MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

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Defense Digest

On The Pulse…

OUR LONG ISLAND, NEW YORK OFFICE

By Anna M. DiLonardo, Esq.*

Anna M. DiLonardo

For five years now I have had the honor of being the managing attorney for the Long Island office of Marshall Dennehey Warner Coleman & Goggin. When I joined the firm in October 2011 and opened the doors of the firm's easternmost office, I could only imagine what the future would hold. When I first wrote an article for *Defense Digest* in March 2012 introducing our brand new location on Long Island, we were a small office with four lawyers specializing in toxic tort litigation. Today, we are an office of 15 lawyers who have extensive expertise in nearly every area of defense litigation and practice.

Long Island, which geographically includes Brooklyn and Queens (two of the five boroughs of New York City), is one of the most highly populated islands in the world with 7.75 million people. Its varied and large population, along with its proximity to Manhattan, makes the island attractive to Fortune 500 companies and small businesses alike. With our recent move to Melville, we are now truly located in the heart of Long Island, and with our expanding team of lawyers, we have the legal talent to help businesses and professionals with all of their legal defense needs. Our talented team of lawyers have a diverse background.

We are fortunate to have a sophisticated and knowledgeable group of lawyers in our Casualty Department. Robert Faller, Neil Higgins, Jennifer Robert, Mark Agin and Avi Goldstein have extensive trial experience in both federal and state courts. They have defended cases involving labor law, contractual disputes, maritime law, retail liability, property loss, SIU, insurance fraud and practically every other type of tort liability possible. Martin Schwartzberg and William Pirk each have over 25 years of trial experience representing professionals and companies in construction law matters. Their experience in design defect, professional malpractice and breach of contract claims is known throughout the industry.

Kevin Ryan and Michael Kelly have defended health professionals and hospitals at all levels, from disciplinary procedures to

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MARSHALL DENNEHEY INTRODUCES LAWYERS' PROFESSIONAL LIABILITY DISCIPLINARY BOARD REPRESENTATION

By J. Edwin A.D. Schwartz, Esq.*

Edwin A.D. Schwartz

Everyone likes surprises, but not all surprises are well-liked. This can be especially true when you receive notification from the state disciplinary board that a former client, colleague or opposing counsel has reported your actions as violating the code of conduct that governs all attorneys. While we've all heard the maxim, "It's the practice of law, not the perfection of law," there are certain immovable cornerstones in the practice of law that serve as the foundation of the profession. Codes of conduct in the legal profession protect the integrity of the practice as a whole and act to ensure that the continued trust clients place in attorneys is well-founded.

The conduct and actions of attorneys are governed by a complex series of rules of professional conduct, rules of civility and ethical practice considerations. To address the continuing spectrum of our professional liability clients' needs, we are now defending attorneys facing disciplinary matters before the disciplinary boards and/or agencies in the states of Pennsylvania, Ohio, New York, New Jersey, Delaware and Florida. Our team of experienced litigators, combined with our physical office presence in each of the above jurisdictions, makes us a unique leader in defending these clients.

Lawyers facing disciplinary board actions need experienced legal representation. Marshall Dennehey attorneys representing clients in these matters are experienced and well-versed in the procedures of the process. Our ability to collaborate on legal strategy and coordinate defense efforts between our respective offices allows

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* *Edwin Schwartz is a shareholder in our Harrisburg, Pennsylvania office and focuses his practice on professional liability matters. He is a member of the Pennsylvania Bar Association's sub-committee on Professional Responsibility and Ethics, and he is frequently asked to speak on professional ethics and malpractice avoidance topics at state and county bar association functions. He has served as a moderator and presenter at more than a dozen professional liability seminars focusing on issues of professional malpractice avoidance, risk assessment, mitigation and best practices. He may be reached at easchwartz@mdwcg.com.*

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A MESSAGE from the EXECUTIVE COMMITTEE

By Thomas A. Brophy, Esq.
President & CEO

When Mark Thompson, the newest member of our Executive Committee, relocated to Philadelphia from his home and practice in Orlando, Florida, he asked what he might do to become more familiar with the Philadelphia legal community and the City of Philadelphia. I recommended that Mark become a member of the Grants Committee of the Philadelphia Bar Foundation. The Philadelphia Bar Foundation is the charitable arm of the Philadelphia Bar Association. It distributes between $600,000-$700,000 a year to more than 35 legal service organizations that provide services to the poor, the elderly, and other disenfranchised citizens of Philadelphia. The Grants Committee vets those legal service organizations that are seeking financial support from the Bar Foundation.

One of Mark's first assignments was to participate in a site visit at a legal service organization called Christian Legal Clinics of Philadelphia (CLCP), which operates a number of legal clinics in Philadelphia. Typically, one or more law firms will partner with the Salvation Army to open a CLCP clinic at a specific location. Mark learned that CLCP was looking for a law firm to sponsor a new clinic at a Salvation Army location at Broad and Fairmount Streets in Philadelphia.

Mark invited lawyers from our firm to staff that legal clinic. Very quickly Mark had a team of 26 lawyers from our Philadelphia, Doylestown, and King of Prussia offices who volunteered to staff that clinic. The lawyers from Marshall Dennehey who staff this clinic and the clients they serve are of various faiths and religious persuasions.

The speed with which Mark was able to gather a group of attorneys to staff this CLCP location reminded me of the myriad ways that the lawyers at our firm support the communities in which they live and practice. I have often been asked, "To what do I attribute Marshall Dennehey's success in its regional offices?" I respond that our regional offices are not mail drops but are offices staffed by people who live in the community in which that office is located and are invested in that community's well being and stability.

In preparing to write this article, I thought I would gather specific information from our lawyers about the things that they do to better the communities in which they live and work. One thing that I quickly learned is that hundreds of our attorneys are involved in community activities of one kind or another. In fact, the overwhelming amount of information that I learned in response to my inquiry has prompted me to write two articles about this topic. This first article will address some of the things that Marshall Dennehey does collectively. A subsequent article will highlight some of our lawyers and the things that they do individually to better their communities.

- Christian Legal Clinics of Philadelphia—As mentioned above, a number of our attorneys now staff a specific CLCP clinic at Broad and Fairmount Streets in Philadelphia. The primary focus of this clinic is to assist citizens in having their criminal records expunged. However, other legal issues are addressed as well at the clinic.
- Cristo Rey High School of Philadelphia—The Cristo Rey High School of Philadelphia is a Catholic college preparatory school open to students of all religious faiths. The total family income for a student to attend Cristo Rey High School must be below $30,500 per year. The educational model that Cristo Rey follows is that each student works one day a week in a professional setting and attends school four days a week. The salaries that are earned by the Cristo Rey students go directly to the Cristo Rey High School to defray the cost of tuition to attend this private school. Each student's family pays what they can afford to pay. The remainder of the students' tuition is paid by foundations, businesses, and individuals who contribute directly to the school. Marshall Dennehey employs four Cristo Rey students. Two of these students graduated from Cristo Rey in 2016. One will be attending Penn State University and the other will be attending Millersville University.
- United Way—We run an active United Way Campaign, with each of our 20 offices participating. Each office does establish its own initiatives to promote participation. We encourage participation from our non-lawyer employees by rewarding them with an extra vacation day for certain thresholds of contribution.
- Class Action and the Marshall Dennehey Horns—Marshall Dennehey has its own firm band, "Class Action." In 2014, "Class Action" was a finalist in the Fortune Magazine Battle of the Corporate Bands and participated in the final competition at the Rock and Roll Hall of Fame in Cleveland, Ohio. "Class Action" volunteers to play for various community groups and, in particular, for organizations that provide legal services for those unable to pay for them.

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OUR LONG ISLAND, NEW YORK OFFICE

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trial. Their advice and counsel is respected and sought after by both health care professionals and fellow members of the bar. Daniel Levin provides counsel to insurers with regard to coverage and claim handling. His advice and opinion are respected in all fields ranging from maritime to aviation to construction defect claims. Rounding out our office is the toxic tort litigation team, which includes Colleen Cronin, Andrew Warshauer, Dr. Noriel Sta. Maria, Sam Ruggeri and me. We represent companies of all sizes involved in asbestos, lead paint and various other types of toxic tort claims.

Making our office complete is our stellar staff of secretaries, paralegals, office support and management. These hard working individuals are truly the heart of the office. It is truly an honor to be a part of such a stellar team. ■

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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Our band's most recent gig was performing at the annual fund raiser for the "Senior Law Center," a legal service organization whose target population is the elderly.

- The Veterans Law Clinic of the Widener Law School—The Widener University School of Law maintains a clinic which provides legal services to military veterans unable to afford them. Lawyers from our firm volunteer their services to assist veterans under the auspices of The Veterans Law Clinic at the Widener University.
- Chester A. Arthur School—We have partnered with Chester A. Arthur Elementary School, which is one of the schools that the Philadelphia School District has deemed to be "distressed." The children who attend this school come from a diverse community with a number of at-risk students. Ninety percent of the students receive free lunches, which means that the population that the school serves meets the Federal government's definition of "needy."

  We have held book drives, breakfast bar drives and coat drives for students at the school. In addition, members of our firm have assisted children at the school in writing papers. Among the activities planned for the coming year are assisting students in preparing applications for private, magnet, and charter high schools. The firm has also donated books, pens and paper to the school.
- Raising the Bar—Raising the Bar is an initiative that was started over 12 years ago as a vehicle to encourage law firms to support the various legal service organizations that administer to the needy. These organizations range from Community Legal Services to the Public Interest Law Center to the Support Center for Child Advocates to the Legal Clinic for the Disabled, etc. Each firm participating in Raising the Bar commits to make a donation based upon the number of lawyers working in its Philadelphia office to support legal service organizations. Marshall Dennehey has been a participant in Raising the Bar since its inception.
- Red Cross Blood Drives—Marshall Dennehey has been sponsoring blood drives for the benefit of The American Red Cross for over 40 years. Initially, the Red Cross would send vans to pick up participants. Now, participation by our employees is so widespread that the Red Cross collects the blood in our offices.
- Susan G. Komen Race For The Cure—Our firm has been an active participant in the Susan G. Komen Race For The Cure for well in excess of a decade. In 2016, we received the 2016 Outstanding Team Participation Award for "Law Firms For The Fight."
- American Cancer Society—Marshall Dennehey has sponsored a team of riders who participate in a 16-mile or more bike ride through Pennsylvania and New Jersey. Employees from as far away as our Scranton and Florida offices have participated in this ride.
- Multiple Fundraisers—Throughout the year, our many offices schedule collegiality events, dress down days, or other initiatives designed to raise money for local charities. For example, our Florida offices recently held a "Dress Day" day to raise money for the victims of the Orlando shootings at the Pulse nightclub. Another example is our participation in "Daisy Day." Money raised on "Daisy Day" is donated to The Children's Hospital of Philadelphia. There are numerous other such events right through the year throughout our 20 offices.

In this article, I wanted to highlight some of what I would describe as collective efforts made by Marshall Dennehey and its employees to support and improve the communities in which we live and practice. In a subsequent article, I will address some of the individuals and the efforts that they make. At Marshall Dennehey, we are very proud of the level of civic engagement of the firm and of our employees. ■

Federal—Employment Law

EMPLOYERS BEWARE: NEW OSHA INJURY AND ILLNESS REPORTING & ANTI-RETALIATION RULE GREATLY EXPANDS POTENTIAL LIABILITY FOR EMPLOYERS

By David J. Oberly, Esq.*

KEY POINTS:

- New OSHA rule expands requirements to report and submit workplace injuries/illnesses. Reports are now available publicly.
- Additional anti-retaliation components give more protection to employees reporting workplace injuries/illnesses.
- OSHA given enhanced investigation and enforcement measurements.

David J. Oberly

Despite considerable opposition from employers, the United States Occupational Safety and Health Administration (OSHA) has issued a new regulatory rule expanding employers' requirements for reporting and submitting workplace injuries and illnesses and making such records publicly available. In addition, the rule also provides several additional anti-retaliation components—bestowing additional protections to employees involved with reporting work-related injuries and illnesses and providing the agency with enhanced investigation and enforcement measures to be utilized by the agency in connection with the reporting of work-related incidents.

Regarding the report and submission of injuries, certain employers will now be required to electronically submit injury and illness data to OSHA. According to the agency, the purpose of the new reporting obligations is to "nudge" companies into placing a greater focus on workplace safety because, in the agency's opinion, employers are more likely to do so if company injury data is available to the public.

Ordinarily, OSHA mandates that employers in most industries with a workforce of 10 or more employees compile records of work-related injuries and illnesses that occur on the jobsite through several OSHA forms, including Form 300 (Log of Work-Related Injuries and Illnesses), Form 301 (Injury and Illness Incident Report) and Form 300A (Summary of Work-Related Injuries and Illnesses). Now, beyond these ordinary requirements, employers are also required to submit these forms to OSHA in electronic format. For companies with a headcount at or above the 250-employee threshold, all three forms must be submitted electronically on a yearly basis. Moreover, for a selection of companies with a workforce numbering between 20 and 249 that operate in certain industries that OSHA considers highly hazardous—primarily those involving utilities, construction, manufacturing, retail, transportation and health care—Form 300A must be submitted annually. In addition, OSHA may also obtain information from employers who do not submit injury and illness data on a regular basis, but those employers would only be obligated to provide such data to OSHA upon request from the agency.

Beyond the electronic reporting requirements, the rule also provides that the injury and illness data from employer submissions compiled by OSHA will be posted publicly on the agency's website. The public employee injury and illness database will be searchable so that interested parties can analyze an individual employer's injury and illness rates. Importantly, OSHA has signaled its intent to utilize the data to target and investigate those companies that it feels have high employee injury and illness rates.

In addition, the recently released final rule also includes certain anti-retaliation provisions that apply to all employers and that allow OSHA to penalize employers for violating the recordkeeping and reporting provisions of the new rule. In this regard, the new rule places additional notification burdens on employers. To comply with the new rule, employers must inform each employee that they maintain the right to report work-related injuries and illnesses, that discrimination in response to the reporting of a work-related injury or illness is expressly prohibited, and that the company cannot discharge employees or otherwise discriminate against them in any form or fashion for reporting a work-related injury or illness. Employers must also inform each employee how to report a work-related injury or illness, as well as the procedure used by the company to report such incidents to OSHA. Moreover, employers must provide employees and their representatives access to injury and illness records. Finally, all employers are now required to create and implement an express reporting procedure for employees to report work-related injuries and illnesses promptly and accurately. Importantly, the procedure cannot have the effect of dissuading employees from reporting an on-the-job workplace injury or illness.

Significantly, the new anti-retaliation provisions provide for new and enhanced inspection and enforcement measures, which provide OSHA with a new tool to investigate and levy citations against

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Federal—Public Entity & Civil Rights

LAND USE LITIGATION—TRENDS, EXPOSURES AND MORAL HAZARDS

By Howard Mankoff, Esq. and Audrey Copeland, Esq.*

KEY POINTS:

- RLUIPA litigation is costly and challenging.
- Insurers of municipalities faced with a request to defend RLUIPA litigation must resolve the thorny issue of whether they will be defending illegal discriminatory conduct.

Howard Mankoff

Audrey Copeland

The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USCS § 2000cc, is a complex federal statute that in theory was written to prevent municipalities from discriminating against religious institutions in land use decisions, among other things. In practice, this shield is often used as a sword to bludgeon municipalities into granting to religious institutions approvals of applications for land uses that are often inconsistent with the municipal entity's zoning ordinances. Municipalities seek to obtain the necessary insurance coverage for costly RLUIPA litigation challenging their zoning decisions. On the other hand, insurers providing the coverage may find themselves facing the moral hazard of providing financial cover for discrimination.

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the United States Supreme Court held that RLUIPA is "the latest of long running congressional efforts to accord religious exercise heightened protection from government imposed burden...." RLUIPA prohibits municipalities from enacting land use regulations that place a substantial burden on the free exercise of religion and prohibits the enactment of land use regulations that have the effect of discriminating against religious institutions, as well as discriminating against religious institutions compared to secular institutions.

