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WARNER COLEMAN & GOGGIN

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Defense Digest

On The Pulse…

OUR ROSELAND, NEW JERSEY OFFICE

By Justin F. Johnson, Esq.*

Justin F. Johnson

As the relatively new managing attorney of the Roseland office, when I was asked to provide a summary and some insights of the inner workings of our local office, my first inclination was to review prior additions of *Defense Digest* to see how other managing attorneys had described their offices. Wendy Bracaglia began her description of our King of Prussia, Pensylvania office as, "Located only minutes away from Valley Forge National Park … . " Martin Sitler began his submission by bragging, "The Jacksonville, Florida office has the most beautiful view of any of our offices. Our 14th floor space . . . overlooks the scenic St. John's River ... ." So how can the Roseland office compete with that? Do I begin by describing our location as "comfortably nestled between the urban cities of Newark and Paterson, New Jersey"? Is there a way that I can describe our office without conjuring images of *The Sopranos*? The answer, unqualifiedly, is YES! Our Roseland office is, in fact, actually located in a scenic, wooded professional office park that is geographically convenient to most major highways.

Our real strength, however, is not in our location or our travel accessibility. Rather, it is in the breadth and depth of the experience of our legal team and our strive for excellence. These are the hallmarks of Marshall Dennehey's office in Roseland, New Jersey. We are an eclectic and diverse group of attorneys and paraprofessionals, comprised of 37 attorneys—22 men and 15 women—and a balanced representation of shareholders (17), special counsel (4), associate attorneys (16) and paralegals (8), including a nurse legal analyst. Because of our attorneys' vast knowledge and experience, we have vibrant and significant representation in each of the firm's four practice groups: casualty, health care, professional liability and workers' compensation.

The largest of our practice groups is the casualty group, which is spearheaded by Matt Schorr, who is also the firm's Assistant

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OUR FRAUD/SPECIAL INVESTIGATION PRACTICE GROUP

By James H. Cole, Esq.*

James H. Cole

In response to the high demand for aggressive trial attorneys to prosecute insurance fraud, Marshall Dennehey Warner Coleman & Goggin continues to expand its Fraud/Special Investigation Practice Group's national footprint. Insurance fraud is, understandably, no longer tolerated or in any way compromised by insurance companies and self-insureds. We work very closely with our clients in furtherance of that philosophy through relentless investigation, aggressive defense, and prosecution in response to false and inflated insurance claims.

Our members supplement their litigation experience with up-to-date knowledge of the current trends in insurance fraud detection and prosecution areas by regularly attending and participating in seminars given by such educational agencies as the National Insurance Crime Bureau, International Association of Special Investigation Units and Certified Fraud Examiners. In addition, they also attend numerous local conferences and association meetings throughout various states, including but not limited to Pennsylvania, New Jersey, Delaware, Ohio, Florida and New York.

As a part of an overall aggressive fraud defense, the members of the Fraud/Special Investigation Practice Group believe that the "best defense is a good offense." Our trial attorneys are quite experienced in the investigation, defense and affirmative prosecution of fraudulent claims. The scope of their practice is focused on the individual claimant as well as organized groups or "rings." We routinely file affirmative litigation and collect judgments against perpetrators of insurance fraud including insureds, medical providers, contractors and anyone else adverse to the insurance industry.

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* *Jim is the Co-Chair of our Fraud/Special Investigation Practice Group and a shareholder in our Philadelphia, Pennsylvania office. He can be reached at 215.575.2635 or jhcole@mdwcg.com.*

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A MESSAGE from the EXECUTIVE COMMITTEE

By Christopher E. Dougherty, Esq.
Chairman, Board of Directors
Chairman, Executive Committee

TALKIN' 'BOUT THEIR GENERATION

Recently, I had one of those "senior moments." I left my cell phone on the hood of my car while grabbing a few extra items before pulling out of the driveway. After getting underway, the wind gliding over my Honda Accord overcame the quickly diminishing coefficient of friction, and my phone soon tumbled off to an untimely demise.

Not being able to bear an extra hour without this lifeline to technology, I called our firm's IT department for help. I was directed to Lauren, one of our IT specialists. Within 24 hours, Lauren secured the old phone's data from hackers, and I was up and running with a FedEx'd new device. Every byte of contact, e-mail and other data were back in hand. It was not just her speed in accomplishing all of this; it was her attention to detail which made a mark on me. Lauren called me seven times over a 24-hour period, advising me of the status of everything—including various insurance and AppleCare options after perceptively appreciating that this might not be a one-time event for me.

Lauren's "service" struck a resonant chord with me. She is a "Millennial." She could have handled this job request in one of many ways. She chose to fulfill it in a way that I would describe as "old school/first-class personal service"—marked by initiative, competence and a warm personal touch.

Why do I mention this?

Our firm's management carefully balances the need to keep one eye fixed on day-to-day operations to ensure we provide our clients the best possible legal services. At the same time, we look beyond the horizon with the other eye. We chart a course to maintain first-in-class service over the next five, ten, twenty years and beyond.

Our longer range thinking necessarily includes manpower management. When anticipating how to meet the needs of our clients in a rapidly changing legal industry over the next 15 to 20 years, we study which attorneys and staff are approaching retirement. We gauge what expertise, skill, client relations, community connections, and other intangible resources should be preserved and devised to the next generations of lawyers and staff. Then we ask: Are the beneficiaries of those bequests ready to properly accept them? Can they carry on the 55-year tradition of excellence that has been the hallmark of our firm? If Lauren is such a beneficiary, then I am confident about our future.

Who are the professionals and administrators who will be our future firm? They are the Millennials. In case you missed it, in early 2015, they became the largest generation in the United States workforce. In two years, they will make up one half of the global workforce. By 2030, they will constitute 75% of the workplace. They will be Marshall Dennehey.

I dislike the label "Millennial." Individuals shouldn't be lumped together under a label that is too easily slapped onto them. I don't share the negative perceptions often ascribed to them.

Everyone has heard the various criticisms of Millennials. Here are a few:

- They are entitled
- They are lazy
- They are "Trophy Kids" who constantly need praise
- They are addicted to technology
- They don't know boundaries between the personal and professional
- They frequently job hop if employment does not fulfill their "passion"
- They are the first ones to seek remote work opportunities
- Their career goals are different from those of older generations
- They don't know how to communicate professionally
- They can't take constructive performance critiques

I cannot debunk all of these myths here. I can only respond from my experience working with them at Marshall Dennehey. I will, however, address some of the more strident criticisms.

MILLENNIALS ARE ENTITLED

The word entitled may be the most damning term used to describe Millennials. Some Boomers believe that Millennials consider financial success and personal happiness as "rights," rather than rewards, and that Millennials are unwilling to sacrifice or endure hardship to obtain them.

We Boomers have to own the fact that we pushed our children to get to the next level, get into good schools, and afford them with substantial opportunities. They bring that background to the workplace. We can't forget that they are the highest educated generation in the world's history. Just look back to 1975,

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OUR ROSELAND, NEW JERSEY OFFICE

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Director of the Casualty Department. Our casualty group includes six shareholders—Matt Schorr, George Helfrich, Michael Speer, Art Bromberg, Alicia Calaf and Christopher Block; two special counsel—Tim Jaeger and Jonathan Williams; and five associates—Julie Dorfman, Josie Scanlon, Sara Mazzola, Rick Halmo and Paul Lanza. This robust practice group handles an immensely broad array of cases, ranging from product liability and premises liability to cases involving trucking and transportation, automobiles and even maritime matters. Our casualty group actively participates in marketing the firm's client base and offers presentations for continuing education and continuing legal education credits for clients at seminars and other industry events and conferences.

Our second largest practice group is health care, which is lead by Frank Leanza. Our health care group consists of five shareholders—Frank Leanza, Robert Evers, Justin Johnson, Roz Herschthal and Julia Klubenspies; one special counsel—Eric Grogan; and four associates—Nick Rimassa, Ryan Gannon, Heather LaBombardi and Talia Guida. Our health care practice are very active litigators, as seven of our ten attorneys have served as lead counsel. Collectively, the group has amassed in excess of 400 verdicts. Its attorneys are frequent presenters for hospital groups, insurance company mock trials, and other continuing legal and medical education functions. Two of the attorneys of that group hold degrees in nursing and pharmacy, respectively. The health care group handles a wide variety of legal actions in the defense of doctors, dentists, nurses, hospitals, and nursing home and rehabilitation facilities. They also represent medical professionals in professional board actions.

Our professional liability practice group, which is headed by Will Waldron, boasts nine attorneys, six of whom are shareholders—Will Waldron, Howard Mankoff, Wendy Smith, Patricia McDonough, Sunny Sparano and Christopher Gonnella; one special counsel—Pauline Tutelo; and two associates—Tim Ryan and Dan Algieri. The professional liability practice group, indeed, is an aggressive, thriving set of attorneys with an impressive case load. They handle matters in the pre-litigation setting and in the event that litigation ensues. A large portion of the work entrusted to this group is in the area of architectural and construction defect litigation. With the rise of the economy, there has been an increase in construction and, by fiat, the pursuit of more claims against our clients. The group also represents real estate agents, brokers and title agents. Mr. Mankoff and Ms. Tutelo also handle cases that run the gamut of constitutional litigation, issues involving boards of education and employment law matters.

Our smallest practice group by number of attorneys—but largest in terms of morale and enthusiasm—is our workers' compensation group, which is supervised by Greg Bartley. This practice group consists of two shareholders—Greg Bartley and Dario Badalamenti—and three associates—Rachael Ramsey-Lowe, Betsey Dietz and Ida Fuda—each of whom handle their own files (irrespective of complexity). This practice group regularly meets internally to hash out issues of concern in their files and is sincerely devoted to rising above and distinguishing themselves from all competitors. The group is well known and respected by clients and courts alike, and Dario is a frequent author of articles for our *Defense Digest* and *What's Hot in Workers' Comp*. The group has grown over the past several years, largely as a result of their willingness to have frequent face-to-face interactions with clients and carriers, which has created and fostered wonderful relationships. The morale of this group is the driving force behind the energy that exudes from the Roseland office, and the group, indeed, enjoys a bright future.

I would be remiss if I did not also include some comments about our paralegals and other staff. We have an extremely resourceful and dedicated group of eight paralegals, serving all four practice groups. These men and women are dependable and dedicated, and they certainly enhance the performance of the attorneys who lean upon them. The Roseland trial attorneys have become increasingly active in utilizing our paralegals for their legal and technical skills at trial. They are an important part of the formula for excellence for which we strive at Roseland. One of our paralegals has received some rather significant law school scholarship offers. We also employ about two dozen administrative assistants and other staff who, under the direction of Keisha Stokes and Margaret Wolf, are to be complimented for their demonstrated abilities to anticipate the needs of the attorneys, keep up with technological advances and maintain a peaceful office atmosphere. Moreover, with respect to our administrative assistants, more than half have worked at our Roseland office for more than 10 years and two have been with us for more than two decades.

We in Roseland are proud to be one of the firm's largest offices. Our greatest sense of pride, however, is the recognition that we receive from clients, carriers, and courts for the quality of legal services which we provide and the professionalism which we exude in all legal arenas in the service of our clients. If you are ever in our area, we would love to have you stop by and see for yourselves. ■

Florida—Insurance Coverage & Bad Faith

CONSTANT OR REPEATED SEEPAGE OVER A PERIOD OF 14 DAYS OR MORE

By Michael A. Packer, Esq.*

KEY POINTS:

- Homeowners "all risks" policy exclusionary clause regarding "constant or repeated seepage over a period of 14 days or more" interpreted by Florida's 5th District Court of Appeals.
- Exclusion determined to be ambiguous and construed against insurer.

Michael A. Packer

Some variation of the exclusionary clause, "constant or repeated seepage over a period of 14 days or more," appears in almost every homeowners policy issued in Florida. Its purpose is clear—to control and limit liability for a continuous leak and to encourage the insured to timely report and mitigate water damage. However, in what appears to be an issue of first impression in Florida, at least according to a recent decision out of Florida's 5th District Court of Appeal, the exclusion itself may need some clarification.

In *Hicks v. American Integrity Insurance Company of Florida*, Hicks was insured by American Integrity Insurance under an "all risks" policy. Between September and October of 2012, while he was out of town for an extended period of time, the water supply line to his refrigerator began to leak. The leak was apparently slow at first, but it increased over time to the point that it was leaking approximately 1,000 gallons per day. Hicks filed a claim with American Integrity. Following its investigation, American Integrity denied the claim on the basis of its policy exclusion for constant or repeated seepage. The exclusion reads: "We do not insure…for loss…[c]aused by…[c]onstant or repeated seepage or leakage of water…over a period of 14 or more days."

Hicks filed suit against American Integrity, alleging breach of contract. Subsequently, American Integrity filed a motion for summary judgment on the basis of its policy exclusion of leaks occurring over a period of more than 14 days. Hicks filed a counter motion for summary judgment, arguing he was entitled to coverage for all losses occurring within the first 13 days following the start of the leak. In support of his motion, Hicks submitted a report from a forensic general contractor, which attempted to determine the portion of the loss resulting from the first 13 days of the leak. Following a hearing on the competing motions, the trial court sided with American Integrity and granted it summary judgment. The court reasoned that while the policy might provide coverage for the first 13 days of the loss, it could not make a determination of the time frame of the damage. This line of reasoning proved significant in the 5th DCA's subsequent reversal. On appeal, Hicks argued that American Integrity's exclusion applied only to the losses caused by water on day 14 and onward.

The appellate court noted that the trial court had actually conceded that the policy "might" cover "the loss in the first 13 days." The court was not persuaded by the trial court's reasoning that American Integrity was entitled to summary judgment because the court could not determine whether the loss occurred in the first 13 days. It noted that under an all-risk policy, once an insured establishes a loss covered under the terms of the policy, the burden shifts to the insurer to prove the applicability of a particular exclusion.

In addition, while the appellate court did not explicitly agree with Hicks' reasoning, it did find that the exclusion was susceptible to more than one interpretation. Because insurance clauses are to be construed narrowly, and exclusionary clauses even more narrowly, any ambiguity is construed against the insurer. The court stated, "[i]t is not unambiguously clear that a provision excluding losses caused by constant leakage of water over a period of less than fourteen or more days likewise excludes losses caused by constant leakage of water over a period of less than fourteen days."

Where, as here, an exclusionary clause could be interpreted in more than one way, the court was inclined to read it in the way most likely to find coverage. Thus, the court reversed the summary judgment that was in favor of American Integrity and remanded the case to the trial court for entry of partial summary judgment in favor of Hicks on the issue of coverage within the first 13 days of the loss. It further found that the burden was on the insurance carrier to prove that a particular loss was sustained after the thirteenth day for the purposes of exclusion under the clause.

The 5th DCA's ruling in *Hicks* places insurers in an unenviable position of having to try to prove what part of a loss occurred within the first 13 days and what part occurred from day 14 on. Even if this is possible—and in many, if not most, cases it may not be—this reasoning strips the exclusion of its teeth as a means to deny coverage. If the insurer is not able to apportion damages between.

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OUR FRAUD/SPECIAL INVESTIGATION PRACTICE GROUP

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We have considerable experience with cases in various jurisdictions involving:

- Medical provider fraud
- Claimant fraud
- Insurance claim inflation
- UM/BI fraud
- Staged accidents
- Affirmative litigation and recovery
- Application/rate evasion fraud
- Workers' compensation fraud
- Vehicle "give ups"
- Suspicious jewelry losses and arsons

We enable our clients to incorporate our knowledge and experience into investigations by providing them with updates concerning recent developments in the industry. Our clients greatly appreciate the fact that we collaborate with them in the course of investigations in order to coordinate efforts and ensure that the goals of fighting fraud are met. The group is also well versed in the use and understating of data as it applies to the claim space so that we are able to enhance our work product in the fraud environment.

