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Defense Digest

On The Pulse…

WESTCHESTER, NEW YORK: POWERHOUSE IN THE HUDSON VALLEY

By James P. Connors, Esq.*

James P. Connors

The Westchester County, New York, office is among the newest at Marshall Dennehey, having opened in July of 2014. At the time, it was staffed with five attorneys, two administrative assistants and one paralegal. The office location is serene, nestled within the park-like atmosphere of Rye Brook, New York, yet "sophisticated," in that we lie fifteen miles north of the Great White Way. Since opening, this small, yet mighty, office has been running on all four cylinders and has almost tripled in size, with 15 current attorneys. We have achieved 100 percent compliance with productivity goals while continuing to handle some of the most high-profile, challenging litigation, including putting to rest the single largest casualty property loss in U.S. jurisprudential history, The World Trade Center case, formally known as *In Re Terrorist Act of September 11, 2001*. In 2018 we were chosen to handle the second largest civil action arising out of a terrorist act, the *Terrorist Acts of October 31, 2017*, resulting in multiple deaths and injuries caused when a truck, driven by a young terrorist, mowed down innocent victims on the bike path located adjacent to the Hudson River Park in Manhattan, New York. This case was acquired after an open vetting of major defense firms in New York City by the client itself, with whom the firm had no prior dealings. Certainly, this is a notable accomplishment for a small satellite office outside the City of New York.

The office is housed in one of Westchester County's largest buildings, the 300,000 square foot, former world headquarters of General Foods, which serves as an elegant yet highly functional base, providing access to major thoroughfares running north, south, east and west. The office handles cases as

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LIQUOR LIABILITY/HOSPITALITY PRACTICE GROUP

By R. Anthony Michetti, Esq.*

R. Anthony Michetti

Your insured operates a bar, restaurant or hotel. A significant amount of revenue generated by the business is from the sale of alcohol. Through a license issued by the appropriate governing body, your insured is permitted to sell intoxicating beverages to the public. Beverages, which, if consumed in sufficient quantity, are known to impair coordination, perception and reduce inhibitions. Occasionally, your insured may overserve (allegedly) a patron by continuing to furnish alcohol after that patron has exhibited signs of visible intoxication. Assuming that patron refrains from breaking a pool cue over someone's head and manages to leave the insured's establishment without tripping and face-planting, you are not home free yet. Outside in the parking lot is a 4,000 pound chariot waiting to whisk away the intoxicated patron. What could possibly go wrong?!

When what could go wrong does go wrong, and the risk of insuring such a business turns into the reality of a lawsuit, the role of the claims handler is to manage and mitigate the exposure. Arguably, the single most important decision that the claims handler makes in fulfilling that role is the selection of defense counsel. You may have retained counsel in non-alcohol-related assault, trip/fall or motor vehicle cases with good results. However, a liquor liability claim is a completely different animal and requires counsel with specialized knowledge and experience.

Allow me the opportunity to sidestep into the weeds a bit and provide you with some useful, substantive information and, at the same time, drive home the point about the selection of counsel.

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A MESSAGE from the EXECUTIVE COMMITTEE

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

"Never be too big to do the small things that need to be done."

Having crossed over the New Year threshold, and similar to what individuals do with New Year's resolutions, the Executive Committee recently met for four days to map out objectives and priorities and seek opportunities to build on our 2018 accomplishments.

Looking back on 2018, I am proud to recognize our newly elected shareholders—two of whom moved from special counsel status—Tim Jaeger (Roseland) and Patrick Delong (Fort Lauderdale).

Thirteen associates were promoted, too: Sarah Argo (Scranton); Mohamed Bakry (Philadelphia); Nicholas Bowers (Philadelphia); Sarah Cole (Wilmington); Andrea Diederich (Orlando); Raphael Duran (Philadelphia); Jason Ferrante (Cleveland); Ryan Gannon (Roseland); Allison Krupp (Harrisburg); Sang Lee (Philadelphia); Chanel Mosley (Orlando); Ashley Toth (Mt. Laurel); and Daniel Tran (Philadelphia).

These attorneys were elected at our December annual shareholders' meeting. At the dinner afterward, it was wonderful to see so many of our retired shareholders and directors return to enjoy an evening of genuine camaraderie with our current shareholders and senior counsel.

Some of our 2018 accomplishments deserve mention:

- In a period of decreased national and regional filings, we are privileged to note that our case counts increased in each of our four practice departments. We have more cases in our inventory than any time in our firm's history. That speaks volumes about the trust that our clients have in our defense capabilities.
- Our fortune widens because we have not only taken on new clients—Uber, Coca Cola and American Express—but our presence on insurance panels in the face of convergence initiatives has not only remained constant, it also has expanded into additional lines of businesses that we defend for insurers.
- Our file portfolio is diverse. No individual client represents more than 7% of our firm's annual revenue. For a defense firm, that is a very healthy, vital sign.
- Our profile in the London market increases. Our membership in Insurance Law Global (ILG) has expanded our visibility internationally with our law firm partners in the UK, Canada, Netherlands and Spain.

As we shift focus to 2019—and as our retreat recently informed us—we cannot be content with the status quo. We keenly understand that, even though our firm enjoys a uniquely competitive position among our peers, that competitive advantage can only be maintained by an introspective mindset—individual and organizational—fully committed to adaptation and incremental improvement.

At our annual shareholders' meeting mentioned above, we discussed the global best-selling book, "*Legacy: What the All Blacks Can Teach Us About the Business of Life*." Author James Kerr spent a year with the New Zealand national All Blacks rugby team—arguably, the most successful sports team ever. . . anywhere.

Kerr describes why this team maintains its dominance. The answer is counter-intuitive because, more than anything else, humility is the organization's most valued trait. Humility allows trust to grow, unselfishness emulated, accountability embraced, and authenticity fostered.

Our firm has grown—thrived actually—because some of those same traits are integral to who we are. Our culture statement specifically says: "Our culture is one which promotes diversity . . . hires employees with the hope and expectation they will finish their careers at the firm . . . encourages and rewards loyalty, humility and teamwork . . . where humor is the great equalizer."

We want these values prepetuated at Marshall Dennehey. That is precisely why I recently gave each of our new shareholders a copy of *Legacy*.

Why are these values important to our new shareholders and to our law firm?

They orient every employee in our firm toward our clients in everything we do. They help us solve our clients' problems. They enable us to pilot our clients through difficult times.

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ON THE PULSE... WESTCHESTER, NEW YORK

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far west as Buffalo and as far north as towns adjacent to the Canadian border and numerous jurisdictions in between. Among the attorneys on staff, four are admitted to practice in Connecticut and two of these attorneys, Dan Corde and myself, are FAA licensed pilots. The unique skillset we bring to aviation litigation has led us to handle numerous cases in Connecticut that involve multiple-fatality aviation incidents. The office also handles a significant number of cases for some of the largest security companies in the United States, defending them against allegations of false arrest, malicious prosecution, failure to provide appropriate guest security and more. In the hospitality arena, we represent two of the largest hotel chains in the world, providing counsel in a wide range of matters. We continue to grow, and our vision is to expand the office by at least two attorneys in 2019.

The Westchester office is devoted almost entirely to serving the needs of the Casualty Department, with the exception of Charles Gura, who primarily focuses on medical professional liability yet also handles and tries casualty matters in New York and Connecticut. The nature of the cases handled by the Westchester office is quite eclectic. While a significant percentage of time and effort is devoted to the defense of security cases as mentioned above, the office is also deeply involved in the defense of one of the major national school bus operators, and a variety of concrete manufacturers, matters that are handled directly or supervised by Harold Moroknek. Harold maintains his sanity by continuing his avocation of coaching AAU girls basketball where he practices the true art of "oral argument."

Attorneys Gail McCallion and Angela Evangelista devote much of their time to the defense of a large international hotel chain, as well as the litigation needs of one of the largest clothing retailers in the nation for whom we provide representation not only in litigated tort claims, but also in issues before the New York State Human Rights Commission and other regulatory boards. By way of background, Gail McCallion is a former professional ballerina, having danced many years with the New York City Ballet Company. Angela, when not handling litigation, serves as a professor at a local college and as an in-house authority for all of the New York offices, as well as the Erie, Pennsylvania office, concerning all aspects of New York practice.

Shareholder Jay Rava serves as a leader of the New York Construction and Labor Law Practice Group, defending contractors, owners, and subcontractors in the vast and complicated field of New York Labor Law. Working with him in that area of specialty is Matthew Rice. Jay and Matthew spend most of their time with the tradesman sitting in the cranes that dot the city skyline.

For almost 40 years, Bob Connor, Of Counsel, has focused his practice on admiralty and maritime law. Throughout his career, he has participated in numerous complex litigation matters, many of which have involved cargo claims and subrogation. As well, Bob has been involved in matters in the aviation industry and represents a major airline in defending cargo claims, as well as baggage and ticket disputes.

Jennifer Meyers and Nadia Niazi are two associate litigators who, in the last four years, have moved from "mentoree" to "mentor" to our younger attorneys, such as Difie Osborne, Caroline Kelly and the most recent addition to the legal staff, Nicholas Taylor, former captain of the University of Albany hockey team. Associate Steven Saal, who works closely with Harold Moroknek, has grown professionally in 2018, having served as second seat in a major federal court trial in Brooklyn that spanned six weeks.

None of the challenging work done here in Westchester could be accomplished without the help of some of the finest paralegals, Lorie Valletta and Bernice Velazquez. Nor would any of us manage through the day without the aid of three excellent office assistants, Troni Brown, Rosemary Delgado and Anthony Rodriguez. The office's growth and productivity would simply not be possible without the extraordinary effort of our unique and talented administrative assistants who process all of the work we generate in a most impressive manner. We cannot thank enough Desiree Robinson, Deanna Polygerinos, Damaris Moreno-Elder, Nadine Reynolds-Billy, Stacey Artis and Annette Corchado. The entire Westchester operation is kept functioning in as smooth a manner as one could want (did I mention the office has zero attrition over the last four-and-one-half years?) only through the magic, skill and personality possessed by the office's assistant manager, Kristine Carrizzo. Since 2014, Kristine has managed, with the guidance of Eva Colon in our New York City office, to essentially grow an office from a small outpost to what has to be one of the most "productive," "efficient" and "happy" offices in the firm. Oh, by the way, did I mention "she has managed zero percent attrition in four-and-one-half years?" (Last time. I promise.) All kidding aside, that accomplishment, in and of itself, in this current work environment is a testament to Kristine's management skills and "give a damn attitude." Each member of the support staff strives to enhance the productivity of Westchester, and they are owed enormous credit for its success.

As you now know, I am extremely proud of the accomplishments we have achieved in the short time that the Westchester office has been in existence. Objective evidence of our office's accomplishments exists in its purest form, ranging from the vibrant support of clients both old and new to the loyalty shown by the office's attorneys and staff. I expect the Westchester, New York office to continue to expand and to represent Marshall Dennehey Warner Coleman & Goggin well in its "northern outpost," proving itself worthy and a crucial part of the finest defense litigation firm in the United States. ■

Federal—General Practice

AN ANALYSIS OF COMMONLY USED STATISTICS TO AID IN THE DEVELOPMENT OF *FRYE* AND *DAUBERT* CHALLENGES

By David J. Krolikowski, Esq.*

KEY POINTS:

- General look at statistics commonly used in scientific papers.
- Statistics are useful but can be misleading.

David J. Krolikowski

I am often asked to evaluate expert opinions. I guess the feeling is that since I used to do some STEM type stuff, maybe I would somehow enjoy untangling the quasi-scientific statements made in a report. And they are right. I do. But what about the poor associate who is asked to evaluate an expert report? In fact, let's goes further. What about Uncle Joe, who wants to talk about global warming at Thanksgiving? Or Aunt Sue and whether or not there is a benefit to essential oils? I write this article for all of you.

What do I mean by this? Well, information about these topics is covered by scientific papers. If you can understand and interpret the data, then you can make your own mind up. So the following is an attempt to provide just general guidelines to help make sense of the source material we never read but always argue about. The following are some general rules of thumb to help you understand statistics used in scientific papers. Aunts and uncles everywhere beware.

