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Defense Digest

On The Pulse…

PROFILE OF OUR ORLANDO OFFICE

By Bradley P. Blystone, Esq.*

Bradley P. Blystone

Sitting in the heart of Central Florida, Orlando is a growing and vibrant metropolitan area known as "The City Beautiful." With its combination of year-round sunny weather and theme parks, it attracts 51 million tourists each year, making it the most visited city in the country. Apart from visitors, it is also one of the fasting growing cities in the U.S. for permanent residents due to its business, cultural and educational environments. The population for the greater Orlando metropolitan area now stands at 2.13 million, which is the 6th largest in the Southeast U.S. It's home to three major theme parks, three hospital systems, three professional sports teams, numerous national sporting events, a renowned performing art center, a major restaurant chain, one of the country's largest supermarket chains, numerous colleges and universities, high tech industries and defense contractors.

The recent tragedy at the Pulse nightclub shows the true character of the Orlando community. Everyone responded to help those in need—people from every ethnic/cultural background, religious organizations, law enforcement, health care providers and government leaders. Among its many accolades, Orlando is now also known as a model of community spirit.

Situated just blocks from the courthouse in downtown Orlando, our office is able to efficiently litigate and try cases. This proximity allows our attorneys to establish familiarity with court personnel and obtain the best results for our clients. Since our office was established in 2003, our attorneys have built a reputation for defending our clients with passion and purpose. Moreover, our team of talented and diverse lawyers are known across the board by the courts for their level of preparation, attention to detail and professionalism.

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* *Brad is the managing attorney of our Orlando, Florida office. He can be reached at 407.420.4406 or bpblystone@mdwcg.com.*

CLASS ACTION PRACTICE GROUP

By Jay S. Rothman, Esq.*

Jay S. Rothman

Class actions come in a variety of flavors. Unfortunately, they are rarely "vanilla." However, whether consumer, commercial, financial products, environmental, employment, manufacturing, data security, an MDL action or one of the other myriad flavors, one thing is constant—if not properly defended, class actions have potentially devastating effects on your business's reputation and bottom line. These actions are almost always prosecuted by an experienced plaintiffs' class action bar.

To meet the needs of our clients who find themselves embroiled in these matters, Marshall Dennehey has a dedicated team of lawyers who use a multi-disciplinary approach to finding practical solutions in the face of class actions. Our ability to draw from 38 deep, diverse and substantive practices groups is what differentiates Marshall Dennehey from other firms practicing in this area. We coordinate this acumen with other litigators who comprise our class action technician team to provide our clients with a comprehensive approach to meeting their objectives.

Critical to virtually all class action defense strategy is blocking the path to class certification. Accurately assessing the likelihood of certification is what our clients need to know, and we have a proven track record in counseling our clients in the face of this risk. Because we are able to draw from our substantive acumen in the discreet area of law which is the subject of the class action, we can quickly identify the critical issues to raise with the court at the preliminary phase of the case, which often results in what would otherwise be a newsworthy event to a trivial passing line.

Our infrastructure allows us to handle these data- and document-intensive cases with efficiencies that provide real cost savings to our clients. We have the technologies to internally handle e-discovery, and we pass on those savings directly to our clients.

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* *Jay is Co-Chair of the Class Action Practice Group. He works in our Philadelphia, Pennsylvania office and can be reached at jsrothman@mdwcg.com or 215.575.2802.*

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

MARSHALL DENNEHEY'S FORCE MULTIPLIERS—OUR PARALEGALS

In the past few years, our firm has received notable recognition for the quality of our defense.

We have been recognized by Corporate Counsel in 2014, 2015, and 2016 as one of the law firms used by Fortune 500 companies most frequently. American Lawyer Media named our firm's Health Care Department as the best in Pennsylvania in 2013. In 2016, American Lawyer Media recognized our firm's Professional Liability/ Health Care Departments as the best litigation departments in Pennsylvania and our Appellate Advocacy and Post-Trial Practice Group as the best appellate practice in Pennsylvania.

Many of our individual attorneys receive statewide, regional, and national recognition for the quality of their work. One hundred and thirty-eight of our attorneys are Martindale-Hubble AV Preeminent rated.

Twenty-five of our attorneys have been recognized by U.S. News-Best Lawyers in America for their achievements in personal injury litigation, including nine attorneys who, since 2012, have been recognized as "Lawyers of the Year" in the area Personal Injury Litigation – Defendants.

One hundred and seventy-one of our attorneys have been listed with Super Lawyers in Pennsylvania, New Jersey, Florida, Ohio, New York and Massachusetts. A select group of attorneys are fellows in the prestigious American College of Trial Lawyers, the American Board of Trial Advocates, and the Litigation Counsel of America.

These firm and individual accomplishments are not attained alone. They are made possible by the exquisite support provided by litigation administrators and paralegals.

I am confident that every attorney in our firm who is supported by a paralegal would agree that they could not obtain the favorable settlements, earlier and more favorable resolutions, and excellent trial results without the dedicated efforts of their support staff and paralegals.

While paralegals are not new to Marshall Dennehey (our CEO, Tom Brophy, began his career here as a paralegal), their numbers have increased quite dramatically over the years. Twenty-five years ago, we employed perhaps a handful. Ten years ago, we had 70. Today, we have 110 paralegals.

More important than this numerical growth is the vital role they provide as we deliver high-calibre litigation defense to our clients.

The growth in our paralegal head count is attributable in part to insurers and clients demanding that more litigation tasks be handled by paralegals. In larger measure, however, this growth has been spawned by our recognition that paralegals are true "force multipliers"—their contributions to our trial teams yield a stronger defense.

This enhanced awareness of our paralegals' value is natural when one considers the expertise and professionalism that these men and women possess. Their collective skill has led to increased usage of paralegals at trial with considerable success.

Because our paralegals work so closely with their trial teams in investigating, discovering and preparing trial defenses, they have become effective assistants at trial with exhibits, witness coordination, and, of late, handling the presentation of case-in-chief and cross examination exhibits via state-of-the-art trial technology.

Last year, our paralegals successfully assisted our attorneys at trial in Harrisburg, Scranton, Philadelphia, Erie, and Roseland. Because we train our paralegals on how to use Summation, Trial Director and other trial presentation media, our clients derive significant cost savings when our paralegals assist in court in lieu of vendors. Our clients and insurers now more frequently approve their appearances, appreciating the added value their intimate familiarity with the case brings.

Three of our paralegals are Nurse Analysts—RNs and BSNs—and they provide enhanced health care-related expertise across the firm when needed. One of our paralegals is a Construction Analyst who is currently pursuing a Master's of Science degree in Construction Management in his "spare time." His enhanced expertise will allow us to parlay that expertise firmwide in the defense of complex design professional and construction defect litigation.

With the explosive growth in our SIU practice, we promoted one of our paralegals to the position of SIU Analyst. She now helps manage SIU operations and processes firmwide to include the key responsibility of ensuring client guideline compliance.

Linda Barron, our Director of Paralegal Services, and the Assistant Director, Eileen Strzyzewski Smith, are passionate about enhancing capabilities. They criss-cross our 20 offices to provide annual training on new software and hardware technologies, ethics, social media, research tools and skills, and current

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* *Chris is a shareholder, the Director of the Professional Liability Department and Chairman of the Board of Directors. He can be reached at 215.575.2733 or cedougherty@mdwcg.com.*

PROFILE OF OUR ORLANDO OFFICE

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The office's largest practice group is its health care liability section, which is comprised of shareholder Janice Merrill and me, as well as associates Andrea Diederich, Chanel Mosley and David Bear.

My practice focuses on acute care institutions. For over 23 years, I have represented one of the largest hospital systems, which houses the only Level I trauma center in the Central Florida area and is a teaching institution with nine residency programs. Over this time, I have successfully defended numerous physicians and nurses in cases ranging from emergency room care to pediatric cardiac surgery. I am among the foremost legal authorities in the state on Florida's Birth-Related Neurological Compensation Act, having successfully litigated numerous brain injury baby cases without any payment by my clients. In addition to health care, I have defended the area's largest theme park over the past 20 years in numerous personal injury lawsuits.

Janice Merrill heads up the long-term care section of Orlando's health care liability practice. A passionate litigator, Janice has defended long-term care institutions and acute care providers throughout Central Florida and has achieved numerous defense verdicts and arbitration victories. Her skills as a trial attorney are not just limited to health care cases. Janice also has trial wins in the fields of product liability and premises liability litigation.

Associates Andrea Diederich, Chanel Mosley and David Bear are exceptionally talented attorneys who comprise the rest of the health care liability group. Andrea handles all varieties of medical negligence and casualty cases and has developed a niche specialty defending institutions that treat minor victims of sexual trauma. Chanel, likewise, specializes in the same areas. Chanel is well recognized for her volunteer bar activities, having served four years on the Board of Directors for the Young Lawyers Section of the Orange County Bar, and she is recognized as a Florida Legal Elite "Up and Comer." David Bear has developed an active insurance coverage practice in addition to his medical negligence defense work. He was also recently appointed by Florida Governor, Rick Scott, to the Judicial Nominating Commission for the 18th Judicial District of Florida.

The office's casualty group is headed by Cynthia Kohn, who has been with the firm for nearly 20 years. Cynthia's litigation talents are varied and diverse. Her specialties include representing clients in high-value cases involving national transportation carries, retail establishments, restaurants and homeowners associations. Her talents go beyond her casualty practice, as she also represents numerous health care professionals in professional liability claims. Shareholders Tom Brown and Amanda Podlucky round out our casualty group and have equally impressive skill sets. Tom oversees an active amusement and entertainment litigation practice in which he represents several theme parks in accident and amusement ride-related litigation. This is in addition to his litigation practice involving catastrophic premises liability cases. Amanda defends all manner of hospitality businesses in her practice, including retail stores, hotels, resorts, night clubs and recreational facilities.

The Professional Liability Department consists of three shareholders whose practices cover the gamut of professional liability claims. Adam Herman focuses on the field of construction defect litigation with an emphasis in the representation of professional architects and engineers. Robert Garcia, likewise, defends professionals from varied disciplines, including manufacturers, contractors, franchisors and insurance brokers. Combined, Adam and Robert have dedicated 30 years of their professional careers to defending the actions of other professionals. David Henry has a multi-faceted practice defending professionals in E&O, D&O, HOA, deceptive trade practice and copyright/trademark litigation. Additionally, he is a Florida Supreme Court Certified Circuit Civil and Appellate Mediator with a proven track record of resolving complex business disputes.

Like the city itself, our Orlando office is growing and energized. We are poised to represent our clients with the highest degree of professionalism now and into the future. ■

CLASS ACTION PRACTICE GROUP

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At any one time, we are actively handling an inventory of dozens of class actions. While we have enjoyed great success at the preliminary phase of these cases, the lawyers at Marshall Dennehey are also prepared to continue the fight into the courtroom for trial should the matter so proceed. Ours is not a firm with a handful of litigators who comprise the litigation department, who have handled a few class actions in their career and who seldom try cases to verdict. Rather, Marshall Dennehey has over 500 lawyers who litigate in the state and federal courts and self-regulatory entities and administrative agencies. In short, if you need your case tried to verdict, we have the depth and the experience. ■

Federal—Employment Law

POST-ACCIDENT DRUG TESTING UNDER OSHA'S NEW RULE

By Ashley L. Toth, Esq.*

KEY POINTS:

- OSHA's "new rule," effective January 1, 2017, requires employers to electronically submit injury and illness data to OSHA.
- The anti-retaliation provision of the "new rule" prohibits post-accident drug testing policies.
- Employers may still drug test employees under certain circumstances.

Ashley L. Toth

On January 1, 2017, OSHA's "new rule" took effect, which requires employers to electronically submit injury and illness data to OSHA. Along with the electronic submissions, the new rule also contains an anti-retaliation provision. This provision prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. More specifically, the section prohibits: (1) disciplinary policies for reporting injuries or illnesses; (2) post-accident drug testing policies ("blanket policies"); and (3) employee incentive programs.

In attempting to conform with OSHA's new rules, the question arises as to when employers may drug test employees? First and foremost, random drug testing and/or pre-employment drug testing are not subject to OSHA's new regulations and, therefore, are not prohibited. Second, an employer may require an employee to submit to a drug test following an accident/incident if there is a "reasonable" possibility or suspicion of impairment from drugs or alcohol. This is a case-by-case analysis of whether the circumstances of each accident gives rise to a "reasonable suspicion" supporting drug testing. Importantly, however, OSHA warns that "bee stings" and "carpal tunnel" claims do not rise to the level of "reasonable suspicion." Third, employers are permitted to drug test an employee after an accident if the drug test is required by some other federal or state law. For example, there are specific and detailed Department of Transportation regulations (49 CFR Part 382) pertaining to drug and alcohol testing for certain truck drivers. Finally, there is one small exception that permits employers to drug test employees after an accident. That is, if the drug test is completed under the Workers' Compensation Drug Free Workplace policy.

Under the Workers' Compensation Drug Free Workplace policy, an employer is specifically permitted to conduct post-accident drug tests if the employer is receiving a rate reduction on workers' compensation premiums for operating a "Drug Free Work Place" in accordance with the state's Drug Free Work Place Act ("DFWPA"). Therefore, to determine whether an employer can legally perform mandatory post-accident drug testing, one must first look to the state's DFWPA. For example, under New Jersey's DFWPA, an employer may drug test an employee only if they "*caused or contributed* to an accident arising out and in the course of employment which results in an injury or death …." Accordingly, in New Jersey if an employer is participating in the workers' compensation rate reduction policy AND the employee "caused or contributed" to an accident that resulted in injury or death, the employer is permitted to drug test that employee under this limited exception.