We would welcome the opportunity to work with you in vigorously defending against insurance fraud claims.

Members of our practice group are also available to give presentations at your location or in one of our offices. ■

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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when only 50% of high school graduates nationwide went to college, 86% attend today. With that comes healthy self-confidence, which is often misplaced as entitlement.

We have another Lauren who is a senior associate. Lauren was one of our summer law clerks. She has been a consistent high performer and hard-working attorney for the past eight years. In the last four-and-one-half years, she married and now is the mother of two children under three. Her husband works at a good and demanding job. Despite being out on two maternity leaves, Lauren never missed a beat when she came back to work. Although her children experienced health issues, which challenged her schedule, Lauren has maintained a high-level practice without the slightest hint of an entitlement mentality. She never takes a shortcut.

What is motivating to us in management is that Lauren's story is a common one among our younger female attorneys. Our younger attorneys are emblems of fortitude, commitment and professionalism. The entitled label just doesn't fit.

MILLENNIALS ARE TOO OBSESSED WITH TECHNOLOGY

Millennials display exceptional technology skills. They rely heavily on technology. We Boomers forget, however, that Millennials encounter unique challenges when they step into the workplace. At home, Millennials rely on social networking, text messages, Snapchat and Instagram as preferred forms of communication. E-mail? No way. Talking on a cell phone provides only a secondary backup.

When they walk into work, however, they step back in time, where the primary means of communication may be face-to-face, telephone or e-mail. Their workplace phone is usually connected to a wire. This means staying in one place for the duration of the call. These adaptations are ones we never had to make. Back in my day—and my parents' day—people communicated at home the same way they communicated at work—i.e., letters, telephones, face-to-face.

The legal profession may be one of the slowest to adapt to the lightning-quick changes in technology. Our firm's technology allows our attorneys to work remotely at any hour of the day from anywhere. Our attorneys can scan and e-mail court documents to clients on-the-go. Our clients appreciate receiving that information promptly.

As we rethink the nature of our workplace, the biggest struggle we face is how do we preserve and pass along our culture of unselfish teamwork if everyone works remotely? We will strike the right balance, and we will use technology as purposeful leverage.

MILLENNIALS ARE LAZY

This category might be the flip side to the label above.

We Boomers and Millennials define the workday differently. Boomers defined the workday as being physically present in the office. We measured commitment by how early one came in; how late one stayed; whether one worked on weekends; how much time one spent "on premises."

Millennials, however, feel comfortable getting work done from virtually anywhere. When a younger worker isn't present in the office, an older co-worker might falsely assume that he or she is not working and improperly conclude that he or she is "lazy." Millennials use technology to streamline organizational processes to make their jobs easier. Millennials view it as a logical way to boost productivity. Not surprisingly, misperception about technology serves as a catalyst for intergenerational conflict in the workplace.

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Florida—Professional Liability

SUBSTITUTED SERVICE: THE LAZY PLAINTIFF

By Adam C. Herman, Esq.*

KEY POINTS:

- Carriers rarely challenge substituted service upon a defendant.
- Plaintiffs rarely satisfy the requirements for substituted service.
- Failure to satisfy substituted service requirements warrant dismissal.

Adam C. Herman

If you are defense counsel or a claims adjuster, you have likely been there. A client/insured is nowhere to be found. The Florida State Division of Corporations identifies the company as being administratively dissolved. The only reason the complaint is on your desk is the carrier was put on notice through an Accord Page. However, the plaintiff never achieved personal service and did little to try. Instead, service was through the Secretary of State under Chapter 48, Florida Statutes, otherwise known as substituted service.

Lately, plaintiffs' counsel have resorted to taking this lazy way to serve a defendant. Carriers rarely challenge substituted service. However, plaintiffs rarely satisfy all the requirements of substituted service.

Under Florida law, service of process and personal jurisdiction are two distinct but related concepts. Personal jurisdiction refers to the actions of an individual or corporation and whether the court can exercise jurisdiction over a lawsuit. Service of process is the means by which a party is notified that the court is exercising jurisdiction over the defendant. The purpose of service of process is to provide proper notice to a defendant so that he is answerable to a claim. Substituted service statutes are strictly construed. The two Florida statutes most frequently utilized to obtain substituted service on a dissolved corporation are § 48.161 and § 48.181.

Under these statutes, there is a substantive and procedural component that must be strictly adhered to. A plaintiff must demonstrate the defendant is either a former Florida resident who previously conducted business in Florida who then became a non-resident or the defendant was/is concealing his whereabouts. The plaintiff may serve process on the Secretary of State, with a copy sent by registered or certified mail to the defendant. Once in receipt of the return receipt, the plaintiff must then file the defendant's return receipt and an affidavit of the plaintiff or his attorney demonstrating compliance. This filing must occur on or before the due date for a response to process.

The Florida courts allow a plaintiff to allege as the basis for substituted service the language of the applicable statute without pleading supporting facts. In *Great American Insurance Co. v. Bevis*, 652 So.2d 382 (Fla. 2nd DCA 1995), the plaintiff brought suit against Great American's insured for damages sustained in an auto accident and invoked the substituted service statutes. Great American appealed. The court reversed, in part, because the plaintiff failed to set forth allegations which tracked the language of the applicable statute.

As stated, the method of substituted service on a non-resident, or a resident concealing his whereabouts, requires strict adherence to procedural requirements contained in Section 48.161. However, courts have found implicit in these procedural requirements the requirement of due diligence. The affidavit of the plaintiff or his or her attorney is required under Florida Statute § 48.161, and it must contain sufficient facts demonstrating due diligence on the part of the plaintiff in attempting to locate the defendant and confirm his non-residence or concealment.

The test for determining the sufficiency of substituted service is not whether personal service can be achieved in a given case, but whether the complainant reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscious effort appropriate for the circumstances to acquire the information necessary.

In *Tire Group International, Inc. v. Confianca*, 776 So.2d 1057 (Fla. 3rd DCA 2001), the Third District stated there was no reason to approve a tactic which permitted the plaintiffs to mail statutory required notices to a defendant's place of employment without a modicum of effort to ascertain his or her residential address. The court held the due diligence requirement applied to both concealment and a determination as to whether the defendant was a nonresident.

In *Knabb v. Morris*, 492 So.2d 839 (Fla. 5th DCA 1986), the court held that a plaintiff had failed to investigate certain leads of Knabb's whereabouts, which were available. Notably, the vehicle accident report contained the addresses of the occupants of the car driven by the appellant during the auto accident.

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Florida—Property Litigation

THE FIRST 13 DAYS…

By Aaron D. Silvers, Esq.*

KEY POINTS:

- Insurance policies are to be construed liberally in favor of the insured and strictly against an insurer.
- A policy provision excluding damages that occur over a period of 14 or more days does not unambiguously exclude coverage for damages that occur during the first 13 days.
- Under an "all risks" policy, the burden shifts to the insurer to prove the damages occurred after the thirteenth day and is not covered under the exclusionary provision of the policy.

Aaron D. Silvers

First-party property insurance claims in the state of Florida are on the rise once again due to the statewide impact from Hurricane Irma, which made landfall in September 2017. However, Hurricane Irma may be the least of insurance companies' concerns given the February 23, 2018, opinion coming out of the Fifth District Court of Appeal of Florida.

Yes, another win for the plaintiffs' bar in the case of *Hicks v. American Integrity Insurance Company*. But, before we get down to the nitty-gritty of the case, I would like to focus for a moment on the differences between an "all risks" homeowners insurance policy and a "named perils" homeowners insurance policy. An understanding of these specific types of policies is important in determining the burden of proof in a first-party property lawsuit.

An "all risks" insurance policy "guards against all risks except those explicitly excluded by the policy." *Jones v. Federated Nat'l Ins. Co*., 2018 Fla. App. LEXIS 561, *9 (Fla. 4th DCA Jan. 17, 2018). Under an "all risks" policy, the insured bears the initial burden to prove that damage occurred to the insured property during the applicable policy period. Once the insured's burden is met, the burden then shifts to the insurer to prove that the cause of the damage is excluded from coverage under the policy.

A "named perils" insurance policy "covers only those stated perils named as included." *Fisher v. Certain Interested Underwriters*, 930 So. 2d 756, 759 (Fla. 4th DCA 2006). Under a "named perils" insurance policy, the insured bears the burden to prove not only that damage occurred to the insured property during the applicable policy period, but the insured must also prove the damage was caused by a covered cause under the policy. *See Royale Green Condo. Ass'n v. Aspen Specialty Ins. Co*., 2009 U.S. Dist. LEXIS 24349, *7-8 (S.D. Fla. Mar. 24, 2009).

The traditional homeowners insurance policy issued in the state of Florida is known as a Homeowners HO-3 Special Form Policy, an "all risks" policy. Thus, under an HO-3 policy, all an insured needs to prove is that the insured property was damaged during the applicable policy period. The insurer then bears the burden to prove the damage is excluded from coverage under the policy.

The ruling in *Hicks v. American Integrity Insurance Company*, 2018 Fla. App. LEXIS 2616, *2 (Fla. 5th DCA Feb. 23, 2018), just made the insured's ability to obtain coverage under an "all risks" policy even easier and made a common HO-3 policy exclusion even more difficult to prove. The insured, Hugh Hicks, brought a first-party breach of contract lawsuit against his insurance carrier after his carrier denied his insurance claim for a water supply line leak to his refrigerator. The carrier claimed the damage was excluded under the "all risks" policy pursuant to a policy provision that states: "We do not insure … for loss … [c]aused by … [c]onstant or repeated seepage or leakage of water … over a period of 14 or more days." Both parties moved for summary judgment, and the trial court granted summary judgment in the carrier's favor. Hicks then appealed the summary final judgment to the Fifth District Court of Appeal, arguing that the trial court misapplied the constant or repeated seepage or leakage exclusion.

On appeal, the Fifth DCA reversed the trial court's ruling and found that the trial court misapplied the constant or repeated seepage or leakage exclusion. In reaching this conclusion, the Fifth DCA looked to the specific language in the exclusionary provision and determined that it was "not unambiguously clear that a provision excluding losses *caused by* constant leakage of water over a period of fourteen or more days likewise excludes losses *caused by* constant leakage of water over a period of less than fourteen days." The Fifth DCA relied on the general principal that "insurance policy provisions susceptible to more than one interpretation should be construed liberally in favor of the insured and strictly against an insurer." In doing so, the Fifth DCA determined that the policy exclusion should be construed in Hicks' favor such that coverage should be afforded for the first thirteen days of the leak. Thus, Hicks merely needed to prove the damage occurred during the policy period, and the burden would then shift to the carrier to prove that the damages sustained to the insured property occurred *after* the thirteenth day and were, therefore, excluded from coverage under the policy.

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Ohio—Insurance Coverage & Bad Faith

SIXTH CIRCUIT SOLIDIFIES UNBENDABLE BAR ON INSURANCE COVERAGE FOR ACTS OF SEXUAL MISCONDUCT IN OHIO

By David J. Oberly, Esq.*

KEY POINTS:

- Ohio Supreme Court has "long recognized that Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts."
- Because there is "nothing accidental" about acts of sexual molestation of children or harm resulting from that molestation, intentional acts of sexual molestation of a minor do not constitute "occurrences" for purposes of determining liability insurance coverage.
- Ohio's public policy bars insurance to provide liability coverage for injuries stemming from criminal acts of sexual misconduct against a minor.

David J. Oberly

On the heels of the Ohio Supreme Court's significant decision in *World Harvest Church v. Grange Mutual Insurance Company*, the Sixth Circuit in *Clifford v. Church Mutual Insurance Company* held that victims of sexual abuse were not entitled to insurance coverage under a policy maintained by the perpetrator's employer based on an application of the plain and unambiguous language of a "sexual molestation and sexual misconduct" exclusion commonly employed in liability insurance contracts. Additionally, the court held that coverage was excluded because Ohio public policy prohibits insurance coverage for sexual abuse of a minor. *Clifford* is a significant decision for Ohio insurers as the opinion illustrates not only the broad applicability and strength of "sexual misconduct and sexual molestation" coverage exclusions in Ohio, but also the additional bar to obtaining insurance coverage for sexual abuse represented by Ohio public policy that precluded insurance for this particular form of misconduct.

Lonnie Aleshire, Jr., an associate pastor at Licking Baptist Church, sexually molested Sandra Cottrell repeatedly and raped her sister Jacquin when both were just teenagers. Aleshire pleaded guilty to his unlawful acts and was sent to prison for seven years. The two teenagers and their parents sued Aleshire for sexual assault, sexual battery, intentional infliction of emotional distress, false imprisonment and loss of consortium. At trial, the plaintiffs focused exclusively on Aleshire's sexual acts and the impact that his sexual misconduct had on the family. The plaintiffs, however, made no attempt to present separate claims for relief unrelated to the sexual acts, and no evidence was presented on the plaintiffs' claims for false imprisonment. An Ohio jury found Aleshire liable and awarded over $4 million in damages to the plaintiffs. The jury did not, however, allocate the award between the various claims for relief.

Licking Baptist Church maintained an insurance contract with Church Mutual Insurance Company. While Church Mutual paid for Aleshire's defense in the underlying civil litigation, it refused to satisfy the judgment, reasoning that the insurance contract did not cover Aleshire for any liability. As a result, after obtaining their judgment against Aleshire, the plaintiffs sued Church Mutual in order to recover the judgment rendered against Aleshire. The plaintiffs asserted that the insurance contract covered their claims under its: (1) bodily injury provision; (2) medical expense provision; (3) counseling provision; and/or (4) personal injury provision. After the case was removed to federal court, the district court granted summary judgment in favor of Church Mutual.

On appeal, the plaintiffs argued that the insurance contract covered their claims based on Aleshire's sexual misconduct. Alternatively, the plaintiffs contended that they were entitled to recover the full amount of the judgment based on three non-sexual incidents between Aleshire and Sandra. The Sixth Circuit rejected both arguments in turn. The Sixth Circuit easily dispatched the coverage argument, finding that Aleshire's acts constituting sexual misconduct or sexual molestation were not covered due to the express coverage exclusion, which stated that the insurance did not apply to "[a]ny person who personally participated in any act of 'sexual misconduct or sexual molestation'." In addition, the court noted that the coverage was further excluded because the contract's remaining provisions also specifically excluded damages arising out of acts of "sexual misconduct and sexual molestation." Thus, because all relevant provisions in the insurance contract excluded coverage for Aleshire's sexual acts, the plaintiffs could not recover for claims based on those acts.

Furthermore, the court found that even if coverage was not expressly excluded, Ohio public policy precluded the plaintiffs from recovering their judgment from the insurance contract because

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Pennsylvania—Automobile Liability

UNLISTED RESIDENT DRIVER? EXCLUSIONS MAY APPLY

By Shannon C. Daniels, Esq.*

KEY POINTS:

- The MVFRL does not intend to shift the risk to insurance companies to insure unidentified, unrelated individuals residing with the insured because the insured is in the ideal position to determine who will drive his vehicle.
- The MVFRL seeks to encourage vehicle owners to obtain proper insurance coverage for themselves and the people they anticipate will be operating the insured vehicle.

