MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 20 | NO. 4 | DECEMBER 2014

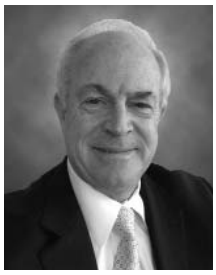
# Defense Digest

20th Year in Publication!

# On The Pulse…

## PROFILE OF OUR WESTCHESTER, NEW YORK OFFICE

By James P. Connors, Esq.*



*James P. Connors*

Marshall Dennehey's newly formed Westchester office is located in Rye Brook, New York, just east of White Plains, the Westchester County seat. Staffed with five accomplished attorneys and outstanding legal support professionals, the Westchester office is strong in experience and serves as home base for the defense of some extremely significant cases, including the federal litigation arising from the September 11, 2001, World Trade Center attacks.

I am honored to be the managing attorney of this office, which serves clients throughout Westchester County and the entire New York tri-state region, providing access to jurisdictions as far north as Albany and the important counties of Rockland, Duchess and Poughkeepsie. By background, I am a "Bronx Kid," whose career path began at New York Law School, where I earned a J.D., and later at the New York University School of Law, where I earned an LL.M. I honed my litigation skills at the largest medical malpractice defense firm at the time, Bower & Gardner. I then served a brief stint at INA/CIGNA before joining the firm of Jones Hirsch & Bull, where I later became a named partner. I remained there for 33 years, trying matters ranging from slip and falls to brain-damaged infant cases. Yet it was not until meeting Tom Brophy at a DRI conference in 2012 that I realized there was another firm where I could be happy and expand the client opportunities I had developed over many years. Thus began our journey to Marshall Dennehey.

I am proud to be a part of the World Trade Center defense team, comprised of some of the finest litigation firms in the nation. This case presents as one of the most significant in United States jurisprudential history, and it required me and several other attorneys in the firm to obtain Sensitive Security Information clearances from the United States Justice Department in order to analyze discovery which is still deemed classified. My litigation experience also includes the defense of the estate of John Fitzgerald Kennedy, Jr.,

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** Jim is a shareholder and the managing attorney of our Westchester, New York office. He can be reached at 914.977.7310 or jpconnors@mdwcg.com.*

## PROFILE OF OUR TRUCKING & TRANSPORTATION LIABILITY PRACTICE GROUP

By Timothy J. McMahon, Esq.*

*Timothy J. McMahon*

The Trucking & Transportation Liability Practice Group is composed of attorneys concentrating in the representation of clients and their insurers in complex tort and coverage litigation involving all types of common and private carriers. The members of this group include shareholders and associates who have handled cases for large common carrier transportation fleets engaged in interstate trucking, railroads, waste hauling, taxicab, shuttle and bus operators, rental vehicle fleets and ambulance services. Members of the group have represented both insurers and self-insurers in personal injury, cargo, environmental, hazardous materials, indemnification and insurance coverage matters within this area of practice. These attorneys understand the complex and changing regulatory structure governing the operation of the transportation industry and are responsive to the challenges that the industry faces. We are particularly sensitive to the impact that evolving transportation technologies, including onboard electronic devices, can have in litigation. The group is well situated to handle a broad range of matters, including catastrophic transportation claims, from the time an accident is reported through trial. Our members are actively involved in transportation-related organizations, including the Trucking Industry Defense Association (TIDA), the Trucking Law Committee of the Defense Research Institute (DRI), RIMS and the Claims Litigation Management Alliance (CLM), as well as regional motor truck associations.

### EMERGENCY RESPONSE – 24/7: 24-HOUR HOTLINE: 1-800-958-2447

This practice group has a 24-hour emergency response hotline for the convenience of its clients. A call to the hotline will result in a timely response tailored to the specific needs and range of circumstances of the client. Our Emergency Response Team is available

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** Tim, a shareholder in our Harrisburg, Pennsylvania office, is chair of our Trucking & Transportation Liability Practice Group. He can be reached at 717.651.3505 or tjmcmahon@mdwcg.com.*

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# A MESSAGE from the EXECUTIVE COMMITTEE

By Christhopher E. Dougherty, Esq.
Chairman of the Board

*"Take love, humanity, and humility and then place it against a performance-driven organization . . . we are unbeatable."*

– Howard Schultz
Starbucks CEO

Recently, on our annual employee appreciation day, several employees were recognized for their legacy contributions to our firm. We recognized Althea Banks and Terry Flint, for example, for their 35 years of service. Teresa Grace received a 30-year award. Sandy Howard, Dawn Voglesong, Lori Forsythe and Cherri Trowbridge received 25-year awards. Scores of others were recognized for their 10-, 15- and 20-year awards. This happens every year, as long-tenured employees are not unique at Marshall Dennehey—administration and attorneys alike. Their individual and collective experience yields untold benefits for our firm.

On one level, that so many employees choose to work at Marshall Dennehey for their careers re-affirms our positive firm culture. This culture is exemplified by our nomination for the second consecutive year as one of the "best places to work" in the Delaware Valley.

On another level, as I have said before, our culture of teamwork and unselfishness actually propels our business success. By having such a large segment of our workforce employed at Marshall Dennehey for a significant number of years—and in many cases, this has been the only law firm at which they have worked—our clients realize tangible benefits.

Our firm is supported by personnel who have been devoted to civil defense litigation for decades. Some of our senior administrative managers worked with our founding name shareholders. They not only have "grown up" with our firm, they have matured in and with the civil defense industry.

Because of that collective experience—and I tell clients this all the time when I proudly boast about our firm—we have become really good at what we do. Our organization was created as a defense litigation firm. We remain committed to the insurers and self-insureds who entrust us with their defense work. This commitment, coupled with an experienced and defense-dedicated workforce, sets us apart from other law firms.

In an era where increasing pressures constrain our clients to manage legal spend, we will continue to provide a distinct value to our clients. Everyone at Marshall Dennehey knows what our mission is, what our clients want and how we should deliver high-quality, value-driven legal services.

Our administrative managers are extremely skilled and experienced in what they do. Not only do they provide us with a disciplined and stable platform from which our attorneys can practice law, I daresay that they are as influential in mentoring our young lawyers as the senior attorneys in terms of teaching the finer points to becoming well-rounded civil defense attorneys.

Our firm has confronted some unique challenges over the past several years; 2014 was no different. Because of the extraordinary efforts of our administrative staff, we overcame some major obstacles.

This past year, Peter Miller, the former Chairman of the Board and Chief Operating Officer, retired after serving 37 brilliant years with us. Tom DeLorenzo, the Chair of our Employment Law Practice Group, retired after working at Marshall Dennehey for 38 years. For the first time in our firm's history, an attorney from an office other than Philadelphia became a member of the firm's executive committee, Mark Thompson. Liz Brown, formerly the Director of our firm's IT department, replaced Peter as our Chief Operating Officer.

Against this flux, we executed the largest joinder of attorneys in our firm's history when the Jones Hirsch firm joined us on July 1st. We opened a new office in Cincinnati, Ohio. It has grown from two to five attorneys within a matter of months. We opened an office in Westchester County, New York. We relocated our Hauppauge, New York office to Melville, New York.

2014 also was one of the busiest real estate years in our firm's history. In addition to moving our Long Island office, we relocated our Harrisburg, Bethlehem and Wilmington offices.

We could not successfully accomplish all of the above without the exceptional sacrifices of so many administrative managers and personnel. With apologies in advance to those who remain unnamed, but who contributed to these efforts, I have to publicly thank Sandy Caiazzo, Terry Shuda, Eva Colon, Mike Marinucci, Paul Tenaglio and the entire New Files Group for their exceptional efforts this year. The level of planning and execution that goes into a single office move, or the opening of a new office, cannot be described in a note like this. Our staff made it happen multiple times this year. Their extraordinary work ethic, commitment to our firm and our clients, and their exceptional level of professionalism was commendable.

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* *Chris can be contacted at 215.575.2733 or cedougherty@mdwcg.com.*

## PROFILE OF OUR WESTCHESTER, NEW YORK OFFICE

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who was tragically killed in a plane crash, and which required sensitivity beyond similar cases I have handled.

In addition to me, the staff who are currently serving out of the Westchester office, or will soon join it, include Thomas Vaughan, senior counsel; Charles Gura, shareholder; Daniel Corde, shareholder; and Angela Evangelista, special counsel.

Tom Vaughn, who is temporarily working out of the firm's New York City office, has 40 years of litigation experience, which began as an Assistant District Attorney in the Manhattan District Attorney's Office. Through the years, Tom has handled many significant product and premises liability matters in both state and federal courts, and he is well-known and respected throughout the New York judicial system. A graduate of St. Lawrence University and the University of Pennsylvania School of Law, he is expected to join the Westchester office at the end of 2014.

Charles Gura comes to the Westchester office with nearly two decades of experience devoted almost entirely to the defense of medical malpractice cases. Charles attended New York Law School while working for Medical Liability Mutual Insurance Company, one of the largest medical malpractice insurance carriers in the country, and this experience provided a strong foundation for his successful legal career. Charles remains very active in his law school's mentoring program, and he is highly regarded, both professionally and personally.

Daniel Corde services multiple jurisdictions, with admissions in both New York and Connecticut, where he has already been called upon to represent Marshall Dennehey clients. Dan's skills and hard work have been appreciated by both carriers and self-insureds alike, and, in addition to handling product liability cases, defending such clients as IKEA and Hyatt Corporation, he is currently representing a global security company in a high-profile assault case. Dan and I are both FAA-licensed pilots, and he spent a considerable number of years managing claims for a major aviation insurer. Such exposure has given him perspective from the "other side" of the litigation spectrum as he was charged with not only monitoring the work of local counsel, but acting as liaison between local counsel and claims management.

Angela Evangelista joins the Westchester office while also actively involved in teaching law at Fairleigh Dickinson University and Montclair State University. Her classes include Tort Law, New York Practice and Procedure, as well as the Jury System in America. Angela has 23 years of civil defense litigation experience in New York, and she serves as a font of knowledge when questions arise regarding tricky New York procedural issues. In addition to her litigation prowess, her attention to detail and depth of knowledge of the more intricate rules and regulations make her a valuable asset—not only in Westchester, but among all of Marshall Dennehey's New York offices.

The Westchester office also is fortunate to have a dedicated and diverse support staff comprised of three administrative assistants, Kathleen Tully, Pearlene Martell and Cassandra Riddick, and one office assistant, Trontel Brown. Kathleen, having been an employee of Marshall Dennehey's New York City office, happily relocated to Westchester to benefit from a much improved commute. She brings extensive litigation experience, and we are thrilled to have her with us. Pearlene, who has been my assistant and "right arm" for the past 31 years, serves as secretarial coordinator/legal administrator. She has an extensive knowledge of New York civil litigation, which she utilizes to manage day-to-day activities of secretarial and attorney work product. The office further benefits from the skills and efficiencies Cassandra and Trontel bring to their respective positions.

On a somber note, I would like to acknowledge the passing of our dear friend and colleague, Bill Brown, who would have joined us in Westchester. Bill was an accomplished attorney in the areas of aviation and maritime law, and he practiced in New York for more than 35 years. I know I speak on behalf of the staff of the Westchester office, Bill's former colleagues at Jones Hirsch and his new friends from Marshall Dennehey in wishing Bill's family our sincere prayers and condolences. He will be missed.

