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Defense Digest

On The Pulse...

PROFILE OF OUR NEW YORK CITY OFFICE

By Jeffrey J. Imeri, Esq.*

Jeffrey J. Imeri

Since its opening in April 2008, our New York City office has grown from three attorneys to over 30 in the most competitive legal market in the country. This achievement is not only a testament to our firm's commitment to expanding our capabilities in New York in order to meet our clients' needs, but also to our clients' continuing loyalty to our firm. Today, we have an experienced, diverse legal staff who are fully equipped to handle all manner of general liability and professional liability matters in the New York City area. Coupled with our Long Island and Westchester offices, we now have nearly 60 attorneys who handle all types of defense cases and legal assignments throughout the state of New York.

We can proudly say that we are now at the forefront of the many defense firms in New York. No longer just a small satellite office, we have grown and gained traction with each passing year to the point where we are now a peer with our larger, long-established offices, such as those in Philadelphia, Cherry Hill and Roseland. This accomplishment is due to the depth of our talent and defense experience in New York and the hard work of our legal staff. It is also due to the careful planning of our management, which has not simply expanded our services in New York for growth's sake, but has assembled a team of attorneys who truly work together as a unit to provide the full range of services requested by our many clients.

We have the personnel to handle the simplest to the most complex general liability and professional liability cases, from inception through trial. In the past few years, our New York City attorneys have obtained multiple defense verdicts in high-exposure jury trials, involving such claims as serious bodily injury, property damage and breach of contract. During a time when many defense firms in New York have only a few bona fide trial lawyers, our legal staff includes more than a dozen lawyers who, between them, have tried hundreds of significant cases to verdict during their careers.

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* *Jeff is a shareholder who works in our New York, New York office. He can be reached at 212.376.6408 or jjimeri@mdwcg.com.*

OUR SPECIAL FORCES UNIT: THE BIRTH AND CATASTROPHIC INJURY LITIGATION PRACTICE GROUP

By T. Kevin FitzPatrick, Esq.*

T. Kevin FitzPatrick

Defending high-exposure cases is routine throughout our Health Care Department, but separate and apart are the litigation matters being handled by the attorneys in our Birth and Catastrophic Injury Litigation Practice Group. Think of our Health Care Department as a branch of the military. Now think of our Birth and Catastrophic Ingury Practice Group as a Special Forces Unit, ready to answer any assignment on short notice. Because these type of cases involve birth injuries, infants and children, significant trauma, as well as catastrophic injuries requiring lifelong medical care with associated wage loss claims, their level of exposure often extends into eight-digit values. As a consequence, these matters require an extremely high level of defense experience and aptitude, which our firm is fortunately able to provide.

Steve Ryan, working out of our King of Prussia office, has been practicing for over 40 years and is chair of the practice group. Steve's trial resume is extensive. He has tried numerous birth injury matters over the years, along with significant high-exposure matters in other areas of medicine. Because of his experience and accomplishments, Steve has been selected and is currently serving on both the Birth Injury Specialty Counsel and Catastrophic Injury Specialty Counsel panels for a national insurer, where he collaborates and shares information with top trial attorneys across the country. Another member of the Specialty Counsel Panel is David Krolikowski, also from the King of Prussia office. Dave is a former molecular immunologist who serves clients through his experience in biostatistics, laboratory research, clinical trials and interpretation of scientific literature, including *Daubert* and *Frye* challenges.

The Birth Injury and Catastrophic Practice Group works in these areas:

- Defending birth injury claims, without geographical limitation.

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* *Kevin is a shareholder and the Director of our Health Care Department. He can be reached at 610.354.8252 or tkfitzpatrick@mdwcg.com.*

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A MESSAGE from the EXECUTIVE COMMITTEE

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

March is upon us, but one can't move forward without looking back. Unquestionably, 2016 was marked by extraordinary events—defining a world some might characterize as chaotic. The Temptations' 46-year-old song, "Ball of Confusion," is awfully prescient. Let's see:

> Real estate tycoon and reality TV host actually wins the presidency! Email servers, Miss Brazil, Tic Tacs, The Clinton Foundation, a torrent of tweets, Comey's investigation(s), Weiner's laptop, Russian hacking ... British voters shock the world with Brexit, global financial markets shudder and British Prime Minister David Cameron resigns ... ISIS suicide bombers terrorize Brussels with a coordinated attack on the city's subway system and airport... a Tunisian-born immigrant plows a 19-ton truck into a crowd celebrating Bastille Day in Nice, France, killing 86 people ... 44 die in an Istanbul airport blast ... A truck driver plows into a Berlin crowd of Christmas shoppers killing 12 ... The brutal Syrian civil war drags on with over 250,000 deaths recorded... A shooter kills 49 people in an Orlando nightclub ... Police shoot two black men, Alton Sterling and Philando Castile, sparking national protests by the Black Lives Matter movement ... In Dallas, a sniper shoots and kills five police officers ... A sovereign's prime minister boasts about tossing a criminal suspect off of a helicopter... .

Against this backdrop, we functioned in a fluctuating insurance industry. While the stock market improved its posture late in the year, insurers still struggled to find decent investment return on premium. Insurers continued convergence of outside panel counsel. Rate increases continue to be difficult to obtain. Ace merged with Chubb. XL merged with Catlin. Tokio Marine purchased HCC. Fosun first purchased Ironshore, and then Liberty Mutual later did the same. Fairfax purchased Allied World.

Yet in the face of unpredictability, we remain rock-solid.

We are privileged to have maintained the favor of those insurers involved in panel convergence. We fortunately have held our position with insurance companies that integrated panels. We are grateful for their confidence in us.

For the fourth year in a row, our firm was named one of the best places to work in the Philadelphia region by the *Philadelphia Business Journal*. Also, *The Legal Intelligencer* announced in 2016 that Marshall Dennehey had the best Professional Liability Department (inclusive of health care) and the best Appellate practice in Pennsylvania.

When I spoke at our shareholder meeting in December—anticipating that 2017 will continue to exert dynamic forces—I urged our shareholders to embrace one particular character trait: PERSERVERANCE.

Perseverance will shape our mindset in everything we do this year. Here are a few examples of how we will persevere:

- In the hiring and development of quality personnel defined by a "total person" concept: solid scholastic aptitude, hardy work ethic, team-oriented disposition, strong character, an ability to communicate and relate well with others, and effective problem-solving.
- In our commitment to maintain comprehensive internal training of our attorneys, paralegals, and administrative staff. While we are confident we train more purposefully than other firms, this year, we will expand and emphasize training on early resolution protocols, accurate budget formulation, and leveraging our experience and technology to yield greater efficiencies and a higher value defense.
- Improving the quality of our legal services by our internal audits of our attorney files, conducting case roundtables, and heeding the areas of improvement noted by insurer audits.
- In our commitment to partner with insurers who are dedicated to early resolution of cases. Last year, we had three "partner" meetings with insurance companies—AIG, Liberty Mutual, and Zurich. Attorneys and paralegals attended these sessions to acquire a better sense of our insurers' litigation objectives. We enjoyed a healthy dialogue regarding reducing write-offs/write-downs. We are aligned with insurers in reducing our errant rates and the time we all spend in the invoice adjustment process.
- In our personal visits to clients to assess our relationships and to deepen them. We want our clients to tell us how we are doing. We want to know how we can assist insurers in advancing their litigation objectives, their professional development, and their standing in the industry. We seek healthy dialogue about how we can help insurers manage legal expense. We want to explore new ways to demonstrate our value.

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* *Chris Dougherty works in our Philadelphia, Pennsylvania office and can be reached at 215.575.2733 or cedougherty@mdwcg.com.*

PROFILE OF OUR NEW YORK CITY OFFICE

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We currently defend scores of high-exposure construction defect and New York Labor Law actions. We also handle many complex coverage matters, including additional insured tenders, bad faith matters and first-party property claims. Our Maritime Litigation Practice Group is regularly involved in various types of cargo defense, cargo subrogation, maritime-related personal injury litigation, including Jones Act and Long Shore Harbor Workers' Compensation Act cases, as well as collisions, oil spills and charter party disputes. Our appellate attorneys have successfully prosecuted and defended numerous appeals in New York's state and federal courts. Our team of casualty lawyers, under the supervision of Steve Christman, one of the New York City office's founding attorneys, defends hundreds of premises liability matters and product liability cases. In addition, we have expanded our SIU and fraud practice in New York. In the past year alone, we have received well over a thousand assignments in that area from our insurance company clients. We also handle consumer financial services litigation, such as the defense of Fair Debt Collection Practices Act cases. Professional liability cases involving architects and engineers, employment, discrimination, legal and medical malpractice lawsuits are also squarely within our areas of experience. Our lawyers not only know New York law inside and out, but they also know the courts, judges and opposing attorneys from years of interaction and experience in their respective practice areas.

Just as importantly, our New York City attorneys, as well as those throughout our firm, are trained and well-versed in compliance with guidelines promulgated by our clients. They know that doing a good job in a case means more than just obtaining a favorable result. It means communicating promptly with the client and providing timely reports, evaluations and budgets in the forms required by the client. It also means working hard to achieve the best result possible in the most cost-effective manner. Client satisfaction is, and will always be, our firm's primary goal.

Our New York City office is located in Manhattan's downtown financial district. We are in close proximity to the city's supreme, civil and federal courts, and our attorneys routinely cover the counties of New York, Kings, Queens, Bronx and Richmond, as well as the Federal District Courts for the Southern and Eastern Districts of New York. ■

OUR SPECIAL FORCES UNIT

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- Defending medical malpractice claims involving other types of catastrophic injury, in multiple jurisdictions.
- Assisting in non-malpractice casualty litigation involving serious injuries with complex medical issues and possible alternate causation.
- Developing robust mitigation strategies and utilizing reputable experts to attack damage projections.

Marshall Dennehey's health care lawyers are recognized for their experience and results in the handling of these types of large-exposure cases. *The Legal Intelligencer* recognized our Health Care Department in 2012 as being the "Litigation Department of the Year–Medical Malpractice." More recently, in 2016, the same publication conferred upon our firm "Litigation Department of the Year" in the "Professional Liability" and "Appellate" categories. The professional liability category included health care matters, and numerous health care litigation cases were reviewed as part of the selection process. Such recognition is achieved through the hard work and efforts of our attorneys and staff in various offices where these type of matters are handled. Significant representative cases in the last few years that have been successfully defended through trial include obstetrical malpractice cases with neurologically impaired newborns; stroke cases resulting in severe neurologic deficits; neurosurgical cases resulting in complications such as blindness, meningitis, infection and death; as well as other medically complex matters.

The fact that clients continue to look to Marshall Dennehey to handle birth injury and catastrophic injury matters is a testament to the experience, training and skill of our attorneys. Our mission as a health care litigation department is to remain vigilant and be as committed as possible to exposing our attorneys to the courtroom experience and to try cases so that carriers and clients will continue to have confidence in our abilities as we move into the future. We will strive to collaborate with our clients and, hopefully, partner with them on the importance of developing our younger attorneys with the goal to always have a team of special forces ready when the need arises. ■

Federal—Employment Law

FOLLOWING THE MONEY: EEOC DRASTICALLY EXPANDS EMPLOYER EEO-1 REPORTING REQUIREMENTS WITH ADDITION OF WORKFORCE PAY DATA COMPONENT

By David J. Oberly, Esq.*

KEY POINTS:

- Beginning in March 2018, the EEOC will start collecting summary employee pay data on modified EEO-1 Reports.
- In implementing these new requirements, the EEOC has sent a strong signal that it intends to boost its enforcement efforts in the area of pay discrimination.
- Employers should take proactive measures to ensure compliance with the new regulations and to avoid future pay discrimination claims.

David J. Oberly

The EEOC recently released its much-anticipated final revisions to its annual Employer Information Report—more commonly known as the EEO-1 Report—which has been significantly modified to mandate the submission of worker pay data from certain employers. As a result, beginning in March 2018, the EEOC will collect summary employee data based on W-2 earnings, as well as hours worked, from a selection of employers on modified EEO-1 Reports. Employers, especially those with 100 or more workers, are well advised to take a close look at the finalized changes, which not only substantially increase companies' data reporting burdens, but will also almost inevitably lead to more charges of pay discrimination being pursued by both the EEOC and employees.

The EEOC enforces federal laws prohibiting employment discrimination, including the Equal Pay Act of 1963 and the Civil Rights Act of 1964, which collectively prohibit pay discrimination on the basis of race, ethnicity, gender and other protected classes of individuals. As a result of the EEOC's new changes to its annual EEO-1 Report, private companies with 100 or more workers will be required to submit pay data with their annual EEO-1 Reports. Employers that do not meet the 100-employee threshold are not affected by the changes and will maintain their current EEO-1 reporting requirements.

