a PRO. Section 1797(b)(4) provides that if an insurer refuses to pay for medical treatment without having challenged the medical necessity or reasonableness before a PRO, a provider or an insured can file suit. If an insurance company fails to challenge the treatment before a PRO and a court later determines that the treatment was medically necessary, the insurance company must pay the outstanding amount plus interest at 12 percent, as well as costs and attorneys' fees.

In *Doctor's Choice*, Travelers stopped payment on chiropractic treatment being rendered to its insured after a peer review concluded it was no longer medically necessary. The provider filed suit against Travelers, claiming that the PRO failed to comply with a regulation contained in Title 31 of the Pennsylvania Code that PROs shall apply national or, when appropriate, regional norms in conducting their determinations. If national or regional norms do not exist, a PRO shall establish written criteria to be used in conducting its reviews based upon typical patterns of practice in the PRO's geographic area of operation. *31 Pa. Code Section 69.53(3)*. At the trial court level, the parties essentially agreed that no national or regional norms existed for the particular treatment at issue. The court then analyzed whether, in the absence of these accepted norms, the PRO had provided written criteria, as the regulation requires, and found that it had not. The trial court concluded that, as a result, no valid peer review had occurred. The court awarded damages to the provider, including attorneys' fees, on the basis that Travelers had not effectively challenged the treatment before a PRO pursuant to § 1797(b)(6). After Travelers filed post-trial motions, the court modified the verdict, removing the attorneys' fee portion, based on the Pennsylvania Supreme Court's decision in *Herd Chiropractic Clinic, P.C. v. State Farm Mutual Automobile Insurance Company*, 64 A.3d 1058 (Pa. 2013). The *Herd* case, which post-dated the trial court's decision, stands for the proposition that § 1797 of the MVFRL does not serve as a basis for attorneys' fees awards on provider challenges to peer review determinations.

The provider appealed to the Superior Court. Notwithstanding the decision in *Herd*, the Pennsylvania Superior Court held that the phrase "challenged before a PRO" as employed in § 1797(b)(4) requires more than a mere referral to a PRO of bills for contested treatment but, rather, requires a completed, compliant and valid peer review determination. 92 A.3d 813 (Pa.Super. 2014), *rev'd* 2015 Pa. LEXIS 3010 (Pa. Dec 21, 2015). It further held that a non-compliant peer review can subject an insurance company to the penalties listed in § 1797(b)(6), including attorneys' fees. The Superior Court adopted the trial court's conclusion that no valid peer review had taken place due to the reviewer's failure to adhere to *31 Pa. Code Section 69.53(3)*. The Superior Court went on to hold that **challenges before a PRO** require a valid, completed peer review. This interpretation empowered plaintiffs' attorneys to argue that certain reviews are invalid and then seek attorneys' fees from the insurance company on the basis that it had not effectively challenged the treatment. This decision had obvious implications for insurance carriers as it ostensibly placed the burden on them to oversee the regulatory compliance of the PROs with whom they contract.

The Pennsylvania Supreme Court agreed to consider whether the Superior Court improperly interpreted § 1797 of the MVFRL to allow attorneys' fees, even when an insurer has utilized the peer review process. It also agreed to review whether the Superior Court had improperly interpreted and misapplied § 1797(b)(4) by holding that the insurer must oversee the statutory compliance of PROs.

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THE PURSUIT OF THE TRIVIAL

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The third case is the most predictable as to result in light of the emphasis that the Court of Appeals placed throughout the decision on the importance of considering all of the facts and circumstances presented by the record. This case also presented a trip and fall on an interior staircase, allegedly caused by a "clump" on one of the steps that had been there for some time and had been painted over.

In its motion for summary judgment, the defendant submitted a photograph of the "clump," but tellingly produced no measurements, nor did the plaintiff. The Appellate Division found the defect to be trivial and granted summary judgment, but the Court of Appeals reversed. The court found the record to be "inconclusive" and stated that "[w]ithout evidence of the dimensions of the 'clump', it is not possible to determine whether it is the kind of physically small defect to which the trivial defect doctrine applies."