Despite arguments from RLUIPA plaintiffs to the contrary, RLUIPA does not allow a religious institution to operate "wherever it so chooses, without regard for zoning rules," and such a position is "simply unreasonable and not supported by the statute or by the First Amendment." *See Christian Methodist Episcopal Church v. Montgomery*, 2007 U.S. Dist. LEXIS 5133, at *30-31 (D.S.C. Jan. 18, 2007). "[S]o long as a municipality applies its codes uniformly and does not impose an unjustified substantial burden on religious exercise, it may apply traditional zoning concerns—such as regulations addressing traffic, hours of use, parking, maximum capacity, intensity of use, setbacks, frontage—to religious uses just as they are applied to any other land uses." *Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA)*, (December 2010), at pp. 3-4.

These principles seem clear enough, but in practice, issues abound. For instance, in one of our firm's cases, the question was whether different parking regulations can be applied to a mosque, where the most well-attended religious service is on Friday afternoon and attended by individual congregants driving their own vehicles, compared to a church's Sunday service, where families are more likely to travel together. In another instance, we represented a municipality sued by a church that claimed the municipality violated RLUIPA by excluding the proposed church from a downtown redevelopment zone, which allowed movie theaters and other secular assemblies.

Among the many challenges in defending against RLUIPA claims is dealing with public statements by fervent objectors to the religious institution's land use application, whether it be a mosque, church or synagogue. Objectors often form rudimentary organizations to campaign against the applicant, and they may use social media—such as Facebook—to make vile and bigoted comments. This can raise a factual issue for the jury as to whether such commentary influenced the zoning board to act with a discriminatory animus. This is also why RLUIPA complaints are often so long and contain detailed descriptions of social media postings, thus requiring equally detailed answers. Discovery can also become extremely expensive very quickly, such as when the plaintiffs seek emails and other communications between the objectors and public officials, like members of the zoning board.

RLUIPA provides several types of damages that create significant exposure for defendants and their insurers. First, the statute provides an award of prevailing party counsel fees. This, by itself, can dramatically increase the cost of RLUIPA litigation. In a current case, the counsel fee claim exceeded $1.5 million before the first case management conference was held. It is clear that the threat of prevailing party counsel fees often drives this litigation. Compensatory damages are also available. Such damages are fact specific and can include the fees for the necessary land use approvals, the rent paid to use another location, and the amorphous damages that courts allow for the violation of first amendment rights.

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MARSHALL DENNEHEY INTRODUCES

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for significant cost savings to our clients and facilitates timely outcomes in disciplinary matters so that our clients can continue their professional activities with minimal interruption. Our goal remains to be the most effective advocates on behalf of our clients throughout the disciplinary process while also being cognizant to the client's cost and time expenditures.

We welcome the opportunity to work with you in addressing any disciplinary matters that you may be faced with, and we will strive to ensure that your options are understood and your interests are protected. Our attorneys are always available to discuss any inquires you may have regarding the disciplinary board process. ■

EMPLOYERS BEWARE

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employers for retaliatory practices on its own initiative, without the need to first receive an employee complaint. While OSHA already bars discrimination against an employee who reports a workplace injury or illness, until now OSHA has been unable to act until a worker submits a complaint. With the new rule, however, OSHA now has the ability to cite an employer for retaliation even in the absence of any employee complaint.

The rule gives OSHA a new tool and broad discretion to investigate and issue citations and penalties if the agency considers any part of an employer's procedures for reporting a work-related injury and illness to be "unreasonable." Unfortunately, what constitutes programs that "discourage" employees from coming forward and reporting on-the-job incidents is a subjective endeavor that is open to debate. While OSHA did not declare any policies unlawful per se, the agency indicated that certain policies are likely unlawful because they have the potential to discourage an employee from reporting an injury or illness: (1) policies providing for discipline if an employee fails to immediately report a work-related illness or injury; (2) certain safety incentive programs; and (3) blanket policies that require drug and alcohol testing for all workplace accidents or injuries.

With respect to post-incident drug testing, while the agency acknowledges that the new rule does not prohibit drug testing across the board, it does bar employers from using drug testing or the threat of drug testing as a form of retaliation against workers who report on-the-job injuries or illnesses. In order to conform with the new rule, drug policies should limit testing in connection with work-related incidents to those situations in which worker drug use is likely to have played a role in contributing to the event and for which a toxicology screen can accurately identify impairment resulting from drug use. Also, with respect to jobsite safety incentive programs, OSHA has noted that an incentive program will run afoul of the new anti-retaliatory scheme if the program discourages workers from reporting injuries or illnesses by denying a benefit to those individuals who disclose such incidents. As just one example, OSHA posits that an employer may be in violation if it excludes a worker from obtaining a financial incentive (such as a bonus) as a consequence of reporting a work-related incident. As a result, under the new anti-retaliatory provisions, incident programs must be "structured in such a way as to encourage safety in the workplace without discouraging the reporting of injuries and illnesses."

There are several key takeaways for employers who wish to steer clear of violating OSHA's new recordkeeping and reporting requirements. At a minimum, employers must become familiar with the new electronic reporting requirements promulgated as part of the new rule and determine what form(s) they must now submit electronically on a yearly basis, which is determined based on an employer's size and industry. Equally as important, employers must also take care to fully understand the new rule's anti-retaliation requirements, which are almost certain to cause a new flurry of discrimination complaints, investigations and lawsuits. Furthermore, as is always the case when new rules and regulations are promulgated, company management and human resources personnel should be properly educated and trained on the new OSHA anti-retaliation requirements. In addition, those employees who are responsible for injury and illness recordkeeping and reporting should also be educated and trained on the new rule. Companies should also review their OSHA workplace postings and guidelines to ensure that employees are properly informed of their rights, which have been significantly augmented under the new rule. Finally, employers should review and analyze both their drug testing policies, as well as their safety incentive programs, to ensure that no hidden deterrents exist that could be viewed by OSHA as deterring or impeding employees from reporting on-the-job injuries or illnesses and that the policies and procedures comply with OSHA's new requirements. ■

Federal—Securities & Investments Professional Liability

FINRA TASK FORCE ENDS WITH A FIZZLE

By Denis C. Dice, Esq.*

KEY POINTS:

- FINRA Dispute Resolution Task Force issues final report with multiple recommended actions.
- FINRA Board of Governors only authorized for filing with the SEC three proposed amendements.

Denis C. Dice

FINRA organized the FINRA Dispute Resolution Task Force in July of 2014. The task force consisted of 13 members who were either arbitrators, mediators, counsel representing claimants and respondents, as well as state regulators and consumer advocates. The purpose of the task force was to review FINRA's arbitration procedures and rules to insure that the forum was meeting the needs of the parties. FINRA asked the task force to coordinate its efforts and ultimately make recommendations with respect to the efficiency, transparency and impartiality of the FINRA Dispute Resolution Form. Thereafter, the task force subdivided into subcommittees, met a total of 57 times over 14 months and solicited comments. In December of 2015, after multiple in-person meetings and multiple meetings by telephone, the task force issued a 70-page report entitled "The Final Report and Recommendations of the FINRA Dispute Resolution Task Force." The report provided a background of FINRA arbitration, reasons for the task force, a summary of the work of the task force, a summary of key issues, a discussion section and ultimately 51 recommendations.

According to the report, the task force met as a group in person on four separate occasions and had five telephonic meetings. At its fourth in-person meeting, the task force reviewed a draft of its final report and approved the final report at their December 7, 2015, telephone meeting. The task force believed that it was important to address the arbitrators and their below-market-rate compensation. The report recommended an increase in arbitrator honoraria from $300 to $500 per session. The task force also believed it was important to expand the depth and diversity of the arbitrator pool. It recommended ongoing recruitment initiatives to increase diversity.

Additionally, the task force discussed awards and that a major concern among the parties who are dissatisfied with the outcome of an award is the absence of any explanation. The task force recommended that an explained decision would be required unless any party notifies FINRA, prior to the IPHC, that it does not want an explained decision. The task force no longer recommended that the current, brief fact-based summary of the award explanation should be continued. The task force recommended a training program for arbitrators on how to write an explained decision.

The task force also reviewed the rules regarding expungement. Their report regarding their review of expungement encompassed five pages and contained significant detail about the expungement process and prior rule changes. Ultimately, the task force recommended that FINRA create a special arbitration panel to conduct hearings on expungement requests and make determinations as to whether to grant expungement requests.

The task force also reviewed other issues. The scope of its review included, but was not limited to, small claims, large claims, mediation, motions to dismiss, time limits (motion to dismiss based on eligibility), multiple case management/procedural issues, the public availability of information, transparency, forum access and unpaid awards.

On May 6, 2016, the FINRA Board of Governors reported that it had met that week to discuss, among other things, the recommendations of the FINRA Dispute Resolution Task Force. Out of the 51 recommendations, the FINRA Board of Governors only authorized for filing with the SEC three minor changes to the FINRA Code of Arbitration Procedure and its processes. The FINRA Board of Governors did not authorize any rules changes with respect to arbitrator compensation or any of the other recommendations contained within the arbitrator task force report. The FINRA Board of Governors approved only the following changes:

- Amendments to Rule 12400 and 13400 (neutral list selection system and arbitrator rosters) to revise the arbitration form chairperson eligibility requirements. Specifically, an attorney arbitrator would be eligible for the chairperson roster if he or she completes chairperson training and serves as an arbitrator through award on at least one arbitration, instead of two arbitrations, administered by a self-regulatory organization in which hearings were held.
- Amendments to Rule 12504 and 13504 (Motions to Dismiss) to provide that arbitrators may act upon a Motion to Dismiss prior to the conclusion of a party's case-in-chief if the arbitrators determine that the non-moving party previously brought the same dispute against the same party and that the dispute was fully and finally adjudicated on the merits.
- Amendments to Rule 12403 (cases with three arbitrators) to increase the number of public arbitrators on the list that FINRA sends to parties during the panel's selection processes in customer cases. Specifically, FINRA would increase the

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Federal—Securities & Investments Professional Liability

PROTECTING SENIORS: A PRIORITY FOR FINRA, FEDERAL AND STATE LEGISLATORS, AND ARBITRATION PANELS

By Samuel E. Cohen, Esq.*

KEY POINTS:

- Protecting seniors from financial exploitation is a goal of recently proposed legislation at the state and federal levels.
- Distinction between state and federal legislation as to whether reporting of suspected financial abuse is mandatory.
- Proposed legislation provides protection from privacy laws to those who report suspected abuse.

Samuel E. Cohen

America's aging population is growing rapidly and, as a result, a target for financial exploitation by unscrupulous individuals. Over the last several years, the Financial Industry Regulatory Authority (FINRA) and the Securities and Exchange Commission (SEC) have made protecting seniors a priority through regulatory notices and initiatives such as FINRA's Securities Help Line for Seniors.

More recently, however, protecting seniors has become a priority at the state and federal levels. FINRA has proposed a rule relating to the financial exploitation of seniors and other vulnerable adults, and the potential exploitation of elderly investors has also raised the ire of a few arbitration panels in recent cases.

A distinction among the various legislation and rules proposed is whether the reporting of financial exploitation is mandatory. As of July 1, 2016, laws in Alabama, Indiana and Vermont require financial advisors to alert state authorities of suspected financial abuse of the elderly or other vulnerable adults. In addition to mandatory reporting in situations involving people older than 65 or who are disabled, the laws also allow advisors to stop a disbursement of funds from client accounts and gives advisors immunity from civil liability.

The Alabama, Indiana and Vermont laws generally follow a model rule adopted in early 2016 by the North American Securities Administrators Association (NASAA), a voluntary association whose membership consists of 67 state, provincial and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada and Mexico. The NASAA model mandates reporting to a state securities regulator and state adult protective services agency when a qualified individual has a reasonable belief that financial exploitation of an eligible adult has been attempted or has occurred. This model also authorizes disclosure to third parties only in instances where an eligible adult has previously designated the third party to whom disclosure may be made. It also directs that disclosures may not be made to the third party if the qualified individual suspects that third party of the financial exploitation.

In April 2016, NASAA made available to its members a training program called "Senior$afe," developed in Maine for bank and credit union employees. The initiative has been modified to apply to other financial services professionals. The program, created by the Maine Council for Elder Abuse Prevention, includes a presentation highlighting behavioral and account management changes that may indicate a senior client's cognitive decline and financial abuse. The other part of the training focuses on reporting incidences within a firm and to outside authorities.

On the federal level, on July 5, 2016, the House of Representatives unanimously approved legislation that would protect financial advisors from liability when they try to stop the financial exploitation of seniors. The measure, the Senior$afe Act, passed the house on a voice vote. The Act ensures that advisors, compliance officers and other supervisory personnel who report elder financial abuse to federal or state securities regulators, law enforcement, adult protective services or other appropriate agencies are shielded from liability for violation of privacy laws on the condition that those individuals have received training on how to spot signs of elder abuse. Meanwhile, Senator Susan Collins (R-Maine), Chairwoman of the Senate Special Committee on Aging, has introduced a companion bill in the Senate. In May, Senator Collins urged state securities regulators to build support for the bill. Unlike the Alabama, Indiana and Vermont laws that follow the NASAA model, the Senior$afe Act does not require the reporting of suspected abuse. Rather, it simply provides legal protection to those who decide to report suspected abuse. The Financial Services Institute (FSI) supports the Senior$afe Act, which was described as "a big step forward in the prevention of elder financial abuse across the country" by FSI president and chief executive Dale Brown.

FINRA, by way of Regulatory Notice 15-37, proposed its own rule on financial exploitation of seniors and other vulnerable adults. FINRA's proposal attempts to accomplish two goals: (1) provide the advisor, at the time of an account opening or routine updating, information on a "trusted contact" who can be contacted in the event that the advisor believes a customer is being subjected to financial fraud or abuse, and (2) allow, but not require, an advisor to place a temporary "hold" on disbursements from an account when there is a reasonable belief that the customer is being exploited. The proposal includes a proposed "safe harbor" period for the time during which

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Delaware—Insurance Coverage & Bad Faith

BAD FAITH FAILURE TO SETTLE: WHEN DOES THE CLOCK START TICKING IN DELAWARE?

By Thomas J. Gerard, Esq.*

KEY POINTS:

- When does the statute of limitations begin to run in Delaware cases involving bad faith failure to settle?
- The Delaware Supreme Court has decided that the statute begins to run when an excess judgment becomes final and non-appealable.

Thomas J. Gerard

The relationship between an insurance carrier and its insured during litigation is often fraught with a delicate balance of interests. At times an insurer's corporate self-interest may seem to drive its decisions regarding litigation and may seemingly result in a conflict of interest with its insured, possibly putting it in a position of bad faith. When an insurer is alleged to have acted in bad faith by failing to settle a third-party insurance action, the insured may pursue a claim for breach of contract. Any lawsuit against an insurer based upon breach of contract must be filed within three years pursuant to 18 *Del. C*. § 8106. When the three-year period begins to run has been considered by the Delaware Superior Court. In *Hostetter v. Hartford Insurance Co.*, 1992 Del. Super. LEXIS 284 (Del. Super. July 13, 1992), the court determined that the statute of limitations began to run when the third party learned the insurer refused to cover or defend the claim. Application of this interpretation could create tension between the carrier and its insured if a carrier refuses to settle a case within policy limits that exposes the insured to an excess verdict.

The Delaware Supreme Court recently considered this question in *Connelly v. State Farm Mut. Auto. Co*., 135 A.3d 1271 (Del. 2016). It determined that the statute of limitations on a bad faith claim begins to run when an excess judgment becomes final and non-appealable.

The facts in *Connelly* are similar to those we see on a regular basis when a decision is made to take a case to trial. In 2007, State Farm's insured, Ronald Brown, rear-ended a vehicle operated by Christina Connelly. Brown had a liability policy providing coverage of $100,000 per person and $300,000 per occurrence. Connelly sued Brown for injuries, and State Farm provided Brown with a defense under his policy. On May 10, 2011, Connelly offered to settle the case for $35,000. The demand was rejected on June 9, 2011, and the case went to trial. Brown admitted that his negligence was the proximate cause of the collision, and the jury awarded Connelly $224,271.41, plus pre-judgment interest of $92,958.96, costs of $5,435.28 and post-judgment interest of $10,580.64. State Farm only paid a portion of the award, and the deadline to appeal expired in April 2012.

In September 2014, Connelly brought a claim against State Farm and Brown as Brown's judgment creditor. Brown alleged State Farm acted in bad faith, maliciously and without any reasonable justification when it refused to settle the claim for less than policy limits and failed to seek appellate review of the excess judgment. State Farm moved to have Connelly's claim against it dismissed for lack of standing, at which point Brown assigned his rights to pursue an action against State Farm to Connelly, who then amended the complaint to reflect the assignment. State Farm moved to dismiss the case, asserting it was barred by the three-year statute of limitations proscribed in 10 *Del. C*. § 8106, which State Farm contended began to run on either May 10, 2011, when the plaintiff's demand was made, or on June 9, 2011, when the offer was rejected.

