MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

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Defense Digest

On The Pulse...

SPOTLIGHT ON THE PHILADELPHIA OFFICE

By Butler B. Buchanan, III, Esq.*

Butler B. Buchanan, III

The Philadelphia office of Marshall Dennehey Warner Coleman & Goggin is the headquarters of the firm. With 140 attorneys and over 230 non-lawyer employees, this office serves as the nerve center for the firm. Among other departments, it houses our Billing & Accounting, Finance, Information Technology, Human Resources and Marketing departments, as well as internal file auditors, staff managers, and many paralegals and administrative assistants. Our non-lawyer staff works hard to facilitate the practice of law by our attorneys firmwide.

Marshall Dennehey is a for-profit corporation. However, it is much more than that. While the firm is a substantial contributor to a number of charitable causes, this article will highlight some activities our Philadelphia attorneys engage in outside of the practice of law to improve our community and to contribute to the improvement of the bar. There is no better example of the firm's commitment to the community and to the bar than Thomas A. Brophy, our president and CEO. Over the past eight years, Tom has served on the Board of Directors of the Philadelphia Bar Foundation, and he is currently in his second year as its president. The Foundation is the philanthropic arm of the Philadelphia Bar Association. As the only foundation in Philadelphia solely dedicated to supporting the city's pro bono legal services community, it supports the full range of non-profit legal aid organizations from education to employment, health to housing, youth to seniors, and people with disabilities to immigrants. Over 35 non-profit legal aid organizations have received crucial support from the Foundation in the past five years, totaling over $3 million in grants and other assistance. It is the embodiment of the Philadelphia legal community's commitment to the fundamental principle of equal access to justice for all. Tom's dedication to Board membership and his current role as president of the Foundation serves as a shining example of Marshall Dennehey's commitment beyond the billable hour. Following his lead,

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* *Buck is the managing attorney of our Philadelphia, Pennsylvania office. In addition, he is Chair of our Diversity Committee and the Hiring Attorney. Buck can be reached at 215.575.2661 or bbbuchanan@mdwcg.com.*

EMPLOYMENT LAW PRACTICE GROUP PROVIDES DEFENSE COUNSELING AND TRAINING SERVICES TO CLIENTS

By Ronda K. O'Donnell, Esq.*

Ronda K. O'Donnell

Employment law claims are the stories of headlines, often costing companies big money, win or lose. Every employment case involves a unique set of highly emotional facts—one of actual or perceived indignities suffered, a job lost or accusations of egregious conduct in the workplace. In these situations, the defense matters.

Marshall Dennehey's Employment Law Practice Group has been representing self-insureds and insurance companies in employment-related litigation for many years. We handle all areas of employment litigation, including claims under the discrimination statutes, federal and state leave acts, the Fair Labor Standards Act and state minimum wage laws, employment-related tort claims, such as wrongful termination, defamation, negligent hiring or supervision, breach of contract actions, and actions for violation of wage payment laws. We regularly appear before administrative agencies, like the Equal Employment Opportunity Commission, and state and local human relations agencies, as well as the Department of Labor, the Occupational Safety and Health Administration, and federal and state courts that sit in the jurisdictions where we have a presence—Pennsylvania, New Jersey, New York, Delaware, Ohio and Florida. When needed, we also defend employers' decisions in labor or private arbitrations.

Our experienced litigators approach cases proactively and strategically, making our clients' objectives and goals primary. If early resolution is important, we leverage our knowledge and familiarity with the jurists in the jurisdictions where we practice to achieve that result. We also have significant experience in alternative dispute resolution proceedings. Otherwise, we work to obtain dismissal of claims at the administrative agency level or,

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* *Ronda is a shareholder and the chair of our Employment Law Practice Group. She can be reached at 215.575.2697 or rkodonnell@mdwcg.com.*

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A MESSAGE from the EXECUTIVE COMMITTEE

By Thomas A. Brophy, Esq.
President and CEO

There are places I remember
All my life, though some have changed
Some forever, not for better
Some have gone and some remain
All these places have their moments
With lovers and friends I still can recall
Some are dead and some are living
In my life, I've loved them all.

(*In My Life* – Lennon-McCartney, 1965)

STEPPING DOWN

On December 31, 2017, I will be stepping down as the President and CEO of this law firm. The timing is right. I am sixty-five years of age. I am in good health and have served in this capacity for thirteen years, but I have been involved in management in one way or another since 1986. Prior to becoming President and CEO, I had served three years as a member of the Executive Committee with Phil Toran and Pete Miller, reporting to Robert Coleman who, at that time, was Chairman, President and CEO of the firm. For three years prior to that, I had served with Phil Toran and Pete Miller as members of the Ad Hoc Committee. Those combined six years were essentially transitional years designed to test Pete, Phil and me to see how we would get along and whether we could lead this firm.

Pete and Phil have already retired and had been involved in the decisions that have moved Chris Dougherty and Mark Thompson into their respective roles. I have had the pleasure of working with them now for several years and plan to work two more years in a consultative capacity, while transitioning some client relationships and undertaking some additional projects at the request of Chris, Mark and Howard Dwoskin, the newest member of the management team. I have a lot invested in this team, having brought Chris and Mark to Marshall Dennehey and having worked directly with Howard over the last seventeen years in the management of our Casualty Department. I know the firm will be in good hands under their leadership. Collectively, they know the firm's history, have a strong belief in its culture, and know that their responsibility is first and foremost to the clients and employees of Marshall Dennehey.

If there is one word to describe how I feel as I watch the days of 2017 slip away, that word is gratitude. I am incredibly thankful that I have had the opportunity to serve in a management capacity and have been able to shape this firm and, to some extent, steer the direction that it has taken over the last twenty years.

- I am thankful that so many people I like and admire thought that I had the ability to lead and better this organization;
- I am thankful that I had the support and loyalty of so many talented people, both attorneys and non-attorneys;
- I am thankful to Bob Coleman, Bob Goggin and Jack Warner for their confidence in me and their guidance and tutelage over three decades.
- I am thankful to Pete Miller and Phil Toran who, with me, defined what our Executive Committee is and how it functions. We started as good friends and completed our time together in management as better friends.
- I am thankful to the many clients for whom I provided direct representation as well as to the clients who entered into and maintained strong institutional relationships with Marshall Dennehey. Without their confidence and loyalty, any success that I had would have been fleeting.
- I am thankful for all of the friendships that I have developed while at Marshall Dennehey and for the network of advisors and supporters who have helped me to do my job;
- I left teaching to come to this law firm, but to a significant extent, the teacher never left me. I am so pleased to see the success of so many people whom I hired or mentored or counseled during their careers and am proud to see them assume positions of leadership and prominence in this firm;
- Serving as President and CEO required me to balance many competing interests, and, at times, I couldn't help but wonder who questioned one decision or felt disenfranchised by another. Over the last several months, many of you have told me that you liked me in the position

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SPOTLIGHT ON THE PHILADELPHIA OFFICE

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several of our Philadelphia office attorneys currently serve on boards of the Foundation and its beneficiary organizations.

CHRISTIAN LEGAL CLINICS OF PHILADELPHIA

Christian Legal Clinics of Philadelphia seeks to address the legal issues of an impoverished clientele via the assistance of volunteer attorneys who travel to neighborhoods where their services are most needed. This organization operates nine legal clinics in some of the most economically depressed neighborhoods in the city. Clients have the opportunity to meet one-on-one with attorneys for a free one-hour consultation. They are given advice, counsel and direction on how to address the legal issues they bring. The clinics handle many types of legal matters, such as criminal record expungements, wills, powers of attorney, landlord/tenant, Orphan's Court issues and other matters. Once per month, Marshall Dennehey's attorneys travel to one of the clinic's locations to provide this counsel. Over 15 attorneys have participated in assisting economically challenged Philadelphia residents in addressing legal issues.

CRISTO REY PHILADELPHIA HIGH SCHOOL

Cristo Rey Philadelphia High School is a new model of private high school education. Cristo Rey is a top-quality, independent Catholic high school for students of all faiths from grades 9 through 12 who could not otherwise afford a private education. The school's curriculum combines rigorous academics with professional work experience in businesses where the students are mentored by college-educated adults. Every student works five days per month with Philadelphia-area "job partner" businesses. The job experience accelerates the students' development and provides a real-world employment experience. Marshall Dennehey serves as a job partner for four students. In exchange for their work, the firm pays a substantial portion of their tuition. In addition, our attorneys and staff mentor the students. Cristo Rey's students come from extremely economically deprived parts of the city and the surrounding region. Thus far, Cristo Rey has graduated two classes. In each class, every graduating student was admitted to at least one four-year college. Two of the students who worked at Marshall Dennehey are now in college—one at Pennsylvania State University and the other at Millersville University in Lancaster, Pennsylvania. Our Philadelphia office employees take pride in our participation as a job partner of Cristo Rey Philadelphia High School students.

CHESTER A. ARTHUR ELEMENTARY SCHOOL

Marshall Dennehey has also partnered with a Philadelphia inner-city public elementary school, Chester A. Arthur School. Three years ago, this relationship began in consensus with a call to action issued by then Chancellor of the Philadelphia Bar Association to encourage law firms to partner with public schools in an effort to assist in raising the quality of education being provided by the Philadelphia School District. Chester A. Arthur serves students from kindergarten through the eighth grade. The firm supports the school in several ways. Many families that send students to Chester A. Arthur cannot afford basic school supplies. Prior to the start of each school year, the attorneys and staff on each of the five floors of the Philadelphia office compete to see which floor donates the most school supplies. The winning floor is rewarded with two dress-down days and two days of free lunches paid for by the firm. As the cold weather approaches, Marshall Dennehey also holds an annual coat drive for the students. Attorneys and staff either purchase outerwear or donate money toward this effort.

Some of the top performing public high schools in the Philadelphia School District require that students apply for admission. That process requires an essay, somewhat similar to essays required of applicants to colleges and universities. Several of our attorneys and staff go to Chester A. Arthur to assist in drafting and editing essays for those students who apply to schools that requires an essay. In addition, throughout the school year, attorneys and staff donate high-nutrition breakfast bars, as well as "Box Tops for Education" coupons that can be redeemed for certain school supplies.

GIVING BACK TO THE PROFESSION

Many Marshall Dennehey attorneys in Philadelphia (and outside Philadelphia) are involved in professional organizations, including bar associations and defense-oriented organizations.

PHILADELPHIA BAR ASSOCIATION

Three of our attorneys currently serve as ex-officio members of the Board of Governors of the Philadelphia Bar Association, and others have sat as members of the Board in the past. One of our attorneys formerly chaired the Board of Governors. That same attorney has twice served as chair of the Philadelphia Bar Association Commission on Judicial Selection and Retention, which evaluates judicial candidates and informs the public regarding whether they find them to be "Recommended" or "Not Recommended." Another of our Philadelphia office attorneys served for two years as chair of the Campaign for Qualified Judges. In Pennsylvania, once judges are elected, they must eventually run for retention to maintain their seat on the bench. The Campaign for Qualified Judges raises funds to support those judges running for retention who make a pledge not to request money from law firms or individual lawyers. Another Philadelphia office attorney is in his fourth year of service on the American Bar Association House of Delegates as a representative of the association.

Yet another Philadelphia office attorney currently serves as chair of the Editorial Board of *The Philadelphia Lawyer*, the quarterly magazine published by the association. Two Marshall Dennehey lawyers serve on the Bar Association's Young Lawyers Division Executive Board. One of them is on the leadership track to become president of this board.

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Federal—Employment Law

EEOC ISSUES UPDATED GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION IN THE WORKPLACE

By David J. Oberly, Esq.*

KEY POINTS:

- EEOC recently updated enforcement guidance on national origin discrimination.
- The new guidance will be heavily relied upon by the EEOC in its investigation of national origin discrimination claims.
- Employers should proactively implement the best practices articulated in the new guidance to guard against national origin discrimination claims in the workplace.

David J. Oberly

INTRODUCTION

Recently, the United States Equal Employment Opportunity Commission issued its much-anticipated updated enforcement guidance on national origin discrimination in the workplace. The newly released enforcement document comes on the heels of the EEOC's newly updated Strategic Enforcement Plan for the fiscal years 2017-2021, in which the Commission signals its intent to place an increased emphasis on investigating and combating discrimination against this particular protected class of individuals. The newly issued guidance provides an up-to-date articulation of the agency's current, expanded interpretation of federal law regarding national origin discrimination as it pertains to an assortment of workplace situations, such as "intersectional" discrimination, the effect of mistaken perceptions, accent discrimination and fluency requirements. In addition, the document also provides several suggested practices for employers to implement in order to steer clear of falling victim to future national origin discrimination claims. The guidance is highly recommended reading for both employers and legal professionals who represent or counsel business entities, as the document will serve as the EEOC's playbook that the Commission will heavily rely on its investigation of claims pertaining to national origin discrimination.

DISCUSSION & ANALYSIS

While federal courts use similar legal frameworks in addressing all types of discrimination claims, the newly issued guidance on national origin discrimination focuses on issues that are unique to claims involving this particular class of protected individuals. The following are some of the highlights and most important takeaways from the document.

A large portion of the recently issued guidance focuses on national origin-oriented language issues. The EEOC cautions that because linguistic characteristics are closely associated with national origin, employers must carefully scrutinize employment decisions that are based on language to ensure that they do not violate Title VII. In particular, the guidance offers some insight as to matters concerning accents, English fluency and restrictive workplace language policies.

The first major area of concern for employers pertaining to language-oriented discrimination concerns decisions based on accent characteristics. Because national origin and accent are intertwined, employment decisions or harassment based on accent may violate Title VII. Due to the link between accents and national origin, courts will take a "very searching look" at an employer's reasons for using accents as a basis for an adverse employment decision and will require evidence—not simply unsupported assertions—to explain such actions. Under Title VII, an employment decision may legitimately be based on an individual's accent if the accent "interferes materially with job performance." To meet this standard, an employer must provide evidence showing that: (1) effective spoken communication in English is required to perform job duties; and (2) the individual's accent materially interferes with his or her ability to communicate in spoken English.