The Court of Appeals, in its concluding paragraph in *Hutchinson*, emphasized that, "[i]n sum, there are no shortcuts to summary judgment." Dimensions are not enough; inconclusive photographs are not enough; the fact that the plaintiff might have avoided the accident by placing his feet elsewhere is not enough. There simply must be more detail to the record. The means to accomplish this is through thorough investigation and discovery, including, if appropriate, the retention of experts. Injuries in trip and fall cases on sidewalks or stairways are often serious. Summary judgment is a worthwhile and achievable goal if the alleged defect is trivial. In *Hutchinson*, the Court of Appeals cautioned lower courts and legal practitioners that a fully developed record is the proper path to the relief of summary judgment. Those who attempt shortcuts through the investigation and discovery process will achieve disappointing results when summary judgment is sought. ■

OHIO SUPREME COURT

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Although emotional distress damages are available to victims of housing discrimination, the court noted that such damages are not automatically awarded and that a court is precluded from presuming emotional distress from the mere fact of discrimination. Rather, a plaintiff is required to actually prove that he suffered from emotional distress and that the discrimination caused that distress. With those principles in mind, the court concluded that it could not say that personal injury was intended in that particular instance, or that emotional distress was inherent in the very nature of housing discrimination. For that reason, the court held that the inferred intent doctrine did not apply to bar coverage under the intentional acts exclusion as a matter of law.

The implications of the *Granger* decision are significant. The opinion provides a clear signal of the court's willingness to apply the inferred intent doctrine in a particularly narrow fashion. The Ohio Supreme Court is now "two-for-two" in declining to apply the doctrine since expanding the rule of inferred intent beyond cases of murder and sexual molestation. In both *Campbell* and *Granger*, the underlying facts were such that harm was almost certain to result from the conduct of the insureds. However, the takeaway from these two decisions is that, to satisfy the inferred intent standard, "almost certain" is not enough; rather, it must be demonstrated that the insured's conduct could not have possibly been carried out without causing harm or injury. In this respect, it appears clear now that the court is unwilling to infer intent as a matter of law where other consequences of an insured's conduct are possible.

With respect to the *Granger* decision in particular, it is difficult to imagine a situation where intentional discrimination fails to result in some type of harm to the recipient. However, the *Granger* court found that such conduct was insufficient to trigger the inferred intent doctrine. Accordingly, in Ohio, the current state of the law is that the inferred intent doctrine still has limited capability to preclude coverage for allegedly intentional acts. ■

THE PENNSYLVANIA SUPREME AND SUPERIOR COURTS

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this was only done after QSC was unable to furnish ladders itself. Moreover, PPL specifically told QSC that, while it was providing ladders, it was QSC's responsibility to inspect them and ensure they were suitable for the job.

As a result, the court found that PPL did not retain control because its actions were well within the safety oversight that the Pennsylvania Supreme Court has found acceptable. In support, the court recalled the case of *Beil v. Telesis Construction, Inc.*, 11 A.3d 456 (Pa. 2011) in which the Supreme Court explained that supervising and enforcing safety requirements does not constitute control for the purposes of imposing liability.

Moreover, testimony at trial showed that QSC, not PPL, determined how to climb the poles on the jobsite. The court emphasized that QSC was the expert with 16 years' experience in industrial painting and previous work for power companies such as PPL.

As a result, the Superior Court found that PPL did not retain actual control of the worksite. It concluded that the trial court erred in denying PPL's motion for j.n.o.v. ■

Pennsylvania—Health Care Liability

PENNSYLVANIA SUPREME COURT UPHOLDS WRONGFUL BIRTH STATUTE

By John C. Farrell, Esq. & Laura J. Persun, Esq.*

KEY POINTS:

- Pennsylvania Supreme Court will not punish past or prospective parties who rely on longstanding legislation by invalidating it retroactively.
- In Pennsylvania, plaintiffs still cannot sue for wrongful birth.

John C. Farrell

Laura J. Persun

In 1988, the Pennsylvania General Assembly passed Act 47 into law, which contained multiple pieces of legislation, many of which did not relate to each other. For instance, Act 47 repealed the Post-Conviction Hearing Act and enacted the Post-Conviction Relief Act in its place. It also conferred the Supreme Court with exclusive jurisdiction to hear appeals in capital cases, mandated minimum sentences for offenses committed while impersonating a law enforcement officer, precluded dismissal of felony charges at a preliminary hearing solely because of a party's failure to appear, limited defenses against claims for injuries sustained while *in utero*, and precluded actions for wrongful birth and wrongful life. In pertinent part, Act 47 states:

