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Defense Digest

On The Pulse…

OUR KING OF PRUSSIA, PENNSYLVANIA OFFICE

By Wendy J. Bracaglia, Esq.*

Wendy J. Bracaglia

To many people, King of Prussia means shopping. But just as captivating are King of Prussia's ties to our country's history. At Valley Forge National Park, which is only minutes away from our office, George Washington's troops spent a harsh winter during the Revolutionary War. The area was a strategic location for him and his men. Today, King of Prussia's location at the intersection of major highways—including the Pennsylvania turnpike, the Schuylkill expressway, US 202 and US 422—makes it a great place for one of the firm's regional offices. As a bonus, plans are underway to expand the area's regional rail system to include stops here, which will make the area even more convenient. With the growth of technology, our firm no longer requires a separate office near each courthouse in the counties where we practice. Instead, a larger regional office allows us to share resources and allows our attorneys to team up to achieve one goal: providing the best legal services in the region.

Marshall Dennehey has been in King of Prussia since 2005. As the managing attorney of this office for over 10 years, I am lucky to be a part of a stellar group of attorneys, paralegals and support staff who are committed to excellence in representing our clients. Our office's greatest asset are these talented, dedicated and hard-working individuals.

In our office, we have 36 attorneys, representing all of the firm's practice groups. We provide a complete range of legal services and handle cases in Montgomery, Philadelphia, Delaware, Chester, Berks, Lancaster, Bucks and other Pennsylvania counties subject to our clients' requests. Our attorneys are experienced in all litigation forums—jury trials, bench trials, arbitrations, mediations and other types of alternative dispute resolutions. We provide presentations and seminars and offer consulting services. We also roundtable cases and present continuing legal education classes to stay current on emerging trends.

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OUR AVIATION & COMPLEX LITIGATION PRACTICE GROUP

By J. Bruce McKissock, Esq.*

J. Bruce McKissock

The Aviation & Complex Litigation Practice Group at Marshall Dennehey is led by three attorneys with a combined experience of over 70 years in litigating aviation-related matters. One member of the team is a professional pilot, and a second has flown actively for almost 40 years as a private pilot. More importantly, each has extensive experience in litigating a broad range of claims involving various aspects of the aviation industry. This team consists of me, Jim Connors and Jim Lare.

I chair the Aviation & Complex Litigation Practice Group and have been handling aviation matters for over 35 years. Admitted to practice in all state and federal courts in Pennsylvania and the Third Circuit, I have handled cases on a *pro hac vice* basis in over a dozen other jurisdictions, from Texas to Massachusetts. In 2004, I was elected as a member of the American College of Trial Lawyers.

After heading the aviation practice at the Jones, Hirsch, Connors firm in New York for almost 30 years, Jim Connors brought his practice to Marshall Dennehey in 2014. He is admitted to practice in all courts in New York and Pennsylvania, and he has also appeared on a *pro hac vice* in numerous other states. Jim has also litigated the full range of aviation cases during his career, including representation of a major party in the 9/11 air disaster.

After initially flying in the air charter and commuter airline industry, Jim Lare joined American Airlines as a First Officer shortly prior to 9/11. After the cutbacks in aviation in 2001, Jim became a paralegal in my aviation practice while pursuing a law degree at Widener Law School. After a federal clerkship and working at two major Philadelphia law firms, Jim joined Marshall Dennehey in 2007 and was elected a partner in 2013. Jim currently splits his time between flying for American Airlines (First Officer – Airbus 321) and serving as counsel to our firm in the Aviation Practice Group.

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By Christopher E. Dougherty, Esq.
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METRICS & ANALYTICS: THE GOOD, THE BAD AND THE UGLY

Everywhere one turns these days, "analytics" is the buzz word. We see metrics and analytics used in science, business, military operations, politics and sports. The fact that metrics and analytics have crept into the insurance defense industry should not surprise anyone. The pace of their development and capability has outpaced generally-accepted methodologies for their deployment—in part because no consensus exists as to the value of "Big Data."

On one end of the acceptability spectrum, analytics advocates herald their ability to enhance innovation; to evaluate return on investment; to gauge an organization's capabilities; to appraise personnel performance; and to address and evaluate leadership performance. These advocates believe in "input metrics," "output metrics" and everything measureable in-between. To them, metrics are *the* driving force behind planning, operations and periodic evaluations.

On the other end of the extreme, critics complain of a "metrics overload." A *Business Week* article recently noted that many organizations complain about too many metrics interfering with what they are trying to accomplish. Everything is being measured, but the measurement criteria differs. The overload causes leaders to view a metrics-centric approach as missing "the heart of the matter." A heavy emphasis on metrics can lead to excessive activities that provide little or no value. Often, this approach creates confusion and conflicting behaviors within an organization.

In sports, NBA Hall of Famer Charles Barkley and MLB Hall of Famer Goose Gossage have become voices for this group critical of the perceived over-reliance on sports analytics.

Goose Gossage lamented:

> The game is becoming a freaking joke because of the nerds who are running it. I'll tell you what has happened, these guys played rotisserie baseball at Harvard or wherever the *!#! they went and they thought they figured the *#!#*!# game out. They don't know *#*!

Charles Barkley put it in his own indomitable style:

> I've always believed analytics was crap, and you know I never mention the Rockets as a legitimate contender, because they're not. Analytics don't work at all. It's all just some crap some people who are really smart made up to try to get in the game because they had no talent. Analytics don't work. What analytics did the Miami Heat have? What analytics did the Bulls have? What analytics do the Spurs have? They just have the best players . . . Give me a break!

Somewhere in between the complete absorption of metrics and analytics into an organization's DNA and abject rejection of their value lies an appropriate middle ground. How we use metrics could be "good," "bad" or "ugly," depending on when and how we modulate its usage at Marshall Dennehey. We must take care to ensure the modulation is just right. We will.

We fully appreciate that insurers and sophisticated self-insureds use analytics to measure the performance of their panel law firms. They also compare that performance against other firms. That we elevated our Chief Operating Officer, Liz Brown, from her position as the IT Director underscores our commitment to keeping pace with how technology and analytics are used in our firm.

It makes no sense denying, however, that metrics and analytics aren't useful. Take, for example, what UPS does with analytics. It sees them as a crucial differentiator in its operations. E-commerce is engaged 24/7/365. UPS has over 55,000 delivery trucks and 106,000 drivers delivering 20 million packages a day. A reduction of one mile per driver, per day yields huge savings in fuel costs alone. By optimizing delivery routes with analytics, UPS reduced 85 million miles driven last year—more than 8 million gallons of fuel saved. By reducing idling time by a few minutes per day, per driver, it reduced fuel consumption by over 650,000 gallons and reduced carbon emissions by over 6,500 tons.

In our firm, we have impressive technological and data capabilities resident in our IT department and in our other administrative departments that support our attorneys' delivery of legal services. Roger Bonine, our IT Director, annually outlines a comprehensive IT budget for hardware, software and services that gives our attorneys state-of-the-art technology support to effectively defend civil litigation in the 21st century. This budget also gives us systems to acquire, manage, use and protect data—all factors that are increasingly important to our competitiveness and growth.

Why is data important to Marshall Dennehey? Data enables us to:

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OUR KING OF PRUSSIA, PENNSYLVANIA OFFICE

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I encourage you to look at the firm's website (www.marshalldennehey.com) to learn more about each of our wonderful attorneys—there is not enough space here to do them justice as many of the firm's most senior and most well-respected lawyers have their offices here.

Our largest practice group is the casualty group, and Ed McGinn is the supervisor. He, along with shareholders Kim Woodie, Dave White, Mark Riley, John Riddell, Paul Brady, Ed Tuite, Jack Tucci, Doug Kent, Jim Hilly, Tim Hartigan, Adam Sorce, Jim Lare and Brian McNulty handle all types of liability matters. These include construction defect, homeowners, premises, product, trucking, special investigation/fraud, dram shop and motor vehicle. They are also involved in initial accident investigations in catastrophic loss cases. Mike Dempsey, special counsel, adds expertise to the group, as do the group's rising stars, associates Michele Krengel, Hannah Donahue and Patrice Turenne.

King of Prussia also has a large health care liability practice. Kevin FitzPatrick, who is Director of the Health Care Department, is part of the King of Prussia team. In addition to his administrative responsibilities, Kevin continues to represent hospitals and physicians in complex medical malpractice cases. Other members of our team include Dan Sherry, chair of the firm's Hospital Liability Practice Group, Steve Ryan, chair of the firm's Birth and Catastrophic Injury Litigation Practice Group and Medical Device and Pharmaceutical Liability Practice Group, and Chan Hosmer, chair of the firm's Physician Liability Practice Group. In addition to myself, the other shareholders in this group, Joan Ford, Jackie Reynolds, Donna Modestine, Carolyn DiGiovanni and Dave Krolikowski, handle matters where we represent hospitals, physicians, nurses, pharmacists, physical therapists, long-term care facilities, skilled nursing homes and other health care professionals. Our associates, Joe Hoynoski and Kim McCarthy, are an integral part of this group.

The Professional Liability Department is also well-represented by four shareholders and a senior associate: Chris Boyle, who represents public entities, including police departments, in civil rights matters; Greg Kelley, who concentrates his practice on architects and engineers; Audrey Copeland, who has 30 years of experience as an appellate specialist; Maureen Fitzgerald, who has extensive experience in employment and accounting issues; and Conrad Radcliffe, a senior associate who concentrates his practice in the coverage area, all base their practices in King of Prussia. Frank Wickersham, a shareholder in the Workers' Compensation Department, rounds out our King of Prussia team.

Although our loyalties run true to the Marshall Dennehey blue and white and to each practice group, we all value the special culture that has developed in our office. We work together, sharing our challenges and our successes. The office is also lucky to have office manager Sandy Caiazzo and her assistant, Martie Licwinko. Together they efficiently manage the work flow and almost everything else that comes up in our busy workplace.

In King of Prussia, we work hard every day to provide our clients with up-to-date and personalized legal services. We never stop trying to improve—all to provide the best value and the best results. Teamwork and innovation are number one priorities.

Please feel free to contact me with any questions, or stop by for a visit. My email is wjbracaglia@mdwcg.com, and my direct telephone number is (610) 354-8256. ■

OUR AVIATION & COMPLEX LITIGATION PRACTICE GROUP

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In addition to the various associates who assist in litigating aviation matters, based on the degree of complexity, the aviation group has the support of the firm's appeals group in the preparation of various motions and other court submissions in complex cases. With 20 offices in five states, our group is poised to handle matters in state and federal court throughout the eastern United States.

This group's experience ranges from the handling of multi-million dollar product recall and catastrophic injury and death claims, to the mundane soft tissue injuries that arise out of airline and airport operation. We have litigated against some of the top attorneys in the country, and we are experienced with the tools for presenting complex evidence and theories to a jury, who may have little understanding of aviation operations.

Through training and/or hands-on experience, we have knowledge of:

a) flight procedures and techniques;
b) ground operations;
c) manufacture of aircraft and airframe and engine components;
d) repair and maintenance of aircraft;
e) cargo handling and transportation;
f) airport operations ranging from hub airports to small regional and local airports; and
g) Federal Air Regulations and FAA oversight.

We have worked with and have quick access to not only many of the leading aviation experts in the world, but also various technical expertise at preeminent universities, and materials testing and analysis facilities throughout the country. ■

Federal—Aviation and Complex Litigation

A GAME CHANGER FOR PERSONAL JURISDICTION

By J. Bruce McKissock, Esq. and Nicolai A. Schurko, Esq.*

KEY POINTS:

- The United States Supreme Court has clarified that, for a court to exercise general personal jurisdiction over a corporate defendant, the defendant must be considered "at home" in the forum state.
- Under *Daimler*, only in an "exceptional" case will a corporate entity's operations in a forum other than its formal place of incorporation or principal place of business be so substantial and of such nature as to render the corporate defendant "at home" in that forum.
- The *Daimler* reasoning has been adopted by several courts across the country and drastically restricted the ability for courts to exercise general jurisdiction over foreign corporate defendants. One major defense victory on this issue came in a case handled by Marshall Dennehey, *Leeds v. S.K. Travel, LLC et al*., July Term 2014, No. 01735, *App. for King's Bench Power or Extraordinary Jurisdiction denied*, *Leeds v. Gulfstream Aero. Corp. (Del.)*, 125 A.3d 774 (Pa. 2015), in which a high-end aircraft manufacturer doing business nationally was dismissed from a lawsuit brought in the Philadelphia Court of Common Pleas following jurisdictional preliminary objections.

J. Bruce McKissock

Nicolai A. Schurko

The landscape of where large national companies can be sued in the United States has dramatically changed over the past few years. Imagine the following scenario: a younger husband and wife, residents of Ohio, have left their children with a babysitter and are driving a rented SUV on a remote road through West Virginia on a camping trip. The SUV was rented from an agency in Ohio, and the couple drove the vehicle straight from Ohio and over the border into West Virginia. After rounding a blind turn in the West Virginia mountains, the wife unexpectedly encounters a line of stopped traffic. She slams on the brakes to avoid a collision, but the brakes suddenly and without warning do not work. The SUV slams into the line of stopped traffic, and, tragically, the husband and wife are killed.

The estates of the deceased couple obtain representation from a nationally-renowned plaintiffs' attorney based in Philadelphia. Upon advice of this attorney, the estates of the deceased couple file a wrongful death and survival lawsuit sounding in product liability in the Philadelphia Court of Common Pleas against various defendants, including the rental car company, the SUV manufacturer and the brake manufacturer. Your firm is retained to defend the brake manufacturer. As you receive and evaluate the file, you know that this is an extremely high-value case. You realize that getting the case out of what is commonly perceived to be a "plaintiff-friendly" venue would be a preliminary victory, which could ultimately set the stage for obtaining the best possible outcome for your client.

One of the first things that sticks out to you is that nothing about the accident, itself, relates to Pennsylvania. This is a vehicle that was rented in Ohio by Ohio residents. The accident occurred in West Virginia. The vehicle was manufactured in Michigan, and the brakes were made in North Carolina and delivered to the manufacturer in Michigan, where they were installed. The plaintiffs, the vehicle and the accident have no relation to Pennsylvania. However, via conversations with your client, you learn that this particular brake manufacturer is a "national" company. Though headquartered in North Carolina and organized under the laws of Delaware, your client: sells its brakes to distributors in all 50 states; has authorized installers/repair shops in most states, including three such shops Pennsylvania; enters into contracts and vendor agreements with several entities that are based in Pennsylvania; and in the past 10 years has, on average, derived 7% of its revenue from sales made to entities or persons based in Pennsylvania. While specific jurisdiction over your client in Pennsylvania is almost certainly lacking, general jurisdiction over your client in the Commonwealth is all but a sure thing, right? Not necessarily.

In *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), the United States Supreme Court clarified the requirements for a court to exercise general personal jurisdiction over a foreign or out-of-state defendant. In that case, the plaintiffs sued Daimler AG, a German company, in California for alleged human rights violations committed outside the United States. The plaintiffs argued in favor of the California court's exercise of personal jurisdiction over the defendant based on its U.S. subsidiary's contacts with California. Specifically, the plaintiffs argued that Mercedes Benz USA, Daimler AG's subsidiary, made Daimler susceptible to general jurisdiction in the courts of California because Mercedes Benz USA sold/distributed a significant amount of automobiles to California dealerships and residents and derived substantial revenue from those sales/distributions. The question presented was whether general jurisdiction over the German parent company was proper based on these contacts.

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Federal—Employment Law

NLRB RULES: CHIPOTLE MEXICAN GRILL UNDER FIRE FOR CONTROVERSIAL SOCIAL MEDIA POLICY AND INTERFERING WITH EMPLOYEES' RIGHT TO ORGANIZE

By Candace D. Embry, Esq.*

KEY POINTS:

- Social media policies that "tend to chill" employees' right to organize or engage in protected concerted activity may violate the National Labor Relations Act.
- Employers may avoid unexpected exposure to liability by being diligent to remove and warn management against the use of outdated policies.
- Unpleasantries in the course of otherwise protected activity do not remove protection of the National Labor Relations Act.

Candace D. Embry

Chipotle is back in the news, but not to worry—your guacamole is safe. (And yes, it is still extra!)