Statistics is useful because it can tell us if something is true, false or merely anecdotal. However, statistics can fool you and should be viewed with caution. An inherent limitation is that we can only observe events as they happen.

With this in mind, the following is a very general look at the statistics commonly used in scientific papers. Admittedly, this is more a heuristics approach than mathematical truth since these concepts can be very complex.

I. RELATIVE RISK AND ABSOLUTE RISK

Relative risk is a way of asking how much does someone's risk change when they are exposed to it. This is a ratio of probabilities and is expressed in its simplest form as:

$$RR = \frac{\textit{Incidence (rate of development) with exposure}}{\textit{Incidence (rate of development) without exposure}}$$

Thus, the exposure risk is always relative to the unexposed person. A general rule of thumb is as follows:

Table 1: RR Rules of Thumb:

RR > 1	Increase risk with exposure
RR = 1	No risk change due to exposure
RR < 1	Reduced risk with exposure

A simple example: RR = 1.36. The risk of getting the disease is increased by 36%. {R = | 1-RR | x100}. Or the RR is 1.36 times more likely.

One must be careful not to confuse this with absolute risk. Absolute risk is the probability of something (i.e., getting cancer) divided by the number of people in the group. Looking at the absolute risk puts these statistics into context or allows one to gauge significance. A lot of confusion comes in the ignorance of what RR percentages mean.

Simple example: Absolute Risk of cancer is 4 in 100 (4%) in non-smokers. RR of cancer for smokers is 1.5 or a 50% increase. Therefore, absolute risk for smokers is an increase of 50% of 4, which is 4+2. Thus, if you smoke, your absolute risk for cancer changes to 6 in 100 or 6%. In this example, a 50% increase in relative risk is only equal to a 2% increase in your absolute risk.

Say you have a 2 in 20 risk (10%) of developing renal cancer by the age of 70. A research paper then claims reduction in RR of getting the disease by 50% when you eat an apple a day. Thus, the absolute risk changes to 1 in 20 (5%) by eating an apple a day. In this example, a 50% reduction in relative risk leads to a 5% reduction in absolute risk.

Depending on the argument to advance will determine which number, 5% or 50%, one is going to use because there is a 100% chance someone will get confused.

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LIQUOR LIABILITY/HOSPITALITY PRACTICE GROUP

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Prior to the enactment of The Fair Share Act in 2011, Pennsylvania was purely a joint and several liability state. The Act substantially modified joint and several liability and made life easier for insurers and defense counsel. For the most part, a defendant's exposure is limited to the assessed percentage share of liability. Joint and several liability still applies, but only if the defendant is found at least 60 percent responsible.

There are a few exceptions under The Fair Share Act. However, one of the exceptions is a liquor liability claim. Not just any liquor liability claim, but one brought under Section 497 of the Pennsylvania Liquor Code. Section 497 deals with accidents that occur off premises. In such a case, pure joint and several liability is still the law. Conversely, an on-premises incident is not an exception, and the protection of The Fair Share Act applies. Just one example of how distinct liquor liability is from other areas of casualty law.

The Liquor Liability Practice Group of Marshall Dennehey has distinguished itself amongst defense firms through our extensive experience representing members of the hospitality and liquor industry. Our clients include major chains, privately-owned taverns, inns, hotel properties and a wide variety of entertainment venues. We have successfully litigated through verdict dozens of claims involving significant personal injury and death.

With the valuable input of our clients, we have developed investigatory procedures, defense strategies, a network of experts and trial preparation techniques that enable us to vigorously defend these matters or settle for realistic sums. It is our practice to make the most of the uniqueness of liquor liability as a tort and to take strategic advantage of opponents who do not fully appreciate their burden of proof.

A strength of this group is the ability to handle claims in all jurisdictions where our firm operates. We have identified a select group of lawyers in all of our offices who have years of experience in defending liquor claims. These lawyers possess the specific knowledge of the law and are familiar with the varied and unique dram shop statutes for every state in which we practice. Beyond the basic liquor liability case, we have experience in handling other claims arising out of the hospitality/entertainment industry, including:

- Amusements, Sports and Recreation
- Hotel and Resort Law
- Hotel Security/Negligence
- Restaurant and Retail Liability
- Slip and Fall/General Liability
- Waterpark Safety

Marshall Dennehey affords our clients a blend of geographic coverage, cost effectiveness and experience. We welcome the opportunity to work with you in defending your liquor and hospitality litigation. If desired, we are also happy to present educational seminars as a mutually beneficial introduction to our working relationship.

Inquiries and referrals should be directed to:

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A MESSAGE FROM THE EXECUTIVE COMMITTEE

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A recent article in *The American Lawyer* caught my eye. It discussed a "revolutionary" concept, noting that more firms are considering changes to their origination credit compensation schemes—viz., migrating away from origination credits is central to year-end compensation.

The article noted that the firms which have abandoned these types of financial incentives "tend to be the happiest, most successful, most team-oriented firms around." Freed from worries about who gets the credits at year-end, "attorneys can put their clients first and ensure that the most appropriate lawyer gets assigned the case."

Imagine that novel thinking!

For over 56 years, we have never tracked a single origination credit. No attorney can claim a client at Marshall Dennehey. Every client is a firm client. Every Marshall Dennehey attorney has always embraced the concept that we want our clients represented by our best attorney in every case.

For us to continue to enjoy the favor of our clients, of course we re-commit to be 100% in sync with the objectives of the insurance industry—e.g., reducing legal spend; shortening file shelf life; being creative in resolving our clients' cases; and leveraging our skill, expertise and experience to reduce our clients' indemnity spend.

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Florida—Workers' Compensation

EX PARTE DOCTOR CONFERENCES CANNOT SUGGEST, DIRECT OR INSTRUCT WHAT TREATMENT OR CARE TO RECOMMEND

By Linda Wagner Farrell, Esq.*

KEY POINTS:

- Recent evidentiary order seeks to limit substantive content of *ex parte* conferences with authorized treating providers.
- Judge ruled the employer or its representative shall not suggest to or instruct the doctor as to what treatment he or she may provide or recommend.

Linda Wagner Farrell

A large part of defense strategy in Florida workers' compensation claims hinges on the ability to conduct *ex parte* conferences with authorized treating providers regarding their opinions of claimants' work-related medical treatment, as permitted by statute 440.13(4)(c). However, a recent evidentiary order seeks to limit the substantive content of such conferences.

The Judge of Compensation Claims in *Bien-Aime v. Correct Care Recovery/ESIS*, OJCC 17-022305DAL, Ft. Lauderdale District, Order January 2, 2019, granted the claimant's emergency motion to prohibit/limit the employer's *ex parte* communication with the transfer of care physician. The judge specifically noted in his evidentiary order that he was confronted with the task of determining whether the employer/servicing agent had conducted an impermissible *ex parte* "mini-trial" or had deliberately undermined the doctor-patient relationship, thereby abusing its statutory right to conduct such conferences pursuant to § 440.13(4)(c).

Florida Statute § 440.13(4)(c) states that the policy for the administration of the workers' compensation system shall include reasonable access to medical information by all parties to facilitate the self-executing features of the law. The statute requires that health care providers furnish medical records to and to discuss the claimant's medical condition relating to the workplace injury with the employer upon request. Otherwise, the provider can be subject to penalties by the department.

In *Bien-Aime*, the employer conferenced with the claimant's authorized treating provider regarding his work injuries to his foot and ankle. The conference was held after the provider referred the claimant to a second foot and ankle specialist, who concluded he had no objective findings to explain the claimant's subjective complaints and had nothing further to offer. After conferencing with the employer's representative and the nurse case manager, the provider signed a conference summary letter, prepared by the employer, indicating the claimant did not require a referral to any other doctor or specialist. At the treating provider's deposition, he explained that he rescinded his referral for a second specialist because he thought a referral was necessary in order for the claimant to exhaust his one-time change in provider. But after conferencing with the employer, he realized that it was not.

The Judge of Compensation Claims held that the attorney for the employer/carrier may discuss the claimant's medical condition with the claimant's provider on an *ex parte* basis and obtain medical records. However, the judge ruled the employer or its representative shall not suggest to or instruct the doctor as to what treatment he or she may provide or recommend. According to the judge, if the employer wishes to challenge a doctor's treatment or recommendations, it must do so at a conference where the claimant or his legal representative has the opportunity to be present. Otherwise, a deliberate undermining of the doctor-patient relationship would occur.

In support of his opinion, the judge cited to the First District Court of Appeal's opinion in *Holiday Inn v. Re*, 643 So. 2d 13, 15 (Fla. 1st DCA 1994)(finding that showing surveillance videotapes to claimant's authorized treating physician *did not appear* to be authorized by the limited exception to the confidentially requirements provided in § 440.13 in effect at the time), where the court held that the Legislature did not contemplate *ex parte* "mini-trials" before the health care provider nor any deliberate undermining of the doctor-patient relationship in drafting § 440.13. However, after the *Holiday Inn* decision, the Legislature amended § 440.13 to specifically allow *ex parte* discussions and conferences with the treating providers and the claimant or the employer/carrier's representatives.

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New Jersey—Professional Liability

NEW JERSEY FURTHER SOFTENS THE BITE OF THE AFFIDAVIT OF MERIT STATUTE

By Timothy R. Ryan, Esq.*

KEY POINTS:

- A new rule of court reduces the impact of the Affidavit of Merit Statute by mandating courts to hold a case management conference to address discovery issues and the need for an affidavit of merit in professional malpractice cases.
- Rule 4:5B-4 will alert plaintiffs to the need to file an affidavit of merit and when the affidavit must be filed, effectively lessening the procedural burdens imposed in professional malpractice cases by the Affidavit of Merit Statute.

Timothy R. Ryan

As of September 1, 2018, the state of New Jersey enacted Rule 4:5B-4, a new rule of court designed to reduce the number of professional malpractice cases dismissed due New Jersey Statute § 2A:53A-27, more commonly known as the Affidavit of Merit Statute. The statute requires the plaintiff in any professional malpractice action to file an affidavit from an appropriately licensed professional attesting that the defendant's actions deviated from an applicable standard of care. Pursuant to the statute, the plaintiff has to file the affidavit of merit within 60 days of the filing of the defendant's answer (or 120 days if good cause is shown to the court). Should the plaintiff fail to file a proper affidavit of merit within the 120-day timeframe, the defendant is entitled to a dismissal of the action with prejudice. The new Rule 4:5B-4 requires the court to conduct a case management conference within 90 days of the filing of the first answer in a professional malpractice case to discuss discovery-related issues, including issues arising out of the Affidavit of Merit Statute.

Since its enactment in 1995, numerous cases have chiseled away at the statute's perceived "draconian" impact on professional malpractice cases. While it was enacted with the intention of weeding out frivolous and meritless lawsuits against licensed professionals, many jurists and plaintiff attorneys view the statute as a way for professionally licensed defendants to get out of a case on a procedural technicality. To neutralize the impact, over the last twenty years, the courts have rendered opinions weakening the language of the statute. The most impactful of those cases came from the New Jersey Supreme Court in *Ferreira v. Rancocas Orthopedic Assoc.*, 836 A.2d 779 (2003), where the Supreme Court proposed holding case management conferences to address affidavit of merit issues prior to the deadline. The *Ferreira* court also carved out exceptions to the statute, permitting plaintiffs to satisfy their procedural requirements through "exceptional circumstances" or "substantial compliance" with the statute. This ruling served to weaken the impact of the statute by granting more leniency to plaintiffs (or their attorneys) who may have taken missteps during the early stages of a professional malpractice case. Importantly, however, while the decision in *Ferreira* created the framework for a conference to be held prior to the expiration of the deadline, it did not require the conference to be held. Rather, it permitted the courts to hold such a conference upon request from the parties. The new Rule 4:5B-4 effectively changes all of that.

