MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 25 | NO. 2 | JUNE 2019

Defense Digest

On The Pulse…

THRIVING 'HERE IN ALLENTOWN'

By Jason Banonis, Esq.*

Jason Banonis

Allentown, Pennsylvania bears little resemblance to its description in the 1982 Billy Joel hit song, written to depict a depressed, blue collar world of the Lehigh Valley in the wake of Bethlehem Steel's decline. Today, the greater Lehigh Valley, conveniently located in close proximity to two major metropolitan areas in Philadelphia and New York City, remains a manufacturing stronghold and has become a warehouse distribution mecca—attracting many Fortune 500 companies and foreign corporations. In the Valley's three major cities—Allentown, Bethlehem and Easton—revitalization efforts have led to significant real estate development. These include billions of dollars of health care, higher education, sports and entertainment, major retail, and residential and commercial projects. The many beneficiaries of this growth continue to look to the Allentown office of Marshall Dennehey for its wide-ranging legal services, depth of experience, and unparalleled stability and reputation.

Marshall Dennehey has advanced steadily in Allentown since the pioneering days of the early 1980s. Today, it is the largest, most established and highly-regarded defense litigation office in the region. Our attorneys defend and try civil cases in every state and federal court within the six counties of east-central Pennsylvania and beyond. Currently, we have ten attorneys, all of whom have deep local ties to the community, as well as ten excellent administrative staff, many with over 25 years with the firm. Our office manager, Donna Stauble, keeps us on our toes to ensure that everything runs efficiently and smoothly.

While we are one of the firm's smaller offices, we cover the full spectrum of claims across the firm's four practice departments: Casualty, Health Care, Workers' Compensation and Professional Liability.

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OUR INSURANCE AGENTS & BROKERS LIABILITY PRACTICE GROUP

By Eric A. Fitzgerald, Esq.*

Eric A. Fitzgerald

Marshall Dennehey represents retail and wholesale insurance agencies and brokerage firms of all sizes and sophistication, ranging from family-owned businesses to nationally-known, managing general agents and risk retention groups in state and federal court. We defend these clients against claims involving allegations of professional negligence, breach of fiduciary duty, breach of contract and fraud, among others. We routinely defend claims by policyholders and carriers across multiple lines of coverage in admitted and surplus markets.

As trial lawyers with extensive experience dealing with all aspects of both underwriting and claims processes, we pride ourselves in the efficient resolution of actions brought against our clients, whether by securing court dismissals on dispositive motions in civil suits, mitigating risk via alternative dispute resolution, or providing an aggressive defense through trial to verdict.

For example, our attorneys recently defended an insurance agency in the Twelfth Appellate District of Ohio where, after written briefs and oral argument, the court of appeals affirmed summary judgment in favor of the agent, finding no evidence of misrepresentations concerning insurance pre-fire. In another suit filed in Centre County, Pennsylvania, our firm recently secured a defense verdict at a jury trial on behalf of an independent insurance agency and its owner against claims of professional negligence brought by former long-time customers of the agency arising from alleged failure to offer builders risk coverage and a requested increase in limits before a fire loss.

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** Eric is a shareholder and the assistant director of our Professional Liability Department. He works in our Philadelphia, Pennsylvania office and can contacted at 215.575.2688 or eafitzgerald@mdwcg.com.*

IN THIS ISSUE

PENNSYLVANIA

A MESSAGE from the EXECUTIVE COMMITTEE

By G. Mark Thompson, Esq.,
President & CEO

"Innovation distinguishes between a leader and a follower."
– Steve Jobs

Earlier this year, Marshall Dennehey was honored to be asked by one of the nation's largest insurers to speak with all its panel counsel about legal innovation at the Claims and Litigation Management (CLM) annual conference in Orlando.

As the firm's CEO, there is nothing like having a valued client hold you up as an example to their other outside counsel. We work hard to align ourselves with the business strategy of our clients, and opportunities like this are both humbling and gratifying. They are humbling because of the caliber and number of law firms with whom we were able to share and gratifying to have our methods and capital investments appreciated. Our thanks go to this particular insurer for putting together an inventive and empowering panel counsel meeting.

It is no surprise that many law firms today view technology and legal innovation as existential threats. Visions of robot lawyers and artificial intelligence seem to have spread overnight from science fiction to mainstream legal chatter, and we have all been warned these and other "disrupters" are things to be feared.

Rather than getting flustered, Marshall Dennehey is bringing innovation to the practice of defense litigation. It is not because we are more daring than other law firms. Much of what we do and have done is just good business. Without innovation it is hard to compete, much less thrive, in the modern legal eco-system. So we have taken a pragmatic approach, secure in the knowledge we have already adapted and overcome all manner of disruption during 57 years in existence, including changes in the law, changes in the industry and transformative changes in technology. We understand fully that what worked yesterday may not be sufficient for tomorrow.

One of the more important lessons we have learned is that legal innovation starts with process, not technology. Opportunities exist in every firm to deliver legal services more effectively and efficiently. By rethinking the process, we can improve litigation outcomes, client satisfaction and revenue streams.

Take compensation for example.

Marshall Dennehey does not compensate its lawyers based on origination. A recent ALM Intelligence survey found that 83% of law firms still do. This is a dicey proposition in which the attorney who first touched the client receives credit, often in perpetuity, for all subsequent assignments. That credit might then be shared with the attorney who grows the account or the attorney who performs most of the client's legal work. Those credits get tracked and the more "originations" a lawyer has, the more they get paid.

These schemes encourage hoarding. They create incentives and shape behaviors that are counter to most clients' interest. Lawyers end up disregarding venue, subject matter expertise or experience – all in an effort to retain a file and preserve origination credit.

At Marshall Dennehey, we'd rather focus on client-oriented performance. Spurning origination credit allows us to easily assign the right matter to the right lawyer in the right location. Our lawyers are also able to specialize in distinct areas of law such as health care, employment, securities, products liability, school leaders, coverage or risk transfer. By contrast, where compensation is based on origination, lawyers tend to juggle multiple disciplines in an effort to keep matters under their own name.

Our pioneering approach puts our clients' interest first. It also fosters sharing, team work and trust among our lawyers, strengthening the firm.

But we don't stop there. We audit ourselves for quality assurance. Within our firm is a staff of seven internal auditors whose job it is to review the files of every shareholder and associate on an annual basis. These senior lawyers look at many of the same things our clients do. They evaluate and report on file handling, guideline compliance and work product. They examine the quality and frequency of reporting and whether the files exhibit efforts to align with case strategy, such as early resolution. The results of these audits are then factored into attorney compensation. This innovative practice not only incentivizes lawyers to meet client expectations, it results in our clients routinely commending us for consistent file handling

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ON THE PULSE... THRIVING 'HERE IN ALLENTOWN'

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The Casualty Department in Allentown is the largest group and handles all areas of third-party civil actions involving personal injury or property damage. Our attorneys in this group include shareholders Brent Green, Wendy O'Connor, Dave Williams, and myself and associate Steve Keim. Collectively, we have more than 100 years of experience handling cases throughout the Lehigh Valley, we all are highly active in the bar, various local, charitable and civic organizations, and local government. We are well-known to local judges and are well-respected as formidable, ethical and experienced litigators. The cases we handle range from the smallest of claims to complex matters, including catastrophic injuries and wrongful death cases. Practice areas in which we are experienced include transportation and trucking, construction accidents, construction defects, premises liability, automobile liability, liquor liability, sports and entertainment, product liability and warranty cases, intentional torts and more.

The Allentown Health Care Department is led by Paul Laughlin, a trial attorney with over 30 years of experience. Paul's trial resume is rare and accomplished—he is regularly consulted and substituted as lead counsel on many types of complex matters. Paul, Dave Williams and Wendy O'Connor represent institutional clients such as hospitals, long-term care facilities, physician practice groups, surgical centers and individual health care providers, such as physicians, nurses, dentists and a variety of other individuals who deliver medical care. The nature, complexity and monetary exposure involved with the matters defended by this practice group fuels the necessity for extensive trial practice before courts all over Pennsylvania.

Paul Lees leads our Professional Liability Department. Paul has 30 years of experience defending all manner of professionals outside of the health care industry. These clients include higher education institutions; lawyers; real estate agents; architects, engineers, and construction industry professionals; insurance agents, insurance companies and claims professionals; and employers, public officials, municipalities and law enforcement officers. As well, Paul represents clients in all stages of employment proceedings, including matters pending before the Equal Employment Opportunity Commission, Pennsylvania Human Relations Commission and, thereafter, within state trial courts and federal district courts.

The Workers' Compensation Department, headed locally by accomplished workers' compensation attorney Bill Scott, defends state claims across our entire practice region. Bill and Judd Woytek remain in high demand for workers' compensation defense litigation, particularly for matters involving claims under the Federal Black Lung Benefits Act.

For more than 30 years, the Allentown office has provided excellence in civil defense litigation services at the crossroads and forefront of the greater Lehigh Valley area and beyond. We stand ready to assist with your litigation needs. Please do not hesitate to contact us with questions or inquiries, or feel free to stop by if you are passing through. ■

ON THE PULSE...OUR INSURANCE AGENTS & BROKERS LIABILITY PRACTICE GROUP

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Emerging trends in claims against insurance agents and brokers may suggest an expanding "special relationship" and a heightened duty to advise. While this trend is challenging for the defense bar, the breadth of our practice enables us to shape the evolving common law and monitor national case law as it develops. Our longstanding relationships with a number of E&O carriers provide us with a unique perspective as we maximize resources to achieve the best results for our clients at the right cost. Evolving regulatory and licensing matters are also a challenge that we are well-equipped to handle.

In addition to litigation, we routinely provide in-house risk management training for E&O carriers throughout the country and for agents/brokers through industry trade organizations, such as the National Faculty for the Society of CIC, the CPCU Society, Motor Carrier Insurance Education Foundation, and state and local trade groups. Currently, we operate professional liability hotlines on behalf of E&O clients. Our attorneys are also active in the Professional Liability Underwriting Society (PLUS) and frequently publish on agent/broker E&O topics in leading industry publications including *PLUS Journal*; The Institutes CPCU Society's professional journal, *Insights*; and the Defense Research Institute's newsletter, *Riding the E&O Line*.

Our Insurance Agents & Brokers Liability Practice Group serves clients from our 20 offices located in Pennsylvania, New Jersey, New York, Delaware, Florida and Ohio, and in neighboring jurisdictions of Maryland, Connecticut, West Virginia and Kentucky. We look forward to serving agency and brokerage needs. ■

Pennsylvania—General Liability

IS A JURY FREE TO FIND NEGLIGENCE DID NOT CAUSE INJURY?