Although OSHA's "new rule" took effect on January 1, 2017, the electronic upload portal is not yet operational. At this time, employers are still required to keep a written record of all workplace accidents or injuries until the portal is available. With regards to enforcement of the anti-retaliation provisions, only time will tell how the Trump Administration will handle enforcement of the "new rule." ■

** Ashley is an associate in our Mount Laurel, New Jersey office. She can be reached at 856.414.6400 or altoth@mdwcg.com.*

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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legal developments. As a practitioner blessed to have been supported—and continue to be supported—by exceptional paralegal support, it is inspiring to observe how motivated our paralegals are to improve their skills.

It is also exciting to see their powerful initiative. In a recent legal malpractice case, one of our paralegals mined metadata in accident scene photos—without a request or any prompting—and she found that the photos were not taken on the date of the accident. It led to plaintiff's counsel dismissing the case with prejudice. Paralegals in our Long Island office actually co-founded a paralegal association which now serves the greater New York City region.

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Federal—Employment Law

SEXUAL ORIENTATION AND GENDER IDENTITY ARE NOT PROTECTED CLASSES UNDER TITLE VII…OR ARE THEY?

By Danielle M. Vugrinovich, Esq.*

KEY POINTS:

- Treat complaints of discrimination based upon sexual orientation and gender identity the same as other complaints based upon Title VII.
- Employers should update and distribute all discrimination policies to include sexual orientation and gender identity.
- Employers should Implement policies and procedures consistently and fairly.

Danielle M. Vugrinovich

As of late, the topics of sexual orientation and gender identity have been at the forefront of media attention. Employers need to take note and educate themselves on the manner in which to respond to employee complaints relative to discrimination based upon sexual orientation and gender identity. It is widely assumed that neither group is subject to the protections of Title VII. However, the courts and the EEOC are interpreting complaints of this nature as discrimination "because of sex," which is the exact phrase included in the text of Title VII itself.

In light of the EEOC's position with respect to the prohibition of discrimination based upon sexual orientation and gender identity, it is reasonable to assume that discrimination claims of this type will be found actionable as sex discrimination under Title VII. Recently, the United States District Court for the Western District of Pennsylvania addressed the issue of whether complaints by a male employee claiming that he was targeted for harassment due to his intimate relationship with another male were actionable under Title VII. *United States EEOC v. Scott Medical Health Center, P.C.*, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa. Nov. 4, 2016). On behalf of the employee, the EEOC argued that: (1) had the employee been female, he would not have been subject to such discrimination; (2) he was harassed because of his relationship with a member of the same sex, which takes sex into account; and (3) he was targeted because he did not conform to the harasser's idea of how a male should conduct himself. The court explained that the central issue in determining whether the lawsuit could move forward was whether the employee would have been subjected to the harassment or discrimination had he been a female under the same circumstances.

In its opinion, the court detailed how the United States Supreme Court has broadened the interpretation of the phrase "because of sex" from Title VII over the years (*i.e.*, men and women are protected from discrimination, same-sex discrimination and gender stereotyping). Sex stereotyping has been used by the courts to characterize behaviors toward women who do not conform with the harasser's perception of how a woman should look and act. Therefore, it is logical to apply the same standard to a male subject to harassment because he does not conform to the harasser's beliefs about how a man should appear and act. Likewise, courts have applied Title VII protection to transgendered individuals based upon theories of discrimination "because of sex" and gender stereotyping.

As with other types of discrimination or harassment under Title VII, illegal actions based on sexual orientation and gender identity can include failure to hire, failure to promote, pervasive inappropriate comments, denying such an individual conditions or privileges of employment that others enjoy, and termination. Additionally, discrimination based upon gender identity can also include preclusion from use of the restroom of the sex with which he/she identifies, use of the name previously used by the individual after being advised of a name change, and continued use of the pronoun associated with the gender with which the individual previously identified after the individual presents at work as the opposite gender.

In light of recent decisions across the country regarding the interpretation of Title VII, employers must be vigilant in performing an investigation when they receive complaints regarding harassment or discrimination that in any way could relate to the sex of the individual complaining of such behavior. Policies and procedures must be applied consistently and fairly among employees without regard to sexual orientation or gender identity. If an individual reports that he or she is being subjected to harassment or discrimination regarding sexual orientation, perceived sexual orientation, gender identity or perceived gender identity, an employer must conduct an investigation in the same manner as for any other type of discrimination or harassment falling under the protection of Title VII.

Additionally, employers should update their employee manuals and any other documentation that explains anti-discrimination and harassment policies to reflect that the employer will not tolerate harassment or discrimination based upon sexual orientation or gender identity and how to report it. If the employer requires its employees to sign an acknowledgement of anti-discrimination policies, those acknowledgments should be updated to include sexual orientation and gender identity. As with all employment relations activities, it is of the upmost importance to apply policies consistently and fairly, promulgate written anti-discrimination and harassment policies, and ensure that employees understand the policies. ■

* *Danielle is a shareholder in the Pittsburgh, Pennsylvania office and can be reached at 412.803.1185 or dmvugrinovich@mdwcg.com.*

Federal—Professional Liability

NEWLY AMENDED FEDERAL CIVIL RULE 26(b)(1): INJECTING HEALTHY DOSES OF PROPORTIONALITY AND RELEVANCE TO CURTAIL THE SCOPE OF DISCOVERY

By David J. Oberly, Esq.*

KEY POINTS:

- Amendments to Federal Rules of Civil Procedure will change discovery practice in federal courts.
- Changes focus on the scope of discovery, proportional discovery, elevated collaboration and reduced gamesmanship.

David J. Oberly

A sweeping collection of modifications to the Federal Rules of Civil Procedure recently went into effect that will drastically change the way discovery is conducted in federal court. Taken together, these recent changes are designed to place a greater focus on proportional discovery, elevated collaboration and reduced gamesmanship. Of note, wholesale modifications were made to Rule 26(b)(1), relating to the scope of discovery and the principle of proportionality, that will have a far-reaching impact on types of civil litigation conducted in the federal courts across the county.

In order to limit ever-increasing discovery costs and burdens that have skyrocketed in recent years with the proliferation of electronically stored information, extensive changes were made to Rule 26, which defines the scope of permissible discovery. In particular, two noteworthy modifications to Rule 26(b)(1) were implemented with the specific intent of significantly narrowing the contours of permissible discovery. To achieve this goal, the amendments taper and limit the overall scope of discovery by making proportionality and relevance the new staples of Rule 26(b)(1) and by explicitly injecting proportionality considerations within the main definition of permissible discovery.

Perhaps most importantly, the scope of discovery under Rule 26 has been redefined and limited as discovery must now be relevant and proportional, as opposed to simply being reasonably calculated to lead to other admissible evidence. The prior version of Rule 26(b)(1) did little to limit discovery, allowing for the discovery of "any nonprivileged matter that is relevant to a party's claim or defense," "any matter relevant to the subject matter involved in the action" where good cause could be shown, and even inadmissible evidence so long as the information or documentation "appear[ed] reasonably calculated to lead to the discovery of admissible evidence." Importantly, with the amendments to Rule 26(b)(1), the phrase "reasonably calculated to lead to the discovery of admissible evidence"—which was often used to argue that the scope of discovery should be expansive—was eliminated from the Rule. The revised Rule now states only that information need not be admissible to be discoverable. This change was necessary to make clear that the limitation on discovery cannot be expanded by discovery claimed to be reasonably calculated to lead to admissible evidence.

In its place, Rule 26(b)(1) now provides that discovery must be "proportional to the needs of the case." In addition, the amended Rule also retained the language requiring that discovery be limited to matters "relevant to any party's claim or defense." Thus, the scope of discovery is now defined based on matters specifically relevant to the claims and defenses put forth in the litigation. This particular amendment provides further clarification that the scope of discovery is no longer linked to the probability of discovering admissible evidence. Because many practitioners previously relied on the argument that discovery was permitted where information or documentation was "reasonably calculated" to lead to something beneficial to the party's cause, this language was eliminated in order to emphasize that discovery should not be permitted beyond the defined scope. Accordingly, two requirements must now be met in order to establish that discovery requests fit within the parameters of Rule 26(b)(1)—relevance and proportionality.

The amended Rule further narrows and limits discovery by inserting a list of proportionality factors into Rule 26(b)(1)'s main definition of the permissible scope of discovery. These proportionality factors are aimed at providing the litigants with a set of limiting principles intended to aid in gauging proportionality. These factors entail "[t]he importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Much of the amended language relating to Rule 26(b)(1)'s proportionality factors was simply moved up from Rule 26(b)(2)(C)(iii) and explicitly incorporated within the defined scope of discovery. While prior Rule 26(b)(2)(C)(iii) contained very similar discovery-limiting factors for consideration, federal courts frequently failed to take these considerations into account and rarely

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* *David is an associate in our Cincinnati, Ohio office. He can be reached at 513.372.6817 or djoberly@mdwcg.com.*

Federal—Public Entity & Civil Rights

HAND IN GLOVE…BUT DOES IT REALLY FIT? *MANUEL* DECISION EXPANDS FOURTH AMENDMENT SECTION 1983 CLAIMS WHILE INCREASING EXPOSURE AND CLAIMS FOR MUNICIPALITIES

By Diana P. Cortes, Esq.*

KEY POINTS:

- Uncertain accrual date increases the expansion of pretrial detention claims.
- Increase in exposure and claims against municipalities.
- Best line of defense: statue of limitations and a good offense.

Diana P. Cortes

"Manuel's [pretrial custodial detention] claim fits the Fourth Amendment, and the Fourth Amendment fits Manuel's [Civil Rights Section 1983] claim, as hand in glove." Justice Elena Kagan wrote this in the six-justice majority rationale of *Manuel v. City of Joliet, Illinois*, 137 S.Ct. 91 (Mar. 21, 2017). The majority found that Elijah Manuel had a pretrial detention claim under the Fourth Amendment. But does this "glove" really fit in Section 1983 litigation? How will this decision impact liability and exposure and the defense against these new claims?

ELIJAH MANUEL'S JOURNEY TO FOURTH AMENDMENT EXPANSION

On March 18, 2011, during a traffic stop, City of Joliet police seized a vitamin bottle of pills from Manuel, who was the passenger in the car. One police officer field-tested the pills, and the test came back negative. Manuel, however, was arrested because one of the police officers still believed the pills could be Ecstasy based on his experience. An evidence technician conducted another test that confirmed the pills were not Ecstasy. In their reports, the evidence technician and one of the arresting officers stated the pills were Ecstasy, and the criminal complaint stated the pills were Ecstasy. Based on the criminal complaint, a county court judge detained Manuel for unlawfully possessing a controlled substance. Two weeks later, a grand jury indicted Manuel based on the same testimony. On April 1, 2011, another lab test again confirmed that the pills were not Ecstasy. The assistant district attorney dismissed the charges on May 4, 2011, and Manuel was released the next day.

On April 22, 2013, Manuel filed a Section 1983 lawsuit alleging unlawful arrest and pretrial detention claims under the Fourth Amendment. The City moved to dismiss the complaint because the applicable two-year statute of limitations had lapsed; Manuel had until March 18, 2013, to file such a lawsuit. The district court granted the City's motion and dismissed all claims with prejudice. Manuel appealed the dismissal of the unlawful detention claim. The Seventh Circuit affirmed, relying on its precedent.

The United States Supreme Court (SCOTUS) granted *certiorari* to address the split in the Circuits regarding whether the Fourth Amendment covers pretrial detention claims. SCOTUS indicated that the Fourth Amendment governs pretrial detention claims even beyond the start of legal process and that Manuel's claim met this threshold inquiry under Section 1983, which requires courts to "[i]dentify the specific constitutional right at issue." Reasoning that the Fourth Amendment protects against unreasonable seizures, SCOTUS found that Manuel's 48-day detention lacked probable cause, which was an unreasonable seizure. The Fourth Amendment is specific to the criminal justice system and could be invoked after the legal process had begun. Despite authorizing this claim, SCOTUS did not determine when this claim accrued: March 18, 2011, the arrest date, or May 4, 2011, the date charges were dismissed. It remanded to the Seventh Circuit to decide the accrual date.

Supreme Court Justices Samuel Alito and Clarence Thomas dissented. Justice Alito initially recognized that the Fourth Amendment applied to pretrial detention, but only through the initial arrest. He cautioned that if the majority's decision meant that the pretrial detention claim "accrue[d] as long as pretrial detention lasts—the Court stretches the concept of a seizure much too far." The Court found that Manuel's remedy should be in the due process clause, not the Fourth Amendment, because the courts and the legal process had intervened and continued his detention. Because Manuel filed his lawsuit on April 22, 2013, his only viable claim would be a malicious prosecution claim.

MANUEL EFFECT: INCREASE IN CLAIMS AND EXPOSURE

Manuel puts into question the accrual date of pretrial detention claims. Commentators predict this accrual issue will return to SCOTUS. Normally, such claims would accrue on the date of the arrest. In Manuel's case, had the Court applied this accrual date, his lawsuit would have been dismissed. However, the Court remanded this issue back to the Seventh Circuit.