The Delaware Superior Court heard arguments and did not address substantive issues raised in the complaint as to whether State Farm's actions amounted to bad faith. Instead, the Superior Court focused on the motions before it, confirming that the statute of limitations in 10 *Del. C*. § 8106 applied and that the central issue was when the statute of limitations began to run. In contrast to State Farm's position, the plaintiff contended the statue of limitations began to run when a final judgment was entered against the insured that was in excess of the policy limit.

The plaintiff asserted in her complaint against State Farm that "State Farm acted in bad faith […] in failing to accept the Plaintiff's settlement offer[…]." The Superior Court relied upon the plaintiff's own words as to when the breach occurred and noted that well-settled Delaware law holds the applicable statute of limitations begins to run at the time of the wrongful act. The Superior Court held that the statute of limitations began to run on the date State Farm denied the plaintiff's settlement demand, putting her on notice of the cause of action. Whether the statute began to run in May 2011 or June 2011 was of no consequence since either date, as the triggering event, resulted in a filing that was time-barred.

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LAND USE LITIGATION

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In addition to the damages allowed by RLUIPA, these cases often attract the attention of the Justice Department, which conducts an independent inquiry to determine whether the plaintiff's civil rights have been violated. Compliance with the Justice Department's demands for production of documents and witness interviews also adds a great deal to the cost of RLUIPA litigation.

Municipalities that find themselves defendants in RLUIPA litigation turn to their insurers, who strive to provide a vigorous defense. An analysis of the many coverage questions surrounding RLUIPA litigation is beyond the scope of this article. However, experience has shown that among these questions is whether violation of RLUIPA requires a showing of intent, and the answer is anything but clear. The insurer's dilemma is the moral hazard of insuring against inappropriate and illegal discriminatory conduct. Should insurers provide insurance that allows public officials to implement and enforce land use regulations that discriminate against religious groups? A solution to this problem is equally evasive. ■

FINRA TASK FORCE

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number of public arbitrators on the list from 10 to 15. FINRA would also increase the number of strikes to the public list from 4 to 6 in order to keep the proportion of strikes the same under the amended rule as it is under the current rule (See FINRA update: FINRA Board of Governors Meeting, May 6, 2016 at FINRA website).

The FINRA Board of Governors did not release any further explanation as to why it only authorized for filing with the SEC these three proposed amendments out of the multiple recommendations from the FINRA Task Force. The amendments authorized for filing with the SEC are relatively minor and somewhat inconsequential. For example, if the same dispute with the same party was fully and finally adjudicated on the merits, such a motion should obviously be permitted at any stage in the litigation and would not need a specific rule to address such a situation.

However, there does not seem to be any indication that this task force would be providing any additional recommendations in the future. Therefore, FINRA arbitration practitioners cannot expect substantive changes as recommended by the FINRA Task Force, other than those listed above, to be implemented in the future. ■

PROTECTING SENIORS

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the hold is in effect. Firms would also incur additional responsibilities to provide disclosure about their right to share certain private information with the customer's trusted contact. The proposed FINRA rule has not yet been approved. However, the treatment of seniors and other vulnerable investors is a FINRA examination priority in 2016.

Finally, protecting senior investors seems to have been a priority of two recent arbitration awards. In early 2016, an arbitration panel ordered Morgan Stanley to pay more than $8.6 million to a retiree for losses tied to alleged unauthorized trading and unsuitable investments, including an investment in a risky Chinese internet company. The FINRA arbitration panel awarded the customer, who is in his seventies, $6 million in damages, along with $2 million in punitive damage and more than $491,700 in legal and other costs. In another recent FINRA arbitration, an elderly woman and her daughter were awarded more than $50,000 for what an arbitrator deemed insufficient advice regarding the tax consequences of an IRA distribution. The award included compensatory damages, attorney's fees and treble damages pursuant to a Florida state law preventing the "exploitation of an elderly person."

Clearly, protecting senior investors is on the minds of regulators, state and federal lawmakers, as well as arbitration panels. All agree that protecting the elderly from abuse is a high priority. However, between the "mandatory" model advanced by the states and the permissive model advanced by FINRA and federal lawmakers, there are differences of opinion on how best to accomplish the objective. In doing business with senior citizens, financial services professionals must keep themselves informed as to any developments with the proposed federal law, FINRA proposed rule and individual states in which they are licensed. ■

Delaware—Workers' Compensation

ATTENTION, CONTRACTORS! THAT SUBCONTRACTOR YOU ARE THINKING OF USING MIGHT COST YOU MUCH MORE THAN YOU ANTICIPATE

By Linda L. Wilson, Esq.*

KEY POINTS:

- A contractor can be liable for a workers' compensation claim even though that contractor never employed the injured individual.
- Be wary of subcontracting with a subcontractor that is not principally located in Delaware.

Linda L. Wilson

Contractors working in Delaware are likely aware that, if they use an independent contractor or subcontractor who does not have workers' compensation insurance, they could be "on the hook" for workers' compensation claims of the independent contractor/subcontractor or its employees. Contractors are likely also aware that the law provides a "safe harbor" from this liability. Pursuant to 19 *Del. C*. § 2311(a)(5), a contractor will not be deemed to insure workers' compensation claims of its independent contractor/subcontractor or the employees of its independent contractor/subcontractor if the contractor obtains from the independent contractor/subcontractor and retains for three years from the date of the contract "a certification of insurance in force under this chapter."

The Delaware Supreme Court, in *Cordero v. Gulfstream Development Corp*., 56 A.3d 1030 (Del. 2012), discusses the liability and protection found in § 2311. In *Cordero*, a sub-subcontractor provided a subcontractor with a certification of workers' compensation insurance. However, by the time the work injury occurred, there was no policy in effect because it had been cancelled 21 days earlier. The claimant in *Cordero* sought to have his claim insured by the subcontractor and general contractor, arguing that § 2311 imposes an absolute obligation on contractors to insure the workers' compensation claims of their subcontractors' employees. The court disagreed, holding that a certification of insurance is "in force" if it is valid on its face at the time it is furnished to the contractor.

The *Cordero* court also discussed narrow circumstances where heightened scrutiny by the contractor might be required pursuant to an implied obligation of good faith. In *Cordero*, the subcontractor and general contractor avoided the financial responsibility of being deemed to insure the workers' compensation claim because the subcontractor complied with the safe harbor provisions of § 2311(a)(5), had obtained/retained a certification of insurance that was valid on its face, and the facts of the case did not trigger an implied obligation for heightened scrutiny.

In *Gregory S. Otter v. Green-Light Solutions, LLC.*, (Del. IAB) Hearing Nos. 1385184, 1390163, and 1392097 (June 3, 2013), the general contractor did not have a similarly good result. Despite taking steps like those taken by the subcontractor in *Cordero* to access the safe harbor protection of § 2311(a)(5), and despite no finding by the Board of facts that would trigger an obligation for heightened scrutiny, the general contractor in *Otter* was still held financially responsible for the workers' compensation claim of its subcontractor's employee.

The facts and procedural posture of *Otter* are somewhat complex. The claimant (Otter) was injured on July 3, 2012, while working for Green-Light Solutions, Inc. (Green-Light). At the time of the injury, Green-Light was a subcontractor for Neighborhood House, Inc. and had workers' compensation insurance through New Jersey Casualty Insurance Company (NJ Casualty). A certification of insurance "that purported to show valid workers' compensation coverage" was provided to Neighborhood House.

Upon receiving notice of the July 3, 2012, claim, NJ Casualty disputed coverage. A hearing on the coverage issue was held on October 18, 2012. After examining the insurance policy and hearing representations about where the claimant worked, the Board determined that the NJ Casualty policy did not cover Otter's claim and dismissed NJ Casualty from the case.

Otter then filed petitions against Green-Light, East Wind Enterprises, LLC (East Wind) and Neighborhood House. He alleged that he was employed by either Green-Light or East Wind at the time of his injury and that Neighborhood House was responsible for insuring his claim because it was the general contractor on the job. The petitions were heard on April 26, 2013, and it was in this decision that the Board found Neighborhood House financially responsible for insuring Otter's claim. The Board arrived at this decision because it determined that Neighborhood House "failed to perform the due diligence required by Section 2311."

Although the Board in *Otter* discusses the *Cordero* decision, it appears that the Board in *Otter* imposed a greater burden on Neighborhood House than is required by § 2311, as interpreted by the court in *Cordero*. In *Otter*, a certification of insurance "that purported to show valid workers' compensation coverage" was provided

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Florida—General Liability

DEATH OF THE NEGLIGENT MODE OF OPERATION THEORY: AN UPDATE ON FLORIDA'S TRANSITORY, FOREIGN SUBSTANCES STATUTE

By R. Thomas Roberts, Esq. & Amanda L. Ingersoll Esq.*

KEY POINTS:

- The negligent mode of operation theory is no longer viable in slip-and-fall cases involving foreign, transitory substances.
- Florida statutory law establishes the burden of proof for a business's liability arising from transitory, foreign substances in its establishment.
- In a slip-and-fall action, the plaintiff must prove that the business establishment had actual or constructive knowledge of a foreign, transitory substance.

R. Thomas Roberts

Amanda L. Ingersoll

Within the past 15 years, Florida's slip-and-fall law has experienced its own ups and downs. In 2010, noting that slip-and-fall accidents were the most common type of liability claims facing insurers of bars, restaurants and taverns, the Florida Legislature revised the statutory burden of proof required to prevail in a slip-and-fall action. Approximating that eight million people are injured each year as a result of slip-and-fall accidents—costing an estimated $100 billion annually—the legislature's 2010 bill switched Florida law back to its pre-2002 burden of proof and eliminated a plaintiff's ability to reply upon the manner in which a business operates to establish that it was negligent.

Beginning notably with the Florida Supreme Court's 2001 opinion in *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315 (Fla. 2001), the legislature sought to codify the burden of proof required to prevail in an action against a business establishment for a slip-and-fall involving a foreign, transitory object. The *Owens* court recognized that a foreign, transitory object—such as the infamous banana peel or a puddle of water—is an inherently dangerous condition from which an unknowing business patron should be protected. Historically, Florida case law required plaintiffs to show that a business had actual or constructive knowledge of a dangerous condition, and, as a result, several theories arose aimed at establishing that a business had, or was imputed, the requisite knowledge. One of these theories focused on a business's manner of operation, which was utilized to show that the way in which the business operated was negligent and resulted in the creation of a dangerous or unsafe condition. This theory effectively eliminated the need to establish knowledge that a specific substance was present. Recognizing the uncertainty arising from previous decisions attempting to apply the knowledge element in a slip-and-fall actions, with those altering or eliminating the knowledge element in favor of the operation theory, the *Owens* court took the final step and eliminated the requirement of knowledge altogether.

Accordingly, under *Owens*, once a plaintiff demonstrated that her fall was the result of a foreign substance, a rebuttable presumption of negligence arose, shifting the burden to the property owner to show it exercised reasonable care to keep the premises safe. The Florida Legislature responded to the *Owens* opinion by passing a bill to codify the burden of proof a plaintiff must meet in a slip-and-fall action. The bill created Section 768.0710, Florida Statues (2002), which provided that a claimant had the burden of proving that: "…[t]he person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises. Actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim. However, evidence of notice or lack of notice offered by any party may be considered together with all of the evidence… ."

In 2010, the legislature undertook its most recent revision, noted above, by passing a bill to repeal the 2002 statute, Section 768.0710, and enact a new statute in its place, Section 768.0755, Florida Statutes (2010). The most obvious difference between the 2002 and 2010 statutes is the re-establishment of the pre-*Owens* knowledge element. Under this current statutory scheme, a person who slips and falls on a transitory, foreign substance in a business establishment "must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it." The statute further instructs that constructive knowledge may be proven by circumstantial evidence showing that:

> The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
>
> The condition occurred with regularity and was therefore foreseeable.

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On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

James Johnson (Cherry Hill, NJ) saw the claimant voluntary withdraw an arbitration demand that involved first-party claimed medical expenses in excess of $163,000. Jim relied upon a favorable IME and the medical records review reports of multiple physicians, who opined that the surgical procedures were neither medically necessary nor causally related to the subject motor vehicle accident, as well as a pending Medical Review Organization request that contained strong medical evidence of a lack of causation, to convince opposing counsel to withdraw the arbitration demand.

At a UIM arbitration in Cumberland County, **Christopher Woodward** (Harrisburg, PA) prevailed in a case involving a claimant with significant pre-existing conditions and a continuation of pre-accident treatment for years after the accident in question. Compelling evidence offered at the hearing included the investigating police officer's description of the accident as a "tap." Bodily injury limits were $15,000. The arbitrators' valuation was well below that, resulting in an award of zero damages for the plaintiff.

Robert Faller and **Mark Agin** (Long Island, NY) obtained summary judgment in favor of their client in a construction case. The plaintiff sustained a serious injury when a wheeled trash container owned by the defendant client, and filled with construction debris that weighed almost 800 pounds, ran over the plaintiff's foot. The plaintiff alleged that there was a defect in the wheels of the container that caused it to stop and start while the plaintiff was pushing it. The plaintiff claimed the container's wheel became stuck, causing the container to jump and roll back onto his foot. Following discovery, the defendant moved for summary judgment. Mark prepared the motion and Bob handled the oral argument. The court granted summary judgment from the bench following oral argument. The plaintiff then moved to reargue the decision, which the court denied.

In a construction accident case filed in the New York Supreme Court, Bronx County with a potential seven-figure exposure, **Steve Kaplan** (New York, NY) obtained summary judgment. The plaintiff allegedly sustained brain and other injuries when struck by a steel stud that fell from the third floor of the premises. He filed suit against the general contractor and seven of its subcontractors, including our client, who provided a hoist, among other things. Steve successfully obtained an order directing the general contractor to make the construction site available for an inspection. He then obtained an order directing the plaintiff to produce, in advance of that inspection, a description of the specific location of the accident and photographs depicting that location. After the inspection, and before written discovery was complete or any depositions were held, Steve moved for summary judgment based on an investigator's affidavit that the hoist was sufficiently distant from the accident location that it could not have been involved. The plaintiff, general contractor and two other defendants all opposed the motion, arguing that summary judgment was premature. The general contractor also argued that, based on a broadly-worded indemnification provision, our client was contractually obligated to indemnify it for any personal injuries occurring on the construction site while the hoist remained on site, whether or not those injuries related to or arose out of our client's work or equipment. These arguments were rejected by the court.

David Blake (Cherry Hill, NJ) recovered $575,000 for a national insurance company in an insurance fraud suit. The case involved several types of fraud, including premium fraud, fraud in the application for insurance and claim fraud (pre- and post-claim submission).

Alicia Smith (Cherry Hill, NJ) obtained summary judgment as to the claims against her client, a health drink brand. Alicia's client was sued when packaging came undone and a pallet of its product fell onto a delivery driver. Discovery revealed that the packaging and shipping was all outsourced to other companies, the product was delivered safely and intact from California to Pennsylvania, and the product packaging remained intact, even after the pallet fell off the lift gate of the truck at its final destination in Philadelphia. The photos showing torn packaging were established to have been taken after the store owners came out to bring the product into the store.

The Delaware Supreme Court affirmed **Gary Kaplan** and **Jessica Tyler**'s (Wilmington, DE) judgment on the pleadings for a national fitness center. The plaintiff signed a gym membership agreement upon joining the facility that included a release of liability for all claims, including those arising from the alleged negligence of the client. Years later, the plaintiff filed suit, alleging he was injured at the gym due to the fitness center's negligence. On the basis of the release he signed, Gary and Jessica filed a motion for judgment on the pleadings. The plaintiff asserted various arguments, including that the Connecticut court did not uphold the same client's release in that state. While Delaware law permits releases for one's own negligence, in practice, the releases are rarely upheld. The Superior Court granted the motion for judgment on the pleadings, finding that the release was clear, not unconscionable and not against public policy. The Delaware Supreme Court agreed and affirmed.

