MARSHALL DENNEHEY
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Defense Digest

Happy Holidays!

On The Pulse...

OUR OHIO OFFICES

By Leslie M. Jenny, Esq. & Samuel G. Casolari Jr., Esq.*

Leslie M. Jenny

Samuel G. Casolari Jr.

From Public Square in Cleveland to Fountain Square in Cincinnati, our Ohio lawyers represent clients and insureds throughout the state in almost all practice groups. From casualty to health care liability, to coverage and bad faith, in all the major state and federal courts, our Cleveland and Cincinnati lawyers carry on the vision and values of the firm.

EXPLORING OUR CINCINNATI OFFICE

By Samuel G. Casolari, Jr.

From our office in Cincinnati, we handle cases throughout all of southern and western Ohio, as well as through the Commonwealth of Kentucky. Indeed, we defend cases all the way down to the Tennessee border.

There are five attorneys in the this office, two of whom are licensed in both Ohio and Kentucky. I am the managing attorney of this office and am joined by Ray C. Freudiger and Timothy B. Schenkel as shareholders.

Ray Freudiger is an accomplished attorney who, since joining Marshall Dennehey, has had a string of defense verdicts in a wide variety of cases, including admitted liability, wrongful death and casualty cases. Complimenting his successes is a winning dispositive motion practice in a wide variety of premises liability, bad faith and coverage cases. Whether it is a car accident, slip and fall, bad faith or breach of contract case, Ray places the utmost premium on detail and dedication, and he keeps his cases in a trial-ready posture.

Tim Schenkel concentrates his practice in casualty work and has many cases both north and south of the Ohio River. Tim travels as far south as the Tennessee border to represent clients and insureds

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HELPING TO MAKE THE BEST OF A DIFFICULT SITUATION: A PROFILE OF MARSHALL DENNEHEY'S BANKRUPTCY LITIGATION PRACTICE GROUP

By Gregory W. Fox, Esq.*

Gregory W. Fox

No matter the industry, it can be very challenging when any person or entity integral to your business files for bankruptcy. Whether it is your client, your customer, your insured, your borrower, your lessee, your sub-contractor, your vendor or any other business "partner," all of a sudden, new rules apply to your business relationship. And successfully navigating this change of landscape is critical to effectively and efficiently moving forward.

The attorneys in Marshall Dennehey's Bankruptcy Litigation Practice Group have the experience and knowledge to help you do just that. Drawing on extensive experience handling various bankruptcy matters, and with the support of a firm of over 500 attorneys with practices spanning numerous industries, our bankruptcy attorneys have the knowledge, support and creativity to ensure that your interests are protected and that you are able to maximize your opportunities in any bankruptcy situation.

FOCUS ON DEFENDING BANKRUPTCY LITIGATION

Stemming from our roots as a civil defense firm, the focus of our bankruptcy practice is defending bankruptcy litigation. Our attorneys defend all manner of bankruptcy-related litigation, including preference and fraudulent-transfer claims, avoidance actions, actions to determine the validity or extent of liens, actions to turn over property, violation-of-stay and violation-of-discharge-injunction proceedings, contract disputes, insurance coverage disputes, director and officer claims, consumer-protection claims and all other types of adversary proceedings.

Some of the most common types of bankruptcy litigation include preference and fraudulent-transfer claims. These claims permit bankruptcy trustees, debtors in possession and sometimes

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PENNSYLVANIA

A MESSAGE from the EXECUTIVE COMMITTEE

By G. Mark Thompson, Esq.
Member, Executive Committee

A reporter once asked Winston Churchill what his country's greatest weapon had been during World War II. Without hesitating, Churchill replied: "It was what England's greatest weapon has always been—hope."

Have you not found most people will stand against adversity, press on, and forge ahead as long as there is hope? As we approach the holidays and what many regard as the season of hope, I thought it appropriate to take stock of the past year and explain why ours is a law firm full of hope.

To be sure, we are working in as challenging an environment as has ever existed in our 54-year history. Since the recession, demand for legal services has contracted and there is an overcapacity of lawyers. These conditions have lead to increased competition, consolidation, and in the case of some firms, extinction.

We know our clients, be they carriers or self insureds, are under enormous pressure to deliver more value to their businesses. We get that and realize paying less money to law firms is one of the ways to achieve that goal.

The emergence of litigation management, the commoditization of legal services, the use of analytics to measure and compare panel counsel, convergence, rate compression, discounts, write-offs, and early resolution strategies all have the effect of reducing legal spend and, thus, law firm revenue. This at a time when our expenses continue to increase.

It is tough out there and easy to get discouraged. Lesser law firms throw up their hands, compromise, and allow their standards to decline. Marshall Dennehey has not done that. We have extended our success by remaining attentive, versatile, and able to move with the times. Our ability to excel while adapting to a changing industry is one of the many things that give us hope.

This past year, the *Legal Intelligencer* honored Marshall Dennehey as the 2016 Pennsylvania Litigation Department of the Year in the categories of Appellate Law and Professional Liability. This second category focused on both medical and non-medical cases. In others words, our Appellate, Health Care and Professional Liability Practice Groups were all recognized as the best in the Commonwealth of Pennsylvania.

Adding to this accomplishment was the news that for the fourth consecutive year, the *Philadelphia Business Journal* selected Marshall Dennehey as one of the Best Places to Work in the Philadelphia region. The honor reflects our achievement in creating a positive work environment that attracts and retains employees through a combination of benefits, working conditions, and firm culture. We were the only law firm within the large employer category to have received this recognition.

That same firm culture allowed us to work through a potentially devastating event this past summer. In June, a fire broke out at 2000 Market, the building housing our firm's Philadelphia headquarters. Thankfully, no one was injured, and our offices escaped physical damage, however, the suppression efforts and resulting damage to the building's electrical system left us without power, forced to shut down our servers, and barred by civil authorities from entering the building for four days.

Considering our Philadelphia and nineteen regional offices were, in one form or another, all dependent on the multiple systems installed at our headquarters, the episode could have weakened us. Instead, we went to work.

Displaced Philadelphia lawyers were welcomed with open arms into our regional offices. The terrific staffs in those offices, combined with the extraordinary efforts of our recovery team, backed by our business continuity apparatus, enabled us, despite the disruption, to continue serving clients and meeting our obligations to courts and counsel.

Why are we hopeful? We are hopeful because we have learned to persevere. We are hopeful because we have risen to be among the best litigation departments in the area while remaining one of the best places to work. We are hopeful because we always strive to do the right thing and people notice.

Earlier this year, I received an email from the chief auditor of one of our larger clients. Before taking on responsibility for a different geographic region, this individual shared the following:

> For just under three years I had the opportunity to work with your firm, attorneys, and staff and consistently found your people to be of the highest professional and ethical standards among all the firms I've worked with across the country as well as being very capable and effective litigators and advocates. More important to me is the demeanor with which I was received in every single interaction I had with your firm - your people are very pleasant to work with, especially given that my involvement is not always a desired one. I wanted to personally thank each and all of you for the opportunity to work with you and your team and for your commitment to consistently strive to improve the billing process.

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OUR OHIO OFFICES

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in matters pending in Kentucky. With a wealth of experience in litigating cases, he keeps a keen eye on bringing matters to conclusion as soon as practical and at the least possible cost. Tim keeps his cases moving, making sure that he gets from one point to another as efficiently and effectively as possible so that cases can be resolved and concluded in a sure and swift manner.

David J. Oberly has a wide-ranging practice, including casualty, coverage, motion practice and appellate practice. David's work has not only been recognized in the courts, but also by numerous publications in Ohio and elsewhere. Indeed, some of David's many articles have received front-page credits in the Cincinnati Bar Association magazine and the Ohio State Bar Association magazine. He has been invited to speak on panels and in front of local associations.

Stephen P. Wagner is the newest member of the Cincinnati office. Stephen is admitted in both Ohio and Kentucky and handles casualty, health care liability and other matters.

Though I serve the Cincinnati office as managing attorney, my practice includes a broad spectrum of casualty work, including premises liability and correction cases (primarily in the federal courts), Section 1983 claims and matters on behalf of non-profits. In addition, I serve on the Executive Committee, Finance & Audit Committee and am Chair of the Governance Committee of the Grove City College Board of Trustees, where I have developed a varied background in the fiduciary duties and obligations of officers and directors, including those of non-profit organizations.

Since our opening, we are most proud of our dispositive motion practice. In many state and federal courts, we have achieved early and significant dispositive victories, which not only ended the litigation for the client, but also saved considerable expense. Indeed, Tim Schenkel received a significant and rare victory in northern Kentucky on summary judgment that eliminated ongoing exposure to the client.

Our Cincinnati lawyers are active alumni in their high schools, colleges and law schools. In addition, we are active in local and state bar association activities, and we are participating members of such organizations as the Defense Research Institute.

EXPLORING OUR CLEVELAND OFFICE

By Leslie M. Jenny

Cleveland is a city on the RISE! It has great historical significance. It has musical impact in the form of the Rock and Roll Hall of Fame. It can claim political connections by way of the 2016 Republican National Convention. It is home to the NBA Champion Cavaliers. Cleveland is also home to one of our two Ohio offices.

The Cleveland office opened in 2012 and is located on historic, revitalized Public Square, overlooking Lake Erie. For the past two years, I have had the honor of being its managing attorney. When I joined Marshall Dennehey, there were four attorneys in this office who were primarily focused on casualty litigation. Today, we have eight attorneys handling health care, professional liability and casualty defense litigation.

This office handles cases in state and federal courts, and our Cleveland attorneys service clients in all manner of civil defense litigation. Our practices range from retail liability, premises liability, health care liability, employment practices litigation and other complex defense litigation matters.

We are fortunate to have sophisticated and knowledgeable lawyers in our Health Care Department. Stacy Delgros, Jason Ferrante and I have extensive trial experience in both federal and state courts. Our group is skilled in defending physician, hospital and nursing home matters, and we have achieved a number of arbitration and defense verdicts. We have successfully argued and attained the first positive opinion applying the Affordable Care Act to reduce future damages.

Our Casualty Department is staffed by highly skilled and experienced attorneys, Andrew Wargo, David Fagnilli and Amelia Leonard, who have more than 50 years combined experience in defending all manner of casualty litigation. They have obtained a number of defense verdicts and summary judgment victories on behalf of their clients. Our casualty lawyers are also involved in initial accident investigations in catastrophic loss cases.

We have grown and expanded the Cleveland office since I joined the firm, and we now have a Professional Liability Department staffed by Keith Hansbrough and Kenneth McCain. Keith and Ken bring special experience in representing public entities in civil rights matters, defending employers in employment practice matters, and in handling complex appellate cases in federal and state courts.

Making our office complete is our outstanding staff of secretaries, paralegals, office support and management. These individuals are the heart of our office, and it is a pleasure to be part of such a remarkable team.

Come visit with us, and experience our city and office—on the RISE!

From Fountain Square in Cincinnati to Public Square in Cleveland, our Ohio lawyers seek to effectively and efficiently represent clients and insureds in all the major courts of Ohio and increasingly in Kentucky. ■

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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These sentiments are uplifting and echo what our own employees tell us when asked their favorite thing about the firm. Lawyers, paralegals, and administrative staff all agree—it is the people.

This year, in addition to awards, we celebrated victories, weddings, births, and retirements. We celebrated the 20th Anniversary of our Erie office and the 2nd Anniversary of our joinder with the New York firm of Jones Hirsch. We breathed a sigh of relief when Hurricane Matthew side-swiped the eastern coast of Florida yet largely spared the folks in our Fort Lauderdale, Orlando, and Jacksonville offices. We are fortunate even if we sometimes forget.

Hope has been defined as the desire for something good and the expectation of receiving it. When we consider our incoming class of associates, our next class of shareholders, the depth and talent of our middle management, the quality of our paralegals and support staff, and the strength of our client base, we literally define hope, as our expectations are exceptional.

We end 2016 stronger than we began, better able to serve our clients and each other. The new year will bring its own mix of successes and challenges, but through it all, Marshall Dennehey will remain hopeful and there for you.

On behalf of the Executive Committee, we wish you and your families a spectacular holiday season filled with peace, love, and the thrill of hope. ■

HELPING TO MAKE THE BEST OF A DIFFICULT SITUATION

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creditors' committees to sue those to whom the debtor paid money prior to filing bankruptcy in order to "claw back" the money for the benefit of the entire bankruptcy estate. For example, any payment made to a creditor within 90 days of the bankruptcy may be clawed back as an avoidable "preference" if it was made in payment of an antecedent debt and enabled the creditor to receive more than it would have through a bankruptcy liquidation. In addition, any payment made within two years of the bankruptcy (and sometimes longer under applicable state law) may be avoided as a "fraudulent transfers" if it was made either: (1) with the intent to hinder, delay or defraud any creditor; or (2) while the debtor was insolvent (or caused to become insolvent) and in exchange for less than a reasonably equivalent value.

Defending these types of claims can be particularly frustrating to those targeted as defendants because, on top of being sued, such people/entities are often already owed money from the debtor that they will likely never recover in full, or even in part. Indeed, when facing the high probability of bankruptcy-related write-offs, the prospect of having to return additional money previously recovered—and sometimes spent—can be exceedingly tough to stomach.

Fortunately, there are a number of defenses available to these claims. Marshall Dennehey's bankruptcy attorneys are practiced at identifying and successfully asserting those that apply, leveraging them to achieve an amicable settlement.

CONSULTING SERVICES REGARDING THE IMPACT OF BANKRUPTCY ON DEFENSE OF NON-BANKRUPTCY LITIGATION

Drawing from both our civil defense background and our bankruptcy experience, another main focus of Marshall Dennehey's bankruptcy practice is advising clients involved in defending non-bankruptcy litigation as to the impact of related bankruptcies on their case. Bankruptcies are often viewed as a roadblock or impediment to litigation. But they don't have to be. And sometimes they can even give rise to additional defenses or litigation strategies. Our attorneys consult with defendants, their defense attorneys, and/or their insurance companies to efficiently guide litigation impacted by related bankruptcies and to identify and implement strategies to maximize any benefit that might be obtained as a result.

GENERAL SERVICES TO CREDITORS

In addition to defending bankruptcy-related litigation and consulting on the impact of bankruptcies on civil defense litigation, Marshall Dennehey's bankruptcy attorneys are also available to provide a wide range of other services necessary to protect and enforce the rights and interests of our clients who find themselves as creditors in a bankruptcy. Among other things, we prepare, file and defend proofs of claims; we obtain relief from the automatic stay or from any discharge injunction; we challenge dischargeability of debts; we object to reorganization plans that are not in our clients' best interest; and we routinely advise our clients as to the impact of bankruptcy events on their rights and obligations and the business options that they may have as a result of such events.