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* *Diana is an associate in our Philadelphia, Pennsylvania office. She can be reached at 215.575.2721 or dpcortes@mdwcg.com.*

Florida—Professional Liability

CONFLICTS BETWEEN CARRIERS AND INSUREDS AT TIME OF SETTLEMENT: MEDIATING PROFESSIONAL LIABILITY CLAIMS

By David W. Henry, Esq.*

KEY POINTS:

- Settling professional liability claims poses some unusual challenges.
- Associations and entities operated by governing boards require additional communication and counseling prior to settlement.
- Privilege preservation is important when dealing with a corporate board where rogue members may have sympathy for the plaintiff's position.

David W. Henry

Professional liability claims present some challenges in the context of settlement or mediation that warrant special consideration. Most professional liability policies contain settlement control clauses that impact liability claims. Such clauses require the consent of the insured. There are potential cost and exposure ramifications to an insured that fails to accept and consent to settlement the carrier believes to be prudent.

The consent issue is not usually difficult to navigate when the insured is an individual or a business with clear lines of responsibility and decision-making. But when the insured is an association or organization that operates with a governing board, the question of consent to settlement can become thorny. In many corporations, including charities, home-owners associations, condominiums and not-for-profits, litigation and settlement decisions must be approved by a governing board of directors or members. There may be real or unknown schisms or factions in the board. Some of the board members may be new to the board and may not understand the history of the litigation. Other times, board members may be sympathetic to the plaintiff or overtly favor the plaintiff's legal position.

There may be vigorous differences of opinion on the merits of settlement and opposition to settlement, even when at a nominal expense. This is particularly common in settlements that may involve more than simply the payment of monies from an insurance carrier. Some negotiations and contemplated settlements involve a discussion of non-economic terms, including, for example, written apologies, changes in HOA bylaws, modifying trademarks or posting information on websites. There are a myriad of "wants" beyond money that the plaintiff might demand as part of a global settlement.

In such situations, the involvement of a trained mediator is particularly helpful. When the lawyer defending "the board" finds himself or herself between bickering factions, the carrier may be precluded from effectuating an economically sound settlement by a deadlock within the board or face heated rancor between members. The solutions are several. Early in the process, well before any formal settlement conference or mediation, involve the mediator in order to flush out those members who may be resistant to any hypothetical settlement. Work early in the case to manage expectations, but make clear to the board that settlements are common. It is important to let the board know that only two to three percent of cases go to trial and that, at some point, a settlement offer is likely to come under consideration. Many board members may think that trial is inevitable when we know it is not. Other board members may have personal vendettas or opinions that are formed from misunderstandings or unsubstantiated concerns over the effect of a settlement.

Another good tactic is to reach out to opposing counsel early to determine if non-monetary considerations are likely to be a part of the negotiations. Additionally, in rare cases, we have come to learn from pre-mediation communication with certain board members that other members of the board may be sympathetic to the plaintiff's position. In those situations, special care must be taken to limit settlement-related communications to a designated litigation subcommittee comprised of less than the entire board. This will typically take a resolution to enact a litigation committee or working group. One should not cavalierly assume that a governing board will accede to the settlement recommendation of defense counsel and the insurer. Where settlement control clauses are in play, early and in-person communication with the board is strongly advised in order to flush out internal divisions, potential opponents and impediments to achieving a global settlement. ■

* *David is a shareholder in our Orlando, Florida office. He can be reached at 407.420.4418 or dwhenry@mdwcg.com.*

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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One other meritorious trait I see in our paralegals is their fortitude. Many of our paralegals remember when the Department of Labor (DOL) characterized them as "exempt personnel" and they could work on cases as attorneys do without having to clock in/out of the office.

When the DOL re-classified them as "non-exempt personnel," this change imposed constraints unique to them—*i.e.*, support busy litigation practices with trial scheduling deadlines, capture their productivity, and juggle important personal responsibilities—all at the same time. While attorneys receive media attention, client recognition and industry accolades, our paralegals labor outside of the limelight.

I make my last observation for our industry colleagues.

More self-insureds and insurers mandate that routinized legal tasks be handled by paralegals. When our paralegals diligently execute those tasks, too often they observe their time being written off as "administrative," "duplicative," or "excessive." Their frustration mounts from having performed legitimate work that is required to be performed by them, only to be challenged later when an invoice for their hard work is presented.

Our firm is completely in sync with industry objectives to contain legal spend. To attain that objective, however, our industry needs skilled defense attorneys and paralegals handling their cases.

Current industry literature supports the fact that large law firms experience a high degree of paralegal attrition. Fortunately, our attrition rates are nowhere near national averages. We are, however, very attentive to the unique challenges civil litigation paralegals face day-to-day, and to any internal paralegal attrition.

Only with well-trained and experienced attorneys and paralegals can cases be worked up efficiently and appropriately and be well-positioned for a valued resolution. Our clients and insurers should recognize that over-aggressive scrutiny and reduction of paralegal time entries will continue to prickle paralegal morale and drive paralegal attrition toward positions in corporate law departments, banks, insurance companies and plaintiffs' law firms where that additional pressure does not exist.

This isn't a Marshall Dennehey problem—it is a defense industry issue. Defense paralegal expertise and experience helps deliver positive case outcomes—a "win-win" for us and our clients.

In closing, and on behalf of senior management and our attorneys, we extend our heartfelt appreciation for the dedication, loyalty, and commitment our paralegals provide to our firm and to our clients.

What success we attain as a firm is made possible by their many and varied individual contributions. ■

NEWLY AMENDED FEDERAL CIVIL RULE 26(b)(1)

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applied them to narrow the scope of discovery. These proportionality considerations, which were previously only triggered following a party's request for a protective order under Rule 26(b)(2), are now included in the main definition of the scope of discovery, and they now constitute a mandatory consideration of the parties at the outset of the discovery process whenever discovery requests or responses are made. This emphasis placed on the proportionality factors through their inclusion in the primary component of Rule 26 highlights the duty imposed by Rule 26(g) that litigants consider proportionality both when requesting and responding to discovery. Moreover, by explicitly tying a proportionality mandate into the more narrowed definition of scope of discovery, the amendments place further emphasis on the fact that discovery must incorporate a balancing of interests and should be confined to the specific claims and defenses put forth by the litigants.

Importantly, amended Rule 26(b)(1) does not place the burden of establishing proportionality on the party requesting discovery. Nor is the revised Rule intended to allow the responding party to resist discovery by asserting boilerplate objections that the requested discovery is not proportional. Rather, the parties now have a collective obligation to take proportionality into consideration both when serving and responding to discovery requests. Likewise, courts have an identical obligation when ruling on discovery disputes as well.

The scope and proportionality focuses of the Rule 26(b)(1) amendments are complemented with an amendment to Rule 26(c)(1) inserting language that authorizes protective orders that include the "allocation of expenses" arising from discovery, allowing a court to shift the costs of providing discovery in the context of protective orders. This particular amendment to Rule 26 was provided to promote the responsible use of discovery proportional to the needs of the case. As a result, Rule 26(c)(1) now offers a basis for recourse to a party who is forced to respond to abusive discovery served with the intent to ratchet up the cost of litigation to exorbitant, unnecessary levels, and it allows courts to protect a party from undue burden and expense in such situations. Beyond that, in linking the expense of discovery to the litigant who seeks to benefit from the discovery, this particular revision further promotes Rule 26's focus on encouraging parties to closely consider whether discovery requests are genuinely required to support the propounding party's claims or defenses.

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New Jersey—Workers' Compensation

BURDENS OF PROOF AND THE NEW JERSEY WORKERS' COMPENSATION SECOND INJURY FUND

By Robert J. Fitzgerald, Esq.*

KEY POINTS:

- The Second Injury Fund pays permanent-total disability benefits in certain workers' compensation cases.
- These benefits are not applicable when the final disabling medical condition is not from a work injury.
- The petitioner always has the burden of proof in proving entitlement for Second Injury Fund Benefits.

Robert J. Fitzgerald

The Appellate Division recently revisited a petitioner's burden of proof for Second Injury Fund benefits in *McLaughlin v. Active Disposal Service, Inc*., 2017 N.J. Super. Unpub. LEXIS 173 (App.Div. Jan. 26, 2017). The petitioner in *McLaughlin* received a permanency award as the result of injuries he sustained to his left leg during a work-related accident that occurred in 1999. Additional injuries were suffered in 2000, and the petitioner received another partial-total award for lumbosacral and cervical injuries.

In 2005, the petitioner suffered injuries to his right arm as a result of a third work-related accident and filed a new petition. During the pendency of the 2005 claim petition, the petitioner filed an application to modify the 1999 and 2000 awards, claiming an increase in his permanent disability to his left leg and lumbar and cervical spines. Finally, in 2008, he filed an application for Second Injury Fund benefits, claiming his last compensable accident—in 2005—rendered him permanently and totally disabled.

The petitioner's three cases were the subject of a consolidated trial before a Workers' Compensation Judge, who heard testimony from the petitioner and his medical experts, Dr. Vijaykumer Kulkarni and Dr. Cheryl Wong. The respondent presented Dr. Robert Morrison. Following the hearing, the judge issued a detailed written decision in which he concluded the petitioner failed to sustain his burden of establishing an entitlement to a modification of the 1999 and 2000 awards.

The judge also found that the petitioner was not entitled to Second Injury Fund benefits because he "[b]ecame totally disabled as a result of his diabetic condition, not his lumbar, cervical, left knee or right elbow injuries." Specifically, the judge noted that the petitioner was unable to continue working because he took insulin for his diabetes. Therefore, taking insulin barred his use of the commercial driver's license that was essential to the performance of his job duties.

In his appeal, the petitioner argued that the judge's rejection of his request for modifications of the 1999 and 2000 awards was not supported by credible evidence. However, the Appellate Division noted that the judge was presented with voluminous and conflicting testimony and evidence concerning the injuries that were the subject of the awards and their alleged progression. There was sufficient credible evidence supporting the judge's determination that there was no increase in permanent disability to the petitioner's left leg, for which he received the 1999 award, or to his lumbar or cervical spines, for which he received the 2000 award. The Appellate Division added that, giving due weight to the judge's expertise and opportunity to view the witnesses and evidence, there was sufficient credible evidence supporting these determinations.

For the same reason, the Appellate Division also affirmed the denial of the petitioner's application for Second Injury Fund benefits. Here, the judge found that the petitioner became totally disabled, but not as the result of a work-connected action or occupational illness but, rather, due to his diabetic condition. The Appellate Division noted that the burden of proof was on the petitioner to prove entitlement to Second Injury Fund benefits and that the petitioner failed to meet his burden.

As a side note, the Appellate Division emphasized that, for the first time on appeal, the petitioner sought reimbursement for medical expenses he incurred for treatment received at a Veteran's Administration hospital. Citing long established precedent, the Appellate Division declined to consider this argument because it was not properly raised before the Division and did not involve jurisdictional or public interest concerns. *Zaman v. Felton*, 98 A.3d 503,519 (N.J. 2014); *see also Nieder v. Royal Indem. Ins. Co*., 300 A.2d 142, 145 (N.J. 1973).

While this case does not present any new concepts for Second Injury Fund benefits, it does remind us of the petitioners' burden of proof for such benefits. In order for a petitioner to be eligible for these benefits, one or more pre-existing injuries or conditions must combine with a last compensable accident to render an individual permanently and totally disabled. If the last disabling condition was not the compensable work injury/condition, as in the *McLaughlin* case, then Second Injury Fund benefits are not applicable. Similarly,

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* *Bob is a shareholder in our Mt. Laurel, New Jersey office. He can be reached at 856.414.6009 or rjfitzgerald@mdwcg.com.*

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Michael Archibald (Tampa, FL), **Shane Haselbarth** (Philadelphia, PA) and **Ryan Burns** (Fort Lauderdale, FL) successfully defended an appeal of a favorable verdict in a wrongful death action tried by Michael in a negligent security case. Michael represented an affordable housing development where the shooting of a 20-year-old resident occurred at the development's playground. The decedent was found with cash in his pockets, so it did not appear that robbery was the motive. The homicide investigation was an unsolved cold case. Therefore, the police refused to provide any substantial evidence concerning how the shooting was done or by whom, leaving our client to fend for itself in determining why its security protocols were not the cause of the decedent's murder. Moreover, during the trial, Michael had to overcome the trial court's exclusion of critical evidence concerning the decedent's request for a gun from his friend hours before his death, as well as evidence that would have supported an inference that the decedent was loitering in violation of curfew at the time of his death. Despite these challenges, Michael was able to convince the jury to apportion 67% comparative fault to the decedent, thereby reducing a $1 million verdict to $333,000. The plaintiff challenged the comparative fault apportionment on appeal. After considerable briefing by Shane and Ryan, and oral argument by Ryan, the Second District Court of Appeal issued a decision affirming per curiam, effectively stripping the plaintiff of the ability to petition to the Florida Supreme Court.

Frank Baker and **Wendy O'Connor** (Allentown, PA) obtained summary judgment in favor of our client, the owner of an event facility, in an action brought by a husband and wife who claimed damages as the result of the wife's slip and fall on a patch of ice on the facility's parking lot. Under cross-examination, the wife admitted that she had seen the patch of ice just prior to her fall and had proceeded to walk across it anyway because she "thought she wouldn't fall." The plaintiffs also admitted at deposition that they were unaware of any other patches of ice in the area of the parking lot other than where the wife fell. In response to the motion for summary judgment, and contrary to her deposition testimony, the wife submitted an affidavit asserting that the conditions at the parking lot were "generally icy" on the day in question and that she had no safe alternative route into the facility. Additionally, the plaintiffs claimed that the doctrine of assumption of the risk did not apply since the wife was not the driver of the couple's vehicle and, thus, did not select the parking space from which she alighted. The court rejected the wife's affidavit, finding it to be "not credible" and "directly contradictory to her previously stated facts." Applying the principles articulated in *Carrender v. Fitterer*, the court went on to note that the patch of ice on which the wife fell was "open and obvious" to her, that she chose to traverse the ice, and that she appreciated the risk of doing so, such that summary judgment based upon the doctrine of assumption of the risk was appropriate.