> (a) Wrongful birth.—There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born . . .
>
> (b) Wrongful life.—There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

See 42 Pa.C.S. § 8305(a)-(b). In the years following passage of Act 47, courts consistently upheld the constitutionality of Section 8305. *See*, *Hatter v. Landsberg*, 563 A.2d 146, 149 (Pa.Super. 1989) (allowing an action for wrongful conception, but precluding actions for wrongful birth and wrongful life); *Butler v. Rolling Hill Hosp.*, 582 A.2d 1384, 1386 (Pa.Super. 1990) (precluding a plaintiff mother from recovering for the costs of rearing a healthy child on the basis that Act 47 precluded actions for wrongful life); *Bianchini v. N.K.D.S. Assocs., Ltd.*, 616 A.2d 700, 705 (Pa.Super. 1992) (precluding a wrongful birth action against doctors for their failure to diagnose a fatal fetal deformity); *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 821 (Pa.Super. 1993) (precluding the plaintiff parents' action for the wrongful birth of their child based on erroneous amniocentesis testing).

While Act 47 was continually challenged, no one ever attacked it on the basis that it was comprised of piecemeal litigation. However, another important law, a prior version of the Fair Share Act, was struck down in *DeWeese v. Weaver*, 880 A.2d 54, 61 (Pa.Cmwlth. 2005) because it contained multiple distinct pieces of legislation in violation of the "same-subject rule" of Article III of the Pennsylvania Constitution. The original version of the Fair Share Act was passed as part of Act 57 of 2002, which amended the DNA Detection of Sexual and Violent Offenders Act and also modified joint and several liability law. Members of the Pennsylvania legislature successfully challenged Act 57 on the basis that it did not address a single theme in conformity with Article III. The legislature subsequently passed a new version of the Fair Share Act (Act 17) in 2011. Codified at 42 Pa.C.S. § 7102, the new Fair Share Act is in full force and effect today.

In *Sernovitz v. Dershaw*, 2015 Pa. LEXIS 2660 (Pa. Nov. 18, 2015), the Pennsylvania Supreme Court unanimously upheld the constitutionality of the wrongful birth and wrongful life statutes contained in Act 47. Rather than focusing on the political tremors underlying claims for wrongful birth, the court based its reasoning on the profound implications of retroactively striking down longstanding law relied upon by past, current and prospective parties.

Sernovitz centered on a failure to identify a genetic marker for disease during pregnancy. The plaintiff, Rebecca Sernovitz, underwent genetic testing during prenatal care. The results revealed she carried a gene mutation that would substantially increase the likelihood that her child would be born with a rare disorder called familial dysautonomia. Her treating obstetrician and gynecologist, Stuart Z. Dershaw, M.D., misinformed her that she was not a carrier. As such, Ms. Sernovitz and her husband did not abort the fetus. Thereafter, the couple gave birth to a son with familial dysautonomia. They sued for wrongful birth and emotional distress, claiming they would have obtained an abortion had they known Ms. Sernovitz was a carrier.

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Pennsylvania—Product Liability

EVIDENCE OF A USER'S NEGLIGENCE AND INDUSTRY STANDARDS ADMISSIBLE IN POST-*TINCHER* DESIGN DEFECT CLAIMS

By Kristin E. Shicora, Esq.*

KEY POINTS:

- *Sliker v. National Feeding Systems, Inc*., et al. is a notable post-*Tincher* decision dealing with evidentiary issues at trial for defendants in strict product liability claims.
- A user's negligence is admissible under the risk-utility test because a user's ability to avoid danger by exercising care when using the product factors into a reasonable manufacturer's conduct in a design defect claim.
- Compliance with industry standards is admissible under the risk-utility test because it is relevant to the reasonableness of a manufacturer's conduct in its design choices.

Kristin E. Shicora

For over 30 years, strict product liability claims in Pennsylvania adhered to an artificial prohibition on the introduction of negligence principles, as set forth by the Pennsylvania Supreme Court in *Azzarello v. Black Bros. Co*., 391 A.2d 1020 (Pa. 1978) and its progeny. Evidence of a user's own negligence in the use of a product and a product's compliance with industry standards were prohibited in strict liability claims because such evidence improperly introduced negligence principles. In its recent decision in *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), the Pennsylvania Supreme Court overruled *Azzarello*'s prohibition on negligence principles and drastically changed the standard for establishing a design defect claim, adopting the alternative standards of a consumer expectations test and a risk-utility test. Despite explicitly overruling *Azzarello*, the court in *Tincher* made clear that the availability of negligence-derived defenses, as well as other evidentiary considerations in product liability claims, were outside the scope of its decision, permitting and encouraging "targeted advocacy" to further develop the potentially broad implications of its decision. Thus, many questions were left unanswered with respect to what evidence a product defendant would be able to present at trial in defense of strict liability claims post-*Tincher*.