The current EEO-1 Report already requires private employers with over 100 employees to submit demographic information concerning the composition of their workforce based on race, ethnicity and gender. The revised EEO-1 Report features two significant additions. The first pertains to summary pay data. Employers must now submit data specifying the number of full- and part-time workers categorized by demographics in twelve separate pay bands for each EEO-1 job category based on W-2 wages. In doing so, employers will report the income provided in Box 1 of their workers' W-2 forms. The revisions do not, however, make any mandates related to reporting of individual pay, salaries or personally identifiable information. The second new feature of the revised EEO-1 Report pertains to data concerning aggregate hours worked. In this respect, employers will now be required to calculate and report the numbers of hours worked on a yearly basis by all employees who fall within each of the twelve pay bands. For non-exempt employees, for whom the FLSA already requires employers to keep records of hours worked, employers will consult these records to identify the number of hours worked. For exempt employees, however, companies have the option of reporting a proxy of 40 hours per week for each full-time employee or 20 hours for each part-time employee, multiplied by the number of weeks those workers were employed during the EEO-1 reporting period or, alternatively, the actual number of hours worked by the exempt worker.

The deadline for employers' first revised EEO-1 Report has been set for March 31, 2018. Accordingly, while companies must submit pay data for 2017, the ordinary September 30th deadline has been extended out six months to allow for additional time to compile the necessary pay data required for the modified form. Therefore, employers will not be required to file an EEO-1 Report in 2017. Future deadlines will fall on March 31 of the year that follows the reporting year.

The EEOC intends to utilize this pay data to assess complaints of discrimination, focus agency investigations and identify existing pay disparities that may warrant further examination. Significantly, for the first time, now the EEOC will have its hands on comprehensive employee pay data, paving the way for the Commission to target and single out "outlier" employers for investigations relating to systemic pay discrimination. In addition,

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

Federal—School Leaders' Liability

THIS IS EXHAUSTING! PARENTS OF SPECIAL NEEDS CHILDREN WHO ALLEGE EDUCATIONAL HARM MUST EXHAUST ADMINISTRATIVE REMEDIES UNDER THE IDEA BEFORE FILING LAWSUIT

By Christopher J. Conrad, Esq.*

KEY POINTS:

- Parents of children with special needs who allege educational harm must exhaust administrative remedies under the IDEA before filing suit in federal court.
- Once the IDEA administrative process is fully exhausted, parents can pursue all rights and remedies in federal court under the IDEA, ADA, § 504, the U.S. Constitution and state disability law.
- The U.S. Supreme Court's eventual decision in *Fry v. Napoleon Community Schools* likely will provide further guidance as to types of claims of educational harm that must be exhausted under the IDEA before suit can be filed.

Christopher J. Conrad

The Individuals with Disabilities Education Act, as amended (IDEA), is a federal civil rights statute intended to "[e]nsure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs ... ." 20 U.S.C. § 1400(d)(1)(A). If an eligible child's parents believe their school district or other local educational agency has failed in its statutory obligation to provide the child with a free appropriate public education, the IDEA affords the parents due process rights, allowing them to file a complaint and request an administrative hearing "[w]ith respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." § 1415(b)(6)(A). Once the administrative process is exhausted, either party aggrieved by the findings and conclusions of the due process hearing officer (or administrative law judge)—whether the parents or the local educational agency—may seek judicial review of the decision in federal court. § 1415(g), (i)(2). A federal district court will not have subject matter jurisdiction over the dispute unless and until the IDEA administrative process is exhausted.

Significantly, the IDEA requires exhaustion of the administrative process in cases brought directly under the Act as well as in non-IDEA cases where parents seek relief that can be obtained under the Act. Section 1415(l) of the IDEA specifically states:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under *subsections (f)* and *(g)* shall be exhausted to the same extent as would be required had the action been brought under this subchapter. (emphasis supplied).

A recent decision from the U.S. Court of Appeals for the 3rd Circuit, *S.D. v. Haddon Heights Bd. of Educ.*, 833 F.3d 389 (3rd Cir. 2016), involved a child who suffered from multiple medical issues, including chronic sinusitis, which caused him to be frequently absent from school. The child was not identified by the school district as an eligible student under the IDEA. However, the school did develop a § 504 accommodation plan for the child, which allowed extra time for assignments, tests and quizzes, and required the parents to communicate with the child's teachers about any missed work and absences. The § 504 plan was later amended at the parents' request and necessitated that the child's teachers send weekly updates about missing assignments and to provide class notes. It also required the child to complete his assignments within two weeks of any absence, allowed his teachers to reduce assignments at their discretion, and mandated the child to create a "to-do" list, keep folders of complete and incomplete work, and communicate with teachers, the guidance counselor and school nurse.

The parents alleged that the § 504 plans failed to provide the child with a mechanism to obtain homebound instruction or other supplemental instruction to enable him to keep up with the curriculum and otherwise enjoy the benefits of the educational program to the same extent as his non-disabled peers. As a result, the parents claimed, the child struggled academically and fell further behind his peers. The parents also claimed that the most current § 504 plan failed to provide an accommodation for the district's new attendance policy. They were concerned that, as a consequence, the child was likely to be retained, in light of his many medically-related absences throughout the school year.

The parents filed suit in federal court against their school district under § 504 of the Rehabilitation Act of 1973 (§ 504), the Americans with Disabilities Act (ADA), the 1*st* and 14*th* Amendments of the U.S.

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* *Chris is a shareholder in our Harrisburg, Pennsylvania office. He can be reached at 717.651.3531 or cjconrad@mdwcg.com.*

Florida—Appellate Advocacy

CALCULATING THE TIME TO APPEAL IN FLORIDA

By Courtney B. Shapero, Esq.*

KEY POINTS:

- The time to appeal an order must be calculated correctly.
- The consequences of miscalculating the time within which to appeal are severe.

Courtney B. Shapero

You are in court at a hearing on a motion that, depending on the outcome, may give your client the right to appeal. The judge issues an order from the bench. Your client is considering whether to file an appeal, and he has only 30 days to do so. However, it takes a week before the judge signs the order and another two days before the order is entered on the docket. When does your appeal need to be filed? Keep in mind that if you calculate incorrectly, the consequences are severe. In *Amos v. Reich*, 2016 Fla. App. LEXIS 19266 (Fla.Dist.Ct.App. 3d Dist. Dec. 28, 2016), the Third District Court of Appeals provided an answer to this question.

Florida Rule of Appellate Procedure 9.110(b) sets forth that an appeal may be brought "[a]fter filing a notice… with the clerk of the lower tribunal within 30 days of rendition of the order [to be reviewed]." This statute turns on the meaning of the word "rendition" or, in its action term, "render." Once this meaning is established for a particular case, the timing of the appeal can be calculated and a timely filing made with the applicable court. The Third District Court of Appeal recently held that "Florida Rule of Appellate Procedure 9.020(i) provides that '[a]n order is rendered when a signed, written order is filed with the clerk of the lower tribunal.' An order is rendered when all these three conditions are met.'" *Amos v. Reich*, 2016 Fla. App. LEXIS 19266 (Fla.Dist.Ct.App. 3d Dist. Dec. 28, 2016).

It has long been held by the Third District Court of Appeal that if an appeal is not timely filed, it will be dismissed. In *Miami-Dade County v. Peart*, 843 So.2d 363, 364 (Fla.Dist.Ct.App. 3rd Dist. 2003), the court held that, "[b]ecause this notice was filed 31 days after the hearing officer rendered her decision (one day late), the County moved to dismiss the appeal." In *Miami-Dade County*, an order was granted on May 13, 2002, against a hearing officer rendering a final decision that the respondents had illegally maintained a commercial vehicle. As a result of this final decision, the respondents filed a notice of appeal on June 13, 2002. However, this notice was filed 31 days after the order was signed by the clerk of the lower court. Thus, the court found the respondents' appeal untimely under Rule 9.110(c). Florida Rule of Appellate Procedure 9.110(c) reads similarly to 9.110(b), but specifically states, "[i]n an appeal to review final orders of lower administrative tribunals, the appellant shall file the notice with the clerk of lower administrative tribunal within 30 days of rendition of the order to be reviewed, and shall also file a copy of the notice, accompanied by any filing fees prescribed by law with the clerk of the court." *See*, Fla. R. App. P. 9110(c).

Similarly, in *First Nat'l Bank v. Florida Unemployment Appeals Com.*, 461 So.2d 208, 209 (Fla.Dist.Ct.App. 1st Dist. 1984), the court dismissed the appeal because the proper notice was not filed with the court within the 30-day period as required by Florida Rule of Appellate Procedure 9.110(b). This rule requires the notice of appeal to be filed—not merely mailed—within 30 days of rendition of the order to be reviewed. *See also*, *Hawks v. Walker*, 409 So.2d 524, 525 (Fla.Dist.Ct.App. 5th Dist. 1982) (holding a timely notice of appeal must be filed within 30 days in order for this court to have jurisdiction; late filing is a defect no one can correct, not even the court); *Dibble v. Dibble*, 377 So.2d 1001, 1003-1004 (Fla.Dist.Ct.App. 3d Dist. 1979) (holding that the appeal was filed in an untimely manner because it was not filed within the applicable period after rendition of the order to be reviewed, as required by Fla. R. App. P. 9.110(b)); *Crapp v. Criminal Justice Stds. & Training Comm'n*, 753 So.2d 787 (Fla.Dist.Ct.App. 3d Dist. 2000) (holding that an appellate court cannot exercise jurisdiction over a cause where a notice of appeal has not been timely filed).

Likewise in *Amos*, the appellant, Amos, appealed a final judgment regarding his property foreclosure, and the appellee, Reich, moved to dismiss this appeal as untimely. Specifically, Reich asserted that the order on appeal was rendered on October 17, 2016. However, the order on appeal was not filed with the clerk until October 19, 2016, and thus not rendered until that day. Nevertheless, Amos failed to file his appeal until November 21, 2016, 32 days after the clerk had filed the order. On December 28, 2016, the Third District Court of Appeal issued a ruling regarding the untimely appeal. The court held that the appeal "was untimely and lacked jurisdiction to entertain the appeal." *See*, *Amos v. Reich*, 2016 Fla. App. LEXIS 19266, at *2.

There is a clear trend toward holding that the rendition of an order is based upon the date the clerk files the final order of the lower court and that an appeal must be filed within 30 days of such date. If an appeal is not filed within the properly calculated 30 days from the final order, the appellate court will dismiss the case for lack of jurisdiction. There is no cure for late filing for an appeal. Dismissal is the one and only consequence. ■

* *Courtney is an associate in our Fort Lauderdale, Florida office. She can be reached at 954.832.3966 or cbshapero@mdwcg.com.*

Florida—General Liability

NEGLIGENT SECURITY CLAIMS IN FLORIDA: THE "VICTIM-TARGETED" DEFENSE

By Michael G. Archibald Esq.*

KEY POINTS:

- Negligent security law in Florida is plaintiff-oriented.
- Experts should be permitted to utilize circumstantial evidence to provide opinions as to whether crime was foreseeable and preventable or an unpreventable victim-targeted crime.

Michael G. Archibald

Insurers of business owners and property managers pay large settlements for injuries and certainly deaths caused by criminal conduct of others that occur on their insureds' properties. Accounting for many of these settlements are claims that can be described as "victim-targeted" crimes. These are crimes that occur on business property owned by another wherein the perpetrators sought out a specific person to victimize. Typically, and especially if the perpetrator remains at large, circumstantial evidence is all that is available to demonstrate the motive for such crimes.

Circumstantial evidence and justifiable inferences are applicable in civil cases. *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960). In fact, Florida Jury Instruction 401.3, Greater Weight of The Evidence, specifically directs judges that no distinction should be made between direct evidence and circumstantial evidence. In Florida, there is no statutory law on negligent security claims, and, unfortunately, Florida's case law on negligent security claims prevents defendants from presenting circumstantial evidence that would tend to show that an event was not foreseeable and, therefore, preventable.

In a recent case, I represented a defendant in a negligent security/wrongful death case. The property owner was a landlord of a 200-unit affordable housing complex located in a high-crime area. The property lacked video surveillance cameras, roving security patrols or access control. Suit was brought after a young male tenant was found dead in a common area on the property. He had been shot once in the head. Cash and his debit bank card remained in his pockets. Marijuana and other paraphernalia were found next to his body. Tenants living in close proximity to the scene saw nothing but did report hearing a single gunshot sometime between 10:00 p.m. and 10:30 p.m. The murder remained unsolved.

Deposition testimony from a friend of the young man was favorable to the defense. It revealed that at about 8:30 p.m. that night, the decedent called him asking to borrow his gun. He denied the request.