By enacting Rule 4:5B-4, the state of New Jersey shifts the burden to the courts to ensure that a case management conference is held before the deadline expires. Under the new rule, the court—on its own—will file a notice scheduling the conference. During the conference, the parties will discuss all discovery-related issues, including the need to file an affidavit of merit. The new rule now reduces the burdens on plaintiffs to: (1) know that an affidavit of merit must be filed; and (2) know the deadline by when the affidavit of merit must be filed. Prior to the enactment of this rule, a professionally licensed defendant could file their answer, then just watch the calendar and wait for the 120-day deadline to expire. Once that 121st day hit without an affidavit of merit, the defendant could file a motion to dismiss, entitling them to a dismissal with prejudice. In this scenario, professionally licensed defendants were dismissed from actions before significant discovery was conducted and substantial legal costs were incurred.

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New Jersey—Workers' Compensation

NEW JERSEY WORKERS' COMPENSATION SECTION 40 SUBROGATION PROVISIONS BEAT BACK A CHALLENGE BY THE MOTOR VEHICLE INSURANCE VERBAL THRESHOLD

By Robert J. Fitzgerald, Esq.*

KEY POINTS:

- Employers have a right of subrogation to recover workers' compensation benefits paid as a result of a negligent third party.
- When an injured employee fails to pursue a third-party negligence action on their own, an employer can pursue subrogation directly against the negligent party.
- An employer can pursue subrogation of economic damages against a negligent party in a motor vehicle accident claim, even when the employee is barred from pursuing a non-economic recovery due to the verbal threshold.

Robert J. Fitzgerald

In New Jersey, the Appellate Division once again has concluded that an employer's Section 40 subrogation rights exist. It determined that such subrogation rights exist even when the injured worker himself is barred from pursuing damages for pain and suffering under the New Jersey Automobile Insurance Cost Reduction Act (AICRA). *New Jersey Transit Corporation, a/s/o David Mercogliano v. Sandra Sanchez and Chad Smith*, 2018 N.J.Super. LEXIS 168 (App.Div. Dec. 4, 2018).

In this case, David Mercogliano was involved in a motor vehicle collision during the course of his employment with NJ Transit. The vehicle driven by Mercogliano was owned by NJ Transit and driven by Sandra Sanchez. Chad Smith was the owner of the other vehicle involved. Following the accident, NJ Transit's workers' compensation carrier paid Mercogliano $33,625.70 in workers' compensation benefits under the Workers' Compensation Act. Mercogliano did not pursue a negligence action.

At that point, NJ Transit initiated a Section 40 subrogation action, which gives the employer the right to pursue the third-party tortfeasors for recovery of damages paid to injured employees. During the litigation of the subrogation claim, it was stipulated that Mercogliano was not permanently injured under AICRA—a/k/a the verbal threshold—and therefore, he was barred from pursuing non-economic damages for pain and suffering. Sanchez and Smith then filed for summary judgment, arguing that since Mercogliano was barred from filing a third-party claim for non-economic damages because of the verbal threshold, NJ Transit's subrogation claim for economic damages must also be barred.

The motion judge held AICRA trumped the Workers' Compensation Act. Therefore, since NJ Transit, as subrogee, stands in the shoes of the injured employee and has no rights superior to the injured employee under AICRA, Mercogliano was fully compensated by the workers' compensation carrier for his medical expenses and wage loss, and he suffered no uncompensated economic loss. Finally, the judge dismissed the subrogation action since Mercogliano was fully compensated for economic damages, concluding the workers' compensation carrier does not have an independent right to subrogate against a tortfeasor when the injured employee is unable to establish a cause of action against the tortfeasor.

On appeal, the court analyzed the conflict between the Workers' Compensation Act and AICRA on the issue of subrogation. The court noted that the Workers' Compensation Act is the exclusive remedy for an employee who suffers a work-related injury. As long as the employee's injuries were caused by a third-party and not the employer, the act gives the workers' compensation carrier an absolute right to seek reimbursement from the tortfeasor for the benefits it has paid to the injured employee. Under Section 40, the workers' compensation carrier is entitled to reimbursement whether or not the employee is fully compensated. *Utica Mut. Ins. Co. v. Maran & Maran*, 667 A.2d 680, 682 (N.J. 1995). Moreover, under AICRA, the workers' compensation benefits are the primary source of recovery for injuries suffered by employees in a work-related automobile accident, and PIP insurers are relieved from the obligation to pay medical expenses.

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AN ANALYSIS OF COMMONLY USED STATISTICS

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II. ODDS RATIOS

Odds Ratio is a way to measure the association between two things. In other words, it is the odds of an event occurring in one group compared to the odds of it occurring in another group. I think of the following expression for OR:

$$OR = \frac{\textit{Odds of disease with exposure}}{\textit{Odds of disease without exposure (control)}}$$

Of course, this is a little shortcut. Taking a step back, the odds that something will occur is (exposed and diseased/exposed and healthy) over (not exposed and diseased/not exposed and healthy). So a more complicated way of saying OR is:

$$OR = \frac{\frac{\textit{Exposed and diseased}}{\textit{Exposed and healthy}}}{\frac{\textit{Not exposed and diseased}}{\textit{Not exposed and healthy}}}$$

Table 1: OR Rules of Thumb:

OR = 1	No change in frequency with exposure
OR > 1	Increased frequency with exposure
OR < 1	Decreased frequency with exposure

OR is useful when you lack good data on the size of the population or if the population you are measuring is small. In general, the RR and OR should be close.

III. RR AND OR IS LIKELY BS

Although it is possible to generate RR and OR numbers, the question becomes whether to believe these numbers, approximate reality. If a confounder is adjusted out and one sees a large change in either RR or OR, then one must be suspicious for a spurious association, i.e., statistical garbage. Also, one should never turn off the common sense critical factor with all statistics since the assumption is that all people will lie and fudge to make their data look better. Does the denominator make sense? Is there a proper control? Are the underlying dataset numbers "normalized," "adjusted" or in any way tinkered with? A high level of skepticism should be the default philosophical mindset when reviewing any statistical data.

IV. CONFIDENCE INTERVALS

A confidence interval (CI) is asking how sure your results are, not just the result of random chance. A common misconception is to believe that the actual, real value lies somewhere within the confidence interval. The CI says nothing about the probability of what the real answer should be since this value is unknowable. The standard in science is to set the confidence interval at 95%. (This was likely born out of practical concerns. In an age before calculators, the math was easier if 95 were used as a default. However, computers have made computation so easy, I would prefer a higher number.) This means there is a 5% chance that your data is the result of just random chance. The CI is usually expressed in two numbers, like this: 95% CI = 0.4 – 0.6. The numbers are the upper and lower confidence limits. If one is comparing a sample to a null hypothesis, then if CL is ever ≥ 1, then there is no difference between what you are looking at. Also, the larger the CI range, the less confident or statistical power your results have.

For the more technically inclined, 95% CI = $\bar{X} \pm (1.96 S_X)/\sqrt{n}$, where n is the sample size, with $\bar{X}$ as the mean of your sample, and S_X is the standard deviation between the sample numbers. Thus, CI is really just determining the margin of error within the sample set! Pretty cool stuff, I know.

V. P-VALUE

The p-value is the probability that the null hypothesis is true. In other words, if testing a drug, what is the probability that the numbers I collected show no real effect but are rather just random events? If the p-value is very small, then I can say I likely got something. Generally, science uses 0.05 as the threshold. Therefore:

- P < 0.05 means there is a statistically significant difference between two groups, i.e., got a drug.
- P > 0.05 means there is no statistically significant difference between the two groups, i.e., drug not doing what I wanted.

Skepticism should increase the closer one gets to 0.05.

In our modern age, more and more data is generated and organized into scientific papers. I realize that only a sadist will have read the entirety of this article with rapt interest. However, that is not the point. My hope is that if you ever find yourself lost in a sea of this technical gobbledygook, you remember this article and use it as a key so you can navigate your way out. ■

A MESSAGE FROM THE EXECUTIVE COMMITTEE

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More than that, however, we fundamentally recognize that our clients have a wide array of defense firm options. When assigned a case, we will re-commit this year in demonstrating why our defense is different from—and a better value than—that which is offered by our competition.

How do we display that differentiation? We reinforce our culture hallmarks—humility and unselfish teamwork. These values exponentially multiply our experience, defense industry loyalty, regional presence, quality service and second-to-none work ethic.

The quote at the beginning of this article is taken from *Legacy*, after the author quizzically observed two of the world's best rugby players sweeping the locker room (shed) of bloody gauze, athletic tape and dirt clumps after a competition.

He asked the two players what they were doing.

They responded: "Never be too big to do the small things that need to be done." They went further and said, "Do it properly . . . so no one else has to."

As we progress further into 2019 and pledge to furnish superior service to our clients, let's ponder James Kerr's question: "Whether excellence—true excellence—begins with humility, a humble willingness to sweep the sheds?" ■

EX PARTE DOCTOR CONFERENCES

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Interestingly, in his opinion, the judge specifically pointed to recent case law clarifying the legislative intent after the statutory change, indicating that claimants no longer enjoy the right to be present at such conferences. *See*, *S & A Plumbing v. Kimes*, 756 So. 2d 1037 (Fla. 1st DCA 2000). Further, the judge uses the "mini-trial" phrase, used by the First District Court of Appeal in *Holiday Inn v. Re,* to interpret the specific statutory language in effect at that time in order to support his ruling in this matter, despite the fact that *Holiday Inn* has been overruled by statute. It appears the judge's opinion is inconsistent, since he uses phraseology employed in interpreting an old version of the statute and includes citations to case law regarding legislative intent directly conflicting with the ruling requiring claimants to be present in certain instances. As such, it is unclear how the judge's opinion in this matter would hold up if challenged on appeal.

Although this is only a Judge of Compensation Claims evidentiary order, it sets forth a specific ruling limiting the content of *ex parte* doctor conferences, and it could be used by claimants in other districts in similar motions as persuasive case law. Further, be prepared to provide a specific independent basis for any provider's new/change in opinion if faced with a similar evidentiary motion limiting conferences. ■

NEW JERSEY FURTHER SOFTENS THE BITE

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The biggest impact from Rule 4:5B-4 may be in professional malpractice cases where the plaintiff's attorney is not experienced in professional malpractice actions and is unfamiliar with the procedural requirements. Prior to the new rule, neither the court nor the defendant were required to alert the plaintiff or their attorney to the need to file an affidavit of merit. Additionally, neither the court nor the defendant were required to alert the plaintiff that a filed affidavit of merit was deficient in some way (for example, an engineer cannot file an affidavit of merit against an architect). In the case of a deficient affidavit of merit, the defendant was permitted to wait for the 120 days to expire and file a motion to dismiss, asserting that the affidavit of merit was deficient and that it was entitled to a dismissal of prejudice. All of that has now changed as Rule 4:5B-4 mandates a conference be held to ensure such issues are addressed and acted upon prior to the expiration of the deadline.

In its present form, Rule 4:5B-4 will work to reduce the likelihood that a professionally licensed defendant will be dismissed from a professional malpractice case with prejudice pursuant to the Affidavit of Merit Statute. Licensed professionals must now be aware that obtaining an early dismissal of a professional malpractice case under the Affidavit of Merit Statute is more unlikely to occur than likely. Rule 4:5B-4 will also increase the burden on professionally licensed defendants as they will incur additional expenses and legal fees through increased discovery and attendance in conferences to address any affidavit of merit issues. In the end, there will be an increase in the number of New Jersey professional malpractice cases that are permitted to proceed forth. ■

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Brooks Foland (Harrisburg, PA) received a defense verdict from a Schuylkill County, Pennsylvania jury in a case involving an accident on a haunted hayride and a claim of Complex Regional Pain Syndrome. We represented a volunteer fire company that hosts an annual haunted hayride on its property to raise money. The plaintiff, then a 12-year-old, went to the hayride event as an invitee and was convinced by other teens to help scare people on the wagons at one of the skits in the woods. Without the knowledge of the fire company, the plaintiff joined the teens, got into costume, and began scaring people in wagons as they passed by. She did this for about an hour, until one of the wagons allegedly ran over her left foot. The plaintiff sued the fire company. In defending the fire company, Brooks raised the many defenses available under the Political Subdivision Tort Claims Act. At trial, the plaintiff was required to prove either that the driver of the tractor pulling the wagon did so negligently or that the accident resulted from a dangerous condition of real property in the care, custody and control of the fire company. The plaintiff suffered no fracture, but was soon diagnosed with Complex Regional Pain Syndrome. Her treatment regimen ran approximately seven to eight weeks. Thereafter, she returned to school and resumed playing sports. In the following years, the plaintiff suffered subsequent episodes of CRPS, sometimes in different limbs, sometimes associated with new trauma, but often not associated with any trauma at all. On causation and damages, the defense retained a renowned pediatric rheumatologist from CHOP. The jury was captivated by this doctor's unique style and presentation. The initial demand had been $450,000. At the time of the pre-trial, the demand was lowered to $250,000, and a nominal amount was offered by the carrier for the fire company prior to trial. The jury found no negligence on the part of the fire company.