Shannon C. Daniels

In *Safe Auto Ins. Co. v. Oriental-Guillermo*, 170 A.3d 1170 (Pa.Super. 2017), the Pennsylvania Superior Court addressed the validity of an Unlisted Resident Driver Exclusion contained in an automobile insurance policy, concluding that the language of the provision was clear and unambiguous and not contrary to public policy. As a result, the court affirmed the trial court's decision that an insurance company had no duty to defend or indemnify the driver of a vehicle who was unrelated to the policyholder and not specifically listed on his policy, despite the fact that the driver resided with the policyholder.

On April 29, 2013, Rachel Dixon was involved in a two-car accident in Allentown, Pennsylvania. Her vehicle was owned by her boyfriend, Rene Oriental-Guillermo, and insured by Safe Auto Insurance Company. The passenger of the other vehicle, Priscila Jimenez, brought suit against Dixon, Oriental-Guillermo and the driver of the other vehicle for personal injuries arising out of the accident.

In response to the underlying action, Safe Auto filed a complaint on May 13, 2015, seeking declaratory judgment on the enforceability of the Unlisted Resident Driver Exclusion, to which the appellants, Priscila Jimenez and Luis Jimenez, responded ten months later. The relevant portion of this exclusion read as follows:

> PART 1 - LIABILITY COVERAGE, EXCLUSIONS, LIABILITY COVERAGE AND OUR DUTY TO DEFENDANT DO NOT APPLY TO BODILY INJURY OR PROPERTY DAMAGES:
>
> - That occurs while your covered auto is being operated by a resident of your household or by a regular user of your covered auto, unless that person is listed as an additional driver on the Declarations page . . .

Safe Auto subsequently filed a motion for summary judgment, asserting that the exclusion absolved them of any duty to defend or indemnify Dixon because she was unrelated to Oriental-Guillermo and she was not listed as a household member on his policy. The trial court granted Safe Auto's motion, concluding that the exclusion was valid and enforceable because its was clear and unambiguous and in accord with the public policy embodied in the Motor Vehicle Financial Responsibility Law.

On appeal, the Superior Court of Pennsylvania quickly discarded with any concerns regarding the language of the exclusion, agreeing with the lower court's finding that it "[e]xcludes from coverage non-relatives of the policyholder who drive the policyholder's car, live in the policyholder's household, and who the policyholder does not list as an additional driver." This clear and unambiguous language absolved Safe Auto of any duty to defend or indemnify Dixon, unless the exclusion violated public policy.

The appellants proffered three grounds on which to void the exclusion as against public policy: (1) Section 1786(f) of the MVFRL; (2) Section 1718(c) of the MVFRL; and (3) *Williams v. GEICO Gov't Employees Ins. Co.*, 32 A.3d 1195 (Pa. 2011). In each instance, the appellants averred that the lower court's decision ran contrary to the policy envisioned by the respective statutes and case law.

The appellants claimed that Section 1786(f) of the MVFRL placed the onus on the owner of a motor vehicle to insure all drivers of that vehicle. See, 75 P.S. § 1786(f) ("Any owner of a motor vehicle for which the existence of financial responsibility is a requirement for its legal operation shall not operate the motor vehicle or permit it to be operated upon a highway of this Commonwealth without the financial responsibility required by this chapter."). The court, however, opined that when the legislature enacted the MVFRL, it did not intend to shift the risk to insurance companies of insuring unidentified, unrelated drivers residing with a policyholder. Therefore, the appellants' interpretation of Section 1786(f) could not be reconciled with divergent legislative intent.

Next, the appellants likened the exclusion to the MVFRL's "Named Driver Exclusion," which provides for situations in which a policyholder may elect to exclude certain individuals from his policy. See, 75 P.S. § 1718(c) ("An insurer or the first named insured may exclude any person or his personal representative from benefits under a policy enumerated in section 1711 or 1712 when any of the following apply: (1) The person is excluded from

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A MESSAGE FROM THE EXECUTIVE COMMITTEE

(continued from page 6)

If a remote work policy exists in an organization, it is true that the vast majority of Millennials will avail themselves of it. Yet, so does every other working generation. Most surveys disclose that Boomers (95%) are actually more likely than Millennials (93%) to use a remote work policy when offered. Contrary to popular belief, younger workers aren't hoping that remote work supplants the physical office. In one significant study, millennial workers were still very much attached to the culture of the physical office. While Millennials have been often portrayed as threatening traditional workplace culture, in reality, they are looking to evolve it. I am excited about that reality.

Marshall Dennehey is currently evolving our workplace. Within employment law and Department of Labor constraints, we are studying how best to fashion flex-time options for our attorneys, para-professionals and support staff. Our technology should allow us to redesign the work day—one which permits attention to personal commitments without sacrificing exemplary client service and profitability.

MILLENNIALS LACK LOYALTY

Research has confirmed that the majority of Millennials are interested in developing a long-term relationship with one employer. One study found that 54% of Millennials want to stay in the same job for their entire career. Contrary to misconceptions, they don't want to "job-hop."

While Millennials agree that they are more likely than other generations to leave an organization for another opportunity, the driving reason for such movement is not a lack of loyalty. Rather, they are more likely to seek another job opportunity if their needs for support, appreciation and flexibility are not met. Surprisingly, Boomers are more likely to leave if they feel they are not being paid fairly. Millennial survey responses actually indicate that 92% feel somewhat or very loyal to their current employer.

To me, this is more Leadership 101 than it is a generational divide. Loyalty doesn't differentiate among organizations or generations. Loyalty is a quality of genuine faithfulness—to one's organization, one's seniors, one's subordinates, one's peers. Loyalty must be earned, and it takes time to build. It is built upon mutual care, respect and interest in each other's welfare. Loyalty is a two-way street. If developed properly, it can take strong root in a Millennial as readily as in a Boomer.

We have Millennial attorneys in every practice department and every office at Marshall Dennehey—too numerous to mention here—with whom Frank Marshall, Gerry Dennehey and Jack Warner would have been proud to work. Their innovation, client-commitment, dedication and business mindedness would have been as notable in the 1960s as it is now in the 21st century. We have Millennial attorneys displaying enviable initiative as they form new practice groups; seek advanced industry expertise by taking the CPCU course; work toward board certifications in litigation disciplines; share their social media marketing skills unselfishly with others throughout the firm; give generously of their spare time to serve on boards for meaningful non-profit organizations; help indigents in need of legal assistance; study for and take bar examinations in neighboring states to expand our firm's geographic coverage… and many other efforts which make the label "lazy" laughable.

Rather than being dismissive of a generation because they dress, communicate and life-prioritize differently, we Boomers have the responsibility to share our firm's culture of respect, humility, loyalty, care and humor with them. More than anything else, those enduring values will position our Millennials to maintain and improve upon our firm's tradition of excellence. ■

CONSTANT OR REPEATED SEEPAGE

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the thirteenth and the fourteenth day of a leak, it would not be permitted to invoke the exclusion. In addition, apportioning a loss in this way is likely a question of fact, making it all but impossible for the insurer to be granted summary judgment on the basis of this exclusion.

Insurers could handle this problem in a couple of ways. First, it is possible that refining the language of the exclusion could render the *Hicks* court's finding of ambiguity moot. If the exclusion is written in such a way as to clearly exclude all damage related to a leak persisting over a period of 14 or more days, whether the damage occurred during the initial two weeks or after, this may render moot the court's reasoning on the alleged ambiguity of the exclusion.

Second, *Hicks* represents the reasoning of the 5th DCA only. It is possible that the right test case in a different district may produce a different result. An argument could be made that the exclusion clearly excludes ANY damage resulting from a leak persisting longer than 13 days. However, Florida courts have historically been very liberal when it comes to finding ambiguities in policies. In light of the *Hicks* ruling, the way ahead may involve refining this exclusion with this problem in mind. ■

Pennsylvania—Automobile Liability

SAFETY FIRST? TO INSTALL OR NOT TO INSTALL GUARDRAILS ON COMMONWEALTH ROADWAYS

By Michele A. Krengel, Esq.*

KEY POINTS:

- The real estate exception to sovereign immunity applies to dangerous conditions of all Commonwealth real estate, not only roadways.
- The presence and installation of a guardrail is not analogous to the absence or the failure to install a guardrail.
- Sovereign immunity is waived and the Commonwealth may be held liable for damages for the negligent installation or design of guardrails.

Michele A. Krengel

A recent Pennsylvania Supreme Court decision clarifies the interpretation of the real estate exception to the Sovereign Immunity Act, 42 Pa. C.S. § 8522(b)(4). Pursuant to the Sovereign Immunity Act, the Commonwealth enjoys immunity from suit for damages in negligence, except under certain exceptions, including:

- Vehicle liability
- Medical-professional liability
- Care, custody or control of personal property
- Commonwealth real estate, highways and sidewalks
- Potholes and other dangerous conditions
- Care, custody or control of animals
- Liquor store sales
- National Guard activities
- Toxoids and vaccines

In *Cagey v. Commonwealth*, 2018 Pa. LEXIS 954 (Pa. Feb. 21, 2018), Joisse and Dale Cagey filed a negligence action against PennDOT, asserting that on January 26, 2015, as they were traveling southbound on State Route 551 in Beaver County, Pennsylvania, their car lost control due to snow and ice on the roadway. The vehicle spun into a guardrail next to the road. The guardrail penetrated the side of their vehicle and caused personal injury to Mrs. Cagey, the driver. Mr. Cagey filed a loss of consortium claim. The plaintiffs alleged that: (1) PennDOT negligently installed the guardrail within an area that should have been traversable by vehicles; (2) PennDOT negligently installed a dangerous "boxing glove" guardrail that was not "crashworthy"; and (3) PennDOT negligently failed to inspect or correct the "boxing glove" guardrail. PennDOT filed a motion for judgment on the pleadings, asserting that the plaintiffs' claims did not fall within any of the exceptions to sovereign immunity.

The Pennsylvania Supreme Court had previously held in *Dean v. Dep't of Transp.*, 751 A.2d 1130 (Pa. 2000), that PennDOT has no duty to erect guardrails alongside Commonwealth roadways and the *absence* of a guardrail does not fall under the real estate exception to sovereign immunity. Since *Dean*, Commonwealth Courts have broadly applied this concept and found that, "[w]here a guardrail *existed*, the failure to design it differently or the failure to maintain it were not dangerous conditions of roadways for which immunity was waived either for Commonwealth or for local government." *Fagan v. Commonwealth, Dep't of Transp.*, 946 A.2d 1123, 1127-1128 (Pa. Commw. Ct. 2006); see also *Lambert v. Katz*, 8 A.3d 409, 417 (Pa. Commw. Ct. 2010); *Stein v. Pa. Tpk. Comm'n*, 989 A.2d 80, 88 (Pa. Commw. Ct. 2010). The question considered by the Pennsylvania Supreme Court in *Cagey* is whether the Commonwealth owes a duty of care when guardrails have been installed in a dangerous manner.

The *Cagey* court held that *Dean* did not control because *Dean* dealt with the *absence* of guardrails. The plaintiffs argued, and the court agreed, that a "dangerous, defective guardrail" is not legally equivalent to the absence of a guardrail.

The court first examined whether the plaintiffs sufficiently alleged the three statutory requirements for waiver of sovereign immunity under §§ 8522(a) and 8522(b)(4). The court agreed that: (1) the injuries resulted from a "dangerous condition," the defective guardrail; (2) the guardrail was installed adjacent to a highway under PennDOT's jurisdiction and thus of "Commonwealth agency real estate"; and (3) the damages were recoverable at common law because a possessor of land owes a duty to protect invitees from foreseeable harm.

The court went on to say that the real estate exception to sovereign immunity applies to dangerous conditions of all Commonwealth real estate, not just dangerous conditions of highways. It was irrelevant whether the guardrails were installed on the highway itself or affixed to the Commonwealth real estate adjacent to it. According to the court, the guardrails were physically attached to the land and had become fixtures of the property.

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SUBSTITUTED SERVICE: THE LAZY PLAINTIFF

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In *Linn v. Kidd*, 714 So.2d 1185 (Fla. 1st DCA 1998), the appellee attempted to serve the appellants at two separate addresses in Florida and then utilized substituted service pursuant to Florida Statute § 48.161. The summons and complaint were sent by the Secretary of State via mail but were returned and marked "return to sender attempted—not known." Thus, no signed return receipt was obtained. The court held that the appellants did not exercise due diligence to locate the appellee as the only effort to locate the appellee was to send the appellee certified letters to an address which a diligent inquiry would have revealed was not the residence.

In *Smith v. Leaman*, 826 So.2d 1077 (Fla. 2nd DCA 2002), a driver appealed an order of the Circuit Court denying his motion to quash a service of process, contending the plaintiff did not strictly comply with substituted service requirements. The court held that when the failure of delivery of process was not caused by the defendant's rejection of the mail and where such failure might have resulted from a cause not chargeable to the defendant, the statutory requirements have not been met.

The cases cited above demonstrate that questions regarding due diligence will generally resolve in favor of the defendant. Substituted service is the "exception" to the general rule requiring personal service.

Not only do plaintiffs have to allege the statutory requirements in a complaint and undertake due diligence in attempting to locate the defendant, but they must also strictly comply with additional procedural requirements. *Mecca Multimedia v. Kurzbard*, 954 So.2d 1179 (Fla. 3rd DCA 2007) (stating "[the] only way Kurzbard [could] avail himself of § 48.181 was to properly plead that Mecca… was concealing… the Complaint, however, did not allege, nor was it amended to allege, any concealment… .").

Under Florida Statute § 48.161, the plaintiff must serve the Secretary of State and mail a copy of the summons and complaint to the defendant by registered or certified mail. The statute requires the plaintiff to provide the court with the receipt demonstrating the defendant received the document and must file an affidavit of compliance with the court demonstrating facts sufficient to show the defendant was either evading service or is no longer a resident. Moreover, the affidavit of compliance must be filed within the time prescribed for a response to service of process. Failure to timely file an affidavit of compliance warrants quashing substituted service. The return receipt must be signed by the defendant and not by someone who purports to act on the defendant's behalf.

As the court in *Chapman v. Sheffield*, 750 So.2d 140, 143 (Fla. 1st DCA 2000) stated:

> Had the legislature intended to authorize other persons to sign for the defendant in a representative capacity, it could have expressed that intention in the statute. The absence of such a provision supports our conclusion that the defendant must sign the receipt. We recognize that the Court may dispense with the filing of a postal receipt if a substituted service statute is invoked on the ground that the defendant is evading service.

Plaintiffs generally do not follow all requirements of Florida Statute §§ 48.161 and 48.181. First, they fail to set forth facts sufficient to demonstrate non-residence and/or concealment. Second, plaintiffs do not file the return receipt because they take the position that the defendant is evading and, therefore, no return receipt is required. This legal tactic is generally not challenged, even though the affidavit of compliance does not support the allegation of concealment. Moreover, some plaintiffs tend to overlook the filing of the affidavit altogether. The lack of a timely filed affidavit, the absence of facts supporting non-residence and/or concealment, or the failure to obtain a signed return receipt from the defendant demonstrating the receipt of service of process are grounds for dismissal.

Based on the foregoing, it is recommended that defense counsel and claims professionals review the basis for substituted service and whether the requirements have been met. There is a good chance your client might just get dismissed. ■

THE FIRST 13 DAYS…

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While it remains uncertain whether the other Florida District Courts will align with the decision out of the Fifth DCA, *Hicks* certainly makes it more difficult to prove the repeated leakage of water exclusion under an "all risks" policy. Engineers and other experts alike are generally able to determine causes of loss—however, conquering Mt. Everest may be a less daunting task than convincing a jury that a loss did not occur until *after* the thirteenth day of a leak. In light of the recent trends towards coverage in South Florida, insurance companies must consider rewriting insurance policies, which either alter the constant leakage of water exclusion or eliminate coverage for water damage altogether. We suspect the latter will drive potential consumers away, but the former may allow for multiple interpretations. ■

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Following oral argument heard en banc, the Delaware Supreme Court issued an opinion upholding the application of the Continuing Storm Doctrine, resulting in the affirmation of the lower court's decision to grant summary judgment to our client. **Jessica Tyler** (Wilmington, DE) served as primary defense counsel on this matter, and **Sarah Cole** (Wilmington, DE) delivered the oral argument in front of the Delaware Supreme Court.