On March 14, 2016, the National Labor Relations Board (NLRB) ruled that Chipotle Mexican Grill violated Section 8(a)(1) of the National Labor Relations Act, effectively chilling employees' right to self-organize when it maintained and enforced an unlawful social media policy and fired an employee for circulating a petition.

In January 2015, James Kennedy, a crew member at the Havertown, Pennsylvania Chipotle store, posted several tweets regarding the working conditions of Chipotle employees. Specifically, Kennedy's tweets commented that Chipotle had cheap labor and referenced the fact that crew members made only $8.50 per hour. On January 29, 2015, after Chipotle's National Social Media Strategist discovered the posts, Chipotle's regional manager and Jennifer Cruz, general manager of the Havertown store, met with Kennedy, provided him with a copy of the company's social media policy and asked him to delete the tweets.

A few weeks later, in February, Kennedy drafted a petition for employees' signatures, regarding management's failure to provide employees with food breaks and rest breaks in accordance with applicable state law. The petition stated that employees were often denied breaks for not getting their work done on time. The petition further stated that failure to provide breaks reduced productivity and increased stress and that the employees hoped to work with management to create a more positive workplace.

On February 17, 2015, Cruz learned that Kennedy had been circulating this petition and asked to speak with him in the back office. Cruz explained her position on the break policy and asked Kennedy to stop circulating the petition. Kennedy refused, raised his voice and told Cruz she would have to fire him to get him to stop. In response, Cruz told him to leave. On the following day, Cruz processed his termination as "insubordination," and, on February 19, 2015, when Kennedy was next scheduled to work, he returned to the Havertown store and was told that he had been fired and to go home.

Section 8(a)(1) of the National Labor Relations Act (NLRA) prohibits employers from interfering with or restraining the exercise of those rights guaranteed by Section 7, which, in short, allows employees to self-organize for the purpose of collective bargaining or other mutual aid. The NLRB has found that an employer violates Section 8(a)(1) when it maintains a work rule that "tends to chill" employees' exercise of Section 7 rights. Even if the rule does not explicitly prohibit Section 7 activity, if employees could reasonably read the rule do so, then the rule will be found unlawful.

Chipotle's social media policy at issue stated, in relevant part, "[i]f you aren't careful and don't use your head, your online activity can damage Chipotle . . . . You may not make disparaging, false, misleading, harassing, or discriminatory statements about or relating to Chipotle . . ."

Under the NLRA, ambiguous rules are construed against the employer and employees' false or misleading statements are protected unless the employee had a malicious motive. The NLRB found that the word "confidential" was vague and that "disparaging" was overbroad and could easily restrict employees' Section 7 rights or lead employees to believe those rights were being restricted. Accordingly, the NLRB determined that those particular portions of the policy were violative of Section 8(a)(1) and were likely to have a chilling effect on employees' Section 7 activities. Chipotle argued that this was an old policy and that it was purely punitive to find a violation based on an outdated policy. Despite this being an old policy, the NLRB found that, because this policy was presented to Kennedy and used as the basis for asking him to delete his tweets, it was a violation. Further, the NLRB found that, although Kennedy acted alone in posting the tweets, his activity

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A MESSAGE FROM THE EXECUTIVE COMMITTEE

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- Predict our clients' costs to litigate a certain type of case in a particular venue and to evaluate our own performance with certain law types in these locales;
- Assess attorney performance in the way that our insurers measure our firm's performance—*i.e*., which attorneys grasp our insurers' and clients' early resolution litigation objectives by evaluating and resolving cases early and inexpensively; which attorneys budget a case appropriately and stay within the budget;
- Provide accurate information about a case's exposure in a certain jurisdiction, before a certain judge and against a certain plaintiff's counsel;
- Predict more critically what an appellate court (or particular panel) will do with a certain appellate issue or for a particular party;
- Price alternative fee agreements appropriately (we have over 50 in place);
- Identify which insurers are the most aggressive in write-offs and write-downs to help us understand why they are reducing our revenue;
- Identify which insurers and clients are slow pay, no pay, or generally contribute to our accounts receivable and to understand why this occurs;
- Prepare our firm's fiscal goals and objectives in order to monitor our fiscal performance on a near real-time basis;
- Evaluate our return on investment for marketing initiatives; and;
- Manage our professional, para-professional and administrative manpower for training, performance, promotion, retention, and retirement planning, and more.

Where we have to be careful, however, is in becoming over-reliant on metrics and allowing an analytics tail to wag the dog. There will always be room in this law firm's leadership for the consideration of intangibles such as experience, work ethic, attitude, determination and character. Like an athlete whose efforts don't always show up in a box score—but whose efforts make a difference in the game's outcome—the contributions of individuals to our firm and for our clients don't always translate onto a spreadsheet.

Shane Battier, a championship basketball performer at the high school, collegiate and professional levels, remarked that as he got older in the NBA, it became more difficult to guard a gifted player like Lebron James or Kevin Durant. Analytics, however, gave him the opportunity to appreciate certain tendencies of star players, and "what I found, drilling down into the analytics, the numbers, the data . . . [it] . . . gave me every advantage possible to survive against the best players in the world."

Every business, including ours, can benefit by becoming more analytical—understanding our clients and our operations and in making our decisions. Analytics will give us keener insight into the business tendencies that exist in our competitive defense litigation environment. As an example, by understanding and anticipating those tendencies, our attorneys and paralegals will better capture and record time. Our clients will appreciate our efforts to diminish our write-off "error rate," and our firm will benefit from fewer write-offs and write-downs. A "Win-Win."

Metrics and analytics could turn "ugly" for us if we become too fixated on Big Data. I fear we could erode the heart and the soul of our firm—both critically-prized attributes that genuinely define us and make us distinguishable from our competition.

Over the last several years, and out of necessity, more data has been needed to make informed decisions—hire a lateral or group of laterals; expand to a new geographical locale; eliminate or enlarge a practice group; develop a new law type practice; move an attorney to a different office or to a new practice group; bid on an alternative fee agreement; respond to an RFP; move, close or improve an office; embark on certain training initiatives; etc.

We need to be mindful, however, that data collection, organization, synthesis and the process to translate that information into intelligence puts strain on people and operational segments of the firm. Even more time is needed to critically analyze that information once it has been collected.

The time spent poring over charts, spreadsheets, graphs and dashboards is time we spent 15 to 20 years ago counseling our clients or teaching, mentoring and guiding others—genuine human interaction. We can't lose sight that we are truly a "people-oriented" law firm, providing services to real people with real human problems. Investment in meaningful human relations must continue. Not only does it enhance our client relationships, but it fosters camaraderie, respect, trust and teamwork internally. These are valuable qualities that our clients perceive. These intangibles have combined over six decades to define the culture of our firm. We must be careful to not allow that culture to be compromised by an over-emphasis on analytics.

Shane Battier remarked that if he were evaluated solely on analytics, he never would have survived "the cut." He wasn't fast. He failed all the visual acuity tests. He did not have great leaping ability. He did not have a quick release on his jump shot. Many fans were puzzled by the great success he enjoyed.

What wasn't measured, of course, was his confidence, fortitude, unselfishness, calmness under pressure and his feel for the game—they all added up to his always being a "winner."

The intangibles that each employee has brought to Marshall Dennehey over the past six decades have made Marshall Dennehey an enviable law firm. We recognize that we are in an era of data-driven processes. Yet, we remain committed to being mindful of those human factors that cannot be measured. They make a difference to judges, juries, mediators and others involved in the litigation process. They permit a work environment to flourish so employees choose to stay at Marshall Dennehey for their careers. We pledge to not become the "nerds" that Goose Gossage talks about.

Big Data is necessary, but not sufficient to succeed in this digital age. Immeasurable human intangibles, combined with the right measure of data, will drive our long-term success. ■

Florida—Civil Rights

FLORIDA BROADENS ITS ANTI-SLAPP STATUTE, BUT IS IT ON THE VERGE OF DEATH?

By Robert Garcia, Esq.*

KEY POINTS:

- In enacting the anti-SLAPP statute, the Florida legislature intended to expeditiously dispose of lawsuits involving an individual's expression of free speech on public issues.
- The anti-SLAPP statute's requirement that the lawsuit be "without merit and primarily" because of an individual's exercise of constitutional speech provides leeway for plaintiffs and defeats the statute's intent to early resolution.
- Other states having stricken similar anti-SLAPP statutes on the basis that they deny individuals their constitutional right of access to the courts.

Robert Garcia

In 2000, the Florida legislature enacted Section 768.295, Fla. Stat. titled *Strategic Lawsuits Against Public Participation* (SLAPP). This section prohibited governmental entities from filing suit against individuals who exercise their right to peacefully assemble, instruct their representatives and petition for redress of grievances before various governmental entities.

In 2015, the legislature expanded Section 768.295 to prohibit the filing of SLAPP lawsuits not only by governmental entities, but also to individuals. The legislature further expanded the scope of the statute to include statements made in connection with the media and arts. The prohibition of SLAPP lawsuits applies only to those suits that are "without merit and primarily" because such person or entity has exercised their constitutional right of free speech on a public issue and/or the media and arts. If a SLAPP lawsuit is filed, a defendant is entitled to an expeditious resolution by way of a motion to dismiss or summary judgment, and the prevailing party is entitled to reasonable attorney fees and costs.

By requiring that the lawsuit be "without merit and primarily" because a defendant exercised his or her right of free speech on a public issue or in connection with the arts and/or media, the legislature provided a loophole for plaintiffs to argue that the defendant's conduct had an ulterior motive and/or was unrelated, thereby defeating a defendant's chances of prevailing on a motion to dismiss pursuant to the anti-SLAPP statute.

In a recent central Florida case, the plaintiff, a real estate developer, filed suit against the president of a commercial homeowner association in his individual capacity based on the defendant's objection, made before the local municipal planning board, of the plaintiff's intent to develop a parcel of land. The municipal planning board found that the defendant's objections were without merit and unrelated to any of the issues of the plaintiff's project. As a result of the defendant's objections, the plaintiff filed suit for malicious prosecution and abuse of process. The plaintiff claimed that the defendant's objections delayed the project and resulted in additional expenses.

In response, the defendant filed a motion to dismiss, arguing that the lawsuit was prohibited pursuant to Section 768.295 as it concerned the defendant's free speech in connection with a public issue. The trial court denied the defendant's motion, finding that the statute requires "meritless claims" and that the defendant's objections, as founded by the municipal planning board, had no bearing. The court also found that the defendant's objections may have been the result of a personal vendetta between the parties stemming from unrelated private matters. Finally, the court held that in order to invoke the anti-SLAPP statute, it must be "clear on the face of the Complaint that the claims are meritless and serve solely or primarily to silence a concerned citizen," as the Florida Constitution guarantees that "[t]he Courts shall be open to every person for redress of any injury." (Art. I, §21, Fla. Const.)

By requiring courts to look at whether the defendant's conduct is "without merit," the Florida legislature unintentionally provided a loophole for plaintiffs to circumvent the anti-SLAPP statute's purpose of providing protection to individuals when exercising their constitutional right of free speech before the various governmental entities. Had the legislature drafted Section 768.295 to prohibit the filing of *any* lawsuit against an individual who voices his concern before a governmental entity on a public issue, regardless of whether the concern is valid, the intent of the anti-SLAPP statute would have prevailed. As a result of this loophole, individuals must be cautious in exercising free speech, as unfounded objections—despite having merit from their perspective—may result in unforeseen lawsuits costing them thousands of dollars.

Finally, in the recent case of *Davis v. Cox*, 351 P.3d 862 (Wash. 2015), the Washington Supreme Court struck down that state's anti-SLAPP statute on the basis that its procedure for early dismissal violated the Washington Constitution's right to a jury trial. In its conclusion, the Washington Supreme Court noted that the anti-SLAPP statute created a "constitutional conundrum" in that "it

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Florida—Health Care Liability

AIRING THE HOSPITAL'S DIRTY LAUNDRY: DEVELOPMENTS IN KEEPING THE EVALUATION OF ADVERSE INCIDENTS CONFIDENTIAL

By David R. Bear, Esq.*

KEY POINTS:

- Since 2004, based upon a constitutional amendment known as Amendment VII, Florida patients have a right to access any records made in the course of business and all adverse incident records.
- Amendment VII supersedes Florida statutory protection for adverse incident reviews.
- Attorney work product can provide privilege to an adverse incident review.
- External reviews are not covered by Amendment VII.
- Hospital review that is maintained inside a Patient Safety Evaluation System is shielded by the Patient Safety and Quality Improvement Act.

David R. Bear

In 2004, the availability of hospital records regarding adverse incidents in Florida changed dramatically. Prior to that date, statutes that protected the confidentiality of the peer review process § 395.0193 and § 766.101, credentialing § 395.0191, risk management reports of adverse incidents § 395.0197 and risk management reports of quality assurance § 766.1016, provided hospitals with confidentiality in their internal review. The courts recognized that these privileges were "[d]esigned to provide that degree of confidentiality necessary for the full, frank medical peer evaluation… ." *Crugar v. Love*, 599 So. 2d 111 (Fla. 1992). The legislature had determined that without the privilege, the peer review process would not be honest and beneficial. *Feldman v. Glucroft*, 522 So. 2d 798 (Fla. 1988). These statutory privileges had the effect of preventing the discovery of otherwise relevant information in litigation. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984).

With the passage of what has become known as Amendment VII, public policy was flipped to the position that "disclosure of information [ ] will allow patients to better determine from whom they should seek health care, evaluate the quality and fitness of heath care providers currently rendering service to them, and allow them access to information gathered through the self-policing process during the discovery period of litigation… ." *Florida Hospital Waterman, Inc. v. Buster*, 932 So. 2d 344 (Fla. 5th DCA 2006). Under Amendment VII, a patient was given a right to access records of any adverse medical incident and any record made or received in the course of business. The language of the Amendment was interpreted broadly to confer upon any person who is receiving or has received medical care the right of access to any document pertaining to medical negligence, intentional misconduct, and any act of neglect of a facility or provider which caused or could have caused injury or death to a patient. *Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008). There is no limitation on whether the adverse incident is the same or similar to the incident being litigated. *Ampuero-Martinez v. Cedars Healthcare Group*, 139 So. 3d 271 (Fla. 2014). Many asked if there was any confidential evaluation that a hospital could perform.

Soon after Amendment VII was enacted, some hospitals began attempting to build confidentiality through the involvement of an attorney in the review of an adverse incident. Courts have since determined that Amendment VII does not vitiate the opinion work-product privilege, but it does supersede the fact work-product privilege. *Fla. Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009). Because of this distinction, it is not enough for a hospital's attorney to simply be present during an adverse incident review. Conferring privilege through work-product requires the attorney to inject her mental impressions, conclusions, opinions and theories. Even opinions communicated by the hospital's employees to the attorney are not protected from Amendment VII. *Acevedo v. Doctors Hosp. Inc.*, 68 So. 3d 949 (Fla. 3d DCA 2011).

Another avenue for obtaining confidential evaluation of an adverse incident is an external medical review. The application of Amendment VII to external medical reviews for purposes of litigation was recently reviewed, and the Second District held that external medical reviews maintain confidentiality. *Bartow HMA, LLC v. Edwards*, 175 So. 3d 820 (Fla. 2d DCA 2015). The court determined that an external medical review done for litigation was not a record "[m]ade or received in the course of business," nor was it a record pertaining to an adverse incident because it was not a functional equivalent of a facility's internal peer review. However, the external review cannot be used as a vehicle to outsource the internal peer review, as the court noted that their decision would have been different if there was no internal peer review of the incident.

Also important is that the Second District has clarified that documents pertaining to adverse medical incidents in general, but not related to a specific adverse medical incident, are not covered under Amendment VII. *Bartow HMA, LLC v. Kirkland*, 171 So. 3d 783 (Fla. 2d DCA 2015). For example, the court specified that general policies regarding handling of patient cases, reports from departments that

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New Jersey—Dram Shop

"SEEING THE INVISIBLE"– RECENT CHALLENGES FOR RESTAURANT, BAR AND TAVERN OWNERS IN DEFENDING CLAIMS UNDER THE NEW JERSEY DRAM SHOP ACT

By Teagan S. Allen, Esq.*

KEY POINTS:

- Eyewitness testimony is not required to establish that a licensed alcoholic beverage server violated the New Jersey Dram Shop Act.
- The "relation back" opinion of a toxicologist remains insufficient on its own to prove that a patron showed signs of visible intoxication.
- The test for service of a visibly intoxicated patron remains highly fact-specific.