Paul Lees (Allentown, PA) successfully obtained the dismissal of a local college from a wrongful death lawsuit involving a pedestrian killed in a motor vehicle accident while attempting to cross a street on our client's campus. The decedent had attended a soccer game at the college campus and had parked in one of the campus parking lots. While attempting to return to his vehicle after the game, he was struck and killed by the co-defendant driver as he crossed a city-owned street on the defendant's campus. The plaintiff's complaint alleged the college had voluntarily assumed the duty to provide safe crossing by encouraging visitors to use its campus lots. Parking in those lots required one to cross the street at issue. The college had previously provided assistance through the use of traffic devices, campus police, and city police to direct and control traffic. The court held that the college did not owe its invitees any duty to control traffic on a municipal street. After being afforded the opportunity to amend the complaint, a second motion to dismiss was pursued on behalf of the college and was granted by the court.

Lori Quinn and **Lindsay Korn** (Melville, NY) obtained summary judgment in a slip and fall case in the New York Supreme Court, Queens County. After falling on a sidewalk, the plaintiff alleged that the defendants, the homeowners of the abutting property, were negligent in failing to maintain and/or repair a raised and uneven sidewalk. The plaintiff alleged the defendants were liable under theories of special use and violation of New York City Administrative Code §§ 7-210. Our defense strategy cited the exception in § 7-210, where the owner of a two-family residential property is statutorily exempt from liability for the sidewalk when the property is owner-occupied and used for exclusively residential purposes. The court agreed that our client was not liable for the condition of the sidewalk under New York City Administrative Code § 7-210. Summary judgment was granted against the plaintiff and on all cross-claims of the city.

Claire Ventola and **Carol Vanderwoude** (Philadelphia, PA) prevailed on a motion for summary judgment in Philadelphia Court of Common Pleas in a catastrophic injury case involving two adult plaintiffs and their two minor children. The four plaintiffs were struck by a vehicle while crossing a public roadway after leaving our client's banquet hall. One plaintiff sustained a permanent and significant traumatic brain injury and orthopedic injuries and will require lifelong medical care.

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse...

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The remaining three plaintiffs, including the children, sustained orthopedic injuries. Two lawsuits were filed and consolidated. In each, the plaintiffs sued the driver of the striking vehicle (who died several months after the lawsuits were filed), the banquet hall operator (our client) and the owner of the premises. After several rounds of preliminary objections, the remaining allegations against our client were that it was negligent in failing to provide adequate parking and in allowing vehicles to double-park in front of its premises. There was no evidence that our client instructed or directed the vehicle drivers to double-park in front of its premises. Our summary judgment motion was granted, following the precedential decision of the Pennsylvania Superior Court in *Newell v. Montana West*, 154 A.3d 189 (Pa. Super. 2017), which squarely held that no duty of care is owed by a property owner/operator under these circumstances.

Keith Andresen and **Adam Calvert** (New York, NY) obtained summary judgment in a case where the plaintiff alleged he tripped and fell at a Manhattan restaurant. He allegedly tripped while leaving his table and sustained a serious leg fracture that required surgery. We represented the building developer and the alleged property manager. We obtained the leases and proved that our client did not own or operate the restaurant or manage that specific portion of the building at the time of the accident. The co-defendant, the restaurant operator, and the plaintiff opposed our motion, citing that discovery had not yet taken place. The court agreed with our argument and dismissed all direct and cross claims.

Ralph Bocchino and **Colin O'Brien** (Philadelphia, PA) obtained summary judgment in Philadelphia County in a case that involved alleged serious injury as a result of a fall at a shopping center. Our clients not only had a triple net lease in effect, but they also had indemnity and insurance clauses in their lease. The summary judgment request was granted, providing our client, the shopping center, with contractual indemnity, and ordered the additional defendant to defend and indemnify them at trial.

HEALTH CARE DEPARTMENT

Walter Kawalec and **Lynne Nahmani** (Mount Laurel, NJ) were victorious in the New Jersey Appellate Division. The case involved a woman with significant cardiac problems who suffered cardiac arrest and death. Her estate alleged that our clients, a medical resident and an intern, improperly administered certain pharmaceuticals that lead to her death. The plaintiff originally named two physicians as experts, a cardiologist, who was offered to testify to the standard of care, and a physician board certified in occupational medicine, medical toxicology and emergency medicine, who was initially named to give testimony on causation. Before deposition, the expert cardiologist withdrew. The plaintiff did not obtain the services of another expert, choosing instead to attempt to proceed with the other expert providing both standard of care and causation testimony. The Appellate Division affirmed the decision of the trial court which dismissed the case, finding that because the expert did not devote the majority of his professional time in the year prior to the decedent's death in a clinical practice that encompassed the medical condition or procedure at issue, he was not qualified under New Jersey law to offer standard of care testimony. As such, the dismissal of the complaint was affirmed.

Daniel Sherry (King of Prussia, PA) obtained a defense verdict after a week-long jury trial in Montgomery County. Dan defended an obstetrician/gynecologist in a suit involving complications from a C-Section. The plaintiff had a major post-partum hemorrhage two weeks later and underwent a hysterectomy, thereby losing the opportunity and ability to have additional children. The case was defended on both standard of care and causation, the defense position being that the care was appropriate and that taking the plaintiff back to the OR carried significantly more risks in this situation. The jury deliberated for 45 minutes and found the physician not negligent.

PROFESSIONAL LIABILITY DEPARTMENT

James McGovern (Pittsburgh, PA) prevailed in an arbitration proceeding on behalf of an engineering firm that had designed a 30-foot high segmented retaining wall at a craft brewery in Pittsburgh. During construction, the supplier of the blocks used to construct the wall raised issues with the engineer's design. The project owner, block supplier and general contractor jointly retained another engineer to review the original design, and it was alleged the original design was faulty in several respects. Our client refuted the criticisms of his design but agreed to redesign the wall. The wall was torn down and rebuilt with product obtained from another supplier. Litigation ensued after completion to recover additional costs incurred by all parties. The arbitration panel unanimously ruled in favor of the engineer and denied all claims and cross claims against our client.

** Prior Results Do Not Guarantee A Similar Outcome*

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Ray Freudiger (Cincinnati, OH) successfully defended an insurance agency and agent in the Twelfth Appellate District of Ohio. The plaintiffs contacted the insurance agent to obtain insurance for two residential properties. The agent obtained the requisite information for the insurance applications from the plaintiffs, including their primary mailing address, a post office box address. The agent advised them that their only insurance option was through the Ohio Fair Plan (OFP), as neither property had been insured in the prior three years. The plaintiffs gave the agent a check for the premium. The agent explained that the OFP would inspect both properties prior to issuing coverage and that coverage would be cancelled if any required repairs were not made. The OFP sent a notice of cancellation to the post office box listed on the insurance application. It also sent a refund check to the agent. The plaintiffs claimed that they never received the notice of cancellation or the refund check. They sued OFP, the agent and insurance agency. After written briefs and oral argument, the court of appeals affirmed summary judgment in favor of the agent and agency on the grounds that there was no evidence that the agent represented to the plaintiffs that the property had insurance coverage prior to a fire at one of the properties. Further, although the plaintiffs claimed that they never received notice of cancellation, the insurance application indicated that they would be informed directly from the insurer whether or not coverage was going to be provided. Therefore, the agent was not required to inform the plaintiffs of the cancellation. The court also held that the plaintiffs failed to present any evidence the agent fraudulently concealed the refund check from them, even if they did not receive the check.

James McGovern (Pittsburgh, PA) was successful in having the plaintiffs voluntarily dismiss their case, with prejudice, against a life insurance agent. The plaintiffs sued the agent who sold them a disability insurance policy, and they also asserted claims against the insurer for wrongful denial of the disability claim. The wife/plaintiff had filed a disability claim based upon her inability to work as a registered nurse due to the alleged gradual worsening problems with her vision. She claimed that she told the agent of her pre-existing eye problems at the time of application, an assertion he denied. Through third-party discovery and her deposition testimony, it became apparent she had given false information to the carrier regarding her pre-existing conditions and employment terminations. She had been terminated from three hospitals for-cause for on-the-job intoxication, but she had asserted that the discharges were due to her inability to perform her duties. Faced with sanctions, the plaintiffs dismissed their case.

Walter Kawalec and **Eric Brown** (Mount Laurel, NJ) were victorious in the New Jersey Appellate Division. In this insurance coverage matter, our client provided additional insured coverage for the landlord of our client's insured. Suit was brought by an employee of the insured against the landlord, who sought coverage from our client on a primary basis. Coverage was declined. In a subsequent suit seeking defense and indemnification, the Law Division judge found that primary coverage was owed under our client's policy, finding that the operative language in the lease—that the landlord would be protected from "any and all liability"—must be read to protect against "any and all claims." The Appellate Division accepted our argument, set out in the appellate brief, that this conclusion was error. Our client's policy only provided primary coverage if the lease between the landlord and the insured specifically required primary coverage. Nothing in the lease specified required primary coverage, however. We further argued that the Law Division judge erred by reading "any and all liability" to mean "any and all claims," therefore requiring primary coverage, as "liability" and "claims" are not synonymous. We argued that since the landlord had other primary coverage, the lease terms did not require our client's policy to provide primary coverage here because the landlord would not suffer any "liability" for any damages or settlement, as its own insurer's policy unquestionably provided primary coverage and our client's policy provided excess coverage. The Appellate Division agreed and reversed the trial judge's decision.

Jack Slimm and **Arthur Wheeler** (Mount Laurel, NJ) obtained summary judgment in a complex legal malpractice action. The case arose out of two underlying cases in which our client, a well-known plaintiff's personal injury practitioner, was sued for legal malpractice because he, along with a successor attorney who took over the cases, failed to obtain an appropriate recovery. After motion practice, the court granted our summary judgment motion, finding that the plaintiff failed to prove a deviation from the standard of care in connection with the settlement that was achieved for the plaintiff.

Christopher Boyle (King of Prussia, PA) obtained summary judgment on behalf of a chief of police who investigated

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embezzlement by the manager of a VFW Post canteen. The chief's investigation included a forensic accounting report by a local accountant that showed over $60,000 in theft. After the criminal court dismissed the charges, this suit followed. The plaintiff claimed that he could account for the missing money, but he was more than a little murky in response to discovery. At deposition we were able to take apart his personal accounting method and show that he still could not account for $42,000 of the missing money. Summary judgment was granted.

Michael Detweiler (King of Prussia, PA) and **Benjamin Levine** (Philadelphia, PA) prevailed on a motion to dismiss on behalf of the City of Philadelphia. The plaintiff claimed that she fell at the Philadelphia International Airport and allegedly injured her left shoulder, requiring surgery. The plaintiff's demand had been $250,000 at the time of the case management conference. It soon became clear that the plaintiff, based in New York, would not cooperate with her counsel in scheduling depositions and independent medical examinations in Philadelphia. Arguing that these events should take place in Philadelphia owing to venue, Ben Levine filed a series of motions to compel, and he obtained several favorable orders, which eventually provided the basis for a motion to dismiss. The court dismissed the entire civil action, with prejudice.