Following oral argument before the Montgomery County Court of Common Pleas, **David Wolf** and **Michael Salvati** (Philadelphia, PA) obtained summary judgment in a case that presented an unusual fact pattern. Our client was the franchisor of a janitorial brand that sold a franchised cleaning business to a franchisee. When a customer suspected that the franchisee or his workers were stealing, the customer reviewed security video, which showed the franchisee engaging in inappropriate sexual activity. He was also accused of stealing certain alleged missing items, including costly jewelry. The

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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plaintiffs filed suit solely against the franchisor, seeking compensatory and punitive damages. The plaintiffs claimed the franchisee was not an independent contractor as stated in his franchise contract, but was a de facto employee based on the franchisor's control over the means and methods of the cleaning work. The plaintiffs also argued that the franchisor was directly liable for failing to perform a background check of the franchisee, which would have revealed a series of drug charges and a guilty plea for aggravated assault. In granting summary judgment for the franchisor, the court agreed that, even if an agency relationship existed, the actions of the franchisee were outside the course and scope of the agency and that the prior criminal conviction did not relate to the current alleged offenses of theft and inappropriate sexual activity.

Thomas Wagner and **Robert Stanko** (Philadelphia, PA) successfully defended a local luxury hotel and its Paris-based parent company in an eleven-day jury trial in the Philadelphia County Court of Common Pleas. The plaintiff alleged she suffered from post traumatic stress disorder as a result of hotel employees allowing her ex-boyfriend unauthorized access to her hotel room as she was sleeping. The jury of six women and two men awarded no compensatory damages and $25,000 in punitive damages against a final demand of $2.5 million.

Following a three-day jury trial, **Martin Sitler** and **Michael Humphries** (Jacksonville, FL) obtained a defense verdict in favor of a Jacksonville apartment complex. The plaintiff alleged that on a rainy day, when exiting the apartment complex's leasing office, she slipped on the top step of the stairway leading from the leasing office to the parking lot. The plaintiff claimed that she suffered a concussion, a torn rotator cuff, a partial tear of the superior labrum and permanent back pain. She subsequently had surgery to repair her rotator cuff and superior labrum. The plaintiff sought compensation for past and future medical expenses, lost wages and loss of earning capacity for the rest of her life, as well as pain, suffering, mental anguish and loss of the capacity for the enjoyment of life. The defense relied on the plaintiff's poor choice of footwear, her lack of credibility and the lack of credibility of her witnesses. Additionally, the defense presented inconsistencies in the plaintiff's reporting of previous neck and back injuries to her treating physicians. The jury returned a defense verdict after less than an hour of deliberation.

After a six-day bench trial in the U.S. District Court for the Southern District of New York, **Jay Hamad**, **Daniel McDermott** and **Christopher DiCicco** (New York, NY) obtained a verdict, defeating our adversary's cross-claims for indemnity and defense costs, and won partial indemnity on behalf of our client, together with an award of attorneys' fees and defense costs. Our client, the general contractor on a project to rehabilitate the Tappan Zee Bridge, chartered a barge as a floating work platform and entered into a subcontract agreement with the tug operator whose tug was used to ferry electricians to the work site. Our client's employee, a barge deckhand, fell into the river after an impact between a tug and the barge. After jointly settling with the employee for $794,448.97, the subcontractor and our client sought indemnification from one another. We prevailed by establishing that the tug was registered with the U.S. Coast Guard under a defunct entity and was operated by an unlicensed captain, and the subcontractor breached its duty of care by failing to exercise ordinary care, caution and maritime skills in the operation of the tug. Additionally, the court accepted our argument that the subcontractor's destruction of the captain's logbook after anticipation of litigation constituted spoliation, warranting an adverse inference that evidence contained within the logbook would have been unfavorable to the subcontractor. The court rendered a verdict in our client's favor, dismissing the subcontractor's cross claims and ordering the subcontractor to pay $62,779.59 to our client, representing the amount our client paid in excess of its percentage of fault.

Julie Dorfman (Roseland, NJ) obtained a defense verdict following a one-week bench trial in Morris County, New Jersey. Julie represented a lake community association in a lawsuit involving a dispute over the non-payment of annual dues and assessments by the plaintiffs, five homeowners living within the community. The lawsuit was initiated shortly after the association filed liens against the plaintiffs' properties for failing to pay dues and assessments for more than a decade. It was the plaintiffs' position that membership in the association was voluntary because there was no deed restriction requiring either mandatory membership in the association or the payment of dues to the community. Therefore, the plaintiffs sought declaratory relief that the liens were improper and that they were not obligated to be members of the association and not obligated to pay dues. The plaintiffs also sought an award of monetary damages, punitive damages and attorney's fees. Prior to trial, Julie was successful in obtaining dismissal of the plaintiffs' claims for punitive damages and attorney's fees. Following trial, the court held that the defendant's by-laws, although unrecorded, applied to everyone in the community, requiring all property owners in the community to participate as members of the association and pay annual dues and assessments.

After a five-day trial in Burlington County, New Jersey, **Douglas Suplee** (Cherry Hill, NJ) obtained a defense verdict on behalf of an auto manufacturer. The plaintiff alleged a violation of the New Jersey Lemon Law, as well as breach of express and implied warranties, in connection with her lease of a vehicle she claimed to be substantially unsafe as a result of erratic shifting. Two different dealers were unable to find a problem with the way the vehicle shifted gears, but each performed customary software updates to the vehicle on all but one occasion. The vehicle was equipped with a nine-speed transmission, which is relatively new to the automotive industry. Doug was able to explain to the jury the benefits of a nine-speed transmission and why it shifts differently from other vehicles. He successfully argued that modern day vehicles are, to some extent, computers on wheels and that the software updates performed were not repairs but, rather, regular updates similar to those on one's smartphone or personal computer. In addition, Doug was able to preclude the plaintiff's expert at trial, resulting in a directed verdict as to the plaintiff's breach of warranty claims. As to the remaining Lemon Law claim, the jury found that the plaintiff had not established a substantial impairment to the use, value or safety of the vehicle, especially considering the fact that the plaintiff had accumulated over 18,000 miles per year during each of the first two years of the lease period.

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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The jury returned a defense verdict in less than 30 minutes.

Christopher Reeser and **Brittany Bakshi** (Harrisburg, PA) obtained summary judgment in York County, Pennsylvania in a negligent security/wrongful death case. Chris and Brittany represented a local gas station/convenience store. The plaintiff (the Estate for the deceased) claimed that on the date of the incident, the deceased and a friend pulled into the convenience store and parked their vehicle. Immediately thereafter, a female co-defendant parked her vehicle and began to yell at the pair, accusing them of cutting her off. Unbothered by the yelling, the friend entered the convenience store and then exited. In the short amount of time the friend was in the store, the female co-defendant had called her boyfriend, who arrived on scene and began to assault the friend. The deceased came to the friend's aid and suffered traumatic injuries at the hands of the boyfriend. The entire assault lasted 39 seconds. Upon seeing the deceased injured, the convenience store's employees called the police. The plaintiff filed suit, arguing that our client failed to adequately ensure the safety and security of its customers and failed to intervene in the altercation and/or rescue the deceased. The court concluded that our client could not have foreseen that a person who was not previously on the property would have arrived and assaulted a patron based merely on the female co-defendant yelling at the friend and the deceased.

Ray Freudiger (Cincinnati, OH) obtained a defense verdict in a week-long trial. The wrongful death and survivorship claims were filed by the estate of the decedent, who was killed when a farm truck backed over her at a grain processing facility. We represented the driver and owner of the farm truck. The estate sought $5 million in damages and had rejected an offer of $200,000. The plaintiffs had four experts: an agricultural safety expert, an accident reconstructionist, an ER doctor and an economist. Their safety expert and accident reconstructionist claimed the truck driver failed to follow safe backing procedures, the truck had an inoperable reverse lamp and inoperable horn, which made the truck unsafe to be driven. Ray was successful in a motion for directed verdict on behalf of the truck owner on the grounds that the driver was not acting as his agent or employee and that there was no evidence of negligent entrustment. The case proceeded against the truck driver and the grain company. Ray presented evidence that: the plaintiff's decedent was familiar with the area, particularly that the ramp where the incident happened was used almost exclusively for trucks to back up to the grain receiving pit; our driver saw the pedestrian on the ramp who then moved from the ramp before our driver began backing up; and that the plaintiff must have been distracted by her use of a cell phone and stepped up on the ramp while the driver was backing up. Ray argued that the driver was not required to ensure the pedestrian was paying attention, did not have to give her verbal warning that he intended to back up, and that the size and sound of the truck was ample warning of his intentions. The jury held that the plaintiff's decedent was 100% responsible for the accident.

In a case involving a fatal traffic accident, **Daniel Krebbs**, **Sang Lee**, **Kimberly Boyer-Cohen** and **Shivaun Young** (Philadelphia, PA) obtained a defense verdict following a two-week trial in the Philadelphia Court of Common Pleas. The case involved a tragic accident that resulted in the death of a 29-year-old woman four days before Christmas. We represented the owner and operator of the tractor-trailer that caught fire following a blown tire in the Lehigh Valley Tunnel. As a result of this initial incident, traffic through the tunnel was stopped completely while the tractor-trailer fire was being extinguished. The plaintiff's decedent was killed when she was rear-ended by one of the co-defendants while stopped in the traffic backlog. The day before the accident, the tractor-trailer was cited for having an active engine oil leak, which the plaintiffs claimed caused the initial accident and resulting fire. After four hours of deliberations, the jury found in favor of the owner and operator and apportioned liability at 100% against the co-defendants in the amount of $1.8 million.

HEALTH CARE DEPARTMENT

Thomas Lent and **Bethany Blood** (Erie, PA) obtained summary judgment in a medical malpractice case on behalf of our client, a family practice physician, who was consulted to provide medical management for a female patient admitted to the hospital's mental health unit. On the fourth day of the patient's stay, she died as a result of bilateral pulmonary emboli. The case brought against the admitting psychiatrist, the hospital and our client alleged gross negligence for failing to provide prophylactic anticoagulation and failing to appreciate the risk for development of deep vein thrombosis due to an alleged immobility. Thom and Bethany successfully argued that our client was covered by the provisions of the Pennsylvania Mental Health Procedures Act because our doctor's care of the patient was medical care designed to facilitate the patient's recovery from mental illness; therefore, the doctor was entitled to immunity. Although the plaintiff's counsel used the magic words "gross negligence" in the complaint, the court correctly determined that our client's conduct did not rise to this level. Our motion and brief pointed to all of the steps the doctor had taken to treat the patient for conditions of dehydration and tachycardia, as well as his assessment of DVT risk prior to death. It appeared that plaintiff's counsel had drafted her three expert reports, not only based on the identical nature of the reports (despite being from three different specialty areas), but also due to the footnotes and citations to sections of the Pennsylvania Code in the reports. The overlay of the "gross negligence" language in the reports was fairly obvious, and the court focused not on that language, but on the actual conduct of our client physician.

Candy Barr Heimbach and **Michelle Wilson** (Allentown, PA) obtained a defense verdict in favor of our client, a hand surgeon, who had performed a carpal tunnel release procedure during which he admittedly lacerated—and immediately repaired—the median nerve. We contested negligence insofar as he adequately protected the nerve and was proceeding with the procedure when he felt something out of the ordinary. He investigated further and found that the median nerve had been pushed off its normal course by other tissue and was crossing the forearm. The jury found that he was not negligent.

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PROFESSIONAL LIABILITY DEPARTMENT

Sharon O'Donnell (Harrisburg, PA) and **Thomas Specht** (Scranton, PA) won a victory in the Berks County Court of Common Pleas relating to an appeal from a school board adjudication to terminate a former superintendent. The plaintiff appealed to the Berks County Court twice, alleging that the school board's adjudication was inherently biased, factually contrived and legally incorrect. The first adjudication was remanded to the board for reconsideration of its decision that was rendered against the plaintiff in absentia, after she failed to appear for a hearing. The second adjudication was appealed when the board president sat as a panel member and testified against the plaintiff. We argued that the law of the Commonwealth allows for this type of due process. The court thereafter heard argument, agreed with the District and affirmed the board's decision.

In an appeal of an insurance coverage dispute, **Walter Kawalec** (Cherry Hill, NJ) secured a victory in the Appellate Division. Our client's insured was a woman whose marriage fell apart when her husband left the marital home unannounced, desiring to start a new life, free of his then-wife. The insured moved out of the marital home, which stood empty for a number of months. Due to financial circumstances, the husband later returned to the marital home well after the insured had moved. He then was involved in an accident as a pedestrian as he was hit by a car. His auto insurer brought a coverage action against our client, alleging the husband was owed coverage under his wife's policy. The claim for coverage stemmed from two arguments. First, he alleged that an initial declaration sheet, which had mistakenly named the husband along with the wife but which was later amended to exclude him, established coverage for the husband through the initial policy period. The second argument advanced was that the husband and wife continued to be part of the same "household," thus triggering coverage during the initial policy period. The Appellate Division rejected these arguments, finding that the initial error in issuing the declaration sheet with the husband erroneously listed did not establish coverage at the time of the accident as an amendment had been issued prior to that date, which removed him from the policy. Further, the irrefutable evidence of record demonstrated that the husband had willfully left the property and abandoned the marriage well before the policy was instituted. As a consequence, the Appellate Division affirmed the decision of the lower court.

In an OSHA whistleblower/relaliation claim, **Phillip Harris** (Tampa, FL) and **Jessica Lanifero** (Jacksonville, FL) obtained a dismissal from the U.S. Department of Justice. The complainant alleged that his employer (a car dealership) failed to meet various OSHA workplace standards. The employee alleged he was terminated for making complaints to his employer. The respondent argued that the employee never made any complaints, the company complied with all OHSA standards and the employee was fired for a valid and non-retaliatory reason. Specifically, the employee was found to have engaged in time-theft by billing the company for an extensive amount of work that was not done. After both parties briefed the issues, the DOJ issued a formal dismissal of the charges.

On the eve of trial, **Sharon O'Donnell** (Harrisburg, PA) and **Thomas Specht** (Scranton, PA) won a summary judgment ruling in favor of all of the defendants, dismissing with prejudice the plaintiff's amended complaint and granting judgment in favor of the defendants on their counterclaim. The case was styled as an action for breach of contract (consulting agreement) and a violation of the Pennsylvania Wage Payment & Collection Law brought before the Philadelphia County Court of Common Pleas against a Harrisburg-based company by a former CEO who was fired for cause. The plaintiff claimed that, although he had a contract, he was treated as an employee and was entitled to an exit salary under his contract. We answered on the basis that he deceived the company's shareholders about his business practices and the true state of the company's financial affairs. We counterclaimed for approximately $100,000 in personal expenses he usurped from a financially-unstable corporate treasury. The plaintiff's failure to respond adequately to our pleadings and discovery rendered a jury trial unnecessary.

Michael Packer and **Danielle Robinson** (Fort Lauderdale, FL) obtained final summary judgment in favor of our insurance company client. The plaintiffs filed suit for breach of an umbrella policy after their claim for $1 million in uninsured motorist benefits was denied because they failed to maintain the required underlying auto insurance. The plaintiffs claimed actual damages in excess of $15 million and filed a count for bad faith, which was stayed pending the outcome of the breach of contract count. The plaintiffs argued the carrier waived its right to enforce the provision of the policy requiring the underlying insurance because it had knowledge that the plaintiffs did not maintain the required limits before it issued the policy. The court granted summary judgment in favor of our client, finding the policy was clear and unambiguous as to the required underlying limits, and because the plaintiffs failed to maintain those limits.

Following a three-day non-jury trial in the Allegheny County Court of Common Pleas, **Brigid Alford** (Harrisburg, PA) obtained a defense verdict. At issue were counts for breach of contract and statutory insurance bad faith, challenging the insurer's denial of a hail claim under a commercial property insurance policy.

Trish Monahan (Pittsburgh, PA) successfully resolved an insurance contract/bad faith lawsuit in federal court by joining an independent adjusting company as a third-party defendant on a breach of fiduciary duty claim. The adjusting company was unsuccessful on a motion to dismiss, and the case proceeded to mediation, where the adjusting company eventually agreed to pay 80% of the contract claim against the carrier. The adjusting company had agreed to settle a property damage claim with the insured's public adjuster without authority from the carrier, in breach of the adjusting company's fiduciary duty to the carrier.