WHERE WE CAN HELP

With offices in both Wilmington, Delaware, and New York, New York, we have a strong presence where the largest corporate bankruptcies are regularly filed. But our geographic reach goes beyond these hotbeds. We have over 20 offices throughout the east coast, and with attorneys regularly practicing in neighboring jurisdictions, our bankruptcy attorneys are poised to efficiently see to your needs in no fewer than 10 different states:

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Federal—Bankruptcy Litigation

RECENT BANKRUPTCY OPINION REITERATES THAT EXCESS POLICIES REQUIRE ACTUAL PAYMENT OF UNDERLYING LIMITS BEFORE COVERAGE IS TRIGGERED

By Stephen M. Wagner, Esq.*

KEY POINTS:

- Excess D&O liability insurance not triggered absent payment of limits of liability of underlying policies.
- Excess D&O insurance policies do not protect against risk of primary insurer's insolvency.
- Insured D&O liability policyholders can protect themselves against risk of primary insurer's insolvency by purchasing "Side A" policy.

Stephen M. Wagner

In the Chapter 11 case of *In re Rapid-American Corp*., 2016 Bankr. LEXIS 2224 (Bankr. S.D.N.Y. June 7, 2016), the court has ruled that excess directors' and officers' liability insurance cannot be triggered without actual payment of the underlying policies' limits of liability. The court's ruling effectively clarifies that *Zeig v. Mass. Bonding & Ins. Co*., 23 F.2d 665 (2d Cir. 1928) is no longer controlling law in light of the Second Circuit's more recent decision in *Ali v. Fed. Ins. Co*., 719 F.3d 83 (2d Cir. 2013). *Zeig* had long stood for the proposition in the Second Circuit that exhaustion language in insurance policies should not be read literally, but, rather, exhaustion language was satisfied so long as the insured settled with and released the underlying insurers, potentially even if those insurers did not pay the full policy limits.

In 1974, claimants began suing Rapid-American in asbestos-related personal injury actions. Many of the claims were settled, but, by March 2013, there were approximately 275,000 asbestos-related personal injury claims pending. Rapid owned several primary and excess liability insurance policies during the relevant periods. Beginning in 1998, Rapid reached settlements with nearly all of its insurers. However, a number of the insurers that issued policies to Rapid became insolvent and were unable to pay the full limits of their policies.

Rapid filed a declaratory judgment action seeking to clarify that coverage under its policies would attach upon the lifting of the automatic stay. Rapid argued that *Zeig* was still controlling and mandated that exhaustion language is satisfied if the insured settles with and releases the underlying insurer, even if that insurer did not pay full policy limits. Travelers Casualty and National Union argued that their policies expressly required exhaustion of underlying insurance *by actual payment* before any excess coverage could be triggered.

The court held that *Zeig*'s "continuing vitality" was open to question following the Second Circuit's decision in *Ali*. In *Ali*, the plaintiff insurers sought declaratory relief, claiming that their excess directors' and officers' liability insurance policies did not attach until actual payment of the full amount of the underlying insurance was made. The defendant directors argued, as Rapid did, that coverage attached once their obligations exceeded the underlying insurance even if it remained unpaid. *Ali* held that excess insurance coverage does not attach until the underlying insurance has been exhausted. To that end, the court stated, "[t]he very nature of excess insurance coverage is such that a predetermined amount of underlying primary coverage must be paid before the excess coverage is activated." This business model, of course, makes excess insurance available at a lower cost.

The court aptly recognized that cases like *Zeig* involve first-party property insurance where an insured suffers a fixed out-of-pocket loss for which he seeks indemnification. In contrast, in cases like *Ali*, the requested relief focuses on the insured's obligations to pay third parties. Practically speaking, the excess insurers bargained for actual payment before their coverage liability attached. Thus, if insureds could trigger the excess policies based on their aggregated, unpaid losses, they might be tempted to structure inflated settlements, which would have the same effect of requiring excess insurers to "drop down" and assume coverage in place of insolvent carriers.

The bankruptcy court's opinion confirms the new principle in the Second Circuit that requires exhaustion of underlying limits by actual payment before excess insurance policies can be triggered. This decision, coupled with *Ali*, makes it abundantly clear that *Zeig* is no longer applicable precedent in the Second Circuit. Thus, excess insurers cannot be forced to "drop down" unless and until primary insurance has been exhausted by actual payment.

Given the clarification from these decisions, insurers and insureds should be cognizant of the coverage they have in place to protect directors, officers or members in situations where those key individuals may be relying on a directors' and officers' policy of insurance that is not designed to protect them against the risk of insolvency or bankruptcy of underlying insurers. Policyholders may

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Federal—Employment Law

TIME FOR A CHECKUP: NEW EEOC RULES SIGNIFICANTLY ALTER THE LEGAL LANDSCAPE FOR EMPLOYER WELLNESS PROGRAMS

By David J. Oberly, Esq.*

KEY POINTS:

- EEOC rules amend GINA regulations, create new ADA regulations, and provide guidance to employers regarding how workplace wellness program can comply with ADA and GINA.
- ADA and GINA final rules apply to employer wellness programs as of first day of first year that plan begins after January 1, 2017.

David J. Oberly

Earlier this year, two controversial rules were finalized and published by the United States Equal Opportunity Commission regarding requirements that employers must adhere to in connection with their employee wellness programs. The new rules amend existing GINA regulations, create new ADA regulations, and provide guidance to employers regarding how workplace wellness programs can comply with the ADA and GINA. Both the ADA and GINA final rules apply to employer wellness programs as of the first day of the first year plan that begins on or after January 1, 2017.

THE NEW ADA AND GINA RULES ON WELLNESS PROGRAMS

Many companies offer wellness programs that are aimed at encouraging and incentivizing employees to pursue healthier lifestyles. The ADA and GINA generally prohibit employers from obtaining and using information about employees' own health conditions or about the health conditions of their family members, including spouses. Both laws, however, allow employers to ask health-related questions and conduct medical examinations if the employer is providing health or genetic services as part of a voluntary wellness program.

The new rules place significant new restrictions on incentives and penalties for employee wellness programs. In particular, under the new rules, wellness programs that are part of a group health plan and that ask questions about employees' or their spouses' health, or include medical examinations, may offer incentives of no more than 30% of the total cost of individual, self-only coverage.

Importantly, the new rules' limitations on incentives applies to any wellness program that requires workers to answer disability-related questions or undergo medical examinations. In addition, the limitations on incentives provided by the new rule also pertain to both financial and in-kind incentives, such as reductions in insurance premiums, cash, prizes and even "trinket" gifts.

The new ADA rule also targets incentives pertaining specifically to tobacco cessation programs. For programs that merely make general tobacco-related inquiries, employers can offer incentives up to 50% of the cost of self-only coverage. Conversely, where tobacco-related biometric screening or other medical testing is mandated, the new 30% cap on incentives is applicable under the new rule.

In addition, under the new ADA rule, all wellness programs must be "voluntary." In this respect, employers are barred from mandating employee participation or denying or limiting coverage or particular benefits for non-participation. Moreover, employers are also barred from imposing adverse consequences on employees for their failure to participate or achieve certain health outcomes. Significantly, the new rules outlaw what has grown to be a fairly common practice among employers—requiring workers to complete health risk assessments or biometric screening as a prerequisite for eligibility for major medical health benefit options.

Furthermore, the rules also impose new burdens on employers to provide notice to their workers informing them what information will be collected as part of the program, with whom it will be shared and for what purpose, the limitations on disclosure of such information, and how the employer will ensure the confidentiality of the information. Any employer who fails to provide notice will run afoul of the new voluntariness requirements of the ADA rule.

The new rules also curtail the allowable scope and breadth that employer wellness programs can take. Importantly, the new ADA rule requires that all employee health programs—including any disability-related inquiries or medical examinations that are part of such a program—must be "reasonably designed to promote health or prevent disease." The EEOC provides that in order to comply with this requirement, a program cannot require an overly burdensome amount of time for participation, involve unreasonably intrusive procedures, be a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or require employees to incur significant costs for medical examinations.

Finally, employers were dealt a significant blow in connection with the new ADA rule providing that the Act's insurance "safe harbor" provision does not apply to employer wellness programs, even if they are part of an employer's health plan.

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Florida—Insurance Coverage/Bad Faith

ENFORCEABILITY OF PROPOSALS FOR SETTLEMENT IN ACTIONS REQUESTING DECLARATORY RELIEF

By Danielle N. Robinson, Esq.*

KEY POINTS:

- Proposals for settlement are a useful tool.
- The *Faith Freight* decision may allow insurers to utilize proposals for settlement in breach of contract cases that also include a claim for declaratory relief.

Danielle N. Robinson

The enforceability of proposals for settlement served upon plaintiffs continues to be a concern in first-party property cases. Florida's courts continue to find issues they consider to be ambiguous within proposals themselves, including the failure to apportion offers made to husband and wife plaintiffs where the damages are indivisible. However, a growing concern has developed with regard to enforcing proposals for settlement in cases that seek monetary damages as well as equitable relief.

Florida Statute § 627.428 allows an insured to recover attorneys' fees in a lawsuit against an insurer if there is a judgment in favor of the insured. However, an insurer is not entitled to fees by Florida statute if it prevails in an action brought by an insured. Florida Statute § 768.79 allows a defendant to recover attorneys' fees "[i]n any civil action for damages filed in the courts of this state" if an offer made in the form of a proposal for settlement "[i]s one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer." Thus, proposals for settlement have become an extremely useful tool in first-party property cases.

On occasion, insurers are faced with insureds who refuse to consider reasonable settlement offers or negotiate settlement. The enactment of Florida Statute § 768.79 has been an effective tool in dealing with insureds in these situations. A plaintiff who feels she has nothing to lose by refusing a reasonable settlement offer may now feel that she does have something to lose because, in the event an offer is rejected and there is a defense verdict (or recovery by the plaintiff of at least 25% less than such offer), the defendant can move for recovery of its attorneys' fees and costs from the plaintiff.

In 2013, the Florida Supreme Court issued its opinion in *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362 (Fla. 2013). In *Diamond Aircraft*, the Florida Supreme Court held proposals for settlement were unenforceable in cases in which both equitable and monetary damages were sought "[a]nd in which the defendant has served a general offer of judgment that seeks release of all claims." Since the issuance of the *Diamond Aircraft* ruling, there has been a substantial increase in the number of first-party property lawsuits that include a count for declaratory relief, in addition to the count for monetary damages, for an alleged breach of the policy. The purpose of such pleadings is to seemingly frustrate the insurer's ability to serve an enforceable proposal for settlement in the case.

However, recent case law has provided some relief to insurers in cases involving proposals for settlement served in cases in which both monetary damages and equitable relief are sought. On September 7, 2016, the Third District Court of Appeal issued its decision in *Faith Freight Forwarding Corp. v. Anias*, 2016 Fla. App. LEXIS 13401 (Fla. 3d DCA. Sept. 7, 2016). In *Faith Freight*, the court found a proposal for settlement to be valid and enforceable in cases in which the "the 'real issue' before the court" was whether monetary damages were owed. The *Faith Freight* case utilized the "real issue" analysis employed in *DiPompeo Constr. Corp. v. Kimmel & Assocs*., 916 So. 2d 17 (Fla. 4th DCA 2005). In *DiPompeo*, the court "looked behind the procedural vehicle used to bring a lawsuit and focused on whether the 'real issue' in the case is one for damages." In *Faith Freight*, the court found the "real issue" was the claim for monetary damages and found the proposal for settlement to be valid and enforceable.

Based upon the recent *Faith Freight* case, insurers can now argue the "real issue" involved in the lawsuit is the plaintiff's claim for monetary damages related to the alleged breach of the policy. Because the real issue is damages, the proposal for settlement is valid. Thus, regardless of whether the lawsuit also includes a second count for declaratory relief, the "real issue" to be determined in the lawsuit is whether the insurance policy was breached and, if so, the amount of damages (if any) owed to the insured.

The *Faith Freight* decision is promising and provides some assistance to insurers who would like to utilize proposals for settlement in breach of contract cases that include a count for declaratory relief for the sole purpose of invalidating proposals for settlement. ■

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Florida—Professional Liability

ASSOCIATIONS REJOICE: FLORIDA APPELLATE COURTS BREATHE NEW LIFE INTO CONTROLLING DOCUMENTS FOR COMMUNITY ASSOCIATIONS

By Jeannie A. Hanrahan, Esq. & Devon A. Woolard, Esq.*

KEY POINTS:

- Florida clarifies that challenge to an association's governing documents must be brought within five years of its recording or five years from date in which challenger takes title to property.
- *Hilton v. Pearson*, *Harris v. Aberdeen Prop. Owners Ass'n* and *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n* hold that challenges to governing documents of community association will be barred if filed five years after their enactment.

Jeannie A. Hanrahan

Devon A. Woolard

It has been commonplace in Florida for condominium owners or homeowners to move into a community and then challenge the propriety or validity of the governing documents which, by virtue of purchasing in the community, they agreed to be bound by at the closing table. It wasn't until late 2014 and again in 2015 that the Florida First and Fourth District Courts of Appeal clarified that a homeowner only has five years from either the date the challenged documents were recorded or five years from the date the condo/homeowner took title to the property. The rationale arises from Florida Statute § 95.11(2)(b), which provides that "[a] legal or equitable action on a contract, obligation, or liability founded on a written instrument… shall be commenced within five years."

It was initially the First District Court of Appeal that affirmed Florida law in *Hilton v. Pearson*, 2016 Fla. App. LEXIS 1813 (Fla. 1st DCA Feb. 10, 2016), holding that "[a] suit challenging the validity of an amendment to restrictive covenants must be filed within five years of the date that the amendment is recorded, even if the suit alleges that the amendment was void because it was not properly enacted." In *Hilton*, the plaintiffs filed suit in July 2013 against a homeowners' association alleging that 2001 and 2005 amendments to restrictive covenants were "null and void" and that the original covenants remained in full force and effect. Hilton was permitted to intervene in the action and raised the five-year statute of limitations defense, arguing that the plaintiffs should have brought their actions in 2006 and 2010 respectively. However, the trial court declared the amendments void. On appeal, the First District Court of Appeal reversed the trial court and ruled that the plaintiffs' suit challenging the amendments was barred by the applicable five-year statute of limitations. Specifically, the court found that the plaintiffs did not file suit against Hilton until July 2013, 12 years after the association's 2001 amendment and eight years after the 2005 amendment—well beyond the five-year statute of limitations.

Likewise, in *Harris v. Aberdeen Prop. Owners Ass'n*, 135 So. 3d 365, 367 (Fla. 4th DCA 2014), the court held the five-year statute of limitations barred the homeowner's claim contesting the validity of a homeowners' association's membership requirement, because that claim accrued when the membership requirement was recorded in 2004 and the homeowners sued more than five years later. In *Harris*, the trial court entered final summary judgment in favor of the association, finding the five-year limitations period applied pursuant to Florida Statute § 95.11(2)(b). The cause of action accrued in 2004 when the association's amendment was recorded. The Fourth District Court of Appeal affirmed, specifically stating: "[t]o the extent that Harris challenges the validity and the enactment of the mandatory membership amendment, we agree . . . that the statute of limitations with respect to such a challenge began to run from the 2004 date the amendment was recorded in the public records." *See also*, *Fredrick v. N. Palm Beach County Improvement Dist.*, 971 So. 2d 974, 979-80 (Fla. 4th DCA 2008)(holding the statute of limitations on a challenge to municipal assessments imposed for expansion of a road began to run either from the date the assessments were created or the date they were approved); *Keenan v. City of Edgewater*, 684 So. 2d 226, 227 (Fla. 5th DCA 1996)(holding that a challenge to a resolution imposing special assessments for the purpose of construction of a water and sewer treatment plant accrued when the resolution was passed); *Winkelman v. Toll*, 661 So. 2d 102, 107 (Fla. 4th DCA 1995) (noting that Florida has a notice-type recording statute, which functions to give "notice to the world" that a property is subject to any properly recorded provisions and regulations).