The defense security expert opined that, based on the crime scene photographs and the testimony from the friend, it was his opinion that the decedent had been targeted. If somebody really wants to do harm to another, there is nothing that can be done to prevent that from happening.

Prior to trial, the plaintiff moved to exclude this expert's testimony. In support, the plaintiff cited the cases of *Florence Smithson v. V.M.S. Realty, Inc.* 536 So.2d 260 (Fla. 3d DCA 1988) and *L.B. v. The Naked Truth III, Inc. d/b/a Pleasure Emporium North*, 117 So.3d 1114 (Fla. 3d DCA 2012). The trial court granted the motions *in limine*, excluding the evidence.

In *Smithson*, the appellate court overturned a negligent security/wrongful death jury verdict, finding for the defendant, a mall owner. The decedent was the manager of a movie theater located inside the mall. He was killed while attempting to make a deposit at a bank drop located inside the mall. The assailants were eventually captured.

In preparation for trial, the defense expert interviewed the assailants. At trial, the expert testified that the assailants revealed that the movie manager would not have been killed had he complied with their demands for the money. The theater owner had an employee robbery policy, which apparently was not followed by the manager. The policy called for immediate and complete compliance with all demands from any robber.

After the defense verdict was returned, the plaintiff appealed, claiming the trial court erred in permitting the defense expert to testify about the assailants' motive. The appellate court found that expert testimony regarding the assailants' motive was beyond the scope of expertise and irrelevant to the issue of whether the defendant breached a duty to provide reasonable security.

Likewise, in *The Naked Truth III, Inc.*, the appellate court overturned a negligent security jury verdict in favor of the defendant. A former employee sued her employer/property owner for a robbery and rape that occurred while she was working alone during the midnight to 8:00 a.m. shift. Her attacker was eventually captured.

At trial, the defense expert recited deposition testimony from another employee who recognized the attacker as being a man who had entered the store about three days prior to the attack and had asked for the plaintiff (by name). The employee told the man that she (plaintiff) was not there. Upon hearing this, the man abruptly turned and left the store.

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* *Michael is a shareholder in our Tampa, Florida office. He can be reached at 813.898.1803 or mgarchibald@mdwcg.com.*

New Jersey—Amusements, Sports & Recreational Liability

REDEFINING GROSS NEGLIGENCE: CAN RECREATIONAL SPORT OPERATORS INSULATE THEMSELVES FROM LIABILITY WITH PRE-INJURY WAIVERS?

By Michael A. Alberico, Esq.*

KEY POINTS:

- Pre-injury liability waivers are unenforceable against gross negligence claims.
- Gross negligence is now more akin to negligence on the liability continuum, resulting in the erosion of pre-injury liability waiver enforceability.
- Failure to supply the most up-to-date manufacturers' warnings to consumers and to train employees on the most up-to-date safety protocols can be evidence of gross negligence.

Michael A. Alberico

Plaintiffs' attorneys are baiting the hook with arguments conflating gross negligence with negligence, and the judicial system is biting. If recreational sport entity operators wish to remain insulated from negligence claims with pre-injury waivers, an examination of gross negligence's modified definition must be considered.

In *Steinberg v. Sahara Sam's Oasis, LLC*, 142 A.3d 742, 744-745 (N.J. 2016), the plaintiff, a patron of the defendant's indoor water park, suffered a spinal cord injury on FlowRider, a simulated surfing ride created by pumping water over a stationary surface. Prior to participating, the plaintiff signed a pre-injury waiver acknowledging the risks associated with FlowRider and waiving liability for any injury caused by the defendant's negligence. In a prior opinion, *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678-681-682 (N.J. 2010), the New Jersey Supreme Court held that pre-injury waivers executed for participation in recreational activities are enforceable for injuries sustained during such activity.

Mr. Steinberg brought suit alleging his injuries were caused by the defendant's negligence and gross negligence, among other things. The defendant filed a motion for summary judgment, which the trial court granted, determining the liability waiver "[e]xtinguished [plaintiff's] right to file a negligence action" and that the facts did not support the plaintiff's action for gross negligence. The Appellate Division affirmed in a split decision, adding that the trial court "[d]id not err in characterizing gross negligence as the equivalent of willful conduct." The dissenting appellate judge disagreed, stating the evidence "provided sufficient support for a gross negligence action" and proof of gross negligence did not require a showing of "willful conduct."

In his appeal to the New Jersey Supreme Court, the plaintiff argued that the record contained sufficient evidence to support a gross negligence claim. Specifically, the defendant's employees failed to inform the plaintiff, as a first-time rider, to lay flat, rather than stand, on the surfboard and, if standing, to hold onto the balance rope with one hand rather than two. Additionally, the plaintiff contended that the defendant failed to post the most up-to-date manufacturer warning signs.

The defendant had displayed the manufacturer's older warning for the ride, which stated, "PARTICIPATION ON THIS RIDE AND CONSENT OF WAIVER INDICATES YOU UNDERSTAND THE POTENTIAL TO GET INJURED SHOULD YOU FALL WHILE PARTICIPATING," instead of the most up-to-date signage, which included the statement "YOU WILL FALL." The newer un-posted signage also instructed riders to watch a safety video before riding and contained drawings illustrating the ride's dangers, including an image of a participant striking his head on the ride's surface. The video referenced on the sign was not available to riders.

Before the ride opened to the public, its manufacturer sent an instructor to educate the defendant's employees on the ride's safe operation. He instructed that first-time riders should participate in a prone position and should not hold onto the balance rope with both hands.

In its opinion, the New Jersey Supreme Court agreed with the Appellate Division's dissenting opinion, holding that "gross negligence is a higher degree of negligence" and "does not require willful or wanton misconduct or recklessness." It also determined that "[n]egligence, gross negligence, recklessness, and willful conduct fall on a spectrum, and the difference between negligence and gross negligence is a matter of degree." The court endorsed the New Jersey Civil Model Jury Charge's gross negligence definition, which states that gross negligence is:

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* *Mike is an associate in our Cherry Hill, New Jersey office. He can be reached at 856.484.6016 or maalberico@mdwcg.com.*

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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- In the advancement of our industry thought leadership. We will write about salient legal issues, speak at national and local industry conferences and events, serve on industry committees, and develop initiatives to further what we and insurers do to advance the evolution of claims management.
- In the provision of *pro bono* services to those in need. We have a variety of individual and company-wide initiatives to build upon. One of our attorneys is the Board Chair of the Nationalities Service Center, which is dedicated to providing support for immigrants and refugees struggling to find and keep hold of the American dream. Twenty-eight attorneys in our Philadelphia office work with the Christian Legal Clinic helping impoverished citizens with a host of legal issues—*e.g.*, expunging criminal records, immigration problems, landlord/tenant issues, child support and more. We directly partner with a Philadelphia elementary school and a high school with our time, talents and financial aid. That Tom Brophy is the current president of the Philadelphia Bar Foundation (the philanthropic arm of the Philadelphia Bar Association that supports charities and public interest non-profits to assist Philadelphia's most vulnerable populations) speaks to our firm's commitment to help others less fortunate than we.
- In our efforts to preserve our teamwork-oriented ethos—which fortunately exists at every level of our organization. It is our teamwork that will allow us to confront and surmount any challenge with confidence. It is our teamwork that fosters genuine personal trust in each other. It is our teamwork that makes us greater than the sum of our parts.

In 2017, we will cling to those organizational traits that define us: steadfast attitude of "client first," 55 years of defense litigation know-how, responsiveness, honesty, and a grounding in humility.

With our experience, regional presence, stable personnel base, anchored financial position and innovative technology, Marshall Dennehey remains a safe harbor for our clients' stormy litigation needs. While some may see a "ball of confusion" out there, our firm remains a refuge for cost-effective resolution of our clients' problems. ■

REDEFINING GROSS NEGLIGENCE

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> An act or omission, which is more than ordinary negligence, but less than willful or intentional misconduct. Gross negligence refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence.

[Model Jury Charge (Civil) § 5.12 "Gross Negligence" (2009).]

With gross negligence definitively defined, the court then concluded that the trial court and Appellate Division majority erred in granting summary judgment and reversed, stating, "[t]he relevant evidence, presented in the light most favorable to plaintiff, demonstrates that a rational fact finder could conclude that [defendant's] conduct constituted gross negligence."

In forming its opinion, the court determined that the defendant's failure to post the updated signage, failure to provide patrons with the safety video, and failure to properly instruct the plaintiff on how to ride could have demonstrated to a rational fact finder that it "failed to exercise slight care or diligence." The court further held that, "[a] liability waiver ... in a consumer agreement that exculpates a business owner from liability for tortious conduct resulting from the violation of a duty imposed by statute or from gross negligence is contrary to public policy and unenforceable."

Steinberg confirms that pre-injury liability waivers are unenforceable against gross negligence claims. The New Jersey Supreme Court has expanded the range of conduct considered to be gross negligence by sliding gross negligence closer to negligence and further from recklessness on the liability scale. The court demonstrates this slide through its holding that, despite evidence showing that the plaintiff signed a liability waiver and that the defendant provided adequate signage describing the FlowRider's dangers, the defendant could still be liable due to this redefinition, pre-injury liability waivers signed before participation at recreational sporting facilities no longer carry the same protections as they did upon *Stelluti*'s release.

Nevertheless, recreational sport entity operators and insurers can insulate themselves from liability. They must train their employees on the most up-to-date safety protocols, post the most up-to-date manufacturer recommended signage, and familiarize themselves with the most up-to-date manufacturer operating manuals. ■

New Jersey—Workers' Compensation

INGRESS AND EGRESS: APPELLATE DIVISION FINDS EMPLOYER HAD CONTROL OVER PARKING LOT

By Michael R. Duffy, Esq.*

KEY POINTS:

- Under New Jersey Workers' Compensation statute, an employer can "control" a parking lot even when it does not own the lot.
- The Appellate Division affirmed a Judge of Compensation's decision finding a parking lot slip and fall compensable where the employer controlled the ingress and egress of its employees.

Michael R. Duffy

The New Jersey Appellate Division recently affirmed a Judge of Compensation's decision finding a slip and fall in a parking lot to be within the course and scope of employment. In *Giordano v. High Point Insurance, et al*., 2016 N.J.Super. Unpub. LEXIS 2233 (App.Div. Oct. 11, 2016), the petitioner slipped and fell in a parking lot of a multi-tenant building on her way to the building in which the respondent/employer had its offices. The petitioner filed a workers' compensation claim for injuries suffered to her right shoulder. Following a trial, the Judge of Compensation found the petitioner's injury compensable. The respondent appealed, arguing the Judge had erred in his finding of compensability.

The petitioner worked for High Point, which provided its employees access to the leased parking lot where the petitioner was injured. As part of the lease, High Point was responsible for a portion of the parking lot's operating expenses and had ten assignable parking spots. In fact, High Point assigned 22 spots to its directors, management and employees who won awards. Other tenants in the building also assigned and marked spots that were not available to other High Point employees. The petitioner and other High Point employees were instructed to park in spots that were "not marked." Employees who parked in a marked spot would be asked to move, and a security officer would place a sticker on their car. High Point enforced the marked parking spots. There was no other available on- or off-street parking for over a mile. At the time of the petitioner's accident, there were three different doors for entering and exiting the building.

On the date of injury, the petitioner parked her car in an unmarked spot in the parking lot. On her way to the building, she fell in the lot on twigs and other debris, injuring her right shoulder. The Judge of Compensation found that the injury arose out of and in the course of employment because the respondent "controlled" the lot. The Appellate Division agreed, finding High Point controlled the ingress and egress to work by providing parking and directing employees where to park. In reaching this decision, the Appellate Division analyzed the history of the "going and coming rule," which has evolved into "the premises rule."

The Appellate Division noted the law previously provided that an injury is not compensable when it is sustained during travel to and from work (the "going and coming rule"). However, there were many exceptions to the rule, which eventually evolved into the premises rule. The statute now clarifies the timeline of employment as, "[w]hen an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer." N.J.S.A. 34:15-36. Under the premises rule, there are two pivotal questions: (1) where was the site of the accident and (2) did the employer have control of the property on which the accident occurred? *Hersh v. Cty. of Morris*, 86 A.3d 140, (N.J. 2014). Therefore, if an employer has control over the area, but does not own the area, an employee's injuries may still be compensable under the premises rule.

The Appellate Division compared this with a prior case dealing with the premises rule, *Livingstone v. Abraham & Straus, Inc*., 543 A.2d 45 (1988), where the court found the employee's injuries, sustained while walking from an employee parking area, were compensable. The employer required its employees to park in the far part of the parking lot, allowing customers to park closer to the employer's place of business. The *Livingstone* court provided that, for the purpose of the premises rule, "[l]ots owned, maintained, or used by employers for employee parking are part of the employer's premises." As the employer designated where the employee parked, the employer had control of the parking lot, and the designation of employee parking was "entirely for its benefit."