In addition, employers must also be cognizant of the potential for discrimination to arise based on issues relating to language fluency. Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. The EEOC notes that an individual's lack of fluency in English may interfere with job performance in some circumstances, but not in others. Because the degree of fluency that may be lawfully required varies from one position to the next, employers are advised to assess the level of fluency required for a job on a case-by-case basis.

Importantly, a sizeable focus of the guidance concerns language-restrictive policies, which is due in large part to the EEOC's position that a worker's primary language is intricately tied to his or her ethnic identity. Accordingly, this is a hot-button issue for the

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Federal—General Liability

BEST PRACTICES AND POTENTIAL LIABILITY FOR DRONE USE IN THE INSURANCE INDUSTRY

By Douglas J. Kent, Esq.*

KEY POINTS:

- Insurers are increasingly using drones to evaluate claims, reduce costs and cut cycle time.
- Drones present a variety of risks and potential exposures.
- To limit liability, drone users must be in compliance with the FAA-mandated best practices in addition to all federal, state, and local laws and regulations.

Douglas J. Kent

The United States has experienced major hurricanes Harvey, Irma and Maria this year. When a catastrophe hits, Unmanned Aerial Systems—UAS or drones—can provide a bird's eye view of inaccessible and unsafe areas to evaluate claims and losses both quickly and effectively. Hurricane Harvey was one of the first catastrophic storms to hit the United States since the Federal Aviation Administration began allowing commercial industries to operate drones. Several large property insurers successfully utilized drone technology to capture images to develop their responses to the destruction Hurricane Harvey left behind. It is easy to see how drone technology can drastically change the life of an insurance claim. The increased use of drones continued with subsequent hurricanes this year. Many insurers are expecting to expand their use of drones in the future. Drone use is highly regulated with potential liability for the operator and their company.

RULES AND REGULATIONS FOR DRONES

The United States Government has the exclusive power to regulate the National Airspace System to protect individuals and property in the air and on the ground and has directed the Federal Aviation Administration to perform this function. Recent developments from the FAA have made it feasible for insurance companies, independent adjusting companies, engineers and experts to obtain commercial licenses to operate drones by way of the FAA Modernization and Reform Act of 2012. All commercial industries must apply for and receive the necessary waivers from the FAA before operating a drone. At least 17 insurance companies have received permission to operate drones in connection with the underwriting of policies, loss control, risk management and the investigation of claims.

Effective August 29, 2016, the FAA implemented UAS Rule Part 107, which sets forth extensive rules regarding the operation of drones. These regulations require, in part, that drones: (1) weigh less than 55 pounds; (2) are operated only in the visual line-of-sight during daylight or civil twilight; (3) have a pre-flight inspection by the Remote Pilot in command; and (4) generally operate at altitudes of only 400 feet above ground.

Similar to the federal government, state and local governments have enacted laws and/or implemented regulations regarding the operation of drones. Los Angeles prohibits the operation of drones after sunset, and Charlottesville, Virginia bans drone use entirely.

THE GAME OF DRONES: LIABILITY CONCERNS

While drones provide a technological advantage to insurers and many major industries, they certainly also present liability concerns. Two major liability issues are bodily injury or property damage caused by the operation of the drone, and another is the potential for invasion of privacy. As drone use increases, drone-related claims are expected to increase in the insurance industry.

Media reports indicate that numerous people have been injured because of faulty drone operation. Drones have caused injuries by crashing into performers and spectators at various public events. They have also crashed into private property, resulting in property damage. Concerns have been expressed regarding the nightmare scenario of a drone hitting a commercial airplane and causing it to crash. In these foreseeable types of incidents, theories regarding negligent operation, training, inspection and maintenance will likely be asserted.

Product liability claims for accidents or damage caused by drone defect or malfunction can also be expected. Such claims will arise against manufacturers, sellers or suppliers. Advances in drone technology may be used to argue that older drones are defective. For example, newer drones have automatic crash avoidance systems to prevent accidents.

In addition to bodily injury and property damage claims, drone owners and operators also face potential exposure for invasion of privacy under both common law and state statutes, such as Florida's Freedom from Unwarranted Surveillance Act (FUSA). Florida's FUSA applies to any individual, state agency, or political subdivision

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New Jersey—Automobile Liability

ARE PIP BENEFITS TRULY NO-FAULT NOW?

By Jessica D. Wachstein, Esq.*

KEY POINTS:

- A standard PIP policy can include five different policy limit options.
- Medical expenses over and above any limited PIP policy can be admissible at the time of trial.
- However, minor expenses may be inadmissible.

Jessica D. Wachstein

The New Jersey legislature attempted to tackle the issues of rising insurance premiums and medical expenses by enacting what is known as the "No-Fault Act." Under this statute, insurance policies must provide personal injury protection coverage in the amount of $250,000, unless the insured selects from one of four other amounts valued at $150,000, $75,000, $50,000 or $15,000 per person per accident. The No-Fault Act was meant to preclude minor claims for medical expenses, such as co-pays or deductibles. Not surprisingly, there has been some confusion by the courts and litigants alike as to whether an injured party can sustain a claim for medical expenses above a PIP policy limit that is under the maximum $250,000 PIP policy. This issue has now been clarified by the Appellate Division, which has held that an injured party can submit a claim for losses over and above one of the lesser PIP policy limits.

The defense industry must now calculate these potential economic losses when evaluating a claim in which the injured party has selected a lesser PIP policy. The Appellate Division noted that any one of the four PIP policy limits is considered a standard policy. However, if no selection is made by the insured, the limit, by default, will be for a $250,000 PIP policy.

The issue regarding whether or not these losses are admissible stemmed from N.J.S.A. § 39:6A-12, which states that evidence of losses collectible under personal injury protection coverage is inadmissible at the time of trial. This limitation specifically restricts evidence of "the amounts of any deductibles, copayments or exclusions." There was some question as to whether this portion of the statute also limited one's right to recover medical expenses if one selected a limited PIP option of $15,000. Previously, the lower courts had decided that the statutory language would not permit a person with a $15,000 PIP policy from seeking recovery of that amount up to the $250,000 standard policy limits.

This changed on June 1, 2017, when the Appellate Division published their decision regarding this issue. In *Haines v. Taft*, 162 A.3d 396 (N.J.Super. App.Div. 2017), the court concluded:

> Section 12 does not make inadmissible medical expenses between the PIP limit in an insured's standard automobile insurance policy and $250,000, less deductibles, copayments or exclusions. Such expenses are a kind of uncompensated economic loss that an injured party may seek to recover against a tortfeasor.

The court's decision acknowledged the legislative intent when enacting the No-Fault Act. However, it concluded that this reading of the law would not frustrate the goals of limiting minor lawsuits and reducing insurance costs.

The legislature's goal in prohibiting evidence of payments made under an injured person's PIP policy was also to eliminate the potential for double recovery. In *Haines*, the court looked at a previous decision where it found that an injured party could not recover the minor expenses of the deductibles and copayments that were "contrary to the legislative intent to reduce minor claims from the court system." The *Haines* court found that the language of the statute did not bar the introduction of all medical expenses. In the two cases brought up on appeal in *Haines*, both were seeking to recover $28,000 and approximately $10,000 in uncompensated medical expenses above and beyond their $15,000 PIP policies. The court concluded that those could not be considered minor expenses and, thus, could be presented at the time of trial in their personal injury lawsuits. The *Haines* opinion surmised that these expenses are different then deductibles and co-payments, which can be reasonably calculated when purchasing insurance. The court concluded that one "[c]an hardly be expected to anticipate the severity of his or her injuries and the consequent expenses of his or her medical care."

At this time, the Appellate Division has mostly resolved this issue. Some outstanding questions and issues can be considered if an injured party is seeking a nominal amount of outstanding medical expenses over and above a limited PIP policy. The panel acknowledged that there might be an issue in which there are medical expenses "just above his or her PIP limits that arguably

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New Jersey—Workers' Compensation

INJURIES OCCURRING DURING MUTUALLY BENEFICIAL TASK ARE COMPENSABLE EVEN ON DAY OFF

By Kiara K. Han, Esq.*

KEY POINTS:

- If an injury occurs outside of work hours, it will only be compensable if the petitioner is performing a mutually beneficial act.
- As long as there is a mutually beneficial task performed, the fact that other personal tasks were also completed simultaneously is generally not given much weight.
- These type of cases are fact-sensitive and determined on a case-by-case basis.

Kiara K. Han

Generally, injuries that occur within the scope and course of employment are found compensable under New Jersey's workers' compensation statute. However, it becomes less clear when an employee is injured outside of normal work hours. The Appellate Division recently addressed this issue and presented an unexpected decision in its unpublished opinion. In *Grawehr v. Twp. of East Hanover*, 2017 N.J.Super. Unpub. LEXIS 1634 (N.J.Super. App.Div. June 29, 2017), the Appellate Division affirmed a workers' compensation award to a petitioner who fell at work on a day he was not scheduled to work.

In December 2011, the petitioner, a township police officer, was injured when he slipped and fell on ice in the municipal parking lot outside police headquarters. A hotly contested issue was whether the injury was compensable because the officer was not scheduled to be at work that day. Because the township denied the injury was work-related, a trial was held on the issue of compensability only.

The police officer testified that, although he was not scheduled to work that day, he went to headquarters to pick up his pay stub and check his folder for new subpoenas that would require him to testify in court. The officer testified that he wanted to check his folder for these subpoenas to avoid any disciplinary problems other officers faced for not appearing in court. A lieutenant also testified that "diligent" officers would regularly go into work on days off to do work, including him.

On the other hand, additional testimony revealed that police officers' court appearances were generally scheduled for days they were on duty, that there was no requirement they needed to check their files on off days, and that no court dates were scheduled in the two weeks following the accident. Despite this testimony, the Workers' Compensation Judge found that the police officer's injury was compensable because his actions were a "benefit to the employer." The judge entered an award in favor of the officer.

In upholding this award, the Appellate Division found that the judge relied on substantial, credible evidence and added only two additional points. The first was that, under the "premises rule" set forth in N.J.S.A. § 34:15-36, employment begins when the employee arrives and ends when he or she leaves. Thus, injuries sustained in an "accident arising out of and in the course of employment[,]" are compensable, regardless of whether the injuries occur on a scheduled day of employment. N.J.S.A. § 34:15-7.

The second point addressed was the fact that an injury may be found compensable if the employee was performing a mutually beneficial task when he or she was injured, even while off duty, as long as the injury arose "from or [was] contributed to by conditions which bear some essential relationship to the work or its nature." *Stroka v. United Airlines*, 835 A.2d 1247, 1250 (N.J.Super. App.Div. 2003). The Appellate Division relied heavily on *Salierno v. Micro Stamping Co.*, 345 A.2d 342, 344-345 (N.J.Super. App.Div. 1975), in which the appellate panel found a heart attack to be compensable when suffered by an employee during contract negotiations on behalf of a union. In doing so, the Appellate Division focused on the fact that the task the petitioner was performing, i.e., checking his folder for new subpoenas, was mutually beneficial to the employer.

While *Grawehr* does not bode well for employers, there have been other cases more favorable for employers. One such example is *Patterson v. Atlantic Club*, 2013 N.J. Super. Unpub. LEXIS 1716 (N.J.Super. App.Div. July 11, 2013), in which the Judge of Compensation dismissed a petition by a personal trainer who was allegedly injured while returning equipment following a cancelled appointment. The trainer did have prior appointments at the gym with clients. She alleged that she had waited around approximately 20 minutes before returning the equipment she was going to use during the appointment. The employer alleged, to the contrary, that the trainer had changed out of her work uniform and was working out on her personal time when she was injured. The judge did not find the trainer to be credible because she had no appointment

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SPOTLIGHT ON THE PHILADELPHIA OFFICE

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Some of our attorneys have served and currently serve as co-chairs of certain substantive law committees, including the Federal Courts Committee and the Medico-Legal Committee, and others have co-chaired committees in the past. A Marshall Dennehey attorney is currently in line to become co-chair of the Workers' Compensation Committee of the Association in 2018.

PHILADELPHIA ASSOCIATION OF DEFENSE COUNSEL, PENNSYLVANIA DEFENSE INSTITUTE AND DEFENSE RESEARCH INSTITUTE

The Philadelphia Association of Defense Counsel (PADC) serves as the voice of the defense bar in the Philadelphia region. The firm has been supportive of this organization, and three of our Philadelphia attorneys have served as president of PADC within the past 15 years. At least one member of the firm has been a member of the Executive Committee of PADC since the mid-1990s.

Four Marshall Dennehey attorneys (one from the Philadelphia office) have served as president of the Pennsylvania Defense Institute, which is the statewide civil defense organization in Pennsylvania. Similar to PADC, our attorneys have held positions of leadership within the organization's Executive Committee for many years.

Our attorneys have also been and remain active in the Defense Research Institute, the national voice of the defense bar. There is currently a Marshall Dennehey attorney on the Board, and another (based in the Philadelphia office) served on the Board in the past. Numerous Marshall Dennehey attorneys are involved in leadership roles and substantive law committees of DRI.

CONCLUSION

Believe it or not, this only scratches the surface of the degree to which attorneys and staff in the Philadelphia office of Marshall Dennehey give of their time and energy to the local community and are involved in state, local, and national defense and other professional organizations. While Marshall Dennehey is a for-profit corporation, we continue to do our share to be a good corporate citizen and to be a good citizen of the profession while doing so. ■

EMPLOYMENT LAW PRACTICE GROUP

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alternatively, through motions to dismiss or summary judgment at the trial court level. If early dismissal is not possible, we provide aggressive and effective trial representation.