Similarly, in *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197, 201 (Fla. 1st DCA 2015), the defendant developer recorded an amendment to the restrictive covenants on December 4, 2000. Thereafter, on March 30, 2009, the condominium association filed suit challenging the validity of the amendment, among other unrelated actions. The court held the association had five years to file suit, which it did not do. Accordingly, the court opined, "[t]he Association's claims challenging the validity of the amendment

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New Jersey—Amusements, Sports & Entertainment Liability

BUSINESS OWNERS BEWARE: CLEAR AND UNAMBIGUOUS LANGUAGE IN ARBITRATION AGREEMENTS IS NOT ENOUGH TO MAKE THEM ENFORCEABLE IN NEW JERSEY

By Douglas D. Suplee, Esq.*

KEY POINTS:

- Arbitration agreements must be clear and unambiguous as a starting point.
- An arbitration agreement should explain, in layman's terms, what arbitration is and how it is different from a proceeding in a court of law.
- An arbitration agreement must spell out that the person signing it is giving up his right to bring his claims in court or have a jury resolve the dispute.

Douglas D. Suplee

Business owners in New Jersey seeking to avoid being sued in court by requiring patrons to sign an agreement to settle any disputes by way of binding arbitration were recently reminded by the New Jersey Appellate Division that clear and unambiguous language of such agreements is not enough to make them enforceable. In *Defina v. Go Ahead and Jump 1, LLC d/b/a Sky Zone Indoor Trampoline Park*, 2016 N.J. Super. Unpub. LEXIS 1797 (App. Div. July 12, 2016), the Appellate Division held that agreements to settle disputes through arbitration must not only be clear and understandable to a lay person, but they must also spell out the fact that a patron is waiving his right to bring a claim in a court of law before a judge or jury.

In *Defina*, the defendant owned and operated the Sky Zone Indoor Trampoline Park (SZITP) and required all of its customers to sign a document entitled "Participation Agreement, Release and Assumption of Risk" before using the facility. The agreement provides in pertinent part that, in consideration of SZITP allowing participation in trampoline games or activities:

> I for myself and on behalf of my child(ren) and/or legal ward, heirs, administrators, personal representatives, or assigns, do agree to hold harmless, release and discharge SZITP of and from all claims, demands, causes of action, and legal liability, whether the same be known or unknown, anticipated or unanticipated, due to SZITP's ordinary negligence; and I, for myself and on behalf of my child(ren) and/or legal ward, heirs, administrators, personal representatives, or any assigns, further agree that except in the event of SZITP's gross negligence and willful and wanton misconduct, I shall not bring any claims, demands, legal actions and causes of action, against SZITP for any economic and non-economic losses due to bodily injury, death, property damage sustained by me and/or my minor child(ren) that are in any way associated with [defendant's] trampoline games or activities.

The agreement also included an arbitration clause, which stated:

> If there are any disputes regarding this agreement, I on behalf of myself and/or my child(ren) hereby waive any right I and/or my child(ren) may have to a trial and agree that such dispute shall be brought within one year of the date of this Agreement and will be determined by binding arbitration before one arbitrator to be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures.

Furthermore, the agreement included the following statement, which was printed in bold type:

> By signing this document, I acknowledge that if anyone is hurt or property is damaged during my participation in this activity, I may be found by a court of law to have waived my right to maintain a lawsuit against SZITP on the basis of any claim from which I have released them herein. I have had sufficient opportunity to read this entire document. I understand this Agreement and I voluntarily agree to be bound by its terms.

On February 8, 2014, Michael Defina signed the agreement electronically on the defendant's website. He certified that he was the legal guardian of two participants: Alexander Defina, who was then nine years old, and another child.

On June 18, 2015, the plaintiffs filed a complaint in the Law Division alleging that on February 8, 2014, Alexander was a business invitee at SZITP and was injured while participating in various activities in the facility, including "Ultimate Dodge Ball." The plaintiffs alleged that the defendant failed to provide adequate warnings and instructions regarding the dodge ball activity; was negligent and careless in creating, advertising and promoting an ultra-hazardous and dangerous dodge ball game; and failed to properly supervise, control or regulate the conduct of other invitees over whom the defendant had supervisory responsibility.

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HELPING TO MAKE THE BEST OF A DIFFICULT SITUATION

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RECENT BANKRUPTCY OPINION

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protect themselves against the risk of an insurer's insolvency by purchasing what is commonly referred to as a "Side A" policy. Specifically, an organization should seek to purchase, from a different insurer, excess coverage through a difference in conditions (DIC) Side A policy.

Purchasing Side A coverage is practical for any organization. Acquiring this coverage provides assurance to directors and officers that the organization is serious about indemnifying them should litigation take a turn for the worst. To make certain that adequate coverage is in place in case of an underlying insurer's insolvency, an organization should consult with a knowledgeable broker to ensure that the Side A coverage being purchased matches the coverage that would have been provided by the underlying policy. ■

TIME FOR A CHECKUP

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TAKEAWAYS FOR EMPLOYERS

With the issuance of these new significant rules, employers should take a close look at their current wellness programs to identify what, if any, modifications are required in order to bring existing programs in line with the new ADA and GINA rules. In particular, employers should review the incentive amounts that are currently being offered to ensure that their programs are not providing inducements beyond the new 30% cap. In addition, employers should evaluate the value of in-kind rewards that are offered for program participation, which are also subject to the 30% cap.

At the same time, employers should also assess their programs to evaluate compliance with the new "reasonable design" mandate. In this respect, companies should verify that the information that is sought and the testing that is required pursuant to their wellness plans do not surpass what is allowable under the new rules. Companies should be especially careful to steer clear of three significant "reasonable design" violations: (1) overly burdensome participation time requirements; (2) unreasonably intrusive procedure requirements; and (3) the imposition of unreasonably high costs in connection with medical examinations.

Lastly, employers should also review their wellness programs to ensure that they fall in line with the new rules' voluntariness requirements. In particular, employers should verify that existing plans—and communications and literature—conform with the new rules' expanded notice requirements. ■

ASSOCIATIONS REJOICE

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to the Restrictive Covenants that removed the entire Beach Property from the Resort's common properties are time-barred."

Regardless of whether one is a condominium association governed by Florida Statutes Chapter 718 or a homeowners' association governed by Florida Statutes Chapter 720, the governing documents, including declarations, bylaws, articles of incorporation and amendments thereto, control. Florida's appellate courts have clarified that any challenge to the validity of these controlling documents, including amendments, must be brought within five years. Based upon the foregoing holdings, associations should be aware that once a governing document or amendment thereto is recorded, the clock starts to run on a challenger's ability to contest the validity of its controlling instrument. ■

New Jersey—Workers' Compensation

WORKERS' COMPENSATION LIENS RULE!!! THE APPELLATE DIVISION FENDS OFF ANOTHER CHALLENGE TO SECTION 40 OF NEW JERSEY'S WORKERS' COMPENSATION STATUTE

By Robert J. Fitzgerald, Esq.*

KEY POINTS:

- New Jersey's workers' compensation statute allows employers to assert a lien against any negligent third party that causes the work injury.
- New Jersey has a strong public policy allowing for only one recovery in personal injury litigation.
- Although New Jersey automobile personal injury litigation does not allow for recovery of PIP benefits, the New Jersey workers' compensation statute does not allow a plaintiff to avoid reimbursement of a lien for medical benefits.

Robert J. Fitzgerald

The New Jersey Appellate Division has once again confirmed the supremacy of Section 40 in protecting a New Jersey workers' compensation lien. In *Paulette Dorflaufer v. PMA Management Corp*., 2016 N.J. Super. Unpub. LEXIS 1861 (N.J.App.Div. Aug 9, 2016), the plaintiff was hit by a car while working as a part-time crossing guard. She filed a workers' compensation claim against her employer, as well as a third-party negligence action against the automobile driver. The civil case settled for $95,000 for her "pain and suffering."

Prior to the settlement of the negligence action, the employer in her workers' compensation claim asserted a Section 40, N.J.S.A. 34:15-40, claim against the settlement proceeds for $46,856.22, the amount of medical benefits it paid. Section 40 provides that an employer is entitled to recover a percentage of the workers' compensation benefits it pays against a negligent third party. For reasons not stated in the opinion, Dorflaufer refused to pay the lien, contending that the defendant was only entitled to reimbursement of temporary benefits paid and that medical benefits were not payable from her third-party tort action.

Both parties filed for summary judgment. The court granted the employer's cross-motion, upholding its right to recovery by referencing the plain language of Section 40 that any sum the plaintiff recovers from a third-party settlement is subject to a lien:

> The statute states that any money paid to an injured employee from a third-party settlement reduces the liability of the plaintiff's insurance carrier and entitles it to reimbursement for medical payments made. There is nothing in the statute that says it matters what the settlement was specifically compensating the plaintiff for or whether the plaintiff recovered full damages from it.

The court noted that the plaintiff presented no case law, statute or rule supporting her argument that the civil action settlement for pain and suffering is somehow exempt from a worker's compensation lien. The court also noted the strong public policy against double recoveries.

On appeal, the plaintiff argued again that an employer cannot recover medical payments it made on behalf of an employee from the employee's settlement for pain and suffering. More specifically, the plaintiff argued that, since personal injury protection (PIP) medical payments are not recoverable against the driver, an employer should not be able to recover medical expenses that it paid arising from an employee's automobile accident.

The Appellate Division disagreed, confirming the Section 40 lien. The court noted the plain language of Section 40(b):

> If the sum recovered by the employee or his dependents from the third person or his insurance carrier is equivalent to or greater than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be released from such liability and shall be entitled to be reimbursed, as hereinafter provided, for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents less employee's expenses of suit and attorney's fee as hereinafter defined.

The court also noted the Supreme Court's long-held policy against a double recovery for a plaintiff:

> Read in conjunction, Section 40 and our collateral source statute … plainly require that a third-party tortfeasor be held to the full extent of its liability for a workplace injury, that the employer or compensation carrier be repaid for benefits paid to the injured worker pursuant to the [Workers' Compensation]

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Ohio—Employment Law

PROOF OF A WORKPLACE INJURY IS NOT A REQUIREMENT FOR A WORKERS' COMPENSATION RETALIATION CLAIM UNDER OHIO LAW

By Keith Hansbrough, Esq.*

KEY POINTS:

- Ohio Revised Code § 4123.90 allows employees to bring retaliation claims against employers regarding the filing of a workers' compensation claims.
- A *prima facie* claim for retaliation under § 4213.90 does not require proof that the employee suffered a workplace injury.
- Fraud in filing the initial workers' compensation claim on the part of the employee could possibly serve as a defense to a retaliation claim brought under § 4123.90 against the employer.

Keith Hansbrough

Scores of private employers in Ohio have had the unpleasant experience of having to defend an employment retaliation claim under Ohio Revised Code § 4112.02. These claims have been increasing over the years, and many are based upon an employee's claim that he was discriminated against in the form of retaliation because he asserted some type of employment right. These claims have typically been based upon an employee having levied an earlier complaint regarding race, gender or age. Over the past few years, there has been an interesting intersection between such retaliation claims and workers' compensation law in Ohio.

For example, in *Onderko v. Sierra Lobo, Inc.*, 2016 Ohio LEXIS 1892 (Ohio 2016), the Ohio Supreme Court finally clarified that an employee can bring a retaliation claim against an employer based upon a previous workers' compensation filing without evidence that there was, in fact, a workplace injury. Ohio Revised Code § 4123.90 addresses the issue of retaliation against employees who bring workers' compensation claims. Specifically, Section 4123.90 states:

> No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued, or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

In years past, it was unclear whether or not an employee could bring a claim for retaliation under Section 4123.90 if he or she was unable to prove that an actual injury had occurred. Amazingly, the appellate courts throughout Ohio were split on this issue. This, in turn, put employers in the difficult situation of not knowing how to properly comply with the law. The Ohio Supreme Court, in *Onderko*, clarified that a *prima facie* case for retaliatory discharge under Ohio Revised Code § 4123.90 does not include proof that the employee suffered a workplace injury.

Michael Onderko worked for Sierra Lobo, Inc. and had asserted that he had suffered a workplace injury and was retaliated against for filing a claim. Prior to filing his lawsuit, he had filed for workers' compensation and was denied. Hence, there was no proof of a workplace injury, and Onderko sought no appeal of this denial. Shortly after his workers' compensation claim was denied, he was terminated from Sierra Lobo for his "deceptive" attempt to obtain workers' compensation benefits for a non-work-related injury. In other words, Onderko's claim for workers' compensation was denied, and his employer fired him for that very reason.

The Ohio Supreme Court held that proof of a workplace injury was not necessary to support a Section 4123.90 retaliation claim. In reaching its holding, the court succinctly stated that "[i]nterpreting the statute to prohibit retaliation against only those workers whose claims have been allowed misses the point of the statute, which is to enable employees to freely exercise their rights without fear of retribution from their employers."

Interestingly, the opinion raises the issue of what should occur if an employee maliciously and in bad faith brings a workers' compensation claim that is denied. Does such an employee still have potential grounds for a retaliation action? In *Onderko*, the Ohio Supreme Court stated that "[o]ur holding in this case by no means suggests that a fraudulent or false claim for workers' compensation may be pursued without penalty and is not grounds for termination. Filing a false claim or making misleading statements in order to secure workers' compensation is a crime in Ohio." It, therefore, appears that the court has left employers with the possible defense of fraud by an employee, but the opinion stopped short of including this language in its holding. As pointed

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On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Following a two-day trial in Berks County, **Brooks Foland** and **Brittany Bakshi** (Harrisburg, PA) obtained a defense verdict on behalf of our client in a negligence action arising from a motor vehicle accident. The plaintiff filed suit seeking compensation for her broken left wrist, foot and ribs. The focus at trial centered on liability and the plaintiff's attempt to prove circumstantially, and without a liability expert, that our client was speeding. The plaintiff was unsuccessful in her attempt as the jury returned a unanimous verdict of "no negligence" after ten minutes of deliberation. The plaintiff's pre-trial demand had been $250,000.

Vlada Tasich (Philadelphia, PA) obtained a defense verdict on the issue of negligence for a utility company employee who rear-ended the plaintiff while driving in wintery conditions. As a result of the accident, the plaintiff alleged a complete rotator cuff tear that required surgery and multiple stints of therapy, but with no relief. The plaintiff husband was a passenger in the vehicle operated by his wife. The speed limit was 55 mph. It was dark and snowing, and she testified to traveling 30 mph. A vehicle traveling two to three car lengths ahead of them began to swerve, and the plaintiff's wife started braking abruptly. The leading vehicle regained control and managed to drive away. Our client was maintaining the same distance and speed behind the plaintiff, but could not stop in time. The wife testified that she felt the speed and distance she kept from the vehicle in front of her was safe and appropriate for the prevailing weather conditions. Our client said the same for himself. Vlada argued that our client, supported by the plaintiff's wife's own testimony, acted in a reasonably careful manner by trying to safely operate his vehicle given the overall road conditions and that sometimes accidents happen despite the exercise of reasonable care. The jury returned a defense verdict after 15 minutes and found that our client was not negligent.

