MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

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Defense Digest

On The Pulse...

MARSHALL DENNEHEY'S GENERAL LIABILITY PRACTICE GROUP—JACK (AND MASTER!) OF ALL TRADES

By Matthew S. Schorr, Esq.*

Matthew S. Schorr

Marshall Dennehey's Casualty Department is the largest of the firm's four legal departments, comprising nearly half of our 500+ attorneys and 100+ paralegals. Our casualty lawyers handle claims of all types and exposures that would typically fall under a CGL or general liability policy for our insured and self-insured clients.

The General Liability Practice Group is housed within the architecture of Marshall Dennehey's Casualty Department, which contains 15 distinct practice groups focused on the following specialized areas of law:

- Amusements, Sports and Recreation Liability
- Asbestos and Mass Tort Litigation
- Automobile Liability
- Aviation and Complex Litigation
- Construction Injury Litigation
- Fraud/Special Investigation
- General Liability
- Hospitality and Liquor Liability
- Maritime Litigation
- New York Construction and Labor Law
- Product Liability
- Property Litigation
- Retail Liability
- Social Services & Human Services Liability
- Trucking & Transportation Liability

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** Matt is the Assistant Director of our Casualty Department and the Co-Chair of the General Liability Practice Group. He may be reached in our Roseland, New Jersey office at 973.618.4155 or msschorr@mdwcg.com.*

A PROFILE OF OUR SCRANTON, PENNSYLVANIA OFFICE

By John T. McGrath, Jr., Esq.*

John T. McGrath, Jr.

The Scranton office of Marshall Dennehey Warner Coleman & Goggin has been open for over 25 years. Presently, there are 21 attorneys who call this office home. Of those, Jennifer Callahan, Ross Carrozza, Maureen Kelly, Benjamin Nicolosi, Jim Pocius and Joseph Vender have been in the Scranton office at least 20 years and some the entire 25 years the office has been open. Earlier this year, Robin Snyder, who has been with the firm since 1994, was promoted to Assistant Director of our Health Care Department and has relocated to the King of Prussia office. Jim Wilson, who spent 22 years in the Scranton office, retired on January 1, 2018. Although we are sad to see Robin and Jim move on, the experience and depth of the office still goes unmatched in Northeastern Pennsylvania.

In this regard, our Workers' Compensation Department is supervised by Joseph Vender. Joe, Jennifer Callahan and Ross Carrozza have been shareholders at Marshall Dennehey for over 15 years. Ross recently added to his practice the handling of Medicare Set-asides along with Jim Pocius, a nationally recognized authority in Medicare/Medicaid circles who speaks frequently on the subject throughout the country. Jim was instrumental in helping draft some of the legislation that is in place today. Joe Vender and Jennifer Callahan work exclusively on workers' compensation matters and have done so since they joined Marshall Dennehey 24 years ago. Between them, they have handled thousands of cases, and there truly is nothing they have not seen.

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** Jack is a shareholder and the managing attorney of our Scranton, Pennsylvania office. He can be reached at 570.496.4603 or jtmcgrath@mdwcg.com.*

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A MESSAGE from the EXECUTIVE COMMITTEE

By G. Mark Thompson, Esq.,

President & CEO

This fall my youngest son begins law school at the University of Florida. His Mom and I are proud of him but surprised how many folks respond to our enthusiasm by asking the same question: "You couldn't talk him out of being a lawyer?"

I usually laugh at this and respond with some variation of "Why would I do that?" Putting aside the goal of most parents to render their kids self sufficient, it never occurred to me to dissuade him. I always wanted to be a lawyer, have always enjoyed being a lawyer and still regard it as a noble profession. Mine are strongly held views, but here is the thing, the more people question your parenting, the more you begin to wonder. Should I have steered him in a different direction?

I did some research and found a number of articles on disaffected lawyers. In one study nearly half of those surveyed indicated they would not choose the profession if they could do it all over and would not recommend it to their children.

How disheartening. What these lawyers expressed is not how I feel nor the way I want smart, industrious people considering a career in law to view their prospects. What I didn't know was whether, after three decades of practicing law and transitioning into law firm management, I'd become desensitized.

I decided to conduct a poll among lawyers at Marshall Dennehey. I'm not suggesting it was scientific, but the sample did include women and men, associates and shareholders, young and old, different practice groups and different offices. I assured everyone who participated there would be no attribution, and there won't be. I do, however, want to share with you some of the responses. I found them astute, candid and, most of all, reassuring.

Let's start with the obvious. Practicing law is not for everyone. It's a hard job, but then so is being a public school teacher, a police officer or a physician. What distinguishes lawyering from these other vocations is what makes it appealing to some and unpleasant to many. It is an inherently adversarial system in which to work. Unlike most people, lawyers are almost always opposed by their equal whose job it is to challenge, obstruct and undermine whatever it is they are trying to accomplish. That constant pressure to prevail can be both exhilarating and exhausting.

Then there is the resignation the job bears little resemblance to its glamorous portrayal on TV and screen. In reality, lawyers often struggle to achieve work/life balance. The hours are long and the demands of clients, courts and employers impose a lot of stress. No one wants to sacrifice sleep, miss a dinner or cancel a vacation, but these things can occur. When they do, personal lives and health can suffer.

Those of us who have been at this awhile also understand the practice is harder than it used to be. We see a profession struggling to recover from the great recession and realize it is never going to be the same. Clients across all disciplines are striving to reduce legal spend and becoming more demanding consumers of our services. That renders the market, already saturated with lawyers and disrupted by technology, commoditization and alternative legal providers, leaner and more competitive than it's ever been.

For younger lawyers there is the added burden of student debt. Law school tuition has for years outpaced inflation and is a big expense to shoulder when embarking on a new career, starting a family and buying a home. I well remember how long it took to pay off.

Add to this, the erosion of civility in our practice and the damage lawyer advertising has brought to its dignity, and you begin to wonder why anyone would want to be a lawyer. That is where the poll responses come in and restore my faith. Let me share with you what some of our lawyers had to say:

"…lawyering requires you to set aside your own interests in favor of those of another. For instance, we are all fighting our own personal battles in life, and in those situations, we are aiming to do what is best for ourselves or those close to us. As lawyers, we are tasked with identifying and hopefully securing results that are best for our clients, regardless of the benefit we derive from the engagement personally. Sure, we get paid, and at the end of the day that is certainly a benefit, but my point is that the profession requires us to set aside our own interests in

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MARSHALL DENNEHEY'S GENERAL LIABILITY PRACTICE GROUP

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Our General Liability Practice Group covers a vast array of claims that do not quite fall within the realm of our more specific practice groups. This type of defense litigation is unique and diversified, covering every type of claim from dog bites to lightening strikes, to slip-and-falls and negligence actions. Other types of general liability claims that we handle include:

Advertising injuries
Assault and battery
Bailor/Bailee
Commercial liability
Defamation
Elevator incidents
False arrest
Fire legal liability litigation
First-party and third-party property damage cases
Malicious prosecution cases
Owners and contractors protective liability
Owners, landlords and tenants coverage
Premises liability
Privacy
Security

Like the tagline from a popular insurance company campaign, "We know a thing or two because we've seen a thing or two," Marshall Dennehey's casualty attorneys have vast experience handling all types of general liability claims. They provide a consistent level of service throughout our firm's 20

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A PROFILE OF OUR SCRANTON, PENNSYLVANIA OFFICE

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The Casualty Department continues to be the largest department in the Scranton office. Presently, there are nine attorneys, including six shareholders—Benjamin Nicolosi, John Nealon, Leo Bohanski, Maureen Kelly, Robert Smith and myself. We have tried well over 150 cases to verdict in the last 20 years. In addition, the uniquely talented Rob Smith, whose practice focuses on underinsured and uninsured motorist claims, has handled hundreds of UM/UIM cases to successful conclusion and is considered to be one of the leading UM/UIM attorneys in the Commonwealth of Pennsylvania. There are also three associates, Michael Connolly, Sarah Argo and Matt Burns, whose skills and willingness to work hard, round out the casualty group. The Casualty Department handles a wide variety of cases, from auto accidents, dram shop, product liability, construction cases and everything in between. Our Casualty Department can do it all.

The Professional Liability Department in Scranton has grown over time from two lawyers to five full-time attorneys at present. Eric Fitzgerald, who is Assistant Director of the Professional Liability Department, also chairs the firm's Insurance Coverage and Bad Faith Practice Group and sits on the firm's Board of Directors. Eric splits time between the Scranton and Philadelphia offices. William McPartland, a shareholder, and Meghan Carey, our newest attorney in the Scranton office, focus their practices on education law. Will represents a large portion of the school districts in Lackawanna and Luzerne Counties, among others. Patrick Boland, a shareholder, and Mark Kozlowski, an associate, handle a wide variety of professional liability matters, including civil rights cases and cases involving the defense of business professionals.

Scranton's Health Care Department is headed up by Victoria Scanlon. Vicky took over the reins of the office's health care group when Robin Snyder accepted her position as Assistant Director of the Health Care Department and transferred out of the Scranton office. Vicky is a shareholder and has been with Marshall Dennehey for over 10 years. Also in the department is Matthew Keris, another long-time employee who has been a shareholder for many years. Robert Aldrich is an excellent associate who works with both Vicky and Matt. The Health Care Department represents hospitals, doctors and their groups, and nursing homes. The practice also represents dentists, nurses and a wide variety of health care providers throughout Northeastern Pennsylvania.

Finally, Tom Specht works in the firm's award-winning appellate practice group. He ably handles all appellate matters from our Health Care, Casualty and Professional Liability Departments.

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Delaware—General Liability

THE NEW SUPERIOR COURT RULE 16.1: THE REVAMPING AND REVIVING OF AN OLD "FAVORITE"

By Lisa M. Grubb, Esq.*

KEY POINTS:

- New Civil Rule of Procedure, Rule 16.1 calls for mandatory non-binding arbitration in civil actions meeting certain criterion and that are valued below $50,000.
- The new Rule mandates the exchange of limited discovery while allowing certain discretionary discovery.
- The new Rule also calls for the issuance of a Trial Scheduling Order.
- The decision to request arbitration belongs to the plaintiff, and the defendant must participate unless otherwise ordered by the court.

Lisa M. Grubb

Effective January 1, 2018, The Superior Court of Delaware adopted a new Civil Rule of Procedure, Rule 16.1. This new rule is an adaptation of the former rule, which had called for mandatory non-binding arbitration in cases meeting certain requirements and with values falling below the jurisdictional limits. In response to concerns expressed by the bar, the old rule was abolished in March 2008. The new rule was promulgated as an attempt to address the concerns raised under the old rule, predominantly related to discovery and delay in trial scheduling.

The court first instituted a compulsory Alternative Dispute Resolution (ADR) program in 1987. In January 1991, the court officially adopted Rule 16.1, which provided for compulsory ADR in the form of arbitration.

The original Rule 16.1 mandated that civil actions falling within its jurisdiction be submitted to non-binding arbitration prior to the court's issuance of a Trial Scheduling Order. In order to fall within the jurisdiction of the old rule, the case (with certain enumerated exceptions) had to be one in which: (1) trial was available; (2) monetary damages were sought; (3) any non-monetary claims were nominal; and (4) the claimed damages did not exceed the jurisdictional limit (which changed several times throughout the lifetime of the old rule.)

One of the more contentious provisions of the old rule related to discovery. Under the previous rule, parties entered into compulsory arbitration without first being afforded the opportunity to engage in discovery. The plaintiffs' bar expressed concern over this provision, noting that the absence of pre-arbitration discovery resulted in parties automatically appealing the arbitrator's order and demanding trial de novo. It was widely perceived that the compulsory arbitration requirement precluded litigants from obtaining a trial date from the onset of a case, thus delaying the time set for trial and disposition. To illustrate, in 2007, 584 civil cases were disposed of via Rule 16.1 arbitration. On average, it took a total of 333 days from the date of the filing of a complaint to disposition via an arbitrator's order. Thus, cases not resolved by the old Rule 16.1 arbitration process were delayed by approximately one year.