Christian Marquis (Pittsburgh, PA) obtained summary judgment on behalf of a large municipality that borders the City of Pittsburgh. The plaintiff claimed that a defective condition of a sidewalk caused her to fall. The sidewalk was located at the corner of an intersection of two state roads within that municipality. On summary judgment it was argued that the sidewalk was not located within the right-of-way of a street owned by the municipality and, therefore, the sidewalk exception to governmental immunity did not apply. The plaintiff, in turn, argued that this element of the sidewalk exception was no longer valid in light of the Pennsylvania Supreme Court's holding in *Walker v. Eleby*. In response, Christian argued that the holding in *Walker* only applied to cities of the first and second class and that the municipality in question is a home rule chartered municipality. The court agreed and granted our motion for summary judgment.

Joseph Santarone (Philadelphia, PA) secured dismissal of a police officer on preliminary objections in the Philadelphia Court of Common Pleas. The plaintiff claimed that the police officer had defamed him and cast him in a false light when accusations against the plaintiff appeared on a third party's website. Absent any link between the website material and the police officer, Joe effectively argued there was no indication that our client was the source and that any filings with the EEOC and PHRC were protected. The court agreed and granted the preliminary objections.

William Waldron and **Timothy Ryan** (Roseland, NJ) obtained dismissal of a civil rights action against a planning board engineer. The plaintiff, a sophisticated commercial real estate developer, brought constitutional claims against a New Jersey borough and its planning board's engineer, alleging inverse condemnation and violations of due process relating to a 14-acre property. The plaintiff intended to develop the property into residential units, retail and commercial structures, and a large parking deck. The plaintiff alleged the engineer violated its constitutional rights by refusing to accept its site plan application for the development project and by preventing the plaintiff's application from going before the planning board for approval. The plaintiff claimed he was entitled to just compensation because he alleged the engineer's actions constituted an unconstitutional taking of its property. Dismissal was granted on the grounds that the engineer, as a consultant for the planning board, did not have the authority or power to determine what applications go before the planning board, and because the plaintiff did not exhaust all of his administrative remedies prior to instituting the civil rights action.

Terrance Bostic (Tampa, FL) and **Samuel Cohen** (Philadelphia, PA) obtained a defense verdict in a binding FINRA arbitration in Boca Raton, Florida. Terry and Sam represented a broker-dealer who was sued in arbitration by two claimants, retired brokers, who sought $5 million in past and future benefits under a retirement program that paid override fees to retired brokers on books of business they had developed decades ago. Terry and Sam defended the case on the basis that their broker-dealer client had no liability to the plaintiffs because the retirement program was already terminated by a predecessor broker-dealer prior to our client's acquisition of that predecessor broker-dealer. In addition, Terry and Sam defended the case on the basis that the applicable contracts allowed the retirement program to be modified or terminated.

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On The Pulse...

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WORKERS' COMPENSATION DEPARTMENT

Linda Wagner Farrell (Jacksonville, FL) successfully defended a petition for permanent total disability benefits, supplemental benefits and penalties, interest, costs and attorneys fees. The judge entered a Final Compensation Order, finding the claimant was not permanently and totally disabled despite a substantial, but not exhaustive, job search. The judge found the claimant's job search was not sufficient or reasonable in light of the totality of the circumstances, which include her physical impairment, age, employment history, training, education, motivation, work experience, work record, and diligence to establish entitlement to permanent and total disability benefits. The judge held the testimony of the employer/carrier's vocational experts was persuasive in his decision to deny benefits, finding the claimant was employable with the assistance of vocational counseling.

Tony Natale (Philadelphia, PA) defended a Philadelphia-based insurance company with fee review *de novo* hearing requests made by a psychologist. The requests alleged that the reduction provisions of the Workers' Compensation Act (which incorporate Medicare reduction codes) are unconstitutional and "unfair." The medical provider's attorney attempted to sway the court with a claimant-friendly decision from a well-known judge on the exact same issue. Tony argued that the court is not bound by a decision of a workers' compensation judge in another action, and he submitted evidence to demonstrate that four of the six original fee review applications were untimely filed, while the other two applications were correctly paid under the reduction provision standards and Medicare standards. The court dismissed all six *de novo* requests on that basis.

Tony Natale (Philadelphia, PA) successfully defended a Philadelphia-based university in the litigation of a claim petition where the claimant alleged that, during the course and scope of her employment with the university, she fell as she was walking across a street. She alleged injuries to her neck and shoulder; however, she was able to return to work at her pre-injury duties. Several weeks later, the claimant was taking the company elevator when she alleged the elevator suddenly dropped several floors. She was not jostled in the elevator nor did she strike any part of her body against the elevator walls. Nonetheless, she alleged injuries in the form of a lumbar disc herniation and an aggravation of the previous injuries she sustained when she fell in the street. The claimant presented medical evidence that both incidents caused disc herniations in the neck and back, along with a shoulder tear that would require surgery. Tony presented medical evidence supportive of a minor strain of the neck and hip as the only nature of injury arising out of the slip and fall. In asserting absolutely no injury in the elevator incident, Tony presented evidence from the employer confirming that the claimant's date of alleged disability from her work injuries coincided with the date she was discharged for cause for various work rule violations. The judge found that the only injuries sustained in the case were minor strains to the neck and hip, and the claimant was pronounced fully recovered from those strains.

Tony Natale (Philadelphia, PA) successfully defended a Philadelphia-based university in an action by a local medical provider for submissions of compound cream medication. The provider submitted the medication to the carrier via three medical specialists from the same medical group. The first doctor submitted an expensive bill for the compound cream to the carrier for payment. A second doctor from the same office submitted another expensive bill for the same compound cream, allegedly based on an exam that took place on the same day as the first doctor's exam. Then a physician's assistant submitted an expensive bill for the same compound medication, allegedly arising out of an exam she had with the claimant on the same day as the first two doctors. The carrier refused payment of the bills and filed a Utilization Review Request against all three providers. The UR requests came back in the carrier's favor, and the provider's attorney filed a review petition to challenge the UR determinations. Tony defended the review by establishing that the provider illegally billed the carrier for exams that allegedly took place on the same day, resulting in the same medication being prescribed and submitted for payment three separate times by three separate practitioners. The judge found the medical provider not to be credible and upheld the UR determination in its entirety.

Michele Punturi (Philadelphia, PA) successfully defended a contracting and demolition company in Montgomery County, Pennsylvania. The claimant alleged repetitive trauma due to his job duties, resulting in an aggravation of his degenerative back and leg conditions that required surgery and bone grafting. He described his job duties as: eight to ten hours a day, five days a week; involving bending, lifting and carrying blocks, bags of concrete and mortar; shoveling; operating

** Prior Results Do Not Guarantee A Similar Outcome*

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On The Pulse…

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equipment including jumping jacks and jack hammers; with lifting between 90 to 100 lbs. The claimant acknowledged treating for his back and leg symptoms prior to the work injury and that he last treated for back issues six months prior to beginning his work with the employer. He testified that his pain significantly increased after working with the employer. The claimant's medical expert opined that the claimant's physical labor and work activities resulted in progression of his degenerative condition, that surgery was reasonable and necessary, and that he was completely disabled indefinitely. On cross-examination, however, the claimant's medical expert admitted that he had not reviewed the claimant's medical records dating back multiple years, nor had he compared old records and post records in rendering any opinions. Michele presented two fact witnesses who confirmed that the claimant failed to report any work injury, that his work activities caused pain, or that the scheduled surgery he reported was in relation to his job. The Workers' Compensation Judge concluded that, based upon the testimony of the fact witnesses and defense medical expert, who reviewed all pre- and post-medical records, the claimant failed to meet his burden of proof.

Ashley Talley (Philadelphia, PA) was successful in substantially limiting the treatment costs by way of a Utilization Review Determination and, subsequently, in litigation. The claimant suffered significant work injuries to the left elbow, lumbar spine, cervical spine and left shoulder on February 16, 2016. As a result, the carrier was on the risk for considerable treatment, including chiropractic modalities, which, in total, comprised a significant portion of the money being paid on the claim each year. Ashley was successful in limiting that treatment by way of a favorable Utilization Review Determination, which was then challenged by the claimant in litigation. However, the judge found that the treatment was not reasonable or necessary, nor could it be justified. The petition was denied, and the Utilization Review Determination was upheld in its entirety. ■

On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

John Hare (Philadelphia, PA) filed an *amicus curiae* brief for the Pennsylvania Defense Institute urging the Pennsylvania Supreme Court to reverse two lower court decisions that deprived the defendant school district of the ability to challenge, on the merits, an injunction related to the district's collection of school taxes. The Supreme Court unanimously reversed the lower courts and ordered them to address the district's challenge to the injunction. *Wolk v. Sch. Dist. of Lower Merion*, 2018 Pa. LEXIS 6425 (Pa., Dec. 11, 2018).

Audrey Copeland (King of Prussia, PA) convinced the Third Circuit Court of Appeals to affirm the Eastern District Court's order dismissing the complaint of the plaintiff, a former township tax collector, which asserted claims against public officials concerning his removal from office and their alleged interference with his duties. The court reasoned that *Younger* abstention was proper and the plaintiff's claims were otherwise insufficient to withstand dismissal under Fed. R. Civ. P. 12(b)(6) where the alleged "conspiracy" by the defendants was a lawful state mandamus action to compel him, as an elected official, to perform his duties as required by state and local law. *Cutler v. Green, et al*, 2018 U.S. App. LEXIS 30668 (Oct. 30, 2018). ■

** Prior Results Do Not Guarantee A Similar Outcome*

On The Pulse…

OTHER NOTABLE ACHIEVEMENTS*

2019 SHAREHOLDER CLASS AND SPECIAL COUNSEL PROMOTIONS

We are pleased to announce that 13 associates and two special counsel have been elevated to shareholder. Additionally, the firm has promoted four associates to the position of special counsel. The new shareholders are:

- Philadelphia, PA: Mohamed N. Bakry, Nicholas D. Bowers, Raphael M. Duran, Sang Woo Lee and Daniel H. Tran
- Scranton, PA: Sarah E. Argo
- Harrisburg, PA: Allison L. Krupp
- Mount Laurel, NJ: Ashley L. Toth
- Roseland, NJ: Ryan Thomas Gannon and Timothy J. Jaeger
- Wilmington, DE: Sarah B. Cole
- Cleveland, OH: Jason P. Ferrante
- Fort Lauderdale, FL: Patrick M. Delong
- Orlando, FL: Andrea Diederich and Chanel A. Mosley

The firm's new special counsel are:

- Adam Levy in Mount Laurel, NJ
- Scott A. Ginsberg in New York, NY
- Karen 'Missy' E. Minehan in Harrisburg, PA
- Heather A. Tereshko in King of Prussia, PA

MARSHALL DENNEHEY JOINS THE COALITION AGAINST INSURANCE FRAUD

Marshall Dennehey Warner Coleman & Goggin has joined the membership of the Coalition Against Insurance Fraud, which is a national alliance of insurers, government agencies and consumer organizations dedicated to combating all forms of insurance fraud through advocacy, public education and research. **James Cole** (Philadelphia, PA) and **Jeffrey Rapattoni** (Mt. Laurel, NJ), co-chairs of the Fraud/Special Investigation Practice Group, have been working with the Coalition and its member organizations for several years. Both attorneys play a vital role in educating the Coalition's membership about best practices in identifying, investigating and defending against insurance fraud claims.

RECOGNITION

James P. Hanratty (Jacksonville, FL) has been inducted into the membership of the American Board of Trial Advocates, a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution. Membership is by invitation only and is reserved for trial lawyers who meet certain qualifications and have significant experience in leading civil jury trials to verdict.

Congratulations to **Elizabeth Ferguson** (Jacksonville, FL) for being recognized as a 2019 "Ultimate Attorney" in construction law by the *Jacksonville Business Journal*. The *JBJ* began this program five years ago to honor those who have helped elevate the legal profession and shape Jacksonville's business community. Honorees are selected by members of the local legal community based upon their professional accomplishments and community involvement.