Samuel Higginbottom and **Michael Archibald** (Tampa, FL) obtained a defense verdict in a negligence action brought against our client, a rent-to-own business. The plaintiff, an insurer exercising its subrogation rights under an insurance policy, alleged that our client improperly installed a clothes dryer vent tube in a tenants' apartment, resulting in a fire that destroyed eight apartments owned by its insured. Our client's limited records indicated the dryer was installed at the tenants' prior address, and our client had no record of it being moved to the insured's apartment complex. The tenants (husband and wife) were adamant that our client installed the dryer. The store manager was insistent that our client did not install the dryer because the vent tube clamps and materials were not the type the company used. After a four-day trial, the jury answered the preliminary verdict question as to whether the defendant installed the dryer at the apartment complex in the negative.

Maureen Kelly (Scranton, PA) obtained summary judgment on behalf of our client, a commercial property owner. The plaintiff alleged a slip and fall on ice and snow in the parking lot of a strip mall. Our client owned the property but had retained a property manager to oversee the daily operations of the property. The plaintiff claimed that we retained some control over the property by, inter alia, requiring approval for property improvements that would cost over a certain sum of money. Meg successfully convinced the judge that our client was a landlord out of possession and, therefore, no duty was owed to the plaintiff.

After a jury trial before Magistrate Judge Timothy Rice in the U.S. District Court for the Eastern District of Pennsylvania, **Keith Heinold** and **Michael Salvatti** (Philadelphia, PA) obtained a defense verdict on behalf of a motorcycle manufacturer. The plaintiff alleged that he regularly let his motorcycle idle in his garage to warm it up in the winter. On the day in question, the plaintiff became distracted by a telephone call and forgot about the motorcycle, which eventually overheated and caught fire, causing significant damage to his home. The defense of our client focused on the fact that the motorcycle was air cooled, which, unlike an engine with a radiator, needs movement for cooling, and on two warnings in the motorcycle's rider's manual that specifically instructed users not to leave the motorcycle idling at a standstill because a fire could result. At trial, the plaintiffs argued that the motorcycle was defectively designed and never should have caught fire, and that the warnings in the manual were inadequate because an additional on-product warning was required. On the fourth day at trial, the jury returned a unanimous defense verdict.

In a premises liability case alleging a spinal injury, **Mark Riley** (King of Prussia, PA) obtained a defense verdict after a four-day trial in Philadelphia. The plaintiff alleged that she slipped and fell on a spill on the premises of the defendant grocery store. She claimed that she underwent two years of treatment for resulting back injuries and experiences ongoing pain and disability. Mark was able to establish that the defendant store had and followed an exemplary floor inspection policy and that there was no negligence. Mark also highlighted problems with the plaintiff's credibility, including a prior accident and inconsistent statements in her medical records and at deposition. Further, Mark was able to preclude the expert testimony of the plaintiff's medical "wrap up" expert. The jury deliberated for only 90 minutes before rendering a defense verdict.

Matthew Hall and **David Williams** (Allentown, PA) received a significant victory in a highly-contested food poisoning case. The judge granted our motion for judgment on the pleadings. He also dis-

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*Prior Results Do Not Guarantee A Similar Outcome

On The Pulse...

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missed the joinder complaint that had been filed by the original defendant restaurant against numerous other restaurants where the plaintiff had allegedly purchased food within the previous seven days before becoming ill.

HEALTH CARE DEPARTMENT

Candy Barr Heimbach (Allentown, PA) obtained a defense verdict for our client, an orthopedist, whom the plaintiff alleged caused him to sustain a soft tissue infection following aspiration and injection of his left knee. The plaintiff, who had severe osteoarthritis in that joint as a result of a prior injury, sustained a work injury. He sought follow-up care from our client after his knee failed to progress, despite conservative treatment and physical therapy provided by his workers' compensation provider. At his second visit with our client, the plaintiff had a swollen, painful knee, whereupon an aspiration and injection were performed. The plaintiff developed a MSSA infection that required debridement surgery and IV antibiotics. He ultimately underwent total knee replacement and claimed to have developed low back complaints as a result of an altered gait due to his knee issues. On cross-examination of the plaintiff's orthopedic standard of care expert, Candy was able to establish that his opinions were based entirely upon his acceptance of the plaintiff's factual assertions and that, if those assertions were incorrect, his opinions were necessarily flawed. Candy was also able to establish that, given his advanced osteoarthritis, the plaintiff would have required knee replacement surgery regardless of this incident. The jury deliberated for 40 minutes before returning a verdict in favor of our client.

Matthew Keris and **Robert Aldrich** (Scranton, PA) obtained a defense verdict in a medical malpractice case in the U.S. District Court for the Middle District of Pennsylvania. The plaintiff alleged to be permanently disabled and in a wheelchair, requiring home health care for the rest of her life, as a result of an Emergency Room physician's failure to timely diagnose and treat a viral infection involving the 7th and 8th cranial nerves (Ramsay Hunt Syndrome). We represented the ER physician, his employer (who staffed the ER) and the hospital. Plaintiff's counsel submitted a $4 million life care plan to the jury for consideration, and the final settlement demand was $2 million. The jury agreed with the defense's position that the ER doctor did not deviate from the standard of care. Because of this, no liability could be found against our client or any of the other defendants.

Following a day of jury selection and a four-day trial in Cumberland County, Pennsylvania, **Craig Stone** (Harrisburg, PA) obtained a defense verdict on behalf of a radiologist and his group. Our client interpreted an MRI to show a herniated lumbar disc, without nerve root impingement. He admittedly did not see or report a small disc protrusion at or near the L3 nerve root, which he saw in retrospect. The plaintiff, a chiropractor, contended that she would have had surgery sooner if our client had identified a free fragment of disc impinging the nerve root. Her treating neurosurgeon testified that the sooner a compressed nerve is freed, the more favorable the outcome. Our defense experts in neuroradiology, orthopedic spine surgery and neurosurgery disputed the finding of a large, free impinging fragment at the time of the MRI, although one was found at surgery two months later. The plaintiff's settlement demand was $850,000 based on permanent nerve injury, lower extremity weakness and a pronounced limp. The jury returned in 30 minutes with a unanimous finding of no negligence.

Fredric Roller, **Mary Kate McGrath** and **Michelle Moses** (Philadelphia, PA) obtained a defense verdict in state court in Montgomery County in a case involving aspiration pneumonia suffered during a routine colonoscopy. We represented a gastroenterologist who had nothing to do with the administration of anesthesia. Following completion of the procedure, the plaintiff aspirated and was transferred to a hospital where he was diagnosed with aspiration pneumonia, treated and discharged after two days. He went on to suffer numerous exacerbations of pre-existing COPD (which he claimed had never occurred prior to the aspiration), which the defense maintained was due to his history of heavy smoking. There were no issues concerning the colonoscopy. Although we had the plaintiff's sole liability expert disqualified, we remained in the case under a "Captain of the Ship" agency theory. The trial lasted for seven days, at the conclusion of which the jury deliberated for 12 minutes before returning a defense verdict.

PROFESSIONAL LIABILITY DEPARTMENT

Martin Schwartzberg (Long Island, NY) was successful on a motion to dismiss where the plaintiffs claimed that there were various design and construction defects in a building that was converted to a condominium. Marty represented the engineer who prepared the plans and specifications for renovations to the mechanical systems in the building. The engineer was impleaded by the sponsor of the condominium conversion, which asserted claims against the engineer for indemnification and contribution. The court granted our pre-answer motion to dismiss, holding that, since the sponsor was sued for its own active wrongdoing, it could not obtain indemnification from the engineer. The contribution claim was dismissed by the court, which held that contribution was not available where the claims being asserted were seeking damages for economic loss.

Timothy Schenkel and **David Oberly** (Cincinnati, OH) secured a victory in Ohio's First District Court of Appeals in Cincinnati that affirmed summary judgment that was originally granted to Tim and David's client at the trial court level. In that case, the plaintiff was discharged from bankruptcy five months after filing her lawsuit against our client. Importantly, the plaintiff failed to disclose her lawsuit to the bankruptcy trustee at any time before she was discharged. The court granted summary judgment on the basis of judicial estoppel, which the plaintiff appealed. On appeal, the First District affirmed the trial court's decision, finding that, as a result of pursuing her claim without disclosing it as an asset in bankruptcy, the plaintiff was judicially estopped from pursuing the claim, entitling Tim and David's client to judgment as a matter of law.

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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James McGovern (Pittsburgh, PA) was successful in having a case voluntarily dismissed upon preliminary objections. The plaintiff, a towing company located in Western Pennsylvania, towed a vehicle at the request of the Pennsylvania State Police after a single-vehicle accident. The towing company stored the vehicle for many months and then filed suit against the vehicle owner and our client, which had financed the purchase for the owner, for breach of contract and unjust enrichment. The plaintiff was seeking several thousand dollars in accident removal, towing and storage fees, as well as attorney's fees. Jamey filed preliminary objections in the nature of a demurrer on the basis that the Pennsylvania Vehicle Code, Abandoned Vehicles and Cargo section, precluded the plaintiff from seeking recovery of such expenses and limited the plaintiff's recovery to the salvage value of the abandoned vehicle (which was a total loss). Plaintiff's counsel did not file a response in opposition and then dismissed the case with prejudice.

Adam Calvert (New York, NY) successfully argued the appeal of a summary judgment motion before the Appellate Division, First Department, which resulted in the affirmance of the trial court's order granting summary judgment to his client. Adam represented the owner of a construction project, a high-rise residential building. The plaintiff worked for a cleaning company that performed "final cleans" of the apartments, which consisted of cleaning each apartment after construction was completed. The plaintiff fell from a kitchen counter while cleaning the top of a cabinet. The main issue in the case was whether the plaintiff's work qualified for protection under Labor Law 2240(1), which imposes absolute liability on owners of construction projects for workers who fall from a height. Protection under 240(1) depended on whether the plaintiff's "cleaning" work was protected under the statute, requiring the application of a four-factor analysis from a recent Court of Appeals case *Soto v. J. Crew, Inc*., 998 N.E.2d 1045 (N.Y. 2013). In one of the first appellate cases to interpret *Soto*, the court upheld the trial court's decision.

Lila Wynne and **Kevin Bright** (Cherry Hill, NJ) prevailed on a motion for summary judgment as to liability in an environmental case involving claims related to a leaking underground storage tank (UST). In this environmental subrogation case, our client sued a fuel delivery company under the New Jersey Spill Compensation and Control Act for delivering fuel oil to the UST while it was leaking, as well as asserted claims for negligence and breach of contract. In response, the defendant filed a cross-motion, seeking to hold our client liable under the Spill Act and to dismiss the negligence and breach of contract claims. Following oral argument, the court granted our motion and denied the cross-motion, finding that a fuel delivery company can be liable under the Spill Act for delivering to a UST while the UST is leaking, even absent actual or constructive notice of the leak.

David Shannon and **Shane Haselbarth** (Philadelphia, PA) obtained a favorable decision from the Third Circuit Court of Appeals in a data breach class action lawsuit. The plaintiffs and the proposed class members were employees and customers of an on-line prescription drug company. The company was allegedly a victim of a hacking incident in which W2 and other personal information of employees and customers was compromised. In 2015, our client's motion to dismiss was granted on the basis that no implied contract existed with the entities for privacy protection and the negligence claims were not available under Pennsylvania law. The plaintiffs appealed to the Third Circuit, which affirmed the District Court's decision dismissing all counts against our clients.

Howard Mankoff (Roseland, NJ) obtained a defense verdict in a malpractice case where our client was a lawyer whose former client obtained a building permit to expand his beach house. When the construction was almost complete, the town issued a stop work order on the basis that the construction did not conform to the plans filed with the town. Our client determined that someone employed by the town altered the plans. Our client filed an answer and counterclaim. Although our client was successful in obtaining an order allowing the plaintiffs to complete construction, several causes of action in the counterclaim were dismissed because our client did not comply with the notice provisions of the Tort Claims Act and the statute of limitations. These dismissals were sustained by the Appellate Court, with one exception, which was remanded for trial. Our client did not represent the plaintiffs on the remand because the plaintiffs had not paid our client. Other counsel tried the case for three weeks and then settled while the jury was deliberating. The plaintiffs then sued our client, arguing that the case would have been worth more if the barred claims were still in the case. The malpractice case was tried over 13 days. The jury found that our client deviated from accepted standards of practice, but that the deviations did not proximately cause the plaintiffs to suffer any damages. The demand at the start of trial was $2 million. The plaintiffs rejected an offer of $425,000.

Edwin Schwartz and **Nicole Ehrhart** (Harrisburg, PA) were successful in having the plaintiff's entire complaint dismissed upon preliminary objections for failure to state a claim. The plaintiff was a former attorney and county commissioner who was indicted in the "Kids for Cash" scandal. A federal jury convicted the plaintiff of conspiracy to commit bribery, bribery, conspiracy to commit extortion under color of official rights, extortion, conspiracy to commit money laundering, and similar relation charges. The plaintiff subsequently filed a legal malpractice action against his criminal attorneys, one of whom was our client, alleging 22 separate instances where our client purportedly breached his duty of care. We were able to convince the court that the plaintiff had exhausted his criminal appellate rights and had been unsuccessful in establishing any basis to overturn the jury's conviction. As such, under the law of Pennsylvania, the plaintiff could not prove actual innocence based upon attorney error. Therefore, the court dismissed the plaintiff's claim based upon his inability to establish a claim for legal malpractice as a matter of law.

Rachael von Rhine (Cherry Hill, NJ) obtained a defense verdict at

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trial on behalf of a condominium association. The plaintiff filed a complaint seeking damages arising from an incident where an entity purchased a condominium directly above the plaintiff's. The entity purchased the foreclosed condominium at a Sheriff's sale and proceeded to perform unauthorized renovations that resulted in extensive flooding in the plaintiff's unit. The defendant owner filed a third-party complaint, alleging that the flooding was caused by the condo association's failure to maintain the common elements. At trial, Rachael was able to get the defendant/third-party plaintiff and their expert to admit that after conducting a site inspection, there was no evidence of any defects with respect to the common elements. The court agreed, and all claims against the condominium association were dismissed.

John Gonzales and **Candace Embry** (Philadelphia, PA) obtained a defense verdict in a Section 1983 excessive force case before the Honorable John E. Jones in the U.S. District Court for the Middle District of Pennsylvania. The plaintiff alleged that a police sergeant physically attacked him after he had been arrested and handcuffed. The incident was captured on video by a neighbor who posted the video on YouTube. The defense presented evidence that the sergeant struck the plaintiff in an effort to separate from him after the plaintiff attempted to wipe blood onto the sergeant's uniform. The jury found that the sergeant's actions were reasonable and did not violate the Fourth Amendment.