Following a jury trial, **Allison Krupp** (Harrisburg, PA) obtained a directed verdict from a Philadelphia County judge in a case that arose from a rear-end motor vehicle accident in which the insured's nephew was operating the insured's vehicle without his knowledge or permission. The plaintiff filed suit against the insured and his nephew. The nephew was sued for negligence, and the insured was sued for negligent entrustment. The plaintiff failed to present evidence

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to establish either element, and a motion for compulsory non-suit was granted as to the negligent entrustment claim at the close of the plaintiff's case. Despite strong opposition, the judge permitted the alleged negligence claim to proceed. At the close of the insured's case, a motion for directed verdict on the negligence claim was granted by the judge.

David Shannon and **Jon Cross** (Philadelphia, PA) obtained a non-suit after a three-week bench trial spread over several months in Bucks County, Pennsylvania. Our client was a third-party defendant in a multi-million dollar breach of contract claim related to an ERP software implementation. The defendant had filed a counterclaim against the plaintiff, alleging breach of contract related to a computer system outage that occurred during the course of our client's consultant services at a public utility water company. Both the plaintiff and the defendant claimed several million dollars in damages against each other, along with multi-million dollar attorney fees claims. After hearing all of the evidence by both parties, the court ordered a non-suit on all third-party claims against our client, including any claim for attorney fees and costs.

In this legal malpractice action, **Edwin Schwartz** (Harrisburg, PA) successfully defended the attorney/defendant who was prosecuting a collection action on behalf of a local bank (co-defendant) against the plaintiff and caused the plaintiff's private financial information (name, address and SSN) to become part of the public record. The plaintiff responded by filing a complaint against the attorney and the bank, asserting claims of negligence, negligence per se, invasion of privacy, conversion, intentional infliction of emotional distress and concerted tortious action. The plaintiff claimed psychiatric injuries due to the worry of future identity theft, which was initially supported by the plaintiff's medical expert. After two days of trial and effective cross-examination of the plaintiff's medical expert, the court granted non-suit in favor of the defendant attorney on all counts, finding that the plaintiff failed establish any "actual" quantifiable damages.

Arthur "Terry" Lefco and **Alesia Sulock** (Philadelphia, PA) obtained a directed verdict after a four-day jury trial in Philadelphia County. The plaintiff, a Philadelphia police sergeant who had been discharged, sued the lawyer provided by the FOP at a grievance arbitration on the basis that, had the lawyer done a better job, he would never have been fired. In response to videotape evidence of 22 clear instances of lying about work hours and proven false entries by him in the official time records, the sergeant maintained that: (1) "everybody did it."; (2) his supervisors had approved it; and (3) no one had ever been fired for such trivial matters before. His discharge was affirmed. The case was defended by essentially replicating the arbitration hearing, playing the surveillance videos for the jury and putting on convincing evidence, including that of former Police Commissioner Ramsay. We also showed through expert testimony that the lawyer represented the union, not the grievant, at the arbitration and that the union had been consulted and approved the trial strategy. We eventually prevailed on a directed verdict because the plaintiff utterly failed to prove damages, which were non-speculative.

After receiving summary judgment in the lower court, **Arthur "Terry" Lefco** and **Alesia Sulock** (Philadelphia, PA) successfully received affirmation in the Pennsylvania Superior Court. The plaintiff operated a restaurant in northeastern Pennsylvania and claimed that he had been the victim of official oppression by representatives of the Pennsylvania Department of Agriculture who arbitrarily discriminated against him and eventually closed down his restaurant for alleged health violations when the real reason was revenge. This revenge was allegedly based upon the failure to give the inspector and her family the usual 50% discount. Allegedly enraged, the inspector set out to destroy the plaintiff's business. Our client was one of a string of lawyers who had represented the restaurateur in the underlying action, but that case was dismissed on several grounds by the federal district court. In this malpractice case, the plaintiff asserted that, had our client conducted the underlying case differently, he would have prevailed. We were successful in demonstrating to the court that the underlying case could never have succeeded as a matter of law.

Lee Durivage and **John Gonzales** (Philadelphia, PA) obtained summary judgment in a Title VII race discrimination case filed in the U.S. District Court for the Eastern District of Pennsylvania. The plaintiff worked as a correctional officer for a county prison. He was caught falsifying a log sheet and was terminated. The plaintiff argued that white employees had engaged in similar misconduct but had not been terminated. The court held that the plaintiff presented insufficient evidence to establish that the prison's stated reason for termination amounted to a pretext or that the decision was motivated by the plaintiff's race.

In a Section 1983 excessive force lawsuite, **John Gonzales**, **Candace Embry** and **Lauren Moser** (Philadelphia, PA) obtained summary judgment on behalf of the City of York and a city police officer. The plaintiff's decedent was shot and killed by police officers who had responded to a radio call of a disturbance at an after-hours club. The plaintiff alleged that the decedent was unarmed and surrendering to police when he was shot through the back and leg. Using experts in ballistics and forensic pathology, we were able to prove that the fatal shot could not have been fired from the location and at the angle the plaintiff alleged, thus disproving the plaintiff's theory that the officers shot the decedent while he was unarmed. The court, relying on the Supreme Court's decision in *Scott v. Harris*, held that the eyewitness testimony provided by the plaintiff was wholly unreliable when compared with the physical evidence at the scene. The court concluded that the force used by the officers was reasonable under the circumstances and dismissed the plaintiff's complaint with prejudice.

Joseph Santarone (Philadelphia, PA) obtained summary judgment in the U.S. District Court Eastern District of Pennsylvania. Our client was a small, private school that had allowed a coach to resign after it was learned that he exchanged thousands of text messages with a student, some of which were alleged to be sexual in nature. A number of years later, that same coach was arrested after having a sexual relationship with a 16-year-old student athlete while he was employed at a public school. He is currently in prison. The claim against our client was for negligence, and negligence per se, for

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violation of the Child Protective Services Law. The employment at our school occurred prior to the January 2014 post-Sandusky changes to the law. The court found there was no common law duty and that the law, as written at the time, did not apply to a prior school that the student plaintiff had never attended. The carriers attempted a number of times to negotiate a settlement, but plaintiff's counsel never moved from a $1.2 million demand.

WORKERS' COMPENSATION DEPARTMENT

John Zeigler (Harrisburg, PA) obtained a decision denying and dismissing an original claim petition specific to an alleged lower back injury. The Workers' Compensation Judge, relying on defense photo, video and testimonial evidence specific to the work site, determined that it was not possible the claimant had stepped off of a step into a drain hole as alleged. Additionally, the judge relied on surveillance evidence of the claimant tearing down a shed to discredit the claimant's allegation of disability. Critical to this determination was the employer's testimony about communications with the claimant, contemporaneous with the surveillance, wherein the claimant described himself as totally disabled. Finally, the judge credited the employer's medical expert over the claimant's treating physician that the claimant had no acute injury but, rather, a pre-existing and unrelated degenerative condition without any proven aggravation. The dismissal of the claim petition by the judge not only avoids potential long-term indemnity exposure, but also significant medical exposure as the claimant was scheduled for multi-level disc fusion surgery.

Tony Natale (Philadelphia, PA) successfully defended a national, mid-market life insurance company in the litigation of a claim petition wherein the claimant alleged a debilitating lumbar nerve root injury that occurred while carrying company property from her car into her home. Under cross-examination, the plaintiff admitted that she previously injured her back many months before the alleged work injury and was actively treating for the same at the time of the work incident. The claimant also admitted she was discharged from employment for cause and did not report the alleged work injury until after this discharge. In cross-examination of the claimant's medical expert, Tony highlighted that the expert was unaware of the claimant's prior injuries and treatment and had an incomplete history as to the date of onset of the her back pain and radiculopathy. The judge found the credibility of both the claimant and her expert to be in considerable doubt and denied and dismissed the claim petition.

Ashley Talley (Philadelphia, PA) obtained a defense verdict in a matter where the claimant was injured after a slip and fall at work. Although liability was initially acknowledged for a low back injury, the claimant sought to expand the injury to include a right shoulder condition, which required extensive surgical intervention. Medical depositions were presented on behalf of both parties, and in a decision mirroring the carrier's legal and factual arguments, the judge granted a termination of benefits, finding the claimant to have effected a full recovery from the work injury, while denying additional liability for the alleged right shoulder condition.

In this high-exposure case, **Michele Punturi** (Philadelphia, PA) received a favorable decision modifying a claimant's benefits. His benefits were subsequently terminated, and Michele defeated his penalty and modification petitions to expand the nature of injury. This case involved a significant amount of evidence, including the claimant's testimony, the deposition testimony of the IME expert, the claimant's medical expert and fact witness testimony of the employer. It is significant to note that in his decision, the Workers' Compensation Judge recognized the extreme importance of supplying all of the medical records and diagnostic study films, as well as past medical history, past medical records and diagnostic studies to the IME expert for comparison. The claimant's medical expert was not furnished with all medical records and diagnostic studies, nor did he have the applicable area of expertise. Also, the fact witness testimony of the employer was very detailed, and this witness was extremely knowledgeable of the employer's work availability and job tasks. His testimony supported Michele's argument that the job offer made to, and rejected by, the claimant was within the restrictions of the claimant.

In a claim petition filed against a national eye lens manufacturer, **John Swartz** (Harrisburg, PA) obtained a defense verdict. The claimant alleged a stress fracture due to overuse of the left foot while working for the employer. The claimant did stand 10-12 hours per day in her employment. The Workers' Compensation Judge found that, despite the claimant's extensive walking and standing during her shift, the stress fracture and subsequent surgery were not related to any work condition but were pre-existing. The judge relied on the evidence and testimony of the defendant's medical expert over that of the claimant's expert. Under cross-examination, the claimant's medical testimony was discredited since the physician's opinion was not supported by the objective diagnostic evidence or by the opinion of other treating physicians. In addition, the claimant did not report this as a work-related injury until after her short-term disability benefits expired. Claimant's counsel then appealed to the Workers' Compensation Appeal Board. John was successful in defending the appeal before the board, and the judge's decision dismissing the claim petition was affirmed in its entirety.

Tony Natale (Philadelphia, PA) successfully prosecuted a termination/suspension petition and defended a penalty/reinstatement petition for a large mushroom farm and distribution company in Berks County, Pennsylvania. The claimant suffered a traumatic fall that resulted in a myriad of neck, back and lower extremity injuries. Tony was able to establish through cross-examination of the claimant's medical expert that all of the ongoing treatment and disability was unrelated to the judicially determined work-related injury. The Workers' Compensation Judge rejected the claimant's medical expert on this basis and found that the claimant fully recovered from the work-related injury. The termination petition was granted, and the claimant's petitions were dismissed. ■

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On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

Audrey Copeland (King of Prussia, PA) secured a decision from the Commonwealth Court of Pennsylvania in favor of the employer in a Pennsylvania workers' compensation matter. The court affirmed the denial of a claim petition and the grant of a termination petition. The claimant alleged exposure to hazardous dust in the workplace and other injuries. The court rejected the claimant's assertion that the Workers' Compensation Judge failed to make essential credibility findings or analyze expert medical witnesses testimony. It could reasonably be inferred that the judge rejected the testimony of the claimant's family physician because the judge rejected the opinion of the claimant's occupational medicine expert upon whom the family physician had relied. There was also no error in omitting a credibility determination as to the employer's expert, a pulmonologist, because the claimant bore the burden of proof on his claim and the employer's expert's opinion was that the claimant did not suffer from occupational asthma. *Wolfe v. WCAB (Ervin Industries, Inc.)*, 2016 Pa.Commw.Unpub.LEXIS 278 (Pa.Commw., April 18, 2016).

In a second workers' compensation appeal before the Commonwealth Court, **Audrey** convinced the court to affirm the Workers' Compensation Judge's grant of a claim petition for a closed period only. The court held that the judge did not err in precluding the claimant from submitting the deposition of her rebuttal physician, which was scheduled for eight days after the final hearing. The judge had the discretion to control her docket and determine that this would have unreasonably delayed disposition of the case. The court cited Section 131.63(c) of the Judge's Rules, noting that the claimant had already been granted an extension, had deposed her physician, and had ample time to depose her rebuttal physician after the employer's IME physician's deposition and before the last hearing. The claimant also failed to offer a compelling reason as to why her physician's testimony was not sufficient. *Martinez v. WCAB (Roman Catholic Archdiocese of Philadelphia)*, 2016 Pa.Commw.Unpub.LEXIS 359 (Pa.Commw., May 12, 2016). ■

On The Pulse…

OTHER NOTABLE ACHIEVEMENTS*

SPECIAL APPOINTMENTS

David Wolf (Philadelphia, PA) was elected president of the Philadelphia Association of Defense Counsel (PADC) at the organization's recent meeting. David's one-year term as president began June 7th.

Alex Norman (Philadelphia, PA) has been named a Fellow of the American Bar Foundation. The Fellows, as the group is known, is an honorary organization of attorneys, judges, law faculty and legal scholars whose careers have demonstrated dedication to the welfare of their communities and to the legal profession.

PRO BONO

Marshall Dennehey has partnered with Christian Legal Clinics of Philadelphia (CLCP) to provide *pro bono* legal services to low-income and disadvantaged people. CLCP is an urban legal ministry that seeks to address injustice and poverty in partnership with existing inner-city host ministries by bringing volunteer attorneys into neighborhoods where their services are most needed. Since it began in 2002, CLCP has helped thousands of people and today runs 10 clinics throughout the Philadelphia area. More than 20 of our attorneys will rotate shifts to staff the clinic, which will be open one or two evenings per month. CLCP will provide required training for lawyers to assist clients in matters involving record expungement, family violence and custody battles, housing, employment, immigration, government benefits, consumer problems and more.

RECOGNITION

Ten attorneys from our Florida offices have been selected to the 2016 edition of *Florida Super Lawyers* magazine. A Thomson Reuters business, *Florida Super Lawyers* is a rating service of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. (A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html.) These attorneys are:

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- **David R. Bear**, Personal Injury, Medical Malpractice Defense
- **Ryan D. Burns**, Personal Injury Defense
- **Michael J. DeCandio**, Construction Litigation
- **Dennis P. Dore**, Personal Injury Defense
- **Phillip J. Harris**, Professional Liability Defense
- **Jessica Lanifero**, Civil Litigation Defense
- **Lindsay G. McCormick**, Construction Litigation
- **Chanel A. Mosley**, Health Care
- **Alan C. "A.C." Nash**, Civil Litigation Defense
- **Amanda J. Podlucky**, Personal Injury Defense

Our **Maritime Litigation Practice Group** has been recognized among the top national maritime practices in the 2016 edition of *Chambers USA: America's Leading Lawyers for Business*. Recognized in the Nationwide: Transportation: Shipping: Litigation (New York) category, the firm was called out for its handling of maritime "cargo claims, with futher expertise in areas such as insurance disputes and Jones Act issues." **Daniel McDermott**, co-chair of the maritime practice, and **Edward Radzik**, shareholder within the group, were cited as "notable practitioners" in the Chambers ranking. While both attorneys have received Chambers recognition in this area several times before, this year Dan was specifically cited for his experience in the areas of marine insurance, maritime personal injury, and marine construction projects. Ed was cited for his litigation experience concerning ship groundings, machinery and hull failures, and stevedore damage, as well as his work as a "mediator and arbitrator in significant maritime cases."

SPEAKING ENGAGEMENTS

Andrew Davitt (Philadelphia, PA) was a featured speaker at the 10th Annual Errors & Omissions Insurance ExecuSummit. He and fellow panelists presented the program "Are Stock Brokers Fiduciaries? Depends on Who You Speak With. The Department of Labor Fiduciary Rule." The program focused on the new Rule and its potential impact on investments and investment professionals.

Matthew Keris (Scranton, PA) recently delivered a presentation regarding electronic medical records. The presentation, "Legal Ramifications of the Electronic Medical Record," occurred at a regional meeting for the American College of Healthcare Trustees.

Sunny Sparano (Roseland, NJ) presented at the annual West Coast Casualty Construction Defect Conference. Along with the AVP of construction defect claims of Chubb Insurance, Sunny spoke about product liability claims in construction defect litigation, the different considerations for manufacturers and general contractors, and the nuances of these types of cases in east and west coast jurisdictions.