Brittany Bakshi (Harrisburg, PA) obtained summary judgment in a slip in fall case filed in Lebanon County, Pennsylvania on behalf of her client, a janitorial service. The plaintiff was working at a warehouse facility as an order filler. On the date of the accident, the plaintiff allegedly ate something that did not agree with her and needed to use the restroom. Upon opening the restroom door, she observed water on the floor generally and a small puddle in the center of the floor. The plaintiff admitted to seeing the water and appreciated the risk of traversing the slippery bathroom floor. However, she entered and held on to the bathroom stall wall to safely make her way to the stall. Upon exiting the stall, the plaintiff chose to exit a different way than she entered, across the center of the floor without holding onto anything, and she fell. Brittany filed a motion for summary judgment, arguing that the plaintiff encountered an open and obvious condition when she traversed the slippery floor and when she exited the bathroom stall. The court agreed and granted summary judgment.

Adam Calvert (New York, NY) obtained summary judgment for a retailer in a product liability case. The plaintiff was burned over half her body when an allegedly defective potholder ignited while she was getting a pan out of her oven. The potholder ignited her nightgown, which went up in flames. Adam represented the retailer before the Supreme Court, New York County, which dismissed the complaint against all defendants. The

** Prior Results Do Not Guarantee A Similar Outcome*

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court dismissed the complaint because the plaintiff's expert testified that the potholder must have touched the heating element of the oven in order to ignite. It would not have ignited if it were only close to the element. The plaintiff testified that she did not touch the element, which her expert tried to explain by stating that she must have inadvertently touched the element. The court found that the plaintiff's expert relied on facts not in evidence and rejected his argument, finding that the plaintiff could not show that a defect in the potholder proximately caused the accident.

Walter Klekotka (Mt. Laurel, NJ) obtained a defense verdict by way of a jury trial that was held in Monmouth County, New Jersey. Walt defended a supermarket in a case in which a vendor claimed he was struck by a large swinging door that was extended beyond its limits by a piece of machinery being operated by a store employee. When the machinery cleared the door, the plaintiff claimed the door was caused to snap back and accelerate towards him, causing injury to his left shoulder, neck and back. There was no wage loss, but there was a $25,994 net workers' compensation lien. The jury deliberated over two hours and came back with a 6-0 verdict, finding no negligence on the part of our client.

Paul Lees (Allentown, PA) obtained a defense verdict for a warehouse operator following a bench trial in Lehigh County. Paul successfully defended a claim involving allegations of $100,000 in property damage to electronic equipment that had been delivered to the defendant's warehouse. The plaintiff claimed that the defendant's warehouse forklift operators signed for the goods as undamaged and then damaged the goods as they were removing them from the delivery truck. At trial the warehouse employees testified and showed video depicting how items are unloaded at the warehouse. They denied that they caused any damage to the goods. The defense argued that the damages were consistent with, and appeared to be caused by, the way the goods were strapped down in the delivery truck. The trial court agreed with the defense that the plaintiff failed to prove that the damage was caused by the warehouse or that its employees were negligent. The court dismissed the claim, with prejudice.

Tony Michetti (Doylestown, PA) obtained a defense verdict in the Bucks County Court of Common Pleas. The plaintiff tripped on an elevated sidewalk in front of the defendant's home and suffered cervical, rib and knee injuries. Although the plaintiff had walked over the sidewalk many times prior to the accident, she claimed to have never noticed its condition. The defendant testified that he had observed the plaintiff, and many others, walking on the sidewalk prior to the accident without difficulty. Tony was able to argue that the defendant was not responsible under the licensee standard because the condition did not present an unreasonable risk of harm and the defendant had no reason to expect that the plaintiff would not discover or realize the risk involved.

Tony Michetti also obtained a defense verdict in a landlord out-of-possession case. The plaintiff was residing with the tenant in a rental property owned by the defendant. As the plaintiff descended the front steps of the rental home, a corner of the masonry steps broke, causing the plaintiff to fall and suffer a fracture in his dominant hand. Coincidentally, the plaintiff was a mason by trade, and he claimed that his hand injury was permanent and resulted in a seven-figure future earning loss claim. It was uncontroverted that the steps were in disrepair and that, prior to the accident, the plaintiff had offered to repair the steps if the defendant landlord would pay for the materials. The defendant landlord testified that the terms of the oral lease required the tenant to make all repairs to the property, even structural repairs. The tenant, who was the niece of the defendant landlord, denied that she had agreed to make all repairs and presented as an extremely hostile witness. The case was tried in front of a single arbitrator.

HEALTH CARE DEPARTMENT

Grant Cannon (Pittsburgh, PA) obtained a defense verdict on behalf of a primary care physician in a case where the plaintiff alleged the physician failed to order a blood test that would have detected a rare blood disorder called TTP. Five days after seeing our client, the decedent's condition rapidly declined, and two days later, he died. Prior to trial, the plaintiff's demand was $975,000. The defense was multifaceted. First, our client directed the decedent to the hospital where a blood test would have been performed, but the decedent refused. Furthermore, the decedent refused outpatient testing, which would have included a blood test. Our client tried to comply with the standard of care, but was prevented from doing so because of the decedent's choices. Second, Grant contended that the decedent did not die from TTP but, rather, from a related blood disorder called DIC, which is only caused by another underlying pathology, which, in this case, was suspected to be lung cancer.

Fred Roller, **Mary Kate McGrath** and **Michelle Moses** (Philadelphia, PA) obtained a defense verdict on behalf of an emergency department physician for his alleged failure to

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adequately evaluate postpartum bleeding, which resulted in a hysterectomy 24 hours later. The plaintiff was 24 years old and from out of state. As she and her family were traveling from Virginia to Reading, Pennsylvania, she presented to the hospital's emergency room two weeks postpartum with complaints of passing large, golf ball-sized clots within the past hour. Our client noted she was not bleeding in the ER, and in light of a normal hemoglobin, elected not to do a pelvic exam, order an Ultrasound or obtain an OB consult. She was discharged with instructions to follow up with her OB within 24 hours, although she allegedly told the doctor that she and her family were in Reading for the week. She appeared to be fine the next day, even though, 21 hours after discharge, she began bleeding heavily again and returned to the same ER. An ultrasound ordered by a different doctor revealed findings consistent with Retained Products of Conception and requested an OB consult. A total of six hours passed before the OB arrived. The plaintiff testified that during this time, she had massive bleeding and had very little monitoring by either the nurses or the ED doctor. A D&C was performed, but it failed to stop the bleeding, which then necessitated a hysterectomy. The plaintiff claimed that everyone, especially our doctor, failed to act promptly enough to have her condition treated, which she claimed would have preserved her uterus. The plaintiff and her husband testified that they wanted a big family. Putting aside standard of care arguments, the defense jointly presented a causation defense of subinvolution of the uterus, which is a relatively rare condition that manifests about two weeks after delivery and prevents placental arteries from sealing off and for which the prevailing treatment is hysterectomy. The Berks County jury returned a unanimous defense verdict after nearly three hours.

PROFESSIONAL LIABILITY DEPARTMENT

Larry Berg and **Kara Pullman** (Mount Laurel, NJ) obtained summary judgment in an employment law matter in which the plaintiff, a former employee of the defendant company, claimed that she was terminated because of her age in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 105-12. The defendant company had an office in New Jersey, but the plaintiff worked out of her home in Massachusetts. According to the defendant, in the seven years prior to her termination, she had not traveled to New Jersey for any work-related reason. The plaintiff claimed to have attended two meetings in New Jersey between 2003 and 2005, each lasting two days, and the last work-related contact the plaintiff claimed she had with the state of New Jersey occurred in 2008 when she supposedly attended a retirement dinner and a "breakfast meeting" with one other person the next morning. The court agreed with the defendant's arguments set forth in its motion for summary judgment that the LAD protected only New Jersey residents and that the plaintiff's limited contacts with the state did not afford her the statute's protections.

Larry Berg and **Kara Pullman** also obtained summary judgment in a matter where the plaintiff put an offer in on a home in Lambertville, New Jersey, after reviewing its online listing. Both the buyer and sellers were represented by the defendant real estate agency under a dual agency agreement. During the home inspection, the water pressure in the home, which was serviced by a well, dropped after ten minutes. The seller's real estate agent commented that the issue was probably due to a pressure switch. The inspection did not include an analysis of the well's capacity or recovery time. The sellers fixed the pressure switch, and a subsequent inspection indicated no further water pressure issues. The plaintiff alleged that, shortly after purchasing the property, water system issues reoccurred, and an assessment revealed that a new well was necessary. The plaintiff alleged negligence, breach of contract, breach of fiduciary duty, common law fraud, and Consumer Fraud Act claims as to the sellers' realtor and real estate agency. We argued that there was nothing in the record to suggest that the sellers' realtor made any misrepresentations regarding the property and that he did not commit fraud by expressing his opinion regarding the pressure switch. The plaintiff also failed to present expert testimony that the sellers' realtor and real estate agency breached the standard of care or that any issues actually existed with the well. The court agreed, and all claims as to the real estate agency and sellers' agent were dismissed.

Patrick Boland and **Mark Kozlowski** (Scranton, PA) obtained summary judgment on behalf of a police department and a police officer accused of using excessive force. The plaintiff was detained by police following reports of an individual with a gun who was riding an ATV near an old amusement park. The plaintiff appeared to be fleeing police on his ATV when he turned into a parking lot. After dismounting the ATV, the plaintiff was placed on the ground and handcuffed. A firearm was then discovered. After a brief investigation, it was determined that the plaintiff was not the individual sought by police. Although he was initially cited, the charges against him were withdrawn. The plaintiff sued multiple police officers and police departments for alleged violations of his constitutional rights to "freedom from use of excessive, unreasonable and unjustified force against his person, the right to be free from malicious prosecution, the

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right to be free from false arrest and the right to due process of law." Initially, a successful motion to dismiss was filed, and our client, one of several police departments, was dismissed. Following the close of discovery, a motion for summary judgment was filed on behalf of our remaining client, a police officer. Because there were no facts in the record to show that our client was involved in the arrest, plaintiff's counsel conceded the motion could not be opposed, and our client was dismissed from the action, with prejudice.

Christopher Boyle (King of Prussia, PA) obtained a jury verdict in the U.S. District Court for the Eastern District of Pennsylvania on behalf of a police officer. The plaintiff, a 67-year-old psychotic with a history of PTSD, engaged in an obscenity-laced altercation at a local McDonald's and refused to leave. When police from three different jurisdictions arrived, including our client, the plaintiff refused to identify himself, demanded an attorney and demanded to be Mirandized. As other officers placed him in handcuffs, our client stood by with his Taser at his side. The plaintiff was released from the scene without charges after producing identification. In his complaint and deposition, the plaintiff described a 22-year-old "hippie" police officer, 6'2", thin build with very long hair who was out of control, referring to himself as "Homeland Security," calling him a terrorist and pointing a "rifle" at him. Our client is a former Marine, 5'10", 235 pounds, with a military buzz cut, who was not armed with a rifle. In denying summary judgment, the court allowed that the plaintiff could have been mistaken in his description of the officer with the "rifle" and, because our client was the only one displaying a weapon, a jury could find that he pointed the Taser at the plaintiff. The case went to the jury on an illegal seizure claim, which returned a defense verdict in less than an hour.

Jeffrey Chomko (Philadelphia, PA) obtained a non-appealable defense award at binding arbitration in an alleged negligent procurement of insurance case. The plaintiff alleged the insurance agent failed to obtain coverage comparable to the plaintiff's prior coverage, resulting in an uncovered property damage loss of $220,000. While the arbitrator found that the agent violated his duty of care to the plaintiff, Jeffrey successfully argued that the plaintiff's own contributory negligence in failing to review and understand his coverage was sufficient to bar any recovery.

Nicholas Chrysanthem and **Steven Kaplan** (New York, NY) obtained a defense verdict in the United States District Court for the Southern District of New York. Our insurance company client adjusted a burglary loss for roughly $1.3 million and wired the proceeds directly to the insured rather than to the bank named as a loss payee on the policy. The bank had a security interest in the stolen inventory and was owed more than $2 million by the insured. Upon receipt of the proceeds, the principal of the insured abandoned his business (and his wife, who was a co-guarantor of the insured's indebtedness to the bank), took the money and fled the country. With prejudgment interest, the case presented a $1.5 million extra-contractual exposure to the insurance company. The primary issue was whether an ambiguous one-line email message sent by a bank employee to the insured, and forwarded by the insured to the insurer, constituted a waiver of the bank's right to receive the insurance proceeds. The burden was on the insurer to prove that: (1) the bank employee who sent the email knew sufficient facts about the adjustment of the loss to waive the bank's rights; (2) her email was intended by her to be a waiver of the bank's rights; and either (3) she had actual authority to send that message (notwithstanding that she was fired for sending it), or (4) the bank cloaked her with apparent authority to waive its rights; and also, (5) the insurer's reliance on her email message, as forwarded by the insured, was reasonable. The court ruled in our favor. R. David Lane, Jr. (New York, NY) provided much-needed assistance with the numerous submissions required by the District Court judge.