The recent opinion in *Sliker v. National Feeding Systems, Inc., et al*, No. 282 CD 2010 (C.P. Clarion Co. Oct. 19, 2015, Arner, P.J.) provides well-reasoned ammunition for product defendants preparing for trial in the post-*Tincher* landscape with regard to certain previously prohibited evidence under *Azzarello* and its progeny. In *Sliker*, the plaintiff was injured while attempting to fix a silo unloader. The plaintiff, proceeding with a design defect claim at trial, alleged the unloader was defective due to the lack of a permanently affixed guard. In ruling on motions *in limine*, the court denied the plaintiff's motion to preclude the admission of evidence of negligence. The court found that evidence of a user's own negligence in using a product is relevant to a fact finder applying the risk-utility standard to determine whether a product is defective in design. The court recognized the *Tincher* court's repeated references to "the negligence roots of strict liability" claims, particularly in describing the "negligence derived risk-utility balancing." In denying the motion, the court reasoned that a user's negligence, when compared to conduct that is reasonably anticipated by a manufacturer in designing the product, permissibly reflects the negligence roots of strict liability, noting a "user's ability to avoid danger by the exercise of care in the use of the product will logically factor into a reasonable manufacturer's conduct." While it limited the effect of such evidence, stating that "evidence of negligence of course does not constitute a complete defense comparable to contributory negligence," the court permitted the product defendants to present negligence evidence in support of their defense under the risk-utility test.

The *Sliker* court also addressed the issue of the admissibility of evidence of a product's compliance with industry standards. The plaintiff sought to preclude the manufacturer's compliance with industry standards, arguing that "the manufacturer's reasonableness in designing a product as it did is irrelevant" in determining whether a product is defective. The court found the evidence to be admissible, citing its particular relevance to the second factor enumerated in the risk-utility test, "[t]he safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury." In support of this ruling, the court went on to discuss the reasoning behind *Lewis v. Coffing Hoist Div., Duff-Norton Co*., 528 A.2d 590 (Pa. 1987), the Pennsylvania Supreme Court decision that originally precluded industry standards in strict liability claims. The court in *Sliker* noted that the reasoning for precluding industry standards in *Lewis* was based entirely on *Azzarello* and its prohibition on the comingling of negligence and strict liability concepts, because such evidence would "go to the reasonableness of the [manufacturer's] conduct in making its design choice." The court went on to state that "industry standards may make the likelihood that a manufacturer acted reasonably more probable by showing that those actions were endorsed by specialized individuals

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MORE THAN 100% DISABLED?

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it logical that the 30 percent partial-total disability can now be further increased? An award of permanent/totally disability benefits would never really be final and subject to recalculation years or possibly decades after it was approved by the court. It is also important to note that, although the Second Injury Fund financially benefited from the award, they also joined in the appeal, mostly likely due to the uncertainty and lack of finality this decision would create.

At this time, Bally's has proceeded with a request for an appeal to the New Jersey Supreme Court. We will report again once the Supreme Court responds. ■

OVERVIEW OF INSURANCE AGENT

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The insurance agent E&O landscape has shifted significantly in recent years as a result of the courts' continued recognition that agents are no longer simply "order takers" but, rather, professionals who are expected to maintain a level of expertise in the field of insurance. And it appears that the current trend of broadening the scope of duties owed by agents to their insureds, and the duty to advise, in particular, will continue for the foreseeable future. Despite these obstacles, insurance agents have many defenses at their disposal when claims are brought against them by disgruntled insureds. As is the case with most professional liability claims, these defenses vary depending on the nature of the allegations and claims asserted against them and the specifics of their alleged negligence.