The definition of predictable is the comfort in knowing where things are headed. Unfortunately for employers, the laws and regulations governing the workplace are constantly changing and evolving such that an employer has little assurance that the way a business managed its workforce in years past is an appropriate model for the future. Employers today face not only the challenge of running a successful business, but they must also be certain to remain in compliance with federal, state, and local employment laws and regulations. Thus, in addition to providing our clients with vigorous representation in employment lawsuits, our Employment Law Practice Group also provides advisory/counseling services to our clients, keeping them up-to-date on a range of workplace issues affecting the various industries in which they operate.

The goal of our counseling and advisory services is to help employers limit or avoid litigation as much as possible. We regularly advise our clients on issues concerning statutory compliance with the Americans with Disabilities Act, Title VII, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Family and Medical Leave Act, as well as other federal and state laws. We also offer assistance to personnel management professionals on issues related to hiring, performance, assessment and monitoring, investigations, discipline, discharge, workforce reduction programs and audits.

An employer without clear and effective personnel policies is an employer at risk. We work with our clients to create legally compliant, efficient, and comprehensive employee handbooks and personnel policies. The Employment Law Practice Group also offers training programs on a full range of employment matters tailored to specific client needs or specific employee groups, such as supervisors, managers, human resource personnel and risk managers.

For those businesses with offices and services open to the public, the Employment Law Practice Group also defends and counsels clients with respect to property and service-based compliance with the Americans with Disabilities Act. In addition, the group's attorneys are experienced in defending housing discrimination cases filed against property owners or residential management companies, including litigating and defending cases filed against our clients by the United States Department of Housing and Urban Development.

Representing employers and business clients requires skill and familiarity with applicable federal, state, and local laws that affect employees and the employer-employee relationship, as well as business and property owner operations. Given the complexity of the laws in this area, a company's best defense is to partner with lawyers who know the law and the forum and who take a proactive approach to solving the company's issues and exposures. The experienced and well-regarded attorneys in Marshall Dennehey's Employment Law Practice Group are those attorneys. We pride ourselves in taking care of the defense—when the defense matters—so our clients can focus on the growth and development of their businesses with the knowledge that they comply with current employment laws and statutes. ■

Ohio—Long-Term Care Litigation

ADMISSIBILITY OF STATE SURVEY RESULTS IN LONG-TERM CARE LITIGATION

By Leslie M. Jenny, Esq.*

KEY POINTS:

- Nursing homes face complicated risk management scenarios that make residents far more susceptible to injury or accident than the average patient.
- Nursing homes are among the most highly regulated entities in health care.
- Annual and complaint surveys by Departments of Health flow from added regulations and present damaging evidence at trial if admissible.

Leslie M. Jenny

Long-term care litigation is one of the fastest growing segments of health care litigation today. These cases can often be replete with bad witnesses, inflammatory photos and health inspection reports that are heavily damaging. These factors, especially in combination, create a hazardous courtroom scenario.

The State Survey process involves an annual state survey as well as complaint surveys. Citations are considered violations of federal regulations.

Effective management of the potential for Department of Health survey admission is crucial. Citations can generally fall into three potential categories:

(1) Prior Bad Acts – character evidence – generally inadmissible;

(2) Habit/ Routine Practice – probative value must exceed potential prejudice; and

(3) Where a citation is issued pertaining to the care of a resident who is the subject of the current litigation.

Jurisdictions vary widely on the admissibility of surveys as is demonstrated below:

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STATE	SURVEY ADMISSIBLE	STATUTE	CASE LAW
Alabama	Unclear	No	*Montgomery Health Care Facility, Inc. v. Ballard* (1990), 565 So.2d 221, 1990 Ala. LEXIS 510 (may be admissible if contributed to injury or death)
Alaska	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Arizona	Unclear	No	*Blackburn v. Sabino* (2012), 2012 Ariz. Super. LEXIS 100 (may be admissible as relevant evidence)
Arkansas	Likely	No	*Advocat, Inc. v. Sauer* (2003), 353 Ark. 29, 111 S.W.3d 346 (finding probative value outweighs potential prejudice)
California	Unclear (testimony of investigator – yes; admission of citation – no)	No	*Nevarrez v. San Marino Skilled Nursing & Wellness Centre*, LLC (2013), 221 Cal. App. 4th 102, 2013 Cal. App. LEXIS 887 (remanded for evaluation of probative value v. prejudice)
Colorado	Unclear	No	*Reigel v. SavaSeniorCare, LLC* (2011), 292 P.3d 977, 2011 Colo. App. LEXIS 2042 (trial court admitted and reversed on appeal due to lack of evaluation of issue)

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ADMISSIBILITY OF STATE SURVEY RESULTS

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STATE	SURVEY ADMISSIBLE	STATUTE	CASE LAW
Connecticut	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Delaware	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
District of Columbia	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Florida	Yes	Florida Statutes § 90.803(8)	*Estate of Croniger v. Life Care Ctrs. of Am.* (2014), 2007 Fla. Cir. LEXIS 1149 (holding survey results are admissible)
Georgia	Unclear	No	*Tucker Nursing Ctr, Inc. v. Mosby* (2010), 303 Ga. App. 80 (probative v. prejudice); *McLain v. Mariner Health Care* (2006), 279 Ga. App. 410 (violation of statute or regulation = negligence per se)
Hawaii	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Idaho	Unclear	No	*Nield v. Pocatello Health Servs* (2014), 156 Idaho 802 (expert affidavit relies on surveys)
Illinois	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Indiana	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Iowa	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Kansas	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Kentucky	Likely	No	*Carole Renfro v. EPI Corp.*(2004), 2004 WL 224397 (holding surveys admissible)
Louisiana	Unclear	No	*Satterwhite v. Reilly* (2002), 817 So.2d 407, 2002 La. App. LEXIS 1217 (appears to reference use of surveys by experts)
Maine	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Maryland	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Massachusetts	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Michigan	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)

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ADMISSIBILITY OF STATE SURVEY RESULTS

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STATE	SURVEY ADMISSIBLE	STATUTE	CASE LAW
Minnesota	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Mississippi	Unclear	No	*Pinecrest, LLC v. Harris* (2010), 40 So.3d 557, 2010 Miss. LEXIS 392 (surveys likely admissible for notice)
Missouri	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Montana	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Nebraska	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Nevada	Unclear	No	*Hansen v. Universal Health Services, Inc.* (1999), 115 Nev. 24, 1999 Nev. LEXIS 9 (affirming trial court's exclusion)
New Hampshire	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
New Jersey	Unclear	No	*Ptaszynski v. Atlantic Health Sys.* (2015), 440 N.J. Super 24, 2015 N.J. Super LEXIS 45 (trial court excluded surveys, not addressed on appeal
New Mexico	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
New York	Likely	No	*Passucci v. Absolut Ctr. For Nursing & Rehabilitation at Allegany, LLC*, 2014 N.Y. Misc. LEXIS 5834 (detailed evaluation of survey results)
North Carolina	Case law suggests not admissible		*Blanchard v. Britthaven, Inc.*, 2014 N.C. App. LEXIS 188, 757 S.E.2d 527, 2014 WL 636814 (exclusion of surveys upheld)
North Dakota	Unclear	No	Management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Ohio	No	ORC §5165.67	*Sliwinski v. Vill. of St. Edwards*, 2014-Ohio-4655, 2014 Ohio App. LEXIS 4539 (Ohio Ct. App. Summit County October 22, 2014 (enforcing statutory exclusion)
Oklahoma	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Oregon	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Pennsylvania	Unclear		Pennsylvania Dept of Health – statement published – statements of deficiencies and/or plans of correction are not evidence of compliance with the standard of care or admission of wrongdoing

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ADMISSIBILITY OF STATE SURVEY RESULTS

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STATE	SURVEY ADMISSIBLE	STATUTE	CASE LAW
Rhode Island	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
South Carolina	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
South Dakota	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Tennessee	Unclear	No	*Christian v. Ebenezer Homes of Tenn., Inc.* (2013), 2013 Tenn. App. LEXIS 466 (discussion of Dept. of Health compliance on survey reports)
Texas	Yes	Texas Health & Safety Code § 242.049	*Brewer v. Capital Cities/ABC, Inc*. (1998), 986 S.W.2d 636 (finding inspection surveys admissible)
Utah	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Vermont	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
Virginia		Va. Code Ann. § 18.2-268.3	*Crouse v. Med. Facilities of Am. XLVIII* (2013), 86 Va. Cir. 168 (holding surveys are admissible)
Washington	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)
West Virginia	Yes	No	*Manor Care, Inc. v. Douglas* (2014), 234 W.Va. 57 (complete discussion of the survey results)
Wisconsin	No	Wis. Stat. §146.38	
Wyoming	Unclear	No	General management of evidence pursuant to applicable Rules of Evidence (probative value v. prejudice)

Early identification of survey/citation issues and effective management are necessary in order to appropriately evaluate potential liability. Unfettered introduction of citations as evidence in long-term care cases are highly inflammatory and can result in emotion-based outcomes. ■

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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of President and CEO because you "trusted" me. I am most appreciative to those of you who have trusted me to make wise and, even more importantly, fair decisions.

- I am particularly thankful to my wife, who tolerated my many long days and my many nights out attending to firm business and to the needs of people with whom she was only marginally familiar. No one gets to do an adequate job as a President or CEO without the support of his or her spouse.

To me, one of the great attractions of this place is its culture. I've always believed, and still do believe, that it is a place where everyone is provided an opportunity to improve their professional, economic and personal situation. It doesn't matter where you went to school. It doesn't matter who your parents were. It doesn't matter when you started with the firm or where you started with the firm. What matters most is who you are, how willing you are to work hard, and how well you treat your fellow workers.

A number of years ago, I was called upon to make a toast about the firm. I toasted this firm's culture and described it as follows:

- It is a culture that treats employees fairly and respectfully, be they shareholders, associates, administrative assistants, receptionists, or file clerks;
- It is a culture that recognizes and promotes diversity among its members;
- It is a culture in which lawyers like and trust one another and like and trust their leadership;
- It is a culture that hires employees with the hope and expectation that they will finish their careers at the firm;
- It is a culture that encourages and rewards loyalty, humility, and teamwork;
- It is a culture where humor is a great equalizer and where no one is above a friendly jest.

I have always believed in this culture, and still do.

Sure, there were days when this job was very difficult, and, yes, the job of President and CEO can be unrelenting. But, without a doubt, the good times, the opportunities, the friendships, the successes and the laughs outweigh all of those things.

It has been my great privilege to have served you as President and CEO, and I am very thankful to all of you for that opportunity. ■

ARE PIP BENEFITS

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might be minor." The court declined to discuss or decide that potential issue. As such, there is an argument to be made, on a case-by-case basis, that the outstanding medical expenses are minor and should be excluded at the time of trial. However, based upon this recent decision, it is important to evaluate the claimant's PIP limits as anything above and beyond the PIP limits may be admissible at the time of trial, notwithstanding deductibles and copayments. ■

INJURIES OCCURRING DURING MUTUALLY BENEFICIAL TASK

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scheduled when she was injured, was working out herself, and was on the premises for her own purposes unrelated to her employment. Therefore, although the trainer was at her place of work, the judge found that she sustained the injuries outside of her work hours while performing personal tasks with no mutual benefit to the employer.

As these cases illustrate, determining compensability for injuries outside of the normal work hours is fact-sensitive. However, the extent to which the mutual benefit doctrine can be applied appears to be limitless in that anyone who drops by work to perform a function that is remotely "work-related" can argue the existence of a mutual benefit to the employer. Due to the conflicting decisions by appellate panels and the subjective nature of the mutual benefit doctrine, future clarification from a reported decision or the Supreme Court is needed to define the contours of this seemingly boundless doctrine. One thing employers might attempt to stave off these types of claims is to limit overtime or discourage off-hours work for employees with specified work hours. However, if this is not feasible or if employees are encouraged to come in during off hours, employers should be aware of the possibility of these types of workers' compensation claims. ■

Pennsylvania—Amusements, Sports & Entertainment

HEADS UP AND WATCH OUT! POTENTIAL LIABILITY FOR TRAUMATIC BRAIN INJURY PURSUANT TO THE SAFETY IN YOUTH SPORTS ACT

By Jon E. Cross, Esq.*

KEY POINTS:

- Interscholastic coaches and schools have a duty to remove from play any athlete who shows signs of a concussion, and they cannot permit such an athlete to return until being cleared by a licensed health-care professional.
- Court decisions have suggested that it may create an "implied" cause of action, which could result in civil liability against a coach and school.
- Failing to abide by the Act may constitute negligence per se.

Jon E. Cross

When a high school student-athlete suffers a concussion and is then permitted to return to play before the concussion heals, the parents of the injured player may bring a civil lawsuit against the player's coaches and the school district. Typically, when a parent initiates such a lawsuit, it may be based on common law negligence, with allegations that the coach failed to notice the incident or prematurely permitted the student to return to play. In addition, a claim may be asserted under the Fourteenth Amendment's Due Process Clause, alleging the coach created a danger to the bodily integrity or physical safety of the student.

In addition to these traditional claims of liability, some have suggested that liability may also arise under similar state statutes when a student-athlete suffers a concussion. The first such statute, the Zackery Lystedt Law, was enacted in Washington State in 2009. By 2014, all fifty states and the District of Columbia had enacted some form of youth sports concussion legislation. Pennsylvania's version, the Safety in Youth Sports Act, *24 P.S. §§ 5321-5323*, was passed in 2012.

The purpose of the Act is to reduce the risk of further injury or death to youth athletes who suffer a head injury. The Act is directed at interscholastic athletics, which the School Code defines as a public school, school district, nonpublic school, or private school in the Commonwealth other than a private or nonpublic school that elects not to become a member of the Pennsylvania Interscholastic Athletic Association. *24 P.S. § 16-1602-A*. The Act covers games, practices and athletic events sponsored by or associated with the school entity. *24 P.S. § 5323*. The Act states in relevant part:

> (c) Removal from Play. A student who, as determined by a game official, coach from the student's team, certified athletic trainer, licensed physician, licensed physical therapist or other official designated by the student's school entity, exhibits signs or symptoms of a concussion or traumatic brain injury while participating in an athletic activity shall be removed by the coach from participation at that time.
>
> (d) Return to Play. The coach shall not return a student to participation until the student is evaluated and cleared for return to participation in writing by an appropriate medical professional….
>
> (e) Training Course. Once each school year, a coach shall complete the concussion management certification training….
>
> (i) Civil Liability.
>
> (1) Except as provided under paragraph (2), nothing in this act shall be construed to create, establish, expand, reduce, contract or eliminate any civil liability on the part of any school entity or school employee.
>
> (2) Any coach acting in accordance with subsections (c) and (d) shall be immune from any civil liability.