Teagan S. Allen

Thirty states across the country have enacted "dram shop" laws that set forth the parameters by which a licensed alcoholic beverage server—such as a restaurant, bar or tavern owner—can be held liable to individuals who suffer injury or death, or cause injury or death of others, as a result of intoxication. In New Jersey, the Licensed Alcoholic Beverage Server Fair Liability Act, N.J.S.A. 2A:22A-2, most commonly known as the New Jersey Dram Shop Act, provides the exclusive legal remedy against a licensed alcoholic beverage server for damages suffered by a person who sustains injury as the result of the negligent service of alcoholic beverages. Pursuant to the Act, a restaurant, bar or tavern owner is deemed to have been negligent **only when** the server served a **visibly intoxicated** person or a minor. "Visibly intoxicated" is defined by the Act as "[a] state of intoxicated accompanied by a perceptible act or series of acts which present clear signs of intoxication." This seemingly straightforward criteria appears to overwhelmingly favor alcoholic beverage servers and places a heavy burden upon plaintiffs. However, the impact of a 2013 New Jersey appellate decision regarding the threshold of evidence required to prove these claims has recently muddied the waters in favor of plaintiffs and is presenting new challenges for the defense of personal injury, wrongful death and survival claims under the Act.

In *Halvorsen v. Villamil*, 60 A.3d 827 (App. Div. 2013), the New Jersey Appellate Division held that eyewitness testimony of service of a visibly intoxicated patron was not required to prove that a licensed alcoholic beverage server violated the Act. In *Halvorsen*, the defendant driver, Villamil, was involved in a motor vehicle accident that occurred approximately 30 minutes after he left the bar at TGI Friday's, where he had been drinking for several hours. Villamil's blood alcohol content (BAC), taken one and one-half hours after the accident, was .278. However, there was no eyewitness testimony of Villamil's condition or alcohol consumption while at TGI Friday's. During discovery, the plaintiffs submitted an expert report from a well-known plaintiff's toxicologist, Richard Saferstein, who concluded that, based on the "relation back" of Villamil's BAC, he must have been served alcoholic beverages while visibly intoxicated at TGI Friday's. Saferstein opined, *inter alia*, that Villamil had consumed 17 drinks at the bar and would have shown visible signs of intoxication, such as slurred speech and an unsteady gait.

At the close of discovery, TGI Friday's filed a successful motion for summary judgment, arguing that the plaintiffs failed to set forth any direct evidence that Villamil was visibly intoxicated when served at TGI Friday's. On appeal, the plaintiffs argued that eyewitness testimony was not required and that Saferstein's "relation back" opinion was enough to survive summary judgment. The Appellate Division reversed, noting that the Act's language did not explicitly require eyewitness testimony. The court reasoned that the plaintiffs could survive summary judgment because they were able to present enough circumstantial evidence that Villamil was served while visibly intoxicated. Specifically, the Appellate Division found that, in the aggregate, the following evidence permitted the plaintiffs' case to proceed:

- Saferstein's "relation back" opinion that Villamil would have shown signs of visible intoxication at least one hour before leaving TGI Friday's;
- Villamil's testimony that he only consumed alcohol at TGI Friday's on the date of the accident;
- The smell of alcohol on Villamil's breath as testified to by the arresting officer;
- Villamil's testimony that he did not eat, and only drank alcoholic beverages while at Friday's;
- Villamil's exceptionally high BAC one hour after the accident; and
- The short timeframe of only 20-30 minutes between when Villamil left the bar and the motor vehicle accident.

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A GAME CHANGER FOR PERSONAL JURISDICTION

(continued from page 5)

The Supreme Court held that general jurisdiction was not proper. In so holding, the Court explained that a corporation must be "essentially at home" in a forum in order for a court in that state to comply with the due process requirements in asserting general jurisdiction:

> [T]he inquiry . . . is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous or systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially **at home** in the forum state."

Id. at 761 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (emphasis added). The Court continued that the "paradigm" bases for assertion of general jurisdiction over a corporation are: (1) its state of incorporation, or (2) principal place of business, both of which "have the virtue of being unique . . . as well as easily ascertainable." Moreover, the Court explicitly rejected the plaintiff's request to approve the exercise of general jurisdiction in every state in which a corporation "engages in a substantial, continuous, and systematic course of business" because that approach would be "unacceptably grasping." Though the Daimler court did not "foreclose the possibility that *in an exceptional case*, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such nature as to render the corporation at home in that State."

Other courts throughout the United States have acknowledged and/or adopted the reasoning of *Daimler*. For instance, in *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 800 (7th Cir. 2014), the Seventh Circuit referenced the "paradigm" test for jurisdiction:

> In *Daimler*, the Court confirmed its adherence to the distinction between 'general jurisdiction' and 'specific jurisdiction.' The former is proper only in the limited number of fora in which the defendant can be said to be 'at home.' For a corporation, such places include the state of incorporation and the state of the principal place of business.

In *Shovah v. Roman Catholic Diocese of Albany*, 745 F.3d 30, 34 (2d Cir. 2014), the court concluded that the Diocese of Albany was not "at home" in Vermont. The diocese was not "not home" there, despite that its parishes employed, served, accepted advertising and collected charitable contributions from, and maintained a weekly newspaper with a partial circulation to people and companies in Vermont.

Recently, our Aviation Practice Group at Marshall Dennehey prevailed on preliminary objections to personal jurisdiction over our client, Gulfstream Aerospace Corporation (a national manufacturer of high-end jet aircraft) in a catastrophic aviation case filed in the Philadelphia Court of Common Pleas. *See Leeds v. S.K. Travel, LLC et al*., July Term 2014, No. 01735, *App. for King's Bench Power or Extraordinary Jurisdiction denied, Leeds v. Gulfstream Aero. Corp. (Del.)*, 125 A.3d 774 (Pa. 2015). While both specific and general jurisdiction were at issue in this case, the primary focus of the jurisdictional arguments was whether the Philadelphia Court of Common Pleas could exercise general jurisdiction over our client. The two named Gulfstream entities were incorporated under the laws of Delaware and Georgia, respectively, with their principal place of business in Georgia. Though Gulfstream, as a national aircraft manufacturer, undoubtedly did what the plaintiffs described as significant and continuous business in Pennsylvania, we were able to successfully argue that the Gulfstream entities' contacts with Pennsylvania were not so systematic and continuous as to render Gulfstream "at home" in Pennsylvania pursuant to the reasoning of *Daimler*.

So, going back to the hypothetical posed at the beginning of this article; is the exercise of general personal jurisdiction in that fact scenario a sure thing? The answer is a resounding "no." A large national company that does business across the country is not necessarily susceptible to the exercise of general personal jurisdiction by courts in every state across the country. As it is now interpreted, *Daimler* stands for the proposition that general personal jurisdiction can only be exercised in a state where a defendant is deemed "at home," with "at home" being either its state of incorporation or principal place of business. And, more importantly, only in an "exceptional case" can a corporation's operations in a forum other than its formal place of incorporation or principal place of business be so substantial and of such nature as to render the corporation "at home" in that state.

The game has changed, and the issue of general jurisdiction has swung in favor of defendants who may be faced with forum shopping. As this is clearly an issue of due process, it is something courts should resolve at the outset of the proceedings. While some jurisdictional discovery may be permitted, in the *Leeds* case described above, we were successful in limiting that discovery to the essential "at home" criteria. All of this means that plaintiffs who are faced with pursuing multiple actions in different fora may be more amenable to an early compromise settlement, especially where they find that they cannot proceed in a "plaintiff-friendly" forum of their choice. ■

New Jersey—Employment Law

CAN EMPLOYERS CONTRACTUALLY LIMIT AN EMPLOYEE'S STATUTE OF LIMITATIONS? THE EFFECT OF EMPLOYMENT CONTRACTS IN NEW JERSEY

By Ashley L. Toth, Esq.*

KEY POINTS:

- New Jersey permits employees to specifically waive/limit their statutory and common law rights in pre-employment contracts.
- Current law permits employers to limit an employee's two-year statute of limitations period in which to file claims against their employer in a pre-employment contract.
- The New Jersey Supreme Court is expected to release a decision this Spring to determine whether an employer may legally limit an employee's statute of limitations in a pre-employment contract.

Ashley L. Toth

Employers in New Jersey are anxiously awaiting the New Jersey Supreme Court's decision in *Rodriguez v. Raymour & Flanigan*, 93 A.3d 760, 764-765 (App. Div. 2014) to determine whether an employer may contractually limit an employee's two-year statute of limitations period in which to file claims against their employer. Current law permits New Jersey employees to specifically limit their statutory rights in pre-employment contracts. For example, an employer may require an employee to agree to arbitrate any claims that may arise out of the course of their employment, thus waiving any right the employee may have to file suit in state or federal court. *See Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 33 (1991).

In *Rodriguez*, the plaintiff applied for a delivery position with Raymour & Flanigan. The employment application, however, stated that if the employee were hired, he or she would have to agree to the following term:

> I agree that any claim or lawsuit relating to my service with Raymour & Flanigan must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

The plaintiff signed the employment contract, agreeing to waive New Jersey's applicable two-year statute of limitations period and accept a six-month statute of limitations. Thereafter, the plaintiff worked without issue for approximately three years. In October 2010, however, Raymour instituted a company-wide reduction in force (RIF), laying off 102 employees. The plaintiff was laid off as part of the RIF.

Nine months after the plaintiff was laid off, he filed suit, alleging he was terminated for having filed a prior workers' compensation claim and due to his disability, in violation of the New Jersey Law Against Discrimination (NJLAD). The NJLAD generally applies a two-year statute of limitations to applicable claims. Here, however, the plaintiff had contractually agreed, in his employment application, to waive the two-year statute of limitations and accept a six-month statute of limitations.

Raymour & Flanigan filed a motion for summary judgment seeking to dismiss the plaintiff's complaint as time-barred by the contractual statute of limitations. The plaintiff opposed, arguing that the contractual provision was unenforceable as a contract of adhesion and was unconscionable. The trial court agreed with the defendant and granted their motion for summary judgment. "In ruling on the motion, the court concluded that the waiver provision in the initial application 'is clear' and 'is clearly brought to the attention of anybody reading the document because of the capital letters and large print.'" In addition, the trial court "found no basis for a finding 'that six months is against any public policy or is an unreasonable time within which to bring a claim about which one would know immediately upon the event happening.'"

The plaintiff appealed the trial court's summary judgment dismissal, and the Appellate Division affirmed. The New Jersey Supreme Court granted certiorari and, on December 1, 2015, heard oral argument on the subject. The Supreme Court's decision on the issue is expected this Spring. In the meantime, however, employers are left wondering about the similar contractual limitation of actions provision of their current employment contracts. ■

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NLRB RULES: CHIPOTLE MEXICAN GRILL UNDER FIRE

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was "protected concerted activity" under the Act because the subject matter of wages and working conditions pertained to the interests of all employees.

When reviewing Kennedy's termination, the NLRB applied a four-factor analysis to determine whether his otherwise protected conduct was sufficiently egregious to remove it from NLRA protection. The Board considered: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice. The NLRB found that Kennedy engaged in protected concerted activity when he circulated a petition challenging Chipotle's denial of employee breaks. Specifically, Kennedy's solicitation of other employees occurred both off-site and on-site, and his on-site solicitations were brief and did not interfere with any employees' work. The NLRB focused its analysis on Kennedy's purported outburst and its cause. Cruz testified that she did not intend to fire Kennedy in their meeting, but she made the decision to fire him after he raised his voice at her and pointed his finger in response to her request for him to stop circulating the petition. Cruz also stated that she felt threatened based on her knowledge that Kennedy had been diagnosed with post-traumatic stress disorder (PTSD) and had a history of inappropriate behavior. The NLRB determined that Cruz's allegation of Kennedy's inappropriate behavior was unfounded and that her purported fear was fabricated and a show of blatant disability discrimination. Further, the NLRB found that Cruz terminated Kennedy for his refusal to cease engaging in protected concerted activity in violation of the NLRA.

As a result of this case, the NLRB ordered Chipotle to offer Kennedy reinstatement and to make him whole for lost wages and other benefits. Chipotle was also ordered to compensate Kennedy for any adverse tax consequences that he might encounter as a result of the back pay, to cease using the policies that violate the NLRA and to post notices of employees' rights in its stores nationwide. ■

FLORIDA BROADENS ITS ANTI-SLAPP STATUTE

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seeks to protect one group of citizens' constitutional rights of expression and petition by cutting off another group's constitutional rights of petition and jury trial. This the legislature cannot do." In light of Florida's constitutional right of access to the courts to seek "redress of any injury," Florida's anti-SLAPP statute may find itself facing the same fate as that of Washington's.

Despite the Florida legislature's intent to protect its citizens from frivolous suits, individuals should be cautious when exercising their right to free speech before the various governmental entities, especially when their concerns are found to be without merit, as such speech may unintentionally subject them to a lawsuit that could cost them and their insurance carriers thousands of dollars in litigation expenses. Until the Florida legislature amends Section 768.295 to protect *all* speech, regardless of whether or not it has merit, individuals will find themselves in a disheartening place before the courts for speech they believed was protected. However, even if such an amendment passes, Section 768.295 may find itself near its deathbed should its constitutionality be challenged. ■

AIRING THE HOSPITAL'S DIRTY LAUNDRY

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do not reference adverse incidents, credentialing committee reports, committee minutes regarding hiring and hospital development plans, and documents generally related to handling sentinel events are not covered under Amendment VII.

Arguably, the most valuable tool in keeping adverse incident reviews confidential is the use of a Patient Safety Evaluation System (PSE) pursuant to the federal Patient Safety and Quality Improvement Act (PSQIA). In 2005, the federal PSQIA was signed into law, and it embraced policy opposite to that embodied by Amendment VII. It conferred confidentiality on a review to encourage providers to share information without fear of liability. The PSQIA provides for confidential review of medical errors when facilities opt to create a PSE that collects information and forwards it to a Patient Safety Organization (PSO) for evaluation and feedback. The PSO must also share information with the Network of Patient Safety Databases. The First District Court recently held that documents put into the PSE for reporting to a PSO are confidential, preempting Amendment VII. *Southern Baptist Hosp. of Fla., Inc. v. Charles*, 178 So. 3d 102 (Fla. 1st DCA 2015). The First District held that this confidentiality also applies if the document serves the dual function of satisfying a state reporting requirement—such as incident reports required under § 395.0197.

In conclusion, while there are limited avenues for a hospital to keep their review of adverse incidents confidential, a hospital does have the ability to maintain some level of confidentiality through use of the tools outlined above. It is vital to know what information remains protected and what information is not covered by Amendment VII so that plaintiff's counsel is not provided unnecessary ammunition in litigation. ■

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

After a seven-day trial, **Bradley Blystone** and **Andrea Diederich** (Orlando, FL) obtained a defense verdict in favor of a resort in a case in which the plaintiff alleged that he slipped and fell on the handle of an unattended dustpan in the bathroom at the resort's pavilion. He was subsequently diagnosed with avascular necrosis of the right hip, permanent back pain and memory problems from post-concussion syndrome. Surgery was performed on his right hip, but it failed to alleviate his pain. The plaintiff sought compensation for lost wages and loss of earning capacity for the remainder of his life, as well as past and future medical expenses, including two future hip replacement surgeries. During closing, the plaintiff and his wife requested an award in excess of $1.2 million. We defended on the lack of credibility of the plaintiff and his experts. After nearly five hours of deliberation, the jury returned a defense verdict.

Tony Michetti (Doylestown, PA) obtained a defense verdict at arbitration on behalf of a water system installer. The plaintiffs retained Tony's client to install a water treatment system in their home. Part of the process involved the installation of a PVC bushing into a brass fitting. Two days after the installation, the bushing failed, and the plaintiffs' home sustained major water damage. Suit was brought against the installer and the manufacturer of the bushing. Expert engineers were retained by all parties, and a joint inspection—which included destructive examination of the bushing—was done at a mutually agreed laboratory. Both the plaintiffs' expert and the manufacturer's expert concluded that the bushing failed due to the installer's over tightening the bushing, which caused a fracture along the bushing seam. Tony's expert concluded that the fracture was caused as a result of defects during the manufacturing process. The arbitration award was against the manufacturer only.