In closing, the first six months at Marshall Dennehey have been invigorating, and I look forward to developing the Westchester office into a site that will extend the firm's reach throughout the tri-state area and beyond. Our office is located at 800 Westchester Avenue, Suite 700-C, Rye Brook, New York 10573. Our main number is 914.977.7300, with my direct line being 914.977.7310, and our facsimile number is 914.977.7301. When the opportunity presents itself, please make sure you stop by and say hello. ■

## PROFILE OF OUR TRUCKING & TRANSPORTATION LIABILITY PRACTICE GROUP

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24 hours a day, seven days a week to respond to any transportation emergency, with services that include interviewing the commercial driver, securing the scene, gathering crucial evidence and, if necessary, dealing with the media. The hotline puts one in direct contact with experienced legal counsel who will provide immediate advice and, based upon the particular needs, will assign, coordinate and direct the efforts of:

- Expert accident reconstruction consultants;
- Field adjusters and investigators; and
- Criminal attorneys

The 24-hour emergency response hotline is a convenient, single source of contact that allows immediate access to a network of resources at the ready for response to trucking and transportation accidents. This immediate response is capable of mitigating the consequences of catastrophic events.

The attorneys in this practice group have also been cross-trained in environmental and toxic tort matters. They have the full support of the firm's appellate and toxic tort environmental sections to draw upon when needed in handling transportation claims. In conjunction with the firm's Insurance Coverage and Bad Faith Litigation and Appellate Advocacy Practice Groups, we also represent insurance carriers in coverage matters arising from transportation cases. ■

***Federal—Employment Law***

# EEOC GUIDANCE ON THE PDA: HAS ANYTHING CHANGED?

By Rebecca G. Yanos, Esq. & Teresa O. Sirianni, Esq.*

## KEY POINTS:

- The EEOC's 2014 Guidance expands the scope of the Pregnancy Discrimination Act (PDA) in many ways, including but not limited to, conforming to the ADAAA's broad definition of disability.
- The EEOC's 2014 PDA Guidance provides clear requirements for the treatment of female employees in the workplace who either are pregnant, who are trying to or may become pregnant, or who have had past pregnancies.

*Rebecca G. Yanos*

*Teresa O. Sirianni*

The Equal Employment Opportunity Commission (EEOC) released updated Pregnancy Discrimination Enforcement Guidance on July 14, 2014, for the first time since the original Guidance was published in 1983. Now, over 30 years later and following the passage of the FMLA in 1993 and the Americans with Disabilities Act Amendments (ADAAA) in 2008, the new Pregnancy Discrimination Guidance is far more comprehensive in scope and has been described as "extremely far-reaching." Pamela Wolf, J.D., *EEOC's Updated Pregnancy Discrimination Guidance is "Extremely Far-Reaching*, (Sept. 14, 2014), http://www.employmentlawdaily.com/index.php/news/updated-pregnancy-discrimination-guidance-is-extremely-far-reaching/. The new Guidance outlines requirements under both the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA), and it addresses the interaction with the FMLA as applied to pregnant workers and related medical conditions arising from pregnancy. As pregnancy discrimination complaints are on the rise, the new Guidance needs to be understood and implemented in order to avoid complaints alleging unlawful discrimination in the work place. Nat'l Partnership for Women & Families, *The Pregnancy Discrimination Act: Where We Stand 30 Years Later* (2008), (Sept. 6, 2014), http://qualitycarenow.nationalpartnership.org/site/DocServer/ Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf?docID=4281.

The PDA generally disallows an employer to discriminate against an employee based upon pregnancy, childbirth or related medical conditions, and it requires that pregnant women be treated in the same manner as other persons similar in their ability or inability to work. Although this language is not new relative to the PDA, the 2014 Guidance expounds on several areas that were previously left unclear and now conform to the ADAAA's broad definition of disability.

* *Rebecca and Teresa work in our Pittsburgh, Pennsylvania office. Rebecca, an associate, can be reached at 412.803.1157 and rgyanos@mdwcg.com. Teresa is a shareholder. She can be reached at 412.803.1177 and tosirianni@mdwcg.com.*

### I. DISCRIMINATION BASED UPON PAST PREGNANCY OR POTENTIAL TO BECOME PREGNANT

An employer may not discriminate against a woman for a past pregnancy or the potential to become pregnant in the future. This precludes an employer from discriminating against a woman for intending to become pregnant, trying to get pregnant or even based upon her ability to become pregnant. Enforcement Guidance: Pregnancy Discrimination and Related Issues, (Sept. 29, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#past.

### II. RESTRICTION FROM PERFORMING CERTAIN JOBS DUE TO PREGNANCY AND AVAILABILITY OF LIGHT-DUTY WORK AND PARENTAL LEAVE

An employer may not restrict pregnant workers from certain jobs, such as a job with exposure to harmful chemicals, as an employer's concern about risks to an employee or her fetus rarely justifies restrictions. The only justifiable limitations are those where the lack of childbearing capacity is a bona fide occupational qualification (BFOQ), such that lack of childbearing capacity is reasonably necessary to the normal operation of the business. Pregnant women are also protected from adverse employment actions based upon an employer's fear that the stress of a job may affect pregnancy, or the fears or concerns of a pregnant employee's co-workers or customers. Likewise, a pregnant employee must be provided the opportunity to perform light-duty work, if required as a result of the pregnancy, in the same way that an employer might offer light-duty work to employees who are not pregnant but who are similar in their ability or inability to perform their work duties. It is important to note that an employer may not require a pregnant woman to take leave at any point during her pregnancy if she is still able to perform her job. Leave to bond with and care for a newborn (parental leave) must be available to both men and women; thus, if an employer provides parental leave after the birth of a child to women, it must also provide this same leave, under the same terms, to men.

### III. LACTATION AS PREGNANCY-RELATED MEDICAL CONDITION

Lactation is now viewed as a covered pregnancy-related medical condition, and, accordingly, less favorable treatment of any lactating employee may give rise to an inference of unlawful treatment.

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## A MESSAGE FROM THE EXECUTIVE COMMITTEE

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One of the challenges Marshall Dennehey faces as we grow is transposing our differentiating culture to our new personnel. I quoted Howard Schultz at the outset of this note because what Starbucks has accomplished as a business is remarkable. Starbucks has grown from a single café in Pike Place (Seattle) to a global enterprise that now employs over 200,000 people and serves over 60 million customers weekly. More important than this fantastic growth, it has maintained a humane, caring and unselfish team-oriented culture that makes it one of the 10 "most trusted" businesses (*Entrepreneur Magazine*) and one of the "most admired" global enterprises (*Fortune Magazine*).

When we join laterals (or another firm), our senior staff performs another critical role for our firm: they are our firm's "advance party" in the ever-important enculturation process. Inculcating new attorneys and new offices into our culture takes time. A solid foundation is built, however, by our senior administrative staff, who spend countless hours away from home meeting with attorneys and staff, clearing cases for ethical conflicts, teaching computer systems and new administrative processes, assisting with benefits, and essentially doing everything possible to make the transition into our firm as smooth as possible. These "ambassadors" do everything humanly possible to enable new employees to succeed here at Marshall Dennehey.

We keenly appreciate that our clients want consistent, quality defense of their cases—whether the case is called in to Jacksonville, Harrisburg or Cincinnati—and regardless of whether the case is a premises liability or accountant's malpractice matter. For our clients to experience replicable service, we will continue to inculcate our new employees—at every level of the organization—with the same sense of teamwork, professionalism and commitment to client service. This mindset has enabled our firm to grow and to be a place where employees enjoy their work. The culture we develop and maintain inside our firm should be felt by our clients. They want to do business with firms they trust and respect. We must be committed to earning and maintaining both.

As we wind down calendar year 2014, we reflect upon our several blessings:

- Our firm culture—created by caring and respectful individuals who work unselfishly together to give our clients the highest quality legal services that are distinguishable from our competition;
- Our new employees—attorneys and staff alike—for the new opportunities you will provide us, the new experiences we will create together and for choosing to make Marshall Dennehey your new professional home; and
- Our clients—who continue to support our firm and entrust us with your legal matters. We will strive to extend excellence in our service to you.

On behalf of the Executive Committee, we extend to every employee and every client our heartfelt wishes for a safe and peace-filled holiday season and a wonderful New Year. ■

## EEOC GUIDANCE ON THE PDA: HAS ANYTHING CHANGED?

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Enforcement Guidance: Pregnancy Discrimination and Related Issues, (Sept. 29, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#past. For example, the need to express breast milk during the workday requires the employer to allow employees to change their schedules or use sick leave to address lactation-related needs the same as employees who are permitted to change their schedules or use sick leave to address routine non-incapacitating medical conditions. The Guidance further suggests that this scenario is consistent with the Patient Protection and Affordable Care Act, which requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk.

### IV. REASONABLE ACCOMMODATIONS REQUIRED FOR PREGNANCY-RELATED IMPAIRMENTS

The Guidance also addresses the broad coverage afforded by the ADAAA, suggesting that pregnancy-related impairments that substantially limit one or more major life activities without consideration of mitigating measures must be accommodated. Enforcement Guidance: Pregnancy Discrimination and Related Issues, (Sept. 29, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#past. This requirement also applies to an applicant or employee who has a record of a pregnancy-related disability based upon a prior pregnancy. Examples of accommodations that may be required for pregnant workers are:

- Redistribution of non-essential job functions (lifting);
- Modifying work policies, such as permitting pregnant workers to have more frequent breaks;
- Modifying work schedules to accommodate conditions, such as morning sickness;
- Permitting work from home if required; and
- Creating light-duty positions.

### V. BEST PRACTICES

- Review, develop and circulate policies based upon the requirements in the ADA and PDA.
- Train managers/employees regarding the ADA and PDA, and provide multiple avenues of complaint.
- Respond promptly to pregnancy discrimination complaints; investigate, document and take corrective action as needed.
- Have a process in place for accommodation requests, and ensure light-duty policies are equally applied to all employees. ■

***Florida—General Liability***

# I'M BEING SUED FOR WHAT?!? ANALYZING THE FLORIDA SUPREME COURT'S OPINIONS APPLYING THE FORESEEABLE ZONE OF RISK TEST TO DETERMINE IF A LEGAL DUTY IS OWED

By Samuel C. Higginbottom, Esq.*

## KEY POINTS:

- Whether a legal duty arises from the specific facts of the case is often disputed.
- The Florida Supreme Court broadly applies the *foreseeable zone of risk test*.
- Access to the courts is not an indication of a claim's merit.

*Samuel C. Higginbottom*

All too often, the first time a client learns of a negligence claim is upon receipt of plaintiff's counsel's request for their insurance policy. The client does not always understand why or how they may be responsible to a claimant. This is particularly the case for small businesses being sued for the first time. The client's lack of understanding can lead to frustration, which hinders our ability to defend the claim. By assisting the client to understand the underlying theme of Florida Supreme Court opinions applying the *foreseeable zone of risk test* to determine if a legal duty is owed, we put the client in a better position to help in defending the claim.

To gain access to court under Florida negligence law, claimants must allege that they were owed some legal duty. A legal duty can arise from: (1) statutes; (2) judicial interpretation of statutes; (3) case law; and (4) the specific facts of a case. Disputes as to whether a legal duty is owed most frequently occur when it is alleged that the legal duty arises from the specific facts of the case. The *foreseeable zone of risk test* is used to determine if the specific facts of the case give rise to a legal duty. This test was explained in detail in the Florida Supreme Court's opinion *McCain v. Florida Power Corp*, 593 So.2d 500 (Fla. 1992), and poses the question, Does the activity at issue create a general zone of foreseeable risk of harm to others?

It seems to be a simple test, but trial court decisions applying the *foreseeable zone of risk test* are often disputed. One reason is that the test is often confused with the concept of proximate cause as applied under Florida law, and the wrong test is applied. More frequently though, a skilled attorney drafts the complaint to allege that the activity created a foreseeable risk of harm to others, and the defense attorney simply disagrees with that assertion. Recently, on March 27, 2014, the Florida Supreme Court clarified the law on this issue in *Dorsey v. Reider*, 139 So.3d 860 (Fla. 2014).