The Appellate Division also addressed employer control over ingress and egress routes by citing *Bradley v. State*, 782 A.2d 978 (App.Div. 2001). In *Bradley*, the employer furnished employees parking in specific designated sections of a parking garage, even though they were not reserved spots. However, the employer did have 350 out of 600 permits to park in the garage. The court found

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* *Mike is an associate in our Cherry Hill, New Jersey office who can be reached at 856.414.6025 or mrduffy@mdwcg.com.*

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Alicia Smith (Cherry Hill, NJ) and **Teagan Allen** (Roseland, NJ) obtained summary judgment on behalf of a skating rink in Middlesex County, New Jersey. The plaintiff made a claim for injuries from a roller skating fall at the defendant's arena under the theory that his rental skates were the wrong size and too old to be in circulation. He claimed the worn leather was insufficiently "stiff" to support his ankle. The court dismissed the case, finding that the plaintiff failed to have an expert to support his position.

Ralph Bocchino (Philadelphia, PA) received an order granting his motion for summary judgment. The plaintiff had four surgeries to a severely broken ankle after a fall on ice and snow. The plaintiffs sued the landlord, its leasing agent and the snow removal company. Demands were in excess of the policy for $2.6 million. We represented the landlord and argued the Hills and Ridges Doctrine. The Philadelphia Court of Common Pleas agreed with us.

Summary judgment was won by **Jason Banonis** (Allentown, PA) in the Court of Common Pleas of Pike County, Pennsylvania. Following an alleged trip and fall at a home rented by the plaintiffs from the defendants, the plaintiff alleged unsafe elevations of the driveway and surrounding lighting conditions. The court determined that the defendants owed no legal duty based upon a lease that expressly stated that the tenant (the plaintiffs), not the landlord (the defendants), was responsible for repairing the leased premises. The court also found that the lease stated that the tenant had inspected the premises and that they were in good order and repair and took the premises "as is." Further, the court noted that the plaintiff wife stated in her deposition that she was aware of the difference in elevation between the driveway surface and abutting ground surface, and that she was aware of the lighting at night at the location, yet failed to use a flashlight.

In their successful petition to the Supreme Court, State of New York, Suffolk County, **Neil Higgins** and **Mark Agin** (Long Island, NY) obtained dismissal of an action for serious leg fractures and injuries by the plaintiff and her husband. The case was dismissed due to the plaintiff's repeated discovery failures. The plaintiff, a real estate broker, allegedly fell and fractured her femur because of the dangerous and slippery condition of the wooden foyer in the defendants' residence. Despite at least two court orders, the plaintiff only partially complied with the defendants' discovery requests. Despite arguments by plaintiffs' counsel that the lengthy delay was due to law office inadvertence and his purported medical conditions, Neil and Mark were able to convince the court that these proffered excuses were insufficient as a matter of law and that the defendants were prejudiced by the plaintiff's delays. The case was dismissed in its entirety before any depositions were conducted.

Walter Klekotka and **William Reiley** (Cherry Hill, NJ) obtained the dismissal of the plaintiff's complaint, with prejudice, on a motion for summary judgment. The plaintiff was working for a contractor in our clients' building. He slipped on what he alleged was our clients' improper waxing of the floor and sustained a wrist fracture. He filed a workers' compensation claim for this injury and had a lien in the amount of $55,000. He then filed his original complaint in the Law Division against his employer and fictitious parties. After expiration of the statute of limitations, the plaintiff successfully moved to amend his complaint to name our clients as defendants. Will successfully argued before the court that the plaintiff knew the identity of our clients prior to expiration of the statute of limitations, thereby making the plaintiff unable to avail himself to the fictitious party rule.

HEALTH CARE DEPARTMENT

Stacy Delgros (Cleveland, OH) obtained a defense verdict in a complicated medical malpractice case in Akron, Ohio. Stacy represented a radiologist who interpreted a brain MRI for a woman who was believed to have suffered a Transient Ischemic Attack. The radiologist did not report any significant abnormalities on the brain MRI, but the patient went on to have a devastating stroke six weeks later. The co-defendants were the family physicians who ordered the brain MRI, but who did not order a carotid artery study, the study of choice to determine the source of a TIA. There was significant animosity between Stacy's client and the co-defendants. The co-defendants

** Prior Results Do Not Guarantee A Similar Outcome*

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hired an expert to criticize Stacy's client, in addition to the plaintiff's expert, who was likewise critical. After a two-week trial, the jury found in favor of all the defendants, despite this conflict.

In a three-day medical malpractice jury trial in the Court of Common Pleas of Erie County, Pennsylvania, **Thomas Lent** and **Bethany Blood** (Erie, PA) secured a defense verdict. Our insured, an OB/GYN, initially performed a hysterectomy on a 76-year-old woman due to a Grade 3 uterine prolapse. The day following the hysterectomy, the plaintiff was experiencing symptoms consistent with internal bleeding, and a second surgery was successfully performed by our client to address the bleeding. It was alleged that during this second procedure, the plaintiff suffered a perforation of the small bowel and that the doctor was negligent for failing to examine the bowel for possible injury at the close of the second procedure. It was also alleged that our doctor was negligent for failing to recognize signs and symptoms of a bowel perforation in the nine days following the second surgery, which led to yet a third surgery. Following the third surgery, the plaintiff was diagnosed with and treated for sepsis, respiratory failure that required ventilator support, and renal failure. Ultimately, the plaintiff was in ICU for six weeks, followed by a six-week stay at a rehabilitation facility. Our client testified convincingly that she had closely monitored the plaintiff in the days following the second surgery and was addressing the plaintiff's medical symptoms as they arose. Our expert, a board-certified general and colorectal surgeon, also testified convincingly that the plaintiff's post-operative condition and complaints were consistent with those of other elderly patients having just undergone two abdominal surgeries and that the doctor's treatment of the plaintiff, including her decision not to examine the bowel during the second surgery, met the standard of care. The jury deliberated for approximately two hours before returning a defense verdict.

James Connors, assisted by **Tonya Lindsey** and **Steve Saal** (New York, NY), won a unanimous defense verdict after a three-week trial in Supreme Court, State of New York, Richmond County. We defended a dermatologist in a case involving allegations of medical malpractice. The case revolved around the alleged failure to diagnose squamous cell carcinoma (SCC), which had clinically and histologically been classified as a common wart. Due to the alleged delay in diagnosis, the patient was subsequently diagnosed with SCC and underwent an amputation of his toe and part of his foot. The jury's verdict was 6-0 in favor of the insured doctor.

PROFESSIONAL LIABILITY DEPARTMENT

Martin Schwartzberg (Long Island, NY) was successful on a motion for summary judgment where the plaintiffs claimed that their home sustained damages of at least $500,000 due to the construction taking place at an adjacent property. Marty represented the architect who prepared the plans and specifications for the construction of a five-story building next to the plaintiffs' house, which allegedly sustained damages as a result of the construction. The homeowners sued the architect and others asserting claims for negligence, trespass and nuisance. The court granted the architect summary judgment and dismissed all claims against it, finding that the architect was not the party responsible for the excavation at the site, the alleged cause of the damage, and that its contract did not give rise to tort liability to third parties such as the plaintiffs.

Adam Herman and **Robert Garcia** (Orlando, FL) successfully obtained summary judgment and final judgment in a construction defect matter. A condominium association brought multiple claims against a general contractor and developer. In turn, the contractor brought third-party claims against our client, the foundation subcontractor, for common law indemnity, contribution, contractual indemnity and breach of contract. The court ruled there is no special relationship between a subcontractor and a general contractor and, therefore, no common law indemnity. The court also ruled that the statutory claim for contribution was negated by the abolition of joint and several liability in Florida. Finally, the court found that the general contractor and condominium association could not demonstrate through experts the cause of foundation cracking and, therefore, could not establish damages.

Brooks Foland and **Allison Krupp** (Harrisburg, PA) secured summary judgment in federal court in a bad faith case against a large insurer. This case arose from a pedestrian-motor vehicle accident that occurred in 2008 and dealt with the insurer's handling of the plaintiff's UIM claim following that accident. The plaintiff was run over by a rollback truck that was being repossessed on behalf of the owner. The various participants in, and witnesses to, the accident provided conflicting versions of events regarding how the accident occurred. In one version, the plaintiff climbed onto the running board of the rollback truck, fell to the ground and was run over by the rollback. As a result, the issue of liability went to arbitration. The arbitrators found that the plaintiff was 33 1/3% causally negligent for his injuries, and the UIM claim later settled. The plaintiff then pursued a statutory bad faith claim, contending the insurer had delayed its investigation of the UIM claim without a reasonable basis and had unreasonably refused to pay him UIM benefits. At the close of discovery, the insurer filed a motion for summary judgment, which was granted by the court. The court found that the undisputed factual record amply supported the insurer's defense that "certain 'red flags' existed that

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justified it undertaking a thorough investigation into the cause of the action, the extent of the plaintiff's injuries, and the insurer's potential liability for the plaintiff's claim." The court found that the delay, if any, stemmed from the underlying criminal investigation and impediments attributable to the plaintiff. As a result, the insurer's motion for summary judgment was granted in its entirety, and the case was dismissed.

Robert Garcia (Orlando, FL) successfully defended a condominium association in arbitration before the Florida Department of Business and Professional Regulation regarding alleged violations of the Florida Condominium Act. The petitioner's complaint contended that the Association willfully violated his statutory rights to inspect and make copies of the Association's records after repeated certified written requests. After several failed attempts by the Department to have the parties settle their dispute, an arbitration proceeding was held in which multiple witnesses were called to testify for both parties. The Department issued its final order, finding that the greater weight of the evidence supported the Association's position that the records were not willfully denied. The Department awarded the Association attorneys' fees and costs.

Edwin Schwartz and **Nicole Ehrhart** (Harrisburg, PA) obtained summary judgment in a legal malpractice action arising from allegations that the defendant attorney failed to properly protect a client's business property from a tax sale. The plaintiff asserted that his attorney had agreed to "take all action necessary" to assist the plaintiff in recovering his business real estate after the purchasers of the property defaulted on the sales agreement. The attorney initiated the foreclosure proceedings, but in the interim, the property was listed and sold at a tax sale. The court determined that the attorney's representation was limited to the foreclosure action and that he had properly advised and warned the plaintiff to undertake actions to prevent the property from being sold at the tax sale.

Mark Kozlowski (Scranton, PA) obtained dismissal of a municipal defendant in the Middle District of Pennsylvania in a suit challenging the constitutionality of an ordinance requiring property owners to maintain and provide access to private cemetery plots. Our township client passed an ordinance requiring all property owners within the township to maintain and provide access to cemeteries and ancient burial grounds on their property. The ordinance provided that the Township Code Enforcement Officer was permitted to inspect properties believed to contain such graveyards. The plaintiff, a resident of the township, is the owner of approximately 90 acres. It was determined that a cemetery exists on her property. She was cited for failing to maintain it. The plaintiff sued the township and the Code Enforcement Officer, arguing that the ordinance was unconstitutional under the Fifth Amendment Takings clause. The court granted our motion to dismiss, finding that the plaintiff's amended complaint alleged only a physical invasion taking, not a regulatory taking. The court then held that the plaintiff failed: (1) to state a cause of action against the Code Enforcement Officer; and (2) to state a cause of action under the Fifth Amendment since she did not exhaust her available state-level remedies.

Jeffrey Chomko (Philadelphia, PA) obtained a "no action" letter from the Commonwealth of Pennsylvania Office of General Counsel on a regulatory inquiry directed to a real estate broker. A real estate investor filed a formal complaint with the Pennsylvania Real Estate Commission alleging negligence, misrepresentation and breach of fiduciary duty in connection with the broker's handling of the bidding process for a residential sale in the City of Philadelphia. Jeff submitted a formal response to the Commission detailing the handling of the transaction. The Commonwealth concluded there was insufficient evidence against the broker to pursue formal charges.

WORKERS' COMPENSATION DEPARTMENT

Judd Woytek (Allentown, PA) successfully defended a claim for Federal Black Lung benefits filed by a coal miner with over 10 years of employment in the coal mining industry. The miner had been awarded benefits by the Administrative Law Judge. On appeal to the Benefits Review Board, Judd successfully obtained a reversal of this award. The Review Board also remanded the claim for further findings by the judge. On remand, Judd's arguments persuaded the judge to find that the miner's treating physician's opinion on total disability due to coal workers' pneumoconiosis was not well-reasoned and could not support an award of benefits to the miner.