BEST LAW FIRMS

Marshall Dennehey Warner Coleman & Goggin has been named a "2019 Best Law Firm" in multiple practice areas, both nationally and across numerous regions of the country, by U.S. News - Best Lawyers®. Additionally, our Appellate Advocacy and Post-Trial Practice Group was ranked both nationally and in the Philadelphia region for the very first time as an outstanding practice. These rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in the field and review of additional information provided by law firms as part of the formal submission process. To be eligible for a 2019 ranking, a law firm must have at least one lawyer recognized in the 24th Edition of The Best Lawyers in America list for that particular location and specialty.

Ranked firms, presented in three tiers, are listed on a national and regional-based scale. Firms that received a tier designation reflect the high level of respect a firm can earn among other leading lawyers and clients in the same communities and practice areas. A description of the selection methodology may be found at http://bestlawfirms.usnews.com/methodology.aspx.

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

SPECIAL APPOINTMENTS

Matthew P. Keris (Scranton, PA) has been elected the Atlantic Regional Director of the Defense Research Institute, the country's leading organization of defense attorneys and in-house counsel. Matt previously was DRI's Pennsylvania State Representative and Membership Chair. He will serve a three-year term on the organization's Board of Directors, to culminate in 2021.

Dana A. Gittleman (Philadelphia, PA) has been selected to serve as the 2019 Board Observer for the Support Center for Child Advocates as part of the Philadelphia Bar Foundation's Board Observer program. The Board Observer program is a partnership between the Philadelphia Bar Foundation and the Philadelphia Bar Association's Young Lawyers Division. Designed to provide young lawyers with the opportunity to develop leadership skills, learn about nonprofit governance and make connections in the nonprofit community, the program pairs attorneys with a Philadelphia nonprofit organization for a one-year time period.

SPEAKING ENGAGEMENTS

Jeffrey Rapattoni (Mt. Laurel, NJ) presented a webinar "Data Driven Major Case" on behalf of IASIU, New York Chapter. Data driven major case is fast and effective and keeps a carrier ahead of the curve when it comes to fraud loss. This presentation discussed the integration of Data and Major Case and where and how the two intersect. Also discussed was how the data is collected and how it can be accessed and used from investigation to pre-suit demand. The International Association of Special Investigation Units (IASIU) is a non-profit organization founded in 1984 by insurance fraud investigators.

Paul Johnson (Mt. Laurel, NJ) co-presented "New Jersey Recent Court Rulings Affecting the Asbestos Litigation: Proving Cross-Claims, Forum Non Conveniens, Bankruptcy Trusts, Bare Metal, etc." at this year's New Jersey Asbestos Litigation Conference hosted by Harris Martin Publishing.

Anthony Natale and **Ashley Talley** (Philadelphia, PA) presented "The Interplay Between Traumatic Brain Injuries and Fraud in Workers' Compensation" at the Pennsylvania Insurance Fraud Conference. In the workers' compensation field, one of the biggest red flags for fraud is the nature of injury, and, more recently, injuries involving concussion, post-concussion or similar traumatic head injuries. Attendees gained insight into how to identify, manage and fight claims for traumatic head injuries that are diagnosed based upon subjective complaints alone. **James Cole** and **Jennie Philip** (Philadelphia, PA) also presented "The Real Housewives of Fraud." The session explored the lives of some "real" housewives who find themselves in precarious insurance situations. Through their stories, Jim and Jennie addressed the effect a fraudulent insurance claim had on an innocent co-insured; investigated luxury contents; and probed the legal issues concerning mysterious disappearance claims.

Lary Zucker (Mt. Laurel, NJ) was a featured speaker at the 2018 International Association of Amusement Parks and Attractions Expo in Orlando Florida. Lary led an educational panel and was a featured speaker at the annual New Jersey Amusement Association Breakfast Meeting. ■

** Prior Results Do Not Guarantee A Similar Outcome*

Pennsylvania—Automobile Liability

PENNSYLVANIA SUPREME COURT TO CONSIDER PHYSICAL EXAM REQUIREMENTS UNDER AUTOMOTIVE INSURANCE POLICIES

By Patrick J. Furlong, Esq.*

KEY POINTS:

- Pennsylvania Supreme Court to consider whether policy language requiring insured seeking benefits to submit to insurer medical examination violates the Pennsylvania MVFRL and public policy.
- Such insurance language may violate 75 Pa.C.S. § 1796(a).

Patrick J. Furlong

The Pennsylvania Supreme Court will consider, upon certification from the U.S. Court of Appeals for the Third Circuit, whether common auto policy language requiring a person seeking coverage or benefits to submit to medical examinations at the request of the insurer violates sections of the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL) and public policy. Specifically, many auto policies contain general provisions that require any person or entity seeking benefits under the policy to submit to medical examinations, at the request of the insurer, in order to qualify for the available coverage. However, Section 1796(a) of the MVFRL states, "[w]henever the mental or physical condition of a person is material to any claim for medical, income loss or catastrophic loss benefits, a court of competent jurisdiction . . . may order the person to submit to a mental or physical examination by a physician." Further, the section states that any such order "may only be made upon motion for good cause shown." The Pennsylvania Supreme Court has not previously considered the interplay between the statutory language and the contractual requirements often contained in auto insurance policies.

Two cases, *Sayles v. Allstate Ins. Co.*, 260 F.Supp. 3d 427 (M.D.Pa. 2017) and *Scott v. Travelers Commercial Ins. Co.*, 2016 U.S.Dist. LEXIS 138728 (M.D.Pa. Oct. 6, 2016), both initially filed in federal court in the Middle District of Pennsylvania, question whether an insurance carrier can unilaterally require its insureds to submit to medical exams, alleging that such requirements contradict the legislative mandates in the MVRFL. As Pennsylvania appellate courts have not yet directly considered the issue, the federal courts were left to predict how the state courts would hold when analyzing the issue.

In *Sayles*, the defendant filed a motion to dismiss all counts, and in ruling on the motion, the court predicted that the Pennsylvania Supreme Court would find the carrier's medical examination provision to be in direct conflict with the requirements of Section 1796 and, thus, would hold that the examination requirement is void as against public policy. The analysis included a review of appellate decisions from other states that have similar statutes to the MVFRL which speak on the requirements of a medical examination in the context of auto insurance benefits. While there is a nuanced discussion surrounding the goals and protections contained in the MVFRL, the court ultimately concluded that the physical examination requirement directly conflicts with the statutory language and the good cause element provided by the Legislature.

In *Scott*, the court considered the legislative balance contained in Section 1796, which seeks to pair the insured's interest in having claims paid in a timely and convenient fashion with the insurer's ability to obtain more complete information regarding the medical details of a particular claim. The court also noted the overall cost reduction intent embodied by the MVFRL and how particular costs would be affected. The court found that the cost of the insurer demonstrating good cause to the court to obtain a medical examination was relatively low, as compared to the high cost to the insured, who would have to utilize the litigation process to obtain benefits if the insured did not wish to participate in the medical examination. Similar to *Sayles*, the *Scott* court also predicted that the Pennsylvania Supreme Court would find the physical examination requirement to be in contradiction with Section 1796.

The holdings in both *Sayles* and *Scott* that dealt with the medical examination requirements were ultimately appealed to the Third Circuit. The Third Circuit, rather than also attempt to predict how the state courts would rule, certified the question to the Pennsylvania Supreme Court.

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Pennsylvania—General Liability

LIMITED TORT LITIGATION—USING THE PLAINTIFF'S PERSPECTIVE TO SHAPE THE PLEADINGS AND DISCOVERY

By Joan P. Depfer, Esq.*

KEY POINTS:

- Limited tort litigation is defensible, and there are strategies available for a successful defense at every step of the case.
- Shape a defense with creative use of pleadings, discovery, investigation and thoughtful selection of expert witnesses.
- Although limited tort plaintiffs' practitioners may press for trial, dispositive motions or alternate dispute resolution are viable defense options.

Joan P. Depfer

Since the 1990s, Pennsylvania motorists have had the ability to select "full tort" or "limited tort" coverage options when purchasing car insurance. Full tort coverage provides the motorist with the option to sue for and recover damages for pain and suffering for injuries resulting from any accident. By selecting limited tort coverage, insureds waive the right to seek pain and suffering damages under most instances in exchange for a discounted premium (up to half of the cost of those providing full tort benefits). In Philadelphia, it is estimated that 95 percent of insured drivers carry limited tort coverage. Therefore, many automobile cases involve a limited tort plaintiff.

The determination of whether or not a limited tort plaintiff may recover pain and suffering damages turns upon the legal concept of whether an injury constitutes a "serious impairment of a bodily function." There are plaintiff's personal injury firms in Philadelphia specializing in limited tort cases who tout their expertise to the legal industry and general public. They would have you believe that plaintiffs' rights to recovery have been devastated by the limited tort option, and it has resulted in unfair treatment and undervaluation of cases. Advertisements both online and in legal periodicals directed to both potential clients and referral counsel cover the pitfalls in limited tort cases and their claimed "keys to success." The truth is that limited tort defense can often be successful, and a closer examination of plaintiffs' litigation strategies and tactics can aid in formulating a winning defense right from the start.

PRE-LITIGATION AND PLEADINGS

Plaintiffs are counseled by limited tort practitioners to file their limited tort cases as major jury cases, rather than arbitration matters in Philadelphia, because the determination of serious bodily injury "is a practical decision for 12 strangers" on a jury. If the plaintiff is likeable and the jury will be comprised of Philadelphia residents, limited tort lawyers believe that they are winning already. This filing tactic "sets the tone" for the litigation, with early settlement negotiations to be discouraged.

Suggestions for the Defense: It may seem basic, but ensure that a limited tort plaintiff is identified at the onset of litigation, and obtain the necessary documentation for their election (declaration sheet, election form signed). Evaluate venue and jurisdictional challenges or potential removal of the case to federal court. Knock out legally insufficient claims and improper efforts to preserve "other acts of negligence to be determined" with preliminary objections. Preserve all applicable affirmative defenses and cross claims, and consider joining third parties where appropriate. If the value of the case is clearly within arbitration limits, take steps to remand it. Since most carriers are interested in early resolution as a cost-control measure, consult them about the pros and cons of requesting a demand. Sometimes it doesn't hurt to see how your opponent values (or overvalues) the case. They have business and litigation costs to consider, too, including retaining and deposing a medical expert.

DISCOVERY AND DEPOSITIONS

Plaintiffs gear their discovery and investigation in limited tort cases towards marshalling evidence of an objective manifestation of a serious impairment of a bodily function which can be used at trial. Limited tort attorneys encourage the creation of "a consistent record of plaintiff's restrictions and cessations of activities of daily living by having the client specify pain, limited strength and mobility that affect each endeavor." This information should be consistently detailed in treating doctors' notes, expert reports, during the plaintiff's deposition and in defense medical examination. The plaintiff's injuries and restrictions can be corroborated by family damages witnesses.

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NEW JERSEY WORKERS' COMPENSATION SECTION 40

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Here, the court noted that the only benefits ever sought by Mercogliano were under the Workers' Compensation Act:

> There are three potential sources of reimbursement of medical expenses and wage loss incurred by an employee injured in a work-related motor vehicle accident: "workers' compensation benefits, PIP benefits, and recovery from the tortfeasor." Here, Mercogliano recovered those losses solely through workers' compensation benefits. He did not seek or obtain recovery from his PIP insurer or the tortfeasor.

Mercogliano, *supra*, 2018 N.J.Super LEXIS 168, at *14.

The court also noted in prior decisions that nothing in AICRA's statutory language or legislative history suggests the Legislature meant to treat workers who are injured in a work-related automobile accident as if they were limited by AICRA's no-fault system. It wrote that there is no suggestion that the Legislature intended to treat workers' compensation insurers as if they were PIP insurers. It found that it is fair to assume that had the Legislature intended to effectuate such a major change, it would have used express language in the statute and discussed that incorporation in AICRA's legislative history.