Ultimately, the court repealed and amended Rule 16. The revised rule took effect on March 1, 2008, and provided that compulsory ADR be included in the court's Trial Scheduling Order from the onset of the case. Additionally, mediation (not arbitration), for the first time, became the default method of ADR in Delaware. This decision was met with disappointment by members of the personal injury bar, many of whom believed that, "[i]mperfect as it may have been, 'Rule 16[.1] Arbitrations' were of great benefit in resolving cases that were significant, but financially difficult to take through a jury trial." *New Procedures for Mandatory Non-Binding Arbitration in Delaware*, R. Young (Sept. 12, 2017).

In Spring 2017, a committee appointed by the Delaware Superior Court drafted a proposal for a yet another new Rule 16.1 for consideration. The new Mandatory Non-Binding Arbitration (MNA) rule took effect on January 1, 2018.

Under the MNA rule, all Superior Court civil actions in which a trial for monetary damages is sought and non-monetary claims are nominal are eligible for the MNA process, **should the injured party elect same**. The jurisdictional limit under the new rule is $50,000.

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A MESSAGE FROM THE EXECUTIVE COMMITTEE

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the pursuit of what is best for others. That experience, to me, has been both humbling and rewarding."

"I like that lawyers face tough challenges where there are not always easy answers and creativity, patience and resourcefulness are needed."

"The best part of being a lawyer is working with talented people to solve problems. This is enhanced by the diversity of our work and the opportunity to learn about things that we would never be exposed to otherwise. In the last week, I have handled cases involving welding electrodes, construction defects and birth injuries. While these cases have not taught me to be a welder, a builder, or an obstetrician, it's incredible how much substance I've had to learn about each of these fields to handle the cases. I don't think any other walk of life exposes someone to such a diverse array of subjects in such detail. Spending so much time outside of any particular wheelhouse can be daunting, but it also prevents boredom and allows us to constantly learn."

"During the course of my career, I've encountered individuals and businesses paralyzed by fear and intimidated by the legal process. Putting these clients at ease and helping them as only a lawyer can is very satisfying personally."

"In my four years at the firm, I've learned about the photovoltaic industry, the process of transforming Honduran cotton into American sweatshirts, the dangers of electrostatic discharge at gas stations and the operation of elevators in high rises. I have had the opportunity to observe stevedores at work at the port and to tour a chemical plant to learn what goes into manufacturing pharmaceutical drugs. I am enjoying the constant challenge of making myself knowledgeable enough to apply the law and formulate a defense on such a wide variety of subject matter."

"As much as people like to poke fun at lawyers, it is still a noble and respected profession."

"Being a lawyer has been one of the great joys of my life because of the many positive relationships I have developed over my career… along with the almost instant respect the title of 'attorney' carries with it in most circles."

"The practice of law is a 'people business'…"

"…the opportunity to assist people when they are in need of advice and guidance is its own reward."

I could go on and on but, suffice it to say, that as the firm's CEO, I could not be prouder of the lawyers I have the privilege of working alongside. Their responses to my informal, unscientific poll revealed a deep commitment to our clients, to persistent learning and to the profession in general.

Without exception, every one of the folks who responded indicated they would choose to be a lawyer if they could do it all over again. While they were cautious in recommending the profession to others, noting:

"It takes a certain type of personality and work ethic to thrive as a lawyer."

"I would not recommend law school to someone merely seeking an alternative career."

"…I would explain the realities of the legal profession and the responsibility involved in representing others."

"I would recommend the profession to family and friends if they have a passion for doing it. It's not an easy job, but it has its rewards."

Collectively, they offered a more positive view of the profession than prevailing reports. Several of the older respondents noted their own children or extended family had followed in their footsteps and how much they enjoyed that commonality.

And so, as my own son embarks on this adventure, I'm comforted by the advice of my colleagues. Ours is a noble and rewarding profession with tremendous capacity to do good. My son is smart, hard working and well informed. Given all that, how could his Dad have steered him wrong? ■

MARSHALL DENNEHEY'S GENERAL LIABILITY PRACTICE GROUP

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offices, covering the entire states of Pennsylvania, New Jersey, Delaware, Ohio, Florida and New York. A portion of our attorneys are also admitted in adjacent states, allowing us to additionally litigate cases in Connecticut, Kentucky, Maryland and West Virginia.

We would welcome the opportunity to work with you in defending general liability and all of your casualty claims. Members of our practice group are also available to give presentations at your location or in one of our offices. ■

Florida—Insurance Coverage & Bad Faith

A SPOUSE WHO MARRIED A DECEDENT AFTER INJURY COULD RECOVER AS A "SURVIVING SPOUSE," SAYS FIFTH DCA, IN CONFLICT WITH FOURTH DCA

By Joey M. Chindamo, Esq.*

KEY POINTS:

- The term "surviving spouse" in the Wrongful Death Act is determined on the date of the other spouse's death, not on the date of injury.
- The Fifth DCA certified express and direct conflict with the Fourth DCA.
- Reversed and remanded for new trial on liability and damages due to plaintiff's counsel's improper closing argument.

Joey M. Chindamo

A man suffers serious injuries in a motor vehicle accident. After the crash, he marries his girlfriend, but he dies several months later. Can his post-injury wife recover damages as a "surviving spouse" under the Wrongful Death Act? The Fifth District Court of Appeal recently answered that question in the affirmative, certifying express and direct conflict with the Fourth District Court of Appeal in doing so.

Domino's Pizza, LLC v. Wiederhold, 2018 Fla. App. LEXIS 6598 (Fla. 5th DCA May 11, 2018), arose from a January 2011 motor vehicle accident. Richard Wiederhold swerved to avoid Jeffrey Kidd, who was delivering pizza for a Domino's franchisee. Wiederhold's vehicle rolled several times, rendering him a quadriplegic. After filing a lawsuit against Domino's, the franchisee and Mr. Kidd, Wiederhold married his girlfriend, Yvonne Wiederhold. Months later, Richard died. Yvonne, as personal representative of Richard's estate, was substituted as the plaintiff. Her amended complaint included a claim for wrongful death damages as Richard's "surviving spouse." After settling separately with the franchisee before trial, Yvonne proceeded to trial against Domino's and Mr. Kidd, who represented himself pro se.

The trial court denied Domino's motions for summary judgment, which argued that Yvonne was not a "surviving spouse" under the Wrongful Death Act because she was not married to Richard at the time of his injuries. Ultimately, the jury returned its verdict against Domino's in excess of $10 million. In its renewed motion for directed verdict, judgment notwithstanding the verdict or alternative motion for a new trial, Domino's renewed its earlier arguments and additionally sought a new trial on the basis of improper comments made by plaintiff's counsel during closing argument. The trial court denied Domino's motions and entered a final judgment against Domino's. An appeal to the Fifth DCA followed.

The Fifth DCA first tackled the question of whether wrongful death actions accrue from the date of a decedent's death or a decedent's injury by determining the scope of the term "surviving spouse." The court noted that statutory interpretation begins with the language of the statute itself, and a statute must be given its plain and obvious meaning if the statutory language is clear and unambiguous. The court analyzed § 768.21, Fla. Stat. (2012), and did not find that the term was unclear or ambiguous. It held that the term "'surviving spouse' is necessarily determined on the date of the other spouse's death because one cannot be a survivor before that date." The court found support for this interpretation from other Fifth DCA opinions and the Florida Supreme Court's decision in *Love v. Hannah*, 72 So.2d 39 (Fla. 1954).

However, the Domino's opinion noted its express and direct conflict with the opinion of its sister court in *Kelly v. Georgia-Pacific, LLC*, 211 So.3d 340 (Fla. 4th DCA 2017). In *Kelly*, the Fourth DCA reached the opposite conclusion regarding the scope of the term "surviving spouse." The *Kelly* court held:

> The plain language of the Wrongful Death Act indicates that the legislature did not intend for a surviving spouse to recover consortium damages if the surviving spouse was not married to the decedent prior to the date of the decedent's injury.

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Florida—Maritime Litigation

WHERE DOES FLORIDA END? IT DEPENDS

By Mike Bradford, Esq.*

KEY POINTS:

- The federal Death on the High Seas Act (DOHSA) applies to deaths that occur "on the high seas" more than three nautical miles from the shores of the United States.
- Florida's 3rd District Court of Appeal considered whether DOHSA applies to a death occurring more than three nautical miles from the Florida coast but within the state's defined territorial waters.
- Court found DOHSA does not preclude state law causes of action based upon death occurring more than three miles from the Florida coast, if death occurs within state territorial waters.

Mike Bradford

The Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301-30308 (2015), is a federal statute that applies to deaths "on the high seas" more than three nautical miles from the shore of the United States. However, it also expressly preserves the laws of individual states regarding wrongful death actions and does not apply to "waters within the territorial limits of a State." In most parts of the country along the Pacific and Atlantic coasts, the language of DOHSA creates no confusion because the territorial limits of the states in those areas extend only nine nautical miles (along the Gulf coast, it is roughly nine miles). Florida, of course, is a little different. Article II, § 1 of Florida's Constitution provides that the state's Atlantic territorial boundary extends to "three miles from the coast, or to the shoreward edge of the Gulf Stream, *whichever is greater*." Well, the shoreward edge of the Gulf Stream is not fixed and can be several miles farther than three miles from Florida's Atlantic coast. This may create some confusion about the application of DOHSA to an action for wrongful death that happens off the coast of Florida between three nautical miles and the shoreward edge of the Gulf Stream.

In a very recent decision, Florida's 3rd District Court of Appeal considered whether DOHSA applies to a death that occurred more than three nautical miles from the Atlantic coast but still within the state's defined territorial waters. *Kipp v. Amy Slate's Amoray Dive Ctr., Inc.*, 2018 Fla.App. LEXIS 7847 (Fla. 3d DCA 2018) arose from the death of Steven Kipp, who died while working as a crewmember on a scuba dive charter. According to the complaint, the vessel on which Mr. Kipp worked took customers for a night dive to a wreck that was more than three miles from shore but, apparently, not as far as the Gulf Stream. During the dive, an adverse current carried some surfacing divers as far as half a mile from the dive vessel. Mr. Kipp snorkeled out to help them back to the boat, but he suffered a heart attack and died in the process. Mr. Kipp's widow filed suit against the dive center and the captain of the vessel. She brought a six-count complaint, which included claims for Jones Act negligence, general maritime unseaworthiness and state court negligence. However, she also included DOHSA claims against the dive center and the captain.

The dive center and the captain filed motions to dismiss. They argued that, because the death occurred more than three nautical miles from the coast, the action was controlled exclusively by DOHSA. Mrs. Kipp countered that, even so, the death still occurred in Florida's territorial waters. The trial court took judicial notice that the wreck was 6.5 nautical miles from shore, but the court did not determine how far the shoreward edge of the Gulf Stream extended at the time of Mr. Kipp's death. The trial court dismissed the complaint, holding that DOHSA provides an exclusive remedy only available in federal court.

The 3rd DCA's opinion turned on its interpretation of Congress' intent in enacting DOHSA and the extent of Florida's boundary. As the court noted, even if Florida tort law extends to the Gulf Stream boundary, Congress has authority to limit the reach of Florida law to less than the full extent of Florida's territorial waters. The court determined Congress did not so limit the application of Florida law with DOHSA. Congress did provide such a limitation in the Submerged Lands Act, which expressly states that the term boundaries should, "in no event," be interpreted to extend more than three miles from the coast into the Atlantic or Pacific Ocean. The court found no such limitation in DOHSA. Although DOHSA provides a remedy for deaths occurring more than three miles from shore, it also

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New Jersey—Health Care Liability

NEW JERSEY APPELLATE DIVISION REMINDS US: NOT ALL EVIDENCE IS EQUAL

By Nicholas A. Rimassa, Esq.*

KEY POINTS:

- New Jersey Appellate Devision explores distinctions between medical malpractice cases based upon deviation from applicalbe standard of care and lack of informed consent.
- Appellate Division recently held that signed consent forms are inadmissible unless the plaintiff is pursuing a claim for lack of informed consent.