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 involving 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

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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 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.

Estelle McGrath (Pittsburgh, PA) and **Audrey Copeland** (King of Prussia, PA) obtained the Commonwealth Court's affirmance of the denial of a claim petition and termination of benefits in an employer's favor in an alleged occupational exposure case. The court rejected the claimant's assertion that the Workers' Compensation Judge failed to make essential findings as to the experts' testimony. Even without a specific finding, it could reasonably be inferred that the judge rejected the testimony of the claimant's family physician because the judge had rejected the opinion of the claimant's occupational medicine expert upon whom the family physician had relied. Nor was any error found on the basis of the judge's failure to make a credibility determination as to the employer's expert pulmonologist, as the claimant bore the burden of proof and the expert's opinion was that the claimant did not suffer from occupational asthma.

Ashley Talley (Philadelphia, PA) successfully defended a national broker for delivery services in a workers' compensation claim. The claimant was a contract delivery driver for our client. While en route to a delivery, he was involved in a motor vehicle accident and sustained injuries that resulted in surgical intervention. After receiving the maximum duration of benefits under a personally-funded Truckers Occupational Accident Insurance Policy, the claimant filed a claim petition alleging that he was an employee of the defendant. Ashley argued that the claimant was an independent contractor rather than an employee, thereby barring his ability to pursue benefits under the Workers' Compensation Act. The parties presented testimonial and documentary evidence on this issue, and the Workers' Compensation Judge ultimately accepted the defendant's argument, denying the claim petition in its entirety.

Tony Natale (Philadelphia, PA) successfully defended a national thermographic inspection company in litigation surrounding an employee's alleged stroke and disability. The claimant asserted that, while on a job for the company, he suffered a work-related stroke, secondary to long periods of travel. It was discovered that the claimant had a congenital hole in his heart. He alleged that travelling for the company caused plaques in his circulatory system to dislodge and damage his heart, leading ultimately to a stroke. Tony presented evidence which proved that the claimant was not travelling long distances prior to the occurrence of the stroke and that the stroke condition itself did not arise from a work-related cause or injury. Additionally, Tony argued that the claim had no jurisdictional nexus to the Commonwealth. The Workers' Compensation Judge dismissed the claim based on lack of causal medical evidence and lack of jurisdiction.

Kacey Wiedt (Harrisburg, PA) successfully defended a penalty petition seeking more than $100,000 in unpaid medical bills because the defendant allegedly failed to pay the terms of a Compromise and Release Agreement. The claimant asserted that the parties entered into a Compromise and Release Agreement which obligated the defendant to continue to pay ongoing medical treatment if the defendant chose not to proceed forward with payment of a Medicare Set-Aside proposal of $78,624.36. Pursuant to the terms of the agreement, if the amount of the Medicare Set-Aside was found by CMS to be greater than the proposed recommendation, the defendant retained the right to cancel funding of the annuity and would continue paying the claimant's reasonable and necessary medical expenses related to the work injury. The claimant alleged that there were more than $100,000 in medical expenses not paid by the defendant after they retained their right to cancel funding of the annuity due to CMS finding an amount higher than the MSA proposal. Kacey presented medical evidence which supported that the medical treatment and ongoing treatment for the claimant were not associated with the accepted injury. Additionally, Kacey argued that the description of injury in the Compromise and Release Agreement limited the claimant's claim and that the medical bills were related to the accepted injury. The Workers' Compensation Judge dismissed the penalty and review petitions and granted termination of the claimant's benefits. ■

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OFFICE LOCATIONS & CONTACT INFORMATION

PENNSYLVANIA

Philadelphia

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

Allentown

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

Doylestown

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

Erie

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

Harrisburg

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

King of Prussia

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

Pittsburgh

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

Scranton

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

NEW JERSEY

Cherry Hill

Woodland Falls Corporate Park
200 Lake Drive East, Suite 300
Cherry Hill, NJ 08002
856.414.6000 • Fax 856.414.6077
Richard L. Goldstein, Esq., Managing Attorney
856.414.6013 • rlgoldstein@mdwcg.com

Roseland

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

NEW YORK

Long Island – Melville

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

New York

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

NEW YORK

Westchester

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

DELAWARE

Wilmington

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

OHIO

Cincinnati

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

Cleveland

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

FLORIDA

Fort Lauderdale

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

Jacksonville

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

Orlando

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

Tampa

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

On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

Audrey Copeland (King of Prussia, PA) convinced the Pennsylvania Commonwealth Court to affirm the underlying decision denying the claim petition in a workers' compensation appeal where the claimant argued that the Workers' Compensation Judge capriciously disregarded the evidence. The judge credited the employer's medical expert that the claimant did not sustain a work injury when the forklift she was driving was involved in a minor collision. The Workers' Compensation Appeal Board affirmed, rejecting the "capricious disregard" argument. The court found that the judge's decision showed he thoroughly reviewed the evidence presented by both parties and explained why he did not credit the claimant, whose subjective history and complaints the judge found not credible, or her medical witness, whose opinions were based thereon. *Benjamin v. WCAB (Omnova Solutions, Inc.)*, 2016 Pa.Commw. Unpub. LEXIS (Pa. Cmwlth. October 6, 2016).

Thomas Specht and **Maureen Kelly** (Scranton, PA) obtained affirmance of a decision issued by the Monroe County Court of Common Pleas in a slip and fall case. The Superior Court of Pennsylvania determined that where the appellant cannot show that the appellee supermarket had actual notice of a dangerous condition (the appellant had fallen on a freshly waxed floor) and cannot produce any evidence that an application of wax had created a dangerous condition so obvious as to amount to evidence from which an inference of negligence would arise, the record did not support that the supermarket had deviated from its duty of reasonable care. Accordingly, the Superior Court affirmed the entry of summary judgment in favor of the supermarket. *Zangenberg v. Weis Markets, Inc., et. al*., 2015 Pa.Super. Unpub. LEXIS 4208 (Pa.Super. Nov. 17, 2016). ■

On The Pulse…

OTHER NOTABLE ACHIEVEMENTS*

NEW PRACTICE GROUP LAUNCHED

Marshall Dennehey recently launched a new practice group within the Casualty Department. Led by **Ralph Bocchino** (Philadelphia, PA) the **Social Services & Human Services Practice Group** counsels and defends mental institutions, non-profit organizations, youth clubs, community social services agencies, group homes, adult day care centers, and myriad other social and human services organizations against all forms of claims brought against them. Ralph and the attorneys in the practice group defend claims ranging from alleged abuse and neglect of special needs children to complex, high-exposure wrongful death litigation.

PROMOTIONS

We are pleased to announce that 10 attorneys have been elected shareholders of the firm and three were elevated to special counsel at our annual shareholders' meeting. The new shareholders, listed by office, are:

- Philadelphia, PA: **Shane Haselbarth**, member of the firm's Professional Liability Department; **Alex B. Norman**, Casualty Department; **Robert W. Stanko**, Casualty Department
- Pittsburgh, PA: **Patrick T. Reilly**, member of the Casualty Department
- King of Prussia, PA: **Joseph L. Hoynoski, III**, member of the Health Care Department
- Harrisburg, PA: **Shannon Fellin**, member of the Workers' Compensation Department
- Scranton, PA: **Thomas A. Specht**, member of the Professional Liability Department
- Fort Lauderdale, FL: **Alan Carroll (A.C.) Nash**, member of the Casualty Department
- Orlando, FL: **Robert Garcia**, member of the Professional Liability Department; **Amanda J. Podlucky**, member of the Casualty Department

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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

SPECIAL APPOINTMENTS

Christopher Conrad (Harrisburg, PA) has been named to the Planning Committee for Lehigh University's 2017 Special Education Law Conference.

Andrea Rock (Philadelphia, PA) has been named Co-Chair of the Philadelphia Bar Association's Workers' Compensation Section for 2018. Andrea will act as Co-Chair elect in 2017, before serving as Co-Chair in 2018.

Stephen Ryan (King of Prussia. PA) has accepted induction into the National Association of Distinguished Counsel, Pennsylvania Region, representing the top 1% of litigators in the country. The invitation was generated by a peer review process overseen by the founding members of the Pennsylvania region, Robert Mongeluzzi, Esq. and Thomas R. Kline, Esq.

RECOGNITION

Marshall Dennehey Warner Coleman & Goggin has been selected a "2017 Best Law Firm" in multiple practice areas, both nationally and across numerous regions of the country. The rankings, which are presented in tiers, are compiled annually by *U.S. News & World Report* and *Best Lawyers* and recognize firms for professional excellence and consistently impressive ratings from both clients and peers. On the National Level, the firm was rated Tier 1 for Admiralty & Maritime Law and Tier 2 for Insurance Law. Metropolitan Tier levels and awards are:

- **Metropolitan Tier 1**
  - Harrisburg: Workers' Compensation Law, Employers
  - Jacksonville, FL: Professional Malpractice Law, Defendants
  - New Jersey: Legal Malpractice Law, Defendants; Professional Malpractice Law, Defendants
  - New York City: Admiralty & Maritime Law
  - Philadelphia: Insurance Law; Medical Malpractice Law, Defendants; Personal Injury Litigation, Defendants; Product Liability Litigation, Defendants; Professional Malpractice Law, Defendants
  - Pittsburgh: Personal Injury Litigation, Defendants
- **Metropolitan Tier 2**
  - Cleveland: Insurance Law; Medical Malpractice Law, Defendants
  - Jacksonville, FL: Personal Injury Litigation, Defendants
  - Philadelphia: Civil Rights Law; Commercial Litigation; Criminal Defense: White Collar
- **Metropolitan Tier 3**
  - Harrisburg: Medical Malpractice Law, Defendants; Personal Injury Litigation, Defendants
  - Jacksonville, FL: Medical Malpractice Law, Defendants
  - Orlando: Insurance Law
  - Philadelphia: Legal Malpractice Law, Defendants
  - Pittsburgh: Legal Malpractice Law, Defendants

SPEAKING ENGAGEMENTS

Bradley Remick (Philadelphia, PA) recently spoke at the DRI Fire Science and Litigation Conference. His presentation, "A Christmas Story," focused on the dangers of Christmas tree fires, how to prevent them and the investigative process to determine the cause. Additionally, Brad recently presented "Negotiation Strategies" as a guest lecturer for the MBA Program at the University of Wisconsin School of Business.

Wilhelm Dingler (Philadelphia, PA) presented "Risk Management–Practical Lessons From the Trenches" to the Bucks and Montgomery County Chapters of the Pennsylvania Society of Tax & Accounting Professionals at their annual meeting. **Wil** was also part of a panel of presenters at the DRI Professional Liability Conference in New York City. Wil was joined by a claims professional and an underwriter to address the topic "The Top Ten Trouble Spots for Accountants." Finally, **Wil** spoke to the Pennsylvania Institute of Certified Public Accountants as part of their annual two-day tax forum. Wil's topic focused on the use of engagement letters and engagement letter clauses as a risk management tool.

Joel Wertman (Philadelphia, PA) was a featured speaker at the 2016 Securities Litigation and Regulatory Update co-hosted by the Philadelphia and New Jersey Bar Associations. The full-day program focused on cybersecurity. Joel presented as part of a panel on broker dealer developments and perspectives on cybersecurity.

Niki Ingram (Philadelphia, PA) participated in "Sisters in Success: Leaning In and On" as part of a series of quarterly round-table discussions hosted by The National Bar Association, Women Lawyers Division, Philadelphia Chapter. Niki joined a panel of successful women leaders in the legal community to share tips and suggestions for balancing the demands of work with everyday life. The series of presentations is intended to empower attendees by providing necessary tools and support to create positive change.

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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Brigid Alford and **Tim McMahon** (Harrisburg, PA) presented "Practical Applications of Social Media In and Out of the Courtroom" at the Eleventh Biennial Cumberland County Bench Bar Conference held at the Dickinson School of Law. Brigid and Tim have been invited to submit an article on this topic for publication in a 2017 edition of the *Pennsylvania Bar Quarterly*.

Matt Keris (Scranton, PA) co-presented a program entitled "Legally Yours: Legal Implications in the Delivery of Anesthesia" at the Pennsylvania Association of Nurse Anesthetists Annual Conference. Matt lectured with a nursing school professor from a local university on the clinical and professional liability issues germane to the administration of anesthesia in an operating room setting.

Dan McDermott and **Christopher DiCicco** (New York, NY) attended Marine Insurance Day at Baruch College in New York City. This annual educational event is hosted by the five major marine industry associations: American Institute of Marine Underwriters, American Marine Insurance Forum, Association of Average Adjusters of the U.S., Inland Marine Underwriters Association, and Marine and Insurance Claims Association (MICA). Dan served as moderator of the MICA session, "New Rules and Regulations With a Marine Insurance Impact."