Christopher Reeser and **Brittany Bakshi** (Harrisburg, PA) received a defense verdict in a binding arbitration of a motor vehicle claim in Clinton County, Pennsylvania. The plaintiff pulled out of a parking lot onto a two-lane roadway in front of our client, who undisputedly had the right-of-way. The plaintiff claimed that she had observed a number of vehicles pass by her, traveling in both directions, before she pulled out onto the roadway. She claimed that she did not see our client because he was driving without his headlights on or because he was traveling at a high rate of speed. The plaintiff sustained a fractured pelvis and eventually required a sacroiliac joint fusion. The recoverable special damages exceeded our client's low policy limits. Plaintiff's counsel agreed to binding arbitration with an agreement that any of the plaintiff's verdict would result in a payment of the policy limits. At arbitration, the plaintiff admitted that she was speculating that our client did not have his headlights on and that she never saw the front of our client's vehicle after the accident. She also conceded that she never saw our client's vehicle moving, so she could not testify to his speed. Our client had taken a picture of the front of his vehicle after the accident, and one headlight was operational. We were able to establish that the non-operational headlight was damaged as a result of the accident. The arbitrator found in favor of our client.

Jack McGrath and **Mike Connolly** (Scranton, PA) obtained summary judgment in the U.S. District Court for the Middle District of Pennsylvania. The plaintiff, an employee of a recently renovated resort, was struck in the head when a solid wooden panel fell, causing serious injuries. The plaintiff alleged improper design, manufacture, and installation of the panel against a number of the defendant contractors and subcontractors. It was unclear which defendant actually installed the panel. However, there was testimony that the panel had fallen down after the renovations were completed and that the resort's maintenance employees had possibly re-installed the panel before it fell the second time, when it struck the plaintiff. There was no evidence of record that our client had any role in the design of the panel. The judge granted summary judgment as to our client.

Carol Vanderwoude (Philadelphia, PA) argued successfully for our client in a case involving a probation officer who fell and badly injured himself during a blizzard. The demand was in excess of $4 million. The decision reaffirms the "Hills and Ridges Doctrine," and the court reiterated our argument that, in essence, our client had no duty to remove snow and ice while it was still snowing. However, the court went further, holding that no landowner has a duty to "pre-treat" their premises, and there is no duty to salt or place sand on parking lots during a storm or IMMEDIATELY thereafter. It also reaffirmed that oral contracts for snow and ice removal are valid.

Tony Michetti (Doylestown, PA) obtained a defense verdict in Bucks County. The plaintiff claimed that she was suddenly attacked by the defendant's Old English Bulldog. The plaintiff maintained that the defendant failed to have adequate control over his dog and violated Pennsylvania's Dog Leash law. Through the testimony of the defendant and an independent witness, the defense established that the plaintiff provoked the attack.

Tony Michetti (Doylestown, PA) obtained a defense verdict in Bucks County. The defendant was walking her dog, "Bella," a Labrador Retriever, along with her five-year-old cousin. The defendant entrusted the leash to her cousin, who promptly lost his grip on the leash, allowing Bella to escape. Bella ran in the direction of the plaintiff and his Shih Tzu, with the defendant in pursuit. The plaintiff claimed that Bella jumped on his chest, knocking him to the ground and causing compression fractures in his lumbar spine. The injuries were confirmed by the defense IME. The defendant, on the other hand, claimed that she was able to regain control of Bella before any contact with the

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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plaintiff. The defendant testified that the plaintiff lost his balance and fell after becoming entangled in his own dog's leash. The defense argued that the plaintiff's injuries were the result of his failure to maintain control over his own dog, not because of negligence on the part of the defendant. The jury accepted the defendant's version of the event and found in her favor.

Jim Connors (Westchester, NY) and **Richard Imbrogno** (New York, NY) attained a summary dismissal of an action in the U.S. District Court for the District of Connecticut. In a somewhat strategic gamble (but with the client's full understanding and consent), a motion was filed seeking a dismissal of the matter for failure to commence within the Connecticut statute of limitations period. The filing of the motion, however, required our waiving any objection to venue. The matter arose out of an incident which occurred in New York State, which has a three-year statute of limitations. The defensive strategy was to waive venue objections and argue that the statute of limitations under Connecticut law was a procedural issue and that, therefore, the law of the forum state, Connecticut (utilizing a two-year statute of limitations in such cases), applies. The federal judge agreed with our position and refused to grant a late request by counsel for the plaintiff seeking a change of venue to New York State.

Keith Heinold, **Shane Haselbarth** and **Michael Salvati** (Philadelphia, PA) had a case dismissed for lack of personal jurisdiction over a national corporation. The plaintiff suffered traumatic injury when the steering column of his tractor trailer became unyoked, rendering it uncontrollable and causing it to crash. The manufacturer is a Delaware LLC headquartered in North Carolina, but it manufactured the truck at its plant in Virginia. The plaintiff, a Pennsylvania citizen, crashed while driving it in Texas. Suit was filed in Philadelphia, as the LLC's sole corporate parent is a Pennsylvania corporation. Based upon that, the plaintiff argued the LLC should be deemed a citizen of Pennsylvania. The trial court sustained our preliminary objections due to lack of jurisdiction. Shane briefed and argued the appeal the plaintiff filed with the Superior Court, which affirmed on the basis that, despite its Pennsylvania parent, the LLC itself is not "at home" in Pennsylvania because it was formed and headquartered elsewhere. Therefore, there is no general personal jurisdiction over it.

Tony Michetti (Doylestown, PA) obtained a defense verdict in Bucks County on behalf of a local restaurant. The plaintiff and her husband were patrons at the restuarant. As they were being led to their table by the hostess, the wife plaintiff slipped and fell on the hardwood floor in the dining room. The hardwood floor had recently been refinished. According to the plaintiffs, the restaurant's manager told them that the floor had not been refinished properly and allegedly stated, "We are having mega problems." The manager admitted that the floor had been recently refinished but denied making the admission that there had been any problems with the floor. No testing or expert testimony was submitted by the plaintiffs. The case was a test of credibility between the plaintiffs and the restaurant's manager.

Frank Baker and **Wendy O'Connor** (Allentown, PA) obtained summary judgment in a case in which the plaintiff sought to recover for injuries allegedly suffered when she slipped on black ice in a grocery store parking lot. The plaintiff was driving to her daughter's college and had stopped to pick up flowers at the grocery store. She admitted at deposition that the weather was fine when she left her home approximately one and a half hours prior to the incident, but that it had begun to rain and sleet while she was driving, and was still raining and sleeting when she stopped, parked and got out of her car. We argued that, because the incident occurred during general slippery conditions then prevailing in the community and there was no evidence of "hills and ridges," there was no duty on the part of the defendant to address the alleged patch of black ice on which the plaintiff allegedly fell. The court agreed, finding that no hills and ridges were present at the time of the fall and that there was no evidence that the icy patch on which the plaintiff fell was attributable to anything other than natural conditions. Thus, the court recognized that the law permits a business owner a reasonable opportunity to address slippery conditions.

Allison Goldis (Philadelphia) received a defense verdict in a jury trial in federal court in Philadelphia. The plaintiff was making a UIM claim, contending that she had sustained major, permanent, disabling injuries to her neck and shoulders as the result of a motor vehicle accident. The defense was that she was limited tort and had not proven a serious injury. After a three-day trial, the jury entered a unanimous verdict, finding that there was no serious, permanent injury. Allison was assisted in the presentation of the case by paralegal, Jennifer Bickel.

HEALTH CARE DEPARTMENT

Frederic Roller, **Michelle Moses** and **Mary Kate McGrath** (Philadelphia, PA) obtained a defense verdict in Philadelphia County on behalf of a supervising emergency department physician. The case involved an alleged delay in diagnosing a

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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leg infection that progressed to necrotizing fasciitis, resulting in an above-knee amputation. The underlying source of the infection was a pelvic mesh that had been used years before in a bladder sling procedure. Well before trial, the plaintiff settled with the mesh manufacturer, and at trial we were precluded by the judge from presenting evidence of the manufacturer's culpability. The plaintiff had been seen by a physician's assistant for complaints of upper thigh and groin pain and was diagnosed with a muscle strain. Our ER physician client reviewed the chart and saw no evidence of infection or other issues. Therefore, the physician did not have the plaintiff return to the hospital. Five days after discharge, she presented to another hospital with mental status changes and advanced necrotizing fasciitis, necessitating the amputation. Many issues were raised, which the plaintiff alleged were evidence that our client should have called her back to the hospital. Fortunately, after two-and-one-half weeks of trial, the jury saw otherwise and returned a defense verdict after deliberating for six hours. The plaintiff's settlement demand had been $20 million.

Daniel Sherry and **Dave Krolikowski** (King of Prussia, PA) obtained a defense verdict in a six-day jury trial conducted in Montgomery County. Dan and Dave represented a hospital in a claim that its Electronic Medical Record system was deficient in allowing a medication to be taken off a patient's current list of medications, which allegedly resulted in the patient having a brain hemorrhage and dying a year later. After two hours, the jury returned with a verdict that the hospital was not negligent.

Matthew Keris, **Robert Aldrich** and **Maura Wormuth** (Scranton, PA) received a defense verdict in a nursing negligence claim in Monroe County, Pennsylvania. The plaintiff was alleged to have suffered a fall in a hospital bathroom three days post-operatively that reinjured his surgically repaired knees. The nurses denied the patient fell to the ground. They testified, consistent with their charting, that the patient lost his balance in the bathroom and sat on a commode. There was a significant economic damage claim because the plaintiff was a young restaurant owner who suffered two distinct orthopedic injuries that required multiple surgeries and additional future care. The jury returned a defense verdict 50 minutes after deliberations began, finding that the nurses were not negligent.

Tonya Lindsey (New York, NY) obtained a defense verdict in a two-week medical malpractice trial in Bronx County. The plaintiff suffered a perforated uterus following an ambulatory IUD removal surgery that was performed by our client OB-GYN. The following day, the plaintiff was readmitted with worsening symptoms and underwent surgery to repair the perforation. The plaintiff alleged that our client was negligent in failing to timely and properly manage the uterine perforation and that the delayed treatment resulted in the plaintiff requiring two open surgeries and ultimately a hysterectomy. Plaintiff's counsel had asked the jury to award $4.4 million.

PROFESSIONAL LIABILITY DEPARTMENT

Jack Slimm, **Jeremy Zacharias** and **Dante Rohr** (Mt. Laurel, NJ) obtained an order dismissing a Fair Debt Collection Practices Act claim that was filed against our client, a company that handles debt collections for banks and financial institutions. The plaintiffs argued that our client violated 15 U.S.C. §1692(e) when it sent a collection letter informing him that, if he paid the balance owed, the account would be brought up to date and collection activities would stop. However, the letter then stated that the bank could continue to add interest and fees as provided in the loan agreement. The plaintiff argued that the collection letter was confusing since it first stated the account would be satisfied if the debtor paid the balance due but then stated that the plaintiff could owe more due to interest and fees. Therefore, the plaintiff claimed that the letter was deceptive because he would not know one way or the other if his account was settled. Our motion to dismiss argued that the least sophisticated debtor standard was satisfied in this case by our client because it provided fair notice of the debt owed.

David Bear (Orlando, FL) successfully represented an employer against a former employee's reemployment claim. The former employee of a local generator servicing company filed a reemployment claim in which she made three allegations against our client, that: (1) she was fired; (2) her working hours materially changed such that she was constructively discharged; and (3) her boss created an intolerable working environment that would have caused any reasonable person to leave. Both sides presented testimony from multiple witnesses. There were allegations that our client belittled his employees with insults and profanity and that he sexually harassed his employees. All three of the claimant's arguments were rejected, and it was determined that she voluntarily left her employment. As a result, she was not entitled to reemployment benefits.

Ray Freudiger and **David Oberly** (Cincinnati, OH) obtained summary judgment on behalf of an insurance agency and insurance agent in a fraud action. Venued in Cincinnati, the case involved a dispute over the agent's alleged failure to procure insurance coverage for a residence that sustained extensive, uncovered fire damage. Ray and David's insurance agent client assisted two homeowners in procuring insurance

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coverage for their residential property with the Ohio Fair Plan Underwriting Association, an entity created by the Ohio legislature to provide insurance for property that is not insurable in the normal insurance market. After completing an inspection of the property, Ohio Fair Plan issued a notice that the carrier was cancelling the homeowners' insurance contract. Ohio Fair Plan also issued a refund check to the homeowners. Sometime thereafter, a fire occurred at the homeowners' residence. It was later conclusively determined that the homeowners did not have coverage with Ohio Fair Plan for the loss as a result of the cancellation of the contract. The homeowners alleged that they never received the cancellation notice or the refund check from Ohio Fair Plan or their insurance agent. The homeowners filed suit against the insurance agent and his agency, alleging claims of fraudulent misrepresentation and fraudulent concealment as a result of the homeowners' purported failure to receive the notice or check prior to the time of the fire, which the homeowners alleged would have enabled them to procure alternative coverage. Ray and David moved for summary judgment, arguing that the fraudulent misrepresentation claim lacked merit because the insurance agent never misrepresented any fact relating to the homeowners' insurance coverage and never concealed any material fact from the homeowners. The court agreed with Ray and David, finding that the homeowners were unable as a matter of law to satisfy all of the essential elements of their misrepresentation and concealment claims, thus entitling Ray and David's client to summary judgment.

Brooks Foland, **Allison Krupp** and **Christopher Woodward** (Harrisburg, PA) secured summary judgment in federal court in a breach of contract/bad faith case against a large insurer. This case arose from a motor vehicle accident involving the plaintiff that occurred in 2015. The plaintiff was a passenger in a motor vehicle that was being operated by his co-worker. The vehicle was rear-ended by the alleged tortfeasor. The plaintiff was in the course and scope of his employment for the City of Philadelphia when the accident occurred. After settling with the alleged tortfeasor, the plaintiff sought under-insured motorist (UIM) benefits under an auto policy that had been issued by our client to the plaintiff's mother. Our client denied the claim for UIM benefits on the basis that the regular use exclusion applied. The plaintiff subsequently sued for breach of contract and bad faith. The District Court agreed that the regular use exclusion applied, granted our client's motion for summary judgment and dismissed the complaint.

Michael Packer (Fort Lauderdale, FL) and **David Bear** (Orlando, FL) obtained declaratory judgment that there was no coverage or duty to defend in a wrongful death suit. A small grocery store purposefully allowed its insurance policy to expire. When contacted by its agent, the store's owner told the agent that he didn't have the money to renew the policy. Fifteen days later, an employee of the store discharged a gun, which killed a patron. The store owner was notified by his employee of the shooting and rushed to his agent that day to obtain a new $1M liability policy. The owner did not tell the agent about the shooting and had the policy post-dated to midnight. As a result, the known shooting occurred within the listed policy period. Endurance was not notified of the loss until five months later, when it received a letter from the deceased's estate's attorney regarding a pending wrongful death suit. After Endurance was notified of the loss, an investigation revealed that the date of the policy inception was the same as the date of loss, that the time of day when the policy was bound was after the shooting, and that the insured knew about the loss before obtaining the policy. With that knowledge, we filed a complaint for declaratory judgment in the federal district court seeking the court to issue a declaration that the policy was void as to this loss, there was no coverage for the loss, and there was no duty to defend the grocery store in the ongoing wrongful death suit. The court granted our motion.