Andrew Wargo and **Amelia Leonard** (Cleveland, OH) obtained summary judgment on behalf of an employer and its employees in a claim for injuries suffered by a temporary worker when a flash fire erupted from an aluminum shredder at the employer's facility. The plaintiff, who suffered second degree burns on 10% to 19% of his body, sought compensation for his injuries, past, present and future lost wages, Post Traumatic Stress Disorder, and his wife's consortium claim in an amount of $950,000. Andrew and Amelia argued that, because the plaintiff was a "borrowed employee" under the state's Workers' Compensation Act, he was barred from compensation for his injuries in tort absent proof that the employer's and co-employees' acts were intentional, which the defendants explicitly denied. Although the plaintiffs argued that the Workers' Compensation Act did not apply, as well as submitting an expert report purporting to establish the defendants' actions were intentional, the court disagreed.

In advance of any depositions being taken, **Steve Kaplan** (New York, NY) obtained summary judgment on behalf of a scaffold erection contractor in a personal injury action with a low seven-figure exposure. The case was filed in New York County by a construction worker who fell from our client's scaffolding. Based on affidavits, photographs, email messages and other documentation, Steve established that the scaffolding was properly erected, that it had been altered by unidentified third parties and that, although the scaffold contractor was aware of the hazard posed by the alterations, it had no duty to repair the scaffolding absent a change order from the general contractor, which was not forthcoming. To obtain summary judgment, Steve established that his motion was not premature because depositions would not lead to evidence sufficient to overcome our client's *prima facie* entitlement to that relief.

Jim Hanratty (Jacksonville, FL) tried a case in which the plaintiff, a disabled veteran, was leaving the client's office when he slipped on a wooden handicap access ramp. He alleged that, due to a lack of maintenance, the ramp had accumulated mold and algae, making it unreasonably slippery when wet. The plaintiff fractured his femur, which required the placement of an intramedullary rod and multiple other internal fixations. Although already partially disabled, the plaintiff worked as a truck driver and claimed an inability to drive trucks due to his damaged leg. He called a nationally recognized expert in slip and fall risks to testify on his behalf, as well as an environmental engineer. He boarded in excess of $400,000 in economic damages. The jury returned a defense verdict, finding no negligence.

In a case before the Court of Common Pleas of Northampton County, Pennsylvania, **Tony Michetti** (Doylestown, PA) obtained a defense verdict on behalf of his client, a snow remover. The plaintiff slipped on ice in the parking lot of the senior independent living facility where she lived. She sustained a tibial plateau fracture and claimed significant residuals compromising her daily activities. The plaintiff presented testimony from a non-treating medical expert that she required a total knee replacement at a future cost of $85,000, in addition to past medical expenses of $20,000. Tony successfully presented evidence that the parking lot was plowed and salted four times throughout the day of the snowstorm and that the defendant had last plowed and salted about 30 minutes before the accident.

After a week-long trial, **Jim Hanratty** (Jacksonville, FL), won a

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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defense verdict in a case involving product liability and warranty claims arising out of the manufacture of a mobile home. The plaintiffs claimed that the home was defectively designed and manufactured by Jim's client and that the defects created violations of Florida warranty statutes and the Magnuson-Moss Warranty Act. The plaintiffs claimed respiratory illness, property damage and the need to move out of the property at the recommendation of an indoor air quality expert, which led to the eventual foreclosure of the home. Two other defendants settled within weeks of the trial, leaving our client as the sole target. One of Jim's tactics was to point to the empty chairs at trial. After a week-long trial, with six expert witnesses, the jury returned a defense verdict.

HEALTH CARE DEPARTMENT

Fred Roller, **Mary Kate McGrath** and **Michelle Moses** (Philadelphia, PA) obtained a unanimous defense verdict in Bucks County, Pennsylvania, on behalf of an emergency department physician who allegedly failed to diagnose a severe fracture of the tibial plateau shortly after the plaintiff claimed to have been pushed into a swimming pool. The plaintiff ultimately went on to have a knee replacement. Our defense was based on a lack of knee complaints to anyone in the emergency department, including the registration clerk, triage nurse, primary care nurse or our client. It did not help her cause that, two days after the incident, the plaintiff and her husband went to Puerto Rico for 10 days. The plaintiff claimed that she believed all she had was a muscle strain, as diagnosed by our client. The fracture diagnosis was made on her return home. The wrinkle in the case was that there was no evidence of any preceding accident to cause the fracture, and our orthopedic expert opined that the fracture had to have occurred two to three weeks before the pool incident. We argued that we did not know when the fracture occurred, but we knew when it did not. The jury agreed with us after short deliberations.

Following a six-week jury trial where the demand was $12 million at the onset, **Rosalind Herschthal** (Roseland, NJ) obtained a defense verdict. The plaintiff, a 44-year old woman, claimed our client, an internal medicine physician, was negligent in failing to order a spinal tap after a six-day period of the plaintiff having a fever and severe headaches, in addition to an upper respiratory virus. (The same allegations were made as to the emergency medicine physician who saw her on day four and an internist who was called on the phone the evening of day seven.) The plaintiff alleged the severe headaches and fever were signs of a brain infection and that a spinal tap would have revealed the infection before brain damage occurred. She was diagnosed with Herpes Simplex Encephalopathy (HSE) eight days after the onset of the original symptoms, and was left with temporal lobe scarring and residual cognitive deficits. She claimed she was unable to return to work as a global analyst on Wall Street. Our internal medicine expert asserted that our client complied with the standard of care, and he noted the doctor's exam included a fundoscopic exam, showing that the optic nerve was normal, which meant there was not brain swelling and no brain infection at that time. All of the defense experts asserted that HSE is a very rare disease and cannot be diagnosed until there are some neurological signs or symptoms. The damage experts for the plaintiff—neurologists and neuropsychologists—contended she was unemployable and would need supervision in the near future for her cognitive deficits. The defense experts asserted her brain injury was minimal and static and that she would not have any further neurologic decline. The jury returned a no cause as to all defendants after nearly five hours of deliberation.

Anthony Williott (Pittsburgh, PA) obtained a defense verdict on behalf of an internal medicine physician in McKean County, Pennsylvania following an eight-day jury trial. The case involved a 69-year-old female who presented to a local hospital complaining of significant chest pain and pressure. After the initial EKG showed ST wave elevation, the ER physician diagnosed the patient with an ST-elevation Myocardial Infarction and called our client, the patient's primary care physician. Our client arrived about 15 minutes later and ordered a second EKG. He believed the second EKG was worse than the first and, thus, felt the patient qualified for thrombolytic therapy (i.e., clot-buster) because the combination of clinical symptoms and EKG strongly suggested a complete occlusion of the left anterior coronary artery. However, a second ER physician, who had just come on duty 10 minutes earlier, disagreed with our client's interpretation of the second EKG and of the patient's clinical symptoms, feeling the second EKG was improved over the first and there was no longer a complete occlusion of the coronary artery. Thus, the patient did not meet the criteria for thrombolytic therapy in his opinion. Our client and the ER physician got into a heated argument over the propriety of thrombolytic therapy, which was witnessed by the patient's brother. Following administration of the clot-buster by our client, the patient developed a massive intra-cranial hemorrhage, a known risk of the therapy. The patient required emergency brain surgery, including partial lobectomy, and was left with a residual brain injury. The plaintiff claimed the thrombolytic therapy was contraindicated and in violation of hospital policy and published guidelines and that the defendant physician should, instead, have emergently transferred the patient to Erie by helicopter for balloon catheterization. The plaintiff also claimed the client failed to properly monitor the patient post-therapy and should have ordered a CT scan as soon as the patient began to complain of a significant headache, rather than two and one-half hours later when the patient crashed neurologically. The plaintiff called 22 witnesses, including the ER physician who had argued with our client over the propriety of thrombolysis, and the staff cardiologist who wrote the hospital's protocol for administration of thrombolytic therapy, both of whom testified that our client should not have administered thrombolytic therapy.

PROFESSIONAL LIABILITY DEPARTMENT

In a complex legal malpractice action that involved a series of cases spanning 25 years and invoked the jurisdiction of several

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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state and federal courts, **Jack Slimm**, **Walter Kawalec** and **Jeremy Zacharias** (Cherry Hill, NJ) obtained a decision from the U.S. District Court of Appeals for the Third Circuit denying the appellant's motion for re-hearing. The case arose out of a Family Court matter in Camden County involving alimony and child support. The plaintiff brought common-law fraud and Section 1983 claims against his ex-wife and her attorney (our client). The District Court granted our motion for summary judgment, and the Third Circuit affirmed. Then, after the plaintiff/appellant moved for re-hearing, the Third Circuit denied that petition under the Rooker-Feldman Doctrine and the statute of limitations.

Wendy Smith (Roseland, NJ) prevailed before the New Jersey Superior Court Appellate Division, which affirmed a trial court decision dismissing a unit owner's consumer fraud claim against the developer based upon the unit owner's failure to establish an ascertainable loss. The unit owner, who had lost his unit due to foreclosure, argued he had sustained significant out-of-pocket loss by virtue of the down payment on his apartment, therefore, establishing ascertainable loss. Wendy successfully argued that the plaintiff's failure to prove the actual value of the property by competent expert testimony was fatal to his claim. The Appellate Division agreed based on the plaintiff's failure to produce an appraisal or an expert report as to the value of the condominium or any depreciation thereof.

Sharon O'Donnell (Harrisburg, PA) successfully defended a whistleblower investigation conducted by the U.S. Department of Labor, Occupational Safety and Health Administration. It was alleged that our client, an environmental cleaning contractor, violated the Surface Transportation Assistance Act when one of its drivers logged more than 10 hours on the road and then returned to work several hours later for another shift that required him to acquire, transport and dispose of a brine solution. The employee sustained severe burns to his skin when the brine leaked out of the hose used to transfer the hot brine from its holding tank to the transport tank. Shortly thereafter, he was fired for a culmination of subsequent policy infractions, which he claimed was retaliation for reporting an OSHA violation regarding the brine transfer. Sharon proved that the employee's own negligence caused his burn injuries and that the subsequent infractions were further evidence of irresponsibility and disregard for corporate policies that track this heavily regulated industry.

Phillip Harris (Tampa, FL) obtained dismissal from the Equal Employment Opportunity Commission. The complainant was a student mentor for a Tampa area YMCA. The complainant alleged that the school discriminated against her due to her Hispanic national origin. Specifically, the complainant argued that her manager refused to allow her access to her cell phone during working hours while allowing Caucasian employees to text and make calls whenever they wanted. The respondent argued that many other employees had been denied access to their phones and proffered a legitimate business interest—the YMCA wished to ensure that all employees were giving 100% attention to its members while on the clock. The employees were given access to business phones for emergency reasons. After both parties extensively briefed the issues, the EEOC issued a determination of No Cause to believe that discrimination had occurred.

After a two-day bench trial under Pennsylvania's bad faith statute, the judge entered judgment in favor of our client. **Brooks Foland** and **Allison Krupp** (Harrisburg, PA) were successful in this insurance bad faith case in Philadelphia County, Pennsylvania in which the judge found that our client did not act in bad faith in the handling of the plaintiff's UM claim. The court found that plaintiff's counsel created confusion in requesting our client consent to settle with the tortfeasor, although plaintiff's counsel had presented the claim as a UM claim and not as a UIM claim. The claim was further complicated by issues of choice of law, joint and several liability, credits and set-offs. The judge ruled that our client's handling of the claim did not even amount to negligence or bad judgment.

Brigid Alford (Harrisburg, PA) and **Terry Sachs** (Philadelphia, PA) we successful before the Superior Court of Pennsylvania in an insurance coverage case that involved claims by an insured business owner for coverage under a commercial general liability policy. The insured was transporting chairs and tables for his business on his truck; as he rounded a curve, some chairs fell onto the path of an oncoming motorcyclist, who reportedly sustained serious injury. The insured sought coverage not only from his vehicle policy, but also from his CGL policy, citing the claimants' "non-vehicle" allegations, such as the insured improperly loaded the vehicle and failed to secure the load. Our client denied coverage on the basis that the claim fell within the motor vehicle exclusion of the CGL policy and filed declaratory judgment actions against the insured and the injured claimants. The Luzerne County Court of Common Pleas granted summary judgment in favor of our client, and the Superior Court affirmed. The Superior Court held that the allegations in the complaint against the insured fell within the exclusion because they were claims "arising out of" the use of a vehicle, which included loading and unloading the vehicle. The Superior Court later denied the insured's and the claimants' application for rehearing en banc.

Trish Monahan (Pittsburgh, PA) and **Terry Sachs** (Philadelphia, PA) were successful before the Third Circuit Court of Appeals in an insurance coverage and bad faith case. The case involved claims by an insured for coverage under a Business Owners and Technology Professional Liability policy issued by our client. The insured was sued by two other participants in a prior business venture who sought a declaratory judgment as to the ownership of certain intellectual property. The insured counterclaimed, and when the other parties answered the counterclaim, they included claims for attorneys fees, expenses and costs for the insured's wrongful conduct under the fee-shifting provisions of the federal and state statutes relating to copyright infringement and misappropriation of trade secrets. Our client denied coverage because the claims against the insured did not constitute a covered "occurrence" under the policy, the insured had not been sued for malicious prosecution and the policy excluded claims for infringement

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of intellectual property rights. The insured filed suit against our client, seeking coverage on the basis that the counterclaim answers amounted to "malicious prosecution" claims that fell within the policy's coverage, and also claiming bad faith. The U.S. District Court for the Western District of Pennsylvania granted summary judgment in favor of our client as to both coverage and bad faith, and the insured appealed. At a Third Circuit mediation, the insured continued to demand $1 million. This past March, the Third Circuit affirmed in a unanimous unpublished decision.

Ray Freudiger and **David Oberly** (Cincinnati, OH) obtained summary judgment on behalf of an insurance agent and agency who sold the plaintiff property and liability insurance on its business. A fire loss occurred, and the insured discovered that it did not have business interruption coverage. It sued the agent and the agency for negligence, breach of contract and estoppel for failing to procure business interruption coverage. Ray and David successfully argued that an insurance agent only has a duty to seek coverage that has been requested by the insured. Even though the agent incorrectly reassured the insured the day after the fire that it had business interruption coverage, there was no evidence of any reliance by the insured, and the insured could have readily determined the lack of business interruption insurance by reading the policy.

In this legal malpractice case, **Dennis Roman** and **Charlene Seibert** (Pittsburgh, PA) obtained summary judgment. The plaintiff was seeking in excess of $2 million stemming from a trial court judge's determination in underlying litigation that our lawyer-clients had waived, on behalf of their former clients, challenges to the sufficiency of the evidence supporting the verdict. The underlying litigation arose from the events of 9/11. On the day of the terrorist attacks, a property manager of an apartment complex entered the residence of a Muslim tenant under the pretext of changing furnace filters, snooped through his apartment and then reported to police the residence as containing items suspicious of terroristic activities. The tenant, a physician, was then arrested and interrogated by the FBI, terminated from his job and subjected to national publicity. The FBI uncovered no evidence of terrorist activity, and no charges were ultimately pursued. The tenant sued in federal court for violations of his civil rights and invasion of privacy. Our lawyer-clients defended the property manager and apartment complex at trial, where the jury found in favor of the tenant on the invasion of privacy claims, entering a verdict for the plaintiff for $2.45 million. On a post-trial Rule 50 motion, the trial judge found that the defendants failed to file a motion during trial specific to the invasion of privacy claims and, therefore, waived such issues for post-trial consideration. In the subsequent legal malpractice lawsuit, the court granted summary judgment on the basis that the plaintiffs, the former clients, were unable to establish that our lawyer-clients were the proximate cause of their claimed loss. The court agreed with our analysis that the issue of causation—whether the verdict in the underlying litigation would have been overturned post-trial or on appeal "but for" the attorney's waiver—was a question of law for the court to decide alone, not a jury, and that consideration of expert testimony offered by either side was inappropriate. The court also agreed with us that, upon reviewing the trial court record and applying the standard of review applicable in the underlying action, the evidence was sufficient to have supported the jury's verdict on both invasion of privacy theories of recovery. Because the plaintiffs could not establish that the verdict would have been overturned had a "proper" Rule 50 motion been made during trial, the plaintiffs could not establish that our lawyer-clients were the cause of actual loss to plaintiffs.