Mary Kate McGrath (Philadelphia, PA) was a panelist for the "Quality Monitoring with 'CPR' – Coding, Payback and Reporting to the OIG" session at the Pennsylvania Health Care Association Annual Convention & Trade Show. Mary Kate and the other panel members provided insight on the scope of clinical record auditing to be conducted, mitigating the financial loss and whether to conduct these activities under attorney-client privilege.

Niki Ingram and **Tony Natale** (Philadelphia, PA) were presenters at the annual Workers' Compensation Summit hosted by the Pennsylvania Chamber of Business and Industry. In "Pennsylvania Workers' Compensation Law Best Practices for Complying with Benefits, Understanding the Flow of a Workers' Compensation Claim, and Tips to Prevent WC Fraud," Niki and Tony discussed the top mistakes businesses make and how to avoid them, how a typical workers' compensation claim is filed, workers' compensation fraud and best practices for companies to follow in complying with Pennsylvania's workers' compensation law.

Joel Wertman and **Jeff Chomko** (Philadelphia, PA) were featured speakers at the Independent Broker Dealer Conference in Phoenix, Arizona. Their presentation on the new Department of Labor Fiduciary Rule focused on "The Best Interest Contract Exemption."

Daniel Sherry (King of Prussia, PA) was a featured speaker at the national conference of the Association of Rehabilitation Nurses, which was recently held in Philadelphia. Dan and his co-presenters, a plaintiffs' attorney and a hospital risk manager, discussed various aspects of nursing malpractice, including issues pertaining to documentation, electronic medical records, chain of command and more.

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 in Dallas, Texas.

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 (PAHCRM) Annual Conference.

WEBINARS

Jon Cross (Philadelphia, PA) was a participant in the A.M. Best webinar "What Insurance Professionals Should Know About Emerging Sports Liability Issues." This webinar explored the widening range of risk exposures faced by schools, volunteer groups and sports organizations, including brain injuries, abuse and molestation, safety of and liability for referees and umpires, and more. This webinar will be made available on the A.M. Best website.

Jennie Philip (Philadelphia, PA) co-presented a webinar in the Property & Liability Resource Bureau Investigating Fraud webinar series titled "Combating Contents Fraud." She spoke about fraudulent content claims, including the latest trends in contents fraud across personal and commercial lines, red flags for early detection of potential fraud, useful strategies, tools and techniques for fraud investigation, and legal and procedural protocols to help combat contents fraud.

Dave 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.

Wilhelm Dingler (Philadelphia, PA) presented a webinar entitled "The Top Ten Trouble Spots for Accountants" in association with North American Professional Liability Insurance Agency. Wil's presentation focused on risk management, engagement letters and loss control, and prevention techniques for accountants. ■

** Prior Results Do Not Guarantee A Similar Outcome*

THIS IS EXHAUSTING!

(continued from page 6)

Constitution and state law. In their complaint, the parents contended the district failed to appropriately identify the child as a student with a disability, and they questioned whether and to what extent the § 504 plans sufficiently addressed the child's right to a free appropriate public education. They claimed the § 504 plans were deficient and denied the child educational opportunities. The parents sought various forms of relief, including compensatory education (an equitable remedy available under the IDEA) and money damages.

In response to the federal lawsuit, the school district filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim under Federal Rule of Civil Procedure 12(b). The district court concluded that in view of the educational nature of the parents' federal claims, they were required to exhaust the IDEA administrative process before filing suit. Consequently, the federal claims were dismissed, without prejudice, for lack of subject matter jurisdiction.

On appeal, the 3rd Circuit affirmed, reasoning that the discrimination claims asserted under the ADA, § 504 and the U.S. Constitution alleged educational injuries that related to the provision of a free appropriate public education as defined by the IDEA. The court found that central to the parents' claims was their contention that the school district should have provided alternative or supplemental instruction to the student, and that the district failed to provide instruction tailored to the student's special needs resulting from his disability. Thus, the court concluded that these were free appropriate public education claims which could have been remedied through the IDEA administrative process. In so holding, the court emphasized the "strong policy" encouraging the exhaustion of remedies in similar cases and stated, "[w]here parents challenge a school's provision of a free appropriate public education and allege educational harm to a child, remediation of the alleged educational deficiencies is best addressed in the first instance by educational professionals, rather than a court."

Notably, the 3rd Circuit in *S.D.* reached nearly the same conclusion as did the 6*th* Circuit Court of Appeals under similar circumstances in *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015). In *Fry*, the student suffered from cerebral palsy and received services under the IDEA through an Individualized Educational Plan (IEP). The student was prescribed a service dog to assist her with everyday tasks. The school provided the student with a human aide in school as part of her IEP and refused to allow the student to bring her service dog to school. The parents sued the school district in federal court, alleging violations of the ADA, § 504 and state disability law. The trial court dismissed the lawsuit for lack of jurisdiction because the parents did not exhaust their administrative remedies under the IDEA. The 6th Circuit affirmed, reasoning: "[b]ecause the specific injuries the Frys allege are essentially educational, they are exactly the sort of injuries the IDEA aims to prevent, and therefore the IDEA's exhaustion requirement applies to the Frys' claims." Significantly, however, the United States Supreme Court granted *certiorari* in *Fry*, 136 S. Ct. 2540 (2016), and heard oral argument in October 2016. As of this writing, the Supreme Court has not rendered a decision.

S.D. is an important decision for school districts and other local educational agencies as it reinforces the IDEA mandate—at § 1415(l)—that aggrieved parents cannot circumvent the IDEA administrative process when seeking to vindicate their child's educational rights by filing suit directly in federal court under statutes other than the IDEA. Even though parents may have viable claims under the ADA, § 504 or the U.S. Constitution, if a claim relates to the provision of a free appropriate public education, or otherwise alleges educational harm, they first must pursue due process under the IDEA and exhaust their remedies in an administrative forum before filing suit. *S.D*. provides a precedential basis to challenge jurisdiction in a lawsuit filed under statutes other than the IDEA where the alleged deprivation of the educational rights of a child with special needs is the driving force behind the claims at issue.

On the other hand, *S.D*. does not foreclose parents' rights to pursue federal litigation arising from their child's education altogether. As the 3rd Circuit explained, parents will still be permitted to seek all rights and remedies they or their child may have—including money damages—under the ADA, § 504 and the U.S. Constitution once they fully exhaust the IDEA administrative process. Therefore, regardless of the forum, local educational agencies must be prepared to defend their decision-making and to convince the ultimate fact finder (whether hearing officer, judge or jury) that a free appropriate public education was delivered and that no educational harm came to the student. Moreover, local educational agencies will need to monitor and await the outcome of the Supreme Court's decision in *Fry*, which will likely provide further guidance as to precisely what types of claims of educational harm must be exhausted under the IDEA before suit can be filed. ■

New York—Construction Injury Litigation

THE CONTINUING EXPANSION OF LABOR LAW SECTION 240

By Seth A. Frankel, Esq.*

KEY POINTS:

- The Appellate Division, First Department, narrows instances where it will find that the sole proximate cause defense to Labor Law § 240 is applicable.
- Courts have begun to rule outright that the sole proximate cause defense does not apply rather than leave the matter to a jury.

Seth A. Frankel

For attorneys defending personal injury claims arising out of construction accidents in New York, one of the biggest challenges is defeating the plaintiff-friendly provisions of Labor Law § 240. Unfortunately, the landscape appears to be shifting to an even more hostile environment for defendants if the recent case of *Saavedra v. 89 Park Avenue, LLC*, 39 N.Y.S.3d 462 (App.Div. 1st Dept. 2016) is any indication.

Before tackling the *Saavedra* case, a quick recap of Labor Law § 240 is appropriate. Generally, Labor Law § 240 calls for strict liability against owners and general contractors, without regard for actual negligence, for workers who fall from a height (*Valensisi v. Greens at Half Hollow, LLC*, 823 N.Y.S.2d 416 (App.Div. 2nd Dept. 2006)) or who are struck by a falling object (*Naughton v. City of New York*, 940 N.Y.S.2d 21 (App.Div. 1st Dept. 2012)). Assuming both the worker and the work are encompassed under the statute, there are essentially two defenses: sole proximate cause or recalcitrant worker.

The sole proximate cause defense states that there is no liability when the plaintiff's own negligence is the sole proximate cause of the accident. This is distinct from comparative negligence, which is not a defense under Labor Law § 240, as decided in *Blake v. Neighborhood Housing Services of New York City, Inc.*, 803 N.E.2d 757 (N.Y. 2003). In *Blake*, the plaintiff fell from a ladder that he had set up himself and which was free of defects. The accident occurred because of the way the plaintiff used the ladder, not because of a malfunctioning or defective safety device. Based upon this, the jury's finding that the ladder provided proper protection to the plaintiff was upheld.

The other defense to liability under Labor Law § 240 is the recalcitrant worker defense, which states that an owner or general contractor is not liable where it provides safety devices or safety instructions but a worker ignores those instructions or devices. In *Cahill v. Triborough Bridge and Tunnel Authority*, 823 N.E.2d 439 (N.Y. 2004), the plaintiff received instructions to use a safety line while climbing, which he then disregarded. The plaintiff's recalcitrance was deemed the cause of the accident.

In *Saavedra*, the plaintiff was injured when he fell from the top step of a six-foot A-frame ladder. There were eight-foot A-frame ladders available on the job site, and the plaintiff was aware of those ladders. The plaintiff claimed, however, that due to the presence of debris on the floor, he was unable to completely open the eight-foot A-frame ladder. Accordingly, he used the shorter ladder, which was not tall enough to reach where he was working. Thus, he stood on the top step, despite admitting that he knew it was unsafe.

The plaintiff claimed his foreman had told him at the beginning of the day to keep working on what they were doing, after which the foreman left the site. The foreman did not specifically direct him to work in a particular room, the plaintiff merely had to install lighting on the whole project, including the room where his accident occurred.

The plaintiff also testified that he told the site safety manager that there was too much debris for him to safely perform his work. In response, the site safety manager told the plaintiff he could not work like that and it was unsafe. The plaintiff countered, however, that the site safety manager conceded she lacked the authority to directly instruct the plaintiff or to stop him from working. Nevertheless, even if the site safety manager lacked the authority to stop the plaintiff from working, the plaintiff disregarded the site safety manager's opinion about the danger of the debris.

The defendants in *Saavedra* argued that there was no reason for the plaintiff to choose a spot where the correct ladder could not be opened, use the wrong ladder and disregard the site safety manager. There was no evidence of time pressure or any emergency that required the plaintiff to work in the area where he was injured. His foreman's instructions were general in nature and merely required the plaintiff to "keep working." As the defendants argued, the plaintiff was provided with an appropriate safety device but opted to use an inappropriate safety device.

At the Supreme Court level an issue of fact was found. On appeal, the Appellate Division, First Department reversed, granting summary judgment for the plaintiff. The Appellate Court held that

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* *Seth, an associate in our New York City office, can be reached at 212.376.6446 or safrankel@mdwcg.com.*

Ohio—General Liability

KENTUCKY OPENS THE DOOR FOR PREMISES LIABILITY LAWSUITS BY ABANDONING THE OPEN-AND-OBVIOUS DOCTRINE. OHIO RETAINS THIS CRITICAL DEFENSE

By Stephen M. Wagner, Esq.*

KEY POINTS:

- In Kentucky, the open-and-obvious doctrine is no longer a complete bar to recovery.
- Liability under Kentucky law must be determined by principles of comparative fault.
- The open-and-obvious doctrine remains a defense to premises liability cases in Ohio.

Stephen M. Wagner

KENTUCKY

The Kentucky Supreme Court has eroded the open-and-obvious doctrine as a complete defense for Kentucky landowners and occupiers through its opinions in *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013) and *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015). Traditionally, in Kentucky, the existence of an open-and-obvious condition that was foreseeable removed a landowner's legal duty to warn an invitee of the open-and-obvious condition.

The facts of *Shelton* are straightforward. While tending to her husband during his stay in Cardinal Hill Rehabilitation Hospital, Ms. Shelton became entangled in wires strung along the side of her husband's bed and fell, fracturing her kneecap. The trial court dismissed her claim on summary judgment by reasoning that Cardinal Hill owed no duty of care to Shelton because the wires were an open-and-obvious condition.

The Kentucky Supreme Court reversed and remanded, turning decades of tort law on its head by holding that the open-and-obvious doctrine is now a question of breach, not a question of duty. Rather than simply labeling a danger as "obvious" and then denying recovery, Kentucky courts must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger, regardless of whether the danger was "obvious." Put simply, there is always a duty owed to invitees in Kentucky. Instead of focusing on the duty, the question for the jury is the foreseeability of this risk encountered by the plaintiff and the apportionment of fault among the parties.