By G. Michael Garcia II, Esq.*

KEY POINTS:

- A defendant's negligence may be non-causal, even where a plaintiff has been injured.
- Two recent Superior Court cases reaffirm this principle.

G. Michael Garcia II

Generally, in order for a plaintiff to prevail in a negligence case, he must establish that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) a causal relationship exists between the breach and the resulting injury suffered by the plaintiff; and (4) an actual loss was suffered by the plaintiff. It is often a plaintiff's position that a ruling of negligence combined with an uncontroverted injury automatically requires a finding that the negligence was a substantial factor in causing the accident that resulted in injury. However, in two recent Pennsylvania Superior Court cases, the court affirmed that a jury is free to conclude that a defendant's negligence was not the cause of a plaintiff's injury, so long as their decision is supported by testimony or facts not inherently improbable nor at odds with admitted or proven facts or within their ordinary experience.

In *Koziar v. Rayner*, 200 A.3d 513 (Pa.Super. 2018), the Superior Court reversed the trial court's decision to vacate a jury verdict in favor of the defendants in a trip and fall case and grant the plaintiff a new trial. The plaintiff, Koziar, a house cleaner, alleged she tripped and fell on the drop-off edge of a concrete garage floor slab when she was exiting to the driveway. It was dark, and the area was not visible. At trial, the defense was able to elicit through cross-examination of the plaintiff that she had given numerous conflicting accounts concerning the exact location of her fall and what actually caused her to fall, including several statements that she thought she had tripped on debris in the garage. The jury returned a verdict finding that the defendants were negligent, but that their negligence was not a factual cause of the harm suffered by the plaintiff.

Thereafter, the trial court granted the plaintiff's request for a new trial on the basis that the jury's decision was against the weight of evidence. The Superior Court reversed the trial court's decision to vacate the jury verdict and grant a new trial, noting that the jury was "free to believe one or more of the versions of events provided by the plaintiff…but ultimately determined that the version was not where or how plaintiff fell and sustained her injuries" or, alternatively, "the jury could have found that while defendants were negligent, it was not their negligence, but rather plaintiff's own negligence that caused her injuries."

Recently, the Superior Court reaffirmed its holding in *Koziar* when it affirmed a trial court's decision not to grant a new trial in the case of *Steudler v. Keating*, 2019 Pa. Super. Unpub. LEXIS 792 (Pa.Super. Mar. 6, 2019). *Steudler* involved a consolidated trial against a single defendant in a personal injury and wrongful death and survival action arising out of a vehicle-pedestrian collision. At trial, undisputed evidence was presented that the two plaintiffs were walking together along an unlit road with their backs to approaching traffic. The disputed issues at trial concerned whether the plaintiffs were walking in the roadway, how the defendant was driving, and the weather and visibility conditions at the time of accident. The defendant testified he was driving on the roadway between the center line and fog line and that he did not see the plaintiffs before the passenger side of his vehicle collided with one of them. Both the responding police officer and surviving plaintiff testified that the road where the accident occurred was dark and it was raining heavily. The responding officer also testified that the deceased plaintiff was wearing dark clothing, one of his shoes was discovered partially lying on the fog line, and he found no tire marks or other markings on the pavement that would indicate the defendant's vehicle traveled off the roadway.

The case was submitted to the jury, which returned unanimous verdicts in which they found that the defendant was negligent, but that his negligence did not cause harm to either of the plaintiffs. The plaintiffs requested a new trial, arguing the jury's verdict was against the weight of the evidence, which the trial court denied. Citing *Koziar*, the Superior Court stated, "[a] verdict that the defendant was negligent and that his negligence did not harm the plaintiff cannot be set aside as contrary to the weight of the evidence simply because it was

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A MESSAGE FROM THE EXECUTIVE COMMITTEE

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across 20 offices in six different states. Consistently good lawyering is a hallmark of Marshall Dennehey. It builds loyalty and assures that no matter where our clients retain our services, they always know what they are going to get.

Our goal of process improvement extends to our Roundtable Program. Perhaps nowhere is rethinking an approach more important than with complex and high-exposure litigation. At no additional costs to clients, we "roundtable" these type of cases, subjecting them to multiple viewpoints from some of the best lawyers in the firm. This testing and refinement of strategy benefits our clients, as well as the handling attorney, and can lead to better outcomes.

Other examples of innovative process include our internal training and professional development of attorneys. Here we teach client-specific litigation management, accurate budgeting, early case resolution, effective mediation techniques and trial advocacy. We have also implemented a remote work policy for eligible attorneys, affording greater flexibility and improved efficiency in how they practice. And when it comes to accounts receivable and client exceptions, we have aligned our back and front office operations. Attorneys now collaborate regularly with billing specialists from our Revenue Capture team to more quickly resolve impediments to payment.

All this process illustrates how legal innovation starts, but there is no question that efficiency-enhancing technology is also essential to the modern practice of law. Clients expect law firms to leverage technology and 34 states have now adopted ABA Model Rule 1.1, Comment 8 which provides in pertinent part:

> *To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…* .

Together with innovation, automation is one of the key factors driving change in the legal industry today. Law firms intent on growing, staying relevant and remaining competitive have no choice but to embrace, invest in and promote their legal technology. Defense litigation firms in particular would be wise to heed the 2019 CLM Litigation Management Study – which is a survey of more than 80 claim and litigation executives. Their Report of Findings suggests law firms should cease presenting requests for rate increases as merely a reflection of higher costs and instead show what they are doing to mitigate costs and optimize their practice.

Marshall Dennehey is proud to answer that call. In addition to the innovative processes described above, we have made significant investments in legal technology. These resources enable us to continuously improve our practice, manage costs and better serve our clients.

As an example, our practice dashboards deliver real-time metrics and data for on-demand reporting of fees, cycle times, total indemnities paid and case dispositions on over 40,000 files annually. These analytics distinguish us from other firms and keep us ahead of the curve. They enable us to demonstrate our value by showing clients they get what they pay for. It is not just fees – but fees plus indemnity – that matter, and we can often beat their program benchmarks on total costs of defense. Our analytics enable us to enter alternative fee agreements with confidence and client audits prepared. And on the occasions we do push back, as we have with the "one size fits all" approach used by some carriers to adjust billing entries, they allow us to speak with authority as an informed and trusted partner.

Our clients are among the most sophisticated consumers of legal services anywhere. They expect law firms to provide more for less and reward those who can lower the cost of delivery while maintaining quality. Realizing this, we have equipped our attorneys with best-in-class technology, enabling them to practice smarter and more efficiently than their peers. These resources include electronic document and file management systems that move us closer to a paperless workplace and reduce our environmental footprint, a central matter diary system designed to assist attorneys and staff with litigation progress, reporting, billing and court-imposed deadlines, and an electronic budget monitoring system that helps attorneys stay mindful of the costs and fees incurred while managing their files.

We have also invested in mobile applications, allowing attorneys to record their time entries on the go, and expense reporting software, enabling them to allocate expenses to files digitally, in compliance with client guidelines, from any secure desktop or mobile device as they occur.

These investments in technology are in addition to those related to cyber security, business continuity, and applications designed to streamline the creation and dispatch of made-to-order, client-specific invoicing, including eBills.

I could go on and on, as I am proud of our firm, but will close with this final point.

Change is inevitable. I hope this column demonstrates that Marshall Dennehey is listening, innovating, investing and striving to be a law firm prepared for tomorrow. ■

Pennsylvania—General Liability

NEW STRATEGIC TOOL: FILING A MOTION TO COMPEL FOR SOCIAL MEDIA SIGN-IN INFORMATION

By Thomas J. O'Malley, Esq.*

KEY POINTS:

- Check to see if there is relevant information in a plaintiff's social media account.
- Ask the plaintiff if her social media account is private or open to the public.
- File a motion to compel to obtain sign-in information of social media accounts.

Thomas J. O'Malley

"May I please have your Social Security Number?"

"I don't feel comfortable providing that information."

"We need your Social Security Number."

"I'm not going to give it to you."

In this day and age, the above exchange is rather common. As most people know, giving someone your Social Security number is basically providing "the key to the kingdom." As recently as 20 years ago, it was routine to share your Social Security number without consequence.

However, in today's "social media age," most people are, in some form or another, addicted to social media. People post their lives on their various social media accounts, whether it be Facebook, Instagram or LinkedIn. But can you imagine the reaction of someone sitting next to you on the train if you were to ask him for the user name and password for his Facebook account?

Yet, that is exactly what a Monroe County, Pennsylvania judge compelled a plaintiff to do. In *Kelter v. Flannigan*, No. 286-Civil-2017 (C.P. Monroe Co. Feb. 19, 2018 Williamson, J.), a motor vehicle case that was defended by Frank Baker of our Allentown office, the Honorable David J. Williamson of the Court of Common Pleas of Monroe County addressed the issue of the discoverability of a plaintiff's access information to her Instagram account.

Ms. Kelter claimed the injuries she sustained in the motor vehicle accident precluded her from performing certain physical activities. Defense counsel then showed the plaintiff public-access Instagram posts from her account, which revealed her engaged in various physical activities after the accident, including shoveling snow and going to the gym. After refusing to provide her Instagram account access information, which would have allowed defense counsel access to her private Instagram posts, defense counsel filed a motion to compel the plaintiff to provide her access information.

In response to the defendant's motion, the plaintiff insisted that all of her Instagram posts were open to public access and that she had made no private posts after the auto accident. The defendant argued that without the plaintiff's access information, the defendant would have no way to determine whether there were relevant private posts on the plaintiff's account; public posts that the plaintiff subsequently made private; or previously public posts that were later deleted. In fact, following her deposition, the plaintiff changed her public posts to private posts, precluding access to posts previously publicly available.

In compelling the plaintiff to provide her Instagram account access information, the court noted that there is very limited authority on the discoverability of a party's social networking account in litigation. Generally, social networking accounts can be discoverable if it appears likely they contain information that could be relevant to the litigation. The court further noted that there can be no expectation of privacy on social media because the user is sharing information with others in a public or quasi-public domain. The key issue is the relevance of the information, pictures and topics contained in a party's social media account.