In *Dorsey*, it was alleged that Mr. Reider prevented Mr. Dorsey from escaping an assault committed by a third individual. A jury trial was held, and Mr. Reider's motions challenging the existent of his legal duty to Mr. Dorsey were denied. The verdict awarded over $1.5 million in favor of Mr. Dorsey. The trial court's application of the *foreseeable zone of risk test* was appealed. The appellate court ruled that Mr. Reider did not owe a duty of care to Mr. Dorsey. Upon further appeal, the Florida Supreme Court, applying the *foreseeable zone of risk test*, determined that hindering someone's "ability to escape an escalating situation created a foreseeable zone of risk posing a general threat of harm to others."

While not an earth-shattering opinion, when reviewed with other Florida Supreme Court precedent, a theme emerges. Over the years the Florida Supreme Court, in applying *McCain*, has determined that the following situations create a foreseeable zone of risk that pose a general threat of harm to others:

- Selling a firearm to an intoxicated person. *See*, *Kitchen v. K-Mark Corp*., 697 So.2d 1200 (Fla. 1997);
- Directing an intoxicated driver to move a vehicle to another location. *See*, *Henderson v. Bowden*, 737 So.2d 532 (Fla. 1999);
- Deactivation of traffic signals. *See*, *Goldberg v. Fla. Power & Light Co.*, 899 So.2d 1105 (Fla. 2005);
- Permitting property conditions to extend into the public right-of-way. *See*, *Williams v. Davis*, 974 So.2d 1052 (Fla. 2007); and
- Storage and handling of pollutants or other hazardous materials. *See*, *United States v. Stevens*, 994 So.2d 1062 (Fla. 2008); *See*, *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216 (Fla. 2010).

The underlying theme of these Florida Supreme Court opinions is that the *foreseeable zone of risk test* should be applied broadly to allow claimants access to the courts and the opportunity to prove their cases. This is consistent with the Florida Supreme Court's policy that summary judgment motions should be rarely granted so that claimants have access to the resolution of claims through trial. By helping our clients understand this concept, they will better understand the legal process and, hopefully, be in a better position to assist us in defending their claims. ■

* *Sam is an associate in our Tampa, Florida office who can be reached at 813.898.1806 or schigginbottom@mdwcg.com.*

***New Jersey—Amusements, Sports & Recreation Liability***

# *WALTERS V. YMCA*, PUTTING SOME LIMITATIONS ON *STELLUTI V. CASAPENN*

By Walter F. Kawalec, III, Esq.*

## KEY POINTS:

- In *Stelluti v. Casapenn*, the New Jersey Supreme Court held that exculpatory provisions in fitness club contracts are enforceable for negligence claims, but not gross negligence or recklessness cases.
- The Appellate Division, in *Walters v. YMCA*, limited *Stelluti* to cases where the cause of the injury was not something which could be present on any business premises and where the cause of the injury was related directly to the inherently risky activity.

*Walter F. Kawalec, III*

In 2010, the New Jersey Supreme Court issued its opinion in *Stelluti v. Casapenn Enterprises, Inc.*, 1 A.3d 678 (N.J. 2010), in which the court examined the applicability of an exculpatory (*i.e.*, hold harmless) provision in the context of a private health club membership. A club patron was injured when the handlebars on the spinning bike she was using collapsed. When she applied for membership in the club, the contract had included a broad exculpatory clause that purported to release the club and its employees from "any and all claims or causes of action" and purported to waive any right to bring legal action against the club for personal injury or property damage. The exculpatory provision also specifically stated it would include injuries occurring as a result of "the sudden and unforeseen malfunctioning of any equipment."

Recognizing that the contract was one of adhesion, the *Stelluti* court applied the law applicable to determine the enforceability of such contracts and held that there had to be a balance between the common law duties of business owners and the assumption of the risk associated with "physical-exertion-involving discretionary activities," such as those at a health and fitness club. The court concluded that the exculpatory clause was appropriate to relieve the club of liability for negligence under these circumstances, but not for recklessness or gross negligence.

One of the questions left unanswered in *Stelluti* concerned how broadly the exculpatory clause could be and still apply under the rationale employed by the *Stelluti* court. In a recently published decision, *Walters v. YMCA*, the Appellate Division tested those limits and narrowed the types of claims for which an exculpatory provision would apply in the context of health clubs.

In *Walters*, the plaintiff was a patron at a Newark YMCA. The plaintiff slipped and fell at the bottom of a set of steps leading to the facility's swimming pool. The evidence demonstrated that each of the steps contained slip-resistant rubber, except for the bottom step. There, the rubber was cut off due to wear, and it was on that spot that the plaintiff slipped and was injured.

The agreement the plaintiff signed with the YMCA contained a very broad exculpatory provision which stated that the YMCA would not be responsible for any injury "sustained... while on any YMWCA premises or as a result of a YMWCA sponsored [activity]." The question then arose as to whether the broad assent to exculpatory clauses for negligence recognized by the Supreme Court in *Stelluti* applied to the specific facts in *Walters* in light of the fact that the patron's injuries did not occur while using exercise equipment, but as a result of a condition of the property not directly related to its use as a fitness center.

The court first detailed the rationale in *Stelluti*, highlighting that a key to that decision was the "inherently risky nature" of the physical activity undertaken by Ms. Stelluti at the time she was injured. By contrast, in *Walters*, the plaintiff was not injured while using the pool or while engaging in any physically strenuous activities. Rather, the injury was one which could have occurred on any business premises, and the YMCA's nature as a physical-fitness facility was irrelevant to the cause of the injury.

One of the arguments the YMCA made was to point out that the plaintiff was proceeding toward the pool at the time of the accident and the pool constituted an activity sponsored by the YMCA. As such, the YMCA proposed, the provision should have applied. However, the court emphasized that this fact was irrelevant because it did not go to the cause of the accident, which was the slipping on an inadequately protected stair tread, and not the utilization of the pool itself. It was the cause of the accident which, in the *Watlers* court's mind, was the key fact.

The court recognized that the YMCA's exculpatory language was so broad that, if applied literally, it would "eviscerate the common law duty of care owed to its invitees, regardless of the nature of the business activity involved." That, the Appellate Division found, would be contrary to the public interest. It would relieve the business owner—the party who is most capable of discovering and ameliorating the negative effects of the condition of property—of the responsibility for the injury and place it on either the injured party or on society as a whole. Thus, the court held, the exculpatory provision could not be enforced and *Stelluti* was limited to injuries caused by or directly connected with the fitness equipment.

The outcomes of *Walters* and *Stelluti* cannot be completely harmonized. The policy arguments for imposing a common law duty of care in *Walters* could have equally applied to *Stelluti*, with the court's concerns for the forseeability of injury in inherently risky activities, which was a key to the *Stelluti* decision, addressed by way of the assumption of the risk doctrine and related legal theories. Indeed, there appears to be at least much reason, from a policy standpoint, to impose a duty of care on the fitness facility to ensure that its exercise equipment is in good repair as there is to ensure its steps are also in good repair.

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*New Jersey—Automobile Liability*

# WHEN A VEHICLE IS AN AUTOMOBILE—THE MAZE OF STATUTORY AND CASE LAW IN NEW JERSEY FOR DETERMINING ELIGIBILITY FOR PIP BENEFITS

By Ariel C. Brownstein, Esq.*

## KEY POINTS:

- Questions regarding the type and use of the vehicle involved in a loss are fundamental in determining PIP coverage.
- A private passenger vehicle is not conveyed to the public as transportation for hire and is not customarily used for business purposes.
- Obtain as much information as possible at the onset of a claim to help identify if a vehicle is an "automobile" for coverage purposes.

*Ariel C. Brownstein*

Coverage for Personal Injury Protection (PIP) benefits in New Jersey is available to those who "sustain bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile, or as a pedestrian, caused by an automobile or by an object propelled by or from an automobile, and to other persons sustaining bodily injury while occupying, entering into, alighting from or using the automobile of the named insured, with permission of the named insured." N.J.S.A. 39:6A-4. While this statute raises several eligibility issues, chief among them is: When is a vehicle considered an automobile?

An "automobile" is defined by N.J.S.A. 39:6A-2(a). In relevant part, that stautute provides that an "automobile" is:

> A private passenger automobile of a private passenger or station wagon type that is owned or hired and is neither used as a public or livery conveyance for passengers nor rented to others with a driver; and a motor vehicle with a pickup body, a delivery sedan, a van, or a panel truck or a camper type vehicle used for recreational purposes owned by an individual or by husband and wife who are residents of the same household, not customarily used in the occupation, profession or business of the insured other than farming or ranching.

In essence, the statute provides two separate distinctions of what can be considered an automobile, each with its own separate sub-elements. Excluded from the definition are motorcycles. *See*, *Ingersoll v. Aetna Cas. & Sur. Co.*, 138 N.J. 236, 238 (1994). Also excluded are motor scooters and dune buggies. *See*, *Solorzano v. Sapunaricj*, 386 N.J. Super. 323, 326 (App. Div. 2006); and *Wilno v. N.J. Mfrs. Ins. Co.*, 180 N.J. Super. 146 (App. Div. 1981) *rev'd on dissent* 89 N.J. 252 (1982). The first inquiry is whether the insurance carrier intended to cover the risks of driving the vehicle at issue. The more unconventional the vehicle, the less likely it will be considered an automobile for coverage purposes.

In *Giordano v. Allstate*, 260 N.J. Super. 329 (App. Div. 1992), at issue was a minivan fitted to carry seven passengers. The vehicle was owned by the plaintiff's employer, who was a sales manager at a car dealership. The vehicle was available to the plaintiff to be test driven by potential customers, as well as for his unrestricted personal use. The plaintiff was involved in an accident while using the vehicle for personal purposes.

The court provided that the first inquiry was whether the minivan was "a private passenger or station wagon type automobile" or a "van…customarily used for business…purposes." The court determined that the minivan was not a van as defined by the statute because a van was viewed by the legislature with less traditional passenger vehicles, such as pickups, panel trucks or delivery sedans. Since the vehicle was outfitted as a passenger vehicle, it was a station wagon type, therefore, the question of whether it was customarily used for business purposes was irrelevant, and the plaintiff was afforded benefits.

Therefore, the only additional inquiry when a vehicle is a private passenger type vehicle is whether it was being operated for a fee and/or normally used for public conveyance. This part of the statute is strictly construed by the courts. The courts look to whether the vehicle is generally available to the public rather than if the vehicle was operated for a fee on the date of loss. *See*, *CSC Ins. Services as Servicing Carrier for MTF of New Jersey v. Graves*, 293 N.J. Super. 244 (Law Div. 1996).

If the vehicle is a pickup truck, van, panel truck and the like, the question is whether the vehicle was "customarily used in the occupation, profession or business of the insured." In *Thompson v. Potenza*, 364 N.J. Super. 462 (App. Div. 2003), the plaintiff was in an accident involving a van, owned by a third party, operated in the course of the plaintiff's employment. Discovery revealed that the plaintiff used the van approximately once a week to make deliveries, but otherwise used it for personal purposes. The court noted that the key to the dispute was the definition of "customarily" as used in the statute. Because the statute did not define customarily, the court turned to *Black's Dictionary* which stated, "[u]sually, habitually, according to custom, general practice or usual order of things; regularly." Therefore, the court found that the plaintiff's use of the vehicle once a week did not rise to the level of establishing usual commercial use of the van and it remained a personal vehicle, entitling the plaintiff to benefits.

A court's focus is fact sensitive and turns on the purpose and use of the vehicle. Coverage decisions should first focus on the type of vehicle in which a loss occurred, then to its use and how it is conveyed to the public. Obtaining as much information about the vehicle and its use in the beginning of the claims process is vital in determining whether a vehicle is an automobile for PIP purposes. For example, a police report that shows the letter "X" before the numerals on the license plate denotes a commercial vehicle. Police reports also denote the vehicle type and use. Recorded statements and Examinations Under Oath at the onset of a claim will also yield critical information as to the type of vehicle and the history of its use, which will help carriers determine whether the vehicle is an "automobile" as defined by N.J.S.A. 39:6A-2(a). ■

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***New Jersey—Workers' Compensation***

# MEETING THE PROOF REQUIREMENTS UNDER THE ANTI-FRAUD PROVISION OF THE WORKERS' COMPENSATION ACT…AN UPHILL BATTLE OR CLIMBING MT. EVEREST?