Jack Slimm (Mt. Laurel, NJ) obtained a dismissal in the U.S. District Court for the District of New Jersey in an extremely complex multi-party legal malpractice action. The action arose out of two estate litigations filed in state court in which Jack's client was the attorney for the decedent and the temporary administrator. The plaintiff, the nephew of the decedent, filed a breach of fiduciary duty claim against our client in the U.S. District Court. The probate cases went against the nephew. The accountings were all approved over the nephew's exceptions, in which he did allege that our client breached a fiduciary duty in several instances in handling the Estate Administration in failing to preserve documents, failing to locate the Will, selling assets in contravention of his fiduciary role, failing to investigate property in the Bahamas, failing to preserve assets, and obtaining orders from the probate judges through fraud and deception. In a 40-page opinion, the District Court granted Jack's motion to dismiss all claims for breach of fiduciary duty against our client.

Edwin Schwartz and **Nicole Ehrhart** (Harrisburg, PA) secured summary judgment as well as Rule 11 sanctions in federal court for a prominent law firm. This case arose out of a claim by a former district superintendent against a school district, a school board, local law enforcement and our client, special counsel to the school district. The plaintiff raised a

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host of claims, most of which were resolved via successful motions to dismiss. However, a claim for malicious prosecution remained. We argued that the plaintiff, despite being afforded every opportunity to do so, failed to maintain the elements necessary to establish a claim. The court agreed and found that the plaintiff failed to provide any actual evidence suggesting that our client was part of a conspiracy, had provided false information for the purpose of initiating a criminal proceeding, or had any contact at all with the District Attorney's Office in order to request or persuade them to authorize charges. We also filed a Rule 11 motion on behalf of our client. The court granted our motion, awarding reasonable attorneys' fees and costs dating back to October 2015 (the first amended complaint in this matter). According to the court, the plaintiff pressed forward with litigation that she knew to be baseless from the beginning. As such, the court determined that her allegations were frivolous and could not be substantiated, and yet she persisted with litigation that had not only occupied years of the court's time, but required our client to incur fees to defend against this action.

Jennie Philip and **James Cole** (Philadelphia, PA) obtained summary judgment in the U.S. District Court, Eastern District of Pennsylvania where the court found in favor of our insurance carrier client on a breach of contract and statutory bad faith claim filed by its insured. The plaintiff returned from vacation to find that his basement oil tank leaked, causing extensive damage to his home and the soil below the foundation. The plaintiff sued the carrier for improperly denying the claim based on the pollutant exclusion. The plaintiff took the position that the denial was improper and in bad faith based upon federal precedent that home heating oil is not a pollutant. These prior decisions changed the way some carriers applied the pollutant exclusion in home heating oil cases in Pennsylvania. We were able to distinguish those cases based on a factual record that established the contamination was not "home heating oil" but its component parts, benzene, toluene etc., which caused the damage. We successfully convinced the court that the "Product at Issue" test, as set forth by the Pennsylvania Supreme Court, should control and that the federal cases holding otherwise for heating oil were inconsistent with the Pennsylvania Supreme Court test.

Samuel Casolari and **David Oberly** (Cincinnati, OH) obtained judgment in favor of our client on the plaintiff's constitutional claims for cruel and unusual punishment and other constitutional claims in the provision for food services and commissary activities. The plaintiff claimed that the commissary prices were excessive and constituted price gouging. The court held that pricing of commissary items in this case did not constitute a constitutional deprivation. The plaintiff claimed that he did not receive the daily caloric intake required of inmates, yet he noted as a matter of law that there was no pattern of objective indifference to establish a constitutional deprivation. Finally, the plaintiff claimed that his dietary needs failed to satisfy his religious needs. Again, the court found neither an objective nor subjective basis to impose a constitutional violation. The Summit County Court of Common Pleas dismissed all claims with prejudice, holding there were no constitutional violations and there was no other wrongful conduct on the part of our client.

Jim Connors (Westchester, NY) and **David Lane** (New York, NY) obtained summary judgment on behalf of an international clothing retailer in the U.S. District Court for the Northern District of New York. The plaintiff brought claims against the store, the local police department and multiple police officers. He alleged the defendants subjected him to illegal detention, excessive force, racial discrimination, and assault and battery, in violation of the Fourth and Fourteenth Amendments and New York state law, after the defendants suspected that he used a manipulated payment card in an attempt to make a purchase at our client's clothing store. After the police questioned the plaintiff for hours at the police station, they found no evidence to press charges for payment card fraud, and they released him. In the plaintiff's civil rights action, the court dismissed all federal claims against our retailer client with prejudice, finding that the retailer did not act under color of state law and that the record was devoid of evidence that our client intentionally discriminated against the plaintiff on the basis of race.

Joseph Santarone (Philadelphia, PA) obtained a defense verdict in the U.S. District Court, Eastern District of Pennsylvania after a five-day jury trial. The case involved claims of excessive force, false arrest and malicious prosecution. This case involved the arrest of woman in Bucks County who had called the police to assist her intoxicated mother, who was involved in a dispute with the mother's boyfriend/fiancé. The defendants had made an early Rule 68 Offer of Judgment because of concerns with the case. Joe had both an orthopedic surgeon, who testied by video to challenge the claim of a knee injury, and a psychiatrist, who came in live to counter the plaintiff's expert psychologist's claim of PTSD.

WORKERS' COMPENSATION DEPARTMENT

Ashley Talley (Philadelphia, PA) obtained a defense verdict on a claim and review petition while successfully prosecuting termination and suspension petitions on behalf of a regional non-profit organization. The claimant was involved in two separate work-related motor vehicle accidents while working for

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the employer. The first accident resulted in left shoulder injuries, and possibly a labral tear (although not accepted by the carrier), while the second accident generated a claim for sprains/strains of the left shoulder, left wrist and thoracic spine. A claim petition was filed for wage loss benefits and the inclusion of additional injuries in the nature of cervical segmental dysfunction, cervical radiculopathy, thoracic segmental dysfunction, and an aggravation of a pre-existing labral tear in the left shoulder. Ashley was successful in defending against these injuries, with the exception of a cervical sprain/strain, by attacking the qualifications of the claimant's medical expert and demonstrating that her opinion was based upon equivocal, subjective evidence. This involved highly complex medical questions and required testimony from a board certified occupational expert and a board certified orthopedic surgeon to rebut the allegations of the claimant's expert. Ultimately, the Workers' Compensation Judge accepted Ashley's argument, finding the medical evidence supported a complete recovery from the work injury along with an unreasonable refusal of a pre-injury job offer. A suspension and termination of benefits was awarded on these bases, while the claimant's claim and review petitions, although granted in part, had no practical impact on future liability.

John Swartz (Harrisburg, PA) was successful in defending against a claim petition that alleged herniated discs in the low back and neck for an injury initially accepted by a Medical-Only Notice of Compensation Payable for low back sprain/strain. The Workers" Compensation Judge denied the claim petition on the basis that the testimony from the employer showed the claimant was appropriately discharged for cause when he failed to comply with company policy on calling off of work for the injury. In addition, the judge found the testimony of the defendant's medical expert more credible and persuasive than the claimant's medical expert. The judge also found that the claimant did not incur any herniated discs from the work injury and was fully recovered from the work injury. No indemnity benefits or ongoing medical benefits were payable to the claimant under the judge's decision, nor was claimant's counsel entitled to reimbursement of over $4,000 in litigation costs.

Judd Woytek (Allentown, PA) was successful in defending a fatal claim petition filed by the widow of a coal miner who had been awarded benefits for totally disabling coal workers' pneumoconiosis in 1984. Despite the fact the miner had been collecting temporary total disability benefits from 1984 until the time of his death in 2016, Judd was able to present credible and persuasive medical evidence to the Workers' Compensation Judge that coal workers' pneumoconiosis was not a substantial contributing factor to the miner's death. The fatal claim petition was denied.

Judd Woytek (Allentown, PA) received a favorable decision in a case where the claimant filed a review petition seeking to expand the description of injury to include herniated cervical discs, along with cervical radiculopathy and cervicalgia. The Workers' Compensation Judge denied and dismissed the claimant's petition, finding that the cervical spine problems were not work related based upon the expert medical testimony that Judd presented. The claimant also filed a petition to reinstate compensation benefits, but the judge found that the claimant failed to provide any evidence to support a reinstatement of benefits to either total or partial disability at any point in time. Finally, the judge found that the claimant had fully recovered from almost all of the accepted work injuries (bilateral wrist sprain/strain, bilateral carpal tunnel syndrome and left cubital tunnel syndrome), with the exception of right lateral epicondylitis. Overall, Judd obtained a very favorable decision for our client that limited the injuries and significantly reduced future exposure.

Michele Punturi (Philadelphia, PA) successfully defended a national car company in a case that encompassed defending a termination petition, the claimant's petition for review of the utilization review determination, the claimant's petition to review compensation benefit off-set, and a petition for penalties. The case involved a 2013 injury involving a low back sprain/strain and an aggravation of degenerative disc disease with radiculopathy and facet arthropathy. The defense expert, a board certified orthopedic surgeon, reviewed all of the claimant's pre- and post-injury medical records and diagnostic study films. The claimant admitted that he had increases of pain with activities not associated with work (long drives out of state, shoveling snow, housework), which he had failed to report to the IME physician or his own treating doctor. The Workers' Compensation Judge ordered the termination of all of the claimant's benefits. The judge also dismissed the claimant's petition to review the URO, finding the treating physician's treatment to no longer be reasonable and necessary. Finally, the claimant's penalty petition was dismissed.

Ross Carrozza (Scranton, PA) successfully prosecuted a petition for termination and a utilization review petition. The employer's medical expert pointed out that the claimant had no objective signs of any abnormalities that would be related to the 2009 work-related injury and that she did, however, have a Tarlov cyst in her spine near her nerve roots, which could be causing her subjective complaints. Ross forced the claimant's expert to admit that the claimant had the cyst in her spine. The Workers' Compensation Judge found that the claimant's doctor's treatment was unreasonable and unnecessary based on the

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Utilization Review Petition that Ross filed. The judge further found the testimony of the employer's medical expert more credible than that of the claimant's expert, and he did not find the claimant's testimony credible as to her ongoing complaints.

Tony Natale (Philadelphia, PA) successfully defended a Berks County mushroom processing plant in the litigation of a claim petition. The claimant alleged disabling bi-lateral carpal tunnel syndrome as a result of light-duty work he was performing with the company. The carpal tunnel injury claim was the culmination of many claims filed by this claimant over the course of five years. Tony was able to demonstrate that the claimant's testimony as to the cause of the injury differed substantially from the history he provided to various treating experts. As a result, a motion to dismiss the claim was made based on the legal defenses of *res judicata* and violation of statutory notice and statute of limitations. The Workers' Compensation Judge accepted Tony's legal arguments and ruled in favor of the employer, dismissing the claim petition.

Tony Natale (Philadelphia, PA) successfully defended an Eastern Regional can corporation in the litigation of a brain injury case. The claimant was struck in the lower extremities by a form of sheet metal which caused him to become unconscious. Nearly three years later, the claimant filed a petition, alleging he sustained a brain injury with post concussion syndrome and cervical disc herniations as a result of the incident. Tony presented fact witness testimony from witnesses at the scene of the accident which directly contradicted the claimant's version of the facts. Moreover, Tony demonstrated the weaknesses in the claimant's medical expert's opinions on cross examination as to causation. The Workers' Compensation Judge found the claimant did not sustain a brain injury, post concussion syndrome or cervical disc herniations related to employment.

Tony Natale (Philadelphia, PA) also successfully prosecuted a termination petition on behalf of a Philadelphia-based university. The claimant, after allegedly discussing with a co-worker the fact that she may be looking for a "pay out" to supplement her retirement, sustained an unusual slip and fall at work, injuring her shoulders. The claimant alleged injuries in the form of aggravation of longstanding degeneration in both shoulders, resulting in rotator cuff tears. The employer accepted the fact that, at most, a strain injury occurred. The employer's medical expert opined that the claimant sustained strain injuries only and that much of the anomalies in the claimant's shoulders were pre-existing, non-work-related arthritic changes. On cross-examination of the claimant's expert, Tony established that the claimant had treated eight days prior to the slip and fall for bi-lateral shoulder arthritic disease and was contemplating surgery. The Workers' Compensation Judge agreed that the claimant's injuries took the form of "strains" only and that the claimant had fully recovered from those injuries, consistent with the employer's medical expert's opinions, thereby eliminating all benefits due and owing as of the date of the employer's medical evaluation. ■

On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

Audrey Copeland (King of Prussia, PA) convinced the Commonwealth Court to affirm the Workers' Compensation Appeal Board's decisions denying the claimant's penalty petition and granting the employer's termination petition. The claimant, an inspector of commercial properties in the Mid-Atlantic region, was injured when the bed in his hotel room collapsed. The court rejected the claimant's arguments that the decisions of the Workers' Compensation Judge were not supported by substantial evidence and that the employer's expert's testimony conflicted with previously determined medical facts. *Havens v. WCAB (CNA Financial Corporation)*, 2018 Pa. Commw. Unpub. LEXIS 94 (Pa. Commw. Ct. Feb. 14, 3018).

In another workers' compensation appeal, **Audrey** obtained the court's affirmance of the Workers' Compensation Appeal Board's decision quashing the claimant's late nunc pro tunc appeal. Although the claimant argued that he was not notified of hearings after his counsel withdrew his appearance, he failed to contend that this affected his ability to file a timely appeal or provide any other reason for nunc pro tunc relief. *Patterson v. WCAB (SMX Staffing)*, 2018 Pa. Commw. LEXIS 138 (Pa. Commw. Ct. Apr. 19, 2018). ■

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OTHER NOTABLE ACHIEVEMENTS*

FLORIDA EXPANSION

We have expanded our Workers' Compensation Department into the state of Florida with the additions of **Heather Byrer Carbone**, shareholder; **Linda Wagner Farrell**, shareholder; and associate **Kelly M. Scifres**. These attorneys will lead our statewide practice from our Jacksonville office.

RECOGNITION

Danielle Brooks (Melville, NY) was named the 2018 recipient of the State University of New York (SUNY) Chancellor's Award for Excellence in Adjunct Teaching. Danielle has been an adjunct professor at Suffolk County Community College (part of the SUNY system) for eight years. In addition to teaching history courses, she serves on the community college's Paralegal Advisory Board for the Paralegal Studies Program. The Chancellor's Awards for Excellence are system-level honors conferred to acknowledge and provide system-wide recognition for consistently superior professional achievement.

R. David Lane (New York, NY) has earned the CIPP/US designation, Certified Information Privacy Professional with a concentration in U.S. private sector laws, standards and practices, from the International Association of Privacy Professionals. The CIPP designation is a global industry standard for professionals entering and working in the field of privacy.

Stephanie Ransom (New York, NY) was recently elected vice president of the Association of Legal Administrators, New York Chapter, for 2018-2019.