Jim Cole and **Shane Haselbarth** (Philadelphia, PA) obtained a complete dismissal, with prejudice, and then a unanimous Superior Court opinion affirming in this suit against an auto insurer. The spouse of the plaintiff-insured caused a fatality in a car accident. The auto insurer timely tendered the full limits of the auto policy, and the wrongful death case settled for three times that amount. The plaintiff then sued his insurer, arguing that it should have advised him to purchase higher insurance coverage in light of the higher liability limit ($1 million) purchased on his homeowner's insurance policy. The trial court and Superior Court agreed that an insurer has no duty to advise concerning the appropriate limits of insurance to purchase nor to "coordinate" the homeowner's liability limit with his or her auto liability limit. Both courts also rejected a claim for breach of contract based on advertising that the insurer would take care of the insurance needs of its insureds. Finding no deception in the policy limits, the advertising campaign was acceptable commercial puffery.

Bill Conkin (Philadelphia, PA) obtained a defense verdict in an insurance bad faith and breach of contract case where the claim was based on extensive damage to a residential property that had been unoccupied for five years. The plaintiffs,

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OFFICE LOCATIONS & CONTACT INFORMATION

PENNSYLVANIA

Philadelphia

2000 Market Street, Suite 2300
Philadelphia, PA 19103
215.575.2600 • Fax 215.575.0856
Butler Buchanan III, Esq., Managing Attorney
215.575.2661 • bbbuchanan@mdwcg.com

Allentown

4905 W. Tilghman Street, Suite 300
Allentown, PA 18104
484.895.2300 • Fax 484.895.2303
Jason Banonis, Esq., Managing Attorney
484.895.2338 • jmbanonis@mdwcg.com

Doylestown

10 N. Main Street, 2nd Floor
Doylestown, PA 18901
267.880.2020 • Fax 215.348.5439
R. Anthony Michetti, Esq., Managing Attorney
267.880.2030 • ramichetti@mdwcg.com

Erie

717 State Street, Suite 701
Erie, PA 16501
814.480.7800 • Fax 814.455.3603
G. Jay Habas, Esq., Managing Attorney
814.480.7802 • gjhabas@mdwcg.com

Harrisburg

100 Corporate Center Drive, Suite 201
Camp Hill, PA 17011
717.651.3500 • Fax 717.651.3707
Timothy J. McMahon, Esq., Managing Attorney
717.651.3505 • tjmcmahon@mdwcg.com

King of Prussia

620 Freedom Business Center, Suite 300
King of Prussia, PA 19406
610.354.8250 • Fax 610.354.8299
Wendy J. Bracaglia, Esq., Managing Attorney
610.354.8256 • wjbracaglia@mdwcg.com

Pittsburgh

U.S. Steel Tower, Suite 2900
600 Grant Street, Pittsburgh, PA 15219
412.803.1140 • Fax 412.803.1188
Scott G. Dunlop, Esq., Managing Attorney
412.803.1144 • sgdunlop@mdwcg.com

Scranton

P.O. Box 3118
Scranton, PA 18505-3118
570.496.4600 • Fax 570.496.0567
Robin B. Snyder, Esq., Managing Attorney
570.496.4610 • rbsnyder@mdwcg.com

NEW JERSEY

Mount Laurel

15000 Midlantic Drive, Suite 200
P.O. Box 5429
Mount Laurel, NJ 08054
856.414.6000 • Fax 856.414.6077
Richard L. Goldstein, Esq., Managing Attorney
856.414.6013 • rlgoldstein@mdwcg.com

Roseland

425 Eagle Rock Avenue, Suite 302
Roseland, NJ 07068
973.618.4100 • Fax 973.618.0685
Justin F. Johnson, Esq., Managing Attorney
973.618.4185 • jfjohnson@mdwcg.com

NEW YORK

Long Island – Melville

105 Maxess Road, Suite 303
Melville, NY 11747
631.232.6130 • Fax 631.232.6184
Anna M. DiLonardo, Esq., Managing Attorney
631.227.6346 • amdilonardo@mdwcg.com

New York

Wall Street Plaza, 88 Pine Street, 21st Floor
New York, NY 10005-1801
212.376.6400 • Fax 212.376.6494
Jeffrey J. Imeri, Esq., Managing Attorney
212.376.6408 • jjimeri@mdwcg.com

NEW YORK

Westchester

1800 Westchester Avenue, Suite C-700
Rye Brook, NY 10573
914.977.7300 • Fax 914.977.7301
James P. Connors, Esq., Managing Attorney
914.977.7310 • jpconnors@mdwcg.com

DELAWARE

Wilmington

Nemours Building
1007 N. Orange Street, Suite 600
Wilmington, DE 19801
302.552.4300 • Fax 302.552.4340
Kevin J. Connors, Esq., Managing Attorney
302.552.4302 • kjconnors@mdwcg.com

OHIO

Cincinnati

312 Elm Street, Suite 1850
Cincinnati, OH 45202
513.372.6800 • Fax 513.372.6801
Samuel G. Casolari Jr., Esq., Managing Attorney
513.372.6802 • sgcasolari@mdwcg.com

Cleveland

127 Public Square, Suite 3510
Cleveland, OH 44114-1291
216.912.3800 • Fax 216.344.9006
Leslie M. Jenny, Esq., Managing Attorney
216.912.3805 • lmjenny@mdwcg.com

FLORIDA

Fort Lauderdale

100 Northeast 3rd Avenue, Suite 1100
Fort Lauderdale, FL 33301
954.847.4920 • Fax 954.627.6640
Craig S. Hudson, Esq., Managing Attorney
954.847.4955 • cshudson@mdwcg.com

Jacksonville

200 W. Forsyth Street, Suite 1400
Jacksonville, FL 32202
904.358.4200 • Fax 904.355.0019
Martin Sitler, Esq., Managing Attorney
904.358.4234 • mhsitler@mdwcg.com

Orlando

Landmark Center One
315 E. Robinson Street, Suite 550
Orlando, FL 32801
407.420.4380 • Fax 407.839.3008
Bradley P. Blystone, Esq., Managing Attorney
407.420.4406 • bpblystone@mdwcg.com

Tampa

201 E. Kennedy Boulevard, Suite 1100
Tampa, FL 33602
813.898.1800 • Fax 813.221.5026
Michael G. Archibald, Esq., Managing Attorney
813.898.1803 • mgarchibald@mdwcg.com

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the insureds on a homeowners insurance policy issued by our client, claimed over $300,000 for structural damage and an additional $259,000 for personal property damage. In addition, the plaintiffs sought an award of punitive damages, attorneys fees and interest, which may be awarded in an insurance bad faith claim. In 2008, the insureds had moved to West Virginia to run a horse farm. They left their Pennsylvania home full of personal property and unoccupied. Water pipes froze after the utilities were shut off due to non-payment. The house flooded, but the insureds did not know about the flood because they never returned while in West Virginia. The damage to the interior was extensive due to the water, vandalism and theft. It was first discovered by the insured's brother in December of 2013. All parties agreed it must have taken weeks and probably months for all of the damage to have occurred. Utility records showed that the utilities had been turned off in 2009. Therefore, it was a logical conclusion that the water damage happened around that time, years before the damage was "discovered." Bill made the argument that no one could prove precisely when the extensive damages occurred. The plaintiffs had the burden to prove that the damage occurred within one year of the date suit was filed per the terms of the insurance contract, but they could not meet that burden due to the fact that they had not resided at the insured Pennsylvania home for at least five years before the discovery of the damage. Accordingly, the court found in favor of our client.

Patrick DeLong and **Devon Woolard** (Fort Lauderdale, FL) obtained dismissal of the plaintiffs' amended class action complaint that alleged various Fair Debt Collection Practices Act (FDCPA) violations by a law firm whose practice focused upon mortgage foreclosures. In their amended complaint, the plaintiffs claimed the law firm violated three provisions of the FDCPA. They sought to certify two separate classes of similarly situated borrowers. According to the complaint, the law firm violated the FDCPA by attempting to collect from the plaintiffs costs for service of process upon unknown tenants of the property at issue in the underlying foreclosure case and by including in the foreclosure complaint an improper date upon which the plaintiffs allegedly defaulted on their mortgage. The law firm representing the plaintiffs previously filed other putative class actions in Florida District Courts, alleging similar FDCPA violations in the mortgage foreclosure context by other defendants. Some of those prior cases were resolved by settlement. We filed a motion to dismiss the amended class action complaint for failure to state a claim upon which relief could be granted under the FDCPA. The United States District Court, Middle District of Florida granted the motion to dismiss, stating, in part, "[u]nless counsel and the Plaintiffs can, after due diligence undertaken in advance of the suit plausibly plead FACTS that support the claim, it should not be filed in the first instance."

David Henry (Orlando, FL) successfully defeated a preliminary injunction motion brought by the owner of The Shaker Bar against The Shaka Bar in which the plaintiff claimed the defendant's mark was confusingly similar and diluting the plaintiff's mark. The court found that the evidence did not show a likelihood of success on the merits and that the defendant's "shaka" mark and symbol have a well-established meaning in Hawaiian culture.

Adam Herman (Orlando, FL) obtained a dismissal, with prejudice, of a legal malpractice claim where the plaintiff alleged that our client/law firm violated the Bankruptcy Abuse Prevention and Consumer Protection Act by accepting credit cards to satisfy attorneys' fees. The plaintiff brought a one-count complaint in the U.S. District Court for the Middle District of Florida against the firm and sought punitive damages of $1 million, as well as class certification. In a case of first impression, District Court Judge Paul Byron held that a bankruptcy attorney is only precluded from accepting credit cards in satisfaction of fees when the attorney's motivation is for an improper purpose. The court noted that it is customary for bankruptcy attorneys to expect compensation for legal services and that the applicable bankruptcy statute contains specific provisions regulating a debtor's transactions with attorneys. Further, it is completely proper for an attorney to accept payment by credit card in Florida under the Rules of Professional Conduct. Accordingly, without more, the mere advice to use credit cards to pay for legal fees did not violate the BAPCPA.

Paul Lees and **Matthew Hall** (Allentown, PA) obtained summary judgment and the dismissal of all claims against their municipality client. The case involved a motor vehicle and pedestrian collision on a state road that is within the municipality and was undergoing extensive reconstruction. The plaintiff and co-defendants maintained that the construction site, being within the borough, was under its control as the borough was responsible for allegedly closing the sidewalks during construction and forcing pedestrian traffic into the street. Following discovery and a motion prepared by Matt, the court dismissed all claims against our client on the determination that the claim against it fell outside of the Streets and Sidewalks exception under the Pennsylvania Political Subdivisions Tort Claims Act.

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Christian Marquis (Pittsburgh, PA) obtained the dismissal of a petition for appointment of viewers in an inverse condemnation action on behalf of a borough. The petitioners alleged a *de facto* taking as a result of water runoff from a storm utility pipe that discharged onto their property, resulting in wet and marshy conditions on a portion of the property. After the filing of preliminary objections to the amended petition for appointment of viewers, the court sustained the borough's objections, determining that the petitioners failed to allege the existence of a *de facto* taking because no exceptional circumstances existed that substantially deprived the petitioners of the beneficial use and enjoyment of their property. They only alleged that a portion of their property was affected by the water runoff, but they did not allege that the best and customary use of their property as a residence was affected.

Patricia Monahan and **Danielle Vugrinovich** (Pittsburgh, PA) obtained summary judgment in favor of our insurance carrier client in an insurance bad faith and breach of contract case. The lawsuit arose out of the insured's claim for "vandalism," which was made about a year after he learned that his tenant was making significant renovations to the leased property in violation of the lease. The tenant had been paying the insured's mortgage. The insured did not make the vandalism claim until the tenant stopped paying the insured's mortgage and the insured was served with a foreclosure notice. Unbeknownst to the insured, the tenant had been taken into custody by the DEA, charged with various offenses related to a nationwide drug ring and, thus, was no longer able to pay the mortgage. The insured then filed a claim with our client seeking damages to his real property and loss of rental income. Trish initially advised our client that the claim was not "sudden and accidental" and, thus, not covered. Moreover, the exclusions for "faulty workmanship," "renovation," and "acts of others," etc., also applied. The insured/plaintiff then filed suit in state court for breach of contract, which was removed to federal court in the Western District of Pennsylvania. The judge agreed on summary judgment that the loss was not "sudden and accidental" and that the aforesaid policy exclusions were applicable. He declined to rule on summary judgment that our client had been prejudiced by late notice, and he did dismiss the bad faith claim because there was no coverage.

Jeremy Zacharias (Mt. Laurel, NJ) obtained summary judgment in an insurance coverage case filed in Gloucester County Superior Court, Special Civil Part, on behalf of his client. The plaintiff sued the defendant when she was scratched by the defendant's dog while visiting the defendant's home. The defendant never notified her insurance company of the claim and proceeded in this case as a *pro se* litigant. The plaintiff, who later learned of the defendant's homeowner's insurance policy, amended her complaint to add the defendant's homeowner's insurance company, our client, to provide defense and indemnity on behalf of the defendant. Summary judgment was filed on behalf of our client, asserting that the plaintiff is not an intended third party beneficiary of a tortfeasor's insurance policy without an assignment of rights or a final judgment entered in favor of the plaintiff. The court granted summary judgment on behalf of our client one day before trial was scheduled to begin.