Nicholas A. Rimassa

In *Ehrlich v. Sorokin*, 451 N.J. Super. 119 (App. Div. 2017), the New Jersey Appellate Division explored critical distinctions between the two most prevalent causes of action in medical malpractice cases: a deviation from the applicable standard of care and a claim based on lack of informed consent. In doing so, the panel reversed the jury's verdict in favor of the defendant physician due to the prejudicial admission of deleterious evidence that the plaintiff maintained was unrelated to her causes of action. *Ehrlich* is of particular interest given the confusion often associated with these two commonly pled causes of actions and the requisite evidence one must present in order to carry the burden of proof for each respective theory of liability.

Ms. Ehrlich treated with the defendant gastroenterologist for a number of years prior to the event giving rise to the lawsuit. Over the course of seven years, the defendant performed five colonoscopy and polypectomy procedures. The defendant used at least two different techniques for the procedures, including one with a saline lift, where fluid helps "lift" the polyp from the colon wall, thus enabling the physician to remove the polyp with a snare. The other technique, known as Argon Plasma Coagulation (APC), allows the physician to use gas and an electrical charge to vaporize the polyp's cells without making any direct contact once the polyp is lifted with saline. During the final colonoscopy, the defendant utilized the APC technique, and the plaintiff suffered a perforated colon, which required a subsequent hemicolectomy, ileostomy and eventual ileostomy reversal.

The plaintiff alleged the doctor deviated from accepted standards of care by specifically failing to inject the polyp and surrounding colon with saline to create a cushion underneath the polyp. The failure to do so resulted in a burn to part of the colon and the resultant perforation. The plaintiff did not assert a claim for lack of informed consent. As part of the defense, the defendant made reference to the plaintiff's signature on surgical consent forms, which stated that the procedure could result in injury and hospitalization. The plaintiff's main argument on appeal was that admission of the informed consent forms misled the jury and were irrelevant in the case, where the sole issue was whether the defendant was negligent in failing to perform a saline lift with the APC.

The court first explained that to carry one's burden in proving a deviation from the standard of care, a plaintiff must present expert testimony establishing the applicable standard, a deviation therefrom, and that the deviation proximately caused the injury. This differs from claims for lack of informed consent, which are generally unrelated to the standard of care for performing medical treatment. To establish a claim for lack of informed consent, a plaintiff must meet a different test, one which requires proof that the doctor withheld pertinent medical information concerning the risks of the procedure or treatment, the alternatives, or the potential results if the procedure or treatment were not undertaken.

The *Ehrlich* court noted that the plaintiff was not advancing a claim for lack of informed consent. Instead, the only issue at trial was whether or not the defendant's use of this particular surgical approach deviated from the standard of care in the gastroenterology community. Whether or not the plaintiff acknowledged the risk of perforation had no bearing upon this determination. In fact, the panel noted that while the two claims fall generally under the "umbrella of medical negligence," the claims are distinct, separate and require different elements of proof. New Jersey joined at least nine other states with reported decisions clearly drawing this distinction between the two claims.

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THE NEW SUPERIOR COURT RULE 16.1

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Included are several provisions geared toward addressing discovery-related concerns expressed by the bar under the old rule. The newest rule calls for both mandatory and discretionary discovery to be undertaken (in a timely fashion) in all civil cases where MNA is requested. For example, subsection (d)(3) states that within five days of filing an answer, the injured party must provide an executed HIPPA authorization to counsel for the defendant. *Super. Ct. Civ. R. 16.1(d)(3)*. The injured party must also produce "all medical records and reports required by Superior Court Rule 3(h)" within five days of filing defense counsel's Entry of Appearance. *Super. Ct. Civ. R. 16.1(d)(4)*. All expert reports in existence at the time the complaint is filed must be produced to the opposing party within five days of the close of responsive pleadings, should the producing party intend to rely upon same at arbitration. *Super. Ct. Civ. R. 16.1(d)(5)*. Insofar as discretionary discovery is concerned, Subsection (e) of the new rule specifically allows the parties to issue subpoenas to obtain records of treating providers [*(e)(1)*] and to retain experts for the purpose of medical records review (Independent Medical Examinations are prohibited, however) [*(e)(2)*].

In a further attempt to expedite the MNA process, the committee promulgated subsection (f) of the new rule, requiring parties to mutually select an arbitrator within 20 days of filing the final responsive pleading. *Super. Ct. Civ. R. 16.1(f)*. Under this new rule, arbitration must be held within 120 days of filing the answer, and the arbitrator who hears the case must issue an order within five days of the arbitration hearing. *Super. Ct. Civ. R. 16.1(h)(1)* and *(l)*. The rule further states that unless a party files a demand for trial de novo within 20 days of entry of the arbitration order, any party may file a motion for entry of an order of judgment. If granted, the judgment shall be deemed final. Subsection (m)(4)(B) awards costs to any defendant who is awarded a defense verdict or who obtains a verdict equal to or more favorable than the arbitrator's order when a plaintiff appeals an arbitration order and demands a trial de novo. *Super. Ct. Civ. R. 16.1(d)(3)*.

Most notably, under the new rule, a Trial Scheduling Order will be issued by the trial judge after the close of initial pleadings, thus immediately setting a trial date without the need to wait until an appeal from MNA. *Super. Ct. Civ. R. 16.1(h)(2)*. A plaintiff can now elect to engage in MNA without trepidation that the case will experience undue delay as a result of not having been assigned a trial date from its inception.

The new MNA rule addresses many of the concerns previously raised under the old rule, including mandatory and permissible discovery and delay in trial scheduling. It also assesses penalties for failure to obtain a trial verdict more favorable than the arbitration order. Under the new rule, the parties are charged with meeting court-proscribed deadlines and with running the arbitration process. The initial impression among the bar appears to be widely favorable. Nevertheless, personal injury plaintiffs do not seem to be selecting MNA in most cases thus far filed in 2018. Even in matters where pre-suit settlement demands are less than the jurisdictional monetary limit for MNA, plaintiffs seem to be filing most of their complaints with traditional jury trial demands and proceeding with mediation. Over time, it is possible that the newly enacted rule will shift the preference toward MNA prior to jury trial. But for now, the new rule does not seem to have had much of an impact on personal injury cases filed in Delaware. ■

A PROFILE OF OUR SCRANTON, PENNSYLVANIA OFFICE

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He also works on major pre-trial motions, as well as post-trial motions, and he monitors trials to assist with the issue of preservation for appeal.

In addition to its attorneys, Scranton is also very fortunate to have a support staff that has plenty of experience and can be counted on to go well above and beyond their stated job classifications. We have five paralegals and 20 support staff.

When visiting the Scranton office, you will always be treated in a very friendly and professional way. With the hundreds of years of experience combined—between the support staff, paralegals and the attorneys—the office has a very family-like atmosphere that makes coming to work each day a pleasure.

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A PROFILE OF OUR SCRANTON, PENNSYLVANIA OFFICE

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Our team of lawyers, paralegals and support staff provides exceptional legal services for the United States Middle District Court, which is located in Scranton but also has offices in Wilkes-Barre and Williamsport. The Scranton office handles cases in our home county of Lackawanna as well as Luzerne, Pike, Wayne, Monroe, Susquehanna, Wyoming, Columbia, Montour, Sullivan, Bradford, Tioga and Lycoming Counties. The Scranton office sees a wide variety of venues. Some of the venues covered by this office are very conservative, and others are considered some of the most liberal jury pools in the state. All of the attorneys in the this office are from Northeastern Pennsylvania, and, for most, Northeastern Pennsylvania has been their home for the entirety of their lives. The familiarity and knowledge this imparts is of great benefit to our clients in that we can advise them of not only the venue in which their case is going to be heard, but also the experience and abilities of the plaintiffs' bar throughout the region we service. The knowledge, professionalism, trial, arbitration and mediation skills within the Scranton office will make you very happy to have us on your side. ■

A SPOUSE WHO MARRIED A DECEDENT

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> The definition of "survivor" in the statute is limited to familial relationships only, and both subsections (1) and (2) of section 768.21 clearly provide that damages are recoverable from the date of "injury." §§ 768.18(1), 768.21(1)-(2), Fla. Stat. (2015). Thus, the plain language of the statute indicates that the legislature anticipated that the surviving spouse would have been married to the decedent prior to the date of injury.

Kelly, 211 So.3d at 345.

The Fifth DCA distinguished its interpretation by stating that, "[i]f, as posited by the *Kelly* majority, survivorship is determined at the time of injury, then children born or adopted by the decedent after the date of injury would not be considered survivors. Likewise, a spouse who divorces a decedent after the date of injury would be considered a survivor. This would be contrary to established precedent, which holds that such determinations are made at the time of the decedent's death." The Fifth DCA also cited out-of-state opinions from Georgia, Louisiana, New York, Ohio, and Pennsylvania that interpreted similar statutory language and similarly found that the plain statutory language permitted such claims. Accordingly, the Fifth DCA affirmed the trial court's ruling allowing Mrs. Wiederhold to recover as a surviving spouse.

However, the Fifth DCA reversed and remanded for a new jury trial on liability and damages due to multiple improper comments made by plaintiff's counsel during closing argument. Domino's objected to some, but not all, of the alleged improper comments. Therefore, the Fifth DCA assessed the entire closing argument to evaluate the cumulative effect of both the preserved and unpreserved error. Plaintiff counsel's multiple denigrations of Domino's case as a "greedy charade" were determined to be improper as disparaging, arguing facts not in evidence, and as an improper "send-a-message" argument. Plaintiff counsel's also impermissibly suggested that a specific amount of requested damages would withstand post-trial scrutiny when he requested $10 million, but "[n]o more than that because it might not be able to be upheld in post-trial motions." These violations, as well as improper golden rule (suggesting the jury place itself in the plaintiff's position) and personal opinion arguments, led the Fifth DCA to conclude that the plaintiff's closing argument "was not designed to prompt a logical analysis of the evidence in light of the applicable law," and the cumulative effect of the preserved and unpreserved error was not harmless.

On the issue of who is a "surviving spouse," *Domino's* stands as precedent in the Fifth DCA. It remains to be seen at this time whether the Florida Supreme Court will resolve the conflict between the Fourth and Fifth DCAs. ■

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Jason Banonis (Allentown, PA) obtained summary judgment in favor of a defendant homeowner in the Court of Common Pleas of Lehigh County, Pennsylvania. The plaintiff alleged catastrophic personal injuries from a head-on collision between two motor vehicles on a public roadway. He claimed, in part, that vegetation on a property caused the co-defendant to leave her lane of travel. On the eve of trial, the court entered an order determining that no genuine issue of material fact existed. The court found that the plaintiff had no idea, other than pure speculation, of: (1) any duty owed to the plaintiff; (2) any breach of duty causing or contributing to any alleged dangerous condition; (3) actual or constructive notice of any condition that caused the alleged accident; and/or (4) any act or omission of the defendant was the proximate cause of the alleged damages.

After a jury trial in the Luzerne County Court of Common Pleas, **Leo Bohanski** (Scranton, PA) obtained a defense verdict. The case involved a rear-end motor vehicle accident in which the plaintiff claimed he sustained a serious injury. The plaintiff underwent several years of treatment with a physiatrist, pain management specialists, physical therapists and a chiropractor. The jury found that the plaintiff did not sustain a serious impairment of a body function and awarded only $5,000 for past and future medical expenses for the injuries conceded by the defense medical expert—a cervical and lumbar strain. The plaintiff's medical expert had boarded $203,000 for past and future medical treatment.