In *Kelter*, the court opined that the information contained in the plaintiff's social media account was relevant to the extent of her injuries and recovery following the accident. The court stated, "The fact that information was available on a public access basis for a period of time does not eliminate the need for full access to the account by the Defendant." The court reasoned that the "plaintiff has chosen to interact and share her personal life with others through social media… . The fact that she changed her account to a private setting, rather than eliminate the account and her use of this social networking source, casts doubt on any assertion that there is nothing relevant in the account postings. Therefore, Plaintiff will be required to disclose her Instagram account log-in information to Defendant's counsel."

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Pennsylvania—Health Care Liability

THERE ARE NO HOTELS IN SMETHPORT, PENNSYLVANIA

By Anthony J. Williott, Esq.*

KEY POINTS:

- Plaintiffs' counsel statewide are focusing on jury selection issues.
- Defense counsel should be prepared for issues that my arise during jury selection.

Anthony J. Williott

There are no hotels in Smethport, Pennsylvania. I learned this when trying the matter of *Keene v. Kirsch, et al.* to a defense verdict in McKean County for eight days in February 2016. Plaintiff's counsel has sought to challenge this verdict on the basis of issues that arose from jury selection, a trend that seems to be on the rise with plaintiffs' counsel statewide.

This medical malpractice case involved a claim that our client, Dr. Kirsch, negligently and in violation of hospital policy treated his patient's ST wave elevation myocardial infarction (STEMI heart attack) with thrombolytic (i.e., clot-busting) therapy rather than life-flighting her to a nearby hospital with a cath lab. The patient's heart attack resolved, but she later developed a massive brain bleed and permanent brain damage from the thrombolytic therapy.

At trial, every possible ruling was in favor of the plaintiff, so we felt good about our ability to hold the 10-2 verdict. However, the plaintiff filed a motion for post-trial relief that included affidavits from the two dissenting jurors, who claimed several majority jurors revealed during deliberations that they either knew Dr. Kirsch or had family members who were previously patients but who did not disclose that fact in *voir dire*.

Our initial legal challenge was based primarily on two things. First, jury selection was not on the record, so there was no way to know what the jurors were asked or what their responses were. (It was discovered during the post-trial motion process that the trial court may not have asked the jury venire if they knew the defendant, based on the court's "Rough Notes" for jury selection provided to counsel the night before jury selection, an omission neither party caught.) Second, we argued that the no-impeachment rule barred the court from considering discussions among jurors during deliberations. We later argued that even if the affidavits were true, about the family-patient relationships of two jurors, those relationships did not rise to the level of requiring a new trial under the dictates of *Cordes v. Associates of Internal Medicine*, 87 A.3d 829 (Pa.Super. 2014). The trial court rejected all three arguments and, over our strenuous objection, conducted a post-verdict evidentiary hearing where the two dissenting jurors and the two jurors whose family members allegedly had been patients of the defendant testified. One juror said his mother had been Dr. Kirsch's patient for a few years before her death four years earlier, but the juror did not remember that question being asked during *voir dire*. The other juror said his brother had treated with one of Dr. Kirsch's partners in the past. Following the evidentiary hearing and briefing, the trial court granted the plaintiff a new trial on the basis of the two jurors whose family members had been patients of Dr. Kirsch or his partner.

We appealed Judge Cleland's decision to the Pennsylvania Superior Court, and thanks to outstanding briefing and argument by Terry Sachs of our appellate group, the Superior Court, in a non-precedential memorandum opinion issued on February 12, 2018, overturned Judge Cleland's decision and remanded for disposition of the remainder of the plaintiff's motion for post-trial relief. The Superior Court held that the no-impeachment rule was not applicable because the issue concerned jury selection, not why the jury reached its decision. However, the Superior Court agreed with us that the claimed relationships between the two jurors' family members and Dr. Kirsch were not close enough to constitute prejudice to the plaintiff. The plaintiff's application for allocatur to the Pennsylvania Supreme Court was later denied.

On remand, the trial court again granted the plaintiff a new trial, this time based on the court's presumed failure to ask the jury venire if they knew the defendant, even though the plaintiff waived this issue. We have again appealed this decision to the Superior Court.

One of the key take-aways from this case is that the plaintiff's bar statewide are seemingly focusing on jury selection issues. Defense counsel should be prepared for the myriad issues that may arise during jury selection. In addition to *Cordes and Keene v. Kirsch, Weart v. Surgical Associates*, 2013 Pa.

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Pennsylvania—Insurance Coverage and Bad Faith

JUST HOW HARD DOES *GALLAGHER* HIT THE HOUSEHOLD VEHICLE EXCLUSION?

By Allison L. Krupp, Esq. and Christopher W. Woodward, Esq.*

KEY POINTS:

- Household vehicle exclusions had been routinely and repeatedly upheld by Pennsylvania courts prior to the *Gallagher v. GEICO* ruling.
- In *Gallagher*, the Pennsylvania Supreme Court found that the household vehicle exclusion conflicts with Section 1738 of the MVFRL, based on the unique facts before it.
- The breadth and scope of the Pennsylvania Supreme Court's ruling is not yet clear.

Allison L. Krupp

Christopher W. Woodward

In January of this year, the Pennsylvania Supreme Court issued a significant decision in *Gallagher v. GEICO Indem. Co.*, 2091 Pa. LEXIS 345 (Pa. Jan. 23, 2019), in which it declared that the household vehicle exclusion contained in a GEICO policy acted as a disguised stacking waiver and it violated the mandate of Section 1738 of Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL). This decision represents a significant departure from the Supreme Court's prior rulings on this issue, which had repeatedly and routinely upheld and applied such exclusions. The breadth and scope of the Supreme Court's surprising ruling is yet to be clarified.

Gallagher owned two automobiles and a motorcycle and insured all three vehicles through GEICO, which issued two policies: one to cover the automobiles and one to cover the motorcycle. The two policies provided stacked underinsured motorists (UIM) benefits. The policy covering Gallagher's automobiles contained a "household vehicle exclusion," stating: "This coverage does not apply to bodily injury while occupying or from being struck by a vehicle owned or leased by you or a relative that is not insured for Underinsured Motorists Coverage under this policy."

After sustaining injuries in an accident with an underinsured motorist while operating his motorcycle, Gallagher submitted first- and second-tier UIM claims under his GEICO policies. GEICO paid the UIM limits under his motorcycle policy but denied his claim for stacked UIM benefits under the automobile policy, citing the household vehicle exclusion. GEICO took the position that, since he was occupying his motorcycle at the time of the accident, and since his motorcycle was not insured under the automobile policy, the household vehicle exclusion applied to preclude Gallagher's UIM claim under the automobile policy.

In considering the coverage issue, the trial court granted summary judgment in favor of GEICO, and the Superior Court affirmed. On appeal to the Pennsylvania Supreme Court, Gallagher argued that the household exclusion "impermissibly narrows and conflicts with the mandates of the MVFRL." Section 1738 of the MVFRL specifies stacked UM/UIM coverage as the default coverage unless the insured signs a statutorily compliant stacking waiver. Gallagher argued he was entitled to stacked UIM coverage since he did not execute a stacking waiver and the household vehicle exclusion operated as a de facto stacking waiver, which did not comply with the requirements of the MVFRL.

GEICO argued that, by virtue of the household exclusion, the automobile policy did not provide UIM coverage to Gallagher while operating his motorcycle. Since there was no UIM coverage in the first instance, application of Section 1738 and/or the question of whether stacking applied was moot.

Ultimately, the Supreme Court determined that the household vehicle exclusion was "inconsistent with the unambiguous requirements" of Section 1738 as "it acts as a de facto waiver of stacked UIM coverage provided for in the MVFRL." The Supreme Court reasoned that Section 1738 provides for stacked UM/UIM coverage as default coverage unless the insured executes a waiver. GEICO could not rely upon an exclusion which "strips an insured of default UM/UIM coverage" absent that waiver. The Supreme Court did not address GEICO's argument that the household exclusion operated to preclude UIM coverage under the automobile policy

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On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

In a case where the plaintiff claimed she sustained serious injuries due to a rear-end motor vehicle accident, **Leo A. Bohanski** (Scranton, PA) obtained a defense verdict in a jury trial. The plaintiff's first year of treatment involved prescription medications from her primary care physician and chiropractic treatment, totaling 33 sessions. As her treatment was weaning down, she was involved in a second, more serious motor vehicle accident that resulted in increased treatment. The plaintiff's physiatrist opined that the ongoing cervical and lumbar pain was attributable to the first accident and the second accident was a minor exacerbation of her prior condition. Her expert boarded $60,800 in future medical expenses. The jury determined the plaintiff did not sustain a serious impairment of a body function and awarded $0.00 for future medical expenses.

Martin Sitler and **Corey Portnoy** (Jacksonville, FL) obtained summary judgment in Clay County, Florida in a pedestrian accident. The plaintiff was walking along the shoulder of a rural road when he was struck by a pick-up truck driven by our client. The plaintiff suffered severe injuries, including a significant traumatic brain injury. Pre-suit, he engaged counsel. Our client's insurer tendered the bodily injury policy limits available, and the plaintiff signed and executed a release agreement. He then endorsed a settlement draft, which was deposited into his attorney's trust account, but he did not receive a distribution from that attorney. Thereafter, he retained new counsel and filed suit alleging over $1 million in damages. On behalf of our client, we moved for summary judgment, asserting the defense of accord and satisfaction. The plaintiff argued he was not competent to sign the release agreement. After several evidentiary hearings, the court granted our motion, finding that the plaintiff was competent to enter into the release agreement and that judgment in favor of the defendant was warranted under the theory of accord and satisfaction.

Before the Delaware County Court of Common Pleas, **Edward Tuite** and **Lisa Goldman** (King of Prussia, PA) obtained summary judgment in a motor vehicle matter. The plaintiff was a driver involved in a motor vehicle loss that he alleged was caused by a phantom vehicle, potentially invoking the benefit of his uninsured motorist coverage. The injuries were so severe the plaintiff was in a coma for a week. Due to his injuries and coma, the plaintiff had no memory of the incident, including information to substantiate the phantom vehicle. In our motion for summary judgment, we argued there was no other evidence or witness to corroborate the alleged phantom vehicle actually existed, including no notation on the police report about another vehicle. The plaintiff's own physicians told the plaintiff that, because of his head injuries, he is unlikely to ever remember anything about the incident. As of the filing date of our summary judgment motion, two years had passed with no further recollections by the plaintiff. Additionally, we argued that the plaintiff failed to report the phantom vehicle to the insurer within 30 days of the date of loss, per the Motor Vehicle Financial Responsibility Law, which precluded the insurance company from timely investigating the alleged phantom vehicle. The first notice to the carrier of the phantom vehicle was when the complaint was filed, which was over one year after the accident. The court found favorably for our client, the insurer.