WORKERS' COMPENSATION DEPARTMENT

Tony Natale (Philadelphia, PA) successfully defended a mushroom distributor in Berks County in an appellate action in which the claimant alleged the underlying Workers' Compensation Judge issued a decision that misinterpreted the law and unfairly painted the treating physician as not credible. Tony had established in the underlying litigation that the treating physician mixed her electronic file containing the claimant's medical records with another patient, resulting in the inaccurate entries regarding history, pain complaints and treatment modalities; therefore, the judge in the underlying matter found that the physician was not credible. The Appeal Board affirmed the judge, noting that the underlying decision was well within the scope of the law as to the claimant's failure to meet his burden of proof and that the judge's decision on all counts was predicated upon the facts of record.

Michele Punturi (Philadelphia, PA) successfully defeated a claim petition seeking workers' compensation benefits for an alleged work injury. Michele presented four fact witnesses from the employer who testified that company procedural policies were not followed with respect to reporting an injury and that the claimant never reported any alleged injury to her supervisors. Michele also clarified that the claimant's medical expert, a chiropractor, did not have an accurate history and that the basis for his opinions were not supported by the medical records, the complaints, the history or the diagnostic studies. Rather, the Workers' Compensation Judge relied on the testimony of Michele's expert, a board certified orthopedic surgeon, and his ability to consider all the medical records and diagnostic studies. This favorable decision also resulted in no liability for the claimant's attorney's litigation.

John Swartz (Harrisburg, PA) successfully defeated a review

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and reinstatement petition and prevailed on a termination petition in a case where the claimant had an accepted work injury for exposure to sulfur dioxide. The claimant filed a review and reinstatement petition to add post traumatic stress disorder. The review petition was granted in part for transient adjustment disorder. However, the judge found that the claimant did not incur post traumatic stress disorder, and the reinstatement petition was denied. John prevailed on the termination petition, with the Workers' Compensation Judge finding that the claimant was fully recovered from the accepted physical and mental claims resulting from the work injury.

Ashley Talley (Philadelphia, PA) successfully litigated a petition to terminate benefits, despite an attempt by the claimant to include a variety of cognitive, neurological and spinal injuries based upon the opinions of two medical experts. The claimant was receiving workers' compensation benefits for a soft tissue injury she sustained while working for a national financial institution. The employer filed a petition to terminate benefits based upon the opinion of a neurologist, after which, a petition was filed by the claimant seeking to expand the injury. The employer relied upon the expertise of its neurologist, who was found to be more credible and persuasive than the claimant's experts. The Workers' Compensation Judge granted the employer's petition, thereby terminating benefits of the claimant in their entirety.

Kacey Wiedt (Harrisburg, PA) successfully defended against the claim of a school teacher seeking benefits for low back surgery as a result of a work injury. The claimant sustained a trapezius strain when she tripped over a hockey stick when distributing exams to her students in a classroom. The claimant received physical therapy and alleged that she injured her low back during the physical therapy exercises. She underwent lumbar spine surgery and related that the surgery and subsequent treatment were the result of being injured during the course of physical therapy. Kacey argued that the surgery and low back injury were not a result of the claimant's physical therapy but due to degenerative disc disease. The Workers' Compensation Judge found that the claimant did not suffer a low back injury as a result of physical therapy activities and that the claimant's activities with physical therapy did not cause the need for surgery, or accelerate or aggravate her pre-existing degenerative disc disease condition. The judge denied and dismissed the claimant's review and reinstatement petition and granted the defendant's termination petition.

Kacey Wiedt also successfully defeated a reinstatement petition seeking workers' compensation benefits for hip replacement surgery as a result of a work injury. The claimant initially sustained a left hip injury, resulting in hip replacement surgery in 2012. The claimant then sustained multiple hip dislocations following the hip replacement surgery, resulting in the claimant undergoing hip revision surgery in 2015. The Workers' Compensation Judge found that the claimant's hip replacement surgery and subsequent disability were not the result of the initial injury of 2012.

Judd Woytek (Allentown, PA) obtained a termination of benefits in a case where the claimant had injured his lower back while lifting ramps on a trailer. Judd presented credible testimony from our medical expert that the claimant's injuries were limited to a lumbar sprain/strain and that the claimant had fully recovered as of the date of the IME. The Workers' Compensation Judge rejected the opinions of the claimant's treating physicians that he had developed lumbar disc protrusions, herniations and radiculopathy as the result of the work injury.

John Zeigler (Harrisburg, PA) obtained a termination of benefits and a denial of claim and penalty petitions in a case where the claimant had injured his lower back from a slip and fall while working as a forklift operator. John presented credible testimony from our medical expert that the claimant's injuries were limited to a lumbar sprain/strain and that the claimant had fully recovered as of the date of the IME. The Workers' Compensation Judge rejected the opinions of the claimant's treating physician that he had developed a "floating" discogenic radiculopathy as the result of the work injury, and that the claimant was disabled from employment. The judge credited the employer's supervisor's testimony that the claimant had returned to full-duty work without apparent production issues and without any physical limitations for a significant timeframe prior to his treating physician taking him out of work. ■

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On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

Shane Haselbarth (Philadelphia, PA) succeeded in defending a favorable summary judgment ruling in the Second District Court of Appeal of Florida. The plaintiff was a homeowners association whose members made up one-quarter of the membership of an umbrella organization club that operated recreational facilities for the common use of all its members, across four networked communities. The plaintiff association voted by a slim majority to except its entire membership from their dues obligations to the club. For years these dues were understood to run with the land under Florida law. The trial court rejected this improper attempt to alter membership in the club because it was attempted by one-half-of-one-quarter of the club's overall membership and was contrary to the club's governing documents. After plenary briefing and oral argument, where Shane asserted that the attempted change in club membership came from the wrong voting members via an improper procedure, inequitably and too late, the DCA saw no issue and issued a *per curiam* order affirming the judgment for Shane's client. *Placida Pointe Home Owners Ass'n v. Placida Harbour Club, Inc.*, 2017 Fla. App. LEXIS 3065 (Fla. 2d DCA Mar. 8, 2017).

Audrey Copeland (King of Prussia, PA) successfully defended the trial court's grant of summary judgment in a corporate negligence claim, which had sought wrongful death and survival damages for the decedent's death while a patient at Saint Vincent Medical Center. The Superior Court held that the plaintiff's claims were barred by the broadly worded Release executed in a previous suit against another hospital, Hamot, for the injuries that led to the decedent's hospitalization at Saint Vincent's and, ultimately, his death. The court noted that the plaintiff had released named and unnamed individuals and entities from any and all actions, causes of action, claims or demands for any known or unknown injuries, losses or damages they sustained that were "[r]elated in any way to any incident...on account of which a Legal Action was instituted by the undersigned in the Court of Common Pleas of Erie County, Pennsylvania at [docket no.], or at any other number or in any other Court." The court refused to "erase the expansive language contained in this general release" and held that the Release plainly extended beyond the claims made in the *Hamot* suit at the specified docket number. *Slater v. Saint Vincent Medical Center*, 2017 Pa. Super. Unpub. LEXIS 1016 (Pa. Super. March 17, 2017)(nonprecedential).

Audrey also persuaded the Commonwealth Court to affirm the Workers' Compensation Judge's and Workers' Compensation Appeal Board's decisions denying a claim petition. The claimant had alleged that she was injured when struck by a resident at a group home. The judge credited the employer's evidence, which included evidence that the injury was not reported until after the claimant was terminated due to the discovery of negative information in her criminal background check. The court agreed with the employer that the claimant's arguments were "nothing more than an attempt to argue her preferred version of the facts," and that the judge's findings of fact were detailed and supported by substantial evidence. *Giacalone-Soltesz v. Workers' Compensation Appeal Board (Fayette Resources, Inc.)*, 2017 Pa. Commw. Unpub. LEXIS 207 (Pa. Cmwlth. March 28, 2017)(unreported). ■

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OTHER NOTABLE ACHIEVEMENTS*

SPECIAL APPOINTMENTS

Colleen Bannon and **Diana Cortes** (Philadelphia, PA) have been appointed the 2017 Co-Chairs of the Federal Courts Committee of the Philadelphia Bar Association. Colleen also served as Vice-Chair of the committee in 2016. The Federal Courts Committee serves as an informational liaison between the federal courts covering the Eastern District of Pennsylvania and members of the bar, and organizes the Federal Bench/Bar Conference held each spring.

Candace Embry (Philadelphia, PA) has been elected to the Board of Directors of Philadelphia VIP, where she will serve as Board Secretary. Philadelphia VIP is a non-profit organization that recruits, trains and supports volunteer lawyers who provide critical legal assistance to low-income Philadelphians.

RECOGNITION

John "Jack" Slimm (Mt. Laurel, NJ) has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in North America. The induction ceremony was held at the College's annual Spring Meeting, held March 2-5 in Boca Raton, Florida. The College is composed of outstanding members of the trial bar from the United States and Canada. Fellowship is extended by invitation only, and only after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Membership in the College cannot exceed one percent of the total lawyer population of any state or province.

NEW SHAREHOLDERS

Marshall Dennehey is pleased to announce that 10 attorneys were elected Shareholders of the firm and three were elevated to Special Counsel at the firm's annual December shareholders' meeting. The new Shareholders, listed by office, are as follows:

- Philadelphia, PA: **Shane Haselbarth**, member of the firm's Professional Liability Department; **Alex Norman**, Casualty Department; **Robert Stanko**, Casualty Department
- Pittsburgh, PA: **Patrick Reilly**, member of the Casualty Department
- King of Prussia, PA: **Joseph Hoynoski**, member of the Health Care Department
- Harrisburg, PA: **Shannon Fellin**, member of the Workers' Compensation Department
- Scranton, PA: **Thomas Specht**, member of the Professional Liability Department
- Fort Lauderdale, FL: **Alan Carroll (A.C.) Nash**, member of the Casualty Department
- Orlando, FL: **Robert Garcia**, member of the Professional Liability Department; **Amanda Podlucky**, member of the Casualty Department

Additionally, the following three attorneys have been promoted from Associate to Special Counsel: **Jon Cross**, Professional Liability Department and **Courtney Schulnick**, Casualty Department in Philadelphia; and **Shannon Voll Poliziani**, Health Care Department in Pittsburgh.

SPEAKING ENGAGEMENTS

Jacqui Canter (Philadelphia, PA) was a featured speaker at the annual NRRDA Conference. Her presentation, "THE SPICE IS (NOT SO) RIGHT! Best Practices in Handling Foodborne Illness and Foreign Object Cases," discussed the best practices for handling these claims, what works and what to avoid. Attendees learned how to gather and preserve vital evidence needed to successfully defend these types of cases.

David Shannon (Philadelphia, PA) spoke at SIM Philadelphia to an audience of mostly chief information officers and vice presidents of information technology. He discussed the topic of cyber security and how it is being viewed as less of an IT/ technical problem and more of a fiduciary and enterprise challenge.

Wilhelm Dingler (Philadelphia, PA) was part of a panel at the 7th Annual Q&A with Internal Revenue Service Liaison and Federal Tax Update with CPA and Attorney Panel, sponsored by the Pennsylvania Institute of Certified Public Accountants. Wil was the sole attorney on the panel, which addressed updates in the federal tax law, the potential changes to the Internal Revenue Code by the new administration, the Affordable Care Act, and an update on Individual and Business taxation and the Small Business Relief Act. In addition to current and former IRS agents, stakeholders and CPAs, Wilhelm was joined on the panel by State Rep. Scott Petri, 178th Legis. District.

Brad Remick (Philadelphia, PA) recently spoke at the annual Door & Access Systems Manufacturers Association meeting. He reviewed the *Tincher* case and the effect it has had upon

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Pennsylvania product liability law. Brad discussed what this meant and why it was important even for out-of-state companies.

OFFICE MOVE

Our southern New Jersey office has moved from Cherry Hill to the Laurel Corporate Center in Mount Laurel. The new office address is 15000 Midlantic Drive, Suite 200, P.O. Box 5429, Mount Laurel, NJ 08054. All telephone and fax numbers remain the same.

SPECIAL NEWS

Marshall Dennehey and three other law firms from across Europe and North America have launched a new multi-jurisdiction legal network to provide a global service to insurance clients. The Insurance Law Global (ILG) network is made up of founding law firms from the UK, Spain, Canada and the USA. The firms will collaborate on a non-exclusive basis to help clients respond to the challenges presented by globalization and the increasingly dynamic political and environmental landscape. In the UK, the network is represented by leading law firm Weightmans, which will work alongside fellow founders Blaney McMurtry of Canada, Spanish firm LC Rodrigo Abogados and the USA's Marshall Dennehey Warner Coleman & Goggin. Collectively ILG has bases in 30 cities across six countries. ILG was launched at a conference in London, which brought together delegates from the UK insurance sector and representatives of the founding firms. ILG discussed the emerging issues affecting global insurance claims, including cyber threats, the impact of climate change on catastrophic loss and the potential of Artificial Intelligence (AI) to transform the claims process. The formation of the network was led by Weightmans. For more information about ILG, please email info@insurancelawglobal.com.

SUPER LAWYERS

Eleven attorneys from our New Jersey offices have been selected to the 2017 edition of *New Jersey Super Lawyers* magazine. A Thomson Reuters business, New Jersey 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. Each year, no more than five percent of the lawyers in the state are selected as Super Lawyers and no more than 2.5 percent are selected for Super Lawyer Rising Stars. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

Marshall Dennehey attorneys selected to the 2017 New Jersey Super Lawyers list include:

- **Richard L. Goldstein**, Professional Liability Defense. Rich focuses his practice in the areas of employment law, civil rights defense and school leaders' liability.
- **John L. Slimm**, Professional Liability Defense. Jack has devoted the majority of his 40-year career to the representation of attorneys, accountants, architects and engineers, directors and officers, and investment and insurance professionals in litigation.
- **Lary Zucker**, Personal Injury Defense and Entertainment & Sports Defense. Lary chairs the firm's Amusements, Sports & Recreation Practice Group and has 35 years of litigation experience.