Finally, in reversing the dismissal of the subrogation action, the court concluded:

> AICRA was enacted eighty-seven years after the Workers' Compensation Act. If the Legislature had intended to treat workers injured in automobile accidents differently from workers injured in any other manner, it would have unambiguously expressed such an intent. We find the same to be true with respect to rights of workers' compensation carriers to seek recovery pursuant to Section 40, which long pre-dated AICRA's enactment. We also note NJ Transit seeks to recover benefits paid to Mercogliano for economic loss comprised of medical expenses and wage loss, not noneconomic loss. The verbal threshold does not apply to economic loss.

Id., 2018 N.J.Super. LEXIS 168, at *17 (citations omitted).

This decision once again confirms that an employer's Section 40 subrogation rights are almost absolute. Even in this case, where the employee did not pursue his own negligence action, an employer clearly has the right and should always pursue subrogation of workers' compensation benefits whenever possible. From the beginning of their investigation of claims, employers should note when a potential third-party recovery exists so they can fulfill the statutory notice requirements to preserve their subrogation rights. If you have a questions on whether you can pursue a third-party recovery or how to preserve your subrogation rights, contact your defense counsel immediately. ■

PENNSYLVANIA SUPREME COURT TO CONSIDER PHYSICAL EXAM REQUIREMENTS

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On October 15, 2018, the Pennsylvania Supreme Court granted the petition submitted by the Third Circuit and agreed to consider the following issue:

> Whether, under Pennsylvania law, a contractual provision in a motor vehicle insurance policy that requires an insured to submit to an independent medical examination by a physician selected by the insurer, when and as often as the insurer may reasonably require, as a condition precedent to the payment of first-party medical benefits under that policy, conflicts with the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. § 1796(a), and is therefore void as against public policy.

Sayles v. Allstate Ins. Co., 194 A.2d 1045 (Pa. 2018).

While the ultimate decision from the Supreme Court is pending, one must be informed by not only the *Sayles* and *Scott* analyses, but also by the overall structure of the MVFRL as well as the public policy considerations often employed by courts when interpreting the statute. While the outcome is not yet determined, the holding from the Supreme Court will, at long last, give a definitive answer to the contractual language and legislative intent debate. ■

Pennsylvania—Insurance Coverage & Bad Faith

IS THAT LOW OFFER SUPPORTED BY THE RECORD? GRAPPLING WITH WHAT CONSTITUTES A BAD FAITH CLAIM IN THE MIDDLE DISTRICT OF PENNSYLVANIA

By Andrew T. Rhoads, Esq.*

KEY POINTS:

- Courts have issued conflicting decisions as to what constitutes bad faith.
- Two recent decision of the U.S. District Court for the Middle District of Pennsylvania illustrate the problem.

Andrew T. Rhoads

When Benjamin Franklin stated that nothing in this world can be said to be certain except death and taxes, it's now clear that the ambiguity of bad faith insurance litigation had momentarily slipped his mind. While we can surely forgive Ben for the omission, can we forgive the courts for the growing mire of seemingly conflicting precedent on just what the standard is for pleading a bad faith claim? In short, maybe.

The acrimony involved with deciphering what constitutes a legally sufficient bad faith claim has once again reared its ugly head with dueling opinions out of the United States District Court for the Middle District of Pennsylvania. In one corner, Judge Mannion allowing a homeowner's bad faith insurance claim to proceed past the pleadings due to a low offer possibly not being supported by the record. In the other corner, Judge Brann granted an insurance carrier's motion for partial summary judgment on a bad faith claim due to a low offer being supported by the record.

Before delving into the minutiae of these opinions, let's take a moment to refresh our collective recollection of insurance bad faith.

In the insurance context, "bad faith" means "any frivolous or unfounded refusal to pay proceeds of a policy." *Terletsky v. Prudential Prop. & Cas. Ins. Co*., 649 A.2d 680, 688 (Pa. Super. 1994) (quoting Black's Law Dictionary 139 (6th ed. 1990)); *see* 42 Pa. C.S.A. § 8371 (providing a remedy for bad faith). To succeed on a bad faith claim, a plaintiff must demonstrate that:

(1) the insurer lacked a reasonable basis for denying benefits; and

(2) the insurer knew or recklessly disregarded its lack of reasonable basis.

Verdetto v. State Farm Fire & Cas. Co., 837 F. Supp. 2d 480, 484 (M.D. Pa. 2011), *affirmed*, 510 Fed. Appx. 209 (3d Cir. 2013).

A plaintiff asserting a bad faith claim must establish it by clear and convincing evidence, even on summary judgment. *Bodnar v. Nationwide Mut. Ins. Co*., 660 F. App'x 165, 167 (3d Cir. 2016) (citing *Post v. St. Paul Travelers Ins. Co*., 691 F.3d 500, 523 (3d Cir. 2012)). The clear and convincing evidentiary standard requires a plaintiff to show "that the evidence is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith." *J.C. Penny Life Ins. Co. v. Pilosi*, 393 F.3d 356, 367 (3d.Cir. 2004).

While an insurer has a duty to accord the interests of its insured the same consideration it gives its own interests, "an insurer is not bound to submerge its own interest in order that the insured's interests may be made paramount, and an insurer does not act in bad faith by investigating and litigating legitimate issues of coverage." *J.C. Penney Life Ins. Co. v. Pilosi*, supra, 393 F.3d at 368. In fact, a reasonable basis is all that is required to defeat a claim of bad faith. *Bodnar*, 660 F. App'x at 167. Notably, "mere negligence or bad judgment does not constitute bad faith; knowledge or reckless disregard of a lack of a basis for denial of coverage is necessary." *Id.* (quoting *Post*, supra, 691 F.3d at 523).

With that insurance bad faith refresher out of the way, we can now push forward in an attempt to parse the *Meiser* and *Newhouse* decisions.

In *Meiser v. State Farm*, 2018 U.S.Dist. LEXIS 167991 (M.D.Pa. Sep. 28, 2018), a dump truck crashed into the plaintiff's house after a vehicle pulled into the path of the truck. The plaintiff's house was insured under a homeowner's policy issued by State Farm Fire and Casualty Insurance Company. The plaintiff filed a claim for damages allegedly caused to her house by the crash. After investigating the damage, State Farm issued the plaintiff a check for $558.91 ($2,243.58 less the plaintiff's

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Pennsylvania—Retail Liability

NO DUTY OWED TO BUSINESS INVITEE DISTRACTED BY PRODUCT DISPLAYS SAYS EASTERN DISTRICT

By Michael S. Miller, Jr., Esq.*

KEY POINTS:

- It is not "reasonable conduct" for a business invitee to pay attention to product shelves rather than the floor in front of her.
- A business invitee must provide evidence that a clearly visible defect was somehow blocked from view.
- A lack of safety policies and procedures is not relevant to the question of whether actual or constructive notice of a defect existed.

Michael S. Miller, Jr.

In the United States District Court for the Eastern District of Pennsylvania, Senior Judge Robert F. Kelly recently granted summary judgment in a premises liability action where the defendant argued that the substance on which the plaintiff fell was an open and obvious condition and the defendant had no notice of the alleged hazardous condition. In *Thomas v. Family Dollar Stores of Pa, LLC* 2018 U.S. Dist. LEXIS 196569 (E.D.Pa. Nov. 19, 2018), Eleanor Thomas went to a Family Dollar store in Philadelphia on June 27, 2016, to purchase laundry and dish detergent. She walked down an aisle on the left side of the store, made a right turn, and proceeded up the detergent aisle. As she rounded the corner of the aisle, she encountered a "thick, yellow substance" on the floor next to a broken glass bottle upon which she fell.

Thomas admitted that, as she was walking through the store, she was looking at the store's shelves rather than at her feet. She did not recall there being anything in front of the substance she fell on that prevented her from seeing it. She alleged she suffered cervical sprains and strains, cervical disc herniations, disc bulges, radiculopathy, posttraumatice cephalgia and other injuries as a result of the incident.

Thomas argued that Family Dollar was negligent in breaching its duty of care to keep its premises free and clear of any hazardous conditions. Family Dollar argued that the alleged condition was open and obvious and that it owed the plaintiff no duty of care.

Senior Judge Robert F. Kelly granted Family Dollar's motion for summary judgment and found that Thomas could not establish that Family Dollar owed her a duty of care or that Family Dollar breached any such duty. In doing so, the court rejected Thomas' argument that it was reasonable conduct for her to be paying attention to the product on the shelves rather than the floor in front of her. The court stated:

> 'It is hornbook law in Pennsylvania that a person must look where he is going.' *Graham v. Moran Foods, Inc*., No. 11-239, 2012 U.S. Dist. LEXIS 69667, 2012 WL 1808952, at *4 (E.D. Pa. May 18, 2012) (quoting *Villano v. Sec. Sav. Ass'n*, 268 Pa. Super. 67, 407 A.2d 440, 441 (Pa.Super. Ct. 1979)) (rejecting argument that business invitee was distracted from hazardous condition because of in-store sale signs). '[J]ust as drivers are not relieved of responsibility for accidents if they are distracted by billboards, customers are not relieved of the responsibility of watching for obstacles while they walk, even if they are distracted by sales displays.' Id. (quoting *Campisi v. Acme Mkts., Inc*., 2006 PA Super 368, 915 A.2d 117, 121 (Pa. 2006)).

Thomas, 2018 U.S.Dist. LEXIS 196569, at *7-8.

The court stated that the substance posed an obvious condition that would have been readily apparent to a reasonable person exercising normal perception, intelligence and judgment:

> Thomas would have easily avoided the 'thick yellow substance' if she had been exercising reasonable care and paying attention to where she was walking. Thomas provides no evidence that the substance was obstructed from view and admits that she had her eyes 'trained on the merchandise' rather than on her surroundings.

Id., at *9.

The court found that because Thomas had not paid the requisite attention to her surroundings, Family Dollar owed no duty to her and could not be liable for her injuries. The court also

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Pennsylvania—Workers' Compensation

EMPLOYER'S FUTURE SUBROGATION RIGHTS UNDER SECTION 319 OF THE WORKERS' COMPENSATION ACT LIMITED BY PENNSYLVANIA SUPREME COURT

By Daniel W. Deitrick, Esq.*

KEY POINTS:

- For purposes of subrogation under Section 319 of the Pennsylvania Workers' Compensation Act, the Supreme Court held that the future credit/reimbursement rate percentage applies to future indemnity benefits, but not future medical expenses.
- The court theorized that "compensation" and "instalments of compensation," as referred to by the language of the statute, are distinct.
- The issue of retroactivity relative to cases for which the insurer had been taking a credit for ongoing medical expenses in addition to indemnity was not addressed by the court.

Daniel W. Deitrick

The Pennsylvania Supreme Court has addressed an employer's subrogation rights against the balance of recovery when a claimant receives a third-party settlement or award stemming from a work injury. In a monumental decision, *Whitmoyer v. Workers' Compensation Appeal Board (Mountain Country Meats)*, 186 A.3d 947 (Pa. 2018), the court has adversely impacted the rights of employers under Section 319 of the Pennsylvania Workers' Compensation Act. Summarily, the court reversed a longstanding subrogation precedent by holding that employers are no longer entitled to a future credit against ongoing medical benefit payments when resolving or being awarded monies in a third-party lawsuit.

In *Whitmoyer*, the claimant sustained serious work-related injuries in 1993, resulting in the amputation of part of his arm, for which he was paid specific loss benefits that were commuted to a lump sum in 1994. While the commutation resolved the claimant's entitlement to indemnity benefits, liability was retained by the employer for payment of ongoing causally-related and reasonable and necessary medical expenses.

In 1999, the claimant entered into a settlement with third parties related to his injury for a lump sum of $300,000. After calculating and deducting the employer's net subrogation lien, and accounting for the insurer's pro rata share of litigation expenses, the claimant was left with a balance of $189,955.86. A third party settlement agreement was drafted, whereby the workers' compensation insurer was entitled to a net subrogation lien and a reimbursement rate on future payment of compensation. On the settlement agreement, the term "balance of recovery" was defined as "a fund for credit against future workers' compensation payable, subject to reimbursement to claimant of expenses of recovery at the rate of 37% on credit used."