Michele Punturi (Philadelphia, PA) and **Frank Wickersham** (King of Prussia, PA) presented during the recent CLM conference in Atlanta. In "Aging Gracefully? The Senior Workforce and Impacts on Workers' Compensation," Frank joined a panel of industry professionals to address the challenges the aging workforce presents to the workers' compensation industry from a medical, legal, and claims perspective and provided practical, cost-effective strategies for managing those claims. Michele participated in a panel presentation, "Developing a Robust Return to Work Program," which provided practical tips and actionable information to expedite the return of injured employees to gainful employment while avoiding litigation under the Workers' Compensation Act.

Lynne Nahmani (Cherry Hill, NJ) and **Rosalind Herschthal** (Roseland, NJ) spoke at the American College of Health Care Administrators 50th Annual Convocation. In their session, "Avoiding and Defending Nursing Home Litigation," Lynn and Rosalind addressed which claims are the most difficult to defend and how to defend them, and how health care administrators can help in the process to limit exposure and litigation costs.

John Zeigler (Harrisburg, PA) spoke at the RIMS National Conference in San Diego. His presentation, "The War on Employee Misclassification—Risks and Costs to Employers and Insurers," covered state and federal actions and trends on the misclassification of employees and their impact on employer and insurer costs and risk. *The Insurance Journal*, *Carrier Management*, Workers Compensation.com, and *Safety National* featured the presentation in releases specific to RIMS highlighted events. ■

New Jersey—Professional Liability

THE IMPLICATIONS OF NEW JERSEY'S LIMITATION OF THE FEE SHIFTING STANDARDS

By Jeremy J. Zacharias, Esq.*

KEY POINTS:

- The New Jersey Supreme Court holds that a non-client would be awarded counsel fees only in cases where there is a finding that the attorney intentionally breached a fiduciary duty.
- This decision is of importance to New Jersey defense attorneys because the court defined the narrow circumstances in which a non-client may recover fees in a malpractice case.

Jeremy J. Zacharias

In *Innes v. Marzano-Lesnevich*, 2016 N.J. LEXIS 331, the New Jersey Supreme Court held that defendant attorneys can be held liable for counsel fees. If, in acting as trustees and escrow agents, attorneys intentionally breach their fiduciary obligations, counsel fees may be awarded.

Peter Innes and his wife Maria Jose Carrascosa were involved in a contentious divorce and custody battle over their daughter Victoria. Innes was a citizen of the United States and a resident of New Jersey. Carrascosa was a Spanish national and a permanent resident of New Jersey. Victoria, their only child, was born in New Jersey in 2000 and is a dual citizen of the United States and Spain. During their divorce proceedings, the parties entered into an agreement whereby Carrascosa's attorneys would hold Victoria's United States and Spanish passports in trust in order to restrict Victoria's travel outside of the United States without written permission of the other party.

Mitchell A. Liebowitz, Esquire was Carrascosa's attorney. Innes was represented by third-party defendant Peter Van Aulen, Esquire. Carrascosa discharged Liebowitz and retained defendants Madeline Marzano-Lesnevich, Esquire and Lesnevich & Marzano Lesnevich, Attorneys-at-Law. Marzano-Lesnevich received Carrascosa's file from Liebowitz, including the agreement and Victoria's United States passport. In December 2004, Carrascosa obtained Victoria's United States passport from the defendants and used it to remove Victoria from the United States to Spain on January 13, 2005.

In October 2007, Innes filed a complaint in the Law Division against the defendants, Van Aulen and Leibowitz. Innes alleged that they improperly released Victoria's passport to Carrascosa and intentionally interfered with the domestic relations agreement. Before trial, the court granted Van Aulen and Leibowitz's motion for summary judgment. However, the trial court denied Marzano-Lesnevich's motion for summary judgment, concluding that the defendants owed a duty to Innes.

At the conclusion of trial, the only issue submitted to the jury was whether the defendants were negligent in releasing Victoria's United States passport to Carrascosa. The jury determined that the defendants were negligent and awarded damages to Innes and Victoria. In assessing an award of counsel fees, the judge explained that that award of attorney's fees was appropriate because the defendants deviated from the standard of care and breached a duty owed to Peter and Victoria Innes when they gave Carrascosa Victoria's passport. On appeal, the Appellate Division concluded that awarding Innes attorney's fees was appropriate, even though no attorney-client relationship existed between Innes and the defendants.

The Supreme Court, in granting Marzano-Lesnevich's petition for certification, limited the issue to whether an attorney defendant can be liable for attorney's fees as consequential damages to a non-client under *Saffer v. Willoughby*, 670 A.2d 527 (N.J. 1996). In affirming the judgment of the Appellate Division, the Supreme Court held that in the field of civil litigation, New Jersey courts had historically followed the "American Rule," which provides that litigants must bear the cost of their own attorney's fees. The Innes court made it clear that New Jersey has limited exceptions to the American Rule. *Id*. (*citing In re Niles Trust*, 824 A.2d 1 (N.J. 2003)("[n]o fee for legal services shall be allowed in the taxed costs or otherwise, except" in eight enumerated circumstances). *See also*, N.J.Ct. R. 4:42-9(a) (permitting award of attorney's fees in a family action; out of court fund; probate action; mortgage foreclosure action; tax certificate foreclosure action; action upon liability or indemnity policy of insurance; as expressly provided by rules in any action; and all cases where attorneys' fees are permitted by statute). The Supreme Court also made it clear that any departures from the American Rule are the exception. In *Innes*, the Supreme Court held that a non-client would be awarded counsel fees only in cases where there is a finding that the attorney intentionally breached a fiduciary duty.

The *Innes* court referenced *In re Niles Trust*, in which the court awarded counsel fees to a prevailing party where the defendant, an estate executor and trustee, was not an attorney. In that case, it was that, "[w]hen an executor or trustee commits the pernicious tort of undue influence, an exception to the American Rule is created that permits the estate to be made whole by an assessment of all reasonable counsel fees against the fiduciary that were incurred by the estate."

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New Jersey—Workers' Compensation

WHAT DID YOU KNOW AND WHEN? THE LATEST ANALYSIS OF THE "DISCOVERY RULE" EXCEPTION TO THE STATUE OF LIMITATIONS DEFENSE

By Robert J. Fitzgerald, Esq.*

KEY POINTS:

- There is a two-year statute of limitations on a workers' compensation claim in New Jersey.
- New Jersey allows a "discovery rule" exception to the two-year statue of limitations defense in workers' compensation claims.
- New Jersey's "discovery rule" exception requires that the petitioner know both the medical diagnosis and its causal relationship to the employment before the statute of limitations begins to run on a claim.

Robert J. Fitzgerald

In *Teague v. Palermo Brothers Masonry*, 2016 N.J.Super. Unpub. LEXIS 1135 (N.J.Super.Ct. App.Div. May 17, 2017), the New Jersey Appellate Division addressed the statute of limitations defense in workers' compensation occupational disease claims.

In 1984, Teague began working as a mason, and in 2004 he began to experience back problems. In 2005 and 2006, Teague took time off from working because of significant pain in his back. He received treatment after a March 8, 2005, MRI study revealed a disc bulge at L3-L4 and L5-S1 with a disc herniation at L4-L5.

Teague had been a mason with Palermo Brothers Masonry (Palermo) from May 2010 through September 15, 2010. During his employment with Palermo, Teague worked seven hours and twenty minutes per day. He was assigned to a couple of jobs at Shore Memorial Hospital, which required him to erect walls using cement blocks while working from a scaffold, after which he again experienced significant back pain. Due to his physical limitations, Teague never returned to work as a mason after September 15, 2010.

Dr. James Lowe evaluated Teague on July 18, 2012, and reviewed a July 10, 2012, MRI and compared it with the March 8, 2005, MRI study. Dr. Lowe concluded there was a new disc protrusion at L3-L4, increased disc herniation at L4-L5 and a new herniation or bulging at L1-L2. Dr. Lowe also concluded that Teague's symptoms and diagnosis were causally related to "the occupational exposure described at Shore Memorial Hospital in 2010."

Teague filed a workers' compensation occupational exposure claim on August 29, 2012. Palermo filed an answer denying the claim and also raised the two-year statute of limitations defense. The trial took place from October 3, 2014, through January 16, 2015. Palermo did not raise the statute of limitations defense in the pretrial memorandum, or at any time during trial. The judge heard testimony from Teague, as well as John L. Gaffney, D.O., on behalf of Teague, and Francis C. Meeteer, D.O., on behalf of Palermo. As a result of Palermo's stipulation to causation in the February 1, 2013, order, the sole issue tried before the judge was the nature and extent of permanent injury, if any, as it related to his work for Palermo.

Dr. Gaffney testified that he diagnosed Teague with multi-level disc pathology in the lumbar spine and that Teague suffered from 52.5% permanent partial disability arising from the period of occupational exposure during his employment with Palermo. Dr. Meeteer opined that Teague suffered from 7.5% permanent partial disability. Contrary to Palermo's stipulation to causation, Dr. Meeteer testified that Teague's condition was not caused by occupational exposure while working for Palermo.

On March 13, 2015, the judge of compensation entered an order in favor of Teague. In an oral opinion of the same date, the judge held that Teague sustained a compensable occupational disease and suffered a 40% whole person impairment related to his occupation with Palermo with a 12.5% pre-existing permanent disability.

In its appeal, Palermo argued the defense of the two-year statute of limitations; specifically, Teague did not file his claim petition until August 2012, more than two years after he knew his work activities caused back pain (May or June of 2010), which, therefore, required dismissal of his claim petition. The Appellate Division rejected that argument, citing several cases for the proposition that the statute of limitations does not begin to run until the petitioner knew, or should have known, that the medical condition was work-related. Here, Teague did not know his condition was work-related until he was evaluated by Dr. Lowe on July 18, 2012, a date within two years of the filing of the claim. The Appellate Division went on to affirm the decision, finding no other basis to overturn the permanency determination.

Teague highlights the "discovery rule" exception to the statute of limitations defense. Although the causal connection between the petitioner's job duties and resultant back pain seemed obvious in 2004 and 2005, when he first sought medical treatment, the court applied a liberal interpretation of the "discovery rule" so as to allow

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New York—General Liability

VENUE IN NEW YORK PERSONAL INJURY ACTIONS CPLR ARTICLE 5: WHERE TO BE AND HOW TO GET THERE

By Angela M. Evangelista, Esq.*

KEY POINTS:

- Understanding venue rules in New York personal injury litigation.
- CPLR Article 5: What you need to know about venue.

Angela M. Evangelista

The rules relating to the venue of civil actions are found in Article 5 of the Civil Practice & Law Rules. This article will focus on venue in personal injury actions.

Personal injury actions commenced in New York State Supreme Court are classified as "transitory actions" under the CPLR. At least initially, such actions are governed by the venue selection rules delineated in CPLR § 503.

Venue is initially chosen by counsel for the plaintiff. When deciding in which county to initiate the action, the attorney makes the determination based upon the factual information available to him or her at the time of commencement of the action, as well as preference as to the location of the courthouse, convenience of the witnesses and the reputation of the jury pool.

CPLR § 503(a) provides: "[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff." (Note that, as opposed to venue statutes in New Jersey and other states, the place of the accident is not a basis for venue in most transitory actions.) A party can be deemed to be a resident in more than one county, and residence is a less stringent standard than domicile. It is defined as the location where a party stays for some time with bona fide intent to retain the place as a residence for some length of time and with some degree of permanency. *Schaefer v Schwartz*, 641 N.Y.S. 2d 138 (App.Div. 2d Dept. 1996).

In cases involving specifically designated parties, venue can be based on factors in addition to residence. An executor, administrator, trustee, committee, conservator, general or testamentary guardian, or receiver shall be deemed a resident of the county of his or her appointment, as well as the county in which he or she actually resides. A railroad or other common carrier is also deemed a resident of the county where the *cause of action arose*.

An action brought against the City of New York is proper in the county within the City in which the cause of action arose. If it arose outside of the City, the action is proper in the County of New York.

As to a corporation, either a domestic corporation or a foreign corporation authorized to transact business in New York, it is deemed to be a resident of the county in which its principal office is located. The residence of a domestic corporation, for venue purposes, is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county. *Graziuso v. 2060 Hylan Blvd. Rest. Corp*., 753 N.Y.S. 2d 103 (App. Div. 2d Dept 2002). A partnership's principal place of business is the county of residence of the partnership, in addition to the county in which the partner or individual owner suing or being sued actually resides. Physicians, in addition to their county of residence, can be deemed to be residents of the county where they have their principal office. *Magrone v. Herzog*, 757 N.Y.S. 2d 866 (App. Div. 2d Dept. 2001); *Harrington v. Cramer*, 493 N.Y.S. 2d 390 (Sup.Ct., N.Y.Co. 1985). Unlicensed foreign corporations are not residents of New York State for venue purposes; therefore, venue must be based upon the county of residence of some other party.

In addition to the residency provisions of the CPLR, venue can also be governed by a written agreement containing a choice of forum/venue provision. These provisions are often found in releases, waivers, leases and contracts.

It should be noted that a party's county of residence is determined at the "time of commencement of the litigation," not at the time of the underlying accident or when the cause of action arose. As indicated above, plaintiff's counsel initially chooses venue based upon the information available to him or her at the time of initiation of the litigation. This information may or may not be accurate. For instance, if a plaintiff's counsel in a motor vehicle accident bases their choice of venue on the address of the driver of the adverse vehicle as listed on the police accident report, it remains a possibility that such is not the address of the adverse driver/defendant by the date the litigation is commenced. For example, if a plaintiff's counsel sees that the driver of the adverse vehicle is listed as a resident of Bronx County, he or she may jump at the chance to begin the litigation in that county. However, the determinative date is the date of the filing of the summons and complaint with the court. Counsel for plaintiff would have no way of knowing if the driver of the adverse vehicle, now the defendant, had moved to a different county in the time period between the accident and the start of the action. Accordingly, defense counsel should be aware of such a possibility. The current address of the defendant (county of residence) should be one of the first questions asked of the client during the initial interview and prior to the service of the answer.

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BAD FAITH FAILURE TO SETTLE

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A three-justice panel of the Delaware Supreme Court reversed the trial court's holding, establishing, instead, that a claim for bad faith against an insurer for refusing to settle a third-party insurance claim accrues when an excess judgment against its insured becomes final and non-appealable. As the court reasoned, this conserves both litigant and judicial resources and properly aligns the incentives of the insurer and its insured. It allows the insurer and the insured to join efforts in defending the underlying third-party claim without a breach of contract claim causing a conflict of interest. Further, the court reasoned that damages cannot be properly pleaded in a bad faith claim until there is a final excess judgment.

The Supreme Court's opinion is sound. It allows the carrier and its insured to align their interests and eliminate the expense and complication of potential prophylactic litigation, which ultimately may prove to be unnecessary. ■

ATTENTION, CONTRACTORS!

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to Neighborhood House. There is no finding that the certification was not valid on its face. Also, there is no finding that Neighborhood House had knowledge of a problem with coverage, which the court in *Cordero* suggested would be sufficient to trigger heightened scrutiny. Despite this, instead of simply looking to see if Neighborhood House obtained and retained a certification of insurance valid on its face, the Board looked to see if Neighborhood House verified actual coverage. Holding that it failed "to obtain a COI valid for coverage in Delaware," it held Neighborhood House financially liable for the claim.

In *Otter*, the Board focused on the fact that there was no actual coverage. It determined this by reviewing the actual policy. However, § 2311 does not require a contractor to obtain and interpret the actual policy or to actually confirm coverage. Rather, the contractor is only obligated to obtain a certification of insurance that is valid on its face.

The *Otter* decision is problematic. Contractors may justifiably rely on § 2311 and *Cordero* and then be hit with the higher expectations of the Board, as demonstrated by *Otter*. If this happens, a contractor could certainly appeal. However, litigation is expensive. A less costly and more immediate way to address this concern is to educate contractors about this issue. Steps they might take to avoid this somewhat hidden and unpredictable liability may possibly be to avoid contracting with subcontractors who have insurance through NJ Casualty (which is also the carrier on another case currently before the Board) and the Pennsylvania State Workers' Insurance Fund (see *Emily Estevam v. Silva*, (Del. IAB) Hearing No. 1342877 (Jan. 7, 2010). Another step might be to refuse to contract with companies that are not principally located in Delaware. A representative of Neighborhood House testified that they now call the insurance agent to verify coverage. However, based on the facts of a case currently before the Board, it is not clear that such action would be sufficient.