Marshall Dennehey attorneys selected to the 2017 New Jersey Super Lawyer Rising Stars list include:

- **Ariel Brownstein**, Insurance Coverage. Ariel focuses his practice on insurance fraud and SIU litigation, with an emphasis on medical provider fraud and large loss fraud.
- **Alicia Calaf**, Personal Injury General Defense. Alicia primarily focuses her practice on medical malpractice and nursing home litigation.
- **Monica Fillmore**, Personal Injury, Medical Malpractice Defense. Monica concentrates on medical malpractice, long-term care and health care litigation.
- **Ryan Gannon**, Personal Injury, Medical Malpractice Defense. Ryan focuses on medical malpractice and nursing home malpractice litigation.
- **Christopher Gonnella**, Construction Litigation, Business. Chris defends architects and engineers in complex construction and construction defect matters.
- **Heather LaBombardi**, Medical Malpractice Defense. Heather defends health care practitioners and facilities in medical malpractice and health care liability matters.
- **Nicholas Rimassa**, Personal Injury, Medical Malpractice Defense. Nick focuses on medical malpractice defense and nursing home malpractice litigation.
- **Kristy Olivo Salvitti**, Workers' Compensation. Kristy devotes the entirety of her practice to the defense of employers in workers' compensation matters. ■

** Prior Results Do Not Guarantee A Similar Outcome*

Pennsylvania—General Liability

THE HILLS AND RIDGES DOCTRINE IN MOST CASES DOESN'T APPLY TO FREEZING RAIN

By LaTi W. Spence, Esq.*

KEY POINTS:

- Hills and Ridges Doctrine protects owner/occupier from liability from generally slippery conditions resulting from ice and snow where ice and snow have not been permitted to unreasonably accumulate in hills and ridges.
- Freezing rain alone does not permit recovery against owner/occupier.

LaTi W. Spence

The quintessential doctrine, the Hills and Ridges Doctrine, that finds most insurance defense attorneys who defend landowners on their heels, has an end. In its most basic reading, the Hills and Ridges Doctrine precludes liability in instances where there is an ongoing storm involving freezing rain. Nonetheless, plaintiffs' attorneys are still bringing cases with facts involving freezing rain and no prior accumulation. Unfortunately, adjusters are not being properly advised that the law deems these cases losers. Attorneys can now more confidently advise their adjusters that, while settlement may be appropriate for other reasons, Philadelphia now has a case that specifically outlines that freezing rain alone does not permit recovery against an owner/occupier.

In the very recent case of *Hung v. Parkway Corporation*, 2017 Phila. Ct. Com. Pl. LEXIS 99 (C.P.Phil. Feb. 13, 2017), the court granted the defendant's motion for summary judgment and rejected the plaintiffs' reliance on the Hills and Ridges Doctrine. The plaintiff, Su Hung, allegedly slipped and fell on the defendant's sidewalk. As is always the case, the plaintiff pursued her claim under to the governing law in Pennsylvania related to slip and falls due to icy conditions, the Hills and Ridges Doctrine.

By way of brief background, this doctrine requires the following:

> (1) The snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct a danger to pedestrians travelling thereon; (2) that the property owner had notice, either actual or constructive, of the existence of such condition; (3) that it was the dangerous ***accumulation*** of snow and ice which caused plaintiff to fall.

Rinaldi v. Levine, 176 A.2d 623, 625 (Pa. 1962).

Additionally, this doctrine also makes clear that general slippery conditions alone are not sufficient to successfully establish liability. "There is no liability created by a general slippery condition on sidewalks. It must appear that there were dangerous conditions due to ridges or elevations which were allowed to remain for an unreasonable length of time or were created by defendant's antecedent of negligence." *Lascoskie v. Berks County Trust Company*, 208 A.2d 463, 464-465 (Pa. 1965). That is, where there has been accumulation over a period of time that was left unattended, a landowner may not escape liability.

In *Hung*, the plaintiff alleged that, at approximately 7:00 a.m., she left her home to head to work and was at 8th and Arch Streets at around 8:00 a.m. As she walked towards the curb ramp from Arch Street to the sidewalk, she took two steps, slipped and fell. The accident resulted in the plaintiff severely injuring her ankle, which required two surgeries. On the day of the accident, the temperature ranged from 27°F to 37°F. Obviously, each party's expert varied as to the exact degree. The plaintiff's expert opined that there was no accumulation but there was intermittent light snow beginning at 4:52 a.m. that morning. Contrary to that, the defendant's expert opined that there was light freezing rain, which began at 7:00 a.m., and the intensity of the freezing rain increased at around 8:00 a.m. and continued through 11:00 a.m. The court found that, although there were some discrepancies given the exact type of precipitation, "[t]he exact nature of the precipitation does not matter under Pennsylvania law."

Even though there was, in fact, general slippery conditions for which the Hills and Ridges Doctrine would be applicable, the court still found that the plaintiff could not establish liability against the defendant. The facts supported that the plaintiff fell on "[s]mooth, mirror-like ice, not a hill or ridge of snow and ice, thus Plaintiff-Appellant cannot establish breach of a duty by Defendant-Appellee (sic)."

When you pair the reading held in *Hung* with Philadelphia Ordinance §10-720, you are left with a strong position as to why defendants cannot be held liable under the law. The Philadelphia ordinance specifically addresses snow and not freezing rain or precipitation. The ordinance reads, " The owner, agent and tenants of any building or premises shall clear a path of not less than 36 inches in width on all sidewalks abutting the building or premises within 6 hours after the ***snow*** has ceased to fall." Phil. Ordinance §10-720.

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* *LaTi is an associate in our Philadelphia, Pennsylvania office who can be reached at 215.575.2596 or lwspence@mdwcg.com.*

NEWLY AMENDED FEDERAL CIVIL RULE 26(b)(1)

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With the burgeoning expansion of electronically stored information and its role in litigation, the necessity of proportionality in discovery has become absolutely essential. The amendments to Rule 26 should rein in discovery abuse, narrow and focus the scope of allowable discovery, and reduce today's often exorbitant discovery costs. Ultimately, Rule 26(b)(1)'s strong emphasis on proportionality will provide a greater benefit to defendants, who almost always prefer to limit the scope of discovery, as courts now have additional ammunition to curtail unreasonably broad discovery requests and re-focus the litigation on the actual claims and defenses asserted in a given case. The ultimate impact of these changes, however, will depend in large part on how these amendments are incorporated and applied in real time by the courts. Moving forward, all litigants and their attorneys are well advised to develop an understanding of the amendments to Federal Civil Rule 26 and the potential impact these changes could have in operating in federal courts and engaging in the litigation discovery process in particular. ■

HAND IN GLOVE...BUT DOES IT REALLY FIT?

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Plaintiffs' attorneys can use this uncertainty to assert more pretrial detention claims that normally would have been untimely. In addition, such an expanded pretrial detention claim would now cover damages from the time of the seizure arguably until the date of the plaintiff's release. Normally, the damages would end at the time of arraignment. Damages under malicious prosecution claims cover relief from the time of arraignment through the date charges against the plaintiff are dropped. Plaintiffs' attorneys can argue the expanded accrual date of pretrial detention claims now provides damages for each day a plaintiff was incarcerated. It is not uncommon that an individual can be detained for more than a year awaiting trial. Plaintiffs' attorneys will likely argue for a settlement amount encompassing that pretrial detention period.

DEFENSES: STATUTE OF LIMITATIONS AND A GOOD OFFENSE

Because *Manuel* left the accrual date unresolved, the statute of limitations, if applicable, is still the best first line of defense. If the courts are reluctant to grant a dismissal based on the statute of limitations because of *Manuel*'s uncertainty, defense attorneys should distinguish their facts from those of *Manuel*: continued prosecution of an individual despite exculpatory evidence. Municipalities can continue their offense against such lawsuits by increasing their training and monitoring of their police officers. Municipalities should show their adherence to the latest Fourth Amendment's and criminal law's nuances. They should continue to work with their solicitors, civil rights defense attorneys, and District Attorneys' offices for their training. ■

BURDENS OF PROOF

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if the last compensable accident by itself renders an individual permanently disabled, regardless of the amount of prior disability, the Second Injury Fund is also not applicable. In practice, the Second Injury Fund considers a wide range of pre-existing conditions in evaluating entitlement to benefits. However, it also aggressively defends against those cases that do meet this basic criteria. Second Injury Fund claims are often the most complicated and extensive claims to litigate or resolve given the complexity of the statute. Employers often prepare to defend these anticipated claims long before the Second Injury Fund Petition is filed. If you have a severe injury case and you think that a claim for Second Injury Fund or total disability benefits may be down the road, speak with your defense counsel immediately. A little preparation now can save a lot of future benefit exposure. ■

THE HILLS AND RIDGES DOCTRINE

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Thus, homeowners should be protected in cases involving only freezing rain conditions. First, because the basic reading of the Hills and Ridges Doctrine requires accumulation. Next, in circumstances where there is only freezing rain for a brief period of time prior to the alleged fall, liability is unlikely pursuant to the doctrine and Philadelphia Ordinance §10-720. Therefore, adjusters should remain committed to defend cases where the facts simply don't support liability. ■

Pennsylvania—Product Liability

THERE'S NO PLACE LIKE "HOME": CHALLENGING GENERAL JURISDICTION WHEN AN LLC IS A CITIZEN OF THE FORUM STATE

By Michael A. Salvati, Esq.*

KEY POINTS:

- Even if an LLC defendant is a citizen of the forum state, it may be able to challenge general jurisdiction.
- The tests for citizenship and for general jurisdiction are distinct.
- Like a corporation, an LLC should only be subject to general jurisdiction where it is "at home."

Michael A. Salvati

Can a limited liability company that is a citizen of Pennsylvania for diversity jurisdiction purposes successfully challenge a Pennsylvania court's general jurisdiction over it? In a recent case, the Philadelphia Court of Common Pleas answered that question, "Yes."

As a quick refresher, personal jurisdiction comes in two varieties: general and specific. If a court has general, or "all purpose," jurisdiction over a defendant, it can hear any case involving that defendant, no matter where the cause of action arose. Specific, or "case-linked," jurisdiction requires that the cause of action arise from the defendant's contacts with the forum state.

For many years, courts evaluated general jurisdiction by quantifying a defendant's business contacts with the proposed forum, asking whether the defendant company engaged in "a substantial, continuous, and systematic course of business" in the forum. In 2014, the U.S. Supreme Court rejected that as a rationale for general jurisdiction over a corporation in the case of *Daimler AG v. Bauman*, 571 U.S. __, 134 S. Ct. 746, 760-61 (2014). For a defendant to be subject to general jurisdiction in a state—that is, for it to be subject to suit on any and every cause of action—it must be "at home" in the forum state. As the Supreme Court explained, a corporation that does business all over the country can hardly be said to be "at home" in every state. Rather, the Court endorsed a simpler jurisdictional test: a corporation is at home in the state where it is incorporated and the state where it has its principal place of business.

Because the holding in *Daimler* applied specifically to corporations, the question naturally arises: how is general jurisdiction established over an LLC? The question is more nuanced than it might appear because of the way citizenship of these entities is determined. According to 28 U.S.C. §1332, the statute governing diversity jurisdiction for purposes of removal to federal court, a corporation is a citizen of its state of incorporation and the state where it has its principal place of business. A corporation is, therefore, a citizen of at most two states. Of course, these are the same two states where the corporation is "at home" under *Daimler*.

For LLCs, the test is different and slightly more complicated. In the Third Circuit (and elsewhere), an LLC's citizenship is determined by the citizenship of its members. *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412 (3d Cir. 2010). If one of the members of the LLC is itself an LLC, the members of that LLC must be evaluated, and so on up through the business structure, until an individual or a corporation is found to establish citizenship. In this way, an LLC with many members, or with a complicated ownership structure, can be a citizen of far more than two states. Should it be subject to general jurisdiction in all of them?

This brings us back to the Philadelphia County decision mentioned at the start of the article. In that case, the plaintiff was injured in an accident in Texas and sought to hold our client, a product manufacturer, responsible for an alleged defect in the vehicle. The plaintiff was a resident of Pennsylvania and brought suit in federal court here. It was determined that the defendant manufacturer, an LLC, was a citizen of Pennsylvania because its sole member was a corporation that was a Pennsylvania citizen. Therefore, diversity of citizenship did not exist, and the case had to be re-filed in Pennsylvania state court.

However, the manufacturer, despite being a citizen of Pennsylvania for diversity purposes, was not "at home" in Pennsylvania under the *Daimler* test because it was formed and had its headquarters in other states. We moved to dismiss on jurisdictional grounds: specific jurisdiction did not exist over this accident; if *Daimler* applied, then general jurisdiction did not exist either. The plaintiff's response referred to the earlier dismissal from federal court and asked how the manufacturer could be a citizen of Pennsylvania but not be subject to general jurisdiction here.