By Jammie N. Jackson, Esq.*

## KEY POINTS:

- The anti-fraud provision of the New Jersey Workers' Compensation Act sets forth the elements necessary to establish a fraudulent claim for benefits.
- The terms "purposely or knowingly" contained in that provision require that a "fraudulent statement must be made with a conscious objective to obtain benefits to which one knows he or she is not entitled or with awareness that the intentional falsehood will cause the desired result of fraudulently obtaining benefits."
- Even if the proof requirements of the anti-fraud provision are satisfied, denial of the claim is not mandatory.

*Jammie N. Jackson*

The New Jersey Office of the Insurance Fraud Prosecutor launched a new public awareness campaign featuring radio, cable, transit and internet ads declaring "Insurance Fraud=Prison." Yet, fraud remains a part of every insurance line, including the workers' compensation system. According to the Association of Certified Fraud Examiners' (ACFE) 2014 Report to the Nations on Occupational Fraud and Abuse, a typical organization loses five percent of revenues each year due to fraud. The study data was compiled from 1,483 cases of occupational fraud that occurred between January 2012 and December 2013. The study found that the average amount of time between when the fraud commenced until it was detected was approximately 18 months. So it is not surprising that more respondents are raising N.J.S.A. 34:15-57.4, the anti-fraud provision of the New Jersey Workers' Compensation Act, in defense of suspected fraudulent claims. However, if you read the case of *Bellino v. Verizon Wireless*, 86 A.3d 751 (App. Div. 2014), it seems that meeting the requirements of N.J.S.A. 34:15-57.4 is more than an uphill battle.

*Bellino* concerned an injured worker's eligibility for temporary total disability benefits and medical benefits and the proof required to establish the elements of the Workers' Compensation Act's anti-fraud provision. More specifically, the Appellate Division addressed the evidence the respondent must offer regarding the claimant's state of mind to disqualify a claimant who makes misstatements about his or her medical history when applying for benefits.

The petitioner sought temporary total disability benefits and medical benefits for injuries to her back and hand resulting from a work-related accident that occurred on February 23, 2010. Compensability was accepted, and the respondent provided authorized medical treatment until one of the employer's doctors issued a report indicating that no additional curative medical treatment for her injuries sustained in the accident, including complex regional pain syndrome, was needed. As a result, the petitioner filed a motion for temporary total disability benefits and medical benefits, and a full trial ensued.

At trial, the respondent alleged that the petitioner provided "fraudulent information to her examining and treating physicians" and, therefore, her claim should be disqualified under the anti-fraud provision of the Act. The respondent contended that several of the petitioner's statements to both her treating and examining physicians were false, incomplete or misleading, including that the petitioner did not disclose every medication she was taking to each doctor she saw; did not report all prior treatment of her back and hand to each doctor; failed to reveal that she had a prior substance abuse problem and took Suboxone to prevent relapse; and failed to disclose her prior psychiatric issues and treatment. The petitioner denied purposely or knowingly providing false or misleading information. She testified that she tried to answer all of the doctors' questions truthfully, but pointed out the she had seen many doctors and was not always certain of times and dates of precise appointments. The Workers' Compensation Judge rejected the respondent's arguments and concluded that the respondent had not proven, by a preponderance of the evidence, that the petitioner "purposely or knowingly made false or misleading statements for purposes of obtaining benefits." The judge noted, "[t]he medical records introduced into evidence reflected petitioner's pre-existing conditions and prior use of medications and were reviewed by treating and examining doctors of both parties." The respondent appealed.

The Appellate Division affirmed the trial judge's decision, noting that under N.J.S.A. 34:15-57.4, the moving party must show that: (1) the injured worker acted purposefully or knowingly in giving or withholding information with the intent that he or she receive benefits; (2) the worker knew that the statement or omission was material to obtaining the benefit; and (3) the statement or omission was made for the purpose of falsely obtaining benefits to which the worker was not entitled. The terms "purposely or knowingly" require that "the fraudulent statement must be made with a conscious objective to obtain benefits to which one knows he or she is not entitled or with

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***Ohio—Employment Law***

# THE IDIOSYNCRASIES OF OHIO'S EMPLOYMENT DISCRIMINATION LAW

By Keith Hansbrough, Esq.*

## KEY POINTS:

- Ohio's employment discrimination statute only requires four employees to subject an employer to its terms.
- Ohio law allows for supervisors and managers to be held personally liable for their unlawful discriminatory actions.
- Ohio has particular rules for plaintiff's counsel's dealings with a company's employees.

*Keith Hansbrough*

Ohio's employment discrimination law presents many idiosyncrasies for defense attorneys who are accustomed to defending employment discrimination cases in other states or exclusively under federal law. Ohio's employment discrimination laws are mostly concentrated in Ohio Revised Code Chapter 4112. This portion of the Ohio Revised Code makes it unlawful for employers to discriminate against individuals on certain grounds. Specifically, section 4112.02(A) of this Code states that it shall be an unlawful discriminatory practice for any employer, because of the race, color, religion, sex, military status, national origin, disability, age or ancestry of any person, to discharge any person without just cause, to refuse to hire or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment. This statutory provision closely follows the various federal laws. In fact, much of the case law interpreting Ohio Revised Code Chapter 4112 refers to one or more of the federal laws. For example, in determining what constitutes a disability under the definition in section 4112.01(A)(13), it is appropriate to look to federal law for guidance under the Americans with Disabilities Act. *Pinchot v. Mahoning County Sheriff's Department*, 843 N.E.2d 1238 (Ohio App. 2005).

There are three major idiosyncrasies under Ohio employment discrimination law that are of particular importance:

**(1)** Ohio's employment discrimination statute only requires four employees to subject an employer to its terms;

**(2)** Ohio law allows supervisors and managers to be held personally liable for their unlawful discriminatory actions; and

**(3)** Ohio has particular rules for plaintiff's counsel's dealings with a company's employees.

First, the requisite number of employees an employer has before the employer becomes subject to the anti-discrimination laws is much smaller than that of most federal laws. Section 4112.01(A)(2) defines "employer" as any person employing four or more persons within the state and any person acting directly or indirectly in the interest of an employer.

Second, Ohio law allows supervisors and managers to be held personally liable for unlawful discriminatory acts committed by such persons. This issue of "personal employee liability" is unique to Ohio law and was established by the Ohio Supreme Court in *Genaro v. Central Transport, Inc.*, 703 N.E.2d 782 (Ohio 1999). In *Genaro*, the court stated that the term "person" is defined very broadly by Ohio Revised Code section 4112.01(A)(1) as including one or more individuals. The court then took that interpretation of the language to find that section 4112.01(A)(2)'s definition of "employer," by its very terms, encompasses individual supervisors and managers whose conduct violates the provisions of Ohio Revised Code Chapter 4112. As such, **supervisors** and managers can be personally liable.

Third, Ohio has particular rules for plaintiff's counsel's dealings with current and former employees of the company. Generally speaking, a plaintiff's attorney representing an interest adverse to a defendant corporation may, in fact, communicate with certain current and/or former employees of the corporation without the consent of a corporation's lawyer, even when defense counsel asserts a "blanket representation" of the corporation and all of its current and former employees. It is critical to analyze the appropriateness of the contact based upon whether the individual contacted is a former or current employee of the defendant corporation.

Many people tumble to the wrong conclusion that, if an individual currently works for a defendant corporation, plaintiff's counsel may not ethically contact that individual. Ohio Advisory Opinion 2005-3 clearly states that such communication with a current employee of a defendant corporation is permissible under specific guidelines. Under Ohio's ethical rules for legal counsel, such contact with current employees is only prohibited when one of three scenarios are present. The three instances where contact with a current employee is prohibited are:

**(1)** The current employee supervises, directs or regularly consults with the defendant corporation's lawyer concerning the case; or

**(2)** The current employee has authority to obligate the defendant corporation with respect to the case; or

**(3)** The current employee's act or omission with the case may be imputed to the defendant corporation for purposes of civil or criminal liability.

As to former employees of a defendant corporation, a plaintiff's attorney may contact them without the consent of the defendant corporation's legal counsel, as long as:

- The former employee is not represented by his or her own legal counsel in the case;
- The former employee has not asked the defendant corporation's attorney to provide legal representation to him or her in the case;
- The former employee has consented to speak with the plaintiff's attorney;

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# On The Pulse…

## IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

### We Are Proud Of Our Attorneys For Their Recent Victories

### CASUALTY DEPARTMENT

**Joe Lesinski** (Pittsburgh, PA) obtained a defense verdict in an automobile liability trial on behalf of our client, an international oilfield services company, and its employee. The employee was operating a semi-trailer truck while hauling 40,000 pounds of drilling equipment. The plaintiff alleged that she was rear-ended by our client's employee while attempting to merge onto a highway at a cloverleaf intersection. The plaintiff's vehicle was pushed off the highway and rolled many times. Through the testimony of an accident reconstruction expert, Joe effectively established that the plaintiff had come to a complete stop on the side of the highway while attempting to merge and had pulled out in front of our client's truck, just seconds prior to impact, while obtaining a maximum speed of only 25 mph. After two hours, the jury returned a verdict finding the plaintiff 85% at fault for the accident.

After a three-day trial before the Superior Court of New Jersey, Atlantic County, **Diane Magram** (Cherry Hill, NJ) obtained a unanimous defense verdict in an auto case. The plaintiff alleged that he sustained permanent injuries to his cervical spine and lumbar spine as a result of an auto accident. The defense expert testified that the plaintiff did not sustain any permanent injuries as a result of the accident and that his current complaints were all related to preexisting degenerative conditions in his neck and back. Both the plaintiff's expert physician and our doctor testified live. The jury deliberated only one and one-half hours and found that the plaintiff did not sustain a permanent injury as a result of the accident. The UM arbitration award had been in the amount of $65,000.

**Ray Freudiger** (Cincinnati, OH) obtained a defense verdict in a jury trial in Warren County, Ohio. The case involved a rear-end car accident in which Ray's client admitted fault. Despite the minimal nature of the impact, the plaintiff alleged serious and permanent injuries. She incurred over $69,000 in medical expenses after the accident. The plaintiff's expert was a pain management specialist. The defense's expert physician testified that the plaintiff's treatment was fueled by her subjective complaints, but that there was no objective evidence of injury. The plaintiff's settlement demand had been $200,000, and she rejected our pretrial offer of $6,000.

In a case that attracted a high amount of media attention in central Pennsylvania, **Brigid Alford** and **Allison Krupp** (Harrisburg, PA) obtained a defense verdict following a six-day jury trial in Cumberland County. The plaintiff was a young, but experienced, sprint car driver who was permanently paralyzed in a racing accident. He had signed a release prior to entering the track that night. During the race, his car collided with another and flipped out of the track. His principal claim in his suit against the race track was that, because the track was poorly designed, it failed to keep his car on the track after the initial collision. We were not assigned the case until nearly ten months after a default judgment had been entered against the race track. After an initial evidentiary hearing, the default was opened, which allowed Brigid and Allison to litigate the issue of liability. The court denied the defendant's later summary judgment motions as to both the release and assumption of risk/no duty arguments. The court also denied a defense motion to bifurcate, letting the jury hear testimony regarding damages and liability. The sole pretrial settlement demand had been $5 million (total liability limits), and no settlement offer was made. The jury returned a defense verdict, finding that the plaintiff had released the track from liability.