24 P.S. § 5323.

Given the unusual language in subsection (i)(1), that the Act is not intended to either "create" or "reduce" civil liability, Pennsylvania's courts have struggled with assessing what impact, if any, the Act has on the existing rules of civil liability. This question was first addressed in *M.U. v. Downingtown High School East*, 103 F. Supp. 3d 612 (E.D.Pa. 2015). During a soccer game, M.U. collided with another player while attempting to head the ball. Despite alleged signs that she was injured, the coach allowed M.U. to play the rest of the game, during which she collided with other players and headed the ball several times. M.U.'s suit alleged traditional claims for common law negligence and violation of the Fourteenth Amendment's Due Process Clause. In particular, the lawsuit claimed that her coach negligently failed to remove her from the game and that the school district failed to implement proper policies regarding concussion evaluation, which violated M.U.'s constitutional rights.

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On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Samuel Higginbottom (Tampa, FL) obtained an entry of final summary judgment on behalf of our client, a managing entity for state- and federally-funded mental health services for the indigent population of the Tampa Bay region. The plaintiff alleged gross negligence by our client for failing to ensure proper safeguards were in place to prevent sexual misconduct at a third-party mental health facility eligible to receive state funding. The alleged sexual misconduct occurred while the plaintiff was receiving court-mandated in-patient mental health care at the facility. After an analysis of the complaint and applicable Florida statutes, Sam moved for summary judgment as to whether our client owed the plaintiff a legal duty. Although initially expressing doubt regarding Sam's position, after considering his legal arguments, the judge entered final summary judgment in our client's favor.

Timothy McMahon (Harrisburg, PA) obtained a defense verdict in a jury trial in a premises liability case in Dauphin County. The plaintiff had alleged that our clients' use of a fog machine on Halloween outside their home obscured the plaintiff's vision, causing him to fall and seriously injure his knee.

Michele Frisbie (Doylestown, PA) obtained a defense verdict at a binding arbitration hearing in Bucks County, Pennsylvania. The plaintiff, a passenger in his brother's vehicle, claimed he was injured when the defendant crossed over a double yellow line, passing traffic, in order to get to a left turning lane. The defendant struck the plaintiff's vehicle as it was turning left out of a parking lot. The arbitrators determined that the defendant never crossed the double yellow line and that the plaintiff's brother failed to yield the right of way when exiting the parking lot.

In a Bucks County jury trial, **Tony Michetti** (Doylestown, PA) obtained a defense verdict. The plaintiff and the defendant, both seniors at a high school, were participating in the annual "Blue-Grey" spirit event in the school gym. This event pits students against each other in a number of activities, including a traditional rope tug-of-war, an obstacle course, a dance competition, and a tire tug-of-war. The plaintiff was a baseball player, and the defendant was an offensive lineman and captain of the football team. As luck would have it, these two athletes were called to compete against each other in the tire tug-of-war. An ordinary car tire is placed on the floor on the center line of the basketball court. The competing players line up at the opposite end lines. On the signal, they run to center court, grab the tire, and the tugging, pulling and twisting commences. The object is to either rip the tire out of your opponent's hands or drag him (or her) and the tire back to your end line. The plaintiff claims that as he and the defendant approached the tire, running at full speed, the defendant left his feet and "torpedoed" head first into the plaintiff with the specific purpose of preventing the plaintiff from grabbing the tire. Unfortunately, the plaintiff suffered a fractured wrist and subluxated tendon that required surgery. The defense argued it was expected that competitors would run as fast as possible toward the tire and that they would have to lower their heads, shoulders and torso in order to pick up the tire. The entire competition, including the subject incident, was video recorded by the school. Both sides used the video evidence to argue that it supported their position. After a brief deliberation, the jury concluded that the plaintiff assumed the risk and returned a verdict in favor of the defendant.

HEALTH CARE DEPARTMENT

Following a five-day trial, **Bradley Goewert** and **Lori Wolhar** (Wilmington, DE) obtained a defense verdict in a medical negligence suit. The 54-year-old patient died three days after gallbladder surgery while still hospitalized. The plaintiffs alleged that post-operative bleeding, which required re-operation, rather than the transfusions and fluids she received, caused the decedent's death. The defense disputed the doctor's alleged negligence and causation, asserting the physician treated this patient appropriately and that the patient died because of previously undiagnosed Coronary Artery Disease, discovered during autopsy, rather than post-operative bleeding. The jury returned a verdict in favor of the physician on the standard of care.

David Krolikowski and **John Rafferty** (King of Prussia, PA) obtained a unanimous defense verdict in a medical malpractice/wrongful death case. The plaintiff had major abdominal surgery, and for several weeks afterwards, home health nurses were seeing him. Over the weekend before his death, the

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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decedent complained of increased shortness of breath. The nurse on duty did a pulse ox saturation and noticed it drop from 99% down to 90% upon walking. Later that night, the plaintiff died from a massive pulmonary embolism. This case was complicated by the fact that the treating physician attacked the care provided by the nurses. The case was transferred to us from another law firm after they could not obtain expert support and reported that this was a "must settle case." After taking over, we obtained four experts within a three-week deadline. The plaintiff's counsel retained co-counsel experienced in deep vein thrombosis (DVT) and pulmonary embolism (PE) litigation. An offer of judgment was filed for $1 million. During the trial, our defense focused upon the absence of clear signs and symptoms exhibited by the decedent of either a DVT or PE. After a three-week trial, we obtained a unanimous defense verdict for all defendants.

Lynne Nahmani and **Monica Fillmore** (Mount Laurel, NJ) obtained summary judgment for a licensed clinical social worker in a negligence, defamation, fraud and intentional infliction of emotional distress case. The plaintiff (the father, a police officer and president of a local school board) brought these claims after the social worker informed the Family Court of the children's allegations of physical and emotional abuse by the plaintiff, which were revealed to her during the minor children's therapy sessions. The court granted summary judgment. The court found that the social worker's correspondence with the Family Court was immune from liability pursuant to the litigation privilege, irrespective of the fact that the court had not specifically sought her opinions and that she did not testify in the Family Court litigation. New Jersey recognizes immunity for all statements made in the course of litigation, regardless of their form, intent or truthfulness. The court also concluded that the plaintiff's claims for negligence and defamation were partially barred by the statute of limitations.

At arbitration, **Stephen Ryan**, **Carolyn DiGiovanni** and **Melissa Wilson** (King of Prussia, PA) obtained a defense verdict on behalf of a family practice physician. The case involved the alleged failure to investigate unexplained weight loss in a diabetic man, who turned out to have pancreatic cancer with liver metastasis. The plaintiff claimed that an earlier diagnosis would have permitted earlier chemotherapy, which would have increased his lifespan by at least the 45 days needed for his widow's survivor pension benefit to fully vest, a $125,000 difference. The defense contended that the initial weight loss was intentional, in an attempt to control blood sugar, following which the weight stabilized for several months and then dropped dramatically, prompting a workup. It was disputed whether the weight recorded at one visit was 158 or 178. If the former, the doctor delayed; if the latter, he did not. At an internal roundtable, the consensus was that the number was clearly 158, but a handwriting expert suggested it was a hastily written 178. Melissa Wilson prepared a compelling *Prezi* presentation, which was used for the opening and direct exam.

PROFESSIONAL LIABILITY DEPARTMENT

After seven years of litigation, **Jonathan Kanov** (Fort Lauderdale, FL) obtained a dismissal with prejudice in favor of our client, a prominent cardiologist, in a negligence and fraud case involving the operation of a Ponzi scheme. The 16 plaintiffs brought suit in 2010 against our client and 14 other defendants with respect to investments in shares of a company called Vision Broadcast Network (VBN), which was supposedly a start-up television network and production company focused on developing, managing, and operating internally owned and operated LPTV stations. The plaintiffs collectively invested and lost approximately $2.67 million in what was a $6 million Ponzi scheme because VBN did not own television stations or licenses as had been represented in the written offering materials. The former CEO of VBN and his top accomplice were convicted of wire fraud and sentenced to lengthy federal prison terms. The two used investor funds for their own personal expenses. Many of the defendants, like our client, were medical professionals who served on the board of directors and/or provided content for medical programming called "Ask the Specialist." The plaintiffs raised claims for violations of state securities laws, negligence, fraud and civil RICO against all of the defendants. With a two-week trial looming, summary judgment motions about to be filed and the threat of our client obtaining a significant attorney's fee award based on previously rejected proposals for settlement, the plaintiffs begrudgingly agreed to voluntarily dismiss our client, with prejudice. They received no settlement monies, and each side paid their own fees and costs. The litigation continues against the other defendants.

Jeannie Hanrahan and **Devon Woolard** (Fort Lauderdale, FL) obtained summary judgment in favor of the defendant, a large property owners association located in Fort Myers, Florida. The lawsuit was filed against the POA by three of the condominium associations that represent the 220 condominium-unit owner members of the POA. The plaintiffs sought declaratory and injunctive relief against the POA. They were attempting to invalidate a 1988 amendment to the POA's Articles of Incorporation that enabled it to charge more in annual assessments to its condominiums/homeowners over the course of 29 years than what the plaintiffs believed were/are permissible. The suit also

** Prior Results Do Not Guarantee A Similar Outcome*

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sought reimbursement of 29 years of overpaid assessments. Prior to the 1988 amendment, the POA was limited to charging only surface water management-related expenses through its annual assessment. In 1988, the developer of the POA executed an amendment that eliminated any restriction on the POA's ability to assess its members. The plaintiffs sought to directly and then indirectly invalidate the 1988 amendment as being improperly executed by the developer. Following the close of discovery, both sides moved for summary judgment. The defendant argued that the claims raised by the plaintiffs were barred by Florida's five-year statute of limitation, which prevented them from challenging any amendments to the POA's governing documents. The court agreed with the defendant on both points. This was a substantial victory for the POA in that, not only did it keep the money it collected for the past 29 years, but it could continue to do so unless the POA were to amend its governing documents.

Christopher Boyle (King of Prussia, PA) obtained dismissal of a police department and six of its officers in the U.S. District Court for the Eastern District of Pennsylvania. The plaintiff was engaged in a drug transaction on the street when uniformed officers, who were watching from a block away, approached him. When the plaintiff jumped into his car and sped away through residential streets in the middle of the day, the officers wisely abandoned the pursuit. Instead, they obtained an arrest warrant for the plaintiff. After his acquittal, the plaintiff brought a malicious prosecution claim against the officers. Finding that the officers did the right thing in ending the pursuit and instead seeking a warrant, Judge Stengel also held that the officers were entitled to qualified immunity, as it was the District Attorney's Office, not the Police Department, which pursued criminal charges against the plaintiff.

In a federal civil rights action venued in the U.S. District Court for the Southern District of Ohio, **Ray Freudiger** and **David Oberly** (Cincinnati, OH) obtained summary judgment on behalf of one of the nation's largest grocery chains in a case that received considerable media attention. An individual walked hurriedly into a grocery store in a suspicious manner while openly carrying a firearm on his hip. At the time, our client maintained an unwritten policy of allowing customers to openly carry firearms in its stores. Immediately after entering the store, he was approached by the grocer's security guard, an independent contractor, who instructed the man to return his gun to his vehicle to avoid causing a panic or he would not be allowed to shop inside the store. After becoming confrontational, the man was asked to leave the premises. The man completely disregarded the command and walked hurriedly into the store. He was arrested for criminal trespassing as a result of his continued failure to leave the grocer's property after being instructed to do so. The plaintiff filed suit against the grocery store, two of the grocer's employees, the security guard, the security guard's employer, the arresting police officers and the City of Cincinnati. He asserted claims under § 1983, § 1985(3) and § 1986 civil conspiracy, as well as claims for false arrest, false imprisonment and malicious prosecution. His claims were premised principally on the contention that the defendants lacked probable cause to arrest the plaintiff for criminal trespass. Ray and David moved for summary judgment, arguing that the grocer and its employees were entitled to judgment as a matter of law because: (1) there was no "conduct under color of state law" by the grocer or its employees; and (2) there was probable cause to arrest the plaintiff as a result of his failure to vacate the premises after his privilege to remain on the property had been revoked. Following oral argument, the district court judge ruled in favor of the grocer and its employees, granting summary judgment. The court noted that, despite our client's open carry policy, the plaintiff did not have an unfettered right to remain in the store while carrying his firearm.

WORKERS' COMPENSATION DEPARTMENT

In a Federal Black Lung claim that had been pending since 2003, **Judd Woytek** (Allentown, PA) obtained a favorable decision and order denying benefits. This matter was most recently before an Administrative Law Judge, on a remand from the Benefits Review Board, on the sole issue of whether the miner's medical expert's testimony was sufficient to establish that the miner was suffering from coal workers' pneumoconiosis. Judd persuasively argued to the judge that the claimant's medical expert failed to offer a well-reasoned or well-documented opinion that the miner had developed coal workers' pneumoconiosis as the result of his 37 years of working in the coal mines. The judge denied the claim for benefits, which could have potentially been retroactive.