After a three-day jury trial before the Montgomery County Court of Common Pleas, **Laurianne Falcone** (Philadelphia, PA) obtained a defense verdict. The 81-year-old plaintiff, who was staying at her daughter's home, alleged she slipped and fell on water in the basement of the rental property and injured her hip. The property was owned by our clients. The plaintiff's daughter and son-in-law claimed they repeatedly complained to our clients of leaks from the ceiling in the basement, without response. They were in the midst of eviction proceedings with our clients for failure to pay rent for several months when the fall occurred. Our clients denied any knowledge of leaking water from the basement ceiling alleged by the tenants, though they did admit that they were aware of leaks in other areas which they attempted to fix. The jury returned a finding of no negligence. There was a nuisance value settlement offer made prior to trial, which was rejected.

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Frank Baker (Allentown, PA) and **Thomas Specht** (Scranton, PA) obtained summary judgment in favor of our clients in a case involving an alleged "attack" by our clients' dog. As the plaintiff walked past our clients' property on a public sidewalk, their dog ran out to the edge of the sidewalk barking loudly. The plaintiff became "startled" and stepped back, falling into the street and sustaining a serious injury that required surgery. Upon review of the summary judgment motion, the court found no evidence that the dog was a "dangerous dog" or that the dog had ever left the confines of the insureds' property. Interestingly, the court ruled that the dog's barking and charging the sidewalk did not represent a breach of duty by the homeowners to the public on the sidewalk under the applicable statutory and case law.

In a case where the plaintiff had made an $8.75 million settlement demand, **Jonathon Cross**, **Benjamin Levine** and **Eric Weiss** (Philadelphia, PA) were successful on a motion for summary judgment, dismissing all claims against their client. The plaintiffs, a mother and minor child, were at a gas station in Philadelphia when a vehicle inadvertently struck a fuel dispenser, knocking it over, and causing a fire and explosion. The claims and cross-claims asserted against our client alleged it should have installed or advised the gas station owners to install a valve that would have prevented the fuel leakage that exacerbated the fire. We filed a summary judgment motion arguing the claims and cross-claims asserted against our client went beyond the scope of the environmental compliance services it was hired to perform such that our client had no duty to either install or advise of installing different valves. The court granted our motion dismissing all claims and cross-claims against our client.

Jason Sandler (New York, NY) obtained summary judgment, dismissing the claims of two separate plaintiffs who alleged negligent security against our client, a private security company. The case involved a shooting at a nightclub where one of the plaintiff's sustained gunshot wounds and the other alleged serious injuries as a result of being trampled in the aftermath of the shooting. The court accepted our argument that our client's duty of care as an independent contractor did not extend to third parties, such as the plaintiffs, because the security company did not launch the instrument of harm and did not completely displace the club owners' responsibility for safety at the premises.

HEALTH CARE DEPARTMENT

Michael Kelly (Long Island, NY) obtained summary judgment in New York State Supreme Court, Kings County in a medical malpractice action against a plastic surgeon. The plaintiff claimed she developed a hernia secondary to an abdominoplasty. By way of an expert affidavit, we were able to demonstrate that: the plastic surgeon's surgical technique was proper; there was a proper informed consent; and the hernia was due to her post-abdominoplasty activities of daily living and her four prior C-sections, rather than any act or omission of our client.

Kevin Ryan and **Michael Kelly** (Long Island, NY) obtained an order from the Appellate Division, First Department affirming a lower court's denial of a plaintiff's motion to amend his pleadings. The case involved claims of injury arising out of the plaintiff's employment in the client's medical school's microbiology laboratory. After many years of litigation, the Workers' Compensation Board held that the plaintiff was an employee, which was affirmed by the Appellate Division, Third Department. After the Court of Appeals refused to hear the appeal of this decision, we moved for summary judgment, arguing the case was barred by workers' compensation law. The plaintiff cross-moved to amend his complaint to include additional claims alleging violation of New York's "Whistleblower" and anti-discrimination laws. The lower court granted summary judgment, dismissing the negligence claims as barred by the workers' compensation law, and denied the motion to amend. The Appellate Division affirmed the denial, effectively ending a case that began in 2003.

In a mixed medical malpractice/product liability case in New York State Supreme Court, Kings County, **Charles Gura** (Westchester, NY) and **Michael Kelly** (Long Island, NY) obtained summary judgment in favor of a thoracic surgeon. The claims involved an experimental weight loss device that was inserted and removed by the co-defendants. The device had perforated the plaintiff's esophagus, and our client was called in to repair it. Our motion for summary judgment was granted on the grounds that the plaintiff could not establish any deviations from accepted standards of care or that our client's treatment was a proximate cause of any claimed injury.

Bradley Blystone and **Andrea Diederich** (Orlando, FL) obtained a Fifth District Court of Appeals order affirming dismissal, with prejudice, of a medical malpractice action

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against an orthopaedic surgeon and his group. In the underlying action, the plaintiff alleged the defendants, her orthopaedic surgeon and his group, negligently fractured her right lower femur while performing hip replacement surgery. Prior to filing her medical negligence complaint, the plaintiff submitted pre-suit affidavits from an emergency room physician, a radiologist and a nurse, all averring that her orthopaedic surgeon's actions negligently caused the fracture of her femur. Following a hearing on the defendants' motion to dismiss, the trial court dismissed the action, with prejudice, and entered final judgment in favor of the defendants. Brad and Andrea were engaged to handle the appeal. On appeal, the Fifth DCA addressed whether, under Florida's Medical Malpractice Act, a pre-suit affidavit submitted by a plaintiff from a health care provider who does not specialize in the same field as the defendant meets the statutory pre-suit investigatory requirements for filing a medical negligence suit. The Fifth DCA held that it does not and affirmed the final judgment in favor of the defendants.

Matthew Keris (Scranton, PA) received a defense verdict in a wrongful death and survival medical malpractice arbitration involving a single mother in her twenties who died from toxic shock syndrome. The plaintiff was admitted to a hospital facility with a provisional diagnosis of anaphylaxis, secondary to a medication allergy. She deteriorated under the supervision of a nurse practitioner while on a telemetry unit and was eventually transferred to the intensive care unit. The plaintiff succumbed to her condition several days later.

Joseph L. Hoynoski, III (King of Prussia, PA) obtained a defense verdict in an arbitration in a Montgomery County medical malpractice case. The plaintiff complained of a shoulder injury after a hysterectomy performed by an OB\GYN at our client hospital. The plaintiff claimed a surgical tool malfunction that occurred during the surgery was caused by the surgeon's negligence, which prolonged the surgery and caused the plaintiff to slide during the procedure into an awkward position. The co-defendant anesthesiologist recognized the slide and did not reposition the plaintiff as her body was still supported. The plaintiff claimed the anesthesiologist should have repositioned her. According to the plaintiff, she suffered a torn rotator cuff and needed surgery. The evidence showed that, in addition to the surgical tool malfunction, the surgery was actually prolonged because of the plaintiff's size and abnormal anatomy. The evidence also showed the plaintiff had pre-existing shoulder symptoms, which were aggravated during the procedure. She completely healed with physical therapy. The plaintiff then injured her shoulder during a bowling party, which tore her labrum, requiring surgery. The arbitrator issued an opinion finding for all of the defendants, noting that the injuries the plaintiff suffered after the hysterectomy surgery were a natural consequence of the surgery, not due to any negligence, as the procedure, while protracted, was not prolonged due to negligence. The bowling injury was not associated.

Anthony Williott and **Missy Minehan** (Harrisburg, PA) obtained judgment of non pros in favor of the defendant, a long-term care provider in Allegheny County, based upon the plaintiff's failure to meaningfully prosecute the action since 2014. Although the conduct described in the complaint occurred between September of 2010 and January of 2011, the plaintiff took no substantive steps on the docket to move this case forward after July of 2014. The plaintiff also failed to affirmatively move this case forward in discovery in any meaningful way beyond responding to the defendant's efforts to obtain the plaintiff's medical records, answering the defendant's written discovery, and producing the plaintiff for a discovery deposition. The plaintiff did not serve the defendant with any written discovery, subpoena any former health care providers, request dates to take the discovery depositions of any current employees, or produce any expert reports. This lengthy period of inactivity and failure to fully and timely respond to the defendant's discovery efforts caused actual prejudice to the defendant because: (1) of the inevitably fading memories of any and all pertinent fact witnesses; (2) by the time the plaintiff finally returned the signed authorization, the third-party hospital had disposed of the retained wound VAC sponge that was surgically removed and that was the subject of the plaintiff's professional liability complaint; and (3) the defendant was sold to a different owner, so it no longer had access to or control over witnesses and records.

PROFESSIONAL LIABILITY DEPARTMENT

Lightning struck a second time for **Teresa Ficken Sachs** (Philadelphia, PA) who presented oral argument again before the Supreme Court of the United States in a case involving a dispute over a local cemetery ordinance that the landowner considers an unconstitutional taking of her property. Inherent to the matter is a 1985 Supreme Court precedent that controls where many property rights battles

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are litigated. Representing the township, Terry argued that eliminating the precedent would trigger federal jurisdiction over local land-use regulations across the country. The case was argued once in October of 2018, with an eight-justice bench, but the Court requested additional briefing and listed the case for plenary reargument.

Peter S. Read (New York, NY) obtained dismissal of the plaintiff's complaint and all cross claims against our client, a commercial plumbing contractor, on a motion for summary judgment in a construction defect case. The case involved claims by a homeowners association for property damage and replacement costs, allegedly in excess of $6 million, as a result of construction defects in the design and installation of plumbing, water collection, drainage, grading, and other water runoff and drainage systems. In addition to our client, the named defendants were the project architects, the general contractor, various plumbing, electric, concrete and grading trades, and the water and electric utilities, all of whom asserted cross claims. We were granted summary judgment on the grounds that the plaintiff's breach of contract claim failed due to lack of privity and proof that the plaintiff was not a third-party beneficiary of our subcontract. All claims and cross claims for negligent installation/breach of warranty were dismissed upon proof that our client's work was performed in accord with project specifications and the applicable building code, and that none of its work contributed to any drainage issues or resulting property damage.