Moving forward, the duty to read will continue to serve as a vital defense to negligent procurement and failure-to-advise claims. In addition, many other defenses also remain at the insurance agent's disposal to combat negligence claims asserted by insureds. In order to maximize the likelihood of success in defeating these claims, defense counsel must work closely with his or her insurance agent client to identify all relevant documents, communications and potentially applicable defenses to liability. With the proper claim investigation and development of evidence, the defense practitioner will be in a position to assert defenses tailored to the specific claim at hand, significantly curtailing exposure for the agent or completely extinguishing liability altogether in any given case. ■

PENNSYLVANIA SUPREME COURT UPHOLDS

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The Montgomery County Court of Common Pleas sustained the defendants' preliminary objections, which argued that the plaintiffs' claims were precluded by Act 47. The plaintiffs appealed on the basis that Act 47 violated the "single-subject rule" of Article III because it addressed multiple subjects. The Superior Court agreed with them and labeled the Act "a veritable potpourri of legislation" targeted toward post-trial matters in criminal cases. Accordingly, the court reversed and remanded the case back to the trial court for discovery and trial. The defendant physicians, joined by the General Assembly, appealed.

In reinstating the trial court's ruling, the Pennsylvania Supreme Court ignored the political and emotional implications of sustaining a claim for wrongful birth and focused on procedural fairness. Quoting a former opinion, Chief Justice Saylor wrote, "[i]t would be arbitrary to preserve one set of provisions germane to one topic, and invalidate the remainder of the bill." The court next considered the defendants' argument that the laches doctrine shielded Act 47 from a procedural challenge. Laches, an equitable defense, precludes a plaintiff from pursuing a claim after "sleeping on his rights." While the court did not agree that the plaintiffs had violated the laches doctrine, it nonetheless noted that "the longer an act has been part of the statutory law and relied on by the public and the government, the more disruption to society and orderly governance is likely to follow from its invalidation . . . Where, as here, such reliance has continued for more than [twenty] years, a presumption naturally arises that any process challenge is too stale to be cognizable regardless of whether the challengers exercised reasonable diligence." The Supreme Court finished its analysis with the simple conclusion that the plaintiffs' action was invalid because it was precluded by valid law. Even if Act 47 did violate the single-subject rule, after 22 years of presumed validity, it was immune from attack.

Consequently, the law in Pennsylvania remains that plaintiffs cannot sue for wrongful birth or wrongful life. Failure to properly interpret a genetic test, an ultrasound, a blood test, an amniocentesis or a similar prenatal study cannot serve as a basis for a medical malpractice action when the claim is that, "but for" the diagnosis, the fetus would have been aborted. Such claims should be attacked in preliminary objections or motions to dismiss at the earliest opportunity.

Critics of the ruling claim it contradicts traditional tort law. They analogize failure to identify a genetic marker with a classic negligence claim for failure to diagnose disease. They maintain Act 47 is politically dated. These critics ignore the devastating impact of retroactively striking down time-honored law, a beacon of predictability in society. While the emotional backdrop of a claim for wrongful birth will inevitably come to light in the future, most herald the Supreme Court's decision to uphold the defendants' right to be judged under existing law. ■

Pennsylvania—Professional Liability

MY ATTORNEY TOLD ME TO…OPENING THE DOOR AND WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

By Nicole M. Ehrhart, Esq.*

KEY POINTS:

- The attorney-client privilege is the oldest of the privileges.
- A client can easily waive the privilege by placing the advice of counsel at issue in litigation.

Nicole M. Ehrhart

The United States District Court for the Middle District of Pennsylvania has once again considered the issue of waiver of the attorney-client privilege. In *Piazza v. County of Luzerne*, 2015 U.S. Dist. LEXIS 147283 (M.D. Pa. Oct. 30, 2015), the plaintiff claimed he was unlawfully terminated from his position as director of elections in Luzerne County because of his lack of political affiliation with a particular candidate, political officials, parties and factions in power in Luzerne County. The plaintiff filed a motion based upon the defendant's, Robert Lawton, assertion of the attorney-client privilege during the course of his deposition. The issue before the court was whether Lawton waived the attorney-client privilege when he asserted at his deposition that counsel's advice was the reason the plaintiff was terminated. Lawton made a simple statement: "I did so on the advice of counsel." Judge Conaboy found that this statement was enough to waive the attorney-client privilege.