Michele Punturi (Philadelphia, PA) successfully prosecuted a termination petition and defeated a penalty petition on behalf of a township. The claimant injured his lower back in 2003. He claimed that injury, which at the time was accepted as a soft tissue injury and sprain/strain, was the cause of his current back problems. A prior termination petition had been filed and denied in 2012 based upon a later review of medical records and an updated IME. With the second termination petition, Michele was able to establish through the credible testimony of a board certified orthopedic surgeon that the claimant's current back condition was in no way causally related to the previous

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work injury and that the plaintiff was fully recovered from that injury. Michele also defeated a penalty petition related to the case. She established that an additional provider, who rendered the treatment being denied, had a diagnosis beyond lumbosacral sprain/strain. When he determined his bills were not going to be paid, he then added the lumbosacral sprain/strain to the diagnosis. It was shown that the claimant failed to meet his burden of proof because he did not submit the appropriate documentation to establish a penalty. Additionally, it was noted the claimant fully recovered several months prior to the medical treatment at issue.

Nearly 12 years after the claimant's injury, **Andrea Rock** (Philadelphia, PA) successfully prosecuted a modification/suspension petition on behalf of a large financial institution. The claimant sustained injuries to her left shoulder and cervical spine in October of 2005. Since that time, she had two cervical spine surgeries and two shoulder surgeries. Andrea was able to establish that the claimant was able to return to work in a sedentary-duty capacity, working from home in a telemarketing position, thus modifying her total disability benefits to partial disability. The Workers' Compensation Judge was particularly persuaded by the factual testimony demonstrating that the actual job duties were no more than what she had to do in her normal activities of daily living.

Kacey Wiedt (Harrisburg, PA) successfully prosecuted a termination petition and defeated reinstatement and review petitions on behalf of a school district. The claimant tripped on a hockey stick left by a student in the classroom, resulting in a trapezius muscle strain. The claimant alleged she injured her low back due to physical therapy for treatment of her work injury. This, in turn, resulted in a disc herniation that required surgery. Kacey established that the claimant had fully recovered from the trapezius muscle strain and that her disc herniation and surgery were not related to the original injury. The Workers' Compensation Judge found that the claimant did not suffer a low back injury because of any activity with physical therapy, that she was suffering from multi-level degenerative disc disease, and that she did not suffer any sort of herniation or tear during physical therapy. ■

On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

Shane Haselbarth (Philadelphia, PA) obtained a unanimous, precedential decision in the Third Circuit reversing a federal district court's denial of qualified immunity for our police officer clients. The plaintiff was a passenger in a car struck by a bullet fired by one of several officers who engaged the vehicle as it sped into a populated area on the main drag through Pittsburgh's south side. The officers, working secondary duty as security guards at bars, opened fire after the vehicle ran a red light, led cruisers on a five-mile chase, failed to obey orders to stop, swerved in-and-out of the right lane, and crashed off cars parked along the street. The Third Circuit agreed with Shane that, in light of the threat posed by the vehicle, the officers' conduct in shooting was objectively reasonable under the Fourth Amendment. The court reversed the denial of qualified immunity and remanded with instructions to enter summary judgment in the officers' favor. *Davenport v. Borough of Homestead*, 870 F.3d 273 (3d Cir. 2017).

Audrey Copeland (King of Prussia, PA) convinced the Commonwealth Court to affirm the Workers' Compensation Judge's and the Workers' Compensation Appeal Board's decisions denying the claimant's, a residential construction carpenter, claim petition. The judge's decision that the claimant was not injured while working on the subject date conformed to Section 422(a)'s "reasoned decision" requirement. The claimant did not prove that he was employed by the subcontractor or anyone else working at the site at that time, he admitted he was never hired by the contractor or our firm's client, Toll Brothers, and he never identified a Toll Brothers employee who supervised his work. Because the judge found that the claimant was not working for the subcontractor at the time, he did not have to consider whether the claimant was an employee or independent con-

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tractor, or whether the contractor or Toll Brothers were a statutory employer under Section 203 of the Act, 77 P.S. §52. *Lopez v. Workers Comp. Appeal Bd. (Martinez)*, 2017 Pa. Commw. Unpub. LEXIS 500 (Pa.Cmwth. Jul. 12, 2017).

In another workers' compensation appeal, **Audrey** persuaded the Commonwealth Court to affirm the Workers' Compensation Appeal Board's decision affirming the Workers' Compensation Judge's denial of the claim. The claimant, who previously strained his low back in 2011 while harvesting mushrooms, did not sustain a new injury or material aggravation of a pre-existing condition of his lumbar spine because of his work duties. Of note was the claimant's lack of testimony as to any specific event at work. In addition, his physician's notes did not reflect complaints of increased symptoms or aggravation of pain. The judge credited the employer's medical expert, who testified that the claimant did not sustain an aggravation, over the testimony of the claimant and his physician. A prior decision, finding an exacerbation of the pre-existing condition, also found that the claimant had fully recovered from his 2011 back strain and that the judge's decision was reasoned. *Oseguera v. Workers' Comp. Appeal Bd. (F&P Holding Company)*, 2017 Pa. Commw. Unpub. LEXIS 658 (Pa.Cmwlth., Aug. 11, 2017).

Thomas Specht (Scranton, PA) won a significant victory in the United States Court of Appeals for the Third Circuit. In a precedential decision issued by the court in *Mann v. Palmerton Area School District*, 871 F.3d 165 (3d Cir. 2017), the Third Circuit affirmed the grant of summary judgment in favor of a school district and its football coach by the United States District Court for the Middle District of Pennsylvania in a case (that had been ably defended at the district court level by **Robin B. Snyder**, Esquire (Scranton, PA)) involving significant injuries alleged to have been suffered by a student football player as a result of alleged concussion-causing hits during football practice. The appellate court affirmed the rejection of the plaintiffs' Section 1983 claim for alleged violation of the student's constitutional right to bodily integrity under a state-created danger theory of liability that had been levied against the coach, holding that the coach was entitled to qualified immunity. The court noted that the right to be free from deliberate exposure to a traumatic brain injury after exhibiting signs of a concussion in the context of a violent contact sport had not been clearly established in 2011. The court firmly rebuffed the invitation by the plaintiffs' appellate counsel to define the right at issue in a more general sense. In also affirming summary judgment for the school district on the plaintiffs' *Munell* claim, the court agreed with the defense that there had been no pattern of recurring head injuries in the district football program and no evidence that any member of the coaching staff had deliberately exposed injured players to the continuing risk of harm that playing football poses. It also found it significant, in disagreeing that the district had inadequate training programs on concussion recognition and protection, that the Pennsylvania General Assembly had not passed legislation that mandated training for coaches to prevent concussions until November 9, 2011 (the alleged injuries to the student allegedly occurred on November 1, 2011), and that the legislation had not gone into effect until July of 2012. *See*, *Safety in Youth Sports Act*, 24 P.S. §§ 5321-5323. Thus, the court found that there was no basis for concluding that a policy or custom of the school district or its alleged failure to provide more intense concussion training to its coaches had caused a violation of the student's constitutional rights. ■

On The Pulse…

OTHER NOTABLE ACHIEVEMENTS*

RECOGNITION

Tom Wagner (Philadelphia, PA) has been recognized by The Best Lawyers in America organization as the Philadelphia region's 2018 "Lawyer of the Year" in the area of Personal Injury Litigation, Defendants.

Teresa Ficken Sachs (Philadelphia, PA), Vice-Chair of our Appellate Advocacy and Post-Trial Practice Group, was inducted as a Fellow into the American Academy of Appellate Lawyers (AAAL) at the Academy's 2017 Fall Meeting. The AAAL was founded in 1990 to recognize outstanding appellate lawyers and to promote the improvement of appellate advocacy and the administration of the appellate courts. Membership is limited to 500 lawyers in the United States and is reserved for accomplished appellate advocates who have demonstrated the highest

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levels of skill and integrity.

Marshall Dennehey is pleased to announce that the firm has been named a **Best Law Firm for Female Attorneys** by *Law360* and its 2017 Glass Ceiling Report. *Law360* grouped firms based on U.S. attorney headcount in order to evaluate them with similar-sized peers. They excluded any firm that had below-average female representation at even a single level of the firm. They then ranked the rest based on their percentage of female attorneys both at the non-partner and partner level. Marshall Dennehey ranked number eight on the top ten list for firms with 300-599 attorneys.

SPECIAL APPOINTMENTS

Alan C. (A.C.) Nash (Fort Lauderdale, FL) has been appointed to the 17th Judicial Circuit Professionalism Panel by Judge Jack Tuter, Chief Judge of the 17th Judicial Circuit. Florida's Professionalism Panels are charged with receiving, screening and acting upon complaints of unprofessional conduct by attorneys practicing in their respective Circuit. While they are not a disciplinary body intended to address violations of the rules regulating the Florida Bar, they do play an integral role in improving professionalism in the legal community by providing an informal educational process to address conduct inconsistent with the Standards of Professionalism and Civility.

SPEAKING ENGAGEMENTS

Janice L. Merrill and **Chanel A. Mosley** (Orlando, FL) presented "EDs & EMRs & E-Discovery, Oh My! How to Stay on the 'Yellow Brick Road' When the Threat of Litigation Arises" at the Florida Assisted Living Association 2017 Annual Conference & Tradeshow.

Additionally, **Janice** and **Chanel** presented "The Defense Bar Strikes Back: EMRs & eDiscovery Risk Management" at the Florida Society for Healthcare Risk Management and Patient Safety Annual Meeting & Education Conference.

Christopher Conrad (Harrisburg, PA) was a guest lecturer at Dickinson Law School, where he presented "An Introduction to Age Discrimination in the Employment Act" to law students as part of the law school's 1st year Problem Solving course.

Kacey Wiedt (Harrisburg, PA) presented at SEAK's 36th Annual National Workers' Compensation and Occupational Medicine Conference. In "How Employers, Insurers and Self-Insurers Can Save Money," Kacey explained how to judge the compensability of workers' compensation claims and determine which ones to accept or defend. He discussed how to partner with defense counsel to create accountability and reduce overall costs on litigated claims, as well as providing practical suggestions for deciding how and when to settle claims and resolve difficult legacy claims.

David Oberly (Cincinnati, OH) presented to the Greater Cincinnati Human Resources Association on the topic of "Wage Discrimination Update." Approximately 60 HR professionals attended the presentation, which focused on the major laws prohibiting wage discrimination, salary history inquiry bans, EEOC directives and best practices for minimizing wage discrimination claims.

SPECIAL NEWS

Congratulations to **John Hare** and **Mohamed Bakry** (Philadelphia, PA), who contributed to the Pennsylvania Supreme Court's ruling in *Commonwealth v. Muniz*, which held that the retroactive registration of sex offenders under Pennsylvania's Megan's Law is unconstitutional. On behalf of 22 university-based experts on sex crimes, John and Mohamed filed an *amicus curiae* brief demonstrating that Megan's Law registries actually suppress the reporting and prosecution of sex crimes.

Doug Kent (King of Prussia, PA) co-authored the cover story article appearing in the summer issue of the CLM Magazine, *Construction Claims*. Titled "360 Degrees Hot: A Drone Can Collect More Data More Safely and in More Situations Than Can Traditional Collection Methods," the article discusses how the insurance industry is recognizing the value of drones for inspection and investigation purposes following property and casualty losses.

Tony Natale (Philadelphia, PA) was published in the August edition of the national *CLM Magazine*. Tony's article, titled "If You See Something Say Something—The Importance of Identifying and Reporting Workers' Compensation Fraud," discusses the implications of ignoring fraud and how reporting fraud can benefit the entire community. ■

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On The Pulse…

CULTURALLY SPEAKING

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

We in senior management frequently talk about—and are very proud of—the culture of our firm. That culture is generated and sustained by teamwork, unselfishness, trust, honesty, humility, hard work, humor and more.

While Marshall Dennehey's culture propelled us to be recognized by the *Philadelphia Business Journal* for the fifth year in a row as a "Best Place to Work" in the Delaware Valley, other tangible benefits are realized:

- Our culture leads to longevity. People like working here. They remain here for a long time. That longevity translates into experience and expertise in civil defense litigation, and that expertise at all organization levels helps to distinguish our service from our competition's.
- Our trust in one another simplifies our business discourse. We can reach the heart of the matter instantly and without any need for "watching your politics," "currying favor," or "guarding your six." There is a business concept called "The Speed of Trust," and our firm is a proving ground for that maxim.
- Our teamwork is amplified by our compensation system. We do not reward file originations—i.e., no fixed formula for compensation tied to the billables on work brought into the firm by an attorney. Our compensation system is built on trust. It is built on the concept that a client will be defended by the most qualified attorney for that case type and in that particular venue.

I thought it would be more meaningful to share observations and reflections of our firm and its culture from a few of our attorneys who worked at—and in some cases managed in—other law firms. Their perspective is insightful. Below is the first in an ongoing series to regularly appear in this publication.

THE MDWCG DIFFERENCE

Terry Sachs

In more than 30 years of practice, I have been at a large firm, a small "boutique" firm and a mid-size firm. I've seen first-hand that each firm develops its own environment, or "personality." The personality of Marshall is different from each of those firms.

Before coming here, I heard that assessment from people whom I have known and respected over years of practice. One told me that coming here was "the best move I ever made," and others told me repeatedly how much they thought I would enjoy working here. I wasn't sure how those assurances fit together with the fact that I have always perceived Marshall Dennehey as a place where people worked very hard, even compared to other firms with our type of practice.

The answer was always, "It's the people." I do really enjoy working here, and I agree—it is the people. Having said that, there are also several things about the way the firm is set up that makes the "people" piece work so well here.

With respect to the people, one friend here described Marshall Dennehey as aspiring to a "no jerks" rule. That seems to partly be a function of the firm's history of people who are "self-made," as opposed to being descended from generations of lawyers. These people recognize the same traits in others. There seem to be many similar personalities and interests at the firm, and there's no sense that some lawyers are better than others because they went to "better" schools.

The culture here also seems to be a function of our type of practice. Most people started in this practice because they wanted to be active litigators in courtrooms and deposition rooms. The types of egos who want to "get rich quick" as lawyers or make big names for themselves at the expense of others aren't doing insurance defense work, or aren't doing it for long.