Arthur "Terry" Lefco and **Gregory Fox** (Philadelphia, PA) obtained a defense verdict in a legal malpractice bench trial in Philadelphia County. The plaintiff, the owner of what was, at the time it was built in the late 1700s, the tallest privately owned commercial building in Philadelphia, claimed that our client failed to timely commence an underlying property damage lawsuit against the neighboring pizza shop. According to the plaintiff, almost $400,000 in damage was allegedly caused to his building by vibrations coming from the pizza shop's dough mixer and water from the pizza shop's rainwater conductor. Although Terry and Greg were ready to prove that such a claim never would have succeeded for a number of reasons, including the fact that the plaintiff was not even the owner of the building at the time it was allegedly damaged, the judge's *sua sponte* decision to bifurcate the case, and to first hear the issue of whether our client actually missed the statute of limitations, ultimately mooted those issues. After hearing all evidence on the SOL question, the judge agreed with Terry's and Greg's arguments that, notwithstanding the fact that the statute of limitations may have expired prior to our client commencing the underlying case, our client was entitled to rely on the plaintiff's statements to him as to the date of loss and he timely filed the matter within two years of that date. The judge, therefore, entered a defense verdict.

Paul Krepps and **April Cressler** (Pittsburgh, PA) obtained summary judgment in defending an extensive pro se prisoner case. The plaintiff named eight employees and officials of the jail as defendants. Although the complaint was vague, the magistrate judge determined that the plaintiff made claims of several counts of deliberate indifference to serious medical needs and several claims of excessive force against multiple defendants. The defendants moved for dismissal via summary judgment at the outset, but the entire motion was denied on the basis that the plaintiff should be given the opportunity to engage in discovery. The magistrate judge noted that, if the plaintiff's recitation of facts were "supported by adequate evidence," the plaintiff would be entitled to summary judgment. The plaintiff served written discovery and filed discovery motions once he received responses. His motions were denied. At the close of discovery, the defendants moved for summary judgment as to all claims. The magistrate judge granted summary judgment as to the medical claims but recommended the denial of all use of force claims on the basis that the "verified" complaint created issues of fact, precluding summary judgment. Objections

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to the magistrate's Report and Recommendation were filed with the district court. The district court judge entered an order directing the magistrate judge to reconsider her denial of summary judgment. On further review, the magistrate judge recommended dismissal of the entire complaint. Once again, the plaintiff filed objections, and we responded to those objections. The district court granted summary judgment to the entire complaint and adopted the Report and Recommendations of the magistrate judge, as amended.

Christopher Conrad (Harrisburg, PA) successfully defended an investigation by the U.S. Department of Education, Office for Civil Rights (OCR) against our client, a local school district, which was alleged to have violated the rights of a qualified student with a disability under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. After being expelled from high school for drug-related offenses, the student was placed in an approved private school with which the district contracts to provide special education and related services for its students. Though the student was attending a private school, the district ultimately remained responsible for her education and for ensuring that she was afforded all rights under Section 504 and the ADA. While at the private school, the student was involved in an incident where she caused significant damage to school property and posed a physical threat to herself and staff. The student's behavior prompted school staff to utilize safe crisis management techniques, including physical restraint, in order to help the student to de-escalate. The student suffered no physical injury, but she and her parent nonetheless claimed the use of restraint under the circumstances was unwarranted and violated her civil rights. Working in collaboration with the district, the private school and its counsel, Chris was able to demonstrate that the use of restraint under the circumstances was justified and necessary in order to prevent harm and further damage and that the school staff involved, all of whom were well trained in safe crisis management, utilized restraint techniques that were consistent with their training and with the district's and the private school's respective policies.

At a FINRA arbitration in New York, **Samuel Cohen** (Philadelphia, PA) obtained a dismissal on a directed verdict. Sam represented a broker-dealer in a dispute with its former customer regarding the unauthorized use of her account information. The claimant was a customer of the broker-dealer's Jericho, New York branch, where her ex-husband also worked as a broker. In the claimant's request for attorney's fees in a separate divorce court proceeding, she claimed to be destitute and alleged that her ex-husband was in the better financial position. Knowing the claimant was misrepresenting her financial circumstances in the divorce proceeding, the ex-husband gained unauthorized access to the claimant's account information. He attached a printout of the claimant's account portfolio to his cross-motion for attorney's fees, while accusing the claimant of misrepresenting her financial circumstances. Despite being advised of the ex-husband's unauthorized access to the claimant's account information, the judge in the divorce proceedings found that the claimant had not been forthcoming in presenting her financial circumstances to the court and denied her motion for attorney's fees. The claimant then sued our broker-dealer client in FINRA arbitration for failure to supervise, negligence, breach of fiduciary duty, invasion of privacy and theft of private financial client information as a result of her ex-husband's access to her account and submission in the divorce proceeding. In addition to legal arguments based upon failure to state a claim, Sam used the divorce court opinion in the FINRA arbitration to prove the claimant sustained no damages.

WORKERS' COMPENSATION DEPARTMENT

Judd Woytek (Allentown, PA) obtained a favorable decision in a Federal Black Lung claim for his clients. Judd successfully argued to the Administrative Law Judge that the miner had failed to prove he was totally disabled due to coal workers' pneumoconiosis. The judge found that the miner had worked in the coal mines for 13 years and that he was suffering from clinical pneumoconiosis, but that he had failed to prove he suffered from a totally disabling respiratory or pulmonary condition or that he was totally disabled due to pneumoconiosis. The judge, therefore, denied the miner's claim for benefits.

In a second Federal Black Lung claim, **Judd Woytek** (Allentown, PA) successfully argued that a miner's widow was not entitled to survivor's benefits under the Black Lung Benefits Act. The miner had not successfully obtained benefits during his lifetime, but the widow alleged that his death at 102 years of age was caused by coal workers' pneumoconiosis. Judd proved through medical evidence that the miner did not definitively have coal workers' pneumoconiosis and that he was not totally disabled due to pneumoconiosis at the time of his death. Therefore, the judge found that the widow could not meet her burden of proof.

Tony Natale (Philadelphia, PA) successfully litigated an appeal before the Workers' Compensation Appeal Board on behalf of a local Fortune 500 financial institution. The claimant slipped and fell while performing her job duties on the employer's property and alleged she was plagued by repetitive traumatic stress. Tony litigated the original claim petition and was successful in having it dismissed before the Workers' Compensation Judge. At the appeal level, the claimant argued that the burden of proof applied by the judge to the repetitive stress claim was improper. In a very complex oral argument and brief, Tony convinced the Appeal Board that the standard of proof applied by the judge did not constitute an error of law. The Appeal Board dismissed the claimant's appeal in its entirety.

Judd Woytek (Allentown, PA) successfully defeated a claim petition in which the claimant had alleged she slipped and fell on the snow-covered parking lot of the employer's premises, sustaining a concussion, post-concussion syndrome and cervical pain. The Workers' Compensation Judge accepted Judd's argument that the claimant failed to sustain her burden of proving she actually slipped and fell on the employer's premises. The claimant lived

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only a few blocks from the employer's place of business, and Judd submitted medical records contemporaneous with the claimant's fall indicating that the claimant had absolutely no recollection of the fall itself or where it occurred. During her testimony, however, she was adamant that she had fallen between rows of cars on the employer's parking lot. Despite the fact that both the claimant's treating physician and our IME doctor found that she had indeed sustained a concussion, Judd was able to convince the judge to deny the claim petition based upon the "coming and going" rule. The judge concluded that the claimant was unable to prove that she slipped and fell on the parking lot, or her employer's premises, and that she was "commuting" to work when the she slipped and fell. The judge also denied the claimant's penalty petition and found that the issuance of the notice of denial seven days late did not warrant a penalty.

Ashley Talley (Philadelphia, PA) obtained a defense verdict in a workers' compensation matter where penalties were requested for denying coverage to a claimant who was laid off from a modified job with the defendant. Arguing that the defendant committed a statutory violation by improperly stopping wage loss benefits by the use of a second Notice of Temporary Compensation Payable, counsel requested an assessment of penalties and requested to depose the adjuster, both of which were denied by the Workers' Compensation Judge. Adopting the defendant's argument, the judge held that the employer was not estopped from denying subsequent indemnity liability (although medical benefits remained payable) and that coverage was properly denied in a manner that did not constitute a statutory violation. As such, both petitions were dismissed in their entirety.

John Zeigler (Harrisburg, PA) successfully defended a motion against a trucking company by claimant's counsel that would have precluded the defendant from being able to present evidence disputing the existence of an employment relationship where a truck driver suffered a significant hand crush injury. The case was assigned to defense counsel after the requisite time allowed for timely submission of an answer to a claim petition. John argued the claim petition was not well pled and, thus, the claimant still had the burden of proving all necessary elements of an employment relationship, which is a legal determination. The Workers' Compensation Judge credited the defendant's argument that, despite a late answer in which all well-pled facts would be deemed admitted, precedent supported that the claimant must present evidence supporting the existence of an employer/employee relationship at the time of injury.

Tony Natale (Philadelphia, PA) successfully defended a Reading area mushroom distribution plant in the litigation of a claim petition. The claimant alleged that long hours of non-stop sitting at work caused lumbar spine maladies, including disc herniations, aggravation of pre-existing degenerative disc disease and lower extremity radiculopathy. The claimant alleged he became totally disabled from employment as a result of these alleged workplace injuries. Tony cross examined the claimant's medical expert and established clear and convincing proof that the expert's chart notes were devoid of any opinions linking the claimant's work duties to the diagnoses. Under cross examination, the claimant's expert admitted that her chart notes voiced causation opinions that were in opposition to her testimony. The Workers' Compensation Judge focused on these inconsistencies when denying and dismissing the claim petition.

Tony Natale (Philadelphia, PA) also successfully defended an international money transfer network in the litigation of a claim petition in which the claimant alleged a traumatic injury in the form of aggravation of right hip and right knee arthritis as a result of confined travel in an automobile during the course and scope of employment. The claimant alleged total disability from work and sought hip and knee replacement surgery. On cross examination of the claimant, Tony established that the timing of his alleged disability due to this injury was contemporaneous with his discharge from employment for cause. Tony further presented credible opinions from an orthopedic surgeon that the alleged hip and knee injuries were actually normal arthritic changes that were not incident to employment. The Workers' Compensation Judge ruled that no work-related injury had taken place, and the claim petition was dismissed.

Tony Natale (Philadelphia, PA) successfully defended a local mobile cardiac outpatient telemetry service regarding claim and penalty petitions arising out of a fall at work. The claimant alleged that she fell off her chair at work, injuring her head, arms, low back and legs. She underwent surgery on her upper extremity and alleged lumbar disc herniations, resulting in scorching pain into her lower extremities, with additional surgery imminent. The claimant alleged that her injuries and surgery were compensable and that the carrier violated the Workers' Compensation Act by failing to accept as compensable the conditions alleged. The parties presented competing orthopedic surgeon testimony. Through the discovery process, Tony uncovered the fact that the claimant was involved in a motor vehicle accident in close proximity to the time of her alleged work injury and that she had not reported that accident to her treating surgeon. Tony was able to use this evidence to argue against the credibility of the claimant and her treating expert. The Workers' Compensation Judge reviewed all evidence in the case and dismissed both the claim and penalty petitions.

Tony Natale (Philadelphia, PA) also successfully prosecuted a termination petition for a local university. The claimant injured his low back after he slipped while exiting a transport vehicle during the course and scope of his employment. Medical evidence revealed the claimant had a congenital pre-existing anomaly in his spine that contributed to his complaints of pain. Tony presented the deposition of an orthopedic surgeon, a treating physician and a surveillance investigator to prove the claimant's full and complete recovery from the work injury. ■

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MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

Shane Haselbarth (Philadelphia, PA) garnered a unanimous judgment in the Pennsylvania Superior Court affirming a defense verdict at trial and rejecting allegations of trial error. Marshall Dennehey's client was a hospital in which an ear, nose and throat doctor performed an upper endoscopy. The plaintiff complained of food lodged in his esophagus, and the doctor removed it. When he inserted the scope for a second time to inspect the esophagus, the doctor noticed a tear, which was later repaired, with complications following. The suit against the doctor and hospital asserted that the endoscopy was performed negligently, without adequate sedation and caused the tear. The trial court precluded a theory of liability premised on failing to record information in the medical chart and instructed the jury that the failure to record data could not cause an esophageal tear. The plaintiff sought a new trial, but the Superior Court affirmed, holding that the theory of unrecorded data causing a tear was unsupported by expert and non-expert evidence. The court concluded that the verdict was consistent with the evidence and that there was no trial error regarding the missing-chart-data theory. *Butka v. Andrews*, 2016 Pa. Super. Unpub. LEXIS 589 (Pa. Super. Feb. 24, 2016).

Audrey Copeland (King of Prussia, PA) convinced the Commonwealth Court to affirm the decisions of the Workers' Compensation Judge and Workers' Compensation Appeal Board that denied the claimant's claim petition on the basis that he was not in the course and scope of employment when injured. The court rejected the claimant's argument that the injuries he incurred when he assaulted a passenger emanated from his essential job function of collecting bus fares. The court observed that the claimant did not ask the passenger (who presented a woman's fare pass) for bus fare but, rather, if he was a man or a woman, knowing the passenger was a man. The video showed that the claimant, despite pushing the police call button, did not wait for assistance; instead, he physically confronted the passenger when there was no immediate reason to do so, conduct that was "wholly foreign" to his job as a bus driver. The court held that the claimant also abandoned his employment "by spoiling for a fight and unnecessarily engaging in an altercation that substantially deviated from Employer's objectives." The claimant's substantial evidence and "after acquired" evidence arguments also failed. *Keith v. Workers' Comp. Appeal Bd. (SEPTA)*, 2016 Pa. Commw. Unpub. LEXIS 63 (Pa. Commw. 2016).

Audrey also obtained an affirmance in three other Commonwealth Court cases. In *Tipton v. Workers' Comp. Appeal Bd. (Pleasant Twp.)*, 2016 Pa. Commw. Unpub. LEXIS 14 (Pa. Commw. Jan. 5, 2016), a workers' compensation case in which we represented the employer, the Commonwealth Court affirmed the grant of the employer's modification petition, thereby rejecting the claimant's assertion that she was fully disabled on the basis that she was unable to return to her pre-injury position as a volunteer fire fighter. The court also found that the claimant's benefits could be modified based on a labor market survey, despite her being unemployed at the time of her injury. In *Kazimer v. Methacton Sch. Dist.*, 2016 Pa. Commw. Unpub. LEXIS 71, at* 8-9 (Pa. Commw. Jan. 22, 2016), a candidate who participated in a question and answer forum at a school claimed to have slipped on "shiny" steps while descending from the stage. The court affirmed the trial court's grant of summary judgment for the defendants as reasonable minds could not find that the stairs constituted a dangerous condition of the real property, which was necessary for the claim to fall within the exceptions to governmental immunity. The plaintiff did not present sufficient evidence that a cause of the injuries was either a structural defect in the stairs (in the form of a varnish or finish) or negligent maintenance. The record also supported a lack of notice of defendants of any defective or dangerous condition of the "real estate," as the stairs had been maintained "in the same observable condition for many years and no incidents or accidents were reported during that time," and the mere fact that an accident occurred did not establish either a dangerous condition or actual or constructive knowledge. Finally, in *Del. Twp. Bd. of Auditors v. Del. Twp.*, 2016 Pa. Commw. LEXIS 6 (Pa. Commw. Jan. 5, 2016), the Commonwealth Court affirmed the trial court's grant of preliminary objections to the complaint filed by the Delaware Township Board of Auditors. At issue was Section 606(b) of the Second Class Township Code, which mandates auditor approval for the participation of township supervisors, who also are employed by the township, in employee pension plans. The court held that there was no indication that the Board of Auditors did not give its approval to a specific pension plan in accordance with its statutory duties under the Code; participation of supervisor-employees in the pension plan did not constitute compensation "of the elected office" under Section 606(a); and one of the former supervisor-employees still continued to be an employee, regardless of the fact that she was not was reelected and reelection was irrelevant to her right to participate in the plan. ■

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OTHER NOTABLE ACHIEVEMENTS*

BANKRUPTCY LITIGATION PRACTICE GROUP LAUNCHED

We recently launched a **Bankruptcy Litigation Practice Group** within our Professional Liability Department. This practice group will counsel and defend clients in all aspects of bankruptcy-related litigation and protect the rights and interests of clients who find themselves as creditors in a bankruptcy. The new practice group will be led by **Gregory W. Fox** (Philadelphia, PA) and **Thomas D. Walsh** (Wilmington, DE). The Bankruptcy Litigation Practice Group will service all types of businesses, individual and commercial creditors, banks, mortgage servicers, auto finance companies, debt collectors, car rental companies, taxing authorities, municipal entities, insurance carriers, insurance brokers, construction companies, and corporate directors and officers.