Carolyn Bogart and **Brielle Kovalchek** (Mt. Laurel, NJ) obtained summary judgment in Passaic County Superior Court of New Jersey on behalf of a non-profit shelter for battered women. The plaintiff, who was staying at the shelter at the time of her alleged incident, accused the shelter of negligence with regard to removing snow and ice from their parking lot. The plaintiff attempted to argue she was not a "beneficiary" of the shelter but, rather, was a volunteer. As such, she was not required to help but chose to work at the shelter in exchange for room and board. We successfully argued the defendant was a qualified non-profit organization and the plaintiff was clearly benefiting from the non-profit at the time of her incident. Therefore, the plaintiff's claims were barred under the New Jersey Charitable Immunity doctrine.

In a personal injury case, **Adam Calvert** (New York, NY) obtained summary judgment on behalf of a building owner. The plaintiffs, employees of a tenant in the insured's building, claimed they were injured when glass doors near their elevators suddenly shattered. Adam was able to obtain summary judgment for the building owner by arguing that it was an out-of-possession owner without a duty to maintain the glass doors.

Matthew Noble (Philadelphia, PA) obtained a defense verdict after a three-day trial in Philadelphia County in favor of a large car dealership. On July 5, 2016, the plaintiffs purchased a used 2011 Chevrolet Cruze from the defendant. The plaintiffs claimed their vehicle was purchased with the undisclosed fact that it had been involved in a flood. They asserted claims under the Unfair Trade Practices and Consumer Protection Law that the vehicle's prior history was not identified and the vehicle was sold having mud, rust and dirt all over the car. The defense proved through witness and expert testimony that the plaintiffs drove the vehicle through high water and mud after purchase, causing the own vehicle's damage.

In a premises liability case in the Court of Common Pleas of Cumberland County, Pennsylvania, **Christopher Reeser** (Harrisburg, PA) obtained a defense verdict on behalf of our client, a supermarket. The plaintiff claimed she was injured when her hand was trapped in a deli case door that was closed on her by an inattentive employee of the deli department. She claimed that in an attempt to free her hand from the deli case, she suffered an injury to her shoulder and her neck. MRI scans after the incident did show degenerative disc disease in her neck, as well as multiple herniated discs. Her treating orthopedic surgeon attributed the injuries to the incident in question and recommended a cervical fusion. Through investigation, we learned that the plaintiff had filed a lawsuit in New York as a result of a fall in 2007. Travelers Insurance's house counsel in New York who defended the 2007 case was nice enough to provide us with the transcript of the plaintiff's deposition from the prior lawsuit, which was

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** Prior Results Do Not Guarantee A Similar Outcome*

On The Pulse...

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cross examination gold at trial. Under Christopher's cross examination, the plaintiff had to acknowledge that her treating physician in New York had recommended the same procedures that had been recommended after this incident. The jury did find the employee who closed the deli case door on the plaintiff's hand to be negligent. The jury also found that the plaintiff was negligent in sticking her hand in the area of an open deli case and the plaintiff's negligence outweighed the defendant's negligence, barring her recovery.

The estate of a deceased individual brought suit alleging violations of Pennsylvania's Dram Shop Act. **Justin Schiff** (Philadelphia, PA) obtained summary judgment in favor of our client in the face of significant opposition to our motion, both in written filings and at oral argument. It was alleged the decedent was served alcohol while visibly intoxicated at multiple establishments, allegedly resulting in a car accident that caused the death of the individual. Our client was joined in the action by one of the defendants. It was claimed the deceased was served alcohol at our client's establishment while visibly intoxicated. Following several depositions, we filed a motion for summary judgment in which we contended the parties had failed to produce evidence demonstrating the deceased was served alcohol while visibly intoxicated at our client's establishment. We also highlighted deposition testimony elicited by Justin demonstrating that the joining defendant did not have sufficient evidence to support their position. Following oral argument, our motion for summary judgment was granted and all claims against our client were dismissed, with prejudice.

Brittany Bakshi (Harrisburg, PA) obtained summary judgment on behalf a supermarket in a slip and fall case filed in Lancaster County, Pennsylvania. After speaking with a market employee at the customer service desk, the plaintiff walked past a checkout register and slipped and fell on a clear liquid. The plaintiff admitted she did not see the liquid prior to falling and did not have any evidence as to how the liquid came to be on the floor or how long it was present on the floor. Brittany filed a motion for summary judgment, arguing the plaintiff could not demonstrate that the market had actual notice of the existence of the liquid on the floor, or that it existed for a sufficient period of time to impart constructive notice on the market. Following oral argument, the court granted the motion and dismissed the plaintiff's complaint with prejudice.

Samuel Casolari (Cincinnati, OH) obtained summary judgment in favor of our client, an international retailer, in the Common Pleas Court of Butler County, Ohio. The plaintiff slipped and fell on water while going from one cash line to another and injured her left hand. In ruling in favor of our client, the court noted the water was open and obvious, was not spilled on the floor by our client's employees, and our client did not have either actual or constructive notice of the water.

Colin O'Brien (Philadelphia, PA) obtained a defense verdict at his first arbitration. Colin represented a store and the store owner. The customers were not pleased with a partial refund, and a melee ensued. The plaintiffs filed a complaint for assault and battery and for a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. After a 7.5 hour arbitration in Philadelphia, Colin and his clients were awarded a defense verdict. Lastly, as Colin was finishing his closing arguments, the plaintiff was rushed out of the Courtroom after threatening to kill the defendant/store owner.

HEALTH CARE DEPARTMENT

Donna Modestine (King of Prussia, PA) obtained a defense verdict after a trial in Bucks County in which she represented a family physician. The case involved the death of a 22-year-old man who died from a colloid cyst in his brain. The plaintiff alleged the physician should have ordered neuroimaging and should have performed a neurological examination when he saw the patient in the office four days before his death. At the time of the office visit, the patient had allegedly been suffering from headaches for three weeks.

Victoria Scanlon, **Robert Aldrich** and **Maura Wormuth** (Scranton, PA) obtained a defense verdict on behalf the defendant midwife in an alleged failure to properly manage and care for a patient's labor and delivery, resulting in catastrophic injury to her child. Counsel for the minor-plaintiff argued the pregnancy and labor were high risk and, therefore, it was below the standard of care to use intermittent auscultation (IA) during the second stage of labor. The plaintiff argued the fetus suffered a catastrophic brain injury during the second stage of labor, resulting in cerebral palsy and daily intractable seizures. The child is six years of age, wheelchair bound, and unable to speak or feed himself. He will require lifetime supervision and care. The defense argued the patient's pregnancy remained low risk. Therefore, IA was within the standard of care, a sentinel event did not occur during the second stage of labor, and the child's brain injury occurred in the days leading up to the hospital admission for labor. Also sued were two labor nurses, and the hospital was in for vicarious liability only.

PROFESSIONAL LIABILITY DEPARTMENT

In a complex construction defect matter, **Justin Schiff** (Philadelphia, PA) filed a motion for partial discontinuance that

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was granted, resulting in the dismissal of all claims against our client. The plaintiff, a homeowners' association, filed suit against a number of defendants alleging significant defects and deficiencies in construction performed at a residential community. The defendants joined a number of additional defendant subcontractors, including our client, in the litigation. In his motion for partial discontinuance, Justin contended the pleadings did not make any specific allegations of wrong-doing by our client, and the evidence and expert reports likewise did not include any allegation that our client's work was defective. The court granted Justin's motion and dismissed all claims against our client.

David Shannon and **Kyle Heisner** (Philadelphia, PA) obtained a defense verdict in the Philadelphia Court of Common Pleas in a case involving damage to a neighboring property during the course of construction of a multi-unit, townhouse development. We represented the subcontractor who was in the process of excavating the adjacent property for underpinning. Between the time the excavation was completed and the delivery of concrete for underpinning the next day, the property subsided and was eventually demolished because of extensive cracking and concerns regarding its structural stability. The plaintiff argued that our client was negligent for: (1) not having an engineer present as required under Philadelphia's special inspections program; (2) not pouring concrete on the same day excavation took place; and (3) not properly following the engineer's plans. The plaintiff was precluded from arguing the first two theories due to favorable rulings on motions in limine. At trial, the plaintiff was unable to establish a deviation from the engineer's plans, resulting in a defense verdict. No appeal was taken.

Brooks Foland (Harrisburg, PA), **Vlada Tasich** (Philadelphia, PA) and **Allison Krupp** (Harrisburg, PA) obtained summary judgment for a large insurer in a putative class action lawsuit in the Eastern District of Pennsylvania. This case dealt with a letter the insurance carrier would send to its insureds following a motor vehicle accident in which it would advise its insureds that they would have a rental vehicle for five days. The named plaintiffs argued the letter misrepresented the policy language. They sued for breach of contract, bad faith, declaratory judgment and equitable relief. Per the insurer's request, the court agreed to stay class action discovery so the insurer could file a dispositive motion as to the named plaintiffs, which, if granted, would dispose of the entire putative class action case. In our motion for summary judgment, we argued that the named plaintiffs could not meet their individual burdens of proof since it was undisputed they had had a rental vehicle for 23 days and had returned the rental the same day they picked up their newly purchased vehicle. The court agreed and granted the insurer's motion for summary judgment in its entirety and dismissed the action. The court reasoned, in part, that the named plaintiffs' alleged damages were speculative and issuance of the rental letter did not constitute a breach of the policy since the plaintiffs could not show they were not afforded benefits to which they were entitled.

A Magistrate Judge in the U.S. District Court for the Southern District of Ohio granted the motion for judgment on the pleadings filed by **Samuel Casolari** (Cincinnati, OH) on behalf of our client. The motion was filed in response to a correctional inmate's claims of cruel and unusual punishment. The judge found the alleged ingestion of rat legs and glass was too few in number, in time, and with too little injury to constitute an objectively serious deprivation of edible and sanitary food. Further, the court found there was no evidence of deliberate indifference on the part of our client in its operations. Thus, the court found no constitutional deprivation or cruel and unusual punishment.

Christian Marquis (Pittsburgh, PA) obtained summary judgment on behalf of a large municipality. The plaintiffs asserted that the wife-plaintiff fell on ice, fracturing her ankle, while she was walking on a driveway claimed to be a public street owned by the municipality. The plaintiffs were tenants in a duplex owned by the co-defendant landlord. The driveway, which was alleged to be a public street, served the duplex that was leased in part by the plaintiffs and another duplex next door. The driveway traveled between two public streets that are owned by the municipality. On summary judgment, it was argued that the location of the fall was not sited on a public street of the municipality, despite the fact that the fall's location was within the right-of-way originally accepted by the municipality for purposes of a public street. However, the municipality had never opened up that area of the right-of-way for use as a public street. Therefore, it was argued the location of the fall occurred on a private easement or driveway serves the duplexes. The court accepted the argument that the municipality did not own or maintain a public street at the spot of the fall. The court also accepted the argument that, regardless of ownership, the municipality did not have a duty to remove snow and ice from streets resulting from natural accumulations.

Trish Monahan and **Grant Hackley** (Pittsburgh, PA) obtained summary judgment in the U.S. District Court for the Western District of Pennsylvania on behalf of a borough, its police chief and its mayor, who were accused of discriminating against

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a female-owned towing company. The plaintiff claimed the defendants purposely discriminated against it when they refused to add the female-owned company to a towing rotation list and, instead, chose another local company that happened to be male-owned. The court disagreed and found no discrimination. The court also rejected the plaintiff's equal protection "class of one" theory because the defendants had discretion in choosing which towing company to call.

Sharon O'Donnell (Harrisburg, PA) and **Tom Specht** (Scranton, PA) secured an "eve-of-trial" summary judgment on a Pennsylvania Human Relations Act claim in the Lehigh County Court of Common Pleas. The claim was brought by a county contract paralegal who claimed disability discrimination.

Joseph Santarone (Philadelphia, PA) obtained a defense verdict after a seven-day trial in U.S. District Court for the Eastern District of Pennsylvania. We represented a school district on a Title IX claim brought by the parents of two second grade girls who allegedly were improperly touched by their teacher. The teacher, a defendant also, had spent time in prison after taking a nolo contendere plea in state court. There were separate plaintiffs' attorneys and an attorney who was privately paid for the teacher's defense, since there was no coverage. Prior to trial, a very significant offer was made to settle the case on behalf of the school district and our former principal only. That offer was rejected. After five hours of deliberations, the jury found in favor of the school district and the principal and against the teacher, awarding $100,000 for each of the students. That verdict is not collectable since the former teacher has few if any assets.