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Pennsylvania—Health Care Liability

SEISMIC SHIFT IN PENNSYLVANIA MEDICAL MALPRACTICE INFORMED CONSENT CASES

By Kathleen M. Kramer, Esq. & Daniel H. Tran, Esq.*

KEY POINTS:

- Pennsylvania Supreme Court mandated that the physician involved in the procedure at issue obtain informed consent.
- The duty to obtain informed consent may no longer be delegated to others.

Kathleen M. Kramer

Daniel H. Tran

On June 20, 2017, the Pennsylvania Supreme Court appears to have changed the landscape of Pennsylvania medical malpractice actions based upon a lack of informed consent. In its opinion in *Shinal v. Steven A. Toms, M.D.*, the court specifically held:

> [A] physician may not delegate to others his or her obligation to provide sufficient information in order to obtain a patient's informed consent. Informed consent requires direct communication between physician and patient, and contemplates a back-and-forth, face-to-face exchange, which might include questions that the patient feels the physician must answer personally before the patient feels informed and becomes willing to consent. The duty to obtain the patient's informed consent belongs solely to the physician.

162 A.3d 429, 455 (Pa. 2017).

This article will set forth an overview of how *Shinal* changes the manner in which informed consent may be obtained in Pennsylvania. In addition, it will discuss the manner in which medical malpractice cases premised on a lack of informed consent will now be litigated within the state.

HOW MUST INFORMED CONSENT BE OBTAINED IN PENNSYLVANIA IN LIGHT OF *SHINAL*?

Given the court's holding in *Shinal*, proper informed consent now requires that the physician involved in the procedure at issue (i.e., the operating physician) have a direct face-to-face exchange with the patient regarding the material risks/complications of the procedure. Prior to *Shinal*, it was understood that proper informed consent could be obtained not only from the operating physician, but also from other qualified staff, such as a nurse, a resident physician, another physician and other knowledgeable persons who would provide the patient with the information regarding whether to proceed with, or defer, a procedure based on its risks/complications. In short, the proper focus on an informed consent claim was the information conveyed, not necessarily on the person(s) who conveyed it to the patient. *Shinal* changed that.

Megan Shinal claimed that the defendant, neurosurgeon Steven A. Toms, M.D., failed to obtain her informed consent. Ms. Shinal alleged that Dr. Toms did not give her all of the information necessary for her to make an informed decision about the surgery she was having. She went forward with the surgery and suffered a known complication. She claimed that, had Dr. Toms given her all of the information necessary, she would have never undergone the operation. She filed a lawsuit, claiming that Dr. Toms failed to obtain informed consent from her.

Dr. Toms had initial discussions with Ms. Shinal to obtain her informed consent. However, Ms. Shinal later called the physician's office and spoke to Dr. Toms's physician's assistant about other risks and benefits of the surgery she was to undergo. At issue in the case, and on appeal, was whether the jury could find that Dr. Toms properly obtained Ms. Shinal's informed consent, even though some of those discussions occurred between Ms. Shinal and his physician's assistant. The jury found in favor of the defendant, acknowledging that Dr. Toms and his physician's assistant had properly advised Ms. Shinal of the risks/complications of the procedure.

In her appeal, Ms. Shinal argued that the jury should not have been allowed to consider what the physician's assistant told her about the surgery. She contended that only what Dr. Toms told her was pertinent to the case. The Superior Court disagreed with Ms. Shinal and affirmed the jury's verdict.

Ms. Shinal then appealed to the Pennsylvania Supreme Court and made the same argument. The Pennsylvania Supreme Court agreed with Ms. Shinal, holding that a new trial was warranted because the jury should not have been permitted to consider what the physician's assistant told her. In so holding, the court appears to have mandated that the actual operating physician (not his or her

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BEST PRACTICES AND POTENTIAL LIABILITY

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and, it prohibits a person from using a drone "[t]o record an image of privately-owned real property or of the owner, tenant, occupant, invitee or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent." The statute further provides that "[a] person is presumed to have a reasonable expectation of privacy on his or her own privately-owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone." This appears to address the use of drones for the use of claimants. In property claims, written notice and/or permission can limit one's exposure. One might also be able to rely on one's property policy provision regarding authority to investigate claims. Many states, including Florida, provide exceptions that must be examined. However, Florida's FUSA allows successful plaintiffs to recover civil damages, injunctive relief and reasonable attorney's fees with a potential multiplier. Other states have enacted statutes regarding drones and invasion of privacy by drone operators, such as Idaho, North Carolina, Oregon, Tennessee and Texas.

Companies continue to analyze whether to operate drones by way of their own employees or to hire vendors to collect the data. A thorough investigation of the vendor and their operation of drones will be necessary to ensure that there is compliance with all federal, state and local laws. If hiring a vendor for drone operation, a written contract should be entered into that requires, at a minimum: (1) compliance with all laws and best practices; and (2) the shift of all risk to the vendor through a hold harmless agreement that also ensures that company is made an additional insured under the insurance policy as evidenced by a Certificate of Insurance. Consider a vendor's endorsement in one's favor from the manufacturer for any large purchases of drones.

NEW HEIGHTS: BEST PRACTICES

Each insurer should establish best practices for drone use. This is critical whether the drone is being operated by the insurer, its employees or an outside vendor. Some practical guidelines are:

(1) A drone operator must be in full compliance with the FAA's Part 107 guidelines and all applicable laws, including federal, local and state, which must be monitored for changes, while limiting any images to the specific claim or property at issue.

(2) The operator and/or crew should complete a pre-flight checklist to evaluate any risks for each particular operation.

(3) Detailed maintenance logs should be kept regarding each inspection and all maintenance performed.

(4) Consider sending written/verbal notices to the surrounding property owners to the extent necessary for your drone use.

(5) Your drone should be analyzed for any potential data security issues.

(6) The drone operator should be wearing proper and professional attire, such as a helmet, safety glasses and a high-visibility safety vest. Warning or caution signs should be placed in the area.

TURBULENCE OR CLEAR SKIES AHEAD FOR DRONE OPERATORS?

The most common use of drones by insurance companies involves the investigation of a variety of bodily injury and property damage claims, which can range from the simple accident claim to a catastrophic disaster claim. The use of drone technology offers many safety, cost and service advantages. Drone usage: (1) reduces the chance of injury to the inspector by avoiding the risk of ladder displacement and slip and falls; (2) eliminates potential damage to the building or roof that the inspector may cause by walking on the material (clay, tile and metal roofs); and (3) expedites and enables more cost-effective coverage of larger areas. While drone technology can improve cycle time and cut costs, it does not come without risks and limitations, such as, property damage, bodily injury, cyber breaches, privacy violations and flight-time restrictions, which must be considered in connection with the use of drones in the insurance industry. Best practices should limit or eliminate your exposure. ■

**A lengthier version of this article appeared in the Summer 2017 issue of *Construction Claims*, a publication of the Claims & Litigation Management Alliance (CLM). That article may be found at this link: http://clmmag.theclm.org/home/article/360-degrees-hot-construction-drones.

***We thank law clerk, Addison Fontein, who greatly assisted in editing this article.

Pennsylvania—Long-Term Care Liability

LONG-TERM HEALTH CARE DEALT ANOTHER BLOW

By Joan Orsini Ford, Esq.*

KEY POINTS:

- *Scampone v. Grane Healthcare Co.*, 11 A.3d 967 (Pa.Super. 2010) established corporate liability for nursing homes.
- *Scampone v. Grane Healthcare Co*., 2017 Pa.Super. LEXIS (Pa.Super. Aug. 8, 2017) now has opened the door to punitive damages, admissibility of Department of Health surveys and exposure for parent companies that "manage" nursing homes.

Joan Orsini Ford

Scampone v. Grane Healthcare Co., 2017 Pa.Super. LEXIS 603 (Pa.Super. Aug. 8, 2017), a longstanding case that has been to the Superior Court twice, the Pennsylvania Supreme Court once and the trial court twice, previously established two distinct bases for recovery against nursing homes: (1) a non-delegable duty under *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991) in direct corporate liability; and (2) vicarious liability. Recently, the Pennsylvania Superior Court reversed the trial court's grant of a non-suit in favor of the parent company of a nursing home and remanded the case back to the trial court for proceedings against the nursing home and the parent company on the issue of punitive damages. *Scampone v. Grane Healthcare Co*., 2017 Pa.Super. LEXIS 603 (Pa.Super. Aug. 8, 2017). This opinion has far greater implications than the previous *Scampone* decision, and it may potentially impact the defense of any entity subject to Department of Health surveys.

The underlying case involves the care provided to Madeline Scampone, a resident of Highland Park Care Center, a nursing home, from February 5, 1998, until January 30, 2004. On December 15, 2003, Madeline was diagnosed with a urinary tract infection (UTI) and hospitalized for a few days before returning to Highland in good condition. She was readmitted to the hospital on January 30, 2004, and was diagnosed with another UTI, dehydration, malnutrition and bedsores. Madeline died on February 9, 2004, from a heart attack. She was 94 years old. Her son, Richard Scampone, filed a lawsuit in September of 2005 against, among others, Grane Healthcare Company (Grane) and Highland Park Care Center, LLC d/b/a Highland Park Care Center (Highland). Highland is the licensed owner and operator of the nursing home. Grane, the parent company of Highland, managed the nursing home pursuant to a written agreement.

Scampone alleged that the UTI, dehydration and malnutrition were a result of substandard care, which led to his mother's death. Scampone claimed the defendants failed to formulate, adopt, and enforce adequate rules and policies to ensure quality care to the residents and that, as a result of chronic understaffing—known but uncorrected—employees were incapable of providing appropriate care to the residents, including his mother. Vicarious liability as to Highland was premised upon its failure to deliver food, water, medicine and proper medical care to his mother from December 18, 2003, to January 30, 2004. As to Grane, it was premised on the fact that some of Grane's employees were directly involved in overseeing the care delivered to the nursing home's residents. Scampone also sought punitive damages. The case went to trial in 2007. Grane was granted a compulsory nonsuit at the close of the plaintiff's evidence, and Highland remained the sole defendant. The trial court refused to submit punitive damages to the jury, which awarded $193,500. Scampone appealed, and Highland filed a cross-appeal.

In the first appeal, the Superior Court reversed the trial court's refusal to submit the question of punitive damages to the jury. It remanded the case for a new trial against Grane on compensatory and punitive damages and against Highland on punitive damages. On Highland's cross appeal, the court ruled that a cause of action for direct corporate liability could be asserted against a nursing home. *Scampone v. Grane Healthcare Co*., 11 A.3d 967 (Pa.Super. 2010). Grane and Highland filed a petition for allowance of appeal as to whether they could be subject to corporate liability under *Thompson v. Nason*. The Supreme Court of Pennsylvania rejected their arguments that nursing home management companies are exempt from liability on a direct corporate negligence theory and that *Thompson v. Nason* should be limited to hospitals. *Scampone v. Highland Park Center, LLC*, 57 A.3d 582, 600 (Pa. 2012). The case was remanded to the trial court.

On remand, the trial court found that, because Grane was to provide management services to Highland—not the care and treatment of Madeline—the law did not impose liability. Also, Grane was not vicariously liable because the record did not support the conclusion that any of Grane's employees caused injury to Madeline. The trial court reentered a compulsory nonsuit in favor of Grane, and it conducted a new trial as to punitive damages solely against Highland, the corporate entity with a non-delegable duty in terms of direct corporate negligence. The jury returned a verdict in Highland's favor. Scampone filed post-trial motions, which were denied.

Scampone filed two appeals in which he raisied five issues, three of which were whether: (1) the trial court erred in dismissing Grane from the case for the second time; (2) the trial court erred in denying Scampone's request for a new trial for punitive damages against Highland; and (3) the trial court improperly refused to strike

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Pennsylvania—Professional Liability

NOT WORTH THE PAPER IT'S WRITTEN ON: PENNSYLVANIA SUPERIOR COURT IMPOSES DUTY TO CONSIDER COLLECTABILITY ON PENNSYLVANIA ATTORNEYS

By Timothy R. Stienstraw, Esq.*

KEY POINTS:

- A recent opinion holds that attorneys are obligated to take collectability of a potential judgment into account when pursuing litigation in Pennsylvania.
- The longstanding affirmative defense to legal malpractice actions based upon non-collectability of a potential underlying judgment may be significantly weakened.
- While some other jurisdictions have addressed claims against attorneys based upon non-collectability of a judgment, none appears to have explicitly imposed a similar duty to consider collectability.

Timothy R. Stienstraw

In an opinion published late last year, the Superior Court of Pennsylvania decided that an attorney, or law firm, could be held liable to his client in a legal malpractice suit if he sues the wrong party. Of course, it is common sense that an attorney can be held liable if he mistakenly files suit against a party who is not at fault and that mistake ultimately results in the dismissal of the case. However, the attorney before the court in *Heldring v. Lundy, Beldecos & Milby, P.C.*, 151 A.3d 634 (Pa.Super. 2016) successfully tried the underlying action and obtained a verdict for his client in excess of $100,000. The problem arose only after the verdict. The attorney entered judgment on the verdict on behalf of his client against the underlying defendant, Grasso Holdings, before realizing that it was merely a trade name. The court refused an untimely attempt to amend the judgment to target the corporation acting under the trade name. Accordingly, the judgment was worthless because it was against an entity that did not really exist and possessed no assets. The client filed suit against his attorney for legal malpractice.

Aligning the law in Pennsylvania with that of the courts in other jurisdictions that have considered this issue, the Superior Court held that suing the wrong party is a valid basis for a legal malpractice claim. However, the court did not stop there. It went on to address the non-collectability of a judgment as the basis for a legal malpractice claim, concluding that "collectability is an important consideration in pursuing litigation—one that lawyers are obligated to take into account." This sweeping imposition of duty did not seem necessary in light of the facts of the case. Rather than simply ruling that filing suit against a trade name rather than a legally recognized entity constitutes malpractice, the Superior Court may have imposed a broader duty to consider the potential collectability upon attorneys contemplating filing suit in Pennsylvania.