SUPER LAWYERS

Eleven attorneys from our Mount Laurel and Roseland, New Jersey offices have been selected to the 2018 edition of *New Jersey Super Lawyers* magazine. A Thomson Reuters business, *New Jersey Super Lawyers* is a rating service of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

The attorneys selected to the 2018 New Jersey Super Lawyers list include:

- **John L. Slimm**, Professional Liability Defense
- **Lary Zucker**, Personal Injury Defense and Entertainment & Sports Defense
- **Wendy Smith**, Construction Litigation

The attorneys selected to the 2018 New Jersey Super Lawyer Rising Stars list include:

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

SPEAKING ENGAGEMENTS

Michelle Moses and **Mary Kate McGrath** (Philadelphia, PA) presented at the 25th Annual Defense Counsel Summit for TeamHealth. In their presentation, "Telehealth Old Dogs, New Tricks?," Michelle and Mary Kate provided real-life examples of how the risk components associated with Telehealth interplay in the professional practice. They educated the audience about the concepts of E-Health, Telehealth and Telemedicine, identified risk components and strategies to help health care providers minimize risk, and discussed the impact of major recent legislation and medical litigation on evolving issues related to Telehealth, the health care system and health care providers.

Jacqueline Canter (Philadelphia, PA) recently participated as a panel member at the 2018 National Retail and Restaurant Defense Association (NRRDA). In "Risk Transfer: Indemnity & Hold Harmless – Are You Sure?," she joined a panel in discussing common pitfalls of indemnity agreements and how to enforce your risk transfer agreements with vendors and contractors.

Mohamed Bakry and **Raphael Duran** (Philadelphia, PA) presented the seminar "Know Your Rights" to the Drexel Black Graduate Student Union. The topics of conversation included 4th and 5th Amendment Rights, as well as police interaction procedures. ■

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UNLISTED RESIDENT DRIVER?

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coverage while operating a motor vehicle in accordance with the Act of June 5, 1968 (P.L. 140, No. 78), relating to the writing, cancellation of or refusal to renew policies of automobile insurance."). More specifically, the appellants reasoned that both exclusions oblige insurance companies to insure every driver of an insured vehicle, absent an insured's request not to provide coverage for a particular individual. Again, the court rejected this argument, instead reasoning that it is the insured—not the insurance company—who is in the best position to identify who will be driving an insured vehicle.

The appellants' final argument was that the exclusion subverted the Commonwealth's "goal of maximum feasible restoration to accident victims." The court reasoned that this goal, one of many embraced by the MVFRL, could not be construed to shift the risk of insuring unidentified, unrelated drivers residing with a policyholder to insurance companies. Such an interpretation conflicted with the established public policy of the MVFRL: encouraging insureds to fulfill their duty to acquire and maintain proper insurance coverage for all expected drivers of the insured vehicle.

The Honorable Kate Ford Elliott dissented, opining that the enforcement of the exclusion ran "contrary to Section 1786(f) of the MVFRL, which requires that permissive users be covered under the owner's insurance." The judge further offered that enforcing the exclusion may be contrary to the MVFRL's public policy goals of "protect[ing] Pennsylvania motorists from uninsured/underinsured drivers and to expand coverage."

The majority opinion is a reminder of the importance of carefully reading insurance policies and of the possible implications of exclusions they contain. It is also important to be aware of the court's conclusion that the MVFRL shifts the risk away from insurance companies and onto insureds to ensure that their vehicles and potential drivers are properly insured. Such a policy may be of consequence in determining the enforceability of other auto insurance provisions. ■

SAFETY FIRST? TO INSTALL OR NOT TO INSTALL GUARDRAILS

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In re Sheetz, Inc., 657 A.2d 1011, 1013-1014 (Pa. Commw. Ct. 1995) (holding that canopies over gas pumps were "fixtures" of gas station property and "real estate"); *Blocker v. City of Phila*., 763 A.2d 373, 374-376 (Pa. 2000) (holding that a bleacher was not a "fixture" of real property).

Accordingly, the *Cagey* court held that sovereign immunity was waived and PennDOT may be held liable for damages caused by the negligent installation or design of guardrails. The court stated in a footnote that the exceptions outlined under the Sovereign Immunity Act and those provided under Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8541, would apply in the same manner.

The concurring opinion of Justice Wecht suggests not only that *Dean* does not apply to the instant set of facts but that *Dean* should be overruled. Justice Wecht states that *Dean* conflicts with the plain meaning of the real estate exception and creates an incentive for the Commonwealth to refrain from the installation of guardrails entirely rather than incur the cost of installing guardrails and the additional cost of exposing itself to liability if the guardrails prove uncrashworthy. Justice Wecht's concurring opinion echoes the dissenting opinion of Justice Nigro, who states: "If, as the majority contends, the absence of a guardrail does not affect the safety of the road for travel, I question why the Commonwealth would ever place a guardrail on a highway in the first place." Justice Wecht goes on to state that the plain language of the real estate exception is not predicated on whether the dangerous condition is the result of the "absence of a safety feature or the presence of a defective one." Justice Wecht is critical of the public policy incentive for the Commonwealth to avoid installing necessary safety measures to the detriment of its citizens because of the fiscal implications. ■

Pennsylvania—Health Care Liability

RECENT COURT DECISION POTENTIALLY EXPANDS ABILITY OF MEDICAL MALPRACTICE PLAINTIFFS TO FORUM SHOP IN PHILADELPHIA COUNTY

By Rachel C. Freedman, Esq. and John C. Farrell, Esq.*

KEY POINTS:

- The Superior Court's decision in *Moody* may make it more difficult for trial courts to successfully order venue transfers out of the plaintiff-friendly Philadelphia County Court of Common Pleas based upon *forum non-conveniens* in medical malpractice cases when at least one defendant is located in Philadelphia.
- *Moody* marks a departure from prior Supreme Court of Pennsylvania precedent that made it easier for defendants to establish that the plaintiff's selected forum was burdensome by showing deference to the trial court's hardship determination based upon the evidentiary record.
- This can be mitigated only by subsequent appellate rulings that follow both the spirit and letter of the law as set forth by the Supreme Court's unanimous ruling in *Bratic*.

Rachel C. Freedman

John C. Farrell

In *Moody v. Lehigh Valley Hospital-Cedar Crest, et al*., 179 A.3d 496 (Pa.Super. 2018), the Superior Court of Pennsylvania departed from Supreme Court of Pennsylvania precedent regarding venue transfer on *forum non-conveniens* grounds. It consequently appeared to heighten what a medical malpractice defendant must prove to establish that the plaintiff's selected venue is burdensome and oppressive.

In a medical malpractice case in Pennsylvania that involves numerous health care providers, it is not uncommon for plaintiffs to strategically name a specific doctor or hospital in Philadelphia as a defendant to serve as a basis for filing the lawsuit in the plaintiff-friendly Philadelphia County Court of Common Pleas. This strategy is especially frustrating and difficult for medical defendants when, given the demands and challenges they often face treating critically ill patients, the majority of the treatment, physicians, witnesses and facilities involved are located outside of Philadelphia. In this scenario, medical defendants have relied upon the Supreme Court of Pennsylvania's holding in *Bratic v. Rubendall*, 99 A.3d 1 (Pa. 2014), to support a motion to transfer venue based upon the doctrine of *forum non-conveniens*.

In *Bratic*, the Supreme Court of Pennsylvania affirmed a venue transfer from Philadelphia to Dauphin County. All of the defendants were located in Dauphin County, all defense witnesses were located more than 100 miles away from Philadelphia, and the only connection to Philadelphia was one defendant's occasional business dealings there. The *Bratic* court made it easier to establish that the plaintiff's selected forum was burdensome. Under *Bratic*, a defendant only must prove that the chosen forum is vexatious or oppressive, i.e., the plaintiff's venue choice was intended to harass the defendant, even to the inconvenience of the plaintiff, or that another venue provided easier access to witnesses and evidence. The *Bratic* court explained that the requisite level of oppression was not as severe as recent Superior Court cases had suggested, stating, "Mere inconvenience remains insufficient, but there is no burden to show near-draconian consequences." The high court's emphasis was that the Superior Court should show deference to trial court rulings transferring cases and should not subjectively overanalyze and dissect supporting affidavits that justified hardship.

In the recent *Moody* decision, the Superior Court came to the opposite conclusion. In this medical malpractice case filed in Philadelphia County, all but one defendant was located in Lehigh County. The plaintiffs filed a wrongful death action on behalf of their deceased daughter, claiming the defendants caused her death by medication overdose. The lawsuit named 14 defendants, including the Children's Hospital of Philadelphia, the only defendant located in Philadelphia County.

Sacred Heart Hospital, located in Lehigh County, and its neonatologist petitioned the Philadelphia Court of Common Pleas for a venue transfer to Lehigh County on the grounds that a lengthy trial in Philadelphia would be oppressive to the small hospital and its medical providers. The neonatologist, who was the director of pediatrics and one of only two neonatologists on staff, was needed on call 24/7. Sacred Heart and Lehigh Valley Hospitals both cited physician coverage issues as well as personal childcare problems for the individual physician defendants.

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Pennsylvania—Insurance Coverage/Bad Faith

THE PENNSYLVANIA SUPREME COURT CLARIFIES THE STANDARD THAT COURTS MUST USE WHEN CONSIDERING CLAIMS MADE FOR INSURANCE BAD FAITH UNDER 42 PA.C.S. § 8371

By Christopher W. Woodward, Esq.*

KEY POINTS:

- The PA Supreme Court clarified that the test for insurance bad faith pursuant to 42 Pa.C.S.A. § 8371 does not require proof of a motive of "self-interest or ill will" on the part of the insurance company.
- Evidence of a motive of self-interest or ill will can be probative of whether the insurance company knew or recklessly disregarded its lack of reasonable basis in denying a claim.
- Mere negligence on the part of an insurance company remains insufficient to prove bad faith.

Christopher W. Woodward

Nearly twenty years after implementation of Pennsylvania's insurance bad faith statute, the Pennsylvania Supreme Court has finally settled the confusion that developed among the lower courts regarding exactly what constitutes the test for bad faith. Proof of a motive of "self-interest or ill-will" on the part of an insurer is not required but may be probative of whether the insurer knew or recklessly disregarded its lack of a reasonable basis in denying a claim.

It has long been Pennsylvania law that an insurance company's transactions with its insureds should be performed with the "utmost fair dealing." *Fedas v. Ins. Co. of Pa.*, 151 A. 285, 286 (Pa. 1930). However, no private cause of action existed for policyholders when their insurance company did not fulfill that duty beyond breach of the insurance contract.

In 1981, in *D'Ambrosio v. Pa. Nat'l Mut. Cas. Ins. Co.*, 431 A.2d 966 (Pa. 1981), an insured argued before the Pennsylvania Supreme Court that it should adopt a private cause of action for first-party bad faith, such as one that was adopted in California. The court declined to do so. Instead, it openly invited the Pennsylvania Legislature to enact such a law that would provide a private cause of action for insurance bad faith.

Roughly ten years later, in 1990, the legislature accepted the Supreme Court's invitation and enacted 42 Pa.C.S. § 8371. This statute provides a private cause of action for policyholders who feel their insurers have handled their first-party claims in bad faith. If the court finds the insurer has acted as such, it can levy interest, court costs, attorneys' fees and punitive damages against the insurer. What the statute lacks, however, is a definition of what exactly would be considered "bad faith." Without a definition, it was up to the courts to fashion a standard.

The first significant definition of bad faith by a Pennsylvania appellate court came from the Pennsylvania Superior Court decision in *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680 (Pa.Super. 1994). In that decision, the Superior Court defined "bad faith" as: "[a]ny frivolous or unfounded refusal to pay proceeds of a policy." It further outlined a two-pronged test that an insured must demonstrate, with clear and convincing evidence, that the insurer: "(1) did not have a reasonable basis for denying benefits under the policy; and (2) defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim." The Superior Court further stated that, "[f]or purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence is not bad faith."

Courts interpreted the *Terletsky* standard as requiring not just the two prongs of the test, but also requiring evidence of a motive of ill will and self-interest to succeed on a claim for bad faith. Many trial courts dismissed actions based on this interpretation. *See, Wiedinmyer v. Harleysville Mut. Ins.*, 42 Pa. D. & C. 4th 204, 217 (C.P. Montg. Aug. 5, 1999) ("There appears in the record no evidence of ill will or dishonest purpose in defendant's conclusion that payment could not be made upon plaintiff's claim . . . "); *Universal Teleservices Ariz., Ltd. Liab. Co. v. Zurich Am. Ins. Co.*, 2004 Phila. Ct. Com. Pl. LEXIS 88, at *18 (C.P. Phila. Mar. 4, 2004) ("The bad faith statute addresses only whether insurers acted recklessly or with ill will in a particular case, here no such evidence was presented."); *Fleeger v. United States Auto. Ass'n*, 43 Pa. D. & C. 5th 408, 426 (C.P. Lawrence Dec. 29, 2014) ("The plaintiffs have not presented any evidence that the defendant's denial of the claim demonstrated an improper purpose on its behalf and there is no evidence that it breached a known duty motivated by self-interest or ill will.").

Confusion developed when the Superior Court issued its ruling in *Greene v. United Servs. Auto. Ass'n*, 936 A.2d 1178

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RECENT COURT DECISION

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The plaintiff argued that many witnesses were located in Philadelphia and the 60-mile distance was not oppressive. The plaintiff argued the neonatologist could provide on-call coverage in the evenings, pointing out that he had recently taken a two-week vacation. The trial court refused to consider this last factor, finding it infringed upon the neonatologist's personal life.

The Philadelphia Court of Common Pleas granted the venue transfer, which the plaintiff appealed. The Superior Court reversed, holding the trial court applied the wrong legal standard for a *forum non-conveniens* motion. Notably, most of the opinion focused on the trial court's analysis of the evidentiary record, micromanaging, and second guessing the trial court's analysis of the affidavits, rather than reviewing the merits of the defendants' claims. For instance, the Superior Court held that the trial court did not consider the totality of circumstances in refusing to consider the neonatologist's vacation, which was proffered to rebut oppressiveness. The Superior Court held that the dismissal of this evidence as "too personal" was inconsistent with the consideration given to the defendants' childcare issues. The Superior Court also held the trial court improperly shifted the burden of proof by criticizing the plaintiff for failing to prove that Lehigh County would be oppressive for the Philadelphia witnesses.

The *Moody* court cited *Bratic* for its statement on *forum non-conveniens*, but distinguished it on the grounds that the *Moody* decedent allegedly received negligent medical treatment at CHOP, while in *Bratic*, one defendant had infrequent business dealings in Philadelphia. The Superior Court was unpersuaded by the argument that CHOP had minimal culpability and was joined solely to attain venue in Philadelphia, citing to allegations of CHOP's claimed negligence in the complaint.

The *Moody* court concluded there was no clear-cut evidence to indicate Philadelphia was a vexatious or harassing forum. The decision focused on criticizing the trial court's analysis. Still unclear is how, per *Bratic*, the *Moody* defendants failed to prove oppressiveness or failed to show that Lehigh County provided easier access to witnesses. The Superior Court did not specifically explain why the evidence presented by the Lehigh County physicians and hospitals, particularly the loss of hospital staff availability, failed to rise to the level of oppressiveness. Further, the distinction made between *Bratic* and *Moody* to demonstrate greater Philadelphia ties in the latter does not discredit the oppressiveness arguments made by the Lehigh County defendants.

In conclusion, the Superior Court's decision in *Moody* supports the viewpoint that the appellate court simply wanted the case to remain in Philadelphia County because one defendant was located there. As a result, contrary to *Bratic*, the Superior Court went to great lengths to question, criticize, and even second guess supportive affidavits fully justifying and supporting the venue transfer. This is not what the *Bratic* court instructed appellate courts to do. The *Bratic* court made it clear, based upon an abuse of discretion standard of review, that the appellate court should defer to the trial court's analysis of the evidentiary record. The *Moody* opinion will now make it much harder for trial courts to successfully order venue transfers based upon *forum non-conveniens* where at least one defendant is in Philadelphia County, unless, of course, subsequent appellate rulings follow both the spirit and letter of the law as set forth by the Supreme Court's unanimous ruling in *Bratic*. ■

THE PENNSYLVANIA SUPREME COURT

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(Pa.Super. Ct. 2007). It held that a "motive of self-interest or ill will" was not required for a finding of bad faith but was probative of whether the insurer "knew or recklessly disregarded its lack of reasonable basis in denying the claim."