SPECIAL APPOINTMENTS

Colleen Bannon (Philadelphia, PA), 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.

Kimberly A. Boyer-Cohen (Philadelphia, PA), special counsel in the Appellate Advocacy and Post-Trial Practice Group, has been named a fellow of the Litigation Counsel of America (LCA). The LCA is a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. Fellows are selected based upon excellence and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation.

Niki T. Ingram (Philadelphia, PA), Director of the Workers' Compensation Department, has been named a Fellow of the College of Workers' Compensation Lawyers. Niki was inducted into the College during the American Bar Association's 2016 Workers' Compensation Midwinter Seminar and Conference, held March 11-12 in New Orleans. The College was established to honor attorneys who have distinguished themselves in the practice of workers' compensation law. Niki is among a select group of attorneys in Pennsylvania, and across the country, who have earned this prestigious honor.

Matthew P. Keris (Scranton, PA), has been elected President of the Pennsylvania Association for Health Care Risk Management (PAHCRM). Matt took office on January 1 and will serve a one-year term. An affiliate of the American Society for Healthcare Risk Management (ASHRM), Matt has been involved with PAHCRM since 2009. As president, he is responsible for leading the state chapter, developing educational programs and facilitating interaction between health care risk management, insurance, claims and the legal community on issues of common interest.

SPEAKING ENGAGEMENTS

Niki Ingram (Philadelphia, PA) and **Eric Fitzgerald** (Philadelphia, PA) spoke at two separate sessions at the Claims & Litigation Management Alliance's (CLM) annual conference in Orlando, Florida. Niki joined a panel discussion, "The First 48 Hours: CSI," which focused on workers' compensation and the essential information to be obtained from an incident report from both the claims and litigation perspectives. Eric participated in a panel discussion on the ethical pitfalls that claims professionals and defense attorneys can encounter when defending claims under eroding limits professional liability policies.

Jacqueline Canter (Philadelphia, PA) recently presented at the annual National Retail and Restaurant Defense Association conference. She spoke on a panel "Assessing the Pros and Pitfalls of Conflict Waivers," which addressed the issues that can arise when conflicts of interest are waived or when circumstances change during the course of litigation, creating a conflict that did not previously exist. Additionally, Jacqui was the moderator for "Choosing the Right Expert," a panel discussion addressing what specialty engineering disciplines exist that could assist a defense attorney in retail and restaurant litigation.

James H. Cole (Doylestown, PA) and **Jennie Philip** (Philadelphia, PA) made a presentation at Pennsylvania's 2016 Insurance Fraud Conference, jointly hosted by the Pennsylvania Insurance Fraud Prevention Authority and the Delaware Valley and Greater Pittsburgh Chapters of the International Association of Special Investigation Units. Jim presented on "Managing the Irrational Claimant - A Psychological & Legal Perspective." Jennie's topic focused on fraud and social media titled "OMG, LOL, Not Another Social Networking Class!"

Lary Zucker (Cherry Hill, NJ) was a featured speaker at the 2016 meeting of the Roller Skating Association International (RSA) East Coast Sections held in Atlantic City, New Jersey. Over 150 skating rink operators from Georgia to Massachusetts heard Lary's presentation on the recent updates to the RSA Risk Management Guidelines. Lary co-authored the RSA Guidelines and serves on the RSA Safety and Risk Management Committee. He has been presenting seminars for the RSA for more than 30 years.

Amelia Leonard (Cleveland, OH), who serves as Chair of the Cleveland Metropolitan Bar Association's (CMBA) Women in Law section, played an integral role in the planning, development and

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On The Pulse...

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execution of the CMBA's Women's Leadership Conference held in early March. The conference was developed in celebration of International Women's Day, with a day-long program devoted to leadership, education and personal development. More than 120 women attended the event, which included presentations on the importance of corporate board service and sessions on mentoring, career negotiations, rainmaking, practice management and more. In addition to helping to organize the event, Amelia delivered the welcoming speech, served as a session moderator and presented the "Women Honoring Women" awards.

Niki Ingram (Philadelphia, PA) was a featured speaker at the 13th Annual National Workers' Compensation Insurance ExecuSummit at the Mohegan Sun Convention Center & Hotel in Connecticut. In her presentation, "Exploring the Rising Use and Costs of Compounded Medications in Workers' Compensation," Niki addressed the recent trend of utilizing compounded medication as a reasonable alternative to traditional prescription care. She discussed what compounded medications are, how they are impacting the workers' compensation system, best practices in identifying compounded medications claims exposures, and how the legislature and judiciary are responding to such claims. The event was attended by workers' compensation professionals from across the country.

NEW JERSEY SUPER LAWYERS 2016

Twelve attorneys from our New Jersey offices have been recognized in the 2016 edition of *New Jersey Super Lawyers* magazine. A Thomson Reuters business, New Jersey Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Each year, no more than five percent of the lawyers in the state are selected as Super Lawyers and no more than 2.5 percent are selected for Super Lawyer Rising Stars. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations.

The attorneys recognized as 2016 New Jersey Super Lawyers are:

John L. Slimm, Professional Liability Defense. Jack has devoted the majority of his 40-year career to the representation of attorneys, accountants, architects and engineers, directors and officers, and investment and insurance professionals in litigation.

Lary Zucker, Personal Injury Defense and Entertainment & Sports Defense. Lary chairs the firm's Amusements, Sports & Recreation Practice Group and has 35 years of litigation experience.

Scott Eichhorn, Personal Injury, Medical Malpractice Defense. For 31 years, Scott has defended physicians and other health care practitioners in various health care liability matters.

Bruce Seidman, Personal Injury Defense. An experienced trial attorney, Bruce oversees the firm's Professional Liability Practice Group in our Roseland office. He has more than 35 years of experience litigating professional liability and general liability matters.

Marshall Dennehey attorneys recognized as 2016 New Jersey Super Lawyer Rising Stars include:

Ian Antonoff, Professional Liability Defense. Ian represents design professionals and contractors in construction defect actions.

Ariel Brownstein, Insurance Coverage. Ariel focuses his practice on insurance fraud and SIU litigation, with an emphasis on medical provider fraud and large loss fraud.

Alicia Calaf, Personal Injury General Defense. Alicia primarily focuses her practice on medical malpractice and nursing home litigation.

Monica Fillmore, Personal Injury, Medical Malpractice Defense. Monica concentrates on medical malpractice, long-term care and health care litigation.

Ryan Gannon, Personal Injury, Medical Malpractice Defense. Ryan focuses on medical malpractice and nursing home malpractice litigation.

Christopher Gonnella, Construction Litigation, Business. Chris defends architects and engineers in complex construction and construction defect matters.

Nicholas Rimassa, Personal Injury, Medical Malpractice Defense. Nick focuses on medical malpractice defense and nursing home malpractice litigation.

Kristy Olivo Salvitti, Workers' Compensation. Kristy devotes the entirety of her practice to the defense of employers in workers' compensation matters. ■

New Jersey—General Liability

WHEN THE VIDEO SURVEILLANCE RECORDING GOES MISSING: SPOLIATION CLAIMS IN NEW JERSEY

By Gregory D. Speier, Esq.*

KEY POINTS:

- Businesses, property owners, insurers and defense counsel should take appropriate measures to preserve video surveillance any time the potential for litigation exists.
- Failing to secure and preserve a surveillance recording can result in significant consequences.

Gregory D. Speier

A video surveillance recording is typically the most sought after piece of evidence in a premises liability case. Surveillance recordings can support a plaintiff's argument that a defendant had "notice" of a condition or, alternatively, can support a defendant's argument that a condition was "open and obvious." To the benefit of a plaintiff, surveillance can capture an employee failing to completely remove a liquid or substance from a floor or, to the benefit of a defendant, can capture an orchestrated event by a plaintiff. Surveillance can also reveal the exact time a snow removal contractor arrived at a property and the condition of a sidewalk thereafter. The potential uses of surveillance recordings are endless.

For that reason, one of the first questions a defense attorney should ask after being assigned a new slip and fall matter is whether a surveillance video of the incident exists. Plaintiffs' attorneys often demand the production of such recordings immediately after suit is filed, if not before. However, video surveillance recordings have a tendency to go "missing." Many times videos are lost unintentionally. For instance, the recording may have been accidently erased, the hard-drive reset itself or the recording simply cannot be accessed for a myriad of other legitimate reasons. On other occasions, the cause for the "disappearance" is more deliberate, such as where a recording has actually been altered or destroyed by a client. In such an instance, what are the consequences of a missing, destroyed or altered video surveillance recording? A possible claim for the spoliation of evidence.

SPOLIATION CLAIMS IN NEW JERSEY

In the legal context, spoliation is used to describe the hiding or destroying of evidence by an adverse party, resulting in the interference with the court's proper administration and disposition of the action. In New Jersey, a duty to preserve evidence arises when there is: (1) pending or probable litigation; (2) knowledge by the party of the existence or likelihood of litigation; (3) forseeability of harm or prejudice to another party if evidence were discarded; and (4) evidence relevant to the litigation. *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1131 (Law. Div. 1993). At a minimum, when litigation is likely, a prospective party is obligated to preserve material evidence. Whether that duty is breached requires a fact-specific inquiry based upon a standard of what is reasonable under the circumstances.

In the litigious modern age in which we live, the chances that litigation will follow a slip-and-fall incident at your retail/grocery store or commercial/residential premises is high. If that occurs, your business has a duty to preserve a video surveillance recording that captures such an incident.

If this duty is breached, the plaintiff can seek three potential remedies: (1) the "adverse inference" charge; (2) the "discovery sanction"; and/or (3) the tort of "Fraudulent Concealment." The applicable remedy is often dependent upon the nature of the spoliation, when the spoliation occurred and when the spoliation was discovered. Generally speaking, these remedies are intended to punish the wrongdoer, deter others from such conduct, to level the playing field and to make whole, as nearly as possible, the party whose action has been impaired by the absence of material evidence. *Rosenblit v. Zimmerman*, 766 A.2d 749, 754-755 (N.J. 2001).

THE ADVERSE INFERENCE

The adverse inference is a jury charge that may be invoked by the court in situations where a litigant becomes aware of the destruction or concealment of evidence during the underlying litigation. It permits the jury to "presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her." If the duty to preserve evidence is violated, this instruction can be used regardless of whether the spoliation was intentional or merely negligent.

Consider the impact such an inference would have upon the jury: video surveillance captured a slip-and-fall incident; the recording was destroyed/is missing/was altered; and the jury is instructed to assume that the recording, had it been available, would have been unfavorable to the defendant and, by inference, would have assisted the plaintiff. Put differently, the adverse inference instruction permits the jury to imagine in their own minds the condition of the defendant's premises in a light most favorable to the plaintiff. *See Jerista v. Murray*, 883 A.2d 350 (N.J. 2005).

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New Jersey—Long-Term Care Litigation

ARBITRATION AGREEMENTS UNDER FIRE IN NEW JERSEY

By Sharon A. Campbell-Suplee, Esq.*

KEY POINTS:

- Arbitration agreements, as utilized by long-term care facilities, have historically been judicially favored.
- Case law in New Jersey indicates such agreements are not in favor with the courts here, who have rejected them in a number of recent cases.
- There are indicators that arbitration agreements are under fire in other jurisdictions as well.

Sharon A. Campbell-Suplee

Long-term care facilities often utilize arbitration clauses in admission agreements with residents. Arbitration is beneficial for a number of reasons, such as reducing litigation costs and keeping disputes private. The use of arbitration can also have long-term benefits, including preventing a perception of a pattern of problems at any given facility. While arbitration agreements are historically judicially favored, recent case law in New Jersey proves they do not receive a warm welcome here in the current climate.

The Federal Arbitration Act (FAA), 9 U.S.C.A. Sec. 1-16, and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to 32, which is nearly identical, both articulate policies that favor arbitration. However, recent rulings raise the question of whether the New Jersey courts are "anti-arbitration." A number of recent cases have seen the courts reject arbitration agreements when they believe they are violative of the rights of consumers and employees. In New Jersey, the analysis focuses on an arbitration agreement as a waiver of rights and whether the language establishing the agreement is clear and unambiguous.

On a national level, as noted in a recent *New York Times* article published on February 22, 2016, "Pivotal Nursing Home Suit Raises a Simple Question: Who Signed the Contract?," judges have consistently upheld arbitration clauses. In their research into the issue, the *Times* found that, regardless of whether the person signing the agreement understood its terms, the courts have determined that once the contract is signed, it is binding. As noted in the *Times* article, "For years, judges hearing elder-abuse cases rejected arguments that arbitration clauses in nursing home contracts were patently unfair because they were signed by people who did not understand them or perhaps even realize they existed."

Through the passage of New Jersey Statute 30:13-8.1, the New Jersey legislature attempted to bar all admission agreements that require arbitration for nursing home or assisted living residents. In *Ruszala v. Brookdale Living*, 1 A.3d 806 (App. Div. 2010), the Appellate Division invalidated this statute, determining that it was preempted by the Federal Arbitration Act. However, the court noted that general contract law defenses were applicable to such agreements. In the *Ruszala* case, the court determined that the arbitration clause in the admission agreement at issue was a contract of adhesion and struck numerous provisions in the clause as unconscionable.

In 2014, the New Jersey Supreme Court decided the case of *Atalese v. Legal Services*, 99 A.3d 306 (N.J. 2014). This case has been repeatedly cited by New Jersey courts in support of rejection of arbitration agreements as invalid. In *Atalese*, the court determined that an arbitration provision had to clearly and unambiguously notify the consumer that they were waiving the right to seek relief in a court of law. At least seven recent cases have rejected arbitration agreements in New Jersey, citing *Atalese* and the "for clear and unambiguous language" requirement. Most recently, in March of 2016, a federal district court judge found an arbitration agreement in the owner's manual of a Samsung Galaxy Gear S smartwatch invalid. The judge concluded that the clause was not conspicuously presented so that the purchaser knew, or reasonably should haven known of the legal rights they intended to surrender. She further concluded that the consumer did not have reasonable notice of the arbitration agreement.

In the case of nursing homes, enforcement of an arbitration argument can be even more difficult. One of the factors examined by the courts is the relative bargaining positions of the parties. The legislature in New Jersey, through the creation of the Nursing Home Act, has already determined that residents of nursing homes and assisted living centers are members of a vulnerable group entitled to special protection. See N.J.S.A. 30:12-1 – 17, *Ruszala*, 1 A.3d at 820-821.

Further, in the industry broadly, state regulators have become concerned due to the secretive nature of arbitration agreements. Recently, 16 attorneys general sent letters urging Medicare and Medicaid to deny money to nursing homes that use arbitration clauses. Moreover, the American Arbitration Association has refused to arbitrate health care cases between residents and facilities unless the parties agreed to arbitrate after the dispute arose.

Plaintiffs' counsel have successfully been focusing on technical issues to attack arbitration clauses. In a case currently pending in Massachusetts that received some local notoriety, a resident of a facility was killed by her roommate. As is frequently the case, the son of the resident had signed the admission agreement, which contained an arbitration provision. The son filed suit on behalf of his mother, but the facility was initially successful in compelling the arbitration. Subsequently, counsel for the son argued that, at the time he signed the agreement, he was his mother's health care proxy, not power of attorney, and could not legally bind his mother to arbitration. In 2014, a judge agreed, and the case is scheduled to be heard this month.

The plaintiffs' bar have suggested this is their new line of attack on arbitration agreements. Given the message sent by the recent spate of cases in New Jersey striking down arbitration provisions, it is likely such an argument will be well-received here. ■

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New Jersey—Workers' Compensation

DOMESTIC OR WORKPLACE VIOLENCE AND HOW TO TELL THE DIFFERENCE: APPELLATE DIVISION'S LATEST ANALYSIS OF NEW JERSEY WORKERS' COMPENSATION LIABILITY

By Robert J. Fitzgerald, Esq.*

KEY POINTS:

- The burden of proof remains on the petitioner to show that injuries both arose out of and were sustained in the course and scope of employment.
- While an intentional workplace assault can be compensable, it must have a causal connection to the work environment.
- An employer's alleged negligence leading to a workplace assault is not a factor when determining workers' compensation liability.