WORKERS' COMPENSATION DEPARTMENT

Gregory Bartley (Roseland, NJ) successfully defended a national home improvement store in the litigation of a claim petition. The petitioner alleged that, as a result of his employment at the retailer, he developed back problems and was in need of medical treatment. Greg was able to call into question the petitioner's credibility, as well as that of the petitioner's expert doctor. The Judge of Compensation found that the petitioner did not sustain his burden of proof. Therefore, both the motion for medical and temporary benefits and the claim petition were dismissed, with prejudice.

Ross Carrozza (Scranton, PA) obtained a favorable Federal Black Lung decision. The claimant, a miner with more than 23 years of coal mine employment, had two expert opinions placed into evidence, while the defense also placed two expert opinions into evidence. The judge determined that one of Ross's defense experts provided the most credible opinion evidence-of-record based on his thorough review of tests and records and the thorough history and examination he conducted. The claimant's medical expert witnesses were not found to be the most credible due to the flawed histories they secured concerning the claimant's past smoking history and last coal mine employment duties, which Ross pointed out during his cross-examination. As a result, Ross was able to secure a favorable decision denying the Federal Black Lung benefits in this matter.

Tony Natale (Philadelphia, PA) successfully defended a national can corporation in the litigation of a claim petition in which the claimant testified that, while lifting a very heavy piece of machinery at work, he sustained two lumbar spine disc herniations. Medical evidence was presented showing that the disc herniations were present 10 years before the work injury. Surveillance of the claimant was also proffered, which demonstrated his activity level to be far greater than his stated restrictions. Moreover, the office notes of the claimant's medical expert failed to establish the requisite disability opinions required by the law. The Workers' Compensation Judge found that, at most, the claimant sustained a strain, which had fully recovered. The allegations of ongoing disability and disc herniations were dismissed summarily.

Tony Natale (Philadelphia, PA) successfully defended a Philadelphia-based university in the litigation of a remanded claim petition. The claimant worked for the university in various capacities and allegedly sustained an injury in the form of a strain to his spine due to lifting paint cans. The claimant had a long history of prior non-work-related lumbar spine anomalies. Tony established upon cross examination of the claimant's medical expert that, despite the work injury, records of treatment did not show any increased diagnoses over and above the pre-existing lumbar problems. This contradicted the expert's testimony as to the nature of injury arising out of the work injury. The Workers' Compensation Judge found the injury limited to a strain only, which had fully recovered. The claimant appealed the matter, and the Workers' Compensation Appeal Board found the judge's decision lacked a clear reasoning for concluding that the claimant's lumbar spine anomalies—including disc herniations and annular tears—were not work related. The matter was remanded to the judge for further findings on this issue. The judge held oral argument concentrating on the lumbar spine MRI findings. She then issued an updated decision, finding the preponderance of the medical expert records revealed that all abnormalities in the claimant's spine as seen on pre- and post-injury MRIs were pre-existing conditions and not work related. The full recovery was upheld.

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On The Pulse...

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Tony Natale (Philadelphia, PA) also defended a New England-based research and management firm in the litigation of a penalty petition that involved issues of quasi-first impression in the Commonwealth of Pennsylvania. The case arose in the form of a penalty petition filed by the aggrieved medical provider who alleged a large sum of medical billings remained unpaid after the underlying litigation of a serious and permanent workers' compensation injury had been settled 12 years earlier. The judge held oral argument on the issues of constitutionality, laches and legal standing regarding the petition. The parties formulated an evidentiary record and prepared briefs on the issues involved. The judge ruled that laches applies to a Pennsylvania workers' compensation claim and the inactivity of the aggrieved provider for 12 years after the settlement of the case prevented a finding of a reasonable cause of action for alleged non-payment of medical bills.

Tony Natale (Philadelphia, PA) successfully defended a mushroom farm in Berks County, Pennsylvania on a claim petition in which it was alleged that disc herniations in the claimant's lumbar spine resulted in permanent incapacity. The preponderance of the evidence revealed the claimant had originally alleged a leg injury, as opposed to a low back injury, and worked for five full months after the alleged injury without a problem. Moreover, the claimant's expert was unfamiliar with the claimant's job duties, knew nothing of his post-injury activities at work or otherwise, and offered no basis for his causation opinions. When the claimant was made the subject of cross examination, the Workers' Compensation Judge noted that he misrepresented his condition and the facts of the alleged injury to the employer's expert, his own expert, and the panel doctor. The judge rejected the claimant's and his expert's testimony as not credible and dismissed the claim petition in its entirety.

Tony Natale (Philadelphia, PA) successfully defended a can supply corporation headquartered in Blandon, Pennsylvania. The company manufactures, supplies, and distributes cans for food and sundry items throughout the United States. A truck driver, employed with the company for over 30 years and on the brink of retirement, filed a claim petition in which he alleged a disabling work-related injury in the form of disc herniations in the lumbar spine. The claimant alleged that 30 years of loading, unloading, and driving an 18-wheel truck while in the course of his employment with the company caused his injuries. According to the claimant, he was unaware of his work injury until a physician informed him of the same immediately before he had decided to retire. He noted that his pain complaints emanated from his calf area and, therefore, he did not know he had a back injury. On cross-examination of the claimant's medical expert, it was established the claimant's pain complaints were registered in his lumbar spine, not his calves. Further, the employer's expert testified the pain in the claimant's back was due to long-standing degenerative changes, which were unaffected by the claimant's work duties, and pre- and post-injury MRIs proved this beyond contention. The Workers' Compensation Judge dismissed the claim petition, finding the claimant not credible and further finding the employer's medical expert's opinions to be beyond reproach.

Tony Natale (Philadelphia, PA) successfully prosecuted a termination petition on behalf of a transportation authority centered in southeastern Pennsylvania. The claimant, a bus driver, was adjudicated to have sustained serious injuries in the form of cervical disc herniations and upper extremity carpal tunnel syndrome by virtue of the employer not filing a timely answer to the claimant's petition. Tony instituted a termination petition in which he alleged the claimant had fully recovered from the adjudicated work injuries. On cross-examination of the claimant's medical expert, it was revealed that the claimant's former treating physician could no longer document any symptoms related to the injuries. It was then established that the claimant switched physicians. The preponderance of the evidence showed no objective ongoing findings to support the alleged ongoing disability. The termination petition was granted in its entirety.

Tony Natale (Philadelphia, PA) defended against reinstatement and penalty petitions alleging the claimant was unlawfully prevented from treating for her work-related injury during work hours. The claimant sought partial disability benefits for time missed from work to attend physical therapy sessions. On cross-examination, Tony was able to establish that the claimant did not research physical therapy providers in the area who could accommodate her work hours. The claimant alleged she did not have access to the Internet, access to a phone, or access to the business yellow pages and, thus, was limited to seeking PT therapy during work hours at a physical therapy office near her home. Tony introduced evidence demonstrating a myriad of PT offices in the geographical community near the claimant's work and home that could accommodate her work hours. The Workers' Compensation Judge dismissed the reinstatement and penalty requests.

Tony Natale (Philadelphia, PA) successfully defended a clinical research laboratory against a claim petition in which the

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claimant alleged permanent upper extremity and neck injuries due to sitting and typing at work. Tony presented two nationally recognized orthopedic surgeons who cast doubt upon the claimant's allegations of a work injury based on the clinical findings, the short duration of the claimant's employment, and the nature of the claimant's job duties. The Workers' Compensation Judge ruled the claimant was not credible as to his testimony surrounding a work injury. The judge further found all defense medical experts to be more credible than the claimant's expert. The claim petition was denied and dismissed.

Michele Punturi (Philadelphia, PA) successfully defended a nationally-known car company in the litigation of claim and termination petitions. While working for the employer as an inventory clerk and while operating a vehicle collecting parts, the claimant was involved in an accident resulting in soft tissue injuries to the lumbar spine and chest. The claimant treated with the company physician and was released to return to work. Work was available, but the claimant failed to continue working. He then treated with a panel physician, who released him to return to work and who expanded the diagnosis to the neck and left shoulder. The claimant's attorney referred him to yet another doctor, who expanded the diagnosis further with respect to the teeth, neck, shoulder, lumbar spine and head. Michele established, through dental records, that the claimant had significant pre-existing dental issues and that the ER records contemporaneous to the accident failed to support any injuries to the mouth, teeth, neck, shoulder or head. The records also established the claimant had a long-standing history of non-work-related lumbar complaints, which he failed to reveal during the litigation. The Workers' Compensation Judge found the claimant fully recovered from the work-related injury of a soft tissue and chest contusion based upon the IME. He further concluded the claimant failed to meet his burden of establishing any injuries beyond those injuries and/or that he was entitled to any disability benefits, other than for a few weeks, based upon the competent medical and factual evidence presented by the employer.

Michele Punturi (Philadelphia, PA) also successfully prosecuted a Supersedeas Fund reimbursement recovery action with legal and factual issues of first impression, resulting in a $1 million recovery on behalf of a nationally recognized insurance carrier.

Ashley Talley (Philadelphia, PA) successfully defended a claim petition filed against an insurance carrier that was one of three named defendants in a workers' compensation proceeding. The claimant filed claim petitions against two transportation companies, one of which was briefly insured by our client. In a case that presented complex legal issues, the claimant attempted to prove that our client was liable for the work injury. Ashley was successful in arguing that our client was not on the risk at the time of injury and, secondarily, that another transportation company was the claimant's legal employer. The Workers' Compensation Judge ultimately assessed liability against the other transportation company, completely absolving our client of any responsibility for the work injury. ■

On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

In a workers' compensation Fee Review appeal, **Audrey Copeland** (King of Prussia, PA) convinced the Commonwealth Court to create a new standard for review as to what constitutes "a significant and separately identifiable service performed in addition to another procedure," which, according to 34 Pa. Code § 127.105(e), are the only "same day" office visits that can be billed separately and are not included in the value of the procedure. The provider/chiropractor argued the "same day" office visits he billed separately were not included in the value of the code for the service performed that day. The provider/chiropractor submitted an affidavit and office notes, which the Hearing Officer credited, ordering payment. The Commonwealth Court stated that the issue of what constitutes "a significant and separately identifiable service" is not defined in the Medicare Cost Containment Regulations and has not been interpreted by any court in this Commonwealth. The court looked to materials, including a CMS "MLN Matters" publication, which we brought to their attention. The court concluded that an examination involving no new medical condition, change in medical condition, or other circumstances

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that require an examination and assessment above and beyond the usual examination or evaluation for the treatment performed on the same date does not constitute "a significant and separately identifiable service" for which a chiropractor must be paid under Section 105(e). Therefore, the court remanded for the Hearing Officer to determine whether any of these circumstances existed. *Sedgwick Claims Management Services, Inc. v. Bureau of Workers Compensation, Fee Review Hearing Office (Piszel and Bucks County Pain Center)*, 185 A.3d 429 (Pa.Cmwlth. April 11, 2018).

Audrey also obtained the Superior Court's affirmance of a trial court order denying the plaintiff's motion to invalidate the settlement of the case in which the plaintiff demanded payment but then refused to sign the settlement agreement. The court determined the settlement was valid as the plaintiff himself had agreed to the settlement on the open record. Because there was a valid settlement agreement, the trial court did not err by refusing to schedule a jury trial. *Hatchigian v. Carrier Corporation and Peirce-Phelps, Inc.*, 2018 Pa.Super. Unpub. LEXIS 1665 (Pa.Super. May 21, 2018).