James McGovern (Pittsburgh, PA) successfully obtained dismissal of a case filed in the U.S. District Court for the Western District of Pennsylvania alleging violations of Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968; the Pennsylvania Wiretapping and Electronic Surveillance Control Act; and Section 1983 equal protection rights. The plaintiff was an employee of a charitable organization and was terminated for insubordination. While she was being fired, the executive director of the charity had his conversation with her transmitted via intercom to a supervisor in an adjacent office. The plaintiff alleged that she was not aware of anyone else hearing her conversation and did not provide consent. Chief Judge Joy Flowers Conti agreed with Jamey's arguments that, (1) pursuant to federal law, only the consent of one participant to a conversation (*i.e.* the executive director) is required, and (2) the charity is a non-profit organization and cannot be considered a "state actor," nor was it "acting under color of state law" when it discharged the plaintiff. Judge Conti dismissed the federal claims with prejudice and declined to exercise supplemental jurisdiction over the remaining claim for violation of the Pennsylvania Wiretapping Act, allowing the plaintiff leave to re-file this claim in state court. Should the plaintiff do so, Pennsylvania case law is clear that the use of a telephone intercom used in the ordinary course of business does not constitute "wiretapping."

Christopher Conrad (Harrisburg, PA) successfully defended a local Intermediate Unit in a special education due process hearing. The dispute involved a five-year-old student with multiple disabilities who is receiving services through the IU's preschool early intervention program. The student's parents are separated and live in different school districts, but they share educational decision-making rights. The mother retains primary physical custody. The father contended the program offered by the IU was not appropriate for the student and failed to provide her with a free, appropriate public education as the IDEA requires. He also contended that the student should be placed in a multiple disabilities classroom offered by the mother's school district of residence. By contrast, the mother objected to enrolling the student in kindergarten because she wanted the student to remain in the IU's early intervention program for another year. The father filed a complaint against the IU, alleging its program failed to offer the student an appropriate education. He also sought an order compelling the IU to place the student in the district's kindergarten program. The hearing officer agreed with our argument that as a matter of law the IU could not be compelled to place the student into a school-age program offered by a local education agency over which the IU has no control, particularly in view of the mother's objection to enrolling the student in kindergarten. The hearing officer also agreed that the early intervention program offered by the IU was appropriate for the student, which was enabling her to make meaningful educational progress. Consequently, the hearing officer denied and dismissed all of the father's requests for relief.

WORKERS' COMPENSATION DEPARTMENT

Michele Punturi (Philadelphia, PA) obtained a seven-figure reimbursement from the Supersedeas Fund of the Commonwealth of Pennsylvania. This extraordinary recovery of *$1,771,961.74* for medical payments stemmed from a complicated fact pattern. The facts of the case involve a 2005 injury with a self-insured employer who had excess coverage provided by a carrier that was a reimbursement policy. In 2000, the employer lost its self-insurance status and replaced it with a workers' compensation self-insurance replacement policy. The claim then pierced to self-insured retention, and the replacement policy carrier became insolvent (liquidated in 2001), and upon liquidation, the claim came under the ongoing payment policy of the Pennsylvania Workers' Compensation Security Fund administered through its third-party administrator. The TPA administered payment of the ongoing claim benefits and submitted reimbursement requests to the excess carrier under the excess policy originally issued to the employer. A URO request was filed challenging the medical treatment as of April 5, 2000, and a decision was issued finding the treatment reasonable and necessary, which was appealed and remanded back to the judge. The judge ultimately found the treatment to be neither reasonable nor necessary by decision in August 2014. No further appeals were filed. In January 2014, the indemnity aspect of the claim resolved by Compromise and Release. The issue in the case was the right/standing of the excess carrier to secure reimbursement for the medical payments found unreasonable and unnecessary. The analysis for the Supersedeas Fund reimbursement focused on Regulation 127.208(g), which addresses URO decisions and reimbursement from the Fund, and Section 443(A), pertaining to

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supersedeas requests and denials, and the fact that the excess carrier was ultimately the liable entity. The Supersedeas Fund was in agreement with Michele's arguments and awarded the significant reimbursement.

Tony Natale (Philadelphia, PA) successfully defended a Lehigh Valley textile facility in an appeal stemming from litigation involving a neck and shoulder injury. In the underlying litigation, Tony convinced the judge that the claimant's departure from work after a shoulder injury was unrelated to that injury. On appeal, the claimant argued that the judge relied on speculative evidence presented by the employer to support a non-work-related disability. Tony argued to the Workers' Compensation Appeal Board that the underlying evidence at issue marked a legitimate area of inquiry and examination, and the end result was that the claimant's credibility was suspect. The Board agreed, and the appeal was dismissed.

Tony Natale (Philadelphia, PA) was successful in defending a Berks County mushroom farm in an action involving incessant medical treatment stemming from a work-related low back injury. The claimant lives in Berks County and treated with a Philadelphia physician for what the employer argued was palliative, non-essential pain relieving modalities. Tony was able to make a legal argument that allowed the judge to find in the employer's favor without any review of the treatment in question. All payment allegations for medical treatment at issue were dismissed based on a res judicata finding by the judge.

Ross Carrozza (Scranton, PA) secured a favorable decision in a highly contested claim and penalty petition case involving an employer/owner who was alleged to have assaulted the claimant over a work-related issue. The employer testified that she had a romantic relationship with the claimant and that it was the claimant who assaulted her at their shared apartment on the date in question. The judge found the claimant's testimony not credible, based upon Ross's cross-examination of the claimant concerning the fact that the Philadelphia Police Department Domestic Violence report indicated that the altercation had nothing to do with the employer's business but, rather, with a personal altercation over an alcohol issue. As such, the claimant was not in the scope and course of employment. ■

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MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

In this data breach suit, **Shane Haselbarth** (Philadelphia, PA) succeeded in obtaining the Third Circuit's affirmance of the District Court's dismissal of the plaintiffs' complaint with prejudice. The plaintiffs, on behalf of a class of employees and customers of Shane's clients (medical and dental benefit providers), sued following a breach of the providers' computer network by non-party, criminal hackers. The class members' personal identifying information was stolen and used to file fraudulent tax returns, causing them monetary harm. The Third Circuit agreed that Pennsylvania law barred the tort claim because the economic loss doctrine requires allegations of personal injury or property damage in order to assert a cause of action for negligence. In addition, the Third Circuit held that the dismissal of the contract claim was proper because the complaint failed plausibly to state a claim that the defendants agreed contractually to protect the class members' data from breach by hackers. *Longenecker-Wells v. Benecard Services*, 2016 U.S. App. LEXIS 15696 (3d Cir. Aug, 25, 2016).

Audrey Copeland (King of Prussia, PA) secured a decision from the Commonwealth Court in favor of the employer, a landscaping company, in a workers' compensation "special mission" case. The claimant had borrowed his employer's truck to drive home for his own convenience and offered to drop off his co-employee in Hagerstown, Maryland on his way home to Chambersburg, Pennsylvania. After leaving the co-employee's home, the truck ran out of gas, and the claimant was struck by another vehicle while he was on the side of the road. The court held that the Workers' Compensation Appeal Board and the Workers' Compensation Judge erred in finding that the claimant was in the course and scope of his employment when injured. The judge had concluded that, because dropping off his co-worker benefitted the employer, the claimant was on a special mission. The court reasoned that, even assuming the claimant was on a special mission, that mission ended when he left his co-worker in Hagerstown. Therefore, the claimant was not on a special mission at the time of his injury. *Classic Landscaping, Inc. v. WCAB (Ramos)*, 2016 Pa. Commw. Unpub. LEXIS 54 (Pa. Commw. Ct. Aug. 3, 2016).

In another workers' compensation appeal, **Audrey** convinced the Commonwealth Court to affirm a termination of benefits based upon the claimant's full recovery from the accepted injury. The court rejected

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the claimant's argument that the employer's medical expert did not acknowledge the accepted injury. Viewing the expert's testimony as a whole, the court held it to be legally sufficient to support a termination. The expert's skepticism regarding a work-related injury alone did not render his testimony incompetent, nor did snippets of his testimony examined outside of the context of his whole opinion affect its sufficiency. *Betancourt v. WCAB (Excel, Inc)*, 2016 Pa. Commw. Unpub. LEXIS 63 (Pa. Commw. Ct. Sept. 8, 2016).

Audrey also succeeded in having the Third Circuit affirm the District Court's order granting the defendants' motions to dismiss judgment in a case brought by a pro se prisoner against a private prison contractor, the prison warden and various federal agencies. The plaintiff contended that the prison and federal authorities refused to provide him with the services of a civil surgeon, which he needed for a medical examination in connection with his application for immigration relief. He sought to complete the immigration proceedings while serving his prison term so he would not be turned over to the Department of Homeland Security's custody for additional detention once his sentence was completed. Among other things, the court held that the standard for mandamus relief was not satisfied and that there was no authority or a duty to provide the plaintiff with access to a civil surgeon. The plaintiff could not prevail on an Administrative Procedure Act claim against the prison contractor or warden because they are not "agencies" subject to the Administrative Procedure Act. *Kalu v. Warden Moshannon Valley Correctional Center*, 2016 U.S. App. LEXIS 16679 (3d Cir. Sept. 12, 2016). ■

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OTHER NOTABLE ACHIEVEMENTS*

SPECIAL APPOINTMENTS

Jason Banonis (Allentown, PA) was recently elected treasurer of the Pennsylvania Defense Institute during its annual conference at the Bedford Springs Resort in Bedford, Pennsylvania.

RECOGNITION

We are honored to announce that Marshall Dennehey has been selected a winner in two categories of *The Legal Intelligencer*'s **2016 Litigation Departments of the Year** contest. The firm has been recognized in the areas of Appellate Law and Professional Liability, which in this particular contest focused on medical and non-medical professional liability. Congratulations to practice group and department leaders **John Hare**, **Terry Sachs**, **Christopher Dougherty**, **Eric Fitzgerald**, **Kevin FitzPatrick**, and **William Banton** and their dedicated, hardworking teams of attorneys who are responsible for the firm receiving this recognition.

For the fourth consecutive year, the *Philadelphia Business Journal* has named Marshall Dennehey one of the Philadelphia region's "**Best Places to Work**." The award recognizes the firm's achievements in creating a positive work environment that attracts and retains employees through a combination of benefits, working conditions and company culture. Hundreds of companies submitted nominations, which ranks the top employers according to scores given to the companies by their own workers.

Two of our attorneys have been recognized as 2016 "Top Women in Law" by *The Legal Intelligencer* and *The New Jersey Law Journal*. Appellate attorney **Kimberly Boyer-Cohen** (Philadelphia, PA) has been recognized by *The Legal Intelligencer*. The award honors women who are "making strides to push the legal profession forward for women" and recognizes outstanding work being done by female attorneys across Pennsylvania, with notable achievements in the last two years. Workers' compensation attorney **Angela DeMary** (Cherry Hill, NJ) has been recognized by *The New Jersey Law Journal*. The award recognizes outstanding work being done by female attorneys across New Jersey, with notable achievements in recent years.

Two of our attorneys have been selected by Best Lawyers in America© as 2017 "Lawyers of the Year" for specific practice and demographic areas. **Timothy J. McMahon** (Harrisburg, PA) has been selected as the 2017 Personal Injury Litigation—Defendants "Lawyer of the Year" in Harrisburg. Additionally, **Stephen A. Ryan** (King of Prussia, PA) has been selected the 2017 Medical Malpractice Law "Lawyer of the Year" in Philadelphia. Mr. Ryan also received this recognition in 2013.

Phillip Harris (Tampa, FL) was selected by the *Tampa Bay Business Journal* as a 2016 "Up & Comer." The award recognizes the Tampa Bay area's outstanding executives under the age of 40 who demonstrate excellence in their professional life and are active in community service.

Roger Bonine, Director of Information Technology (Philadelphia, PA), was recognized at the International Legal Technology Association annual conference as a "shortlist honoree" for the

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"2016 Technology Advocacy Professional of the Year" award. Roger was honored as a runner-up for the successful implementation of KwikTag Legal scanning solution as part of our firmwide initiative to improve operational efficiency and productivity.

SPEAKING ENGAGEMENTS

Several of our shareholders served as faculty at the Claims and Litigation Management Alliance's (CLM) 2016 Claims College, an educational experience designed to help educate and grow industry claims professionals and the industry. Each school within the college is comprised of three levels, and participants who successfully complete all levels in a particular school receive a CLM designation reflecting their education and commitment to the profession. The following shareholders made presentations:

- **James Cole** taught two classes within the School of Property: *Coverage Level II* and *Good Faith Claims Handling Level III*.
- **Andrew Davitt** presented to the School of Professional Lines, teaching *Roles Within Professional Lines, Level I*.
- **Eric Fitzgerald**, CPCU, CLU, addressed the College's School of Extra-Contractual Claims, teaching *Extra Contractual Claims and the Duty to Defend, Level I*.
- **Edward McGinn** addressed the College's School of Casualty Claims, teaching *Claims Evaluations, Level I*.
- **Matthew Schorr** spoke to the College's School of Property: *Coverage – Know Before You Go – Level I*.

Victoria Scanlon (Scranton, PA) presented "Closing Special Presentation: Medical Malpractice Case Study—Suicide and the Defense of a Wrongful Death Claim" to the Pennsylvania Association for Health Care Risk Management annual conference.

Denis Dice (Philadelphia, PA) was a panelist for the "Managing Risk and Protecting Your Practice" session at the 2016 Financial Services Institute Forum: *Navigating a Post-DOL Fiduciary World*.

David Shannon and **Joel Wertman** (Philadelphia, PA) presented a webinar for the Financial Services Institute on emerging trends and the current regulatory environment for independent financial advisors and independent financial service firms. The interactive webinar was attended by representatives of FSI member firms.

NEW YORK METRO SUPER LAWYERS 2016

Six attorneys from our Manhattan office have been selected to the 2016 edition of *New York Metro Super Lawyers* magazine. A Thomson Reuters business, Super Lawyers is a rating service of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html. The attorneys recognized as 2016 New York Metro Super Lawyers are:

- William R. Connor, III, Transportation/Maritime.
- James P. Connors, Personal Injury General: Defense.
- Daniel G. McDermott, Transportation/Maritime.
- Edward C. Radzik, Transportation/Maritime.

Our Manhattan attorneys recognized as 2016 New York Metro Lawyer Rising Stars include:

- Adam C. Calvert, Personal Injury General: Defense.
- Christopher J. DiCicco, Transportation/Maritime. ■

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Ohio—Professional Liability

TIME IS OF THE ESSENCE: LEVERAGING OHIO'S CONSTRICTED STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE CLAIMS TO DISPOSE OF LITIGATION INSTITUTED AGAINST ATTORNEYS

By David J. Oberly, Esq.*

KEY POINTS:

- Ohio has a one-year statute of limitations for legal malpractice claims.
- This discovery rule may enhance the effect of this limited period.
- Defense practitioners can successfully utilize the statute of limitations to shield attorneys and defeat legal malpractice claims.