Two years later, in *Carter v. Bullitt Host, LLC*, the Kentucky Supreme Court further eroded the "open-and-obvious" defense, even as applied to naturally occurring conditions, such as snow and ice accumulation. James Carter was an invitee at a Holiday Inn Express operated by Bullitt Host, LLC. Near the entrance of the hotel, Carter slipped and fell on ice, breaking his ankle in the fall. The hotel obtained summary judgment under the long-standing law in Kentucky that a landowner cannot be liable for injuries to an invitee caused by an open-and-obvious, **natural outdoor hazard**. Like in *Shelton*, the Kentucky Supreme Court stated unambiguously that liability under Kentucky law must be determined based on principles of comparative fault, even with regard to natural outdoor hazards.

Following *Shelton* and *Carter*, the open-and-obvious nature of a hazard under comparative fault principles is nothing more than a circumstance that the Kentucky fact finder can consider in assessing the fault of any party. Prior law has been abandoned.

OHIO

In Ohio, the open-and-obvious doctrine remains a complete bar to recovery for many plaintiffs. Specifically, under the open-and-obvious doctrine, the owner or occupier of the premises is under no duty to protect business invitees from dangers known to the invitee or that are so obvious and apparent that the invitee may be reasonably expected to discover them and protect himself against them. *Paschal v. Rite Aid Pharmacy, Inc.*, 480 N.E.2d 474 (Ohio 1985).

Unlike in Kentucky, the rationale for the open-and-obvious doctrine is that the open-and-obvious nature of a hazard itself serves as a warning of the danger and allows the owner or occupier to reasonably expect that invitees will discover the danger and take appropriate measures to guard against it. Although more Ohio courts are finding exceptions to the open-and-obvious doctrine, it still remains the most viable and effective method for disposing of premises liability cases on summary judgment.

KENTUCKY GUIDANCE

Moving forward in the cold winter months, brick-and-mortar businesses will benefit by implementing routine premises inspection policies. Doing so will greatly reduce a defendant's potential economic exposure when a jury evaluates the foreseeability of the harm under comparative fault principles. ■

* *Stephen is an associate in our Cincinnati, Ohio office who can be reached at 513.372.6816 or smwagner@mdwcg.com.*

Pennsylvania—Amusements, Sports & Recreational Liability

YES! WAIVERS OF LIABILITY FOR RECREATIONAL ACTIVITIES ARE STILL EFFECTIVE IN PENNSYLVANIA

By Stuart H. Sostmann, Esq.*

KEY POINTS:

- Conspicuous release language in recreational activity waivers are not against public policy and are not contracts of adhesion.
- Requiring a signature on an agreement containing release language removes all analysis of the conspicuous nature of the language and increases the chances of a successful waiver.
- It is irrelevant to the analysis of a waiver whether the plaintiff read and understood the language.

Stuart H. Sostmann

Over the years, the plaintiffs' bar has continuously tried to attack releases included in membership agreements, recreational activity waivers and other forms for non-essential activities. The appellate courts in Pennsylvania have been addressing various releases on a continuous basis for the last 10 years. With each case, the plaintiffs' bar tries to chip away at the validity of these releases in order to prevent their clients' claims from being thrown out at summary judgment.

Nevertheless, within the last five years, Pennsylvania's appellate courts have developed a series of principles that, if followed correctly, will result in a waiver of negligence claims for incidents that involve non-essential activities. The latest case addressing these principles is *Toro v. Fitness International, LLC, a/k/a LA Fitness International LLC*, 2016 Pa. Super. LEXIS 655 (Pa.Super. Nov. 10, 2016).

Toro was a member of an LA Fitness gym and had signed a membership agreement when he first joined. Subsequently, Toro slipped and fell in the locker room area at the LA Fitness on August 14, 2012. He filed a negligence cause of action, claiming that he slipped and fell on an unreasonable accumulation of soapy water located within the locker room. After a period of discovery, Fitness International filed a for summary judgment on two grounds: first, that Toro did not establish the gym had constructive notice of the alleged dangerous condition; and second, that Toro had waived his right to file a negligence cause of action based on a release included within the signed membership agreement.

There are three important points the court considered in evaluating the release language in Toro. First, at the outset of the release and waiver paragraph in the membership agreement, it started with the following in bold capital letters: "IMPORTANT: RELEASE AND WAIVER OF LIABILITY AND INDEMNITY." This conspicuous language was found by the Superior Court to have put Toro on notice that there was important release language forthcoming in the next paragraphs of the agreement. Second, the release and waiver clause contained language that specifically included all areas of the gym's facility, noted that the risk of injury included in the clause was applicable to "accidental injuries occurring anywhere in the club, dressing rooms, showers and other facilities," and that the clause "is intended to be as broad and inclusive as is permitted by the law of the State of Pennsylvania." The Superior Court found this language to be clear that any injuries occurring in the locker rooms were covered by the release language in the membership agreement. Lastly, on the first page of the membership agreement—important to note, not the last page of the agreement—the gym included a signature line for the member, and it specifically noted above the signature line that "[t]he member was of legal age, had received a completed copy of the agreement, and had read and understood the entire agreement, including but not limited to the … release and waiver of liability and indemnity." The Superior Court found that, by placing his signature below this language on the first page of the agreement, Toro was being placed on notice by the gym that he was accepting the terms of the release and waiver clause.

Based on the specific, conspicuous and all-encompassing language of the release and waiver clause in the membership agreement, the trial court granted summary judgment to Fitness International. On appeal, Toro argued that prior appellate case law precluded application of the release and waiver clause in the membership agreement. First, Toro argued that the exculpatory language in the membership agreement was invalid as it was a contract of adhesion and against public policy. Second, Toro argued that the release and waiver language clause was unenforceable because he had not read and understood that clause. Third, Toro argued that the exculpatory language in the release and waiver clause was not sufficiently prominent such that a reasonable person would be aware of it.

The Superior Court addressed each one of these arguments in turn. First, the court cited *Hinkal v. Pardoe*, 133 A.3d 738, 743

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* *Stuart, a shareholder in our Pittsburgh, Pennsylvania office, can be reached at 412.803.1179 or shsostmann@mdwcg.com.*

Pennsylvania—Health Care Liability

IMMUNITY FROM ADDICTION IN THE NEW YEAR

By Ryan J. King, Esq.*

KEY POINTS:

- Pennsylvania law limits the amount of opioid pain medication licensed health care providers can prescribe from an emergency department or urgent care facility.
- Those providers are prohibited from refilling prescriptions for opioid pain medication.
- Health care providers working in emergency departments and urgent care facilities must meet the Act's mandatory requirements.
- Compliance with the Act's requirements grants health care providers immunity from civil suit.
- Noncompliance with the Act could negatively impact the provider's ability to practice medicine.

Ryan J. King

It is no secret that, over the last decade, the rate of prescription drug abuse and misuse in the United States has grown at a significant rate. According to the Pennsylvania Legislature, a recent report found that 20 to 30% of all opioid pain medications are being misused. Experts estimate that as many as five million Americans are abusing prescription opioid pain medications, and the problem continues to grow. In an attempt to stem the tide of this epidemic, on November 2, 2016, Governor Tom Wolf signed the Safe Emergency Prescribing Act (SEPA), which became law on January 1, 2017.

SEPA places strict limitations on the amount and the way opioid pain medications can be prescribed by licensed health care providers in emergency departments and urgent care facilities. More importantly, the Act imparts immunity from civil liability if the health care providers working in these settings follow SEPA's requirements. This unprecedented shield from civil lawsuits will not only protect health care providers, but it should have the added effect of curtailing the amount of prescription pain killers being obtained for misuse from emergency departments and urgent care facilities. The Act, however, is not without some potential problems for health care providers.

SEPA applies to health care providers licensed to prescribe opioid-based medications working in emergency departments and urgent care facilities in the Commonwealth. Thus, the Act applies to physicians, physician assistants, nurse practitioners or any other health care professional licensed to prescribe narcotic medications in an emergency department or urgent care facility. SEPA also covers patients who are in "observation status" but may be physically located outside the emergency department or urgent care facility. A patient is "under observation" if he or she receives onsite services from a hospital for more than 23 consecutive hours, including meals and a bed, but have not been formally admitted as an inpatient to the hospital.

The main provision of SEPA limits the amount of opioid pain medication that can be prescribed to a patient seeking treatment in an emergency department or urgent care facility. Under the Act, licensed health care providers cannot prescribe more than a seven-day supply of opioid pain medication to a patient seeking treatment. There is, however, an exception to this rule. If, in the provider's professional medical judgment, a seven-day supply of opioid medication is insufficient to treat a patient for an acute medical condition, cancer or palliative care, the provider may prescribe more than the seven-day limit. Doing so requires that the provider identify and document the medical condition in the patient's chart. The provider must also document that a non-opioid medication was not appropriate.

In the event the provider decides to prescribe opioid medication to a patient, the provider must check the prescription drug monitoring system known as Achieving Better Care by Monitoring All Prescriptions (ABC-MAP). There is no need to check this system if the patient is being medicated in an emergency department or urgent care facility. Checking ABC-MAP will inform the provider whether the patient is receiving opioid medication from another health care practitioner. Implementation of this requirement will not only help the current provider make an educated decision as to whether he or she should prescribe an opioid drug product, but it could also alert the provider to a drug seeking/abusing patient.

SEPA also prevents providers from refilling opioid medications in the emergency department or urgent care facility. There is no exception. This provision was obviously meant to combat drug seeking behavior from individuals who attempt to obtain refills of pain medication from overburdened emergency departments instead of from their primary care or pain management physicians, where they are likely to face closer scrutiny of their prescription and drug use history. This prohibition significantly bolsters the legislature's

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* *Ryan is an associate in our Pittsburgh, Pennsylvania office. He can be reached at 412.803.1155 or rjking@mdwcg.com.*

Pennsylvania—Workers' Compensation

CLAIMANT'S COUNSEL MUST REFUND ERRONEOUSLY GRANTED ATTORNEYS' FEES

By Shannon Fellin, Esq.*

KEY POINTS:

- When attorneys' fee awards are paid and then later reversed, the proper remedy is a refund from claimant's counsel, not from the Supersedeas Fund.
- Principles of unjust enrichment to require reimbursement of both litigation costs and attorneys' fees from claimant's counsel are expanded.
- Argument that a claimant's right to representation would be jeopardized by reimbursement from his attorney is rejected.

Shannon Fellin

Believe it or not, sometimes Workers' Compensation Judges get it wrong. A recent case from the Commonwealth Court allows the employer to be made whole when there is an award of attorneys' fees that was erroneously awarded. The remedy is not reimbursement from the Supersedeas Fund, but directly from claimant's counsel!

Under the Pennsylvania Workers' Compensation Act, Section 440 (b), an employee who prevails in a contested case shall be awarded attorneys' fees, unless the Workers' Compensation Judge finds that the employer presented a reasonable contest. To avoid an award of attorneys' fees, the employer must prove that there are genuine issues of fact and law. When the judge awards attorneys' fees, it is done on an hourly basis from a summary provided by claimant's counsel. These awards can be quite generous.

An award of attorneys' fees can be appealed to the Workers' Compensation Appeal Board, with a request to stay the award pending the appeal (a supersedeas request). If the request is denied, then the employer must make payment. In the past, there has been no satisfactory remedy for the employer if the Workers' Compensation Appeal Board or a higher court ultimately finds that the attorneys' fee award was not warranted based on the language in the reimbursement statute. The provision was limited to "payments of compensation," which has been interpreted to include medical and indemnity payments, but not attorneys' fees.

However, on December 20, 2016, in *County of Allegheny v. WCAB (Parker)*, 2016 Pa. Commw. LEXIS 556 (Pa.Commw.Ct. Dec. 20, 2016), the Commonwealth Court held that when attorneys' fees are improperly awarded, the employer is entitled to repayment from claimant's counsel. *County of Allegheny* has a very complicated procedural history involving the employer's suspension petition based on an actual job offer. By decision dated April 23, 2008, a Workers' Compensation Judge granted the suspension petition, finding that the 80-year-old claimant had failed to follow through on a job offer and had completely withdrawn from the labor market. The claimant appealed. The Appeal Board reversed this decision and found that the employer did not have a reasonable contest. The case was sent back to the Workers' Compensation Judge to determine the amount of attorneys' fees. The judge awarded fees for the work done on a portion of the litigation, and this second decision was appealed by both parties.