"It is well-established that the scope and conduct of discovery are within the sound discretion of the trial court." *Marroquin-Manriquez v. Immigration and Naturalization Serv*., 699 F.2d 129, 134 (3d Cir. 1983). The Federal Rules of Civil Procedure permit discovery of "any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). Discovery is not limited solely to admissible evidence but encompasses matters that "appear reasonably calculated to lead to the discovery of admissible evidence." *See Id*.; *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

It is well known that attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383 (1981). As the "oldest of the privileges for confidential communications known to the common law," it serves the purpose of "foster[ing] disclosure and communication between the attorney and the client." "The privilege forbidding the discovery and admission of evidence relating to communications between attorney and client is intended to ensure that a client remains free from apprehension that consultations with a legal advisor will be disclosed." *Piazza*, 2015 U.S. Dist. LEXIS 147283 at 5.

A party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice at issue in the lawsuit. *Rhone-Poulenc Rorer v. Home Indem. Co*., 32 F.3d 851 (3rd Cir. 1994). In other words, by making the decision to take an affirmative step to place the advice of counsel in issue in the litigation, "the client has opened to examination facts relating to that advice." *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc*., 227 F.R.D. 382 (W.D. Pa. 2005) (citing *Rhone-Poulenc Rorer Inc*., 32 F.3d at 863).

Courts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and advice does not necessarily become an issue merely because it might affect the client's state of mind in a relevant manner. The advice of counsel is placed at issue when the client asserts a claim or defense and attempts to prove that claim or defense by disclosing or describing an attorney-client communication. *Rhone-Poulenc Rorer Inc*., 32 F.3d at 863 (citing *North River Ins. Co. v. Philadelphia Reinsurance Corp*., 797 F. Supp. 363, 370 (D.N.J. 1992)). The Third Circuit has clearly identified a "two-step inquiry into whether the privilege has been waived due to advice of counsel: (1) the assertion of a claim or defense, and (2) an attempt to prove that claim or defense by disclosing or describing an attorney client communication."

In *Piazza*, the court found that the defendant disclosed an attorney-client communication when he said he terminated the plaintiff on the advice of counsel, and his testimony further established that he relied on the communication in his decision to terminate the plaintiff. Bottom line: be careful not to put the advice of counsel at issue in litigation if you desire to preserve the attorney-client privilege. ■

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PENNSYLVANIA SUPREME COURT LIMITS

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In December 2015, the Supreme Court answered both questions in the affirmative and reversed the Superior Court's holding to the extent that it had allowed attorneys' fees to be assessed against Travelers. The Supreme Court relied on the American Rule, that there can be no recovery of attorneys' fees from an adverse party in litigation absent express statutory authorization or agreement by the parties. The court found no such authorization within the MVFRL and found no express language signifying that a challenge necessarily requires a valid review. The Supreme Court opined that the Superior Court's decision was "policy driven." It also expressed concern with the peer review process. However, it felt changes to the current system were best left to the legislature.

The Supreme Court's decision in *Doctor's Choice* is far from surprising, but it creates a bright-line rule regarding attorneys' fees in this context; as long as an insurance company submits the treatment to a PRO in a timely manner, attorneys' fees will not be available. That being said, the opinion left other important questions unanswered. The *Doctor's Choice* case involved a peer review that did not comport with the insurance regulations and was consequently labeled "invalid" by the trial court and the Superior Court. Unfortunately, the Supreme Court opinion did not discuss in any great detail what is necessary to comply with this particular regulation, whether failure to do so truly renders the PRO determination invalid, or whether an insurance company's reliance on a non-compliant review could result in a liability in some other context, such as bad faith. ■

SLIKER – EVIDENCE OF A USER'S NEGLIGENCE

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with knowledge of product design superior to that of courts," namely those within an industry who created the standards themselves. Because *Tincher* overruled *Azzarello* and pronounced that a manufacturer's conduct and reasonableness is relevant to the determination of a product defect, the court in *Sliker* determined that evidence of industry standards and a manufacturer's conduct was now proper for consideration under the risk-utility test.

The evidentiary rulings and sound reasoning in *Sliker* provide product liability defendants with strong arguments for the admissibility of evidence of a plaintiff's negligence and industry standards at trial, evidence that was previously prohibited under *Azzarello*. Under the invitation of the Pennsylvania Supreme Court for "targeted advocacy," product manufacturers and their counsel should take the opportunity to highlight the reasoning of this opinion in pretrial and trial practice. ■

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