On the eve of trial, **Jack Slimm** and **Jeremy Zacharias** (Mt. Laurel, NJ) obtained summary judgment, dismissing a complex legal malpractice case in which damages were sought in connection with an underlying land transaction. This case included allegations that the attorney/client had multiple conflicts. The plaintiffs' claim for damages included an allegation of $8 million in lost profits due to our client advising the plaintiffs to sell out of this business deal early, while another client of the attorney made $40 million in this deal! Jack and Jeremy were successful in obtaining dismissal by demonstrating that the plaintiffs' experts could not prove their lost profit claim due to a New Jersey's New Business Rule and due to the fact that they could not prove any out-of-pocket damages in this case.

Aaron Moore and **Alesia Sulock** (Philadelphia, PA) obtained summary judgment in a legal malpractice action in the Philadelphia Court of Common Pleas. The plaintiff, a police officer, was arrested after failing to appear in court following a hit-and-run car accident involving his motor vehicle. After proving that he was not the driver of the vehicle, the charges were dismissed. The plaintiff then sought damages from the township, police department and individual police officers for alleged violations of his civil rights. Our client, an attorney, represented the plaintiff in responding to summary judgment and appealing the dismissal of his civil rights claims. Ultimately, the dismissal of the plaintiff's claims was affirmed. The plaintiff sued the attorney involved for alleged malpractice. We successfully argued on summary judgment that the plaintiff's claims were time-barred and failed as a matter of law because the plaintiff could not have prevailed in the underlying litigation. In fact, the plaintiff brought similar civil rights claims in three separate lawsuits, all of which failed. The court agreed, dismissing the legal malpractice claims as time-barred and further stating that, even if they were not barred by the statute of limitations, the plaintiff's claims failed as a matter of law because he could not demonstrate that he would have prevailed but for something the attorney did or failed to do.

Mark J. Kozlowski (Scranton, PA) obtained summary judgment in favor of a town and several of its police officers in an excessive force and malicious prosecution case in the U.S. District Court for the Middle District of Pennsylvania. The night before his daughter's graduation, the plaintiff got into a fist fight with a bar owner. The owner suffered significant injuries, and the plaintiff fled the scene. He was spotted a short time later by one of the defendant officers, pursued and arrested. The plaintiff was charged with disorderly conduct, harassment, simple assault and aggravated assault. Following the criminal trial, the plaintiff was found not guilty. He then sued our clients—the town and several officers—for excessive force and malicious prosecution. The plaintiff's wife also sued, alleging loss of consortium and emotional distress. The wife's claims were dismissed via a motion to dismiss. Following the close of discovery, motions for summary judgment were filed on behalf of our clients. The court granted our motions, finding the existence of probable cause as a defense to claims for malicious prosecution and wrongful arrest. The court also found that the arresting officer acted reasonably during the pursuit and detention of the plaintiff.

Donald Carmelite and **Brian Murren** (Harrisburg, PA) successfully argued a series of preliminary objections resulting in the dismissal of the plaintiff's lawsuit, with

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prejudice. Following the termination of his employment with a Pennsylvania county, the plaintiff filed a lawsuit, raising a claim pursuant to the Pennsylvania Whistleblower Act and a claim for wrongful termination. Don and Brian successfully argued that the wrongful termination claim was barred under the Pennsylvania Political Subdivision Tort Claims Act. Concerning the whistleblower claim, it was demonstrated to the court on the face of the pleadings that the plaintiff lacked a temporal proximity between the county's alleged wrongdoing and the plaintiff's "good faith" report as defined within the Act. The court agreed and found that the amended complaint failed to set forth a cause of action under the Whistleblower Act, dismissing the lawsuit, with prejudice. Don and Brian also succeeded on a summary judgment motion in a slip and fall lawsuit filed against a Pennsylvania county. Don secured an admission from the plaintiff during her deposition that she failed to pay attention to where she was walking at the time of the fall and, as a result of her inattention, failed to see a patch of ice allegedly on the county's property. Based upon this, the court granted summary judgment in favor of the county.

Scott G. Dunlop and **Danielle M. Vugrinovich** (Pittsburgh, PA) obtained summary judgment in favor of a borough, its police chief, a detective, a lieutenant and a school resource officer in a civil rights lawsuit. The plaintiff, a local high school teacher, alleged that no probable cause existed to charge him with witness intimidation, arising from an alleged incident involving a female student who was a victim of institutional sexual assault by another teacher. In its opinion granting summary judgment, the court determined that the Affidavit of Probable Cause, which was the basis for charges against the plaintiff, was supported by the evidence at the time the affidavit was prepared. The court also held that, because no violation of Section 1983 existed, all claims against the individuals and the municipality must be dismissed. Finally, the court ruled that the individual defendants enjoyed qualified immunity because no constitutional violation existed.

Scott G. Dunlop and **Allison Genard** (Pittsburgh, PA) obtained summary judgment in a civil rights case involving local police officers. The plaintiff originally filed a civil rights action under Section 1983 for search and seizure, false imprisonment, excessive force and Monell liability. The plaintiff complained that when the police officers escorted his estranged wife into their house to retrieve her belongings, his rights were violated when the officers did not stop the entry and then interjected when the plaintiff and his wife became engaged in a physical altercation. Following the filing of a second amended complaint, we filed a motion to dismiss all counts. Following oral argument, the court permitted the filing of a motion for summary judgment. We argued that, not only did the plaintiff fail to allege sufficient facts, but the documentary evidence supported judgment in favor of the defendants. The court agreed and entered summary judgment on all counts, holding that the defendants were entitled to qualified immunity.

Christopher Boyle (King of Prussia, PA) obtained summary judgment on behalf of our clients, four township police officers, accused of excessive force. An 87-year-old woman called 911 when she saw the plaintiff, whom she did not know, sitting in his car in her driveway. The four officers arrived to investigate the clearly intoxicated man, who refused to cooperate by providing his name. During the course of his arrest, he bit one of the officers and resisted arrest, leading to his conviction on several counts, including possession of methamphetamine found in his pocket. The court agreed that the plaintiff's claims of being hit in the head with four police flashlights, although he received only a small cut that did not require stitches, was not a plausible tale, especially absent any expert report establishing causation. The court granted our clients' qualified immunity.

Samuel Cohen (Philadelphia, PA) obtained a defense award on behalf of his broker-dealer client following a three-day FINRA arbitration. The claimants alleged their investment portfolio was improperly over concentrated in speculative energy and precious metals investments and that the portfolio allocation was unsuitable for their moderate risk tolerance. The claimants sought damages of approximately $365,000 in purported losses in the energy and precious metals investments. In the award denying the claimants' claims in their entirety, the arbitrators ordered the claimants to pay over $3,000 in forum fees.

WORKERS' COMPENSATION DEPARTMENT

Tony Natale (Philadelphia, PA) defended the Corporation of Roman Catholic Clergymen in an appeal arising out of the

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claimant's allegations that she should receive workers' compensation benefits for the time out of work she was using to undertake treatment for a work-related injury. The Workers' Compensation Appeal Board upheld the original decision of the workers' compensation judge on the issue and dismissed the claimant's appeal on the basis that medical treatment must be undertaken outside of work hours, if available.

Tony Natale (Philadelphia, PA) successfully defended a law firm in litigation surrounding an alleged work injury with resultant post-concussion syndrome. The claimant tripped and fell at work, alleging that he struck his head during the fall. He donned sunglasses at the hearing and depositions, claiming his injury led to photophobia and post-concussion syndrome. During discovery, it was determined that the claimant had suffered and treated for headache symptoms and memory loss prior to the alleged work injury. Surveillance revealed that the claimant did not use sunglasses when carrying out everyday activities. The claimant's medical expert admitted on cross-examination that he was unaware of the claimant's pre-existing medical condition and was not aware of the surveillance evidence when arriving at his opinions and conclusions. The workers' compensation judge found the claimant and the medical expert not to be credible, leading to the successful defense of the claim.

Tony Natale (Philadelphia, PA) additionally prosecuted a termination petition and defended against a review petition to add injuries for a mushroom distribution corporation. The claimant originally sustained an injury to his lower back while lifting mushroom cases. Ultimately, the claimant was relegated to working a light-duty job for four hours per day due to the injury. The work restrictions were in part based on an Functional Capacity Evaluation (FCE) the claimant undertook at the advice of his treating physician. The employer secured an independent medical examination from a nationally renowned orthopedic surgeon. The claimant's credibility was shrouded in doubt based on this exam. The employer filed a termination petition, alleging full recovery from the work injury. The claimant responded by filing a review petition to add additional injuries to his work-related condition, including an S-I joint dysfunction. The parties proceeded to litigation. During cross examination of the claimant's medical expert, Tony secured various admissions, including the fact that the expert did not review the claimant's testimony and that he relied on an FCE, which described the claimant as magnifying his symptoms. The claimant's expert also admitted that he felt the claimant was 49 percent not credible—a fact the workers' compensation judge found extremely important. The termination petition was granted, finding the claimant fully recovered, and the review petition was dismissed.

Michele R. Punturi (Philadelphia, PA) successfully defended a worldwide youth adult development organization in litigation surrounding a fall at work. The claimant allegedly fell when he walked into an object that he claimed included a metal connector, striking his head and resulting in his glasses falling off his head and temporary total disability. The claimant was diagnosed with orthopedic, neurologic and neuro-ophthalmologic injuries, including but not limited to the neck, eyes, skull contusion, concussion and post-concussive syndrome. The employer captured the incident on video. Due to the questionable mechanism of injury, Michele convinced the workers' compensation judge to travel to the employer's location to view the actual video of the incident and observe the surroundings where the claimant continued to work out in the gym. The parties submitted multiple expert opinions on the nature of the claimant's condition and disability status. The employer presented multiple fact witnesses, corroborating the video and lack of disability. The judge found only a head contusion, full recovery and no disability based upon the video of the incident and the fact witness for the employer. The judge further found no liability for the claimant's extensive litigation costs. ■

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MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

In a workers' compensation appeal, **Audrey Copeland** (King of Prussia, PA) successfully defended against the claimant's appeal of the Workers' Compensation Appeal Board's decision that reinstated the claimant's total disability status as of June 20, 2017—the date of *Protz v. Workers' Comp. Appeal Board (Derry Area School District)*, 161 A.3d 827, 841 (Pa. 2017)(*"Protz II*"). The claimant argued that the Appeal Board was required to reinstate total disability back to the date of his IRE, September 10, 2013. The court held that, in accordance with the en banc *Whitfield v. Workers' Comp. Appeal Board (Tenet Health System Hahnemann LLC*), 188 A.3d 599 (Pa.Cmwlth.), neither the original IRE date nor the *Protz II* date were applicable. The court also held that the claimant's total disability status could be reinstated no earlier than the date he filed his review petition and the claimant bore the burden of proving continuing disability. *Womack v. Workers' Comp. Appeal Board (Philadelphia Parking Authority)*, 2019 Pa.Commw. Unpub. LEXIS 129 (Commw.Ct. Mar. 13, 2019).