The Board's decision in *Otter* appears to have started a slippery slope situation that has taken from contractors the guidance of *Cordero* and replaced it with uncertainty and unpredictability. Until this is resolved through additional litigation or legislative action, contractors should be aware that the Board may require more than what § 2311 and the court in *Cordero* indicate, although what that may be is unclear. ■

DEATH OF THE NEGLIGENT MODE

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Under the 2010 statute, the negligent mode of operation theory was abrogated. The Florida's Fourth District Court of Appeal directly confronted the issue and provided some insightful precedent in *Pembroke Lakes Mall, Ltd. v. McGruder*, 137 So. 3d 418 (Fla. 4th DCA 2014). Comparing the language of Florida's 2002 and 2010 premises liability statutes, the Fourth District noted that the 2002 version allowed a plaintiff to succeed in a slip-and-fall case by showing the business acted negligently in its mode of operation. Proof of actual or constructive notice of a specific condition was not required. The 2010 statute, on the other hand, "does not contain any language regarding the owner's negligent maintenance, inspection, repair, warning, or mode of operation." Because the 2010 statute explicitly requires proof of actual or constructive notice and the language regarding mode of operation has been removed, the Fourth District concluded that the same prevailing plaintiff under the 2002 statute would be unable to assert a cause of action based on negligent mode of operation under the 2010 statute.

Legislative staff analysis of the 2010 bill projected that it might affect the outcome of litigation in slip-and-fall suits in a manner more frequently favorable to business establishments than under the 2002 law. This more fact-specific shift, and the recognition that a business's operation model is most likely inapplicable for establishing liability, potentially apply beyond just the pleading stage. A business can, and should, explore the possibility of demanding fact- or case-specific discovery requests by objecting to inquiries pertaining to, for example, other falls, inspection logs or operations manuals as irrelevant. The legislature also recognized that "business establishment" is not formally defined; likewise, "transitory foreign substances" are not specifically defined, giving counsel on both sides latitude to argue deserving applications or restrictions. ■

Ohio—Health Care Liability

A CREATIVE USE OF *WUERTH* FOR THE MEDICAL MALPRACTICE DEFENSE LAWYER

By Stephen M. Wagner, Esq.*

KEY POINTS:

- A health care entity cannot be held vicariously liable for a physician's negligence unless the negligent physician is properly named in the case and found liable.
- The First District Court of Appeals in Ohio confirms that *Wuerth* indicates that a plaintiff's case cannot survive a directed verdict where the incorrect physician is named in the lawsuit.
- Electronic medical records can contain critical errors relating to the true identity of the ordering physician.

Stephen M. Wagner

In 2009, the Ohio Supreme Court issued a decision in *Nat'l Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 913 N.E.2d 939 (Ohio 2009), which many practitioners at the time considered to be a radical departure from well-settled respondeat superior principles in Ohio. In *Wuerth*, the Sixth Circuit Court of Appeals certified a novel question to the Ohio Supreme Court: "Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant principals and employees have either been dismissed from the lawsuit or were never sued in the first instance?," *Nat'l Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 913 N.E.2d 939, 941 (Ohio 2009). The court's response to this seemingly limited question, however, was divided into two separate and distinct holdings. Specifically, (1) whether a law firm may be directly liable for legal malpractice; and (2) whether a law firm may be held vicariously liable for malpractice when none of its principals or employees are liable for malpractice or have been named as defendants.

The court answered the first question in the negative, finding that a law firm does not engage in the practice of law and, therefore, the entity alone cannot directly commit legal malpractice. The second, more hotly litigated holding ruled that, under the principles of *respondeat superior*, an employer may be held liable only when an employee or agent may be held directly liable and that, in the absence of liability on the part of a firm principal or employee in the case, a law firm may not be held liable for legal malpractice.

The court's second holding was initially construed as overturning of years of *respondeat superior* precedent in Ohio, where it has always been the case that a plaintiff may sue the employer, the employee *or* both and need not join the employee in litigation against the employer. However, subsequent cases have shown that *Wuerth* was not such an extreme departure. Nonetheless, application of *Wuerth* in lower courts, specifically in the medical malpractice arena, has left defense practitioners with a significant sword to wield against inattentive plaintiff's counsel.

Since 2009, Ohio's Courts of Appeals have been presented with numerous opportunities to creatively apply the holdings of *Wuerth*, but thus far, *Wuerth*'s scope has yet to be extended outside of claims of malpractice waged at doctors or lawyers. Indeed, the limitations of *Wuerth* were made clear in *Stanley v. Community Hosp., Stanley v. Community Hosp*., 2011 Ohio App. LEXIS 1120 (Ohio Ct.App. Mar. 18, 2011), where the Second District Court of Appeals examined a trial court's ruling granting summary judgment to the defense because the nurse at issue was not individually named as a defendant. The court found that a claim for *respondeat superior* liability could not be maintained against the nurse's employer. On appeal, the Second District reversed and remanded the case, effectively halting the expansion of *Wuerth* by stating, "[T]he holding in *Wuerth* must be given a narrow application. Nowhere in the *Wuerth* decision does the Supreme Court conclude, expressly or otherwise, that a medical claim brought against a hospital for the alleged negligence of one of its nurse employees constitutes a claim for malpractice."

Thus, while the use of *Wuerth* has been limited to lawyers and physicians, *Wuerth* still does provide the defense practitioner an avenue to prevail on summary judgment or directed verdict, particularly with the advent of electronic medical records (EMR). A recent appellate decision, coupled with observations from practice, illustrate this suggestion precisely. In *Rush v. Univ. of Cincinnati Physicians, Inc., Rush v. Univ. of Cincinnati Physicians, Inc*., 2016 Ohio App. LEXIS 861 (Ohio Ct.App. Mar. 11, 2016), the First District Court of Appeals upheld the trial court's grant of a directed verdict on all claims against UC Physicians, except for those arising from any negligence committed by Dr. Kunkel, who was named in the suit because he was listed in the EMR as the physician who ordered a decrease in the patient's epidural rate. However, Dr. Kunkel insisted, credibly so, that it was likely another physician received the call and ordered the decrease in the epidural rate. To that end, Dr. Kunkel testified that it was common practice for anesthesiologists to routinely sign electronic orders for each other.

The First District Court of Appeals, relying on *Wuerth*, found that the trial court was on solid legal ground in granting a directed verdict because the physician who actually signed the order in the EMR, Dr. Khalil, was not named in the lawsuit. Furthermore, by the

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THE IMPLICATIONS OF NEW JERSEY'S

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It should be noted that the Supreme Court, in *In re Estate of Folcher*, 135 A.2d 128 (N.J. 2016)—decided on the same day as *Innes*—declined to expand the *Niles* exceptions to the American Rule. Counsel fees could not be awarded against a person who did not owe a fiduciary responsibility to the estate and its beneficiaries, no matter how repugnant the conduct.

The *Innes* court made it clear that New Jersey has limited exceptions to the American Rule, and the court, in deciding *In re Estate of Folcher*, declined to expand these exceptions when a fiduciary responsibility is not owed. This issue is particularly important for defense attorneys and insurance adjusters working in New Jersey because knowledge of the narrow holding of *Innes* will provide a key defense when a non-client demands an attorney fee award in a third-party malpractice case. ■

VENUE IN NEW YORK

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When defense counsel determines that the venue initially chosen by plaintiff's counsel is improper, he or she must act quickly. The time periods for seeking change of venue from an improper venue are very strict and should be in the forefront of defense counsel's mind when preparing an answer. (If a defense practitioner gets to the point where they are questioning venue, they have presumably already confirmed that personal jurisdiction exists over the defendant as such is a separate evaluation based upon the activities of the defendant within the forum state.)

If a case has been initiated in an improper venue, a demand for change of venue must be served with or before the defendant's answer. The plaintiff will then have 10 days to consent to the change or provide an affidavit as to why their initial choice of venue was proper. If the plaintiff does neither, the defendants have five days to serve a motion seeking a change of venue.

These time requirements are strictly enforced, and if they are not complied with, objection to venue can be deemed waived. (*See, Collins v. Greenwood Mgt. Corp*., 810 N.Y.S. 2d 17, 18 (App. Div. 1st Dept. 2006). Therefore, defense counsel should be familiar with the specific requirements and time provisions set forth in Article 5 of the CPLR. In the instance where a plaintiff's misleading statements regarding residence causes the defendant's untimely service of the demand, a delay in seeking a change of venue can be excused. *Herrera v. R. Conley Inc*., 860 N.Y.S. 2d 21 (App. Div. 1st Dept. 2008).

Defendants who serve their motion papers by mail are entitled to a five-day extension of the 15-day period after they have served their demand to change venue as prescribed in CPLR Rule 511(b), pursuant to CPLR § 2103(b). *See, Simon v. Usher*, 934 N.Y.S. 2d 362 (N.Y. 2011). This five-day extension is unlikely to be available for an e-filed case, but this has yet to be specifically addressed by the courts.

If plaintiff's counsel does not comply with CPLR Rule 511 by serving an affidavit providing factual basis for why their initial choice of venue was proper, the defendant's motion to change venue can be filed in **either** the county where the action is pending or the defendant's proposed proper county. If an affidavit is provided, the motion must be filed in the county where the action is pending. *King v. CSC Holdings, LLC*, 1 N.Y.S. 3d 139 (App. Div. 2d Dept 2014); *HVT, Inc. v Safeco Ins. Co. of Am*., 908 N.Y.S. 2d 222 (App. Div. 2d Dept 2010).

In the scenario discussed above, where the defendant has moved from the county listed on the police accident report, an affidavit from the defendant as to his address at the time of the commencement of the action should be submitted in support of the motion to change venue. It is suggested that motion practice may even be avoided if such an affidavit is, along with the demand for a change of venue, served with the answer. Plaintiff's counsel may be amenable to the change of venue after receiving proof that venue was improperly placed in the county based on the prior address of the defendant. In such an instance, venue can be changed by consent, pursuant to CPLR Rule 511, without the need for motion practice.

A court, upon motion, may also change the place of trial of an action where there is reason to believe that an impartial trial cannot be had in the proper county or the convenience of material witnesses and the ends of justice will be promoted by the change. Even if a case has been properly venued in the county of residence of a party, venue can be changed based upon the aforementioned reasons. *O'Brien v. Vassa Bros. Hosp*., 622 N.Y.S. 2d 284 (App. Div. 2d Dept1995). This is rare, but the CPLR provides for situations where circumstances may warrant such a transfer. The motion seeking change of venue based upon the convenience of the witnesses is not subject to the strict time restrictions of CPLR § 511. However, the statute provides that a motion for change of place of trial on any ground other than for improper venue is to be made "within a reasonable time after commencement of the action." Although such a motion is permitted to be filed later in the litigation, it is always better practice to file the motion as early in the litigation as possible.

Article 5 of the CPLR contains the rules relating to venue, and practitioners should be familiar with the contents of this important article. It will help them know where to be and how to get there. ■

Pennsylvania—Asbestos Litigation

EASTERN DISTRICT COURT OF PENNSYLVANIA PREDICTS APPLICABILITY OF THE "BARE METAL" DEFENSE IN PENNSYLVANIA ASBESTOS LITIGATION

By Melissa D. Cochran, Esq.*

KEY POINTS:

- The "bare metal" defense is the theory that a product manufacturer cannot be held liable for alleged harms caused by asbestos component parts used with its product when it did not manufacture, distribute or supply the component part.
- The U.S. District Court for the Eastern District of Pennsylvania has predicted that the Pennsylvania Supreme Court will apply the "bare metal" defense.
- The District Court also held that a product manufacturer could not be held liable for negligent failure to warn unless the manufacturer (i) knew that any asbestos-containing component part of that type would be used with its product, and (ii) knew at the time it placed its product into the stream of commerce that there were hazards associated with asbestos.

Melissa D. Cochran

Known in the asbestos community as the "bare metal" defense is the theory that a product manufacturer cannot be held liable for alleged harms caused by asbestos component parts used with its product when it did not manufacture, distribute or supply the component part. This theory is most commonly raised by valve and pump defendants as a bar to claims of harm caused by third-party-manufactured asbestos-containing packing and gaskets used on their equipment. While the "bare metal" defense has been accepted by the high courts in several jurisdictions, including California in *O'Neill v. Crane, Co.*, 266 P.3d 987 (Cal. 2012) and Washington in *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008), the Pennsylvania Supreme Court has yet to consider and decide upon the applicability of the "bare metal" defense to asbestos cases pending in the Commonwealth.

Generally, Pennsylvania does not impose liability on product manufacturers for harm caused by component parts that the manufacturer did not make or supply. In *Toth v. Economy Forms Corp.*, 571 A.2d 420 (Pa.Super. 1990), the Pennsylvania Superior Court found that the defendant, a manufacturer of a scaffolding system, was not liable when a wooden plank attached to the scaffolding gave way, leading to the death of the plaintiff-decedent. The wooden plank was manufactured and sold by another party, not the scaffolding manufacturer.

Toth argued two bases for strict liability to apply to the scaffolding manufacturer: (i) defective design based on the manufacturer's failure to provide the wooden planks and (ii) defective warning for failing to instruct on the proper use of the planks. However, the Superior Court rejected both arguments, explaining, "There is no legal authority supporting appellants' attempt to hold a supplier liable in strict liability for a product it does not even supply." The court likewise rejected the plaintiff's attempt to impose liability in negligence for failure to provide proper field services, including appropriate warnings. This holding was bolstered by the court's determination that the plaintiff did not offer any evidence that the manufacturer had breached a duty to ensure the proper use of the wooden plank. The Superior Court concluded that, instead of suing the manufacturer of the scaffolding system, the plaintiff "must look to the lumber supplier" who actually made the faulty wooden plank.

On its face, *Toth* would seemingly translate to apply to an asbestos case, protecting a manufacturer (such as a pump defendant) from a plaintiff's claim that he or she were harmed from exposure to asbestos related to replacement of another manufacturer's gaskets and packing utilized in repairing a pump. Yet, Pennsylvania's appellate courts have not been faced with or ruled upon the issue of whether the "bare metal" defense is applicable in the Commonwealth. Further, the Courts of Common Pleas of Pennsylvania are not in agreement as to whether this defense applies.

For example, the Common Pleas Court's decision in *Kolar v. Buffalo Valves, Inc.*, 15 Pa.D.&C.5th 38, 46 (C.P.Phila. Aug. 2, 2010), demonstrates the Philadelphia Court of Common Pleas' willingness to apply the "bare metal" defense because the plaintiff could not prove that he ever worked on a pump with original, asbestos-containing parts and did not offer any evidence to prove that the asbestos-containing component parts at issue were required by the pump manufacturer. Accordingly, the court granted summary judgment in favor of the defendant. Likewise, the Butler County Court of Common Pleas, citing *Toth*, granted summary judgment to a defendant valve manufacturer after finding no evidence that the plaintiff was near work on a valve that contained its original packing material or that the defendant supplied replacement packing. *See, Milich v. Anchor Packing Co.*, 2009 Butler County Court of Common Pleas No. A.D. 08-10532 (March 16, 2009).

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Pennsylvania—General Liability

IT'S ALL ABOUT THE TIMING...A GUIDE TO PRODUCING SURVEILLANCE EVIDENCE OF THE PLAINTIFF IN PERSONAL INJURY CASES

By Laurianne Falcone, Esq.*

KEY POINTS:

- The production of surveillance evidence to opposing counsel depends on discovery requests and timing.
- The trial judge has latitude to admit or exclude surveillance evidence depending on the facts of your case.
- Consider your goals for the case in determining when to produce surveillance evidence to opposing counsel.

Laurianne Falcone

Aside from the thorny question of whether to even conduct surveillance on the plaintiff in a personal injury case, there is the question of when to produce the surveillance you obtained to opposing counsel. Pennsylvania's case law indicates that this production should occur early enough before trial so that your opponent has an opportunity to review the evidence and prepare for cross-examination. However, all cases are fact-specific, and the trial judge has latitude to admit or exclude surveillance evidence based on very specific circumstances.

In *Mietelski v. Banks*, 854 A.2d 579, 581 (Pa.Super. 2004), the Pennsylvania Superior Court affirmed the trial court's decision to exclude the defendant's surveillance video of one of the two plaintiffs, as well as the defense medical expert's testimony regarding that video, because the video was not made available to plaintiffs' counsel until three days before the expert was deposed. The Superior Court noted that defense counsel had possession of the footage more than one month prior to the expert's deposition but did not disclose its existence until three days before the deposition and ten days before trial was set to commence.