**David Wolf** and **Michael Salvati** (Philadelphia, PA) obtained summary judgment before the Philadelphia Common Pleas Court in a home repair accident claim. The plaintiff was a subcontractor hired by the prime contractor defendant to perform window repairs at our client's house. At the end of the first day of work, the plaintiff fell off a ladder, resulting in a leg fracture and internal fixation surgery. He faulted the prime contractor for not holding the ladder, as he had done previously. He also faulted our client/homeowner, the only insured defendant, as being vicariously liable for the actions of the prime contractor, whom the plaintiff's expert characterized as the "owner's representative." David and Michael argued that, although there was a quasi-family relationship between the prime contractor and our client, the prime contractor remained independent and there could not be vicarious or agency liability for his alleged culpable conduct. The court accepted our argument that the hiring of a contractor for home repair work does not establish an agency relationship in the absence of an explicit or implied understanding that such a relationship exists. The court found that there was no such understanding in this case, as the homeowner had hired the prime contractor for his independent, specialized expertise.

**Adam Calvert** (New York, NY) obtained summary judgment in the New York State Supreme Court, Kings County. Adam represented a company that provided management of the janitorial services for the codefendant, a hospital. The plaintiff, a patient in the hospital, slipped and fell on water outside of her hospital room. Adam was able to get the plaintiff's direct claims dismissed because our contractor client did not owe a duty to the plaintiff. Adam was also able to have the hospital's cross-claims against our client for contribution and indemnity dismissed because he was able to show that the hospital also had some involvement with maintenance and janitorial services at the hospital.

**April Collins** (Orlando, FL) represented a discount retailer in a negligence action in which she prevailed on a motion for final summary judgment. The plaintiff alleged that she had slipped, but

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** Prior Results Do Not Guarantee A Similar Outcome*

# On The Pulse...

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did not fall, on some yogurt. She claimed a severe back injury. But she did not seek treatment until approximately nine months after the incident. April argued that the record evidence showed that her client did not have actual or constructive notice of the alleged dangerous condition. The plaintiff asserted that constructive notice could be inferred due to the location of a cashier's close proximity to the yogurt. To counter this argument, April presented case law holding that the mere presence of an employee does not, on its own, create an inference of constructive notice.

**Christopher Reeser** (Harrisburg, PA) obtained a defense verdict in a binding high/low arbitration in a case that arose out of a rear-end collision. Both our client and the plaintiff were traveling in heavy fog. Our client truck driver admitted that he was traveling too fast for conditions when he rear-ended the plaintiff, who had undergone an L5-S1 fusion three years before the accident. She went on to have a second fusion after the accident, followed by radiofrequency ablation surgery and then implantation of a spinal cord stimulator. Although she worked an additional three years after the accident, she ultimately applied for and received Social Security Disability. A records review performed by our neurosurgeon concluded that the surgery was not causally related to the accident. However, our neurosurgeon could not do an IME due to a change in his work responsibilities. Therefore, an IME was requested with another neurosurgeon, who wrote a report very favorable to the plaintiff on the causation issues. We were able to persuade the neurosurgeon who did the records review to write a detailed report based on his records review. We took his deposition by videotape and subjected him to cross examination, even though it was not required that we take the doctor's testimony under the arbitration agreement. At arbitration, Chris argued that the surgery was unrelated to the accident based upon statements that the plaintiff made before and after the accident, including a statement that she returned to baseline six weeks after the accident. Because the plaintiff was bound by the limited tort option and there were no out-of-pocket economic losses for the short period of disability following the accident, Chris argued that the plaintiff was not entitled to recovery. The judge agreed and ruled that the limited tort threshold had not been breached.

## HEALTH CARE DEPARTMENT

**Dan Sherry** (King of Prussia, PA) obtained a defense verdict in a jury trial in Beaver County, Pennsylvania, on behalf of an interventional radiologist and his professional group. The radiologist was removing an infected dialysis catheter and replacing it with a new one when he inadvertently punctured or tore both the left jugular vein and the adjacent parietal pleura. Our client suspected a tear and did a venogram, which showed no active bleeding. The patient was admitted for observation and was initially relatively stable. However, the plaintiff subsequently went into a cardiopulmonary code and could not be revived. Dan successfully defended this case on standard of care and causation, and the jury returned a verdict that our client was not negligent. No settlement offer was ever made.

**Justin Johnson** and **Michael Levenson** (Roseland, NJ) obtained a defense verdict in a two-week wrongful death trial in Somerset County. The plaintiff claimed that our client, an interventional radiologist, failed to diagnose and treat an acute cardiac tamponade caused by a tear to the superior vena cava (SVC) following a dialysis catheter exchange with balloon angioplasty. This condition occurs when blood fills the pericardial sac surrounding the heart, preventing it from beating properly. In response to the decedent's deteriorating condition, the defendant doctor called a "code," undertook efforts to resuscitate the patient and drained a large hemothorax, which had also developed as a result of the SVC tear. The plaintiff further claimed that the defendant doctor failed to obtain informed consent from the decedent before the procedure. The jury found for the defense on all claims.

After a five-week medical malpractice trial, **Jay Hamad** (New York, NY) obtained a defense verdict on behalf of a cardiothoracic surgeon. The suit against our client and the co-defendants alleged deviations from the standard of care relating to the diagnosis, management and treatment of a post-catheterization femoral bleed, resulting in permanent disability, nerve damage, pain and atrophy. During cross examination of the plaintiff's surgery and cardiology experts, Jay elicited testimony directly contradicting their respective reports, depositions and trial testimony. After presentation of the defense case-in-chief and cross examination of the co-defendants and their experts, Jay succeeded in foreclosing the co-defendants' ability to implicate our client. At the conclusion of evidence (including 11 experts) and summations by counsel for the co-defendants, Jay's summation capitalized on blow-ups of the trial testimony of the plaintiff's experts' assertions/diagrams ("promises") presented during the plaintiff's opening to demonstrate that the plaintiff's liability/causation arguments lacked context, relied upon unfounded factual assumptions, and were in contradiction of aspects of counsel's "promises" and testimony of his experts. After 43 minutes of deliberations, the jury returned a unanimous defense verdict on all counts.

**Chanel Mosley** (Orlando, FL) obtained summary judgment in a premises liability case in which she successfully defended a hospital that was sued after the plaintiff alleged that she slipped and fell in water while walking down a patient hallway. The testimony in the case established that neither the plaintiff nor the hospital had any knowledge of how the water got on the floor, who was responsible for its presence or how long it had been there. Therefore, the court found that the plaintiff failed to meet her burden of proving that the hospital had actual or constructive knowledge of the presence of the water, as required under the Florida transitory foreign substance statute.

## PROFESSIONAL LIABILITY DEPARTMENT

**Christopher Gonnella** and **William Waldron** (Roseland, NJ) obtained summary judgment dismissing the plaintiff's claims of professional negligence, breach of contract, unjust enrichment

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# On The Pulse...

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and fraud against our client, an architect, in the Superior Court of New Jersey, Gloucester County. In the complaint, the plaintiff/homebuyer asserted that our client breached his contract with the developer/seller and deviated from accepted standards of architectural practice in connection with his professional design services related to the repair and renovation of a fire-damaged home. In essence, the plaintiff alleged that our client's plans and specifications for the project failed to comply with applicable building codes and did not provide sufficient information for the contractor to properly perform the renovation of the structure. After extensive briefing and argument, the court granted our motion for summary judgment and dismissed the complaint with prejudice on the basis that the plaintiff could not establish a *prima facie* case as to our client based upon the evidence produced during the course of discovery.

In a case filed in Delaware, **Wilhelm Dingler** (Philadelphia, PA) and **Art Aranilla** (Wilmington, DE) obtained the dismissal of a case against an Arizona accounting firm sued for alleged malpractice, breach of fiduciary duty, breach of contract and vicarious liability. Total damages with parallel litigation in Arizona exceeded $2 million. The plaintiff's claims were barred by the statute of limitations, but the plaintiff attempted to avoid early dismissal by omitting certain allegations in the complaint that would have established a time frame. We moved to dismiss, attaching one of the plaintiff's IRS filings from an audit in which the plaintiff had admitted to actual knowledge of the alleged claims five years ago. Delaware's statute of limitations for all the alleged causes of action is three years. As grounds for requesting the court's consideration of evidence outside of the complaint in reviewing the motion to dismiss, we argued that the court could take judicial notice of the content of documents required by law to be filed, and actually filed, with federal or state officials, pursuant to Delaware Rule of Evidence 201. In response, the plaintiff filed a notice of dismissal without answering our motion to dismiss.

**Frank Baker** and **Wendy O'Connor** (Allentown, PA) obtained summary judgment in an action surrounding the publication of allegedly defamatory statements on the website of a political action committee. The plaintiffs—a candidate for public office and his friend, a former elected official involved in local politics—sued several defendants over comments published on a website created by one of the defendant's political action committees that described two instances in which the plaintiff/candidate had stolen public property and assaulted a man during a road rage incident. The plaintiffs did not name our client as an original defendant and did not seek leave to join our client until 18 months after they became aware of the alleged tortious conduct. Finding that the plaintiffs did not commence their actions against our client within a year of becoming aware of the alleged harm, the trial court ruled that the claim was barred by the statute of limitation. It also rejected the plaintiffs' argument that the inclusion of a John Doe defendant served to toll the statute. Additionally, the court was unpersuaded by the plaintiffs' argument that the discovery rule should apply to toll the statute because they were allegedly unable to discover the alleged involvement of our client in the creation of the website, notwithstanding their suspicion that individuals other than the original defendants were involved. The court also granted summary judgment on behalf of the remaining defendants, noting that the mere re-publication of a link to a website does not constitute defamation. Finally, the court had further determined that the plaintiffs, as public figures, had failed to show that the statements were made in reckless disregard for the truth.

**Jack Slimm**, **Art Wheeler** and **Dante Rohr** (Cherry Hill, NJ) obtained dismissal of a $55 million claim asserted by a Wall Street group against closing counsel and our client, general counsel for a hospital. Our client, a health care regulatory expert, became general counsel of a Wall Street group that was purchasing a hospital out of bankruptcy. The Wall Street group knew that the hospital would be extremely profitable if run properly. Therefore, counsel was retained to handle the purchase. Our client was retained to handle the regulatory aspects of the takeover, which were significant. He was relied on by his clients (purchasers), the purchaser's attorneys and the bankruptcy counsel. Therefore, there were no privity issues. However, we were able to demonstrate that our client covered each and every aspect of the transaction and advised the purchasers of the pitfalls in accepting the old hospital's Medicare provider numbers. Therefore, the court found that the claims against our client were not viable, despite expert reports.

**Howard Mankoff** (Roseland, NJ) obtained summary judgment in a legal malpractice suit. Based on our subsequent motion, the court awarded us $86,000 in legal fees and costs, agreeing with Howard's argument that the legal malpractice suit was frivolous. Our client had represented the plaintiff in a commercial dispute that had been tried non-jury. After the trial, the plaintiff wrote a letter to the Administrative Office of the Courts complaining about our client and alleging that our client failed to introduce critical evidence during the trial. Shortly after that, our client sued the plaintiff for unpaid legal fees and obtained a judgment. After waiting more than six years, the plaintiff filed this legal malpractice suit, arguing he was entitled to the benefit of the discovery rule. The court granted the plaintiff eight extensions of discovery. Shortly before the expiration of the final extension, the plaintiff attempted to substitute new counsel, which the judge characterized as trying to jump off the Titanic as it was going down. The court granted Howard's summary judgment motion, agreeing that the complaint was barred by the statute of limitations and the entire controversy doctrine. As required by New Jersey Court Rules, we filed a separate motion for counsel fees based on the argument that the claim was frivolous. The court agreed with us again, finding persuasive Howard's argument that after eight discovery extensions, the inability of the plaintiff to obtain an expert was conclusive evidence the claim had no factual or legal basis.