Audrey also convinced the Superior Court to affirm the trial court's decision granting a motion to dismiss a case filed in Philadelphia based on *forum non conveniens*, without prejudice, to refile in an appropriate forum. The plaintiffs were out-of-state residents, the alleged exposure and all medical treatment occurred out of state, but some defendant entities were alleged to have Pennsylvania connections. The Superior Court reasoned that it was within the trial court's discretion to weigh some of the public and private factors considered in such an analysis more heavily than others, and the fact that cases with similar facts had different results did not establish that the trial court abused its discretion. *Rhyne v. United States Steel, et al.*, 2019 Pa. Super. Unpub. LEXIS 638 (Pa.Super. Feb. 22, 2019). ■

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OTHER NOTABLE ACHIEVEMENTS*

RECOGNITION

John J. Hare (Philadelphia, PA), co-chair of the Appellate Advocacy and Post-Trial Practice Group, and **Heather Russell Fine** (Philadelphia, PA), shareholder in the firm's Casualty Department, have been selected to join the International Association of Defense Counsel (IADC). The IADC is an invitation-only organization of 2,500 peer-reviewed inside and outside counsel, and insurance industry executives representing companies across the world.

Congratulations to **John J. Hare** and **Teresa Ficken Sachs** (Philadelphia, PA) who have been selected 2019 "Influencers of Law" in the area of business litigation by *The Philadelphia Inquirer*. The awards program recognizes attorneys who have raised the bar through outstanding leadership and counsel, and whose contributions have helped to shape, change and transform the legal industry in Pennsylvania.

Brooks Foland (Harrisburg, PA) was recently installed as the 2019 president of the Dauphin County Bar Association. Brooks has been a member of the Bar Association for several years and most recently served as its vice president.

Ashley Talley (Philadelphia, PA) was awarded a Westfield Insurance Company 'Golden Gavel' for outstanding legal representation on behalf of the insurer in a complex workers' compensation case. The Golden Gavel Award is a formal recognition program designed by Westfield to recognize

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outstanding achievement by its outside counsel. Nominations for award winners are completed by Westfield claims professionals and submitted to its legal unit for consideration.

MARSHALL DENNEHEY ANNOUNCES 2019 NEW JERSEY SUPER LAWYERS AND RISING STARS

Eight attorneys from our New Jersey offices have been selected to the 2019 edition of *New Jersey Super Lawyers** magazine. The attorneys selected to the 2019 New Jersey Super Lawyers list include:

- John L. Slimm, Professional Liability Defense
- Lary Zucker, Personal Injury Defense and Entertainment & Sports Defense

The attorneys selected to the 2019 New Jersey Super Lawyer Rising Stars list include:

- Ariel Brownstein, Insurance Coverage
- Alicia Calaf, Personal Injury General Defense
- Christopher DiCicco, Transportation/Maritime Litigation
- Julie Dorfman, Civil Litigation Defense
- Ryan Gannon, Personal Injury, Medical Malpractice Defense
- Heather LaBombardi, Medical Malpractice Defense

SPEAKING ENGAGEMENTS

Eric Fitzgerald and **Michele Punturi** (Philadelphia, PA) were presenters at the CLM Annual Conference in Orlando. Eric joined a panel of industry professionals to present "Tear It Up and Start Over – The New Generation of AFAs." This panel discussed the new generation of AFAs, including what is working and what are the next great ideas. In "Driven to Distraction – Mitigating Distracted Driving Claims," Michele joined other industry professionals to discuss the importance of developing a roadmap to minimize the impact and effect of distracted driving by limiting exposures, reducing costs, and mitigating workers' compensation claims.

Christopher Dougherty and **David Shannon** (Philadelphia, PA) participated in the 3rd Annual Insurance Law Global (ILG) conference in London. The theme of the conference was "Privacy, Cannabis and the Future of Claims." More than 100 insurance and claims professionals attended the half-day event at the Lloyds of London Library. Speakers included ILG representatives as well as outside business and insurance leaders. While in London, Chris was elected to serve another year on ILG's Board of Directors.

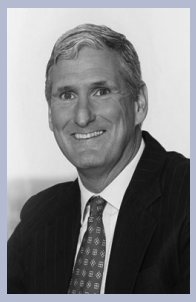
Kacey Wiedt and **Christopher Conrad** (Harrisburg, PA) presented "Navigating the Bermuda Triangle: The Intersection of Workers' Compensation, FMLA and ADA." The presentation was part of the risk management training program for the County Commissioners Association of Pennsylvania. The session explored the interplay between the multiple state and federal laws, and provided attendees with best practices for compliance strategies to minimize liability, and tips for avoiding costly mistakes related to leave issues.

Janice Merrill and **Chanel Mosley** (Orlando, FL) were the featured speakers at an educational workshop hosted by the Florida Society of Healthcare Risk Management & Patient Safety. Their presentation, "Strategies for Optimizing Risk Management & Patient Safety in Long-Term Care," focused on techniques to manage communications between families and healthcare providers, the importance of promoting collaboration between LTC and acute care providers during transitions in patient care, and how to avoid pitfalls in practice that create litigation exposure, and what to do when problems arise.

Paul Krepps (Pittsburgh, PA) was invited to present a seminar for Allegheny County law enforcement leadership on the topic of the law and litigation as it applies to mass disturbances. The event was sponsored by the University of Pittsburgh. Paul's presentation was entitled "Mass Disturbances Law and Litigation." The seminar covered a number of topics which included the history of development of the Mobile Field Force Concept, the three stages of potential litigation, civil rights that are implicated in mass disturbances, and a recommended methodology for preparing for and assisting in the defense of litigation arising out of such events. The seminar was attended by over 100 command-level police officers.

John Hare (Philadelphia, PA) presented a seminar on the state constitution to trial and appellate judges at the annual meeting of the Pennsylvania State Trial Judges Conference. The seminar focused on the increasing use of the state constitution to develop claims and decide cases. ■

** Prior Results Do Not Guarantee A Similar Outcome*



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.

COMMON PURPOSE AND JOINED EFFORTS

Harold L. Moroknek

When my previous law firm disbanded, the future abruptly shifted from comfortable to unsettled and unknown. After leaving the Orange County District Attorney's Office in 1992 to join private practice, I had seemingly found solid footing at a law firm where I had hoped to spend my career. However, the firm broke up in 2007. I was quickly faced with an uncertain future and a young family relying on me. Several attorneys and I sought to reestablish ourselves and somehow support our families with no office to go to, no clients of our own and no steady stream of revenue coming in the door.

Although that time was difficult, and at times scary, it was also exciting. Our new firm was founded with my name on the door. We embarked on a quest to build our brand in the New York metropolitan area. After several months of hard work, and far too many without any revenue, we were able to establish roots and a client base. Being part of a firm that was built from the ground up gave me the opportunity to develop my practice style and the hands-on, personal service my clients expect today. While we enjoyed many successes, our platform remained limited to the local New York area at a time when national and multi-national transportation brands were directing their litigation to firms that could provide legal services both within and outside of New York. Unfortunately, our firm's marketing plan and long-term vision was not sufficient to satisfy my clients or to allow for meaningful growth.

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* *Harold, a shareholder, works in our Rye Brook, New York office. He can be reached at 914.977.7316 or hlmoroknek@mdwcg.com.*

Pennsylvania—Public Entity & Civil Rights Litigation

MOVEMENT NO LONGER REQUIRED: EXPANSION OF THE "OPERATION OF MOTOR VEHICLE" EXCEPTION IN MUNICIPAL CASES SINCE *BALENTINE*

By Michael L. Detweiler, Esq.*

KEY POINTS:

- Claims against local governmental agencies pursuant to vehicle liability exception were actionable only if harm was caused by the voluntary movement of a government vehicle.
- Supreme Court has determined that movement of a vehicle, whether voluntary or involuntary, is not required by language of the vehicle liability exception to governmental immunity under PSTCA.

Michael L. Detweiler

The Pennsylvania Political Subdivision Tort Claims Act (PSTCA), 42 Pa. C.S.A. §§ 8541, *et. seq,* provides local governmental agencies in Pennsylvania with qualified immunity for tort liability, subject to eight enumerated exceptions. One of those exceptions, the "vehicle liability exception," was expanded dramatically in scope last August by the Pennsylvania Supreme Court in *Balentine v. Chester Water Authority,* 191 A.3d 799 (Pa. 2018). For 30 years, claims against local governmental agencies pursuant to the vehicle liability exception were actionable only if the injuries or damages were caused by the voluntary movement of a government vehicle. For example, *see Love v. City of Philadelphia*, 543 A.2d 531 (Pa. 1988). Now, however, the *Balentine* court has determined that movement of a vehicle, whether voluntary or involuntary, is not required by the statutory language of the vehicle liability exception to governmental immunity under the PSTCA.

In *Balentine*, the decedent was a contractor hired by the Chester Water Authority to rehabilitate a section of its water distribution system. On the afternoon of August 15, 2012, the decedent was working on the side of a two-lane road with no parking lanes on either lane of travel. The decedent was inside a ditch located between the sidewalk and the curb when a Water Authority inspector drove up to the work site and parked his vehicle, with the engine running, approximately 10 to 15 feet from the ditch. Testimony from workers at the worksite indicate that the Water Authority vehicle was either 80 percent or "completely" in the roadway while parked.

The Water Authority inspector activated the vehicle's four-way flashers and the amber strobe light on the roof of the vehicle, which he then exited. He walked to the front of the vehicle and placed blueprints on the hood. Approximately five minutes later, a vehicle operated by a third party (not affiliated with the Water Authority) struck the inspector's parked vehicle, causing it to move forward. The Water Authority vehicle struck the decedent as he worked in the ditch, dragging him and pinning him under the vehicle when it came to a stop.

The governmental defendants obtained summary judgment from the lower court, arguing that the motor vehicle exception to governmental immunity did not apply. On appeal, relying on the fact that the Water Authority vehicle was parked at the time of the accident, the Commonwealth Court affirmed, describing itself as "constrained" to conclude as a matter of law that the vehicle was no longer in operation when the accident occurred. Consequently, the Commonwealth Court concluded that the involuntary movement of a vehicle does not constitute operation for purposes of the motor vehicle exception to governmental immunity.