John Hare and **Shane Haselbarth** (Philadelphia, PA), who were retained as appellate counsel shortly before trial, obtained a victory in the Pennsylvania Superior Court, which vacated a $39 million judgment against their client. While driving our client's truck, an employee struck a car from behind that had stopped in the middle of the road after its hood flew open. The collision injured three members of a family and killed a six-year-old child. The Superior Court vacated the judgment and remanded for a new trial on the basis that the Pittsburgh trial judge had improperly granted summary judgment to several vehicle repair shops and to the decedent's father, all of whom knew of but failed to repair the condition that made the car's hood fly open. ■

On The Pulse…

OTHER NOTABLE ACHIEVEMENTS*

SPECIAL APPOINTMENTS

Elizabeth Ferguson (Jacksonville, FL) was sworn in as president elect of the Jacksonville Bar Association on June 20, 2018.

Karen Grethlein (King of Prussia, PA) is one of only 11 attorneys who have been selected to the 2018/2019 Pennsylvania Bar Leadership Institute, which was developed in 1995 to strengthen the Pennsylvania Bar Association's ongoing efforts to recruit and develop leaders of the Association.

RECOGNITION

Lary Zucker (Mt. Laurel, NJ) was recently presented with the Bob Bollinger Lifetime Achievement Award from the Roller Skating Association International for his years of service to the roller skating industry. A member of the RSA Risk Management Committee, Lary is the co-author of the RSA Risk Management program and the author of the New Jersey Roller Skating Fair Liability Act, enacted in 1991.

The **Maritime Litigation Practice Group** in our New York City office has once again been recognized among the top national maritime practices in the 2018 edition of Chambers USA: America's Leading Lawyers for Business. Recognized in the Nationwide: Transportation: Shipping: Litigation (New York) category, the firm was called out for its experience in "handling a range of matters…involving insurance disputes, cargo loss and vessel damage." Additionally, the firm was acknowledged for its increasing activity in personal injury defense cases, "particularly those occurring in the marine construction sector." **Daniel G. McDermott**, chair of the firm's maritime practice, and **Edward C. Radzik**, of counsel within the group, were cited as "notable practitioners" in the Chambers ranking. While both attorneys have received Chambers recognition in this area several times before, this year Mr. McDermott was specifically cited for his "longstanding experience as a litigator on various civil matters, notably maritime personal injury and insurance actions"…and his "expertise in marine construction projects litigation." Mr. Radzik was noted for his experience in "handling claims for cargo losses and damages" and for his "measured approach to cases," as well as mediation and arbitration experience.

Rachel A. Ramsay-Lowe (Roseland, NJ) has been selected to The Network Journal's 2018 List of "40 Under Forty" Dynamic Achievers. *The Network Journal* is a quarterly publication focused on Black professionals, executives and

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small business owners. Each year *TNJ* recognizes outstanding young African-Americans who are "reaching for higher goals" in their careers while remaining committed to their community's development.

SPEAKING ENGAGEMENTS

Janice Merrill and **Chanel Mosley** (Orlando, FL) presented at the Florida Society for Healthcare Risk Management & Patient Safety's 2018 annual meeting and education conference. In "Transitions of Care and Avoidable Hospital Admissions and Readmissions," they addressed risk management for transitions of care in the nursing and long-term care facility setting, and how operations and facilities can mitigate avoidable hospital admissions and readmissions.

SPECIAL NEWS

Andrew J. Marchese (Fort Lauderdale, FL) has earned his board certification in Condominium and Planned Development Law from The Florida Bar. Board certification recognizes attorneys' special knowledge, skills and proficiency in various areas of law, and professionalism and ethics in practice. Andrew has represented hundreds of condominium associations, homeowners associations, directors, officers and property managers in claims involving breach of fiduciary duty, breach of the declaration, real estate liens, real property document disputes, Fair Housing Act and HUD claims.

SUPER LAWYERS–PENNSYLVANIA

Sixty-six attorneys from our Pennsylvania offices have been selected to the 2018 edition of *Pennsylvania Super Lawyers* magazine. A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html. Receiving special recognition for the 12th consecutive year is **Daniel J. Sherry** (King of Prussia, PA), who has been named to the "Top 100 Attorneys in Pennsylvania" and the "Top 100 Attorneys in Philadelphia" Super Lawyer lists. **John J. Hare** was also named to the "Top 100 Attorneys in Pennsylvania" and the "Top 100 Attorneys in Philadelphia." **Teresa Ficken Sachs** (Philadelphia, PA) was named among the "Top 50 Women" attorneys in Pennsylvania.

Our 2018 Pennsylvania Super Lawyers include:

- Allentown: Candy Barr Heimbach, Paul Laughlin
- Harrisburg: Brooks Foland, Timothy McMahon, Edwin Schwartz, Craig Stone
- King of Prussia: Christopher Boyle, Audrey Copeland, T. Kevin Fitzpatrick, Chandler Hosmer, Edward McGinn, Daniel Sherry
- Philadelphia: William Banton, Ralph Bocchino, Kimberly Boyer-Cohen, Thomas Bracaglia, Thomas Brophy, Butler Buchanan, Christopher Dougherty, Howard Dwoskin, William Foster, Scott Gemberling, Tiffany Giangiulio, Norman Haase, John Hare, Keith Heinold, Kevin Hexstall, Niki Ingram, Kathleen Kramer, Bruce McKissock, Bradley Remick, Daniel Ryan, Teresa Ficken Sachs, Joseph Santarone, Christopher Santoro, Lori Strauss, Vlada Tasich, G. Mark Thompson, Thomas Wagner, Eric Weiss, David Wolf
- Pittsburgh: Terry Cavanaugh, John Deasy, Steven Forry, Michael Karaffa, Stuart Sostmann

Our 2018 Pennsylvania Super Lawyer Rising Stars include:

- King of Prussia: Joseph Hoynoski, III
- Philadelphia: Mohamed Bakry, Lawrence Bartel, Nicholas Bowers, Joanna Buchanico, Raphael Duran, Lee Durivage, Gregory Fox, Adam Fulginiti, Kyle Heisner, Sang Woo Lee, Michelle Moses, Angeline Panepresso, Jennie Philip, Kristin Shicora, Robert Stanko, Daniel Tran
- Pittsburgh: Patrick Reilly, Charlene Seibert
- Scranton: Michael Connolly

SUPER LAWYERS–FLORIDA

Eleven attorneys from our Florida offices have been selected to the 2018 edition of *Florida Super Lawyers* magazine. A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html.

Our 2018 Florida Super Lawyers include:

- Michael J. DeCandio, Construction Litigation
- Elizabeth B. Ferguson, Construction Litigation
- Michael J. Bradford, Civil Litigation Defense

Our 2018 Florida Super Lawyers Rising Stars include:

- Julie Cunningham Aiello, Transportation & Maritime
- Kimberly Kanoff Berman, Appellate
- Ryan D. Burns, Personal Injury Defense
- Lindsay G. McCormick, Construction Litigation
- Chanel A. Mosley, Health Care
- Alan C. "A.C." Nash, Civil Litigation Defense
- Amanda J. Podlucky, Personal Injury Defense
- John K. Weedon, Personal Injury Defense ■

** Prior Results Do Not Guarantee A Similar Outcome*

New Jersey—Workers' Compensation

BIFURCATION, COMPENSABILITY AND OTHER CONFUSING THINGS IN NEW JERSEY WORKERS' COMPENSATION

By Robert J. Fitzgerald, Esq.*

KEY POINTS:

- New Jersey workers' compensation allows bifurcated trial procedures to tackle preliminary issues without the need to address a final conclusion on permanency benefits.
- The petitioner must first prove that a claim is compensable before proving entitlement to disability and medical benefits.
- Where a trial court exceeds the issues to be addressed in a bifurcated trial, the proper remand is appropriate to allow full litigation of the remaining issues.

Robert J. Fitzgerald

In *Nestor Moran v. Cosmetic Essence, LLC*, 2018 N.J.Super. Unpub. LEXIS 573 (N.J. Super. App. Div. Mar 14, 2018), the New Jersey Appellate Court affirmed that in a bifurcated workers' compensation trial, the Workers' Compensation Judge cannot enter findings or make determinations on issues not specified in the bifurcated trial agreement. The employer in *Moran* disputed both the compensability of the claim and the petitioner's entitlement to temporary disability benefits.

The petitioner claimed he was injured on January 28, 2016, when he felt a "pop" in his back while lifting a heavy box. He reported a back injury via an initial text message on February 1, 2016. The text message did not specifically state the back injury was work-related.

At trial, the parties did not dispute that the petitioner telephoned the employer's warehouse operations manager that week about an injury and that the petitioner texted he would return to work on February 11, 2016. The petitioner did return on February 11, 2016, and provided a doctor's note. The general manager, however, told the petitioner he had been absent too often and terminated his employment. At trial, the Workers' Compensation Judge found the petitioner was "more credible" than the employer's witnesses and determined the injury was compensable.

On appeal, the employer contended the petitioner did not suffer a work-related injury because his various messages in the days following January 28 , 2016, never indicated the back injury was work-related. Further, the petitioner's doctor had made a note in his records that the petitioner stated he "was shoveling snow" when his back pain developed. On the first argument, the Appellate Court noted the judge's findings were supported by the petitioner's testimony, which the judge found more credible than the testimony of the other witnesses. The court added that the employer was more intent on proving it had a rational reason for terminating the petitioner, a fact that had no bearing on the determination of a work injury. "Even if [petitioner] imperfectly informed [employer] about the injury, it does not necessarily follow—as [employer] seems to contend—that the work-related injury must not have occurred."

As to the second argument against compensability, the court noted that the petitioner testified that he and his doctor spoke of many things, including the severe blizzard that hit the northeast between January 22 and 24, 2016. The petitioner stated he never told the doctor that snow-shoveling was the cause of his injury. He also indicated the employer never called the doctor to testify about the conversation. Rather, the employer relied solely on the doctor's otherwise unexplained note. The court reasoned the judge was entitled to give the doctor's note whatever weight she deemed appropriate, particularly when she was not provided with a further explanation that might have come from the doctor's testimony. As the court stated, "[c]ommon sense and human nature entitled the judge to assume that the severity of the blizzard days earlier was something Moran and the doctor spoke about and that such a conversation may have been conflated by the doctor when he memorialized in his file the genesis of Moran's complaints and discomfort." Accordingly, the Appellate Court affirmed the compensability determination.

However, as to the award of disability benefits, the Appellate Court reversed and remanded, determining that the

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New York—General Liability

COME ONE, COME ALL: MOTIONS FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

By Dean G. Aronin, Esq.*

KEY POINTS:

- New York plaintiffs are no longer required to prove the absence of comparative negligence as a prerequisite to obtaining partial summary judgment.
- The court will inevitably start granting more partial motions for summary judgment in favor of plaintiffs.

Dean G. Aronin

On April 3, 2018, the New York Court of Appeals held, in *Rodriguez v. City of New York*, 31 N.Y.3d 312 (N.Y. 2018), that the plaintiff did not need to establish the absence of his own comparative negligence in order to obtain partial summary judgment on liability. The court concluded that a plaintiff does not bear a double burden of establishing a *prima facia* case of liability and the absence of his or her own comparative fault.

Prior to *Rodriquez*, the Court of Appeals had held that a plaintiff's own comparative negligence raises an issue of material fact as to liability. *See*, *Thoma v. Ronai*, 82 N.Y.2d 736 (NY 1993). Therefore, the plaintiff was required to establish that he or she was free from any comparative negligence in order to obtain partial summary judgment as to liability. This rule produced numerous orders finding a triable issue of fact as to liability based upon a plaintiff's comparative negligence.

In *Thoma*, a pedestrian was walking within the crosswalk when she was struck by a van. The pedestrian sued the operator of the van for negligence. The defendant did not dispute the fact that the pedestrian was struck while lawfully in the crosswalk. However, the defendants raised the issue of comparative negligence based on the plaintiff's failure to look to her left while crossing the street. The Court of Appeals of New York found the plaintiff failed to satisfy her burden of proof for summary judgment. Additionally, the court found there was a material issue of fact as to the plaintiff's comparative negligence.