Following a three-week trial in the Chancery Division in New Jersey, **Jack Slimm** (Cherry Hill, NJ) obtained a dismissal on behalf of an accountant in connection with an action filed by a Trust against the purchasers of land appraised at $6 million, but which

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was purchased by the defendant purchasers for only $2 million. The chief of Psychiatry at Jefferson Hospital testified on behalf of the Trust that the seller, a wealthy widow, suffering from Alzheimer's at the time she signed the agreement of sale, attended the closing and sold the property to the defendant purchasers. Based upon his examination of the plaintiff and his review of voluminous hospital and medical records, the psychiatrist opined that the seller did not have sufficient mental capacity to enter into the agreement of sale and did not appreciate what she had done. The seller had memory deficits for years, and when examined for purposes of trial, she had prominent deficits in memory and executive function. Performing a retroactive opinion, the expert testified that the cognitive deficits he observed in May of 2014 were evident at the time of the sale in May of 2013. The expert for the purchasers testified that it is inappropriate for an expert to give a retroactive opinion. The appraiser for the Trust testified that the property value was $6 million, while the appraiser for the purchasers testified that the property was now worth $3.5 million. However, the plaintiff's banker testified that the property was worth $2 million, the exact amount that was in the agreement of sale that the plaintiff Trust was trying to set aside. Our client handled the accounting matters for the partnership that owned the land, including filing of all returns. When he learned that the property was being sold, he referred the plaintiff to a well-known tax and estate planning attorney for the formation of a Trust in an effort to undo the agreement of sale. Our client, together with the seller's nephew—who is the sole heir—were joined for tortiously interfering with the contract of sale. Ultimately, the plaintiff Trust settled with the purchasers through a deal that rescinded the transaction, including payments by the Trust to the purchasers, and an agreement to lease the property to the purchasers with options to buy.

**Christopher Boyle** (King of Prussia, PA) obtained summary judgment on behalf of a municipality, its chief of police and a detective/sergeant. The plaintiff had been a contracted security guard at a naval installation 20 years ago. While he was treating at a local hospital, he approached a security guard there, looking for work. Showing his old security guard identification, which he still kept in his wallet, he convinced the guard that he was a police officer and gained access to the hospital's director of security. Our clients were contacted by the director of security to investigate, and the plaintiff was charged with impersonating a public servant. The plaintiff was eventually acquitted of that charge, and he brought suit against our clients, alleging false arrest, municipal liability and malicious prosecution. Chris successfully persuaded the court that the plaintiff had not been "seized" as a matter of law, as he was ordered to appear in court on a summons, was never handcuffed and had never had restrictions placed on his liberty. It certainly helped when the plaintiff showed his current identification during his deposition, which Chris recognized as the off-duty badge case of a police officer. The plaintiff was at a loss to explain where he obtained it.

**Christopher Conrad** (Harrisburg, PA) successfully defended a school district in a special education due process hearing. The parent of a 7th grade student diagnosed with ADHD, oppositional defiant disorder and mood disorder, and who was eligible for and received special education and related services, sought an order to compel the district to fund a private placement for her son in a partial hospitalization program, which would have cost the district more than $60,000 per school year. The parent argued that the out-of-district placement was necessary, contending the district failed to and could not offer an intensive enough program to address her son's behavioral and emotional needs. Several members of the student's education team offered testimony to show that the student demonstrated measurable progress, both academically and behaviorally, with the itinerant level of learning and emotional support provided to him through his Individualized Educational Program. The hearing officer concluded that the district had offered the student an appropriate program and placement, and that the parent failed to show there was a need to place her son in such a highly restrictive setting at the district's expense.

**Sharon O'Donnell** and **Lauren Burnette** (Harrisburg, PA) obtained summary judgment in favor of a school district and its administrators who had terminated a high school honors English teacher for blogging derogatory comments about her students. The plaintiff argued that her blog entries were free speech protected by the First Amendment. The plaintiff argued that her termination was unlawful retaliation for exercising her First Amendment right to free speech. The district argued that her speech was disruptive, which is not protected by the First Amendment. The Eastern District agreed, observing, "Education is one of the most heavily protected public interests in modern American jurisprudence, [and] free speech is the 'matrix, the indispensible condition, of nearly every other form of freedom.' The plaintiff's speech, both in tone and effect, was sufficiently disruptive so as to diminish any legitimate interest in its expression and thus her speech was not protected."

## WORKERS' COMPENSATION DEPARTMENT

**Tony Natale** (Philadelphia, PA) successfully defended a large mushroom manufacturer from a claimant attempting to reinstate workers' compensation benefits after his discharge from employment. The claimant argued that he was terminated without merit and was entitled to ongoing benefits. Tony argued that the discharge was for cause and proffered a video of the claimant at work violating company policy by sleeping on the job, using his cell phone for personal reasons, eating a hot dog in a sterile work environment and making obscene gestures to the security cameras. The Workers' Compensation Judge found that the claimant was not entitled to ongoing benefits based on a discharge for cause and dismissed the claimant's reinstatement petition.

**Tony Natale** (Philadelphia, PA) also successfully defended a large mushroom distribution company in a claim petition. The claimant slipped and fell at work and landed on her knee. Within a month she had meniscal repair surgery and, a few months later, total knee

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replacement surgery. Between surgeries, the claimant was discharged from employment for violation of the company absenteeism policy. Despite original testimony to the contrary, Tony was able to have the claimant admit that she violated the company policy at issue by failing to produce medical records certifying the cause of her various absences. Tony cross-examined the claimant's medical expert and, as a result, the Workers' Compensation Judge found the claimant's surgery not to be work related. The judge also found the claimant to be fully recovered from any and all injuries sustained during the slip and fall. ■

## On The Pulse…

### MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

**Audrey Copeland** (King of Prussia, PA) successfully defended the summary judgment obtained by trial counsel **Ben Nicolosi** (Scranton, PA). The plaintiff had alleged that she was injured while waking on a sidewalk to enter the defendants' tavern when a vehicle driven by another defendant pulled into a "head-on" parking space, jumped the five-inch concrete wheelstop separating the parking spaces from the sidewalk, and struck the plaintiff. The plaintiff primarily argued that she was a business invitee and was owed a duty of reasonable care to protect her from the foreseeable harm caused by a third party. Through her expert's report, the plaintiff contended that the defendants were required to provide a sidewalk with a five-inch curb and bollards (poles or pillars of concrete or metal) to protect pedestrians from vehicle infringement. The defendants argued that they met all local zoning and building code requirements, that no similar accident had ever occurred, that the incident was unforeseeable and that their use of wheel stops was sufficient to protect pedestrians under the known circumstances.

The appellate court affirmed in a 2-1 decision, holding that summary judgment was appropriate because the plaintiff provided no legal precedent requiring the use of bollards. Also, even accepting the plaintiff's expert's opinion as true, his report failed to relate the appropriate engineering standards for the design of a parking lot and use of wheel stops, and was inadequate as a matter of law to demonstrate that the defendants were negligent for using wheel stops.

**George Helfrich** and **Patricia McDonagh** (Roseland, NJ) obtained an affirmance from the Appellate Division of an order for summary judgment granted to the defendant homeowners on a sidewalk slip-and-fall case. The trial court had dismissed the matter because the plaintiff's expert report did not provide the "why and wherefore" to explain the alleged defect in the sidewalk, such as negligent construction or repair of the sidewalk, that was allegedly created by an identified predecessor in title. The plaintiff's expert did not provide in his report the requisite construction standards that were in effect when the sidewalk was built. The Appellate Court held that the expert's bare statement that the sidewalk had collapsed because of failure to compact the base material was an inadmissible net opinion.

**Walter Kawalec** (Cherry Hill, NJ) and **John Gonzales** (Philadelphia, PA) were victorious before the Third Circuit Court of Appeals. In this civil rights case, the plaintiff alleged malicious prosecution, a violation of §1983, in connection with his arrest in a shooting investigation. The arresting officer was the investigator of the shooting. During that investigation, the officer received information from an informant that the arrestee was bragging about having shot someone. Based on that information, the investigating officer created a photo array line-up of six individuals. The shooting victim identified the arrestee as the man who shot him. Later, in connection with a separate investigation, the arresting officer obtained information suggesting that the arrestee may not have, in fact, been the shooter, but suggesting that another man was. The arresting officer created another line-up, which included this other man, and the victim confirmed that he was the actual shooter. Based on that identification, the arrestee was released and later filed a malicious prosecution action. The Third Circuit Court of Appeals affirmed the decision of the District Court below, holding that, at the time the arrest was made, there was sufficient evidence based on the initial identification from the photo line-up, as well as the informant's information, to establish probable cause to arrest and that the plaintiff had no viable case for malicious prosecution. Although the plaintiff raised issues concerning the validity of the photo line-up and other additional claims, the Third Circuit found none of them to be sufficiently viable to reverse the decision that probable cause existed and that the arresting officer had the protection of qualified immunity. ■

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## OTHER NOTABLE ACHIEVEMENTS*

**Daniel Sherry** (King of Prussia, PA) was inducted into the International Academy of Trial Lawyers (IATL) at the organization's recent international meeting. The IATL's purpose is to cultivate the science of jurisprudence, promote reforms in the law, facilitate the administration of justice and elevate the standards of integrity, honor and courtesy in the legal profession. Membership in the IATL is highly selective and is offered only to lawyers who have demonstrated skill and ability in jury trials, trials before the court and in appellate practice, and to those who have attained the highest level of advocacy.

**Bradley Remick** (Philadelphia, PA) has authored the book, *Pennsylvania Products Liability,* published by *The Legal Intelligencer*. "The practice of products liability law in Pennsylvania has grown increasingly complex over the last few years," said Mr. Remick. "Given the dramatic changes with the federal and state courts' division over the application of the Second and Third Restatements, legal practitioners are operating in previously uncharted territory. In *Pennsylvania Products Liability*, I examine the legal implications of the courts' conflict for evaluating whether a product contains a defect, using the history of products liability law in Pennsylvania as the backdrop."

Effective Monday, October 27, 2014, the physical address of our Wilmington, Delaware office changed to:

1007 N. Orange Street, Suite 600
Wilmington, DE 19801

Our mailing address remains:
P.O. Box 8888
Wilmington, DE 19899-8888

Please note our telephone numbers and extensions have not changed. However, effective October 27, 2014, our fax numer has changed to 302.552.4340.

Thomson Reuters Legal recently published *Electronic Medical Records and Litigation*, *2014 Ed.*, written by **Matthew Keris** (Scranton, PA). The book is a brand new offering that provides attorneys, physicians, health care claims professionals, risk managers and virtually every member of the health care community with an overview of the emerging legal issues surrounding Electronic Medical Records in medical negligence cases.

**Matt Keris** was also recently elected president of the Pennsylvania Defense Institute during its annual conference. Additionally, **Jason Banonis** (Bethlehem, PA) was appointed vice-president-north of the organization.

Marshall Dennehey proudly welcomed representatives from the Philadelphia Bar Foundation on September 10th for a cocktail reception in honor of the organization's 50th anniversary celebration. Special recognition was given to Marshall Dennehey's leading benefactors.

**Chanel Mosley** (Orlando, FL) has been recognized by *Florida Trend Magazine* as a Florida Legal Elite "Up and Comer" for 2014. This distinction honors the top attorneys in the state of Florida who exemplify a standard of excellence in their profession as recognized by their peers.

**Terry Bostic** (Tampa, FL) served as faculty member at the DRI's annual Young Lawyers Seminar *Elevating Your Practice in the Mile High City*. His presentation, "Trial Skills: Watch and Learn: Closing Arguments," discussed the effect of a successful closing argument and how closing arguments can ultimately win the client's case.

**A.C. Nash** (Ft. Lauderdale, FL) has been recognized by the *Daily Business Review* with their "Top 40 Lawyers Under 40" award. He was honored at a reception hosted by the DBR on September 17, 2014.