Upon receipt, counsel for the claimant submitted the first of two letters to the insurer, primarily asserting that payment of the net lien would be made and that the insurer would not be entitled to a credit against future medical expenses since said credit applied only to future "installments of compensation," excluding medical expenses, pursuant to the language of Section 319 of the Act. While the insurer's representative executed the third party settlement agreement, counsel for the claimant did not sign the document. The insurer also cashed the check for the net lien recovery as of the date of the third-party settlement. Reasonable and necessary medical expenses that were directly attributable to the work injury continued to be paid by the insurer for several years thereafter, without assertion of a credit or reimbursement rate.

In 2012, the insurer filed a petition to modify compensation benefits, seeking an adjustment to the third party settlement agreement to reflect medical expenses paid since its execution. The Workers' Compensation Judge granted the modification petition, specifically holding that the reimbursement rate and future credit calculated on the third party settlement agreement applied to future medical expenses. In so holding, the judge awarded a percentage credit for payment of future medical expenses.

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LIMITED TORT LITIGATION

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Suggestions for the Defense: Use written discovery as a preliminary tool to identify all educational, employment and medical records to be acquired. Perform pre-deposition investigation of prior accidents and litigation—social media searches or even surveillance can yield a treasure trove of inconsistencies to be used during the deposition or later in the case. During the deposition, ask (and demand) the plaintiff to identify each and every limitation of their activities in an effort to close out the claims, and confirm that they have identified all of them. Be prepared to cross-examine the witnesses on their specific activities and when and how much they participated in such. You would be surprised to hear and determine that they last participated in an activity when they were in their teenage years. Also, if a plaintiff seems to heavily exaggerate his or her claims, arrange surveillance to video their activity level. Depose all identified damages witnesses. Evaluate the credibility of all witnesses and how a jury will view them.

EXPERTS

Plaintiffs must present medical testimony in every limited tort case. Practitioners caution that the selection, preparation and presentation of the expert is key, because "[they] know that a good expert witness could change the way the carrier evaluates the case." Also, plaintiffs' counsel recommend to list the treating doctor as a fact witness at trial and then collaborate their testimony with the expert who will speak to causation.

Suggestions for the Defense: Limited tort attorneys often use the same treaters and experts over and over again. Investigate the doctor's bias through the use of expert interrogatories addressing retention and compensation and the expert's history of testimony. When selecting a defense doctor, think outside the box of usual experts. Talk to colleagues and consult resources.

TRIAL/DISPOSITION

Limited tort attorneys consider a major jury trial before a Philadelphia jury as their ultimate goal, because "insurance companies don't get to decide how serious [a] client's injury is," and the jury is a "plaintiff's greatest ally." An aggressive approach with the litigation will "send a message" to the insurance company.

Suggestions for the Defense: In Philadelphia, summary judgment for the defense is a rare occurrence. However, in a limited tort case, there may be strong legal positions that merit a partial motion for summary judgment. Also, practical and economic factors may make high-low parameters and/or mediation attractive to a plaintiff and insurance carriers. Finally, at trial, gather all information obtained in discovery, and use a common-sense approach to presenting it to the jury. Photos of no damage to the vehicle, gaps or limited treatment, treatment via attorney recommendation, and/or lack of any significant issues in daily life will support arguments that there is not a serious impairment of bodily function.

Limited tort claims have been and will continue to be a major source of civil litigation in Philadelphia and other Pennsylvania jurisdictions. Although plaintiffs may try to press these cases to trial, the defense must not lose focus. Formulate a winning strategy at every step of the litigation. ■

EMPLOYER'S FUTURE SUBROGATION RIGHTS

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On appeal, the claimant asserted that Section 319 of the Act only allows a credit on future installments of compensation, i.e., indemnity benefits, none of which remained to be paid since they were commuted in 1994. However, the Workers' Compensation Appeal Board affirmed, holding that it was well settled that medical expenses are compensation payments subject to the subrogation rights against the claimant's recovery from a third party.

In a divided en banc opinion, the Commonwealth Court affirmed, reasoning, in part, that Pennsylvania appellate courts have consistently concluded that medical expenses constitute "compensation" under Section 319 of the Pennsylvania Workers' Compensation Act. The claimant subsequently appealed to the Pennsylvania Supreme Court, arguing in summary fashion that the Commonwealth Court's decision improperly reads the word "installments" out of the language of Section 319 and urged the court to consider a distinction between the meaning of "compensation" and "instalments of compensation." The claimant submitted that the latter refers to disability benefits, not medical expenses. Conversely, the employer asserted that, as was set forth in the underlying Commonwealth Court decision, "compensation" has repeatedly been interpreted to include both indemnity benefits and medical expenses, both in and outside the purview of Section 319 of the Act.

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IS THAT LOW OFFER SUPPORTED BY THE RECORD?

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$1,562.00 deductible). The plaintiff requested that State Farm reevaluate its estimate as she alleged that the estimate was not sufficient to pay for the total actual damages and costs of repair. State Farm refused. The plaintiff then hired her own appraiser to prepare a damage estimate for her house. This appraiser determined the value of the loss to be $39,281.67. Additionally, the insurer for the vehicle that pulled into the path of the dump truck determined that the plaintiff's house sustained significant structural damages and estimated her damages to be about $60,000. State Farm did not revise its estimate after the plaintiff provided it with both estimates. The plaintiff subsequently brought an action for breach of contract and bad faith in the Schuylkill County Court of Common Pleas. State Farm removed the suit to the Middle District and filed a partial motion to dismiss, seeking to dismiss the plaintiff's bad faith claim. Judge Mannion denied State Farm's motion to dismiss and allowed the plaintiff's bad faith claim to proceed to discovery.

Judge Mannion's decision seems to turn on the procedural posture of the case, with the plaintiff reaping the benefit of the liberal pleading standard. Specifically, Judge Mannion cited to the plaintiff's allegation that State Farm unreasonably refused to pay benefits being supported by the extreme disparity between the plaintiff's estimates and State Farm's estimate. *Id*., 2018 U.S.Dist. LEXIS 1679 at *8. Further, Judge Mannion found that the plaintiff's allegations that State Farm misrepresented pertinent facts regarding coverage and whether the plaintiff's house was structurally damaged, as found in the plaintiff's estimates, would require discovery to determine if they could be substantiated. *Id*., at *9.

In *Newhouse v. GEICO*, 2018 U.S.Dist. LEXIS 175785 (M.D.Pa. Oct. 12, 2018), the plaintiff was injured after being rear-ended by an intoxicated driver. After recovering the policy limit from the other driver's insurer ($15,000), the plaintiff submitted a claim for underinsured motorist (UIM) coverage to his own insurer, GEICO. The plaintiff sought to recover his own policy limit ($200,000), but GEICO offered only $10,000. GEICO's position did not change after further negotiations and investigation. The plaintiff then brought an action for breach of contract, bad faith and loss of consortium in the Clinton County Court of Common Pleas. GEICO removed the suit to the Middle District and subsequently moved for partial summary judgment on the plaintiff's bad faith claim. Judge Brann granted GEICO's motion for partial summary judgment on the bad faith claim.

Judge Brann's decision turns on the heightened burden of proof for bad faith claims, which requires clear and convincing evidence. *Id*., 2018 U.S.Dist. LEXIS 175785 at *2. Specifically, Judge Brann focused on the fact that two doctors, including the plaintiff's own medical expert, believed that a preexisting medical condition had contributed to the plaintiff's current ailments. *Id*., at *4. Judge Brann found that GEICO was not prohibited from considering these doctors' opinions regarding alternate causation. *Id*., at *5. Thus, Judge Brann concluded that while reasonable minds could differ as to the true sum of the plaintiff's loss, it could not be said that GEICO's estimate was "frivolous or unfounded." *Id*.

Now that we've placed both decisions under a microscope, what are the takeaways? Well, keep in mind that the liberal pleading standards are more often than not going to let a bad faith claim continue to discovery if the complaint contains any allegations which purport to show that an insurer's low offer could possibly not be supported by the record. Don't allow yourself, or the insurer, to be discouraged by a loss at the pleading stage. Take solace in the fact that the liberal standards will be kicked to the curb once you get to summary judgment. There, you will be able to put the plaintiff's feet to the fire of the clear and convincing evidentiary standard. Of course, you are going to need to have something akin to the alternate causation doctors' opinions in *Newhouse* in your pocket to deliver the coup de grâce to the bad faith claim. But you wouldn't be vehemently fighting the bad faith claim if you didn't have something like that, right? ■

NO DUTY OWED TO BUSINESS INVITEE

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found that Thomas' negligence claim failed because she could not establish that Family Dollar had the requisite notice of the condition to breach a duty of care.

Thomas did not argue that Family Dollar either created the hazardous condition or had actual notice of it. Instead, she argued that Family Dollar was negligent in allowing the condition to exist due to a lack of safety policies, procedures and training in its stores. According to her, Family Dollar failed to exercise reasonable care by not inspecting the premises or having adequate safety policies.

The court found that Thomas' argument was insufficient to establish that Family Dollar had constructive notice of the spill. It held that under Pennsylvania law, a plaintiff is required to provide some proof as to the length of time a spill existed on the floor to establish constructive notice. *Thomas*, *supra*, 2018 U.S. Dist. LEXIS 196569, *9 (citations omitted). The court explained:

> Though perhaps not a 'bright-line rule,' without any evidence regarding the length of time the spill existed, it is immaterial when Family Dollar conducted an inspection because a '[d]efendant cannot be liable for negligence by failing to identify and clean up a spill only a short time after its occurrence.'

Id., at *12 (citations omitted).

The court also found unpersuasive Thomas' argument that because the spill had "a brown ring around it," it must have existed for an extended period of time. The court concluded that no reasonable jury could find that Family Dollar had constructive notice of the spill prior to Thomas' fall and, without such notice, Family Dollar could not have breached a duty of care to her.

The *Thomas* decision highlights and reinforces several concepts commonly cited by defense attorneys practicing in the area of premises liability. It remains to be seen whether the Eastern District will continue to be receptive to commonly made defense arguments concerning lack of duty and notice in premises cases with similar fact patterns. However, the *Thomas* decision will certainly be a tool for defense practitioners in premises cases where duty and notice are at issue. ■

EMPLOYER'S FUTURE SUBROGATION RIGHTS

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The primary issue thus presented to the Supreme Court involved an interpretation of the term "installments of compensation" in Section 319 of the Act, which, in turn, demanded that the court both ascertain and effectuate the intention of the General Assembly. In doing so, the court noted its obligation to take care to give meaning to every word and provision in the statute in question.

The court ultimately reversed the underlying decision after an analysis of the language set forth in Section 319, finding that for purposes of subrogation, the future credit/reimbursement rate applies to future indemnity benefits, not future medical expenses. The court reasoned that inclusion of the words "installments of compensation" in Section 319 references payment of disability benefits only, as medical expenses, in theory, cannot be paid in installments. Further, medical expenses were not characterized as regular and periodic in nature, as were the payment of indemnity benefits. The court held that the terms "compensation" and "installments of compensation" are, in fact, distinct and that a third-party recovery in excess of the subrogation lien is considered an advance payment of benefits under Section 319 of the Act. This advance payment intended by the General Assembly was said to be on account of future disability benefits, not medical expenses.

The court further reasoned, "[t]o conclude that 'installments of compensation' carries the same meaning as 'compensation' would render the words 'installment of' meaningless. Our rules of statutory construction do not permit such as result." The court viewed "installments of compensation" as clear and unambiguous in its exclusion of medical expenses. It was, therefore, held that an employer is not entitled to a credit/reimbursement rate for future medical expenses against a balance of recovery following resolution of a third-party claim.

Importantly, the court did not specifically address whether this change will be applied retroactively. Similarly, the court was silent as to situations in which both parties have executed and entered into a third party settlement agreement, contrary to the facts set forth in *Whitmoyer*. However, the absolute right to subrogation under Section 319 of the Act for employers, their insurers and third party administrators has undoubtedly been adversely impacted moving forward. While subrogation can be asserted against both indemnity and medical benefits paid to date, future medical benefits can no longer be recouped from a claimant's balance of recovery. ■

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