The Pennsylvania Supreme Court reviewed the Commonwealth Court decision on appeal and centered its focus on the import and meaning of the vehicle liability exception, which states in pertinent part:

> **(b) Acts which may impose liability.**--The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
>
> (1) Vehicle liability.--The operation of any motor vehicle in the possession or control of the local agency, provided that the local agency shall not be liable to any plaintiff that claims liability under this subsection if the plaintiff was, during the course of the alleged negligence, in flight or fleeing apprehension or resisting arrest by a police officer or knowingly aided a group, one or more of whose members were in flight or fleeing apprehension or

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IS A JURY FREE TO FIND NEGLIGENCE DID NOT CAUSE INJURY?

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undisputed that the accident injured the plaintiff, if the defendant's negligence and its causal relationship to the accident were in dispute and there was evidence from which the jury could find that the defendant's negligence did not cause the accident."

These cases illustrate the importance of conducting a thorough and complete review of all records and reports containing statements from the plaintiff or a witness from the date of the underlying incident up to and including the time of trial, regardless of the context in which those statements were made. At minimum, conflicting and contradictory statements from a plaintiff are valuable pieces of evidence that may gain leverage in potential settlement negotiations and, at best, when deployed properly via cross examination and during argument before a jury, a foundation upon which a jury can reach a verdict in your favor. ■

NEW STRATEGIC TOOL: FILING A MOTION TO COMPEL

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In light of the sweeping prevalence of social media today, it can be assumed that plaintiffs' counsel generally advise their clients to avoid posting on social media during the pendency of litigation. However, social media can be addictive, and it may be difficult for some to refrain from posting. Accordingly, it is important to access, as soon as possible, the social media accounts of plaintiffs and the public profiles of other individuals in their social media network. Just be careful not to tip your hand while you are perusing a social media account by inadvertently "liking" a post. Strategically, consider the following:

- Determine whether there may be relevant information in a plaintiff's social media account.
- Ask the plaintiff if his/her social media account is private or open to the public.
- Request the plaintiff's social media account access information.
- File a motion to compel the plaintiff's user name and password to social media accounts, setting forth the possible relevance of the information contained in those accounts. ■

THERE ARE NO HOTELS IN SMETHPORT, PENNSYLVANIA

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Super. Unpub. LEXIS 1037 (Pa.Super. Jan. 31, 2013) dealt with a jury bias issue that was revealed during deliberations: a juror failed to reveal during jury selection that he had been a patient of the defendant physician. More recently, the Pennsylvania Superior Court ruled that a judge must preside over jury selection, *Trigg v. Children's Hospital*, 187 A.3d 1013 (Pa.Super. 2018), undoing decades of accepted practice in Allegheny County where jury selection is conducted by counsel and a court employee, with a judge only being involved if there is a challenge of some sort. *Trigg* is currently being reviewed by the Pennsylvania Supreme Court. *See*, *Trigg v. Children's Hospital*, 2019 Pa. LEXIS 400 (Pa., Jan. 23, 2019). ■

Pennsylvania—Retail Liability

RULE OF THUMB VS. RULE OF LAW: PRESERVATION OF VIDEO SURVEILLANCE AND SPOLIATION

By Daniella R. Price, Esq.*

KEY POINTS:

- A business or property owner's conscious and unilateral decision to preserve only a fraction of the requested video because of a "rule of thumb" constitutes spoliation.
- Video surveillance for an extended period prior to a slip and fall is highly probative evidence.
- Businesses and property owners must pay particular attention to video surveillance preservation letters when received within the timeframe to review and preserve the requested video.

Daniella R. Price

It was once said that "surveillance breeds conformity." In the legal context, *Marshall v. Brown's IA, LLC*, 2019 Pa. Super. LEXIS 279 (Pa.Super. Mar. 27, 2019), a recent Superior Court decision, creates unsettling law on the preservation of video surveillance evidence and spoliation. In Pennsylvania, spoliation of evidence is defined as "the non-preservation or significant alteration of evidence for pending or future litigation." *Pyeritz v. Pennsylvania*, 32 A.3d 687, 692 (Pa. 2011). The spoliation doctrine is broadly applicable to cases where "relevant evidence" has been lost or destroyed. *Mt. Olivet Tabernacle v. Edwin L. Wiegand Div.*, 781 A.2d 1263, 1269 (Pa.Super. 2001). Where a party loses or destroys evidence relevant to a lawsuit, the court may permit an adverse inference instruction to the jury, or "spoliation inference," that the lost or destroyed evidence would have been unfavorable to the offending party.

According to the Superior Court, the scope of relevant evidence is neither defined by the plaintiff's request nor is it defined by the "rule of thumb" of a property owner. In March 2019, the Superior Court in *Marshall* vacated a defense verdict and ordered a new trial, finding that the trial court took an "unreasonably narrow view of relevant evidence in concluding that no spoliation occurred in a premises liability case."

The plaintiff in *Marshall* slipped and fell on water in the produce aisle of a grocery store and sustained injuries. Approximately two weeks after the incident, the store received a preservation letter from the plaintiff's attorney requesting that the store retain video surveillance of the accident and the area in question for six hours prior to the accident and three hours after the accident, for a total of nine hours of video footage. The letter also cautioned that failure to preserve the evidence may result in an adverse inference against the store. Based on the store's "rule of thumb" to preserve video surveillance from twenty minutes before and twenty minutes after a fall, the store preserved 37 minutes of the video capturing the fall. The remainder of the video was automatically overwritten after 30 days. The video retained did not capture the time between the last store inspection and the plaintiff's fall, almost 50 minutes later.

The *Marshall* court found the store's conscious and unilateral decision to preserve only a fraction of the requested video because of a "rule of thumb" constituted spoliation. The court reasoned that the video of the area for a more extended period prior to the plaintiff's fall may have yielded evidence highly probative of whether the property owner had notice or exercised reasonable care for the safety of its customers. The store offered evidence of its reasonable care in keeping the premises safe for its customers, such as employee safety training, financial incentives for employees who locate and clean up spills, and the inspection log. In addition, there was testimony that preserving nine hours of video was time-consuming and expensive. However, the court made it a point to note that the store inexplicably did not adhere to its own policy of preserving 40 minutes of video and "conspicuously absent was testimony that anyone watched the six-hour period prior to plaintiff's fall to determine that it did not contain any relevant evidence."

Ultimately, the court held that the video surveillance from the hours prior to the plaintiff's fall was relevant for showing far more than the water on the floor. The court concluded that probative value lay in demonstrating what steps, if any, the store took to make the premises reasonably safe for visitors in the hours leading up to the plaintiff's fall. Though arguable, such evidence was relevant to showing knowledge, constructive notice and a lack of care for the safety of business customers.

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JUST HOW HARD DOES *GALLAGHER* HIT

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entirely and does not implicate Section 1738. The court did, however, note that GEICO had issued both policies and, therefore, could not argue that it was not aware of all of the household vehicles prior to the loss at issue.

In its footnotes, the Supreme Court acknowledged its prior decisions upholding the identical household vehicle exclusion, but avoided issues of *stare decisis* by noting that the cases relied upon by GEICO and the Superior Court were not binding precedent upon the Supreme Court. Perhaps in an effort to mitigate the impact of its ruling, the Supreme Court commented that insurers can "require disclosure of all household vehicles and policies as part of its application process." In a strongly-worded dissenting opinion, Justice Wecht pointed out the practical issues associated with the majority's decision and its potential impact on the insurance industry.

The majority's ultimate holding seems to turn on the unique facts before it: there were two insurance policies issued by the same insurer; the claimant was the named insured on both policies; the insurer required issuance of both policies; and the claimant-named insured selected and paid for stacking under both policies. The court's focus on these specific facts, and the fact that the issues certified on appeal were also framed around these facts, should render the sweeping statement at the close of the majority's opinion—that "the household vehicle exclusion violates the MVFRL"—mere *dicta*. Regardless, the scope and breadth of the majority's ruling will likely be hotly litigated in the coming years by insurers and insureds alike. ■

MOVEMENT NO LONGER REQUIRED

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> resisting arrest by a police officer. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

42 Pa.C.S. § 8542(b)(1).

The Supreme Court held that the the word "operation" was not defined in the PSTCA and applied definitions of "operation" from both *Black's Law Dictionary* ("the process of operating or mode of action") and the *American Heritage Dictionary* ("to run or control the functioning of: operate a machine"). Moreover, the vehicle liability exception to governmental immunity refers only to "operation," not to "motion." Accordingly, the Supreme Court adopted the dissenting opinion of Justice Newman in *Warrick v. Pro Cor Ambulance, Inc*., 739 A.2d 127, 128-129 (Pa. 1999), who opined: "The process of operating a vehicle encompasses more than simply moving the vehicle. When a person 'operates' a vehicle, he makes a series of decisions and actions, taken together, which transport the individual from one place to another. The decisions of where and whether to park, where and whether to turn, whether to engage brake lights, whether to use appropriate signals, whether to turn lights on or off, and the like, are all part of the 'operation' of a vehicle."

The Supreme Court, therefore, reversed the decision of the Commonwealth Court. It remanded the matter to the trial court, holding that the plaintiff had pled facts sufficient to establish a *prima facie* cause of action in negligence base on acts that constitute the operation of a vehicle, thereby invoking the governmental immunity exception.

The *Balentine* decision reverses 30 years of Pennsylvania precedent requiring voluntary movement of a vehicle in order for the vehicle exception of the PSTCA to apply. In addition, the court held that where a vehicle obstructs a roadway, it is assumed that a government agent operated the vehicle to arrive at that position. The *Balentine* decision also means that the scope of "vehicle liability exception" to the PSTCA may be expanded to any applicable negligent theory involving a 'non-moving' governmental vehicle. Perhaps most importantly, the *Balentine* decision is a dramatic reminder of the fluid interpretation of the PSTCA and the tendency of the courts to expand the scope of the eight enumerated exceptions. It is imperative that municipalities, local government agencies and their carriers keep abreast of these developments to ensure that these entities do not rely on PSTCA immunity arguments that are no longer recognized by the courts in Pennsylvania. ■

Pennsylvania—Workers' Compensation

APPLYING *BAXTER* OR *LITTLE*: EXAMINING THE BURDEN OF PROVING A FULL RECOVERY IN THE CONTEXT OF A PRE-EXISTING CONDITION

By Ashley S. Talley, Esq.*

KEY POINTS:

- Apply *Baxter* when there is an aggravation of an unrelated pre-existing condition and *Little* when the pre-existing condition is work-related.
- It is irrelevant whether the pre-existing condition occurred from prior employment for purposes of examining whether to apply *Baxter* or *Little*.
- So long as there is a continuity of employment, average weekly wages should be calculated under Section 309(d), even if there are layoffs and fewer earnings in certain quarters of employment.