The Appeal Board increased the award of attorneys' fees, and the employer appealed to the Commonwealth Court. When the employer's request for supersedeas was denied, $14,750 was paid to claimant's counsel. Ultimately, the Commonwealth Court ruled in the employer's favor. When the employer applied for supersedeas reimbursement, the Bureau of Workers' Compensation approved the reimbursement for indemnity payments but denied reimbursement of the $14,750 in attorneys' fees. The Bureau maintained that such payments were not reimbursable under Section 443.

The employer challenged the Bureau's determination and sought an order requiring counsel to refund the $14,750 in attorneys' fees. The Workers' Compensation Judge rejected the claimant's contention that the employer had waived his right to reimbursement and held that there was no clear precedent for an order requiring the return of unreasonable contest attorneys' fees. The judge further stated that claimant's counsel may voluntarily return the fees pursuant to ethical and moral principles, but he would not be ordered to do so. The judge also denied the claimant's request for attorneys' fees in this round of litigation. Both parties appealed, and the Appeal Board affirmed. This decision was also appealed to the Commonwealth Court.

On appeal to the Commonwealth Court, the employer argued that there was precedent under *Barrett v. WCAB (Sunoco)*, 987 A.2d 1280 (Pa.Commw.Ct. 2010), which held that an employer

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* *Shannon is a shareholder in our Harrisburg, Pennsylvania office who can be reached at 717.651.3507 or spfellin@mdwcg.com.*

INGRESS AND EGRESS

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the employer exercised sufficient control over the area, even though the site was not actually owned, maintained or exclusively used by the employer.

Lastly, the Appellate Division cited *Hersh*, which found that an injury sustained by an employee while walking two blocks between her employer-provided parking garage and her office building was not a compensable injury. The court reasoned that the employer did not have control over the garage or the public street where the injury occurred. The Appellate Division listed the factors to be analyzed, stating: "[t]he employer in *Hersh* 'only rented a small portion of the spots in the lot,' did 'not own or maintain' the garage, 'derived no direct business interest from paying for employees to park in the garage,' did not control the public street the injury occurred on, did not add 'any special or additional hazards' to the employee's ingress or egress to work, and did not control the employee's ingress or egress route."

The court reasoned that High Point had sufficient control over the parking lot where the petitioner was injured. The critical factors in reaching this decision were:

(1) High Point leased a portion of the lot for its key employees and business invitees;

(2) High Point was responsible for a portion of the operating expenses of the lot, pursuant to the lease agreement;

(3) High Point controlled the lot by designating where employees were to park and not to park;

(4) High Point further established control by enforcing the parking rules;

(5) As there was no on- or off-street parking available for over a mile, High Point controlled the ingress and egress of the employees; and,

(6) The accident occurred in the lot, unlike *Hersh*, where the accident occurred on a public road where the employer had no control.

In analyzing workers' compensation parking lot cases, it is important to determine if the employer had the requisite control. Does the employer own, lease, maintain or control where some or all of its employees park? Does the employer tell its employees where to park or where not to park? Is there available off-site parking within a reasonable distance? *Giordano* leaves unanswered how many of the above factors are sufficient to satisfy "control." ■

YES! WAIVERS OF LIABILITY

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(Pa. Super. 2016)(en banc) appeal denied, 141 A. 3d 481 (Pa. 2016), for the proposition that a gym membership agreement does not sufficiently implicate health and safety concerns that would allow one to conclude the waiver would violate public policy. Further, the court referred to a number of prior appellate cases in Pennsylvania where it has been determined that an individual engaged in voluntary athletic or recreational activity can enter into contracts containing exculpatory clauses. Applying those principles to *Toro*, the Superior Court determined that Toro was engaged in a voluntary athletic or recreational activity by participating in activities at his gym. The court determined that, because he signed an agreement containing a release and waiver clause that explicitly waived all claims for injuries he suffered at the LA Fitness facility, the clause was not contrary to public policy. Along those same lines, the court further stated that an exculpatory agreement involving the use of a commercial facility for voluntary, athletic or recreational activities is not considered a contract of adhesion, and the member is under no compulsion, economic or otherwise, to participate, much less to sign the exculpatory agreement, as it does not relate to essential services.

The second argument raised by Toro was that the language contained within the release and waiver clause was not conspicuous and that there was testimony that he failed to read and understand that clause. Initially, the court noted that the mere fact that a plaintiff did not read or understand an exculpatory clause was not determinative of whether that clause would be deemed valid. Instead, an analysis would need to take place as to whether the exculpatory provisions were conspicuous. However, the conspicuous argument raised by the plaintiff was deemed moot by the court as the plaintiff's own signature on the membership agreement did not require the court to engage in an analysis of the conspicuous nature of the language. The court, referring back to the language on the first page of the agreement directly above the area where Toro signed the agreement, specifically noted that Toro signed the membership agreement directly after reading language which indicated that he had acknowledged reading and understanding the membership agreement, including but not limited to the release and waiver of liability clause. As such, Toro's signature on the membership agreement formed a valid contract, and he was bound to its terms, including the release and waiver clause.

Based on *Toro*, any client providing a recreational activity to the general public should be counseled on preparing comprehensive agreements containing conspicuous clauses releasing that client from liability. Not only should these clauses be conspicuous, but an effort to obtain the signature of the party participating in the recreational activity is a must and should be included as early as possible in the membership agreement. Lastly, the release and waiver clause should be comprehensive and include all portions of the activities and facilities so that there is no confusion that the release and waiver clause encompasses the entirety of the activities that the participant would encounter while at the client's facilities. ■

NEGLIGENT SECURITY CLAIMS IN FLORIDA

(continued from page 8)

The defense expert opined that the victim/plaintiff had been targeted for the rape. He based his opinion on the fact that the assailant asked for the plaintiff by name just a few days before the attack. His ultimate opinion was that, because it was a victim-targeted crime, the landlord could not have foreseen that the event would occur, and this was the reason the event was unpreventable. In overturning the jury's verdict, the appellate court held that the defense expert should not have been permitted to testify that the sexual assault was a victim-targeted crime.

To conclude, Florida's state of the law on a negligent security claims continues to uniquely favor a recovery for plaintiffs, and from all appearances, it does not look as though this is going to change any time in the near future. Through use of circumstantial evidence, experts should be permitted to provide their true and whole opinions as to whether an event was foreseeable and, therefore, preventable. Otherwise, the Florida business property owner does, in fact, become the insurer for anything and everything that happens on the property, regardless of fault. ■

FOLLOWING THE MONEY

(continued from page 5)

the EEOC has stated its intention to publish "industry-specific reports" that will detail what employees earn on average based on their individualized employment categories.

In implementing these new requirements mandating the submission of company pay data, the EEOC has sent a strong signal that the Commission intends to boost its enforcement efforts in the area of pay discrimination. As a result, employers are well advised to take proactive measures not only to ensure adherence to the new pay data reporting mandates, but also to minimize the risk of falling victim to future investigations, administrative charges or civil lawsuits stemming from claims of unlawful company compensation policies or practices, which are almost certain to spike as a result of the newfound ability of both the EEOC and employees to utilize this abstract, summary pay data to form the basis for allegations of discrimination on the basis of pay.

Employers should begin their preparations for the new EEO-1 reporting requirements well in advance of the early 2018 pay data submission deadline. In particular, employers should take measures to ensure that they are able to collect the necessary data with the current systems they have in place at the present time. If not, employers must acquire any new programs or codes that will become necessary in order to compile and submit the required W-2 wages and hours data that they will need to give to the EEOC beginning in March 2018.

It is also strongly suggested that employers conduct self-audits to target and remedy any potential red flags or other issues before the new reporting requirements begin in order to eliminate any possibility of being faced with an EEOC investigation or enforcement action down the road. At the same time, however, employers must be cognizant of the fact that any internal audits will likely be discoverable in future litigation regarding pay discrepancies. For that reason, audits should be conducted by or with the assistance of outside counsel in order to ensure that any audit details, findings or conclusions are shielded by the attorney-client privilege.

Ideally, employers should engage in an internal audit of company compensation practices within each EEO-1 category and pursuant to the EEOC's twelve pay bands in order to discern any pay disparities, which will need to be adequately supported by a legitimate, non-discriminatory business rationale. If any evident pay discrepancies are identified that do possess a valid business rationale, the company must ensure that it retains the necessary documentation to adequately support the reasoning underlying the differences in compensation. If any pay practices are identified that cannot be adequately explained, such potentially problematic disparities should be remedied well in advance of when the new reporting period begins.

In addition, as a result of the EEOC's intention to publish "industry-specific reports" providing the average earnings of the different employment categories, employers whose minority workers earn less than the industry average should consider modifying their salary structure system or, at a minimum, be ready and able to fully justify the method and manner in which salary levels are calculated.

Finally, if feasible, employers should consider developing policies that describe and document the methodology for calculating compensation, especially in the areas of overtime, commissions and bonuses, and any other potentially precarious aspects of Box 1 W-2 wages. ■

THE CONTINUING EXPANSION OF LABOR LAW

(continued from page 22)

the plaintiff was not the sole proximate cause of his accident because the debris prevented him from opening the eight-foot ladder. Similarly, the Appellate Division held that the plaintiff could not be deemed a recalcitrant worker because the site safety manager's opinion did not carry the weight of a formal instruction. Moreover, the court found the debris was a recurrent condition well known to the owner and general contractor, eliminating the applicability of the recalcitrant worker defense.

The most important point of the *Saavedra* decision is that the Appellate Division appears to be trending towards granting summary judgment, rather than permitting the jury to be the final arbiter on the applicability of the sole proximate cause or recalcitrant worker defenses. Here, there appeared to be at least conflicting testimony that necessitated a finding of an issue of fact. The Appellate Division, however, granted summary judgment for the plaintiff.

It appears that *Saavedra* represents another step in the erosion of Labor Law § 240 defenses. Going forward, it will be imperative to swing the pendulum back towards defendants, lest the sole proximate cause and recalcitrant worker defenses become meaningless. ■

IMMUNITY FROM ADDICTION

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first attempt at stopping drug abusers from preying on emergency departments. The language used in the original draft of the Act stated that a provider could not authorize the refilling of a prescription for an opioid drug product that has been lost, stolen or destroyed—some of the common excuses used by habitual drug seekers. However, the current language simply prohibits emergency room and urgent care providers from refilling opioid prescriptions regardless of the reason for needing the refill.

SEPA additionally attempts to combat the opioid addiction epidemic by offering help to individuals who may have a substance abuse problem. The Act requires a provider to refer for treatment individuals who are suspected substance abusers or who may be at risk for substance abuse. However, SEPA does not specify to whom the provider must refer an at-risk patient, it only requires the provider to make the referral. It does not require that the provider admit the individual or have the patient committed to a treatment facility.

The most significant provision in the Act may very well be the potential for immunity from civil lawsuits. If a provider follows the regulations promulgated by SEPA, he or she will be presumed to have acted in good faith and will be immune from civil liability. If, however, a provider fails to follow the Act's requirements, he or she will be subjected to review and potential disciplinary action from the applicable governing body(ies). ■

CLAIMANT'S COUNSEL MUST REFUND

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can recover litigation costs directly from claimant's counsel when those costs were erroneously awarded. In *Barrett*, the court had concluded that, since litigation costs could not be recovered from the Supersedeas Fund, allowing counsel to retain costs to which he was not entitled would result in unjust enrichment. The court noted that there would be no hardship to the claimant, since reimbursement came from the attorney.

In *County of Allegheny*, the Commonwealth Court adopted this reasoning and directed claimant's counsel to reimburse the costs. They noted that every factor in *Barrett* was present in this case, including the lack of any other remedy in law. The court rejected the claimant's argument that the claimant may have to pay attorneys' fees or that this could have a "chilling effect" on representation of claimants. To the latter argument, the court suggested that if claimant's counsel was concerned about the hardship of later having to repay unreasonable contest attorneys' fees, he could have agreed to a stay of the award during the pendency of the appeal.

This decision was supported by three judges only, with two not participating, and one dissenting. The dissent argued that the majority's reliance on *Barrett* was overreaching and that the legislature, not the court, should address this issue.

For those of us who face claimants' counsel who routinely request attorneys' fees and judges who often award these fees, it is reassuring to know that there is a remedy to recoup improperly awarded attorneys' fees. ■

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215.575.2664 • Fax 215.575.0856
email: hpdwoskin@mdwcg.com
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HEALTH CARE DEPARTMENT

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

PROFESSIONAL LIABILITY DEPARTMENT

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

Niki T. Ingram, Esquire—Director
2000 Market Street, Suite 2300, Philadelphia, PA 19103
215.575.2704 • Fax 215.575.0856
email: ntingram@mdwcg.com
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Thomas A. Brophy, Esq.
President & CEO
2000 Market Street, Suite 2300
Philadelphia, PA 19103
215.575.2748
email: tabrophy@mdwcg.com

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

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

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