The confusion created by the *Greene* decision was clearly evident in the *Rancosky* case, beginning at the trial court level. Despite the *Greene* case, the trial court in *Rancosky* found in favor of the insurer after a bench trial because *Rancosky* failed to prove that the insurer had acted out of "some motive of self-interest or ill will." *Rancosky v. Wash. Nat'l Ins. Co*., 2014 Pa. Dist. & Cnty. Dec. LEXIS 9954 (C.P. Washington Dec. 1, 2014).

On appeal, the Superior Court adopted the *Greene* court's interpretation. It held that a "motive of self-interest or ill will" was not required and reversed the trial court. *Rancosky v. Wash. Nat'l Ins. Co*., 130 A.3d 79 (Pa.Super. 2015).

Given this confusion, not only among the courts in *Rancosky* but among the lower courts in general, the Pennsylvania Supreme Court accepted the *Rancosky* case and considered, for the first time, the elements of a first-party bad faith insurance claim under § 8371. Specifically, it considered whether a motive of self-interest or ill will is a third prong to the *Terletsky* test for bad faith. The Supreme Court stated that "[a]n ill-will level of culpability would limit recovery in any bad faith claim to the most egregious instances only where the plaintiff uncovers some sort of 'smoking gun' evidence indicating personal animus towards the insured," and that "[s]uch a construction could functionally write

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Pennsylvania—Product Liability

THERE'S NO TURNING BACK NOW: PRODUCT LIABILITY JURY INSTRUCTIONS IN THE WAKE OF *TINCHER V. OMEGA FLEX*

By Michael A. Salvati, Esq.* and Keith D. Heinold, Esq.*

KEY POINTS:

- Very little has been settled in product liability law since the Pennsylvania Supreme Court's landmark ruling in *Tincher v. Omega Flex*.
- In the fight to fill the vacuum left by *Tincher*, the plaintiffs' bar has sought to cling to pre-*Tincher* jury instructions.
- In *Tincher II*, the Superior Court made clear that the Supreme Court meant what it said in *Tincher I*, that it is "fundamental error" to give *Azzarello*-era instructions.

Michael A. Salvati

Keith D. Heinold

Pennsylvania product liability law has been in a state of uncertainty and upheaval since November 2014, when the landmark decision *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), overruled the formerly seminal case of *Azzarello v. Black Bros. Co*., 391 A.2d 1020 (Pa. 1978). *Azzarello* was noteworthy for endorsing an onerous jury instruction, holding that a product was defective if it "lacked any element necessary to make it safe for its intended use, or contained any element that made it unsafe for its intended use."

For these and other reasons, *Azzarello* was long criticized by the defense bar. *Tincher* overruled *Azzarello* and created two new tests for product defect—the consumer expectations test and the risk-utility test. The Pennsylvania Supreme Court recognized that overruling a foundational case and instituting new standards of proof raises many questions about appropriate jury instructions and evidentiary issues. However, it expressly left those questions open for development by targeted advocacy on a case-by-case basis.

Since then, very little has been settled. The plaintiffs' bar and the defense bar have been battling over virtually every issue, striving to fill in the gaps created by *Tincher*, while the lower courts have disagreed on just how much *Tincher* changed. One prominent post-*Tincher* struggle has arisen over the Suggested Standard Jury Instructions (SSJI). The Pennsylvania Bar Institute published a set of Suggested Standard Jury Instructions that were largely inconsistent with *Tincher*—as a notable example, the Suggested Standard Jury Instructions retained the "any element" definition of product defect that the Supreme Court had expressly criticized and overruled. Essentially, Suggested Standard Jury Instructions treat *Tincher* as though it changed nothing.

The defense bar objected that it did not have adequate representation on the committee that prepared the Suggested Standard Jury Instructions and attempted to work with the Pennsylvania Bar Institute to correct these deviations from *Tincher*. When those efforts were unsuccessful, the Pennsylvania Defense Institute responded by issuing their own set of standard instructions, which we believe are closer to the letter and spirit of *Tincher*. We were proud to be part of a small group of defense counsel that prepared the Pennsylvania Defense Institute's version, and we were deeply involved in drafting these alternative instructions.

The battle over these jury instructions is a high-stakes one. Many judges will accept the Pennsylvania Bar Institute's suggested standard instructions, even though they have not been endorsed or approved by the Supreme Court. The issuance of slanted instructions by the PBI was a blow to the defense bar. Nevertheless, we are heartened by two recent successes in the arena of the proper post-*Tincher* jury instructions.

In a matter close to home, our office recently tried a wrongful death case involving product liability claims in the Philadelphia Court of Common Pleas. As expected, the plaintiffs' attorney pressed hard for the PBI's suggested instructions, emphasizing that they were "standard" instructions approved by a "Supreme Court subcommittee." Our office responded that the subcommittee's instructions were never reviewed or approved by the Supreme Court and, in any event, the PDI instructions were more consistent with *Tincher*. The court agreed, finding that PDI's instructions were a more accurate statement of the law. We are hopeful that drawing attention to the controversy over the PBI's suggested instructions, and publicizing the PDI's fairer alternatives, will lead to more positive results like this one.

In a somewhat weightier development, the Superior Court recently issued a precedential opinion on the remand of the *Tincher* case. In addition to redefining product liability law, the Supreme Court's 2014 decision ("*Tincher I*") sent the case back to the trial court to determine the proper relief for the defendant in light of the

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Pennsylvania—Professional Liability

PENNSYLVANIA LEGAL MALPRACTICE CLAIMS: MOVING AWAY FROM A (NEARLY) AUTOMATIC FOUR-YEAR STATUTE OF LIMITATIONS

By Alesia S. Sulock, Esq.*

KEY POINTS:

- *Brenco Oil* holds that if a legal malpractice complaint alleges that an attorney was *careless* in performing a contract, not that the attorney *failed to perform* a contract, the gist of the action sounds in tort, not breach of contract.
- This is a departure from the line of cases that had suggested a legal malpractice claim may sound in breach of contract where the claim is merely that the attorney breached an obligation to provide representation in accordance with the appropriate standard of care.
- This is significant to a statute of limitations defense to a legal malpractice claim because the statute of limitations in Pennsylvania for a negligence claim is two years, while the statute of limitations for a breach of contract claim is four years.

Alesia S. Sulock

The United States District Court for the Eastern District of Pennsylvania recently entered an interesting and potentially important opinion in a legal malpractice case applying Pennsylvania law. In *Brenco Oil, Inc. v. Blaney*, 2017 U.S. Dist. LEXIS 204775 (E.D. Pa. Dec. 13, 2017), the court held that a legal malpractice claim alleging an attorney was careless in performing a contract, but not that the attorney failed to perform a contract, sounded in tort, not breach of contract.

The plaintiff retained an attorney to issue title opinions that identified the current owners of land so that the plaintiff could purchase the oil, gas and mineral rights for resale. The attorney issued title opinions that identified the wrong owners of the land. The plaintiff purchased the rights to the land from the incorrectly identified owners, resold those rights and was later sued by the end purchaser. The plaintiff sued the attorney, alleging legal malpractice in the form of negligence and breach of contract for failing to issue title opinions that identified the correct landowners.

When a plaintiff brings tort and breach of contract claims arising from the same conduct, the court must decide whether the complaint sounds in tort or breach of contract. *Bruno v. Erie Ins. Co*., 106 A.3d 48, 68 (Pa. 2014). Even if a contract exists and the claim arises from actions taken while performing the contract, the claim is not "automatically" for breach of contract. Rather, the contract could simply be "the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed." "Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.

Thus, although nearly all legal malpractice claims arise from a contract between the attorney and the client, not all legal malpractice claims sound in breach of contract. "[W]hen a plaintiff's cause of action is based on the attorney's failure to exercise due care, it will sound in contract only if the attorney fails to follow the client's specific instructions or, by her negligence, breaches a specific provision of the contract." *Edwards v. Thorpe*, 876 F. Supp. 693, 694 (E.D. Pa. 1995). In *Brenco Oil*, the court found that the gist of the action was in tort because the plaintiff alleged a "careless performance" in drafting the title opinions, rather than a "flat-out failure to perform."

This is an important digression from prior case law, which suggested that a legal malpractice claim can sound in both tort and contract when alleging a breach of the professional standard of care. In *Bailey v. Tucker*, 621 A.2d 108, 115 (Pa. 1993), the Pennsylvania Supreme Court stated: "An attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large." In *Gorski v. Smith*, 812 A.2d 683, (Pa.Super. 2002), the Pennsylvania Superior Court specifically stated that: "[a] breach of contract claim may properly be premised on an attorney's failure to fulfill his or her contractual duty to provide the agreed upon legal services in a manner consistent with the profession at large." However, both *Bailey* and *Gorski* preceded *Bruno*, which applied the gist of the action doctrine in considering a negligence claim against a homeowners' insurance company for failing to recognize the nature and severity of a mold problem. There, the Pennsylvania Supreme Court held: "[a] negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract."

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Pennsylvania—Workers' Compensation

BACK FROM THE DEAD: THE AGREEMENT FOR COMPENSATION

By Alexander B. Possino, Esq.*

KEY POINTS:

- Plaintiff's civil suit is barred due to exclusivity of workers' compensation remedy because he had entered into Agreement for Compensation with employer.
- Agreement of Compensation can sometimes provide greater protection than the Notice of Compensation Payable.

Alexander B. Possino

In the recently decided case of *Kweh v. US Airways et al*., 2017 Pa. Super. Unpub. LEXIS 4009 (Pa.Super. Oct. 27, 2017), the Pennsylvania Superior Court served an important reminder. The workers' compensation system remains the exclusive remedy for workers injured on the job.

While that general principle is uncontested, ambiguity can arise in circumstances where it is not clear that the employee suffered an injury during the course and scope of employment. One such situation presented itself in *Kweh*.

The claimant was a baggage handler for US Airways at the Philadelphia International Airport. On a day when he was not scheduled to work, Kweh returned to his place of employment to retrieve a personal laptop computer that he had left in his work locker. The path he chose to reach his locker had both pedestrian and baggage doors. He entered through the pedestrian doors, retrieved his laptop, and returned to find a trash receptacle blocking the pedestrian doorway. Kweh decided that he would leave the airport through the baggage doors, which were overhead "high speed roll up" doors operated by sensors. Kweh testified that he had used the baggage doors as a pedestrian on other occasions and had witnessed other US Airways employees do the same. When he attempted to exit, the baggage doors closed and struck him on the head. He was taken to a hospital and missed three weeks of work.

Kweh applied for and received workers' compensation benefits from US Airways by the execution of an Agreement for Compensation. Shortly thereafter, Kweh filed suit against several entities related to the incident, the majority of which were dismissed, with the exception of US Airways, Rytec and American Overhead. The trial court granted summary judgment in favor of all three defendants.

With respect to US Airways, the trial court recognized the exclusivity of the remedy provided by the Pennsylvania Workers' Compensation Act, noting that the Act requires the injury to occur during the course and scope of employment. In support of that contention, US Airways presented the Agreement for Compensation entered into by the parties. Typically after a worker suffers an injury that the employer agrees is compensable, the employer will issue a Notice of Compensation Payable, or Notice of Temporary Compensation Payable, indicating the injury that was accepted and the compensation rate provided. In either case, it is a unilateral action on the part of the employer. Conversely, an Agreement for Compensation is a mutually agreed upon contract that requires execution by the employer and worker. Kweh had applied for and received workers' compensation benefits by the execution of an Agreement for Compensation.

In arriving at the decision to grant summary judgment in favor of US Airways, the trial court looked toward a logically analogous case in *Black v. Labor Ready, Inc*., 995 A.2d 875 (Pa.Super. 2010), in which a worker was sent by a temp agency to a factory where he was injured. The worker filed a claim against the factory seeking workers' compensation benefits. The factory successfully defended the claim by asserting that the temp agency was the worker's employer. The worker then filed a civil suit against the factory, which then attempted to claim Workers' Compensation Act immunity as the worker's employer. The court prohibited the factory from doing so by applying judicial estoppel. The court reasoned that the factory could not claim to be an employer after successfully denying the same in the earlier workers' compensation proceedings.

In *Kweh*, the trial court applied the logic of *Black*, holding that Kweh could not deny being injured in the course and scope of his employment. He successfully took the opposite stance to obtain workers' compensation benefits.

The Superior Court concurred in the analysis of the trial court and affirmed the ruling. In doing so, it noted that one purpose of the Workers' Compensation Act is to protect employees by establishing quick and certain compensation for work-related injuries and resultant loss of earnings without wasting time and expense on litigation. The takeaway for employers and insurers is that the best interests of the insured are not always served by issuing a Notice of Temporary Compensation Payable or Notice of Compensation Payable. While these are far and away the most frequently used mechanisms for accepting a workers' compensation claim, they are not always the most effective option for employers.

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SIXTH CIRCUIT SOLIDIFIES UNBENDABLE BAR

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Ohio prohibits coverage for sexual abuse of minors. In this respect, the court noted that insurance contracts generally define an insurable "occurrence" as an "accident." The Ohio Supreme Court has "long recognized that Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts." Because there is "nothing accidental" about acts of sexual molestation of children or harm resulting from that molestation, in Ohio incidents of intentional acts of sexual molestation of a minor do not constitute "occurrences" for purposes of determining liability insurance coverage. Thus, the public policy of the state of Ohio precludes the issuance of insurance to provide liability coverage for injuries produced by criminal acts of sexual misconduct against a minor.

Turning to the present coverage action, Aleshire had pleaded guilty to molesting minors, the plaintiffs sought damages from an insurance company for an insured's sexual acts and the insurance contract defined "occurrence" as an "accident." As such, the court found that Ohio public policy precluded coverage as a matter of law. In addition, the court also rejected the plaintiffs' contention that their case fell outside of Ohio's public policy barring insurance coverage for sexual misconduct because they were attempting to recover under a religious insurance policy. The court refused to establish an exception to Ohio's general rule against sexual misconduct insurance. Rather, because Ohio public policy prohibited insurance coverage of sexual abuse of a minor, the plaintiffs were precluded from recovering claims based on Aleshire's sexual acts.

In a last ditch effort to save themselves from the jaws of an adverse judgment on appeal, the plaintiffs also argued that three non-sexual incidents involving Aleshire and one of the daughters—constituting false imprisonment—served as a potential basis from which the jury may have returned their verdict at trial, which the plaintiffs contended fell within the insurance contract's scope of coverage. The plaintiffs further argued that Church Mutual had the burden to allocate damages between covered and non-covered claims and, therefore, Church Mutual was on the hook for the full $4.35 million judgment because it did not request an allocated verdict. With respect to the district court's finding that the general rule in Ohio is that the party seeking coverage bears the burden of allocating a verdict, the plaintiffs countered that an exception to the rule applied in that particular case that required an insurer to allocate the verdict when it maintained a duty to defend the insured. The Sixth Circuit rejected this alternative argument in its entirety. In doing so, the court found that it was unnecessary to resolve the question of who maintained the burden to allocate a verdict because, in that case, "there was nothing to allocate." Importantly, the plaintiffs failed to present any non-sexual, covered claims at trial, which precluded them from recovering based on these "hypothetical, manufactured-after-the-fact" claims. Thus, there was simply no basis to support the argument that the jury returned any portion of its verdict for the purported non-sexual incidents. Therefore, their *post hoc* argument failed as a matter of law.