Robert J. Fitzgerald

In its most recent decision in *Jennie Rosario v. State of New Jersey*, 2016 N.J.Super. Unpub. LEXIS 165 (App. Div. Jan. 28, 2016), the Appellate Division has upheld personal animosity as a defense to compensability in a workers' compensation case. The underlying facts of the case were not in dispute. The petitioner was an employee of DYFS, and on May 23, 2007, as she was leaving her office to get into a state-owned vehicle to perform her duties as a field case-worker, her ex-husband violently assaulted her.

The petitioner had recently been transferred from the Division's East Orange office to its office in Maplewood. Just days earlier, she had been granted a judgment of divorce and a domestic violence final restraining order against her ex-husband. Because he did not know where she lived, he contacted the Division's East Orange office to find her and was informed by the receptionist that the petitioner had been relocated to the Maplewood office.

Witnesses testified that the Division was aware of the threat of danger posed by the petitioner's ex-husband based on her request to relocate. She highlighted the fact that her ex-husband had recently been released from prison and was making harassing calls to her and that she was worried he would come to her office to "harass or injure" her. The petitioner also provided DYFS with a copy of the restraining order. The Division notified supervisors, security personnel, and receptionists at both the East Orange and Maplewood offices of the petitioner's concerns, as well as the security guard at the Maplewood office. DYFS employees were instructed that anyone asking to meet with the petitioner had to be screened, and the petitioner was advised she could request an escort whenever she left the office.

The Workers' Compensation Judge bifurcated the trial on the issue of compensability. Following the trial, the judge dismissed the claim petition, finding that, per *Coleman v. Cycle Transformer*, *Corp*., 520 A.2d 1341, 1343-1344 (N.J. 1986), there was no "causal connection between the employment and the injury." More specifically, the petitioner's injuries arose out of a "personal risk," versus a risk from a work injury or a neutral risk. The judge emphasized the ex-husband's testimony that he only went to see the petitioner in an effort to apologize and to see if the two could reconcile. At the time of the incident, he was not taking medications for his psychiatric condition and depression. The judge also determined the incident could have taken place anywhere and that the state did not have a duty to not disclose her location or a duty to protect her from her ex-husband's attack.

In her appeal, the petitioner argued that her injuries were in the course and scope of her employment. In denying the appeal, the Appellate Division noted that the mere fact that a petitioner's injuries are sustained at work does not satisfy the requirements of the Act for compensability. *See Mule v. N.J. Mfrs. Ins. Co*., 812 A.2d 1128, 1133-1134 (App. Div. 2003). The Appellate Division acknowledged that an intentional assault can be an "accident" for the purposes of workers' compensation. *See Cierpial v. Ford Motor Co*., 109 A.2d 666, 668 (N.J. 1954). However, it emphasized that, if the attack arose out a personal relationship between the petitioner and the assailant, unrelated to her work environment, the injury could not be said to have arisen out of the employment. *See Howard v. Harwood's Rest. Co*., 135 A.2d 161, 167-168 (N.J. 1957).

The Appellate Court also rejected the petitioner's argument that DYFS's alleged negligence had any impact on determining compensability:

> Whether an employer actually commits a negligent act is irrelevant to determining compensability – the sole issue is whether the injury is work-related. *See Estate of Kotsovska, ex rel. Kotsovska v. Liebman*, 221 N.J. 568, 583-84 (2015) ("[T]he . . . Act provides employees who have sustained work-related injuries medical treatment and limited compensation 'without regard to the negligence of the employer.'" (quoting N.J.S.A. 34:15-7).

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Ohio—Employment Law

SIXTH CIRCUIT KICKS OPEN THE DOOR TO MUCH BROADER RANGE OF WORKPLACE RETALIATION CLAIMS UNDER TITLE VII

By David J. Oberly, Esq.*

KEY POINTS:

- In *New Breed Logistics*, the Sixth Circuit Court of Appeals significantly expanded the scope of "protected" activity under the opposition clause of Title VII's retaliation provision.
- Now, simply saying "no" to a supervisor in response to harassing conduct can potentially lead to an employer being found liable for retaliation.
- This decision substantially broadens the burden placed on companies to implement effective strategies for preventing and remedying workplace harassment and retaliation.

David J. Oberly

In recent years, workplace retaliation has remained the most frequent allegation among discrimination complaints, topping claims of race, disability, sex and age discrimination. In *Equal Employment Opportunity Commission v. New Breed Logistics*, 783 F.3d 1057 (6th Cir. 2015), the Sixth Circuit Court of Appeals significantly widened the scope of "protected activity" under the opposition clause of Title VII's retaliation provision. The decision has critical implications for employers as it substantially broadens the burden placed on companies to implement effective strategies for preventing and remedying harassment and retaliation in the workplace.

New Breed Logistics operated a warehouse in Memphis that was staffed with predominantly temporary employees supplied by staffing agencies. A worksite supervisor repeatedly made sexually suggestive comments to three female employees while they were in his department, some of which were overheard by another male employee. All three women voiced their opposition to the harassment directly to their supervisor, and two also reported the harassment on New Breed's complaint line. In addition, the male co-worker admonished the supervisor for his behavior. In response, a human resources representative conducted an investigation by simply asking the supervisor five questions related to his alleged sexual remarks. Based solely on the supervisor's denial of the allegations, and without interviewing any other witnesses at the site, human resources concluded that there was no misconduct. Upon the advice of the supervisor, New Breed terminated all four individuals a short time thereafter.

The EEOC filed suit. A jury found that New Breed had permitted the sexual harassment of the three female employees and retaliated by firing the three women and the male co-worker after they complained.

On appeal, New Breed argued that its former employees did not engage in protected activity before their terminations because telling a supervisor to cease his harassment did not constitute a protected activity under Title VII. The Sixth Circuit disagreed, holding that "[a] demand that a supervisor cease his/her harassing conduct constitutes protected activity by Title VII." Importantly, the court ruled that an employee is not required to file a formal complaint of harassment to be protected against retaliation. Rather, "[i]f an employee demands that his/her supervisor stop engaging in this unlawful practice—*i.e.*, resists or confronts the supervisor's unlawful harassment—the opposition clause's broad language confers protection to this conduct." Similarly, the court also ruled that Title VII does not require the opposition to be lodged with the company's human resources department or a specific designated manager, finding that "[t]he language in the opposition clause does not specify to whom protected activity must be directed" and that it would be unfair to hold that a complainant engages in protected activity only when he or she opposes the harassment to a particular official designated by the employer. In the case of the New Breed employees, all four individuals verbally requested that the supervisor stop his behavior, thus fulfilling the requirements of Title VII's opposition clause.

The implications of this opinion are significant for employers in Ohio, Kentucky, Michigan and Tennessee. After *New Breed*, simply saying "no" to a supervisor in response to harassment (or anything that an employee feels is subjectively offensive) can potentially lead to a claim for retaliation. As a result, the possibility exists that an employer may be found liable for retaliation without ever having had any opportunity to become aware of and correct the harassing behavior. Fortunately for employers, there are several ways to combat this risk.

The starting point is the implementation of a strong, clear anti-retaliation employment policy. An anti-retaliation statement should put into plain terms precisely what constitutes retaliation and note that the company will not tolerate it in any form or fashion. Furthermore, employers must design and implement anti-harassment policies and procedures that provide multiple avenues for employees to lodge complaints and that require employees to report harassment to someone aside from the alleged harasser.

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WHEN THE VIDEO SURVEILLANCE

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THE DISCOVERY SANCTION

The duty to preserve evidence arises even without a court order. The negligent loss of evidence has been equated with a failure to comply with a party's discovery obligations. When a party fails to comply with a discovery demand or request, the New Jersey Court Rules provide for a number of potential consequences: for designated facts to be taken as established; to refuse to permit the disobedient party to support or oppose designated claims or defenses; to prohibit the introduction of designated matters into evidence; to dismiss an action; or to enter judgment by default. The Court Rules also allow the court to order the spoliating party to pay reasonable expenses resulting from his conduct, including attorneys fees. *See Aetna Life and Cas. Co. v. Imet Mason Contractors*, 707 A.2d 180 (App. Div. 1998). In the worst-case scenario, if material evidence goes missing, the plaintiff may seek a dismissal with prejudice, which will be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party.

However, a party will not be penalized for a loss of evidence for which it was not responsible where the adversary is not unduly prejudiced by the loss. Absent exceptional circumstances, the court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. Of course, if litigation is reasonably expected, and video surveillance capturing an incident is stored electronically, a duty upon a business or property owner to preserve such evidence remains.

As indicated, the discovery sanction can be used by a plaintiff during the course of an underlying action to penalize a defendant for destroyed or altered video surveillance. The numerous sanctions noted above can obviously be detrimental to one's ability to successfully defend a lawsuit.

TORT OF FRAUDULENT CONCEALMENT

New Jersey courts have held that "spoliation" is not a separate cause of action. Rather, the adverse inference and the discovery sanction are remedies sought during discovery and/or trial. However, if the spoliation is intentional, a plaintiff may pursue a separate cause of action known as "fraudulent concealment." This tort requires the plaintiff to show that: (1) the defendant had a legal obligation to disclose the evidence to the plaintiff; (2) the evidence was material to the plaintiff's case; (3) the plaintiff could not have readily learned of the concealed information from another source; (4) the defendant intentionally withheld, altered or destroyed the evidence with the purpose to disrupt the litigation; and (5) the plaintiff was harmed by the nondisclosure by having to rely upon an evidential record void of the evidence that the defendant concealed. *Tartaglia v. UBS PaineWebber, Inc.*, 961 A.2d 1167, 1188 (N.J. 2008).

If the spoliation is discovered while the underlying action is ongoing, a party can amend the complaint to add a count for fraudulent concealment. If the loss or alteration of material evidence is not discovered until after the underlying action has been resolved, the plaintiff may file a separate action for fraudulent concealment.

In the scenario where a fraudulent concealment count is brought by way of amended complaint, bifurcation is required because the fraudulent concealment remedy necessarily depends upon the jury's assessment of the underlying case of action. After the jury has returned a verdict in the underlying action, it will be required to determine whether the elements of fraudulent concealment have been established and, if so, whether damages are warranted. The bifurcated claim will focus on the damages, both compensatory and punitive, incurred in having to proceed without the destroyed evidence. If a plaintiff has already prevailed on the substantive claim with the benefit of the adverse inference, the fraudulent concealment bifurcated action does not permit the jury to consider anew whether its substantive verdict would have been different had the missing evidence been considered. Rather, it only permits the plaintiff to recover additional compensatory damages limited to the further costs of proceeding without the spoliated evidence, or costs incurred in an effort to replace that evidence, together with, if appropriate, punitive damages. If, however, the act of spoliation is discovered after a verdict is reached in the case-in-chief, the cause of action for fraudulent concealment will be entirely separate and, depending upon the outcome of the original trial, may include both consideration of substantive counts as well as the spoliation-based damages.

Consider a plaintiff who is deprived of a video surveillance recording due to intentional destruction and is subsequently required to hire additional experts or to create a model based on photographs or verbal descriptions. Such a plaintiff may be entitled to those costs as an element of damages. Quite simply, a tort that allows for the imposition of punitive damages against a defendant should be avoided at all costs.

CONCLUSION

In today's world, businesses and property owners increasingly have surveillance in place. It can often be a double-edged sword, potentially problematic should it reveal a defendant having "notice" of a condition or, on the other hand, beneficial should it demonstrate evidence of comparative negligence or an orchestrated event on the part of a plaintiff. Even if the surveillance recording is damaging, it may still give defense counsel *something* to work with in an effort to limit a defendant's exposure. A surveillance recording is frequently the most accurate piece of evidence relating to the occurrence of an accident on one's property. Therefore, after a slip and fall takes place, steps should be taken to actively seek out and preserve any type of surveillance recording because, before long, a preservation letter from an attorney may be received or a summary proceeding to preserve the evidence may be filed.

The failure to secure and preserve a surveillance recording can result in significant consequences, which can include monetary sanctions, adverse inferences at trial and even punitive damages. Businesses and property owners should avoid such consequences

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Pennsylvania—Architectural, Engineering & Construction Defect

STATING A CLAIM FOR NEGLIGENT MISREPRESENTATION FOR A DESIGN PROFESSIONAL'S SUPPLY OF INFORMATION

The False Information Need Not Be Expressly Misrepresented, and How Specific the Allegations Must Be Remains Subjective

By Gregory J. Kelley, Esq.*

KEY POINTS:

- A contractor's claim against a design professional for additional costs on a project because of the negligent supply of information (defective plans and specifications) is based on the information supplied being false in its context.
- The false information is not necessarily an actual or express misrepresentation by error or omission; the falsity of the information supplied can be determined by explicit or implicit context.
- The amount of specificity of the facts alleged in identifying the false information remains subjective and is determined by the court on a case-by-case basis.

Gregory J. Kelley

Until 2005, in Pennsylvania the Economic Loss Doctrine precluded contractors from suing design professionals in negligence for additional costs incurred on a construction project due to errors or omissions in the design plans. The contractor's recourse was to sue the party who had contracted with the contractor and provided the plans. This changed when the Pennsylvania Supreme Court, in *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270 (Pa. 2005), adopted the *Restatement (Second) of Torts*, § 552, Information Negligently Supplied for the Guidance of Others, which states in part:

> (1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, *supplies false information for the guidance of others in their business transactions*, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. …

In adopting § 552, the *Bilt-Rite* court created a narrow exception to the Economic Loss Doctrine. This exception allows contractors to sue design professionals under a negligent misrepresentation theory for losses incurred on a project because of errors or omissions in the design plans.

In Pennsylvania, a plaintiff is required to state facts in the complaint with sufficient specificity to allow the defendant to ascertain the subject matter and basis of the claim. An issue remains with respect to the specificity required to plead a claim under *Bilt-Rite* and § 552. In asserting a negligent misrepresentation claim against a design professional, how specific must the complain be in identifying the allegedly false information that was supplied by the design professional? Is it sufficient to allege that the design plans as a whole were faulty? Can the claim be based on an implied misrepresentation? Must a claim be an express misrepresentation by error or omission in the plans and specifications supplied?

The Pennsylvania Superior Court addressed these issues in *Gongloff Contracting, L.L.C. v. Robert Kimball & Associates, Architects and Engineers, Inc.*, 119 A.3d 1070 (Pa.Super.2015), in which the steel erection contractor had contended that the roof design of a university's new convocation center was faulty in that steel beams were undersized. The contractor alleged that the faulty design caused three work shutdowns during construction, the lay offing of its employees, an inability to pay vendors, and other economic losses and damage to its reputation.

The contractor sued the architect and two of its engineers (the designers) for negligent misrepresentation. The complaint alleged that the design professionals: (1) either explicitly or implicitly represented that the structure could safely sustain all required loads; (2) either explicitly or implicitly represented that normal construction methods could be employed to erect the structure; and (3) supplied false information in the form of its structural design of the project. The convocation center was completed and standing, but the contractor denied that the structural system was the same as originally designed. The architect denied the allegations and moved for judgment on the pleadings, contending that the economic loss doctrine barred the claim. The trial court granted the motion on two grounds.

First, the designers contended that the contractor did not identify in its complaint the alleged express or implied representation that the roof could safely hold the loads. Thus, although the design was complex and had allegedly required further engineering and design by the contractor, this could not be attributed to any representation by the designers. Second, the designers required that the

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Pennsylvania—Professional Liability

UTILIZING FEDERAL RULE OF EVIDENCE 502(D) AS INSURANCE FOR INADVERTENT DISCLOSURE AND A COST-SAVING DEVICE

By Kyle M. Heisner, Esq.*

KEY POINTS:

- F.R.E. 502(d) was enacted to reduce the risk of waiving privilege or protection associated with producing voluminous documents or e-discovery.
- A properly tailored 502(d) order will allow a party to clawback any privileged or protected materials.
- A 502(d) order may also be used to curtail the expense of voluminous document production through use of "quick peek" agreements.