Our reply addressed the subtle yet significant differences between the test for citizenship and the test for general jurisdiction. General jurisdiction asks where a defendant has such deep roots that it may properly be held to answer for any claim, no matter where it arises. The term "at home" is an apt descriptor. This concept overlaps with corporate citizenship, but it falls apart when applied to an LLC. It would be inequitable for a manufacturer with

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* *Mike is an associate in our Philadelphia, Pennsylvania office. He can be reached at 215.575.4552 or masalvati@mdwcg.com.*

Pennsylvania—Professional Liability

PENNSYLVANIA SUPREME COURT REJECTS CONSTITUTIONAL CHALLENGE TO THE DRAGONETTI ACT

By Aaron E. Moore, Esq.*

KEY POINTS:

- Dragonetti Act penalizes attorneys and clients who engage in frivolous litigation.
- Dragonetti Act is not unconstitutional.
- Supreme Court held that the Act does not regulate the conduct of attorneys.

Aaron E. Moore

In 1980, the Pennsylvania General Assembly created a statutory cause of action for "wrongful use of civil proceedings," commonly referred to as the Dragonetti Act. 42 Pa. C.S. 8351, et seq. The Dragonetti Act is designed to curtail frivolous litigation by holding attorneys and clients who engage in frivolous litigation liable to wrongfully sued parties. Under the Act, an attorney who participates in civil proceedings can be held liable to a prevailing opposing party if he, in prosecuting the underlying action, acts in a grossly negligent manner or without probable cause and primarily for an improper purpose. 42 Pa. C.S. §8351(a)(1). An attorney has probable cause if he reasonably believes that, under the facts upon which the underlying claim was based, the claim may be valid under existing or developing law. 42 Pa. C.S. §8352(1).

For many years, professional liability defense attorneys have argued that the Dragonetti Act seeks to regulate the conduct of attorneys in violation of Pennsylvania's Constitution. Specifically, the Pennsylvania Constitution, Art. V, §10(c), provides, "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts.... All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions." This issue was recently presented to the Pennsylvania Supreme Court in *Villani v. Seibert*, 2017 Pa. LEXIS 939 (Pa. Apr. 26, 2017), where the court held that the Dragonetti Act did not violate Pennsylvania's Constitution.

In the underlying civil proceedings, the Villanis, represented by Attorney Thomas D. Schneider, commenced an action to quiet title, claiming ownership of a 15'-wide strip of land that was part of a lot owned by Mary Seibert. When it was determined that Mrs. Seibert was in possession of the disputed land, the Villanis filed an action in ejectment. The Seiberts prevailed in the ejectment action on a motion for summary judgment, which was upheld by the Superior Court. Subsequently, the Seiberts filed suit against the Villanis and their attorney, Mr. Schneider, claiming that they were liable to them for wrongful use of civil proceedings.

Mr. Schneider filed preliminary objections to the Seibert's Dragonetti claim, arguing that he could not be held liable under the Act because the Act violates Pennsylvania's Constitution by encroaching the Pennsylvania Supreme Court's exclusive power to regulate the conduct of attorneys. The trial court agreed with Mr. Schneider and dismissed the Dragonetti claim. Specifically, the trial court held that "[t]he Dragonetti Act is a legislative attempt to intrude upon the Supreme Court's exclusive authority to regulate the conduct of attorneys in the practice of law." *Villani v. Seibert*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 13784 (C.P.Ches. Aug. 27, 2015)(citing *Beyers v. Richmond*, 937 A.2d 1082 (Pa. 2007)). The trial court further stated, "It is for the judiciary to sanction lawyers for bringing actions that are baseless or for otherwise engaging in inappropriate conduct. The Dragonetti Act, as it pertains to lawyers, is unconstitutional and unenforceable."

The Seiberts appealed, and given the constitutional implications, the issue was presented to the Pennsylvania Supreme Court. The Supreme Court reversed the trial court and held that the Dragonetti Act was not unconstitutional. The Supreme Court disagreed with Mr. Schneider's contention that the power to regulate the conduct of attorneys is exclusively vested with the Judiciary, stating, "The separation of powers doctrine contemplates a degree of interdependence and reciprocity between the various branches." *Villani*, 2017 Pa. LEXIS 939 at *28. The court further concluded that the Dragonetti Act was not designed to regulate the conduct of attorneys; rather, its "[p]urpose to compensate victims of frivolous and abusive litigation and, therefore, has a strong substantive, remedial thrust."

The Supreme Court's opinion in *Villani* appears to contradict its own holding in *Beyers v. Richmond*, 937 A.2d 1082 (Pa. 2007), where the Supreme Court held that Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL) is unconstitutional under Art. V, §10(c), to the extent it purports to regulate an attorney's conduct because it constituted an encroachment upon

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* *Aaron is a shareholder in our Philadelphia, Pennsylvania office who can be reached at 215.575.2899 or aemoore@mdwcg.com.*

Pennsylvania—Workers' Compensation

STATE OF CONFUSION: *DUFFEY V. WCAB* AND PENNSYLVANIA'S IMPAIRED IMPAIRMENT RATING SYSTEM

By Francis X. Wickersham, Esq.*

KEY POINTS:

- Under the Pennsylvania Workers' Compensation Act, IREs are utilized by physician-evaluators to "determine the degree of impairment due to the compensable injury."
- Pennsylvania's appellate courts have contributed to uncertainty about IREs.

Francis X. Wickersham

Impairment Rating Evaluations (IREs) have been in existence for over 20 years in Pennsylvania, ushered in with the passage of Act 57 and its significant amendments to the Pennsylvania Workers' Compensation Act. In that time, Pennsylvania's Commonwealth and Supreme Courts have scrutinized and interpreted Section 306(a.2) of the Act, the provision that established the IRE system. At no time in recent memory, though, have Pennsylvania's higher courts contributed to so much uncertainty about IREs.

In the 2015 case of *Protz v. WCAB (Derry School District)*, 131 A.3d 572 (Pa. Cmwlth. 2015), a divided Commonwealth Court held that the Section 306(a.2) directive to determine impairment by using the most recent version of the American Medical Association Guides to the Evaluation of Permanent Impairment was an unconstitutional delegation of legislative authority to the AMA. In 2016, in *IA Construction Company and Liberty Mutual Insurance Co. v. WCAB (Rhodes)*, 110 A.3d 1096 (Pa. 2016), a split Pennsylvania Supreme Court held that a Workers' Compensation Judge had the authority to invalidate an IRE because of the IRE physician's lack of expertise to give an opinion on a traumatic brain injury, even though the employer was the only party to present evidence of the claimant's impairment. In their opinion, the Supreme Court openly called for legislative review of the Act's IRE provisions.

At the beginning of 2017, another divided Supreme Court weighed in on Pennsylvania's IRE system with its opinion in *Duffey v. WCAB (Trola-Dyne, Inc.)*, 152 A.3d 984 (Pa. 2017). There, at the expiration of 104 weeks, the employer had requested an impairment rating of the claimant. The employer described the underlying compensable injury as "bilateral hands—nerve and joint pain." The claimant injured his hands when he picked up electrified wires while repairing a machine. The impairment rating physician gave the claimant a six percent whole-body impairment. The employer then issued a notice to the claimant adjusting his disability status from total to partial. The claimant timely challenged the adjustment by filing a Petition to Review in which he argued that the IRE was invalid because the IRE physician failed to rate the full range of work-related injuries, including an adjustment disorder with depressed mood and chronic post-traumatic stress disorder.

The Workers' Compensation Judge, agreeing that the claimant's psychological conditions were part of the work injuries and should be added to the Notice of Compensation Payable, determined that the IRE was invalid since the IRE physician did not address those conditions. The Workers' Compensation Appeal Board, however, reversed. The Board held that the IRE physician evaluated the accepted injury as reflected in the Notice of Compensation Payable at the time of the evaluation. The Board pointed out that the claimant did not seek to amend the Notice of Compensation Payable to include additional injuries until six months after the IRE was performed. The Commonwealth Court affirmed the Board. In doing so, the Commonwealth Court emphasized that Section 306(a.2) required a determination of the degree of impairment "due to the compensable injury." That compensable injury, according to the court, was the injury set forth in the Notice of Compensation Payable.

The Pennsylvania Supreme Court reversed the Commonwealth Court. Relying on a novel and unique interpretation of Section 306(a.2) and the applicable impairment guidelines, the court said that the IRE physician must exercise professional judgment to render appropriate decisions concerning both causality and apportionment. According to the court's review of the evidentiary record, the IRE physician failed to apply professional judgment to assess the psychological conditions identified by the claimant during the IRE examination and to determine whether the conditions were fairly attributable to the claimant's compensable injury. In the court's analysis, the IRE physician ignored a range of potential diagnoses and impairments. For this reason, the Supreme Court held that the IRE was invalid.

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* *Frank is a shareholder in our King of Prussia, Pennsylvania office. He can be reached at 610.354.8263 or fxwickersham@mdwcg.com.*

THERE'S NO PLACE LIKE "HOME"

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its operations in other jurisdictions to be subject to general jurisdiction in Pennsylvania simply because a *different* corporation is based there. Further, an LLC may have many members, sprawled across the country. Just as a nationwide corporation cannot be considered at home everywhere it does business (per *Daimler*), an LLC should not be considered at home everywhere it has a member.

Although no Pennsylvania appellate level decision has addressed the application of *Daimler* to LLCs, at least two federal district court cases have held that *Daimler* should be so extended and that LLCs should only be subject to general jurisdiction in their state of formation and the state where they have their principal place of business. *Finn v. Great Plains Lending, LLC*, 2016 U.S. Dist. LEXIS 21558, *7 n.3 (E.D. Pa. Feb. 23, 2016) (*Daimler* "applies with equal force" to both corporations and LLCs); *Carruth v. Michot*, 2015 U.S. Dist. LEXIS 145224, *19-*20 (W.D. Tex. Oct. 26, 2015) (the tests for citizenship and general jurisdiction are distinct). The Philadelphia Court of Common Pleas agreed with this position and dismissed the plaintiff's claims against the manufacturer.

The plaintiff immediately appealed, so this is not the last word on this issue. But, for the time being, at least, there is no place like "home" for establishing jurisdiction over a defendant, whether a corporation or an LLC. ■

PENNSYLVANIA SUPREME COURT REJECTS

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the Pennsylvania Supreme Court's "exclusive" power to regulate attorney conduct under Pennsylvania's Constitution. Although the trial court relied on *Beyers* in dismissing the *Dragonetti* claim asserted against Mr. Schneider, the Supreme Court offered no analysis of the *Beyers* opinion. As *Beyers* and *Villani* both involve the issue of whether a statute that purports to regulate the conduct of attorneys violates Pennsylvania's Constitution, one might have expected some sort of analysis of the *Beyers* holding. It should not go unnoticed, however, that Chief Justice Saylor, who authored the *Villani* opinion, offered a dissenting opinion in *Beyers*. ■

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The court noted that "professional judgment" is explained in the AMA Guides as a physician's use of "clinical knowledge, skills and abilities to arrive at a specific diagnosis; define the pathology and rate impairments based on the Guides' criteria." The court said that a physician evaluator should not completely disavow all responsibility from considering causality with respect to a given condition. Moreover, the court concluded that the IRE physician in *Duffey* was bound to take his guidance from Section 306(a.2) and the AMA Guides. Instead, he only followed the instructions that were provided to him by the employer.

A considerable portion of the Supreme Court's opinion written by Chief Justice Saylor was used to address strong dissents written by Justices Baer and Wecht. The dissenting Justices strongly criticized the majority's interpretation of Section 306(a.2) as requiring a duty on the part of the IRE physician to rate all of the claimant's injuries, even those that were never accepted as compensable. According to Justice Baer, the court's holding will "undermine the IRE process" by giving claimants an easy path to invalidating an IRE simply by claiming new physical or psychiatric conditions, even those that were not accepted by the employer. In the view of Justice Wecht, the court's reading of Section 306(a.2) will "fundamentally alter the impairment rating process" and turn impairment rating physicians into "junior varsity Workers' Compensation Judges." In other words, *Duffey* will only serve to heighten the state of confusion that currently exists for IREs in Pennsylvania. ■

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email: hpdwoskin@mdwcg.com
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HEALTH CARE DEPARTMENT

T. Kevin FitzPatrick, Esquire—Director
620 Freedom Business Center, Suite 300
King of Prussia, PA 19406
610.354.8252 • Fax 610.354.8299
email: tkfitzpatrick@mdwcg.com
Affordable Care Act
Birth and Catastrophic Injury Litigation
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Medical Device and Pharmaceutical Liability

PROFESSIONAL LIABILITY DEPARTMENT

Christopher E. Dougherty, Esquire—Director
2000 Market Street, Suite 2300, Philadelphia, PA 19103
215.575.2733 • Fax 215.575.0856
email: cedougherty@mdwcg.com
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WORKERS' COMPENSATION DEPARTMENT

Niki T. Ingram, Esquire—Director
2000 Market Street, Suite 2300, Philadelphia, PA 19103
215.575.2704 • Fax 215.575.0856
email: ntingram@mdwcg.com
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Our firm welcomes inquiries, comments and suggestions regarding this publication or other questions, which may be directed to:

Thomas A. Brophy, Esq.
President & CEO
2000 Market Street, Suite 2300
Philadelphia, PA 19103
215.575.2748
email: tabrophy@mdwcg.com

Christopher E. Dougherty, Esq.
Chairman of the Board of Directors
2000 Market Street, Suite 2300
Philadelphia, PA 19103
215.575.2733
email: cedougherty@mdwcg.com

G. Mark Thompson, Esq.
Member, Executive Committee
315 E. Robinson Street, Ste. 550
Orlando, FL 32801
407.420.4390
email: gmthompson@mdwcg.com

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