Insurers should bookmark the Sixth Circuit's decision, especially as the frequency and severity of disputes continue to proliferate over claims for coverage stemming from sexual misconduct. *Clifford* demonstrates that both state and federal courts sitting in Ohio continue to treat sexual misconduct exclusions favorably to preclude institutional insureds and their representatives from obtaining coverage for acts arising out of sexual abuse. Furthermore, this broadly applicable exclusion is further backstopped by Ohio public policy barring insurance coverage for acts of sexual misconduct. Thus, even when a policy does not expressly exclude coverage for sexual misconduct, Ohio public policy nonetheless precludes insureds and third-party claimants from obtaining coverage because Ohio prohibits coverage for acts of sexual abuse. Combined, it is clear that unmovable roadblocks exist for policyholders seeking coverage for claims arising out of inappropriate sexual contact, which Ohio insurance carriers can rely on to completely defeat coverage actions arising out of claims for sexual misconduct. ■

PENNSYLVANIA LEGAL MALPRACTICE CLAIMS

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More recently, the Philadelphia Court of Common Pleas applied *Bruno* to dismiss a plaintiff's legal malpractice claim sounding in breach of contract, holding that, because the plaintiff did not allege that the defendant breached a specific term of the contract, the gist of the action sounded in tort. *Seidner v. Finkelman*, 2016 Phila. Ct. Com. Pls. LEXIS 378 at *36 (C.P. Phila. Oct. 4, 2016). The court explained that allowing breach of contract claims that sound in tort would allow plaintiffs to circumvent the statute of limitations for a negligence claim by "[u]sing contracts as a foundation upon which to sue for negligence that occurred during the contractual relationship and may otherwise be time-barred."

The court's ruling in *Brenco Oil* further solidifies the trend towards reestablishing the difference between a legal malpractice claim sounding in tort and one sounding in breach of contract. This is an important development for the statute of limitations defense to legal malpractice claims because, in Pennsylvania, the statutes of limitations for those claims are different—two years for negligence and four years for breach of contract. With the application of the gist of the action to legal malpractice claims, more cases will be subject to the two-year statute of limitations, and plaintiffs will no longer be able to automatically rely on the four-year statute of limitations simply due to the existence of an engagement agreement. ■

Pennsylvania—Workers' Compensation

PROTZ—ONE YEAR LATER

By A. Judd Woytek, Esq.*

KEY POINTS:

- Pennsylvania's Workers' Compensation Judges have split on the issue of how to handle reinstatement petitions in light of *Protz*.
- The Workers' Compensation Appeal Board has permitted reinstatement of benefits back to June 20, 2017—the date *Protz* was decided.
- The Commonwealth Court has been instructed to make a determination as to the retroactivity of *Protz*.

A. Judd Woytek

The epitaph reads: "Here lies the IRE. June 23, 1996-June 20, 2017. Killed by the Supreme Court of Pennsylvania and Mary Ann Protz. Rest in Peace."

In June 1996, the Pennsylvania Legislature made sweeping changes to the Pennsylvania Workers' Compensation Act, including the creation of the Impairment Rating Evaluation (IRE) process, which allowed employers to require a claimant to undergo an IRE. A whole person impairment rating was determined by a physician under the American Medical Association's *Guide to the Evaluation of Permanent Impairment*. The employer could then potentially change the claimant's benefit status from total disability to partial disability—which has a 500-week maximum. In theory, the law placed a cap on wage loss benefits of 604 weeks.

Challenges to the process ensued, and the courts slowly whittled away at what was viewed as an employer-friendly provision of the Act. Time restrictions for requesting an IRE were imposed, a request for an IRE made too early was invalid, and a request for an IRE made too late meant litigation to effectuate the benefit status change.

Then, the American Medical Association (AMA) updated its *Guides to the Evaluation of Permanent Impairment*, and a new challenge to the IRE was raised. A constitutional challenge. *Protz*. The argument was that the legislature had unconstitutionally delegated legislative authority to the AMA by wording the Act that the IRE was to be performed pursuant to the "most recent edition" of the *AMA Guides*.

The Commonwealth Court took what is now viewed as a conservative approach and said IREs could only be performed using the *Fourth Edition of the AMA Guides*, which were in effect in 1996. The Supreme Court of Pennsylvania disagreed. In *Protz v. WCAB (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017), the justices held that the entire section of the Act that created the IRE process was an unconstitutional delegation of legislative authority, and they wiped it out completely. June 20, 2017. The IRE was dead.

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It has been one year since that landmark decision was handed down by the Pennsylvania Supreme Court. So, what has happened in the year since *Protz* became the law of the land?

A survey of decisions issued by Workers' Compensation Judges, the Workers' Compensation Appeal Board, and the Commonwealth Court shows that there remains uncertainty and disagreement on how to apply *Protz*. It appears that the status of a claim and the status of a claimant's benefits have an impact on how the *Protz* decision is being applied.

There are claimants whose benefits had been modified to partial disability by an IRE and who were still collecting wage loss benefits at the time of the *Protz* decision. There are claimants who had already collected the full 500 weeks of partial disability benefits to which they were entitled after an IRE had modified their benefit status. There are claimants who were in the process of litigating a modification petition based upon an IRE. How are each of these categories of claimant to be treated in light of the *Protz* decision?

Workers' Compensation Judges have split on the issue. We have seen decisions finding that a claimant seeking reinstatement of temporary total disability benefits due to the *Protz* decision are only entitled to reinstatement of temporary total disability benefits as of June 20, 2017 (the date of the *Protz* decision). These judges have held that any weeks of partial disability benefits that have expired after an IRE are still expired. These judges seem to feel that the IRE was valid when performed, and, if the claimant did not challenge it, the claimant should not benefit from the later change in the law.

Other Workers' Compensation Judges, however, are taking the position that *Protz* completely did away with the IRE provisions of the Act as if they had never existed in the first place. Therefore, these judges are granting reinstatement of temporary total disability benefits back to the date the benefit status was changed from total to partial disability. In one case we reviewed, the claimant's disability status had been changed in 1999 pursuant to an IRE. The claimant's 500 weeks of partial disability expired in 2008 and his wage loss benefits were stopped. The judge in that case ordered reinstatement of temporary total disability benefits all the way back to 1999 (with the employer being able to take a credit for benefits paid between 1999-2008).

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THE PENNSYLVANIA SUPREME COURT

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bad faith under Section 8371 out of the law altogether." Therefore, the Supreme Court upheld the two-pronged *Terletsky* test and clarified that evidence of an insurer's "motive of self-interest or ill will" is merely probative of the second prong of the test. The Supreme Court, however, reiterated that mere negligence is not bad faith.

In what is arguably *dicta*, the Supreme Court dismissed arguments that a higher standard than the two-pronged *Terletsky* test is required for bad faith claims seeking punitive damages and stated that § 8371 put punitive damages on the "same footing as other categories of damages." There were no dissenting opinions to the majority opinion. However, Justice Saylor warned, in his concurring opinion, that trial courts must be mindful of the constitutional limitations placed on punitive damage awards by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as interpreted by the United States Supreme Court.

After *Rancosky*, it is anticipated that the plaintiffs' bar will argue that the Supreme Court has "lowered the bar" for bad faith claims. Thus, an accompanying increase in bad faith counts may be added to standard breach of contract cases where, previously, bad faith claims might not have been brought. However, it is vital to keep in mind that negligence does not—and has never—constituted bad faith, and *Rancosky* does not suggest otherwise. As a practice note, it is paramount that counsel for insurers be aware of the dicta in *Rancosky*, regarding the potentially lower standard for punitive damages, and evaluate and prepare their cases accordingly. ■

THERE'S NO TURNING BACK NOW

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sweeping rulings in *Tincher I*. On remand, the trial court determined that the defendant was entitled to no relief, finding that the original pre-*Tincher I* jury instructions were appropriate. (Several other lower court decisions have likewise found no error in clinging to *Azzarello*-era principles).

In a welcome opinion in *Tincher II* (*Tincher v. Omega Flex*, 2018 Pa.Super. LEXIS 117 (Pa.Super. Feb. 16, 2018), the Superior Court confirmed what should have been apparent: *Tincher I* disapproved of the *Azzarello*-era instructions, which are now an incorrect statement of the law. To instruct the jury, as in *Azzarello*, that a product is defective if it lacks "any element necessary to make it safe for its intended use" is fundamental error and warrants a new trial. Also important, the Superior Court characterized the Supreme Court's opinion in *Tincher I* as a "new legal reformulation" supported by a "thorough and extensive decision." To treat *Tincher I* as though it changed nothing, as the trial court did and the plaintiffs' bar continues to do, "undervalues the importance" of this landmark decision.

Thus, the Superior Court has rejected attempts by plaintiffs to hold onto elements of law fathered by *Azzarello*. We now have much stronger support for the position that pre-*Tincher I*, *Azzarello*-era instructions are inappropriate—in fact, "fundamental error." The *Tincher II* decision thus provides additional ammunition with which to push back against the PBI's suggested instructions. The "any element" instruction has been held to be an incorrect statement of the law, and the remaining instructions should be viewed with skepticism as well.

The battle over the meaning of *Tincher* rages on. Although we now have a clearer picture of what post-*Tincher I* jury instructions should not look like, we still have precious little guidance from the courts on what language is appropriate. We believe the PDI's suggested instructions offer a fair and reasonable take on the matter, and we recommend them for your next product liability case. ■

BACK FROM THE DEAD

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Prior to issuing either document, it is important to analyze potential legal issues that could present themselves if litigation later unfolds. If it is not clear that the injury was work-related, as was the case in *Kweh*, an employer that fears the risk of civil litigation would be prudent to consider presenting the worker with an Agreement for Compensation. Through the execution of the Agreement, both parties mutually agree that the worker suffered a compensable injury during the course and scope of his employment. Should the parties enter into such an agreement, a trial court is far more likely to dismiss a subsequently filed civil suit for violating the exclusive remedy provided by the Workers' Compensation Act than would be the case if a worker had received workers' compensation benefits as a result of unilateral action taken by the employer. The holding in *Kweh* serves as a reminder to employers and insurers that the Agreement for Compensation, often looked at as a relic of the past, can sometimes provide greater protection than the frequently issued Notice of Compensation Payable. ■

PROTZ—ONE YEAR LATER

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The Workers' Compensation Appeal Board issued a series of decisions on December 19, 2017, that appear to be consistent. They have held that a claimant's total disability benefits should only be reinstated back to June 20, 2017 (the date of the *Protz* decision). The Appeal Board reasoned that there had been "countless unchallenged transactions" during the 20 years that the IRE process was still valid whereby a claimant's benefit status was legally changed pursuant to the valid law at that time. The Appeal Board felt that it would be improper to allow a claimant to reinstate temporary total disability benefits all the way back to the date of the status change. The Appeal Board held that any weeks of partial disability that had expired were deemed to remain expired, but the claimants were all entitled to reinstatement of temporary total disability benefits as of June 20, 2017.

The Commonwealth Court has cited *Protz* in a total of five decisions. Only three of them pertain to workers' compensation claims (the other two cases cite *Protz* for its holding on unconstitutional delegation of legislative authority in other settings).

In *Thompson v. WCAB (Exelon Corp.)*, 168 A.3d 408 (Pa. Commw. Ct. 2017), the court had to decide what effect *Protz* had on a claimant whose benefits had been modified by a Workers' Compensation Judge based upon an IRE. The matter was pending on appeal when *Protz* was decided. The Commonwealth Court held that the Supreme Court's decision in *Protz* effectively struck the entirety of Section 306(a.2) from the Workers' Compensation Act, and, therefore, the claimant's benefits could not be modified based upon an IRE.

A different scenario arose in *Gillespie v. WCAB (Aker Phila. Shipyard)*, 179 A.3d 451 (Pa. 2018). In that case, the claimant had filed a challenge to the modification of his benefits based upon an IRE that was performed eight years after the modification was effectuated. The claimant had challenged the change in benefit status based upon the Commonwealth Court's *Protz* decision (124 A.3d 406 (Pa. Commw. Ct. 2015)), which had held that IREs could only be performed under the *Fourth Edition of the AMA Guides*. The Workers' Compensation Judge granted his reinstatement petition, but the Appeal Board reversed and found the reinstatement petition to have been untimely filed. The Commonwealth Court actually affirmed the decision of the Appeal Board that held that the claimant's reinstatement petition was filed untimely in its decision issued on May 17, 2017 (about a month prior to the Supreme Court's decision in *Protz*). *Gillespie v. WCAB*, 167 A.3d 308 (Pa. Commw. Ct. 2017). The Supreme Court issued a per curium order on January 18, 2018, in which they vacated the Commonwealth Court's opinion and remanded the matter to the Commonwealth Court to determine whether their decision in *Protz* applied retroactively, "thereby rendering Petitioner's IRE void *ab initio*." Therefore, it certainly seems that the Supreme Court feels that any IRE is completely void based upon their decision in *Protz*.

Finally, in *Bradosky v. WCAB (Omnova Solutions, Inc.)*, 2018 Pa. Commw. Ct. Unpub. LEXIS 80 (Pa. Commw. Ct. Feb. 2, 2018), the claimant had challenged the constitutionality of IREs throughout litigation of the employer's modification petition based upon an IRE. The Workers' Compensation Judge had modified benefits, and the Appeal Board affirmed. The Commonwealth Court held that, based upon the Supreme Court's decision in *Protz*, they were "compelled" to reverse the modification of the claimant's benefits based upon an IRE. The court again noted that Section 306(a.2) was stricken in its entirety from the Act.

So, despite the fact that some Workers' Compensation Judges and the Appeal Board seem to be taking the position that a claimant's benefits can only be reinstated back to June 20, 2017, the Commonwealth Court is clearly taking the position that benefits cannot be modified at all based upon an IRE. In *Thompson* and *Bradosky*, the claimants were in the process of litigating whether their benefits should be modified based upon the IRE. The court clearly held that *Protz* controlled and that the claimants' benefits in those circumstances could not be modified based upon an IRE. Therefore, if you have a claimant who is still litigating or appealing the change in benefit status based upon an IRE, the courts seem to agree that a claimant's benefits must be reinstated to temporary total disability benefits back to the date the change in status was effectuated.

The more concerning case is *Gillespie*. The Commonwealth Court initially found the claimant's challenge to the modification of his benefits eight years after the fact to be untimely. This would imply that they were unwilling to retroactively apply *Protz*. However, the Supreme Court vacated the Commonwealth's decision and remanded for specific consideration of the retroactivity question. Hence, *Gillespie* is clearly the case to watch going forward. If the Commonwealth Court retroactively applies *Protz* to any claim where benefits were modified based upon an IRE and orders reinstatement of temporary total disability benefits back to the date of the change in status, then the IRE is indeed utterly and completely dead.

There is legislation pending—Senate Bill 963 and House Bill 1840—that would reinstate the IRE process in Pennsylvania and dictate the use of the *Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment*. The House Bill was referred to the Department of Labor & Industry for review in October 2017. The Senate Bill had first consideration in the Senate on January 23, 2018. It is awaiting second and third consideration with possible amendments to be made.

It's a year after *Protz*, and we still have a lot of uncertainty. Whether IREs will ever be brought back to life in Pennsylvania remains to be seen. For now, however, it appears that any modification made to a claimant's benefit status based upon an IRE is likely to be found void and temporary total disability benefits will likely be reinstated either back to the date of the status change or back to at least June 20, 2017. ■

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