**Jon Cross** (Philadelphia, PA) recently authored the article "Fair Game? Legal Exposures Alter the Playing Field for Youth Sports" published on Property-Casualty360.com, the parent website of *Claims* and *National Underwriter Property & Casualty* magazines. The article explores the rise in youth sports injury claims and how courts are interpreting and ruling on these cases.

**Jeffrey Rapattoni** (Cherry Hill, NJ) recorded a podcast for A.M. Best Company on the topic of "The Burden of Medical Provider Fraud on the Insurance Industry." During the 10-minute Q&A segment, Jeff discusses the ubiquity of medical provider fraud and how carriers can minimize litigation and mitigate losses.

**Michael Detweiler** (Philadelphia, PA) recently authored the article "Top Legal Considerations for Independent Contractors," published in *Travel Agent* magazine and its website, www.travelagentcentral.com. The article considers the tax benefits, risks and liabilities for independent contractors in the travel agency context, in addition to errors and omissions insurance considerations. ■

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***Pennsylvania—General Liability***

# WILL IT BE EASIER FOR DEFENDANTS TO CHANGE VENUE IN PENNSYLVANIA?

By Thomas J. O'Malley, Esq.*

## KEY POINTS:

- The *Bratic* opinion provides trial courts wide discretion to decide whether the *Cheeseman* standard of "vexatiousness and oppressiveness" is met.
- *Bratic* empowers the trial judge to level the playing field for all parties as it considers whether to transfer venue within the boundaries of the Commonwealth of Pennsylvania.

*Thomas J. O'Malley*

On August 18, 2014, the Pennsylvania Supreme Court rendered the decision of *Bratic v. Rubendall*, 2014 Pa. LEXIS 2093 (Pa. August 18, 2014). This important decision clarifies the standard for intra-state venue transfers based on *forum non conveniens*.

It is established practice in the Commonwealth of Pennsylvania that plaintiffs have the initial choice of the court in which to bring an action, provided that court has jurisdiction. The *Bratic* decision points out that this plaintiff-friendly practice comes from the notion that plaintiffs will choose a forum that is convenient for them. It is not a practice designed for plaintiffs to choose a more "plaintiff-friendly" forum to seek higher verdicts. Although the court gives deference to plaintiffs' initial choice of forum, that choice is not unassailable. The original potential of "tipping of the scales" in favor of the plaintiff is counterbalanced by the defendant's option to file a petition for *forum non conveniens* to ensure fairness and practicality for all parties.

Consequently, it is significant to determine if another county could be an appropriate jurisdiction for a case when first receiving a complaint in Pennsylvania. Rule of Civil Procedure 1006.1(d) provides guidance on the defendants' ability to seek a transfer of venue. Interestingly, while the Rule itself specifically speaks of convenience to the parties and witnesses, convenience is a mere afterthought in the analysis.

Seventeen years ago, in *Cheeseman v. Exterminator, Inc*., 701 A.2d 156 (Pa. 1997), the Pennsylvania Supreme Court clarified the facts which a trial court must consider when ruling on a *forum non conveniens* motion. *Cheeseman* held that such a motion should only be granted if the defendant "demonstrate[s], with detailed information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant." The *Bratic* court pointed out that the *Cheeseman* opinion was not intended to heighten the level of oppressiveness or vexatiousness that a defendant must show; rather, *Cheeseman* merely corrected the practice of the lower courts, which gave greater weight to "public interest" factors when ruling on a petition for *forum non conveniens*. The *Bratic* court stated that public interest factors are not determinative, but may only be considered insofar as they bear directly on the ultimate test. In a point of clarification, the *Bratic* court emphasized that Rule 1006(d)(1), on its face, allows transfers based on the convenience of the parties and witnesses. In practice, convenience, or the lack thereof, is not the test that the Pennsylvania case law has established. Instead, the moving party must show that the chosen forum is either oppressive or vexatious.

The *Bratic* decision provides some additional arguments for defendants to raise in a *forum non conveniens* transfer. Some of the salient points that the *Bratic* court made on this issue are as follows:

- Affidavits in support of *forum non conveniens* motions need not be exhaustively detailed, but need only provide enough information to allow a trial judge to assess oppressiveness.
- A plaintiff's choice is given deference because it is presumably more convenient for the plaintiff and not because juries will return larger verdicts in a particular court.
- "Public interest factors" are certainly relevant to the court's consideration of *forum non conveniens* motions.
- The time and distance/mileage factors are "inherently part of the equation" for trial courts to consider, and they don't have to be specifically articulated in an Affidavit. ("The Trial Judge need not be told like a child how the distance in and of itself makes things more disagreeable and disruptive to the persons obliged to travel . . . As between Philadelphia and adjoining Bucks County, the situation in *Cheeseman*, we speak of mere inconvenience; as between Philadelphia and counties 100 miles away, simple inconvenience fades in the mirror as we near oppressiveness with every mile post of the turnpike and Schuylkill Expressway.")
- Payment of a witness by his or her employer to attend trial reduces the hardship for the witness, but does not eliminate oppressiveness.

Significantly, the *Bratic* opinion now provides trial courts with wide discretion for determining whether the *Cheeseman* standard of "vexatiousness and oppressiveness" is met. Trial judges had previously seemed more reluctant to grant a petition *forum non conveniens* motions because their decisions were being reversed on appeal. The *Bratic* decision should provide confidence to the trial courts as they now consider what will likely be an uptick in the filing of these motions in Pennsylvania. The Supreme Court's guidance in *Bratic* empowers the trial judge to indeed level the playing field for all parties as he or she considers whether to transfer venue within the boundaries of the Commonwealth of Pennsylvania. ■

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***Pennsylvania—Health Care Liability***

# THE SUPERIOR COURT OF PENNSYLVANIA JUST MADE IT A WHOLE LOT EASIER TO BLAME THE SURGICAL SPONGE

By Grant W. Cannon, Esq.*

## KEY POINTS:

- In a retained sponge case, Superior Court holds that *res ipsa loquitur* does not require a plaintiff to present direct evidence that the defendant's conduct was the proximate cause of the plaintiff's injury.
- By eliminating other responsible causes of a retained sponge, the court found that the plaintiff was entitled to an inference of negligence and causation, without the necessity of expert testimony.

*Grant W. Cannon*

All surgeries involve some risk that something adverse to the patient's interests may occur. One risk common to almost any surgical procedure is the risk of an object being left within the patient after the surgery is complete. In order to reduce the risk of this happening, hospitals have enacted policies and procedures intended to prevent a retained surgical instrument or sponge. Unfortunately, sometimes an object is left within a patient regardless of the amount of care that is exercised. When this happens, it will almost certainly lead to a lawsuit.

For many years, health care providers who were sued because of retained objects could structure their defenses around causation; what damages did the sponge actually cause? Of course, the plaintiff had the burden of proving, through expert testimony, that the sponge caused damages. In many cases, a retained sponge does not cause any actual harm to the patient, and the alleged damages are simply the result of the patient's bad health or other comorbidities. Moreover, oftentimes the sponge is identified and removed before it causes any injury. Plaintiffs who brought these cases had to overcome significant obstacles and a substantial burden in proviing damages and causation. The Pennsylvania Superior Court appears to be removing obstacles and lightening plaintiffs' burden.

In July 2014, the Superior Court of Pennsylvania rendered a decision in *Fessenden v. Robert Packer Hospital*, 97 A.3d 1225 (Pa.Super. 2014). The plaintiff in the case, Richard Fessenden, underwent removal of a portion of his esophagus and proximal stomach on August 13, 2004. During the procedure, a laparotomy sponge was placed inside Mr. Fessenden and was never removed. Shortly after the surgery, Mr. Fessenden allegedly began experiencing intermittent lower abdominal pain. **Four years later**, he presented to the emergency room with severe abdominal pain. A CT scan revealed the presence of the laparotomy sponge. A subsequent surgical procedure was done to remove the sponge and drain an abdominal abscess that had formed around the sponge. The procedure also necessitated the removal of Mr. Fessenden's gallbladder and a portion of his small bowel.

Of course, Mr. Fessenden and his wife filed a lawsuit against his prior surgeon and the hospital. In their complaint, the Fessendens alleged that the retained sponge caused Mr. Fessenden abdominal pain and an abscess, necessitating surgery, and that it caused him to lose his gallbladder and a portion of his small bowel. They further alleged that they did not need expert testimony from a licensed medical professional to meet their burden of proof because the doctrine of *res ipsa loquitur* applied. When applied, this doctrine allows the fact finder to infer from the circumstances surrounding the injury that the harm suffered was caused by the negligence of the defendant.

After the Fessendens failed to produce an expert report connecting Mr. Fessenden's alleged injuries to the retained sponge, the defendants filed a motion for summary judgment. The defendants argued that the Fessendens failed to provide any evidence that the damages complained of were caused by the retained sponge. Ultimately, the trial court agreed with the defendants and dismissed the case. The Fessendens then appealed to the Superior Court.

Somewhat surprisingly, the Superior Court overturned the trial court's decision, holding that the Fessendens established that the doctrine of *res ipsa loquitur* should apply and that they were entitled to an inference of negligence **and** causation. To justify the holding, the court stated that the Fessendens proved that sponges are not usually left in patients after surgery and that there was no explanation for the retained sponge other than the defendants' negligence. The court ignored the causation argument upon which the trial court based its decision. Unfortunately, by ignoring this key element of the defendants' argument for summary judgment, the Superior Court blurred the difference between negligence and causation in cases involving retained surgical instruments and sponges. In essence, one can argue that the Superior Court's opinion removes a plaintiff's burden of proving negligence **and** causation in cases pertaining to retained surgical instruments and sponges.

Only time will tell whether the Superior Court's ruling in *Fessenden v. Robert Packer Hospital* will be addressed by the Pennsylvania Supreme Court. Right now, it appears that the Superior Court has made it much easier for plaintiffs to bring claims against health care providers and hospitals when an object is left inside a patient.

However, the argument must be made that this opinion does not relax a plaintiff's burden of proving damages. Those who defend health care providers in matters involving retained surgical instruments and sponges will have to stand by the position that the damages portion of these claims still requires expert support, and argue that, otherwise, the damages are simply speculative. As this area of the law evolves, this may be the last line of defense. ■

* *Grant is an associate in our Pittsburgh, Pennsylvania office. He can be reached at 412.803.2440 or gwcannon@mdwcg.com.*

***Pennsylvania—Long-Term Care Liability***

# ENFORCEABILITY OF NURSING HOME ARBITRATION AGREEMENTS IN PENNSYLVANIA

By Victoria C. Scanlon, Esq.*

## KEY POINTS:

- Not all executed arbitration agreements are enforceable.
- An agreement's provisions must not unreasonably favor the drafter.
- Review an arbitration agreement regularly to confirm that its provisions remain valid.
- Correctly identify those with legal authority to sign the arbitration agreement.
- Some claims are beyond the scope of an arbitration agreement.

*Victoria C. Scanlon*

Arbitration is a favored method of resolving claims. It is often less expensive and more efficient than traditional litigation. It provides finality and, if agreed to, confidentiality—preventing a nursing home's name from being blasted across the front page of a local paper or in a social media post, describing in detail all the horrible acts or failures that the facility or its employees are alleged to have committed, and protecting a nursing home's ability to retain and attract new residents. However, not all signed arbitration agreements are enforceable. While Pennsylvania courts have strongly favored arbitration as a means of dispute resolution, the existence of an arbitration agreement and a liberal policy favoring arbitration does not mean that a court will rubber stamp an agreement and enforce arbitration. A claimant/plaintiff may ask a court to find that an arbitration agreement is invalid because either the language of the agreement is unconscionable or no longer valid. In addition, arbitration may not be permitted if the party who signed the agreement did not have authority to do so, or the dispute is beyond the scope of the agreement.