David J. Oberly

Time is of the essence. Truer words cannot be said when it comes to legal malpractice claims in Ohio, which has an extremely constricted one-year statute of limitations period for filing suit against attorneys for claims of allegedly deficient legal representation. Add to the mix what is commonly known as the "discovery rule"—which does not require actual discovery of the existence of a legal malpractice claim to trigger the limitations period, but only that a client had knowledge of sufficient facts to put him or her on notice of a need to pursue his or her possible remedies—and the statute of limitations becomes a potential minefield for plaintiffs and their attorneys, one that may completely preclude the possibility of recovery in legal malpractice actions if not navigated successfully. When utilized properly by defense practitioners, the statute of limitations can operate to completely shield attorneys from liability and defeat legal malpractice claims in their entirety in a variety of contexts.

Under Revised Code § 2305.11(A), a legal malpractice claim must be commenced within one year following the date upon which the cause of action accrued. Pursuant to R.C. § 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered his injury was related to his attorney's act or non-act, and the client is put on notice of a need to pursue its possible remedies against the attorney, or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Generally, a cause of action exists from the time the wrongful act is committed. However, because application of the general rule in certain circumstances could lead to unconscionable results (barring the injured party's right to recovery before he is even aware of its existence), Ohio has created an exception commonly known as the discovery rule. The discovery rule provides that a cause of action does not arise until the plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has been injured by the conduct of the defendant. In other words, the discovery rule tolls the running of the statute of limitations until the time that a client discovers or should have discovered his or her alleged injury.

When applied to matters of legal malpractice, a cognizable event is "an event sufficient to alert a reasonable person that his attorney has committed an improper act in the course of legal representation." Importantly, in the legal malpractice context, the discovery rule contemplates notice of an injury to the client's legal interests, not the particular breach of the attorney's duty of care that proximately caused the injury. In other words, an action accrues when the injury is discovered or should have been discovered, not when the negligent act occurs. The injured person does not have to be aware of the full extent of the injury before there is a cognizable event causing the statute of limitations to begin running. Instead, it is enough that some noteworthy event—the cognizable event—has occurred that does or should alert a reasonable person of the legal malpractice. The cognizable event puts the plaintiff on notice to investigate the facts and circumstances relevant to his or her claim in order to pursue remedies, and the plaintiff need not have discovered all of the relevant facts necessary to file a claim in order to trigger the statute of limitations. In this respect, constructive knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule as to a legal malpractice claim. In analyzing the existence of a cognizable event, because statutes of limitations are remedial in nature and are to be given a liberal construction to permit cases to be decided upon their merits, courts will "indulg[e] every reasonable presumption and resolv[e] all doubts in favor of giving, rather than denying, [a] plaintiff the opportunity to litigate." With that said, where a "noteworthy event" occurs that does or should alert a reasonable person that a questionable legal practice may have occurred, courts will find a cognizable event sufficient to commence the one-year statute of limitations period.

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

Pennsylvania—General Liability

ELIMINATING DUPLICATE CLAIMS WITH THE GIST OF THE ACTION DOCTRINE

By Adam M. Sorce, Esq.*

KEY POINTS:

- Claims of negligence and breach of contract against insureds in premises liability and property damages cases are increasing.
- Where a contract exists and controls the work of the insured, the Gist of the Action Doctrine may eliminate the tort-based claims against the insured.

Adam M. Sorce

Increasingly, insureds in premises liability cases and property damage/subrogation cases are faced with defending complaints and joinder complaints containing claims of negligence **and** breach of contract. The focus of this article will be applying the Gist of the Action Doctrine to eliminate tort-based claims—primarily those of negligence against insureds.

Cases that involve some type of contractual agreement, whether it be for janitorial services, cleaning services, snow removal services or the like, may have claims sounding in both negligence and breach of contract. The party bringing the claims often cites alleged violations of the insured's obligations under the contract and then seek to expand the insured's alleged duties by making broad claims of negligence stemming from the obligations. This is a common practice in Pennsylvania given that the Pennsylvania Rules of Civil Procedure allow for the pleading of claims in the alternative. *See, Pa. R.C.P. 1020(c)*(providing that "[c]auses of action… may be pleaded in the alternative."). The benefit of using the Gist of the Action Doctrine is that it can be pled in preliminary objections in state court or as a motion to dismiss/motion for judgment on the pleadings in federal court. Often, there is no need for a court to look beyond the allegations contained in the complaint to determine whether or not the tort-based claims are barred by the Gist of the Action Doctrine.

The Gist of the Action Doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort claims. *eToll, Inc. v. Elias/Savion Adver., Inc*., 811 A.2d. 10, 14 (Pa.Super. 2002). In its practical application, the doctrine is used to preclude plaintiffs and joining defendants "[f]rom recasting ordinary breach of contract claims into tort claims." The Pennsylvania Supreme Court expressly adopted the doctrine and described it in the following manner:

> The general governing principal which can be derived from our prior cases is that our Court has consistently regarded the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a Plaintiff's Complaint, to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract. In this regard, the substance of the allegations comprising a claim in a Plaintiff's Complaint are of paramount importance, and, thus, the mere labeling by the Plaintiff of a claim as being in tort, *e.g*., for negligence, is not controlling. If the facts of a particular claim established that the duty breached is one created by the parties by the terms of their contract—*i.e*., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the Defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

Bruno v. Erie Ins. Co., 106 A.3d. 48, 68-69 (Pa. 2014) (internal citations omitted).

In plain English, if your insured would not have been on a construction site or an apartment complex or a retail location but for the terms of the contract expressly agreed to by it, then the Gist of the Action Doctrine may be able to limit your insured's potential liability under broader tort-based claims. To be sure, the Gist of the Action Doctrine can be used to successfully eliminate claims of negligence and other tort-based claims where the terms of a contract are clear and unequivocal. If a plaintiff or joining defendant argues that there are broader social duties that should have been followed by your insured, you can argue the Gist of the Action Doctrine and show the court that, but for the contract, your insured would not have been on site performing its job duties in the first place. Thus, the duplicative tort-based claim is unnecessary and improper.

That said, the Gist of the Action Doctrine is not a catch-all for every tort-based claim. A notable exception is fraud in the inducement. *See, Sullivan v. Chartwell Inv. Partners*, 873 A.2d. 710, 719

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Pennsylvania—General Liability

EXPERT MEDICAL EVIDENCE MANDATORY ON INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS

By Michael J. Connolly, Esq.*

KEY POINTS:

- Expert medical evidence not required to support *negligent* infliction of emotional distress claim.
- Expert medical evidence required to support *intentional* infliction of emotional distress claim.

Michael J. Connolly

Oftentimes we see a claim of intentional infliction of emotional distress or negligent infliction of emotional distress as an "add-on" count at the end of a plaintiff's complaint. Sometimes these claims can be the result of a "kitchen sink" approach by an aggressive plaintiff's lawyer, and, of course, there are times when such claims have merit. Defendants must be cognizant of how to approach these claims, as a dismissal of the claim under the proper circumstances is possible as the plaintiff/appellee in *Gray v. Huntzinger*, 2016 Pa. Super. LEXIS 488 (Pa.Super. Aug. 30, 2016), recently learned.

First, the courts have made clear that expert medical evidence is not required for establishing claims of negligent infliction of emotional distress. The *Gray* court was faced with a claim of intentional infliction of emotional distress and solely addressed such claims in its August 30, 2016, opinion.

Traditionally, to prove a claim of intentional infliction of emotional distress, the following elements must be established: (1) the conduct must be extreme and outrageous; (2) it must be intentional or reckless; (3) it must cause emotional distress; and (4) that distress must be severe. *Hooten v. Penna. College of Optometry*, 601 F.Supp. 1155 (E.D.Pa.1984); *Hoy v. Angelone*, 691 A.2d 476, 482 (Pa.Super. 1997); Restatement (Second) of Torts § 46.

At the trial level, Gray alleged assault, battery and intentional infliction of emotional distress against his employer. The jury found no evidence of assault and battery, but they did make an award to Gray on the claim of intentional infliction of emotional distress. His employer appealed on a number of grounds, but the primary appellate claim was that Gray failed to provide expert medical evidence to support his claim for emotional distress and to establish that the distress was, in fact, severe.

The Pennsylvania Superior Court addressed the issue of intentional infliction of emotional distress. For guidance, the court turned to the 35-year-old opinion of the Pennsylvania Supreme Court in *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988 (Pa. 1981).

The *Kazatsky* court contrasted claims of intentional infliction of emotional distress with other intentional torts, such as assault, battery and false imprisonment, noting that the definition of "outrageousness" required for intentional infliction of emotional distress is subjective and nebulous. It stated that recovery on such claims is "highly circumscribed" and that objective proof of an injury is required.

To this end, the court in *Kazatsky* concluded as follows:

> It is basic to tort law that an injury is an element to be proven. Given the advanced state of medical science, it is unwise and unnecessary to permit recovery to be predicated on an inference based on the defendant's "outrageousness" without expert medical confirmation that the plaintiff actually suffered the claimed distress. Moreover, the requirement of some objective proof of severe emotional distress will not present an insurmountable obstacle to recovery. Those truly damaged should have little difficulty in procuring reliable testimony as to the nature and extent of their injuries. We therefore conclude that if section 46 of the Restatement is to be accepted in his Commonwealth, at the very least, *existence of the alleged emotional distress must be supported by competent medical evidence*. Id. at 995 (emphasis added).

The *Gray* court reaffirmed the decision of the Pennsylvania Supreme Court in *Kazatsky*. It distinguished the cases cited by Gray in his response to the appeal on the basis that those cases either dealt with negligent infliction of emotional distress, battery or other unrelated torts.

The *Gray* opinion provides fresh perspective and a reminder to defendants in addressing intentional infliction of emotional distress claims on summary judgment. Since such claims rarely stand alone and are often accompanied by other allegations from plaintiffs, defense attorneys need to be aware when an opportunity presents itself to dispose of an additional, unnecessary claim going to a jury. If a plaintiff has simply "piled on" by including a count for intentional infliction of emotional distress, there is a fair chance plaintiff's counsel may not follow through in providing the requisite level of medical evidence mandated by the law. The goal is always to force plaintiffs to meet their required burden of proof on any claim, and letting an intentional infliction of emotional distress claim proceed without sufficient scrutiny could have longer-term, unnecessary consequences. ■

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Pennsylvania—Health Care Liability

CONSIDER RETAINING MULTIPLE EXPERTS TO OPINE ON THE STANDARD OF CARE TO INCREASE YOUR CHANCES OF SECURING A DEFENSE VERDICT

By John Farrell, Esq. & Daniel Dolente, Esq.*

KEY POINTS:

- Consider retaining an expert outside client's area of medicine to opine about the standard of care.
- A second expert opinion could assist in obtaining a favorable verdict.

John Farrell

Daniel Dolente

Pennsylvania's MCARE Act does not prevent a doctor who specializes in one medical specialty from rendering a standard of care opinion on behalf of a doctor who specializes in a different medical specialty, so long as their specialties overlap and the testimony is directly relevant to the issues in the case. In addition to using an expert who is similarly qualified to your client, consider retaining a specialized expert outside of your client's area of medicine to opine to the applicable standard of care.

In every medical malpractice case in Pennsylvania where the claimed malpractice is not obvious and is being challenged by the defense, a qualified expert must provide testimony regarding the applicable standard of care. Pennsylvania's Medical Care Availability and Reduction of Error Act (MCARE) mandates that an expert testifying to a physician's standard of care must be: (1) substantially familiar with the applicable standard of care at issue; and (2) practice in the same subspecialty as the defendant physician or in a subspecialty with a substantially similar standard of care for the issue at hand.

Recently, in *Frey v. Potorski*, 2016 Pa. Super. LEXIS 475 (Pa.Super. Aug. 26, 2016), at issue was whether the defendant, an interventional cardiologist, took all necessary steps within the standard of care to ensure that the patient's blood would not clot during a necessary percutaneous coronary intervention (PCI) procedure. The Pennsylvania Superior Court held that a physician with a different subspecialty than the defendant physician was qualified to provide standard of care testimony, along with another defense expert physician who shared the same specialty as the defendant. Specifically, the *Frey* court allowed a hematologist to opine to the standard of care regarding correct dosages of anticoagulation drugs prior to the PCI procedure.

Prior to trial, the plaintiff filed a motion in limine to preclude the hematologist from offering opinions on whether the defendant interventional cardiologist's administration and dosage of anticoagulants prior to the start of the PCI procedure was in accordance with the standard of care. The plaintiff's argument was that the standard of care in the fields of hematology and cardiology were not substantially similar. The trial court disagreed and held that they were substantially similar in the discrete area where the hematologist would render his opinion, namely, whether the interventional cardiologist selected the appropriate drug and dosage of anticoagulant so that the patient's blood would not clot during the PCI procedure.

At trial, the plaintiff presented testimony of an interventional cardiologist who testified that the defendant violated the standard of care by failing to conduct an activated clotting time test to determine the plaintiff decedent's actual clotting time after receiving heparin and prior to the start of the PCI procedure. The defense presented a competing interventional cardiologist who testified that determining the plaintiff's activated clotting time was not necessary under the appropriate standard of care because the patient had been on a regimen of aspirin and had been administered two anticoagulants—600 milligrams of Plavix and 5,000 units of Heparin—prior to the PCI.

In addition to the competing interventional cardiologist, the defense also presented a hematologist whose particular expertise was in the treatment of clotting, coagulation, and bleeding and thrombosis. The hematologist also testified that he frequently consulted with interventional cardiologists prior to PCI procedures regarding blood clotting issues. The hematologist provided the opinion that the particular drugs (Plavix and Heparin) and the dosage of those drugs would produce the necessary anti blood clotting necessary to proceed with the PCI procedure.

The plaintiff appealed to the Pennsylvania Superior Court, claiming the defense hematologist was not qualified to testify to the standard of care for an interventional cardiologist under the MCARE Act. The crux of the plaintiff's argument was that, as a hematologist who did not personally perform PCI procedures, he was not qualified to testify to the standard of care applicable to an interventional cardiologist. The Superior Court disagreed.

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BUSINESS OWNERS BEWARE

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Additionally, the plaintiffs asserted claims of gross negligence and alleged that the defendant knew or should have known that statements in the agreement were false, inaccurate and contrary to established New Jersey case law. In addition, they alleged that the agreement should be reformed or rescinded and that the defendant's use of the agreement was an unconscionable commercial practice in violation of the New Jersey Consumer Fraud Act.

In September 2015, the defendant filed a motion to compel arbitration and stay proceedings in the lawsuit. The plaintiffs opposed and filed a cross-motion to rescind the agreement. The motion judge heard oral argument and entered an order compelling arbitration and staying the Law Division action. In a rider to the order, the judge stated that Michael Defina had validly agreed to arbitration on behalf of his minor child and there was no evidence that he had been coerced into signing the agreement. The judge found that the arbitration clause was enforceable.

Thereafter, the plaintiffs filed a motion for reconsideration. In denying the motion for reconsideration, the judge rejected the plaintiffs' contention that the arbitration clause did not clearly and unambiguously place the person signing it on notice that he was waiving the right to a trial and agreeing that any disputes would be determined by binding arbitration.