In *Rodriquez*, an employee of the Department of Sanitation was injured when the operator of a sanitation truck skid into and struck the employee. The City maintained that the employee was comparatively negligent because he walked behind a sanitation truck moving in reverse during icy conditions. The Supreme Court of New York County denied the plaintiff's and the defendant's motions for summary judgment, finding issues of fact regarding foreseeability, causation and the plaintiff's comparative negligence. The New York Court of Appeals held the plaintiff does not need to establish the absence of his or her own comparative negligence to obtain partial summary judgment on liability. The court stated that the prior holding in *Thoma* was mistaken.

The court cited the legislative intent of Article 14-A of the CPLR, which was designed to codify New York's precedent that comparative negligence is no longer a complete defense to be pleaded and proven by the plaintiff but, rather, is only relevant to the mitigation of the plaintiff's damages and should be pleaded and proven by the defendant. New York adopted a system of pure comparative negligence. In so doing, it directed courts to consider a plaintiff's comparative fault only when considering the amount of damages a defendant owes to a plaintiff.

The court believed this rule would help the jury focus on the following issues:

(1) Was the plaintiff negligent?;

(2) Was the plaintiff's negligence a substantial factor in causing his or her own injuries?; and

(3) What was the percentage of fault of the defendant and what was the percentage of fault the plaintiff?

The recent holding in *Rodriquez* will ultimately result in more summary judgment motions being filed by plaintiffs. The courts will likely start granting more partial summary judgments as to liability. The *Rodriquez* decision will preclude defense counsel from attempting to convince a court that there is a material issue of fact as to liability with regard to the plaintiff's own conduct. *See*, *CPLR 1411*.

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WHERE DOES FLORIDA END?

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expressly provides that it does not affect state laws governing the right to recover for death, and it does not apply to waters within the territorial limits of a state. In reconciling these provisions of DOHSA, the 3rd DCA determined that applying a three-mile limit, as proposed by the dive center and the captain, regardless of whether it eliminates a state wrongful death remedy, would render meaningless the other provisions of DOHSA that preserve state law. The court noted DOHSA was created to provide a wrongful death remedy where one did not exist under any state law because the death took place beyond the reach of state law. That purpose would not be served by eliminating state law remedies that also exist.

The appellate court rejected the defendant's reliance on cases from other jurisdictions, which held that DOHSA did preclude state law actions beyond three miles, because the states in those cases did not have claims to waters beyond three nautical miles. To the contrary, Florida's claim to waters beyond three miles, as provided in the state's Constitution, has been recognized by Congress and the United States Supreme Court.

Based on its analysis of DOHSA, the appellate court reversed the trial court's order of dismissal and remanded the case with instruction to the trial court to determine if Mr. Kipp's death occurred in the state territorial waters of Florida; in other words, on the landward side of the edge of the Gulf Stream. If it did, DOHSA would not preclude the state law causes of action, even though the death occurred more than three nautical miles from Florida's Atlantic coast. The appellate court also determined, based on United States Supreme Court precedent, that to the extent DOHSA does control the case, the trial court was wrong to determine that federal court is the exclusive forum for DOHSA claims. Rather, state courts have concurrent jurisdiction to entertain DOHSA claims. ■

NEW JERSEY APPELLATE DIVISION REMINDS US

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The Appellate panel concluded that the admission of this evidence had the capacity to mislead the jury and was, therefore, capable of producing an unjust result as it led the jury to reason that giving consent to the procedure implies consent to the resultant injury. The admission of such evidence took away from the jury focusing on the sole issue before them, which was whether or not the defendant's surgical approach was in accord with the then current standard of care.

The *Ehrlich* holding did not fundamentally change the landscape of New Jersey's body of law for medical malpractice actions. However, the Appellate Division sent a message in this published decision by reminding lower courts and litigants alike to be mindful of the critical distinctions between these two prevalent causes of actions. The decision also illustrates the Appellate Division's willingness to intervene on evidentiary trial matters, particularly if the evidence shown to the jury is capable of misleading or producing an unjust result. Finally, this decision serves as a reminder to the defense that certain documents—such as signed consent forms, which are traditionally viewed as favorable to the defense—will not be admitted into evidence at trial unless the plaintiff is pursuing a claim for lack of informed consent. ■

On The Pulse…

CULTURALLY SPEAKING

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

This is the third piece in a series discussing the positive culture of Marshall Dennehey Warner Coleman & Goggin. As I have previously noted, I try to share observations and reflections about our firm from attorneys who have practiced in other firms. Because of those prior experiences, their perceptions about our firm are worth highlighting.

Here, I append remarks by Norman Haase. Norman joined us in March 2017. Norman has been practicing law since 1968. He is a perennial "Super Lawyer" in Pennsylvania and has been voted as a Top 100 Super Lawyer in Pennsylvania. He is also the past president of the Delaware County Bar Association.

Here are Norman's unique perspectives about Marshall Dennehey after 50 years of practice.

MY JOURNEY TO MARSHALL DENNEHEY

By Norman Haase, Esq.

Norman Haase

Fresh out of Villanova law school, happy to have a first job in a law firm, I began to observe—over several decades—key differences of law firm management while moving through the ranks of several law firms as an associate, partner, law firm founder and lateral partner. I witnessed the contrasts between small suburban firms and large Center City firms with offices in multiple states.

SUBURBAN, ONE-OFFICE FIRMS

I enjoyed great opportunities for immediate client contact, individual mentoring and early trial experience. After a few solo depositions, I defended an auto claim through jury verdict within my first year. Soon, I tried five claims through jury verdict in the same year. Then the firm merged with two others, resulting in new leadership, who emphasized profits over cooperation.

A law school classmate proposed liberating several clients from the merged firm to start our own firm. I borrowed $5,000 from my father-in-law for my share of a capital contribution toward rent, electric typewriters, desks, several months of salaries for a secretary and, most important, business cards and a sign with the names of the founding partners! As we shoveled the snow from our suburban sidewalk, we wondered if Abe Lincoln and his partner had such humble beginnings.

Small firms aren't always profitable without taking on a wide range of legal issues. Thus, I soon found myself involved in divorces, child support, real estate, wills, probate and the like. Criminal defense work was fun, but I learned I better get the entire fee up front. The practice included corporation formation and federal estate tax reviews—a scary way to make a living. Then, a constant flow of work from one insurance carrier fell into my lap, and I began the transformation from generalist to a litigation specialist.

CITY-BASED, MULTI-OFFICE FIRM

Our three-man firm expanded from its Media base to offices in Philadelphia and Cherry Hill with a cooperative blend of male and female partners ably mentoring associates and agreeing upon fair compensation for all. We even adopted a fully paid, six-month sabbatical program for one partner at a time. But before a second partner could avail himself of that perk, a lateral partner arrived and soon pushed us into formula compensation. This led to disputes, major and minor, e.g., if A trains a paralegal resulting in less profits for the first year, then

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Pennsylvania—Amusements, Sports & Entertainment

PLEASE RELEASE ME? GYM RELEASES AND OTHER AGREEMENTS WITH EXCULPATORY CLAUSES

By Michele P. Frisbie, Esq.*

KEY POINTS:

- Signed recreational releases, such as those required by gyms, are valid and enforceable.
- These releases can benefit not only the facility, but also other entities associated with the activity.
- Insureds and insurers should consider working together to craft language that is effective.

Michele P. Frisbie

Claims professionals often encounter claims involving questions concerning the enforceability of pre-event written waivers. A claimant or litigant may be injured in a bicycle, 5K or even an obstacle race; or at a trampoline park, a trapeze school or a rock climbing gym. Many times the claimant or litigant will have signed a membership agreement or waiver. These claims involve common issues concerning the enforceability of these documents and whether or not they afford the insured any protection.

This past spring, a series of cases involving gym releases and exculpatory clauses came out of the United States District Court for the Eastern District of Pennsylvania and Pennsylvania Superior Court that resulted in the enforcement of the releases.

In the case of *Vinson v. Fitness & Sports Clubs, LLC*, 2018 Pa.Super. LEXIS 430 (Pa.Super. May 4, 2018), the court affirmed a trial court's entry of summary judgment based upon a plaintiff's execution of a recreational release. The release did not violate public policy, and failure to read the release was not a valid defense to void the contract.

In 2012, the plaintiff joined an L.A.Fitness and signed a three-page membership agreement that contained an exculpatory clause. Here is what it said, in part:

> IMPORTANT: RELEASE AND WAIVER OF LIABILITY AND INDEMNITY. You hereby acknowledge and agree that use by Member and/or by Members minor children of L.A. Fitness' facilities, services, equipment or premises, involves risks of injury to persons and property, including those described below, and Member assumes full responsibility for such risks. In consideration of Member and Member's minor children being permitted to enter any facility of L.A. Fitness (a "Club") for any purpose including, but not limited to, observation, use of facilities, services or equipment, or participation in any way, Member agrees to the following: Member hereby releases and holds L.A. Fitness, its directors, officers, employees, and agents harmless from all liability to Member, Member's children and Member's personal representatives, assigns, heirs, and next of kin for any loss or damage, and forever gives up any claim or demands therefore, on account of injury to Member's person or property, including injury leading to the death of Member, whether caused by the active or passive negligence of L.A. Fitness or other-wise, to the fullest extent permitted by law, while Member or Member's minor children are in, upon, or about L.A. Fitness premises or using any L.A. Fitness facilities, services or equipment … Member further expressly agrees that the foregoing release, waiver and indemnity agreement is intended to be as broad and inclusive as is permitted by the law of the State of Pennsylvania … Member has read this release and waiver of liability and indemnity clause, and agrees that no oral representations, statements or inducement apart from this Agreement have been made.

After Ms. Vinson tripped and fell over a wet floor mat in October of 2013, she sued L.A. Fitness, claiming it improperly maintained the facility. L.A. Fitness cited the exculpatory clause in its reply to her complaint and eventually filed a motion for summary judgment on several grounds, including the exculpatory clause. The trial court granted L.A.'s motion, and Ms. Vinson appealed.

Ms. Vinson claimed the exculpatory clause violated public policy because it affected public health and safety. The Superior Court disagreed. The court explained that an exculpatory clause only violates public policy if it involves a matter of interest to the public or state, such as an employer-employee relationship, public service, public utilities, common

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Pennsylvania—Construction Injury

OSHA AND THE "CONTROLLING EMPLOYER" POLICY: NO AUTOMATIC LEGAL DUTY FOR GENERAL CONTRACTORS

By Colin J. O'Brien, Esq.*

KEY POINTS:

- Court reaffirms that OSHA violations do not establish negligence per se.
- OSHA regulations may establish a duty of care in a negligence suit.
- OSHA compliance directives, including the "controlling employer" doctrine, do not establish tort liability under Pennsylvania law.

Colin J. O'Brien

In its recently published opinion in *Kovacevich v. Reg'l Produce Coop. Corp.*, 172 A.3d 80 (Pa.Super. 2017), the Superior Court of Pennsylvania distinguished between violations of statutory standards and administrative directives in litigation stemming from Occupational Safety and Health Administration (OSHA) regulations. The court held that, while OSHA regulations can be used to determine appropriate standards in negligence actions, OSHA compliance directives—and specifically the "controlling employer" policy—do not establish tort liability under Pennsylvania law.

Kovacevich involved claims made by the plaintiff stemming from an injury caused by a co-worker's operation of a pallet jack at the Philadelphia Wholesale Produce Market. The plaintiff, a salesman for one of the tenants at the market, filed a premises liability claim against the market's management company in which he alleged the management company had control over the co-worker who was operating the pallet jack. One issue on appeal was whether the market's management company was liable for the co-worker through OSHA's "controlling employer" policy and whether a violation of an OSHA directive should constitute negligence per se.