Kyle M. Heisner

Congress enacted Federal Rule of Evidence 502 in 2008 to address the growing risk of inadvertent production of privileged documents as e-discovery became more prevalent. Rule 502(d) provides automatic protection in all federal cases for privileged material (including, but not limited to, e-discovery) that is disclosed inadvertently after reasonable steps were taken to prevent its disclosure, so long as counsel also took prompt steps to rectify the error. Failure to meet these requirements could constitute a waiver of privilege. Even if a court rules that the disclosure did not constitute a waiver, costly motion practice could be required to obtain such a ruling.

Despite the risks outlined above, Rule 502(d) has gained limited traction among practitioners. Recent amendments to the Federal Rules of Civil Procedure, which went into effect on December 1, 2015, now specifically reference 502(d) orders in Rules 16 and 26 in an attempt to popularize their use. Under Rule 502(d), the court may issue an order containing terms typically, but not necessarily, stipulated by the parties limiting the circumstances under which disclosure of privileged materials constitutes a waiver. Documents inadvertently produced are protected regardless of the level of care taken to review them for privilege prior to production, and the order can even be tailored to allow the claw back of privileged materials that were produced intentionally.

The intentional production of privileged materials can be used as a cost-saving measure where a party's adversary is allowed to review a large set of documents under a "quick peek" arrangement in order to identify the documents it would like produced from that larger set. By allowing an adversary to first expend the time to identify specific documents for production, a party can save the time and expense of reviewing the entire volume of documents for privilege and focus its efforts on the narrower set of document production identified by opposing counsel. Of course, counsel should be familiar with the nature of what documents are being produced, and this approach should only be taken where the privileged materials are not highly sensitive.

Another advantage of a 502(d) order is that it can permit parties to disclose privileged materials in one proceeding while maintaining the privilege in any other state or federal proceeding. In other words, a party can disclose privileged materials to its adversary where doing so may help resolve the case without worrying about what effect a privilege waiver might have in other proceedings.

The additional protection that a 502(d) order provides for inadvertently produced documents has led one judge, Magistrate Judge Andrew Peck of the United States District Court for the Southern District of New York, to suggest at multiple speaking engagements on this subject that failure to do so could be akin to malpractice. Moreover, there are no inherent disadvantages to securing a 502(d) order. It is conceivable, however, that a judge might be more inclined to compel the production of privileged or potentially privileged documents if such an order is in place. Counsel should be prepared to discuss the purpose and intent of the Rule should this occur, and to respectfully explain that it is improper for the Rule to be used to infringe upon a party's right to privilege or protection.

DRAFTING A 502(D) ORDER

As previously indicated, a Rule 502(d) order can be tailored by the parties to reflect the terms by which they would like discovery to proceed. The most important language to include in a 502(d) order is that the production of privileged documents or information is not a waiver of the privilege or protection from discovery in the case at hand or in any other state or federal proceeding. To avoid any confusion regarding what standard is to be applied, the order should not make reference to the reasonableness standard of Rule 502(b), and the term "inadvertent" should be used carefully if the parties intend the order to protect documents produced intentionally. The parties may even consider specifically stating that the analysis of Rule 502(b) is inapplicable. Judge Peck provides an example of a simple 502(d) order on his chambers' website, which contains the following two paragraphs:

> The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or

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Pennsylvania—Workers' Compensation

NEW EXPOSURE FOR WORKERS' COMPENSATION CARRIERS AND EMPLOYERS

By John C. Swartz, Jr., Esq.*

KEY POINTS:

- Impairment Rating Evaluation allows an employer/carrier to limit liability to 500 weeks of workers' compensation indemnity benefits once the claimant has received 104 weeks of temporary total disability benefits.
- The Commonwealth Court in *Protz v. WCAB* found that cases based on use of anything but the Fourth Edition of the AMA Guidelines were unconstitutional because those were the AMA guidelines in use at the time the statute was passed.
- Impairment Rating Evaluations based on the AMA Guidelines, other than the Fourth Edition, can now be found unconstitutional.

John C. Swartz, Jr.

The Pennsylvania Workers' Compensation Act allows employers and insurance carriers to limit exposure by requesting an Impairment Rating Evaluation (IRE) once a claimant has received 104 weeks of disability benefits. The IRE is conducted by a medical physician, and if it is determined that the claimant is 50% or less disabled, benefits can be converted from total disability to partial disability. The claimant may then receive 500 weeks of her full disability benefits. The disability benefits then terminate completely. See § 306(a.2) of the Act.

In *Protz v. WCAB (Derry Area School District)*, 124 A.3d 406 (Pa.Cmwlth. 2015), the claimant incurred an injury in April of 2007. The employer obtained an IRE, which found the claimant 10% impaired under the Sixth Edition of the AMA (American Medical Association) Guidelines. Based on the IRE, the employer filed a modification petition in April 2012, seeking to convert the claimant's total disability benefits to partial disability benefits, thereby reducing the amount of compensation to 500 weeks. The Workers' Compensation Judge granted the employer's petition, finding the claimant less than 50% impaired under the Sixth Edition Guidelines.

The claimant appealed to the Workers' Compensation Appeal Board, arguing that § 306(a.2) was unconstitutional because the IRE was based on the wrong AMA Guidelines. The IRE physician had used the most recent AMA Guidelines, the Sixth Edition. The claimant argued that the Guidelines in effect at the time the legislation was enacted, i.e. the Fourth Edition of the AMA Guidelines, should have been used since those are the guidelines the General Assembly adopted. It was the claimant's contention that by using the recent AMA Guidelines, the AMA, not the legislature, was given authority over deciding a claimant's impairment.

The Commonwealth Court agreed with the claimant and reversed the judge's decision. The court ruled that the IRE was invalid since it was not based on the Fourth Edition of the AMA Guidelines. The court remanded the case back to the judge to allow a decision to be made based on the Fourth Edition of the AMA Guidelines.

Under the facts in *Protz*, it will most likely not make a difference since the claimant was found only 10% impaired. However, there will be a question as to when the conversion begins. Will it return to the original IRE or pick up with the judge's new decision?

In other cases, use of the Sixth Edition may make a difference as to whether a claimant is less than 50% disabled because the AMA Guidelines have undergone two revisions, and the Sixth Edition provides very different standards than the Fourth Edition. Thus, a claimant may be found greater than 50% disabled under the Fourth Edition, but not the Sixth Edition.

IREs performed using the most recent AMA Guidelines—not the Fourth edition—have been attacked by the claimant's bar. Petitions to review or reinstate benefits have been filed. Exposure has been re-opened for employers based upon the *Protz* case. Benefits could be reinstated to temporary total disability, even if the claimant's benefits have converted to partial disability based on an IRE. This makes the Commonwealth Court's decision in *Protz* troubling. An employer/carrier cannot rely on any limited exposure in a case that has been converted to partial disability based on an IRE using a newer edition of the AMA Guidelines.

In terms of litigation, the defense bar has been defending these cases on the basis that the 60-day appeal period to challenge the IRE and conversion to partial disability has expired. In some cases, the IRE was performed over five years ago, and there has been no challenge since the *Protz* case was decided. If the IRE is more recent, this is not as problematic because the IRE can be rectified without much lapse in the time period the benefits have been converted. The more troubling cases are those where the claimant's benefits have been converted to partial disability for several years or more. The exposure has already been calculated and funded. Obtaining a new IRE is not a good financial option to limit exposure.

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DOMESTIC OR WORKPLACE VIOLENCE

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The issue of causal relationship has always been one of the most litigated issues in New Jersey workers' compensation. While the facts in this case are tragic and unique, the court's analysis of workers' compensation liability remains the same. The burden of proof will always remain with the petitioner to show that the injuries are causally related to his or her work duties or work environment . However, injuries that are sustained due to a purely personal risk or condition of the petitioner are not compensable, even if the employer's alleged negligent actions caused an increased level of personal risk. While workers' compensation claims from assaults are, thankfully, rare, this case does reaffirm that these claims require a thorough investigation of the parties and the facts that lead to the violence. Otherwise, an employer or insurance carrier may end up unnecessarily paying benefits for a non-compensable claim. ■

SIXTH CIRCUIT KICKS OPEN THE DOOR

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However, these policies and procedures will serve no purpose unless both employees and supervisors understand what they mean and how they should be utilized. In this vein, employers should train their workers on what constitutes harassment and retaliation and the complaint procedures for addressing such issues. Likewise, supervisors must also be trained on how to properly handle and manage complaints of harassment.

Assuming that the proper policies and procedures are in place to funnel all issues to the appropriate decision makers once a complaint is filed, employers must ensure that they conduct a complete investigation into the matter to determine the merits of the claim. Investigations must be prompt, objective and thorough. A key aspect of the investigatory process is documentation. Every portion of the investigation should be documented in detail. When the investigation is complete, all information obtained during the investigation should be disclosed in a written final report. Effective remedial action should be taken in the event that the claims are substantiated.

Finally, employers must move forward with greater caution when taking a subsequent adverse employment action against a worker who has lodged a harassment complaint. All subsequent employment actions taken with respect to the complainant must be carefully reviewed and scrutinized before being carried out, with an eye on ensuring that the company can successfully rebuff any argument of retaliation by the employee. ■

UTILIZING FEDERAL RULE OF EVIDENCE 502(D)

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> state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).
>
> Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

These clauses provide the basic framework for a 502(d) order, but they can be expanded upon significantly to suit the parties' needs. Another helpful, but optional, clause to include in a 502(d) order is one that sets forth the procedure to be followed when a party wishes to clawback inadvertently produced documents. Including such a clause streamlines the clawback procedure and avoids any dispute over what is expected from each party. Similarly, clauses setting forth the procedure for producing privilege logs (if any), handling discovery disputes as to claims of privilege and other discovery-related items are optional, but can assist in streamlining the discovery process. Marshall Dennehey attorneys appreciate the sensitive nature of their clients' records and are ready to assist in tailoring a 502(d) order that ensures their protection.

A few samples of general Rule 502(d) Orders are available from the following resources:

- Chambers of Hon. Andrew J. Peck, U.S.M.J. (http://www.nysd.uscourts.gov/judge/Peck)
- Fordham Law Review (http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4872&context=flr)
- Seventh Circuit Electronic Discovery Pilot Program (http://www.discoverypilot.com/content/model-discovery-plan-and-privilege-order) ■

STATING A CLAIM FOR NEGLIGENT MISREPRESENTATION

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contractor have special credentials, which the contractor did not have. This requirement undermined the contention that the designers implied that normal construction methods could be used to erect the structural steel.

On appeal, the Superior Court addressed two questions: (1) whether § 552 requires that the designers make an **explicit** negligent misrepresentation of a specific fact; and (2) whether the contractor properly alleged that the designers either "expressly" or "impliedly" represented that the structure could safely sustain the load.

The designers argued that an **actual** misrepresentation was required and that, in the complaint, the contractor must identify some particular communications or documents provided by the designers that were false. The appellate court ruled against the designers, distinguishing between the allegations in a complaint and the level of proof that must be shown at trial. In reviewing the complaint, the court accepts the allegations as true. In noting that § 552 pertains to the supply of false information, the court stated that *Bilt-Rite* required only that information, **a rather general term**, be negligently supplied by the design professional. Accordingly, the court concluded that the contractor was not required to identify an express representation by the designers. Therefore, the complaint's allegations that the designers' documents constituted negligently-supplied false information were pled with the appropriate level of specificity to state a cause of action for negligent misrepresentation. The court noted that while the designers might prove later in the litigation that the allegation—that it provided false information concerning the integrity of its roof design was unsubstantiated—it was not entitled to judgment at the pleadings stage.

A plaintiff-contractor still must plead facts to support the elements of a common law claim for negligent misrepresentation, which are: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation." *Bilt-Rite*, 866 A.2d at 277. However, in analyzing whether the facts are sufficiently pled, the totality of the circumstances must be considered. Have the design plans or specifications that are allegedly false been sufficiently identified? Were there requests for information (RFIs) seeking additional information or clarification? Were the plans and specifications revised, and if so, how, when, why and in what form were the changes communicated to the contractor?

Such analysis should determine whether a contractor has sufficiently stated a claim against a design professional. If not, then it should be challenged in the pleadings stage. If yes, then discovery will be taken to further develop the facts and determine whether there was a misrepresentation in the supply of information.

In *Gongloff*, the designer **fully knew** the subject matter and context of the claim, but argued that the contractor did not identify an explicit representation by the designer on which the contractor detrimentally relied. The court ruled that the allegations of faulty design in the roof system were sufficiently stated in the complaint, even though no specific representation (*e.g.* specific design detail) was identified as false and, thus, negligently supplied. The implication is that the falsity of the information, evaluated in its totality, and not limited to an express misrepresentation, still must be proven at trial. The takeaway from this decision is that it may be more difficult to challenge a plaintiff-contractor's **general** allegations at the pleadings stage. The sufficiency of specificity averred in the complaint will continue to be subjectively determined by the court on a case by case basis. ■

WHEN THE VIDEO SURVEILLANCE

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by investing in technology resources that allow for easy surveillance preservation, exportation and transfer. There are many reasonably priced technologies on the market today that are as simple to operate as the DVR on your television.

This article should serve as a reminder to all businesses and property owners, insurers and defense counsel to take appropriate measures to preserve video surveillance evidence anytime the potential for litigation exists as the plaintiffs' bar will undoubtedly pursue all available remedies as the result of a defendant's failure to do so. ■

NEW EXPOSURE FOR WORKERS' COMPENSATION CARRIERS

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The defense bar has contended the *Protz* case should not support a retroactive application of unconstitutionality. *Protz* does not indicate that it should be applied retroactively. Fortunately, the Pennsylvania Supreme Court has decided to hear the defendant's appeal. The Supreme Court could do a number of things. It could completely overturn the decision in *Protz*, limit the decision, clarify it or affirm it. We will, of course, be monitoring the Pennsylvania Supreme Court for its decision and will update our clients. ■

"SEEING THE INVISIBLE"

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TGI Friday's did not appeal. Consequently, at first blush, the *Halvorsen* decision appears to be a fundamental departure from the standards set forth in seminal dram shop cases, including *Mazzacano v. Estate of Kinnerman*, 962 A.2d 1103 (N.J. 2009). Yet, the court was careful to note that "relation back" testimony, on its own, remains insufficient to create a genuine issue of material fact. Other facts must be present that would allow a reasonable juror to find that the driver was served alcohol while visibly intoxicated. Nevertheless, the lasting effect of the *Halvorsen* decision is that a plaintiff may now prove negligence with circumstantial evidence alone.

In the wake of *Halvorsen*, plaintiffs have successfully applied to defeat summary judgment in DUI-related dram shop cases where the record is devoid of direct evidence demonstrating the negligent service of alcohol. DUIs are the most common types of liability claims faced by restaurant, bar and tavern owners. Thus, questions have been raised regarding how a licensed alcoholic beverage server can realistically defend these claims when plaintiffs are no longer required to prove through eyewitness testimony that someone actually **saw** the patron exhibit signs of visible intoxication. Has *Halvorsen* effectively negated the requirement of **visible intoxication**? Not necessarily. Although *Halvorsen* is certainly a blow to defendants, particularly in the context of dispositive motions, its broader impact is tempered by the highly fact-specific analysis applied by the *Halvorsen* court. Knowledgeable and well-prepared advocates can develop and make crucial distinctions, based on the circumstances of their cases, to argue that the *Halvorsen* decision is inapplicable. Overall, nearly three years post-*Halvorsen*, the Act remains, at least for the time-being, a significant hurdle for plaintiffs in hospitality-related personal injury actions. ■

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Marshall Dennehey Warner Coleman & Goggin, a professional corporation, was founded in 1962. Since that time, our law firm has realized substantial growth in response to our continually expanding client base. We are exclusively a defense firm, and our professional practices encompass a wide spectrum of litigation matters. We apply business discipline to the practice of law with resulting cost savings to our clients.

We are 500 attorneys strong and have 20 offices strategically located throughout Pennsylvania, New Jersey, Delaware, Ohio, Florida and New York.

Surveys of the nation's largest firms consistently show our firm to be a leader in minority hiring and advancement.

Our continued dynamic growth and the expansion of our client base constitute the best evidence that we are effectively meeting our clients' business needs and expectations. We are very proud of our success. We will strive to continue to be part of yours.

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