On appeal, the plaintiffs argued that the motion judge erred by enforcing a contract that was invalid, fraudulent and unconscionable. The plaintiffs also argued that enforcement of the agreement was erroneous because it did not apply to personal injury claims arising from conduct greater than ordinary negligence. They further argued that the arbitration clause was not enforceable. The Appellate Division agreed.

In concluding that the trial court erred by finding that the arbitration clause in the agreement was enforceable, the court did recognize that New Jersey has a strong public policy in favor of arbitration as a means of dispute resolution. *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 392 (N.J. 2006). In *Hojnowski*, the court held that an agreement by a parent to arbitrate claims of a minor child arising out of a commercial recreation contract was enforceable. The court stated that, in the absence of any allegations of fraud, duress or unconscionability in the execution of the agreement, or a showing that the agreement to arbitrate was not written "in clear and unambiguous terms," the "[p]arent's agreement to arbitrate is valid and enforceable against any tort claims asserted on the minor's behalf."

However, in *Defina*, the plaintiffs did not claim that Michael Defina was fraudulently induced to execute the agreement or that he did so under duress. Instead, they argued that the arbitration clause was not enforceable because it was not clear and unambiguous. They asserted that the arbitration clause failed to inform the consumer he was giving up his right to bring a lawsuit in court and have the claim decided by a jury. In *Hojnowski*, the arbitration clause stated that the person signing the agreement was indeed giving up the right to sue the recreational facility in a court of law and the right to a jury trial.

In reversing the trial court's decision and remanding the case for further proceedings, the court in *Defina* relied upon *Atalese v. U.S. Legal Servs. Group, L.P.*, 99 A.3d 306, 314-315 (N.J. 2014). The arbitration agreement at issue in *Atalese* stated that either party could submit any dispute to binding arbitration, a single arbitrator would resolve the dispute, and the arbitrator's decision would be final and could be entered as a judgment in a court of competent jurisdiction. However, the court in *Atalese* held that the arbitration clause was not enforceable because the clause did not clearly and unambiguously explain that the plaintiff was waiving the right to seek relief in court for a breach of statutory rights under the Consumer Fraud Act. The court stated:

> [t]he provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceedings in a court of law. Nor is it written in plain language that would be clear and understandable to the average consumer that she is waiving statutory rights. The clause has none of the language that our courts have found satisfactory in upholding arbitration provisions clear and unambiguous language that the plaintiff is waiving her right to sue or go to court to secure relief.

The court noted that arbitration clauses had been upheld because they "[e]xplained that arbitration is a waiver of the right to bring suit in a judicial forum." The court added, "We do not suggest that the arbitration clause has to identify the specific Constitutional or statutory right guaranteeing a citizen access to the court that is waived by agreeing to arbitration. But the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute."

In *Defina*, the court was convinced that the arbitration clause at issue did not clearly and unambiguously inform the plaintiff that he was giving up his right to bring claims arising out of the participation in activities at SZITP in a court of law and have a jury decide the case. Although the clause stated that the person signing the agreement waived any right to a "trial," there was no "[c]lear and unambiguous statement that the person signing the agreement is waiving [his] right to sue or go to court to secure relief." There was no reference in the clause to a court or a jury. Nor did the agreement explain how arbitration differs from a proceeding in a court of law.

In conclusion, the *Defina* court held that the agreement did not clearly and unambiguously inform Michael Defina that he was "[g]iving up his right to bring [his] claims in court and have a jury resolve the dispute." Indeed, *Defina* confirms that clear and unambiguous language in arbitration agreements is not enough—such agreements must also **explain** what arbitration is and what the person signing them is giving up as a result. ■

Pennsylvania—Health Care Liability

IT AIN'T OVER 'TIL IT'S OVER: JUDGE WETTICK AFFIRMS PRACTICE OF LIMITING DEPOSITION OPINIONS OF DEFENDANT PHYSICIANS

By Matthew P. Keris, Esq.*

KEY POINTS:

- Plaintiffs' counsel routinely ask defendant doctors for their opinions as to the standard of care in medical malpractice depositions in Pennsylvania.
- Recent legal precedent affirms the traditional practice of not allowing defendant doctors to testify regarding standard of care issues during a discovery deposition.

Matthew P. Keris

A common deposition practice by plaintiff lawyers is to ask the defendant health care provider to offer his or her opinion about whether the standard of care was met. Traditionally, this question will draw objection from defense counsel, who will instruct the witness to not answer the question. The reason for the objection is that expert testimony as to standard of care would be provided by a specialist with more knowledge than the treating physician. With an additional statement on the stenographic record by defense counsel that the defendant will not be providing expert testimony on his or her own behalf at the time of trial, in a majority of cases, nothing comes of the objection. Defendants typically do not provide standard of care testimony at deposition.

At the beginning of 2016, defense counsel began receiving more resistance to the limitations of deposition opinion testimony. For example, in *Karim v. Reedy*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159 (C.P. Lacka. Jan. 11, 2016), Judge Terrence Nealon specifically disagreed with this practice, as well as a decision from the Honorable R. Stanton Wettick of Allegheny County that memorialized it—*McLane v. Valley Medical Facilities, Inc*., 157 P.L.J. 252 (C.P. Alleg. 2009). In the *Karim* case, Judge Nealon ordered a physician to provide standard of care testimony, not only as to the witness's own standard of care, but as to the co-defendant health care provider's as well. Whereas Judge Wettick prohibited this testimony on relevance grounds, Judge Nealon reasoned that this type of testimony is relevant at deposition (as opposed to trial testimony that the jury considers) because the scope of discovery is broad, allowing a party to seek information that is reasonably calculated to lead to the discovery of admissible evidence, and due to the fact that the information sought involves an opinion.

From a practical perspective, Judge Nealon's decision ran contrary to typical Pennsylvania deposition practice and was hailed a victory by members of the plaintiffs' bar. Had Judge Nealon's decision been affirmed by an appellate court, it would have compelled a witness to not only comment on his or her standard of care, but also as to the standard of care of others. It would have further created the need to prepare substantive motions in limine in advance of trial to prohibit a defendant physician's opinions from jury consideration, given the plaintiffs' bar's practice of videotaped deposition testimony playback at trial.

However, in *Lattaker v. Magee Women's Hospital of UPMC*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1144 (C.P. Alleg. July 5, 2016), Judge Wettick re-evaluated his prior decision in *McLane* and commented on Judge Nealon's opinion in *Karim*. Judge Wettick compared the two decisions and affirmed his prior ruling. In *Lattaker*, Judge Wettick considered a motion to reconvene a defendant physician's deposition after the attorney would not allow his client to answer deposition questions regarding the interpretation of fetal monitoring strips. In ordering the physician to return to deposition to answer those questions, Judge Wettick held that, "[n]othing in my *McLane* decision suggests that a party may object to the testimony of a treating physician or any other witness who testifies that a review of a slide, chart, report, x-ray, and the like may be helpful in refreshing the witness's memory." He further provided guidance about the scope of his *McLane* ruling and contrasted it with Judge Nealon's *Karim* opinion.

Judge Wettick held that *Lattaker* and *Karim* both permit robust discovery relevant to what the witness remembers. According to Wettick, the only difference between the cases is that, under his analysis, the defendants cannot be asked at deposition what they see and reasons why the medical treatment provided did or did not fall below the standard of care. The primary difference between the opinions is that Judge Wettick does not allow standard of care testimony by a physician defendant primarily on relevancy grounds, whereas *Karim* uses a more broad evidentiary standard that allows a party to seek information, including opinion testimony, that is reasonably calculated to lead to the discovery of admissible evidence.

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WORKERS' COMPENSATION LIENS RULE!!!

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> Act without regard to the compensability of the claim, and that the employee not obtain a double recovery.

Utica Mut. Ins. Co. v. Maran & Maran, 667 A.2d 680 (N.J. 1995).

The court in *Dorflaufer* concluded with very strong language:

> We are convinced that, based upon the plain language of Section 40, there is no bar to a workers' compensation lien for reimbursement of medical expenses from an employee's settlement in a third-party automobile negligence action. There is nothing in Section 40 that prevents a lien from applying where the settlement represents payment for pain and suffering. The fact that PIP benefits are not recoverable against a tortfeasor has no bearing on an employer's Section 40 lien rights.

In *Dorflaufer*, the court has again affirmed the strength of a Section 40 workers' compensation lien and the public policy against a double recovery. Regardless of how a third-party settlement or judgment is characterized—"pain and suffering," "loss of consortium," etc.—a workers' compensation lien will always be given first priority for reimbursement given the clear statutory language. If a negligent party causes a work injury, that negligent party, not the employer, should bear the financial responsibility. It is somewhat surprising that a large portion of workers' compensation appellate litigation is focused on trying to avoid or weaken Section 40 given the court's decisions. However, as long as the public policy against double recoveries remains intact, Section 40 will continue to help employers seek financial reimbursement against negligent third-parties where appropriate. ■

PROOF OF A WORKPLACE INJURY

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out by Justice O'Donnell's dissent, "[a] court should not construe the statute in a manner to encourage fraudulent claims for workers' compensation benefits and here the Bureau of Workers' Compensation determined there was no workplace injury. The evidence therefore supports the trial court finding that Sierra Lobo, Inc. fired Plaintiff Onderko for filing a fraudulent claim." In short, Justice O'Donnell argued that the majority's ruling in this case did not provide a fraud defense to an employer for a Section 4123.90 retaliation claim.

In conclusion, the law in Ohio is now such that an employee may bring a claim against an employer for retaliation regarding a workers' compensation claim even if no proof can be shown of a workplace injury under Ohio Revised Code § 4123.90. This is true even if the employee both loses his attempt to receive workers' compensation and never appeals the denial. Further, although the Ohio Supreme Court hinted in dicta that an employer may be insulated from liability for a retaliation claim if the initial workers' compensation claim was "fraudulent," an explicit statement by the court in *Onderko* is missing. ■

TIME IS OF THE ESSENCE

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Revised Code § 2305.11(A)'s confined limitations period is a weapon that can be wielded by defense practitioners to defeat a wide variety of legal malpractice claims filed by disgruntled clients against their former attorneys. While determining the accrual date of the cause of action can be a thorny, elusive endeavor, this task should be a top priority for defense practitioners handling legal malpractice matters during the course of a lawsuit from start to finish. Right out of the gate, defense attorneys should thoroughly analyze the applicability of a statute of limitations defense during the preliminary evaluation of the claim. Importantly, the defense can operate to efficiently, effectively and definitively dispose of legal malpractice actions at the outset of litigation where the attorney is able to point to the existence of a cognizable event that occurred more than one year before the date that suit was filed, which can be utilized to extinguish claims with a successful Rule 12(b)(6) motion to dismiss. Furthermore, even if the preliminary investigation fails to reveal any obvious cognizable events at the outset of the litigation process, defense practitioners should focus their paper discovery requests and deposition inquiries in a manner that will allow them to obtain the necessary facts to demonstrate that the former client knew or should have known of the allegedly negligent performance of his or her attorney more than a year before suit, which can then serve as the basis for a successful motion for summary judgment based on a failure to comply with R.C. § 2305.11(A). ■

Pennsylvania—Public Entity & Civil Rights

INVOLUNTARY VEHICLE MOVEMENT & GOVERNMENTAL IMMUNITY: A CLOSER LOOK AT THE MOTOR VEHICLE EXCEPTION TO THE POLITICAL SUBDIVISION TORT CLAIMS ACT

By Patrice M. Turenne, Esq.*

KEY POINTS:

- Driving records of employees who operate motor vehicles for governmental agencies should be screened.
- Governmental agencies should consider having their employees complete reports for any motor vehicle accidents they are involved in while at work.
- As technology advances, the bounds of the motor vehicle exception will continue to evolve.

Patrice M. Turenne

In *Balentine v. Chester Water Auth*., 140 A.3d 69 (Pa.Commw.Ct. 2016), a case of first impression, the Pennsylvania Commonwealth Court recently addressed the motor vehicle exception to the governmental immunity bestowed by the Pennsylvania Political Subdivision Tort Claims Act (Tort Claims Act), 42 Pa. C.S. §§ 8541-42. It held that the involuntary movement of a vehicle caused by the actions of a third party does not constitute operation sufficient to trigger the application of the motor vehicle exception.

The plaintiff, individually and as Administratrix of the estate of Edwin Omar Medina-Flores, filed a complaint against the Chester Water Authority, its employee, and the owner and operator of another vehicle. The plaintiff alleged that the Water Authority's employee negligently parked its truck, which was then struck by another vehicle, causing the vehicle to pin the decedent, ultimately leading to his untimely death. The Water Authority argued that it was immune from liability under the Tort Claims Act. The plaintiff responded by arguing that her claim qualified under two exceptions. Most important for our purposes, the plaintiff argued that her claim qualified under the motor vehicle exception. The trial court granted the Water Authority's motion for summary judgment, and the plaintiff appealed to the Pennsylvania Commonwealth Court.

A brief overview of the motor vehicle exception is helpful for the purpose of understanding the potential implications of *Balentine*. The motor vehicle exception specifically states that a governmental agency can be held liable for injuries caused by the operation of any motor vehicle in the possession or control of the agency. A motor vehicle for the purpose of the exception is defined as any vehicle that is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

On appeal, the plaintiff argued that a stopped car could still be considered in operation for the purposes of the exception. The court quickly distinguished all of the plaintiff's cited cases on the issue and did find one case cited by the plaintiff particularly helpful in its analysis. In *Mickle v. City of Philadelphia*, 707 A.2d 1124 (Pa. 1998), the Pennsylvania Supreme Court highlighted the idea that negligence related to the operation of a vehicle encompasses not only **how** a person drives but **whether** they should be driving. The court then turned to the cases cited by the Water Authority to support its argument that a stopped vehicle is not in operation for purposes of the motor vehicle exception.

In *Love v. City of Philadelphia*, 543 A.2d 531 (Pa. 1988), the Pennsylvania Supreme Court held that to operate means to put something in motion and mere acts of preparation to operate or cessation of operation do not count as actual operation. By way of example, getting into or out of a vehicle would not constitute operation under the holding in *Love*. Furthermore, under the holding of *Pennsylvania State Police v. Robinson*, 554 A.2d 172 (Pa.Commw.Ct. 1991), even a police vehicle stopped for the purpose of allowing an officer the ability to assist a disabled motorist is not considered in operation for the purpose of the exception.

Additionally, a vehicle stopped but still running with flashers activated would not be considered in operation under *First National Bank of Pennsylvania v. Department of Transportation*, 609 A.2d 911 (Pa.Commw.Ct 1992). In *First National Bank*, the plaintiff's decedent was injured when his car collided with the defendant agency's vehicle, which was left parked, but running, on the side of the road with the flasher activated while the employee placed delineators on an adjacent highway. The Pennsylvania Commonwealth Court held that the vehicle was not in operation because it was not temporarily stopped in traffic and because the injuries alleged were not caused by any moving part of the vehicle. Finally, even a negligently parked car does not qualify as in operation pursuant to the holding in *City of Philadelphia v. Melendez*, 627 A.2d 234 (Pa.Commw.Ct. 1993) if the vehicle is already parked at the time of a collision.