Ashley S. Talley

A fundamental principle of Pennsylvania workers' compensation law is that a claimant who suffers a work-related injury is entitled to total disability benefits. Conversely, a claimant who no longer suffers from a work-related injury is, therefore, no longer entitled to total disability benefits. The question of whether a claimant is fully recovered is often nuanced, and even more so when dealing with an individual who has aggravated a pre-existing condition. Is the disability work-related? Or, is it attributable to an underlying, non-work-related condition? Each has very different legal implications. Generally speaking, a claimant has fully recovered from an aggravation when he has returned to his baseline condition. However, when the underlying injury is work-related, the claimant has a "materially different baseline" and, as such, is not fully recovered if there are residual conditions that prevent a return to pre-injury work.

The Commonwealth Court examined these issues in the recently published case of *Kurpiewski v. WCAB (Caretti, Inc.)*, 202 A.3d 870 (Pa.Cmwlth. 2019). Mr. Kurpiewski worked at various job sites as a union bricklayer. Over his approximately 18 years of work, the claimant was exposed to chromium, a compound found in bricks, concrete and mortar. He had previously been diagnosed with allergic contact dermatitis and suffered a recurrence while working for the employer. A claim petition was filed for a work-related allergy to chromium, which was granted by the workers' compensation judge. In awarding benefits, the judge dismissed the applicability of *Bethlehem Steel Corporation v. WCAB (Baxter)*, 708 A.2d 801 (Pa. 1998), which holds that a claimant has returned to baseline and, therefore, has fully recovered from an aggravation injury "where there are no restrictions from the work-related injury, [despite]… the threat of future recurrences prevent[ing.]…claimant from performing [the] pre-injury job."

Both Mr. Kurpiewski and the employer appealed, and the Workers' Compensation Appeal Board remanded the case, finding in pertinent part that a full recovery was evident, per the *Baxter* case. The Board explained that because the work injury was only an aggravation, once the claimant returned to baseline, benefits should have been terminated, even if he could not return back to work as a bricklayer. Based upon *Baxter*, the threat of recurrence would be from a non-work-related condition. On remand, the workers' compensation judge awarded a termination of benefits, which was appealed by the claimant. The Appeal Board affirmed, and cross appeals were filed in Commonwealth Court.

The first issue on appeal was whether the Appeal Board erred in terminating benefits based upon the *Baxter* case. The claimant argued that, unlike *Baxter*, he did not suffer from an unrelated pre-existing condition, but one caused by prolonged exposure at work. This made the *Baxter* case inapplicable. The employer responded that, regardless of the cause, the claimant's allergy still pre-existed his employment and, therefore, *Baxter* controlled. However, the court did not agree, holding that since the claimant's pre-existing allergy was caused by exposure at work, the *Baxter* standard did not apply. In *Baxter*, the aggravation was from childhood asthma, while in this case, the claimant's allergy was directly caused by long-term exposure at work.

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RULE OF THUMB VS. RULE OF LAW

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While the scope of the duty to preserve relevant evidence is not boundless, it is not "unreasonably narrow" either. Without more, property owners cannot rely solely on their own video surveillance preservation policies, procedures or "rules of thumb" to justify a unilateral decision to retain *only a fraction* of video surveillance.

Marshall acknowledges that plaintiffs bear the burden of proving knowledge or notice of the dangerous condition and how video surveillance may be useful in meeting that burden. As a result, businesses and property owners will likely receive broad video surveillance preservation letters requesting extended amounts of video and cautioning an adverse inference for failing to retain the requested video surveillance evidence. Plaintiffs will likely challenge minimal portions of video retained and contend the property owner failed to preserve relevant video, even where the video surveillance fails to capture the incident. Consequently, plaintiffs will argue that lost or destroyed footage may have shown when the spill occurred or, at the very least, would have been probative of showing constructive notice and whether safety precautions were being followed.

In essence, the *Marshall* decision places an affirmative duty on the recipient of a preservation request that may result in significant consequences for failing to comply. In light of the recent ruling, business and property owners should pay particular and immediate attention to video surveillance preservation letters received within an adequate timeframe to review and preserve the requested video. To avoid a spoliation inference in cases where minimal video of the requested amount is preserved, property owners should employ a combination of the following:

(1) Promptly notify the requesting party of its retention policy or that it does not intend to preserve the requested video evidence;

(2) Reach a reasonable agreement regarding the scope of the request;

(3) Offer to make the video available for viewing prior to its destruction and/or overwriting; and/or

(4) Seek a judicial ruling on the reasonableness of the preservation demand prior deleting the requested footage in light of the time and expense required to preserve it.

Video surveillance preservation requests received outside the timeframe to preserve the video—typically 30 days—are likely not subject to the *Marshall* decision. However, in such cases, business and property owners are encouraged to promptly notify the requesting party of their retention policy. The major implication of the *Marshall* decision is that a business or property owner cannot rely solely on its own video preservation policy or "rule of thumb" to preserve a fraction of the requested video. Without more, such evidence constitutes spoliation and warrants an adverse inference. ■

APPLYING *BAXTER* OR *LITTLE:*

(continued from page 25)

Instead, the case was like earlier Supreme Court cases—*Lash* and *Farquahar*—that were most recently explained in *Little v. WCAB (Select Specialty Hosp.)*, 113 A.3d 1 (Pa. Cmwlth. 2015). In those cases, each of the claimants suffered aggravations of conditions caused by their employment. The difference, the court held, was that those claimants had residual medical conditions as a result of their employment. Similarly, in the instant case, because the initial exposure was work-related and the threat of an aggravation also work-related, the claimant was incapable of returning to work. As a result, the court reversed and found that the claimant had not fully recovered from his injury.

As illustrated in *Kurpiewski*, a full recovery argument cannot be made if the pre-existing condition was caused by a previous work injury. It is irrelevant whether the injury occurred while working for other employers. In those cases, the burden is significantly higher and requires proving that a claimant has fully recovered from the underlying work-related condition. Conversely, under *Baxter*, the employer need only prove that the claimant has returned to his/her baseline condition. It is important to remain current on a claimant's treatment and opinions of disability in order to identify early opportunities to mitigate ongoing exposure.

The court also examined the calculation of the claimant's average weekly wage, holding that Section 309(d) of the Act applies to long-term employment, even if there are layoffs and fewer earnings in those specific quarters. The test is whether there is continuity in employment. As to the issue of concurrent employment, the court noted that to qualify, a claimant must be working for both employers at the time of injury. Here, because the claimant testified he only worked for the employer at the time of injury, concurrent employment did not exist at the time of his injury. ■

ON THE PULSE... CULTURALLY SPEAKING

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During this time, I had occasion to attend a CLM conference in Texas. By chance and good fortune, I met Jacqueline Canter of our Philadelphia office. Jacqui and I were seated next to each other at dinner and, fortuitously, had a client in common, which provided the spark for a conversation that would change my professional life. Having practiced within the New York metropolitan area, I had not heard of Marshall Dennehey until Jacqui and I began discussing the firm. I was immediately impressed that she had been at Marshall Dennehey for over 20 years– essentially her entire professional career. She described the firm's platform for excellence in client service, growing the business model and obtaining new clients. Most importantly, she told me about the atmosphere within the firm that causes so many attorneys, including herself, to spend their entire careers with the company. We discussed the model for the firm, both in terms of lifestyle and from a professional perspective. She invited me to meet a gentleman by the name of Howard Dwoskin to discuss the possibility of joining the firm and developing a marketing strategy that could expand the work for my existing transportation client beyond the New York City/Long Island/Westchester region.

Needless to say, this opportunity intrigued and excited me. Within the next few weeks, Howard and I discussed how we could facilitate bringing my work into the firm and how we could develop a marketing plan to expand the work for the transportation client. To say we have succeeded would be an understatement. Eighteen months after joining Marshall Dennehey in January of 2015, I became counsel for my national transportation client's risk management litigation, not only in New York, but in Connecticut, Delaware and Ohio. With the help of Patrick Carey, Charles Gura, Joseph Rava, Douglas Walsh, Timothy Schenkel, David Fagnilli and numerous attorneys spread throughout a half dozen other Marshall Dennehey offices, our development of this client and practice area has been a tremendous success.

That is not to say that all of this success came without adjustments. Anyone who has operated their own firm will attest to the challenges one must face when transitioning from a small or midsize firm to a large, multi-faceted organization, such as Marshall Dennehey. One goes from controlling nearly every aspect of a company's operations to joining forces with scores of professionals charged with working together to sustain a business model that employs well over 1,000 people. What I have come to learn and greatly appreciate, though, is that with common purpose and joined effort comes a feeling of support that is, in comparison, virtually unobtainable in a small firm. In a small firm, one knows that it all comes down to you and your client, and any issue, large or small, could have significant consequences. While the stakes are no less with a larger firm, we know that the support of the entire organization exists and we do not hesitate to seek assistance if it means better serving our clients or growing our business.

Marshall Dennehey recently had the opportunity to co-host the 2019 Legal Panel Summit for our national transportation group client, its risk management team, TPA-dedicated resolution unit and panel counsel from all over the country. The summit was an unmitigated success. It provided us the opportunity to show off the resources and benefits that Marshall Dennehey can offer to the client, not only in our legal work, but in our ability to leverage our resources to assist fellow counsel nationwide to provide better representation for the company as a whole.

Working at a firm that makes client service a priority and that provides the platform, resources, and marketing strategy necessary for growth allows us to look to the future with optimism. If the last four years are any indication, I strongly believe we're headed in the right direction. ■

ABOUT OUR PUBLICATION

Our experience confirms that effective risk and claims management must be founded upon timely information. Our firm is dedicated to prompt, informative reporting to our clients.

This publication is offered to furnish our views on current court decisions and other matters that may be of interest to our clients on topics not specifically related to any particular claim. This publication is provided free of charge and without a professional relationship to any particular person, entity or claim. The views expressed are those of the authors and are not to be construed or used as professional advice.

Our firm welcomes inquiries, comments and suggestions regarding this publication or other questions, which may be directed to:

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