Pennsylvania courts have adopted § 286 of the Second Restatement of Torts, which permits the use of legislative enactments designed to protect a class of individuals, such as the Occupational Safety and Health Act, to set the duty of care owed in a negligence case. In other words, Pennsylvania's courts have ascertained that OSHA violations do not establish negligence per se but, rather, that OSHA regulations can be used to determine appropriate standards in negligence actions: "[a] failure to comply with OSHA regulations is not negligence per se, but it is some evidence of negligence." *Wood v. Smith*, 495 A.2d 601 (Pa.Super. 1985)(court looked to OSHA regulations to determine appropriate standards applicable to erection of scaffolding). See also, *Brogley v. Chambersburg Eng'g Co.*, 452 A.2d 743 (Pa.Super. 1982)(proper to utilize OSHA regulations to determine standard applicable to maintenance of equipment used in a forge).

The nuance involved in *Kovacevich* was the issue of OSHA's "controlling employer" doctrine, an updated agency directive published in its policy manual, which instructs enforcement staff that more than one employer may be cited for an OSHA violation. This policy is significant in construction industry litigation, where the use of general contractors and subcontractors is especially prevalent. The requirement defines a "controlling employer" somewhat broadly as "one who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." OSHA Compliance Directive 02-00-124 (Dec. 10, 1999).

Kovacevich alleged the market's management company was liable for his injuries because of its failure to enforce OSHA regulations; the co-worker did not receive the proper training and certification required under OSHA regulations to operate the pallet jack machine. The plaintiff asserted the management company owed him a duty since it maintained control over the daily operations of the market and also exercised control over its tenants' employees. The general manager of the market testified that, while the market did not have control or authority over its tenants' employees, management could give "verbal corrections" for unsafe work performed in the common areas of the market. The plaintiff alleged that the *combination* of the OSHA violations together with the "controlling employer" doctrine were enough to find liability against the market's management.

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MY JOURNEY TO MARSHALL DENNEHEY

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B works with that paralegal, is the first-year loss shared by A and B? What is the effect of A advancing $500k in costs while B, C and D have together advanced less than $25k? Thus a compensation formula designed to remove subjectivity and disagreements resulted in never-ending disputes. Those eventually caused firm dissolution.

Servicing clients with ever-growing volumes of work requires not only specialized expertise for each client's issues, but also a team capable of providing concurrent, in-depth analysis and reporting. A small firm cannot readily manage the personnel or financial effects in sudden increases and decreases in client assignments.

Having learned that lesson, I sought to move my clients and staff team to a large, city-based firm with offices that could handle my expanding client base. Compensation would be steady with bonus possibilities. My proposal that different office rent costs should be homogenized for an equal overhead effect—because we all attracted business on the basis of having multiple offices—was met with enthusiasm by high-rent office partners and disappointment by partners in distant county offices. Yet, I was thrice elected to the firm's management committee as the first lateral partner and first from a suburban office.

Over almost two decades, I observed declining trends in insurance assignments and profitability due to several factors beyond our control: expansion of in-house firms, audits, changes in the law and reverse auction bidding.

I observed leadership adopting accounting views that emphasized personal rewards over career development for all. I proposed forming a trial school to promote the skills of associates at no cost to the firm. No one responded with encouragement or an offer to assist. Compensation guidelines for many were ignored to assure steadily increasing compensation for a few.

By the end of 2016, it was time for me to move on; hopefully, my team would follow. They (a partner, an associate and three staff) were in unanimous agreement, even though it meant changing from a 10-minute commute to boarding a train for almost an hour each way. On behalf of the team, I wanted us to associate with a financially secure firm, well respected within our profession and by clients, with a deep trial bench, and offices in multiple jurisdictions where our clients have business. Compensation would be based on dedicated, cooperative efforts, but no specific formula.

Having known Dan Ryan for several decades and the reputation of his trial team, Marshall Dennehey was my first choice. But, business due diligence required exploring multiple options. So I met with several firms. Would our clients fit among theirs? Would our team fit their culture? We received multiple offers.

Our choice was easy. Before and after our transition to Marshall Dennehey, every promise made has been kept. Every question has been promptly answered. After our first month, I asked, "Where are the jerks?" The response, "All in the Alaska office." (We don't have one – yet.) Several times I have reminded Dan that this is not management to which we were accustomed, but we will try to adapt.

MARSHALL DENNEHEY EXPERIENCE

Upon the arrival of my team over a year ago, we were welcomed and immediately integrated within the Marshall team. Some observations during our first fifteen months:

- **Orientation:** The investment of several days for staff and attorneys to understand the firm's initially complex computer software and policies involving billing and anti-harassment is well worth the time involved to establish uniformity, which is essential to best practices. Participation in one location (Philadelphia) by personnel from all offices is unique to our firm.
- **Support Staff:** Always willing to assist. The benefits package available here is second to none.
- **Attorneys:** The advantage of working within a culture that values coordination toward client development and maintenance over competition for originations plays out in unselfish cooperation among attorneys and practice groups.
- **Management:** I am not a shareholder. I am a senior counsel, and I have been invited to attend shareholder events, such as the annual meeting. I learned that the process for compensation decisions involves multiple levels of management, thus avoiding the possibility of a small, insider group acting in purely self interest. "The proof is in the pudding," as shareholders rarely depart, and the firm has invested in controlled growth rather than management directing profits toward their own pockets.
- **Ethics:** Rather than leaving decisions regarding potential conflicts of interest to individual attorneys without any oversight, here a new case conflict check triggers management review. In addition, at least one attorney well versed in issues involving professional ethics is available for consultation.

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COME ONE, COME ALL

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However, defense counsel will not be precluded from filing motions for summary judgment. There remain various grounds upon which defense counsel may be able to file victorious motions for summary judgment and adequately oppose a plaintiff's motion for summary judgment. ■

BIFURCATION, COMPENSABILITY AND OTHER CONFUSING THINGS

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judge's other determinations exceeded the trial's scope. It appeared the actual bifurcation boundaries were never clearly placed on the trial court record. On appeal, counsel represented that the terms of the bifurcation developed during in-chambers discussions never quite made it to open court. As stated on the record, "[t]he parties agreed, with the judge's acquiescence, to bifurcate the issues so the judge might first determine whether a compensable injury occurred before the parties and the court invested time and energy on other issues not otherwise necessary to reach if the judge answered the preliminary question in [employer]'s favor."

Based on this bifurcated trial agreement, the Appellate Court found the judge exceeded her authority by finding that the petitioner was entitled to temporary disability benefits and by entering findings about the nature of the injury. According to the court, "These other issues were decided without warning and deprived [employer] of an opportunity to present evidence or to confront the evidence upon which the judge relied." The court went on to hold that, because the judge exceeded the limits of the bifurcation agreement, the only remedy was to vacate those findings on disability and nature of injury and to remand the case back to the Workers' Compensation Judge for additional litigation.

While the Appellate Court may choose to bifurcate a worker's compensation trial to save resources in order to first address things like employment or insurance coverage, the procedures and results can often be confusing unless the issues to be addressed are clearly identified ahead of time. Again, the workers' compensation system is more informal. It is unclear from this case if the parties completed the required pre-trial memorandum identifying the specific issues. Often, too, the court and/or the parties may change or add issues to be addressed during the course of a trial once it begins and testimony is taken for the first time (since there is no chance for pre-trial depositions). Therefore, if your litigation strategy is to proceed with a bifurcated trial, make sure you develop with your counsel a clear and concise list of the limited issues to be addressed. Otherwise, you end up expending more resources on an appeal. ■

OSHA AND THE "CONTROLLING EMPLOYER" POLICY

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The Superior Court affirmed the trial court's non-suit against the market's management company, finding that the OSHA "controlling employer" policy does not establish a legal duty under Pennsylvania law. Pennsylvania courts have repeatedly emphasized the distinction between OSHA regulations that establish a standard of care compared to those that "merely describe OSHA's enforcement policies." Following the precedent of *Leonard v. Commonwealth*, 771 A.2d 1238 (Pa. 2001), a leading case on distinguishing the applicability of OSHA regulations, the court held that the "controlling employer" policy found in the compliance directive does not create a legal duty; rather, it is merely an enforcement policy.

Pennsylvania courts have established a strong precedent that, while evidence of OSHA violations is admissible at trial to prove the duty of care, an OSHA violation itself does not constitute negligence per se. *Kovacevich* goes one step further, excluding the use of OSHA compliance directives in a plaintiff's attempt to create an additional statutory duty of care. The "controlling employer" doctrine is still a relevant and important focus for litigation, especially construction litigation, but the court has held that this theory must be supported by robust evidence that shows a general contractor's control and authority over the employees of a subcontractor. Simply arguing liability under the OSHA "controlling employer" doctrine is not enough to substantiate claims against a general contractor who truly had no control over a subcontractor's employees. ■

PLEASE RELEASE ME?

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carriers or hospitals.The court can be the voice of the community, declaring a contract against public policy, only when there is virtual unanimity of opinion as to the public policy the contract supposedly violates. Citing *Chepkevich v. Hidden Valley Resort, L.P.*, 2 A.3d 1174 (Pa. 2010) and *Toro v. Fitness International, LLC*, 150 A.3d 968 (Pa.Super. 2016), the *Vinson* court ruled that recreational releases, such as those required by gyms, are valid and are enforceable and that voluntary athletic or recreational activities are not matters of public interest or state interest.

Ms. Vinson apparently mentioned in a footnote that she might not have even received the exculpatory clause. Setting aside the fact that she raised this argument too late, the court also noted that an alleged failure to read the release is not a valid defense.

However, in another gym release/exculpatory clause case, *Hill v. L.A. Fitness*, 2018 U.S.Dist. LEXIS 62342 (E.D.Pa. April 10, 2018), the court granted summary judgment for the defendant on the plaintiff's personal injury claim. In *Hill*, unlike *Vinson*, it was timely argued that there was an issue as to whether the plaintiff signed the agreement. Mr. Hill testified that his "ex" secured and signed the membership agreement for him because he did not have a credit card at the time. However, Mr. Hill admitted he did read the agreement and initialed the remaining pages of the same. The court found this to be evidence that the plaintiff understood he was entering the membership agreement, including the exculpatory waiver. The *Hill* court took advantage of both *Toro* and *Vinson* to uphold the exculpatory clause. Because the plaintiff was found to have entered a valid, enforceable exculpatory waiver, the court ruled the plaintiff's negligence claims were barred by that waiver and, therefore, granted the defendant's motion for summary judgment.

Exculpatory clauses are found not limited to gym cases. We have found they arise in a variety of cases. For example, in one such case, the plaintiff signed an agreement with an exculpatory clause in connection with a motorcycle class. They might also be found in permission slips for school trips.

Exculpatory clauses may also benefit third parties, apart from the entity that issues the agreement containing the exculpatory clause. To wit, in another case, the plaintiff was participating in a race sponsored by a local YWCA. When she fell, she sued not only the YWCA, but also the municipality. The agreement she signed happened to specifically mention the municipality.

Encouraging and supporting insureds in creating clear, concise and proper exculpatory clauses in their agreements may be well worth the investment for both the insureds and insurers. They may create a clear pather to summary judgment for an insured in a subsequent injury case. ■

MY JOURNEY TO MARSHALL DENNEHEY

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- **Quality Client Service:** As part of our firm's culture, lawyers are encouraged to seek different perspectives and ideas through "Round Table" discussions with other firm attorneys. This contrasts with my other firms, where I often had to offer a percentage of file origination credit in order to motivate partners to participate in a file review beyond a brief hallway conversation.
- **Education:** In-house, lunch hour CLEs are time efficient and informative. I recently participated as a faculty member for the firm's mock trial program, which is offered once annually to a limited number of senior associates and junior shareholders. The quality of the presentations (openings, witness examinations, closings) by our firm's senior trial counsel matched or exceeded the quality I have observed at national seminars, such as DRI and PBI. This year's associate participants are all rising stars, so both the present trial bench and future trial bench at Marshall Dennehey are in very good hands.
- **Social Conscience:** We should all be proud of the firm's personnel diversity, respect for everyone regardless of position, and for having adopted a local public school for contributions and attention.
- **Negative:** Still no talk of a London office, where we could partner with barristers and wear robes and wigs to court. ■

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