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Pennsylvania—Public Entity & Civil Rights

WHEN IN DOUBT, GET IT IN WRITING

By April L. Cressler, Esq.*

KEY POINTS:

- The increase in media coverage of negative law enforcement stories is leading to a rise in civil suits.
- Plaintiffs appear emboldened by the anti-police rhetoric common today.
- In order to protect your law enforcement clients, it is essential to work closely with prosecutors to ensure plea agreements contemplate potential civil liability.

April L. Cressler

It was New Year's Eve, and Sue Smith was closing out her year with a bang. It wasn't yet midnight when the bartender determined it was time to cut her off. Sue responded by launching a beer bottle at the bartender's face, and a scuffle with two uniformed officers ensued, eventually concluding with Sue being tasered and an officer receiving substantial bite wounds. At her preliminary hearing, Sue pleaded for mercy because she wanted to be a nurse and a conviction would likely hurt her chances of finding a job. Also, during the struggle, Sue had been tasered in her breast area. In light of the circumstances, all parties agreed that the charges would be withdrawn. Sue then immediately filed suit against the officers for excessive force in the use of the Taser. With no record of her admission of guilt and pleas for mercy, a costly defense would ensue. All of which could have been avoided with a release/dismissal agreement.

Release/dismissal agreements are by no means a new strategy for those prospectively seeking to prevent Section 1983 claims stemming from an arrest and/or criminal prosecution. Nor are they unique to Pennsylvania. A prominent case that addressed release/dismissal agreements, and subsequently established standards for evaluating the voluntariness of said agreements, was decided in 1987 in the case of *Town of Newton v. Rumery*, 480 U.S. 386 (1987). The *Rumery* case involved allegations of sexual assault, witness intimidation and a prominent criminal defense attorney determined to win Rumery's case at any cost. In the end, a written settlement was reached in which it was agreed that all charges against Rumery would be dismissed as long as Rumery agreed not to sue the town. Further, all parties agreed that one of the reasons Rumery would not be prosecuted was to protect the alleged victim, who did not want to testify.

Approximately ten months after signing the agreement, Rumery filed a Section 1983 action, alleging that the town and its officers had violated his constitutional rights. The defendants moved to dismiss based upon the release/dismissal agreement, and the District Court concluded that a release of claims under Section 1983 was valid if it results from a decision that was voluntary, deliberate and informed. Upon appeal, the Supreme Court ultimately concluded that release/dismissal agreements were enforceable and that the *Rumery* agreement was valid because: (1) it was voluntary; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement would not adversely affect relevant public policy interests. The Supreme Court emphasized a case-by-case analysis of the facts giving rise to the agreement.

The Third Circuit similarly addressed the enforceability of a release/dismissal agreement in *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515 (3d Cir. Pa. 1996). In *Livingstone*, police responded to a domestic dispute in which Mrs. Livingstone hit a police officer with a fishing rod, resulting in her being taken into custody. Although contested, Mrs. Livingstone argued that a stun gun was used between her legs and a hospital examination would confirm a burn in the vulval area. The defendants contended they used only the force necessary to place Mrs. Livingstone under arrest. Mrs. Livingstone was charged with aggravated assault, among other charges.

Prior to Mrs. Livingstone taking the stand during her criminal trial (and perhaps testifying to the use of the stun gun on her genital area), a conference was held, and an agreement was reached that clearly laid out the understanding that the Livingstones would forgo any civil claims upon the payment of all bills associated with the subject incident. The parties all agreed to the representation of the agreement on the record, and the court granted an acquittal. One year later, the Livingstones sued the police officers and their employing municipalities.

The defendants sought dismissal, arguing the suit was barred by the release/dismissal agreement. However, the Livingstones claimed they never intended to waive their rights to sue, pointing out that the agreement was never reduced to writing and was contrary to Pennsylvania law. Protracted litigation followed until the matter of the validity of the agreement reached the Third Circuit Court of Appeals. In evaluating the soundness of the release/dismissal agreement, the court looked to *Rumery* for guidance and acknowledged that citizens are permitted to waive their constitutional rights in a variety of circumstances. Accordingly, the court held that, as Pennsylvania has adopted forms of plea bargaining, so, too, would the Pennsylvania Supreme Court be likely to permit release/settlement agreements upon a showing of voluntariness. The court cautioned, however, the scrutiny applicable to the voluntariness of a

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Pennsylvania—Workers' Compensation

CLARIFYING THE BURDEN IN A SECTION 108(R) OCCUPATIONAL DISEASE CLAIM: THE IMPACT OF *SLADEK* AND *HUTZ*

By Ashley S. Talley, Esq.*

KEY POINTS:

- The presumption of compensability in § 301(f) of the Workers' Compensation Act is inapplicable to the 600-week time frame for filing a claim petition under § 108(r), unless the petition is filed within § 301(f)'s 300-week time frame for applying the presumption of compensability.
- The presumption of compensability analysis of § 301(f) is triggered only after claimant proves a causal relationship between his occupational exposure to a Group 1 carcinogen and claimed disease.
- A claimant must prove that his or her exposure was a substantial contributing factor to the occupational disease.

Ashley S. Talley

As a general matter, an individual has the right seek compensation for a wide variety of injuries under the Pennsylvania Workers' Compensation Act, including a category of claims for occupational diseases generally thought of as injuries that predominate in a specific profession as a result of long-term exposure to a hazardous condition. The definition of these injuries is governed by Section 108 and includes a specific category for occupational diseases suffered by firefighters. Specifically, Section 108(r) reads: "[c]ancer suffered by a firefighter which is caused by exposure to a known carcinogen…recognized as a Group 1 carcinogen by the International Agency for Research on Cancer."

Recent case law has interpreted the requirements of Section 108 and clarified the exact standards and presumptions to be used when evaluating a Section 108(r) occupational disease claim. In the case of *Hutz v. Workers' Compensation Appeal Board (City of Philadelphia)*, 2016 Pa. Commw. LEXIS 382 (Pa. Commw. Sept. 7, 2016), the claimant was employed a firefighter for the City of Philadelphia. Over the course of his 33-year career, he was exposed to various toxic substances, including diesel fuel emissions, asbestos, smoke and gas, among other inhalants. The claimant was diagnosed with prostate cancer in 2006 and missed three months of work for treatment. He eventually returned to his pre-injury position and continued working until retiring in January of 2008. A claim petition was filed four years later, alleging that his previous prostate cancer arose as a result of exposure to Group I carcinogens that he encountered through his employment as a firefighter for the City. Total disability benefits were requested pursuant to Section 108(r) of the Pennsylvania Workers' Compensation Act.

In reviewing the evidentiary record, which included medical reports and deposition transcripts from various medical experts, the Workers' Compensation Judge denied the claim petition, finding that, despite work-related exposure to Group 1 carcinogens, the claimant failed to prove it was a substantial contributing factor to his prostate disease. The Workers' Compensation Appeal Board agreed. In affirming the judge, the Board reasoned on a different basis, that the presumption of compensability under Section 301(f) only applies to claims made within 300 weeks from the last date of employment. Because the claim petition was filed 318 weeks from the last date of work-place exposure, the Board concluded the claimant could not be afforded the presumption of compensability and had to proceed on a regular inquiry of causation.

On appeal to the Commonwealth Court, the claimant argued the Appeal Board misinterpreted Section 301(f) to require that an occupational disease claim be made within 300 weeks before he could avail himself of the presumption of compensability. This, according to the claimant, is not required for any other occupational disease and, therefore, unduly restricts a firefighter's ability file a Section 108(r) claim. The court disagreed, clarifying that the issue was not whether the claim petition was timely but whether the claimant can rely upon the statutory presumption of compensability. Both inquiries are specifically set forth in Section 301(f), which mandates that Section 108(r) claims be made "[w]ithin 600 weeks of the last date of employment in…which a claimant [is] exposed to the hazards of the disease." Thus, in order to be timely, a claim petition for a Section 108(r) disease must be made within 600 weeks, a time frame separate and apart from the time limitation for applying the presumption of compensability. This, as established in Section 301(f), "[s]hall only apply to claims made within the first 300 weeks." Thus, while timely, the claimant had filed his claim petition outside of the 300-week period, thereby eliminating his ability to rely upon the presumption of compensability.

Ultimately, however, the court noted that the filing date was immaterial. The claimant failed to establish a causal relationship

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ELIMINATING DUPLICATE CLAIMS

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(Pa.Super. 2005)(observing that the doctrine "would not necessarily bar a fraud claim stemming from the fraudulent inducement to enter into a contract.").

Courts will uphold the specific terms of a contractual agreement involving the insured and are more likely to strike tort-based claims where a written contract exists. There is well-established case law in the Commonwealth that when interpreting a contract, our courts are to give effect to the intent of the contracting parties. *See*, *Hart v. Arnold*, 884 A.2d. 316, 332 (Pa.Super. 2005). Moreover, the intent of the parties to a written agreement is to be regarded as being embodied in the writing itself. The whole instrument must be taken together in arriving at contractual intent. Courts do not assume that a contract's language was chosen carelessly, nor do they assume that the parties were ignorant of the meaning of the language they employed. When writing is clear and unequivocal, its meaning must be determined by its contents alone. *Murphy v. Duquesne University of the Holy Ghost,* 777 A.2d. 418, 429 (Pa. 2001). This is why it is important to use the Gist of the Action Doctrine at the preliminary objection/motion to dismiss stage. Only where the terms of a contract are ambiguous would parole evidence be introduced. *See*, *Synthes USA Sales, LLC v. Harrison*, 83 A.3d. 242, 251 (Pa.Super. 2013).

The Gist of the Action Doctrine may also be utilized for defendants who are not parties to the applicable contract. For instance, in *Sparrow v. Pace/CM, Inc*., 22 Pa. D. & C. 5th 515 (C.P. Lack. 2011), the Court of Common Pleas applied the doctrine to dismiss tort-based claims against the defendants who were not parties to the contract at issue.

While the Gist of the Action Doctrine may not eliminate a complaint or joinder complaint in its entirety against your insured, it can be successfully utilized to eliminate tort-based claims against your insured. The use of the Gist of the Action Doctrine is successful in causing plaintiffs and joining defendants to focus their claims on the actual obligations of the defendants under the applicable contract or relevant agreement and decreases the number of arguments that can be made against your insureds. ■

CONSIDER RETAINING MULTIPLE EXPERTS

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The court opined that the hematologist specifically limited his testimony to the standard of care necessary to the administration of anticoagulation medication prior to a PCI procedure. His particular expertise in clotting, coagulation, bleeding and thrombosis, as well has his experience consulting on the proper dosages to be administered prior to PCI procedures, allowed him to testify that the 5000 units of Heparin given to the decedent comported with the standard of care.

Accordingly, in addition to establishing that a physician with a different subspecialty to the defendant can still opine on standard of care issues under MCARE, this opinion is extremely helpful to the defense bar because it allows multiple defense experts to opine to the standard of care. When defending a physician in a medical malpractice case, thought should be given to whether a subspecialist should also be retained as a second expert to render an opinion on the applicable standard of care. If there is a discrete issue within the standard of care that can be competently addressed by an expert in a different field of medicine, *Frey* allows the defense to admit additional expert testimony on the standard of care. As was the case in *Frey*, additional expert testimony on the standard of care, and how a physician defendant acted appropriately within that standard, can go a long way toward securing a defense verdict. At times, two is better than one. ■

INVOLUNTARY VEHICLE MOVEMENT

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After analyzing the cases relied upon by both parties, the court turned to the facts at issue. The court affirmed the trial court's grant of summary judgment on the issue of the applicability of the motor vehicle exception. The court reasoned that the motor vehicle exception did not apply because, although the Water Authority's truck was running at the time of the collision, it was parked and only moved, involuntarily, as a result of being struck by a vehicle operated by a third party. The court signaled that the outcome may have been different if the plaintiff had alleged that the vehicle was not fully parked, that the injury alleged was caused by an involuntary movement of the truck's parts or an attachment to the truck, or that the truck had been negligently maintained or repaired. ■

IT AIN'T OVER 'TIL IT'S OVER

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Lattaker and *Karim* are trial court opinions that serve as legal precedent in those cases only. That being said, many plaintiffs' lawyers hailed *Karim* as a way to compel opinions at deposition. From a practical standpoint, a defense attorney confronted with the *Karim* decision can argue and counter with *Lattaker*. As it currently stands, the issue of doctors' opinions at depositions can be argued both ways, at least until an appellate court offers further guidance. Until then, if defense counsel does not want a client to be compelled to provide standard of care testimony at deposition, he or she can continue the practice of having them state on the deposition record that they will not serve as an expert at the time of trial and instruct their client not to provide answers to those questions if asked. This protective practice ain't over until an appellate court says it's over. ■

WHEN IN DOUBT, GET IT IN WRITING

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release/settlement agreement that is not reduced to writing. Accordingly, in order to ensure that the agreement was not reached under improper circumstances or under the threat of prosecution, the voluntariness of oral release/dismissal agreements must be evaluated according to the heightened clear and convincing standard.

Thus, in order to protect your law enforcement clients, it is critical to work with the prosecuting attorney in order to ensure that any release/settlement agreement is in writing and it is clear that it is voluntary and not the product of duress or misconduct. When agreements cannot be reduced to writing, it is important that an acknowledgement is made on the record that probable cause existed for the arrest and/or that the force used was only that necessary to effectuate the arrest. ■

CLARIFYING THE BURDEN

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between his prostate cancer and his occupational exposure to a Group 1 carcinogen, and, thus, he could not meet his burden of proving the presumption of compensability. Citing its recent holding in *City of Philadelphia Fire Department v. WCAB (Sladek)*, 144 A.3d 1011 (Pa. Commw. Ct. 2016), the court emphasized the procedural requirements for a *prima facie* case of compensability, which requires a threshold showing that the claimant's cancer is caused by work-related exposure to Group 1 carcinogens. If the claimant is successful, he is alleviated from eliminating outside possibilities for the occupational disease, with the inquiry turning to the requirements of Section 301(f). Only then and upon meeting this criteria does the claimant establish a presumption of compensability. Here, because the claimant could not meet his threshold burden of establishing that his work-related exposure was a substantial contributing cause to the development of prostate cancer, the remaining inquiry of presumption of compensability was moot. There was ample evidence to support the specific findings on this issue, and, thus, they could not be disturbed upon appeal. This analysis further rendered unnecessary any discussion about whether the discovery rule applied, as was alternatively argued by the claimant.

The cases of *Sladek and Hutz* provide much needed guidance on what standards a claimant must meet when navigating a Section 108(r) claim. Specifically, there must be a threshold showing of causation between work-place exposure and claimed occupational disease, a fact-intensive inquiry decided based upon the credibility determinations of a Workers' Compensation Judge. It is only after this initial burden is met that a claimant may pursue the remaining elements of a *prima facie* case for compensability, and because these are straight-forward requirements, there is less flexibility for a defense. Thus, these cases seem to suggest that the greatest hurdle for the claimant will be in meeting the threshold burden, and it is recommended that any defense to a Section 108(r) claim be mounted at this time. ■

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