In *Dominick v. Hanson, et al.*, 753 A.2d 824 (Pa.Super. 2000), the Superior Court affirmed the trial court's judgment in favor of the defendants. The jury returned a verdict for the defendants after viewing surveillance evidence of the plaintiff that was not produced to plaintiff's counsel before trial. Defense counsel had indicated his intention to present the surveillance evidence of the plaintiff after plaintiff's counsel completed his case-in-chief. The court noted that, although plaintiff's counsel had served written discovery to the defendants requesting surveillance evidence, the defendants lodged objections to those discovery requests. Plaintiff's counsel never challenged those objections, which rendered his objections at trial moot.

What's the lesson for defense practitioners in Pennsylvania? First, ensure that you have served objections to any discovery requests involving surveillance, experts, reports, videos and/or photographs. If plaintiff's counsel challenges those objections and prevails, you must abide by the court's order. In that situation, ensure that you produce the surveillance evidence in accordance with the court order.

If plaintiff's counsel does not serve discovery relating to surveillance, or if she fails to challenge your objections to such discovery, you have to make a judgment call. Do you wait until the plaintiff completes her case before announcing your intention to present surveillance evidence to the jury, as defense counsel did in *Dominick*, or do you produce the surveillance evidence to plaintiff's counsel before trial, thus avoiding the risk that the trial judge will exclude the evidence based on unfair surprise and/or prejudice?

You should also consider what you want to achieve with the surveillance evidence. For example, your client may want to resolve the case before trial. If you produce your surveillance evidence before trial, or even before a settlement conference with the court, you may be in a better position to resolve the case.

Every situation is unique. Thus, you and your client must consider your endgame for the case, as well as how likely it is that the court will admit your surveillance evidence at trial. ■

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WHAT DID YOU KNOW AND WHEN?

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an occupational exposure claim to proceed. As a respondent, it is very important to do a thorough job of investigating a petitioner's medical history to determine other possible causes for a work injury, as well as to establish the timing of the petitioner's knowledge of his or her condition. Maintaining complete personnel files and leave request documentation for employees are a few ways an employer can help investigate a workers' compensation occupational exposure claim. Be especially aware of maintaining this documentation ahead of facility changes/closures or when an employee is planning to retire, which usually trigger an uptick in occupational claims. Contact your defense counsel for more suggestions in better preparing for these anticipated claims. ■

Pennsylvania—General Practice

POST AT YOUR OWN RISK

By Maureen Kelly, Esq.*

KEY POINTS:

- Social media discovery should be part of your litigation plan from start to finish.
- Social media posts can be relevant to a party's state of mind, bias, motive and credibility.

Maureen Kelly

We live in a world consumed by social media. Whether it be blogs, tweets, posts, snaps, links, podcasts, photographs, videos, pins, flicks, tumbles or tags, almost everyone has a social media presence. Shockingly, more than 25% of users do not bother with any kind of privacy control. What results could be a defense attorney's dream: discovering a plaintiff's post that bears directly on an issue in the case and reflects negatively on the plaintiff.

We all know that social media should be included in your discovery plan from the start of litigation. Using standard internet search tools, investigate whether a plaintiff has a social media presence. If it is public, there is no issue with searching for it and retaining it to use in the future. If a plaintiff does have privacy settings, there is always the option to use formal discovery—interrogatories and requests for production of documents—to learn more. If you are still unsatisfied and have a hunch that there is "more out there," you can utilize a discovery motion to attempt to obtain additional information. The emerging trend among common pleas courts appears to be that, if information readily available on a party's "public" page warrants a deeper probe, a judge will allow it. However, if nothing on a person's public profile acts to open the gates of discovery, his or her private page will stay that way. A party seeking discovery must demonstrate that the information sought has relevance to the case at hand. In addition, the party seeking discovery must also "articulate some facts that suggest relevant information may be contained within the non-public portions of the profile" as opposed to simply guessing or presuming that the information sought could be there without a basis for so doing. (Judge R. Stanton Wettick, Jr.—*Trail v. Lesko*, CCP Allegheny County). The general rule and a practical pointer is to know what fact you are trying to prove and to articulate how the social media evidence will prove that fact.

In addition to the formal written discovery discussed above, a plaintiff's social media presence should be monitored by both defense counsel and claims adjusters on a regular basis up to, and including, the time of trial. Nothing shows the importance of this concept more than the recent Superior Court case of *Krayzel v. Roberts*, 2015 Pa.Super.Unpub.LEXIS 4642 (Pa.Super. 2015). This case, as an unpublished decision, cannot be relied upon or cited by a court or a party in any other action or proceeding. Therefore, no attorney should specifically cite this case in any motion or argument before a court. However, the arguments of the attorneys and the rationale of the Superior Court in *Krayzel* can and certainly should be repeated to any court should a similar social media issue arise.

The *Krayzel* case involved a rear-end motor vehicle accident in 2010. The plaintiffs, father and son, alleged soft tissue injuries. The defendant admitted negligence, and the case proceeded to arbitration on damages only. The arbitration panel awarded a total of $20,000, $10,000 to each plaintiff, which the defendant then appealed to the Court of Common Pleas. The case eventually proceeded to trial with a stipulated maximum damages in the amount of $25,000 pursuant to Pa. R.C.P. 1311.1.

During the course of the two-day trial, defense counsel monitored the public Facebook page of the plaintiff son. It was discovered that he "tagged" his location at the courthouse and posted a comment that he was "becoming a millionaire." The court permitted defense counsel to cross-examine this plaintiff on his statement, over objection. The jury returned a defense verdict, finding that the defendant's negligence was not a factual cause of injury to either plaintiff.

On appeal to the Superior Court, the plaintiffs argued that the plaintiff son's social media post should not have been admitted for several reasons, including that it was not disclosed to plaintiffs' counsel despite an ongoing discovery request, that it was knowingly misleading as the parties had stipulated to limiting damages to $25,000, that statements with regard to the amount of damages demanded are inadmissible, and that it was otherwise inadmissible, irrelevant and prejudicial.

The Superior Court denied all grounds on appeal and affirmed the trial court's decision, finding no abuse or error of law. Specifically, the Superior Court found the Facebook post relevant to show the son's state of mind, bias, motive and credibility. (Citing *Yacoub v. Lehigh Valley Med. Assocs*., P.C., 805 A.2d 579 (Pa.Super. 2002) (stating that a party may cross-examine to explore credibility or bias that would affect the testimony of the witness)). The court found that its probative value in demonstrating that the son did not sustain significant injuries and was attempting to use the litigation to his profit outweighed any prejudice. Moreover, the statement was made by the son on his own Facebook account and was available to him.

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Pennsylvania—Insurance Coverage

SHOULD THE UNDERINSURED MOTORIST CARRIER BE IDENTIFIED AT THE TIME OF TRIAL?

By Robert E. Smith, Esq.*

KEY POINTS:

- Superior Court has yet to specifically address the argument of whether "due process" requires the UIM carrier to be identified.
- Court reiterates that a jury's lack of knowledge that the UIM carrier was a party defendant does not warrant granting a new trial.
- Defense counsel may want to consider filing a motion to preclude evidence of insurance with respect to the trial of a UIM claim.

Robert E. Smith

About ten years ago, in what has commonly been referred to as the *Koken* decision, the Pennsylvania Supreme Court held that the Pennsylvania Insurance Department "does not possess the authority to require mandatory binding arbitration for UM and UIM disputes…." *Insurance Fed. of Pennsylvania, Inc. v. Department of Insurance*, 889 A.2d 550 (Pa. 2005). Following that decision, most insurance carriers either completely removed binding arbitration clauses or required both parties to "mutually agree" to arbitration with respect to claims for uninsured (UM) or underinsured (UIM) coverages. The impact of *Koken* is still being felt as many procedural and evidentiary issues continue to work their way through the court system. This article focuses on recent case law discussing whether the UIM carrier should be identified as a party where both the UIM claim and the negligence claim against the driver/tortfeasor are tried at the same time.

Generally, when UM/UIM claims are tried, plaintiffs seek to introduce as much evidence as possible about insurance coverage while defendants seek to preclude as much evidence of insurance as possible. The prevailing thought is that evidence of insurance coverage will drive up jury verdicts.

Two appellate cases have addressed whether the UIM carrier should be identified during trial. In the first, *Stepanovich v. McGraw*, 78 A.3d 1147 (Pa.Super. 2013), the plaintiff sued both his UIM carrier and the driver/tortfeasor. The trial court ruled that the UIM carrier could not be identified as a party at the time of trial. The case proceeded to trial, and the jury found that the driver was not negligent. The plaintiff appealed, and the trial court reversed itself, holding that the UIM carrier should have been identified at trial. The UIM carrier then appealed to the Superior Court, which reversed the trial court, holding that the plaintiff "would have to show that, but for the jury's ignorance of (the UIM carrier's) identity, it would have found (driver) negligent." The court explained that there was no "legal or logical connection" between the UIM carrier's status as a defendant and the driver's alleged negligence. However, the Superior Court did not specifically address the plaintiff's argument that "due process" required the UIM carrier to be identified.

In the second and very recent case, in a non-precedential decision, the Superior Court once again addressed the issue of whether the UIM carrier must be identified as a party at time of trial. In *Zellat v. McCulloch*, 2016 Pa.Super.Unpub.LEXIS 213 (Pa.Super. Mar. 9, 2016), the plaintiff's vehicle was rear-ended, and she sued the driver of the vehicle that struck her. The plaintiff later joined her own UIM carrier as a co-defendant. The court granted a motion by the defendant/driver to preclude any mention of insurance at time of trial. The court also entered an order allowing the claim against the other defendant/driver and the plaintiff's UIM claim to be tried together and mandating that insurance not be mentioned. Pursuant to that order, the parties were "not permitted to reference that (the UIM carrier) was a named defendant…." The case proceeded to trial, and the jury returned a verdict, finding that the defendant/driver's negligence did not cause the plaintiff's alleged injuries. In her appeal, the plaintiff raised several issues, including:

> Did the trial court err in permitting a named party's identity to remain hidden from the jury while simultaneously permitting its counsel to participate in trial under the guise of assisting the counsel to another defendant?

The court held that its prior decision in *Stepanovich v. McGraw* was "directly on point" and explained as follows:

> The *Stepanovich* decision is directly on point. Herein, the negligent tortfeasor and the plaintiff's UIM carrier were named defendants, and the tortfeasor successfully prevented mention of the UIM carrier's status as a party. This was the precise factual scenario at issue in *Stepanovich*. This court ruled that the jury's lack of awareness that the UIM carrier was a party defendant does not warrant the grant of a new trial. That holding applies herein.

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EASTERN DISTRICT COURT OF PENNSYLVANIA

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However, in Allegheny County, the second most active jurisdiction for asbestos litigation in the Commonwealth, the Courts of Common Pleas have vacillated on the applicability of the "bare metal" defense. During Judge Robert Colville's time on the bench, he chose to apply the "bare metal" defense, in part, finding that a defendant could not be held strictly liable for harms allegedly related to exposure from after-market asbestos-containing replacement parts used on a manufacturer's product, but the manufacturer could be liable for negligence related to those same component parts if the plaintiff could prove that the defendant manufacturer knew or should have known that asbestos-containing replacement parts would be used with its product and that the components could pose a risk to one's health. Abandoning Judge Colville's partial application of the "bare metal" defense, Judges Michael Marmo and Arnold Klein more recently have summarily dismissed the notion that *Toth* is transferrable to asbestos litigation and that the defense applies at all. The Court of Common Pleas of Allegheny County, now and for the foreseeable future, holds defendant manufacturers both strictly liable and liable in negligence for alleged harms caused by asbestos components utilized with their products or equipment, even if the defendant did not manufacture, distribute, supply or specify the use of such components.

In the backdrop of nationwide litigation, where some states' higher courts have applied the "bare metal" defense to product manufacturer defendants in asbestos litigation, and against the backdrop of the varying Commonwealth jurisprudence, how will the Supreme Court of Pennsylvania rule when faced with the applicability of this defense? While the ultimate answer may be a coin flip, the U.S. District Court for the Eastern District of Pennsylvania has carefully analyzed the "bare metal" defense in the context of Pennsylvania product liability theories, social policy, and national and common pleas decisions.

In *Schwartz v. Abex Corporation*, 2015 U.S. Dist. LEXIS 68074 (E.D. Pa. May 27, 2015), Judge Eduardo C. Robreno considered whether a manufacturer of airplane engines could be held liable for another manufacturer's asbestos-containing external insulation applied to its engines. The District Court acknowledged that the Pennsylvania Supreme Court has not addressed a product manufacturer's liability under such circumstances. In predicting Pennsylvania's position, the District Court found that a product manufacturer could not be held strictly liable for component parts that it neither made nor supplied.

The District Court in *Schwartz* further held that a product manufacturer could not be held liable for negligent failure to warn unless the plaintiff proves that the manufacturer knew that: (i) any asbestos-containing component part of that type would be used with its product; and, (ii) at the time it placed its product into the stream of commerce, there were hazards associated with asbestos. Having addressed both applicable theories of liability, the court made it clear that strict liability is foreclosed to a plaintiff when the product manufacturer did not make or supply the component part. Conversely, the court did leave the door open to negligence-based claims but emphasized that "a product manufacturer is not liable in negligence for injury arising from all foreseeable use of asbestos-containing component parts[,]" as this "would create an undue burden on those product manufacturers."

The District Court in *Schwartz* ultimately granted summary judgment for the defendant on both the strict liability and negligence claims. The court's decision in *Schwartz* and its analysis, while not binding on the Pennsylvania state and appellate courts, certainly points to the direction in which Pennsylvania courts may eventually rule on this issue. ■

SHOULD THE UNDERINSURED

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In *Zellat*, the plaintiff also argued that the trial court erred in failing to identify the UIM carrier as a party because *Stepanovich* held that Pa. R.E. 411, which precludes certain evidence of insurance, does not apply to evidence of a plaintiff's UIM coverage. The court rejected that argument as well and held, in part, "… the fact that Pa. R.E. 411 is inapplicable does not alter the holding of *Stepanovich*, which is that a new trial is not to be awarded based upon the fact that a jury is not told that the plaintiff's UIM insurer is a party to the action."

While the *Zellat* decision is non-precedential, it does afford some guidance as to how the Superior Court would interpret its prior holding in *Stepanovich*. Based upon the guidance afforded by the *Zellat* decision, defense counsel may want to give further consideration to filing a motion to preclude evidence of insurance with respect to the trial of a UIM claim. ■

A CREATIVE USE OF *WUERTH*

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time the plaintiffs discovered that the defendants intended to assert that Dr. Khalil had signed the order, it was too late for them to name Dr. Khalil in the lawsuit.

As such, the confusion created by the EMR, which can mislead a plaintiff's attorney as to the true identity of the ordering physician, has created a devastating tool for the defense if used properly. In practice, many allegations and lawsuits are inevitably directed towards physicians who actually had nothing to do with the treatment of a patient because someone at a hospital created an electronic order in the EMR with a non-treating physician erroneously listed as the ordering physician. This confusion has made evaluation of medical malpractice cases significantly troubling for plaintiff's attorneys, simply because the EMR may contain errors as to the true identity of an ordering physician.

Wuerth leaves no room for vicarious liability for medical malpractice where a doctor cannot be found liable for malpractice. Thus, it is now possible for defense counsel to simply sit on his or her hands when a plaintiff is pursuing a theory of liability in a malpractice case against a physician who had nothing to do with the patient's treatment. This defense is further made possible by the clear law in Ohio, stating that once a cognizable event occurs that places a plaintiff on notice that an injury may have resulted from medical treatment, the statute begins to run and the plaintiff has a duty to investigate and identify all potential tortfeasors, *Akers v. Alonzo*, 605 N.E.2d 1 (Ohio 1992); *Pratt v. Wilson Memorial Hospt.*, 2000 Ohio App. LEXIS 2955 (Ohio Ct.App. June 30, 2000). ■

POST AT YOUR OWN RISK

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What can we learn from this case? Obviously, perform formal social media discovery in your case. At the inception of the lawsuit, search a plaintiff's social media presence and print everything out! Everything you find needs to be preserved in the event of a "delete happy" plaintiff. In addition, be sure to search social media throughout the case to gather information. Continue this periodically, up to the time of trial, as well as during trial. As the *Krayzel* case shows, you never know what you might find! ■

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