This holding is also noteworthy given the minimal amount of previous case law supporting the existence such a duty. The court principally relied upon the Pennsylvania Supreme Court's decision in *Kituskie v. Corbman*, 714 A.2d 1027 (Pa. 1998), which addressed collectability as a **defense** in legal malpractice claims. It is commonly noted that a legal malpractice plaintiff must prove the "case within a case" by showing that he would have actually recovered a judgment in the underlying litigation but for the attorney's conduct. Such proof is necessary to show that the alleged damages were caused by the attorney's negligence. However, in *Kituskie*, the Supreme Court held that an attorney could assert the non-collectability of that judgment as an affirmative defense in legal malpractice claims. Where the attorney can prove that an underlying judgment, though obtainable, would not have been collectable, such proof allows the attorney to mitigate or avoid liability as the client would have been unable to actually realize any gain in the underlying action.

The ruling in *Heldring* has the potential to turn this non-collectability defense on its head. Based upon the Superior Court's ruling, a client who anticipates that an attorney-defendant will raise a non-collectability defense may now claim that suing an insolvent defendant was negligence in and of itself. This tactic would introduce additional issues of fact and law into a case that might otherwise be meritless. Moreover, given Pennsylvania's liberal amendment standards for pleadings, a plaintiff presented with a case where the defense has already been invoked in a responsive pleading could seek to add this additional allegation. Of course, not every underlying case has a multitude of potential defendants. However, just as a defendant can point the finger at a non-party in an attempt to escape liability, a plaintiff may only need to identify some plausible third party not joined in the underlying action to support a legal malpractice claim.

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EEOC ISSUES UPDATED GUIDANCE

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EEOC, and one that employers should address with great care. As a rule, "one-size-fits-all" blanket policies requiring all employees to speak a certain language are per se unlawful and in violation of Title VII. Moreover, a restrictive language policy will violate Title VII if it is adopted for discriminatory reasons, such as in order to avoid hearing foreign languages in the workplace, to generate a reason to discipline or terminate people who are not native English speakers, or to create a hostile work environment for certain non-English speaking workers. Significantly, the EEOC cautions that evidence of disparate treatment could be found in this respect where the employer fails to consider whether there are substantial business reasons for the policy. A general rule of thumb here is, the weaker the business reasons, the more difficult it will be for the employer to justify the policy under Title VII.

In addition, the new guidance makes clear that an employer's mistaken perceptions pertaining to national origin are not a defense to a claim of workplace discrimination or harassment. In this respect, Title VII prohibits discrimination based on perception or the belief that someone is from one or more particular countries or belongs to one or more particular national groups. Thus, it is a prohibited employment practice to discriminate based on the perception that someone is from a Middle Eastern country or is of Arab ethnicity when, in fact, the person is from India.

The guidance also cautions employers to ensure that customer preferences relating to national origin do not influence or motivate employment decisions in any fashion. Specifically, it is a violation of Title VII to rely on the discriminatory preferences of co-workers, customers or clients as a basis for employment actions. In this respect, an employment decision based on the discriminatory preferences of others is itself discriminatory.

Finally, employment and staffing agencies should make particular note of the new guidance as they are singled out by the EEOC in the document. Staffing firms, including temporary agencies and long-term contract firms, also may be covered as employers by Title VII if they have the right to control the means and manner of the staff's work performance, regardless of whether they actually exercise that right (assuming they maintain the statutory minimum number of employees), in which case they may be covered as "joint employers." The guidance notes that employers may not request that an employment agency refer only applicants and/or employees who are of a particular national origin group. Furthermore, employment agencies may not comply with discriminatory recruitment or referral requests from employers. For example, a placement agency may not honor a client request to recruit only Asian workers.

TAKEAWAYS FOR EMPLOYERS

Employers are well advised to take note of the new guidance issued on national origin discrimination as the combination of this document and the EEOC's updated Strategic Enforcement Plan together clearly indicate that this type of discrimination will be a prime target of the Commission moving forward for the foreseeable future. As such, employers should carefully and thoroughly review the guidance and evaluate its impact on any company policies, procedures or practices that may implicate matters of national origin discrimination. Importantly, in addition to discussing hot-button topics in the area of national origin discrimination, the new guidance provides a list of recommended "Promising Practices" for employers to utilize in order to avoid being on the receiving end of future national origin discrimination claims. Accordingly, employers should also thoroughly analyze these proposed practices and implement them where feasible in order to minimize the risk of running afoul of this particular aspect of Title VII moving forward. In addition to guarding against the risk of future charges of discrimination, incorporation of these suggested practices can also serve as a valuable illustration of a company's adherence to a non-discriminatory workplace environment in the event the company does find itself facing allegations of unlawful workplace practices at some point down the road. ■

SEISMIC SHIFT

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nurses, physician's assistants or physician colleagues) must directly discuss with the patient the risks/complications and intended benefits of the surgery in order to properly obtain informed consent. In other words, the surgeon **cannot delegate** any of those discussions or responsibilities to other physicians, nurses, residents, physician's assistants or anyone else.

HOW WILL CASES PREMISED ON LACK OF INFORMED CONSENT BE BROUGHT TO COURT POST-*SHINAL*?

Post-*Shinal*, a plaintiff filing a medical malpractice case based on a lack of informed consent will have to obtain a Certificate of Merit showing that an appropriate physician has reviewed the medical records and believes that the operating physician did not obtain proper informed consent, which, in turn, caused the patient to suffer injuries. Much, if not all, emphasis will be placed on what the operating physician conveyed to the patient regarding the procedure. A jury will still serve its fact-finding function to determine whether the information provided to the patient by the operating physician was sufficient to obtain informed consent. While the informed consent forms are certainly relevant to show the discussions and information conveyed between the patient and operating

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Pennsylvania—Securities & Investment Professional Liability

PA SUPREME COURT NARROWS BASIS TO ESTABLISH FIDUCIARY DUTY OWED BY FINANCIAL ADVISORS/INSURANCE AGENTS

By Timothy G. Ventura, Esq.*

KEY POINTS:

- A fiduciary duty may arise in the context of consumer transactions, only if one party cedes decision-making control to the other party.
- Reliance on another's specialized skill or knowledge in making the purchase, without more, does not create a fiduciary relationship.
- Claims for breach of fiduciary duty against sellers of insurance may be dismissed where there exists an "arm's length consumer transaction," in which consumers accept advice to purchase life insurance absent any "overmastering influence."

Timothy G. Ventura

In addition to more common tort claims for fraud, negligence/negligent misrepresentation and statutory claims for violation of the Pennsylvania Unfair Trade Practices Act (UTPCPL, 73 P.S. § 201-1, et. seq.), plaintiffs in civil suits may pursue claims for breach of fiduciary duty against insurance agents/brokers and financial advisors. In some types of relationships, a fiduciary duty exists as a matter of law, e.g., principal and agent or attorney and client. *Yenchi v. Ameriprise Fin., Inc*., 161 A.3d. 811, 820 (Pa. 2017)(*McCown v. Fraser*, 192 A. 674 (Pa. 1937)). Where no fiduciary duty exists as a matter of law, however, Pennsylvania courts have recognized the existence of confidential relationships, i.e., fiduciary relationships where equity requires. *Darlington's Appeal*, 86 Pa. 512 (Pa. 1878). A fiduciary duty is the highest duty implied by law, and it requires a party to act with the utmost good faith in furthering the other person's interests, including a duty to disclose all relevant information. *Miller v. Keystone Ins. Co*., 636 A.2d 1109, 1116 (Pa. 1994); *Basile v. H&R Block, Inc*., 761 A.2d 1115, 1120 (Pa. 2000); *Young v. Kaye*, 279 A.2d 759, 763 (Pa. 1971)). Some courts have held that a fiduciary relationship exists between insurance agents and their customers/clients that triggers a duty to act with the highest level of honesty and loyalty.

In *Yenchi*, the Pennsylvania Supreme Court recently analyzed whether a fiduciary relationship existed in the context of a financial advisor selling insurance to a married couple. In that case, after a "cold call," a captive financial advisor met with the Yenchis and, for a $350 fee, presented them with a financial management proposal, including various financial recommendations. At a subsequent meeting, the advisor proposed a whole life insurance policy, which Mr. Yenchi opted to purchase. The advisor later proposed that the Yenchis increase their life insurance coverage, but they rejected his advice on that occasion.

After their portfolio was reviewed independently by a third party a few years later, the plaintiffs were told that the life insurance policy would inevitably lapse, was underfunded, and that additional premiums beyond those allegedly represented by the advisor would have to be paid. The Yenchis filed suit against their advisor and Ameriprise, alleging claims for negligence, fraud, unfair trade practices and breach of fiduciary duty, among other others.

The trial court granted summary judgment on the fiduciary duty count, holding that no fiduciary relationship existed because the plaintiffs continued to make their own investment/purchasing decisions. In addition, the lower court cited its own decision in *Ihnat v. Pover*, 1999 Pa.Dist. & Cnty. Dec. LEXIS 225 (C.P.Alleg. Feb. 1, 1999), in which it held that no fiduciary duty arises between an insurance agent and a policyholder unless the policyholder delegates decision-making control to the agent. In applying that decision, the court found no material difference between an insurance agent and a financial advisor.

In reversing the Superior Court and upholding the summary judgment of the trial court, the Supreme Court in *Yenchi* held that no fiduciary duty exists in a consumer transaction for the purchase of a whole life insurance policy based upon the advice of a financial advisor when the consumer purchasing the policy does not "cede decision-making control to the other party." In so holding, the court noted that fiduciary duties do not arise "merely because one party relies on and pays for the specialized skill of the other party." *eToll, Inc. v. Elias/Savion Advertising*, 811 A.2d 10, 23 (Pa.Super. 2003). Rather, the court stated, "The critical question is whether the relationship goes beyond mere reliance on superior skill, and into a relationship characterized by 'overmastering influence' on one side or 'weakness, dependence or trust, justifiably reposed' on the other side, which results in the effective ceding of control over decision-making by the party whose property is being

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THE MDWCG DIFFERENCE

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Since every firm presumably has some nice people, how does Marshall Dennehey retain a distinct culture, where the predominant feeling is that people work together well and genuinely enjoy doing so? That's where two specific aspects of the firm's structure seem to make the difference.

One aspect is that people aren't paid based on business "attribution" points. There's no "penalty" for bringing in lawyers from other practice areas for their expertise where appropriate or for sending work to other practice groups. That approach is good for the clients and for the firm. In addition, lawyers regularly ask to "round table" cases to get ideas on case handling or on specific issues, and their colleagues meet to lend expertise even though these sessions are generally not billable. I've never seen anyone treat such requests as signs of weakness; it's just how people expect to work together to benefit the firm as a whole.

The other aspect is that people here aren't paid based on calculating the precise profitability of each group and sub-group. Those calculations can lead to ongoing micro-aggressions (or macro-aggressions!) about which lawyer/support staff/administrator is really doing what for whom how much of the time. I've seen how that friction can ultimately impact how people work together and feel about one another.

These two aspects may not be something younger people at the firm are able to appreciate, but they affect the culture of the firm because they impact how we feel about the people we work with.

Our people and our structure combine to make us a "best place to work." ■

PA SUPREME COURT NARROWS BASIS

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taken." The court found that, because the plaintiffs followed some of the broker's recommendations and rejected others, there existed nothing more than an "arm's-length consumer transaction" between the parties. The plaintiffs' lack of education, the advisor's specialized training and even the payment of the advisor's fee were all insufficient to establish a fiduciary relationship of "overmastering influence." In addition, recognizing consumers have other common law tort (e.g., fraud/negligence) and statutory (UTPCPL) claims available in such circumstances, the court expressly declined "[t]o modify the law of fiduciary duty to encompass the particular pitfalls involved in the sale of insurance products by commissioned agents or financial advisors to less savvy customers."

This Supreme Court decision is favorable for the defense of insurance agents/brokers and financial advisors in Pennsylvania. It clarifies and limits the basis for finding a fiduciary relationship exists that would trigger an agent's heightened duties to act with "utmost good faith in advancing another's interests." Where evidence can be developed through discovery to demonstrate that plaintiffs/consumers ultimately retain final decision-making power on what types and amounts of insurance to purchase—e.g., by establishing that a plaintiff accepted certain offers while rejecting others, such as multiple premium quotes—summary judgment should be granted on fiduciary duty claims, and such claims should be dismissed as a matter of law, pre-trial. ■

NOT WORTH THE PAPER IT'S WRITTEN ON

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The only other case cited by the Superior Court in *Heldring* on the subject of collectability was a 1933 decision of the Supreme Court of Arkansas, where the court found there could be liability for an attorney who delayed an action to collect a prior judgment until it became uncollectable. It is not surprising that the Superior Court relied on a rather stale case from a foreign jurisdiction, as it appears that no other state has placed an affirmative duty on attorneys to consider collectability. However, a handful of states have considered cases where non-collectability was alleged as the basis for liability.

One notable example comes from the Federal District Court for the Southern District of New York. *Ayala v. Fishman*, 1998 U.S. Dist. LEXIS 16094 (S.D.N.Y. Oct. 14, 1998) arose in the context of underlying automobile accident litigation in which claims were filed against both the other driver and the City of New York, the latter on the theory that it failed to repair an inoperative traffic signal. During trial, the City made significant settlement offers, but the plaintiff, after consultation with his attorney, decided to proceed to a verdict rather than settle. The resulting judgment was not only less than the settlement offer, it was against only the other driver, who did not have the means to pay. The City escaped liability. In the subsequent legal malpractice suit, the district court denied the attorney-defendant's motion for summary judgment based, in part, on the allegations that the attorney should have advised his client about the difficulties of proving the case against the City, the only party who could pay a judgment.

While the *Ayala* case was later dismissed on other grounds (based upon a second motion for summary judgment), it may serve as an example of the type of lawsuit that may be recognized in Pennsylvania under the Superior Court's decision in *Heldring*. On the other hand, attorneys and insurers attending mediations or considering offers of settlement should consider whether the affirmative duty to consider collectability could be used to their advantage. ■

Pennsylvania—Workers' Compensation

UP ON THE HOUSE TOP, CLAIMANT FALLS: HIGH RISK CONDUCT AT WORK UNDER THE PENNSYLVANIA WORKERS' COMPENSATION ACT

By Maria A. Ciccotelli, Esq.*

KEY POINTS:

- Even deliberate, intentional and misguided actions can be considered to be within a claimant's course and scope of employment under the Pennsylvania Workers' Compensation Act.
- Employers should take care to ensure that their employees know what to do in unexpected situations to prevent claims based on misguided actions.

Maria A. Ciccotelli

Ever since people have been employed, mistakes have been made at work. While some of these mistakes are merely misguided, others rise to the level of stupidity. However, regardless of how misguided the action, it can still lead to a compensable workers' compensation claim in Pennsylvania.

Generally, workers' compensation in Pennsylvania is a "no fault" system, as long as the employee was doing his or her job at the time of the injury. Under Section 301(c)(1) of the Act, for a claim to be compensable, an injury must have occurred in the "course" of employment, including injuries "sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer." One of the more contested aspects of the law is what constitutes an activity in the furtherance of an employer's business. Even imprudent actions—attempting to jump and touch a basketball rim while delivering furniture, drinking and driving, and relieving oneself on the side of the road—have been found to be activities in the furtherance of an employer's business, as in *Baby's Room v. WCAB (Stairs)*, 860 A.2d 200 (Pa.Cmwlth. 2004), *Kovalchick Salvage Co. v. WCAB (St. Clair)*, 519 A.2d 543 (Pa.Cmwlth. 1984) and *WCAB (Shremshock) v. Borough of Plum*, 340 A.2d 637 (Pa.Cmwlth. 1975), respectively.

This issue arose again in the case of *Wilgro Services, Inc. v. WCAB (Mentusky)*; 165 A.3d 99 (Pa.Cmwlth. 2017). The claimant in *Wilgro Services* jumped off the roof of a two-story building after he realized his ladder was gone. He fractured both feet and injured his back. Interestingly, although the claimant tried to open the roof hatch, he did not exhaust all of his egress possibilities. He did not call for help or bang on the hatch. He failed to use his cell phone to call the building owner, the employer or 911. Instead, the claimant jumped about sixteen to twenty feet to the ground.

The employer denied that the claimant's injuries occurred in the course and scope of his employment, and the claimant filed a claim petition. The Workers' Compensation Judge granted the petition, finding that the claimant was in the course of his employment when he jumped from the roof. According to the judge, the claimant did not intentionally or deliberately try to injure himself when he jumped. Although his decision was misguided, it did not bar him from receiving compensation benefits because he was not involved in horseplay, he knew jumping was not appropriate and he did not violate any positive work order.

The employer appealed to the Workers' Compensation Appeal Board, arguing that the claimant's actions were wholly foreign to his employment; therefore, he was not in the course and scope of his employment. The employer referred to the case *Penn State University v. Workers' Compensation Appeal Board (Smith)*, 15 A.3d 949 (Pa.Cmwlth. 2011), which found that an employee was not acting in the course and scope of his employment when he intentionally jumped down a flight of stairs during his unpaid lunch break, as this action was "wholly foreign" to his employment.

The Appeal Board affirmed the judge's original decision, finding that *Wilgro Services* was distinguishable. It held that the employee in *Penn State* was acting on a "whim" while the claimant's actions in *Wilgro Services* were deliberate.

The employer appealed the issue to the Pennsylvania Commonwealth Court, asking the court to consider the intentional, premeditated, deliberate, extreme and high-risk nature of the claimant's conduct. The claimant argued that, even if his actions were misguided or "stupid," he was still acting within the course and scope of his employment. The Commonwealth Court found that, although jumping off of a roof was not one of the claimant's job duties, exiting a work site was a necessary component of any job that advanced the employer's business and affairs. While the claimant's decision to jump was not advisable, dumb and foolish, it was not unreasonable. The employer failed to prove that the claimant's deeds were so foreign and removed from his employment to constitute an abandonment of employment. The Commonwealth Court affirmed the Appeal Board's decision.

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HEADS UP AND WATCH OUT!

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Although the Safety in Youth Sports Act had not been pled as a basis for liability, counsel for M.U. used the opportunity of oral argument to urge the court to look to the Act for the proper standard of care for protecting student athletes from concussions. M.U.'s counsel also argued that violations of the Act should both overcome the governmental immunity that is commonly asserted by school districts and satisfy the high standard—willful indifference—required for Fourteenth Amendment claims. The court ultimately applied immunity and found that M.U. had not met the willful indifference standard, but it stated that a plaintiff "could possibly argue" that a coach's "failure to abide by the Safety in Youth Sports Act constitutes negligence per se under state tort law." This cryptic statement breathed life into the argument that negligence per se could result if coaches and schools do not follow the procedures of the Act.

In 2017, another federal district court located in Pennsylvania addressed the Act in *R.B. v. Enterline*, 2017 U.S. Dist. Lexis 89998 (M.D. Pa. June 12, 2017). In that case, the plaintiff was a cheerleader who fell to the ground and hit her head. R.B. sued her coach for negligence. The coach raised governmental immunity under the Pennsylvania Political Subdivision Tort Claim Act as a defense. In response, like her counterpart in *M.U.*, the plaintiff argued that the Act abrogates immunity. The court rejected this argument and granted immunity to the coach. However, it did not address whether the Act creates its own cause of action.

Unlike the Pennsylvania courts, the Supreme Court in Washington opined that a wrongful death lawsuit brought by a high school football player's estate could proceed under Washington's Zackery Lystedt Law, which contains language similar to that of Pennsylvania's Safety in Youth Sports Act. In *Swank v. Valley Christian School*, 398 P.2d 1108 (Wash. 2017), the court held that "the Lystedt law includes an implied cause of action" relevant to a claim against a high school football coach.

More recently, in *Mann v. Palmerton Area School District*, ___ F. 3d. ___, 2017 U.S. App. Lexis 18261 (3d.Cir. Sep. 21, 2017), the Third Circuit in Pennsylvania found a school district not liable for traumatic brain injuries suffered by a football player during a practice in 2011 because there was no evidence the coaches deliberately exposed the injured player to the continuing risk of harm. However, in reaching its conclusion of no liability, the court stated, "It is also significant that the Pennsylvania General Assembly did not pass legislation (the Safety in Youth Sports Act), that mandated training for coaches to prevent concussions, until November 9, 2011, and the legislation did not even go into effect until July of 2012."

A few weeks later, the Commonwealth Court of Pennsylvania addressed the Act in an opinion that affirmed a trial court decision that overruled preliminary objections that had been filed against the plaintiffs. *See*, *Hites et al. v. Pennsylvania Interscholastic Athletic Association, Inc.*, 2017 Pa. Commw. Unpub. Lexis 784 (Pa.Commw.Ct. Oct. 10, 2017). Among other things, the plaintiffs asserted that the Act describes minimum standards of care for interscholastic athletics. The trial court stated that the Act must be considered when evaluating whether a duty should be imposed on the Pennsylvania Interscholastic Athletic Association. The Commonwealth Court acknowledged the immunity clause but stated that, while the Act imposes certain responsibilities upon school entities and school employees, it does not eliminate civil lawsuits, such as the lawsuit filed against the Pennsylvania Interscholastic Athletic Association. The Commonwealth Court affirmed the order of the trial court, and the case was remanded for further trial proceedings.

These cases suggest confusion about whether youth sports concussion laws create new civil liability for coaches and school districts and, if so, whether such liability will overcome traditional defenses, like governmental immunity and the high standard for Fourteenth Amendment claims. *M.U.* and *R.B.* ruled for the defendants and applied the traditional defenses, but *M.U.* suggested that the Safety in Youth Sports Act "possibly" creates new liability, and *R.B.* left the question unanswered. On the other hand, *Swank* held that the Lystedt Law creates an "implied" cause of action. Certainly, high schools and coaches need to follow the strict protocols set forth in the Act. Additionally, until the existing state of confusion is resolved and the courts reach a consensus, schools, coaches and insurance carriers should be aware of the potential for increased civil liability. ■

UP ON THE HOUSE TOP, CLAIMANT FALLS

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The Commonwealth Court's decision begs the question of what employers can do to prevent misguided actions from being compensable. While it is impossible to anticipate every ill-advised act, some actions can be preempted with positive work orders. One of the factors the Workers' Compensation Judge took into account in *Wilgro Services* was that the claimant had not violated any positive work order when he jumped, and the Commonwealth Court considered it important that the claimant found himself in an unexpected situation.

There is a slim chance that an employer can use the violation of a positive work order as an affirmative defense if the injury is caused by a violation of the order, the employee knew of the order, and the order implicated an activity not connected with the employee's work duties, as per *Miller v. WCAB (Millard Refrigerated Servs.)*, 47 A.3d 206 (Pa.Cmwlth. 2012). It might not have saved the employer from paying out benefits here in *Wilgro Services*, as the Commonwealth Court found that exiting the work site was a necessary component of the claimant's job. However, if given clear directions as to what to do in certain situations, at the least, employees are less likely to make foolish choices, such as jumping off the roof of a job site. ■

LONG-TERM HEALTH CARE

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Highland's answer and affirmative defenses when it declined to obey the court's discovery order.

The Superior Court, in assessing whether Grane was properly granted a nonsuit, looked at the plaintiff's evidence and the management agreement, which required Grane to "[e]stablish and administer a quality assurance program to assure Highland provided quality nursing services to its residents." Grane was responsible for management of all aspects of the operation. While Highland set staffing levels, Grane had budget approval over staffing levels, hired and trained all of the RNs and employed a nurse consultant, who visited weekly and oversaw the quality of patient care. In evaluating the shifts and staffing, the court considered the testimony from the RN unit manager and two CNAs regarding concerns raised about state surveys and staffing. The Superior Court found that the Restatement (Second) of Torts § 323 (Negligent Performance of Undertaking to Render Services) and § 324(a) (Duty of One Who Takes Charge of Another Who Is Helpless) imposed a duty upon Grane sufficient to establish a cause of action. The management agreement required Grane to manage all aspects of Highland's operation; therefore, Grane was contractually responsible. After the 2007 trial, Scampone uncovered a policy and procedure manual that Grane created that demonstrated Grane's role in overseeing the operations of the facility. Highland's non-delegable duty under *Thompson* did not mandate the dismissal of Grane. Grane's liability was attached under vicarious liability and was voluntarily assumed by its contract. Highland's liability in direct corporate negligence for Grane's alleged misfeasance did not absolve Grane from its duty of care, which it assumed by virtue of Restatement (Second) of Torts § 323 and § 324(a).

Scampone averred that he was entitled to a new trial as to both Grane and Highland on the issue of punitive damages and that reversible error occurred when he was not permitted to introduce certain evidence at trial. The trial court permitted Scampone to introduce the Department of Health surveys relating to the failure to hydrate patients properly, a condition that led to his mother's death. However, the court refused to admit the surveys pertaining to other substandard patient care issues the DOH found. Scampone argued that all of the DOH deficiencies in surveys from August of 2002 through July of 2004 regarding patient care were admissible in order to demonstrate the defendants' awareness of the various conditions that existed and that they recklessly disregarded their responsibility to correct those conditions.

The Superior Court held that the trial court abused its discretion in prohibiting Scampone from introducing certain DOH surveys, which demonstrated that the nursing home operated in a systemic manner, patient neglect was common and the existence of across-the-board substandard patient care. These surveys were relevant to show that Highland and Grane had knowledge of the deficiencies and ignored them by failing to increase staffing levels. These deficiencies proved that Highland and Grane knowingly failed to take corrective measures to remedy the neglect of patients and that the deficiencies involved with Madeline's care were not isolated incidents.

The Superior Court addressed Scampone's contention concerning the denial of his motion for sanctions due to the defendants' discovery violations. Scampone contended that the defendants failed to produce the policy and procedure manual that Grane created, which was requested during discovery, and that the defendants understated the amount of their insurance coverage. At trial, Highland introduced undisclosed materials that included 400 pages of staffing sheets and payroll documentation. Scampone's sanctions essentially sought entry of a default judgment against the defendants. The Superior Court found that the failure to produce the manual was improper and inexcusable and that the sudden discovery of staffing sheets during trial was especially egregious. However, it held that the trial court did not abuse its discretion in refusing to direct a verdict due to these discovery violations, but that it would be apprpriate for the trial court to consider on remand some type of monetary sanction. The Superior Court stated that, if the foregoing were the fault of counsel, it could constitute a violation of the Rules of Professional Conduct.

The defense of long-term health care continues to present multiple challenges. Care generally involves an at-risk patient population, staff turnover is common, documentation issues are common, policies and procedures are scrutinized, and now management companies can be implicated and Department of Health surveys can be used to support claims for punitive damages. Clients should be mindful of these challenges and work with counsel to provide all relevant information at the outset of litigation. ■

SEISMIC SHIFT

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physician, the operating physician will also be able to testify to the jury regarding what discussions occurred based on the physician's recollections, customs and practices. Again, the focus in a medical malpractice case based on a lack of informed consent will be on the discussions and information conveyed by and between the patient and the operating physician.

Because *Shinal* is a new pronouncement on informed consent, it is inevitable that the courts of this Commonwealth will provide interpretations of that holding based on the multitude of scenarios that may be litigated regarding informed consent. However, medical professionals and medical malpractice lawyers should be guided by the *Shinal* court's holding, which limits the inquiry regarding whether informed consent has been adequately obtained to solely the discussions and interactions that have occurred between the patient and operating physician. ■

FIRM BACKGROUND AND STATEMENT OF PURPOSE

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

We are 500 attorneys strong and have 20 offices strategically located throughout Pennsylvania, New Jersey, Delaware, Ohio, Florida and New York. Devoted to defense alone, our firm consists of a number of litigation practice groups, including:

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