## DO THE TERMS OF AN AGREEMENT UNREASONABLY FAVOR THE DRAFTER OR IS AN INTEGRAL PROVISION NO LONGER VALID?

When determining the unconscionability of an agreement, the court will conduct a two-fold inquiry: (1) whether the contractual terms unreasonably favor the drafter of the agreement; and (2) whether there is no meaningful choice on the part of the other party regarding the acceptance of the provision. Recently, in *MacPherson v. The Magee Memorial Hospital for Convalescense*, 2014 Pa.Super. LEXIS 1781 (Pa.Super. 2014), the Pennsylvania Superior Court addressed whether an arbitration agreement was unconscionable and, therefore, unenforceable. (Subsequent to the submission of this article, the Superior Court granted reargument in *MacPherson* and withdrew its opinion. *See*, 2014 Pa.Super. LEXIS 2925).

Nevertheless, the *MacPherson* court held that the agreement was not unconscionable because: the agreement provided that each party pay their own fees and costs in preparing for arbitration; the agreement contained a conspicuous, large and bolded notification that the parties, by signing, were waiving the right to a trial before a judge or jury; at the top of the agreement, in underlined and bold typeface, the agreement stated that it was voluntary and that, if a resident refused to sign it, the resident would still be allowed to live in and receive services at the nursing home; the nursing home would pay for the arbitrators' fees and costs; there were no caps or limits on damages other than those already imposed by state law; and the resident was permitted to rescind within 30 days.

The *MacPherson* court also addressed whether a provision that was no longer valid was integral to the agreement and, therefore, results in an unenforceable agreement. The agreement provided that the National Arbitration Forum (NAF) would administrate the arbitration. However, the NAF can no longer accept arbitration cases pursuant to a consent degree it entered with the Attorney General of Minnesota. Yes, check your agreement, does it include the use of NAF? In an earlier case, *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215 (Pa.Super. 2010), the arbitration agreement included a forum selection clause designating the NAF and its procedures. The *Stewart* court held that the agreement was unenforceable because the provisions designating the NAF and its procedures were integral to the agreement and could not be enforced due to the unavailability of the NAF. The court found that it was an express intention to arbitrate exclusively before NAF. Also, the severability clause could not save the agreement because the court would be forced to rewrite the forum selection cause and devise a substitute forum and mode of arbitration for the parties.

In *MacPherson*, however, the agreement did not require exclusivity with the NAF. Rather, it contained a hierarchy with alternatives to NAF. The agreement provided that the arbitration would be administered by NAF, but that the parties could agree in writing to not select NAF, or, if NAF was unwilling or unable to serve as the administrator, the parties could agree upon another independent entity to serve as the administrator (unless the parties mutually agree to not have an administrator). The *MacPherson* court found the aforementioned language permissive and not mandatory and held that, in the absence of an exclusive forum-selection clause, the provisions in question were not integral to the agreement.

## WHO HAS THE AUTHORITY TO EXECUTE AN ARBITRATION AGREEMENT?

The answer is easy if a resident is an adult of sound mind. But what if you have a resident who has symptoms of or has been diagnosed with dementia of the Alzheimer's type, mental illness, disorientation, confusion or some other condition that places a resident's capacity to form a binding contract into question? Can you safely assume that a spouse or sibling has authority to execute an arbitration agreement? Simply, no. An arbitration agreement must be signed by a party with legal authority to enter the contract. If someone other than a resident signs the agreement, the agreement is valid and legally binding only if an agency relationship existed between them.

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## *WALTERS V. YMCA*

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Nevertheless, as a consequence of *Walters*, as it pertains to exculpatory clauses in health club membership contracts, the law in New Jersey is two-tiered, depending first on the cause of the alleged accident and second on the extent of the culpability of the facility. First, if the cause of the accident has nothing to do with the physical activities that carry with them the inherent risk of injury but deal, instead, with the type of injury that could occur at any business property, then, under *Walters*, the exculpatory clause would likely be found to be unenforceable. However, if the matter is directly related to the inherently risky activities, then the provision would only be enforceable as against claims of negligence, and not gross negligence or recklessness.

Thus, in these types of cases, it is important to find out the nature of the injury as early as possible to determine whether an exculpatory clause in the contract would be controlling. An analysis should be done regarding causation and also on the severity of the potential conduct for which the fitness club could be held responsible, as those factors are key to determining whether the exculpatory clause will be enforceable. ■

## THE IDIOSYNCRASIES OF OHIO'S EMPLOYMENT DISCRIMINATION LAW

(continued from page 11)

- The former employee has been informed by plaintiff's counsel not to divulge any communications that the former employee may have had with defendant corporation's attorney or other legal counsel; and
- The former employee was fully informed that the plaintiff's counsel represents a client adverse to the defendant corporation.

In conclusion, Ohio's employment discrimination laws make bringing a claim much easier than if stated under federal law and allow supervisors and managers to incur personal liability. Also, Ohio requires that defense counsel consider the scope of permissible contacts between a planitiff's attorney and former and current employees of the defendant company, and that they proactively seek to protect the interests of the company. ■

## ENFORCEABILITY OF NURSING HOME ARBITRATION AGREEMENTS

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An agency relationship can be created in one of four ways: (1) express authority; (2) implied authority; (3) apparent authority; and (4) agency by estoppel. If a claimant/plaintiff challenges whether an agent had authority to execute the agreement on his/her behalf, it is the defendant nursing home that will have the burden of establishing an agency relationship.

Express authority is that authority directly granted by the principal to bind the principal in certain matters, *i.e.* power of attorney or legal guardian. However, make sure you obtain a valid power of attorney or proof of guardianship. Implied authority is when the acts of the agent are necessary, proper and usual in the exercise of the agent's express authority.

Meanwhile, apparent authority exists where a principal, by words or conduct, leads a party with whom the alleged agent deals to believe the principal has granted the agent the authority he purports to exercise. A court will look to the actions of the principal, not the agent, in determining apparent authority of the agent. For example, a marital relationship alone does not grant a spouse with apparent authority. A court will look to the principal's words or conduct at the time the agreement was executed to determine whether the principal granted the third party with authority to bind the principal's interests.

Finally, authority by estoppel occurs when a principal fails to supervise the affairs of his agent and, thus, allows the agent to exercise authority not granted to him. If the principal fails to take reasonable measures to protect himself and third parties dealing with the agent from harm caused by the agent, then the principal may be estopped from denying the authority of the agent.

### THE SCOPE OF THE AGREEMENT

This issue is more difficult than one may anticipate. If the dispute involves a claim for wrongful death, a key issue will be whether the decedent/resident has surviving beneficiaries under the Pennsylvania wrongful death statute. The wrongful death statute limits beneficiaries to the decedent's spouse, children or parents. If the decedent has surviving beneficiaries, as limited by the wrongful death statute, then an action for wrongful death benefits belongs to the designated relatives and exists only for their benefit. Therefore, a wrongful death claim brought for the benefit of designated representatives may not be subject to an otherwise enforceable arbitration agreement.

For example, in *Lipshutz v. St. Monica Manor*, 2013 Phila. Ct. Com. Pl. LEXIS 396 (J. Bernstein, Nov. 12, 2013), the decedent's daughter brought a survival and wrongful death claim. The decedent's daughter, who had a power of attorney, executed an admission agreement that contained a mandatory arbitration clause. The court found that the plaintiff executed the agreement strictly, and only in her representative capacity, and that she did not affect her own right or the rights of the other beneficiaries to bring a wrongful death claim in a court of law. The court retained jursidiction of the wrongful death claim and remanded the survival claim to arbitration.

A second example is in the *MacPherson* matter. There, a claim was brought by the decedent-resident's brother, and the decedent did not have any surviving designated beneficiaries under the wrongful death statute. In that instance, a wrongful death claim may be brought solely for the benefit of the estate, and damages are limited to reasonable hospital, nursing, medical, and funeral expenses and expenses of administration necessitated by reason of injuries causing death. The *MacPherson* court held that the wrongful death claim brought for the benefit of the estate only was bound by an otherwise enforceable arbitration agreement that had been signed by the decedent.

In conclusion, draft your arbitration agreement carefully. Review the language of the agreement regularly, and be sure that the person signing the agreement has the authority to enter into the contract. Finally, stay tuned for what the Superior Court will decide about arbitration agreements upon rearguement in *MacPherson*. ■

***Pennsylvania—Trucking & Transportation Litigation***

# LIMITED TORT PROOF: GET THE SIGNED WAIVER ELECTION FORM!

By James D. Hilly, Esq.*

## KEY POINTS:

- Obtain an actual copy of the signed tort option selection form at the earliest possible opportunity when handling an auto claim or litigation.
- Counsel should always raise the applicable limited tort defense.
- In cases where the actual signed election/waiver form cannot be obtained, a tort defendant may argue that the policy declarations and premium discount are *prima facia* evidence of limited tort, and the defendant may seek to shift the burden of proof to the plaintiff on the issue.

*James D. Hilly*

Pennsylvania's Motor Vehicle Financial Responsibility Law (PAMVFRL) (75 Pa.C.S. § 1705) provides that a named insured may elect the "limited tort option," subject to certain exceptions. An insured can choose to limit the right to sue for noneconomic damages (*i.e.*, pain and suffering) in exchange for a reduction of premium. Choosing this option binds the insured in both liability and UM/UIM claims, and it binds all other resident relative household members of the insured under the policy.

In order to elect the limited tort option, a prescribed waiver form must be signed. The policy declarations issued for the policy will then indicate that the coverage has been issued with a limited tort election, and the premium discount will reflect that.

For a number of years, the limited tort provision operated as intended by the Pennsylvania legislature, and many plaintiffs attorneys refused to take limited tort cases. Production and introduction of the policy declarations reflecting limited tort selection and premium discount were routinely accepted in support of the limited tort application of the verbal threshold. Unfortunately, the courts have somewhat watered down the "serious injury" provision of the limited tort defense by making it largely a question for the fact finder. *See*, 75 Pa.C.S. § 1705(d)(person who selected limited tort option may maintain action for noneconomic loss when he or she has sustained "serious injury"). This has encouraged more claims by attorneys who believe they will at least get to a fact finder on the limited tort issue. Moreover, plaintiffs counsel have increasingly objected to the *prima facia* proof of limited tort coverage reflected in the declarations, instead, insisting upon proof of the signed waiver form to sustain the burden of the defense of limited tort. Although, as suggested below, there is still room to argue that *prima facia* proof of the declarations showing limited tort and premium discount (particularly as to the named insured) should shift the burden to the plaintiff to prove the right to bring a noneconomic damages claim, the best practice in a limited tort case is to nip the argument in the bud by obtaining the signed waiver form at the earliest possible stage in the case. If a first-party carrier insists on a subpoena or authorization, a spoliation-type letter should be sent to the carrier to demand preservation of the signed waiver form for later litigation purposes.

The issue of burden of proof is a significant one. Essentially, a claimant receiving the limited tort premium discount who then testifies that he/she "forgets" or "does not understand" the limited tort selection in later litigation is having his cake and eating it too. Obviously, therefore, if the signed waiver is obtained early on, a plaintiffs attorney may reconsider prosecution of the claim. However, even where the signed waiver is unavailable from the first-party carrier, there may remain some argument, although a weak one, that might shift the burden of proof to the plaintiff upon proof of the declarations and premium discount.

One important practice reminder is that a limited tort defense is an affirmative defense that is waived if not raised in new matter. Pa.R.C.P. 1030; *See*, *Santana v. Wentzien*, 26 Pa. D&C 4th 22, 25--33 (Bucks Co., June 19, 1995) (holding that New Jersey's verbal threshold was waived when it was not raised in the new matter). Because any statutory defense, such as limited tort, under either Pennsylvania law or the law of another state is likely to be considered waived when not raised, counsel should always raise the affirmative defense of a limited tort (or verbal threshold) in the new matter.

Plaintiff attorneys have argued that, absent the actual signed waiver form, a plaintiff can benefit by a convenient lack of recall on the issue. Their arguments are somewhat difficult to overcome:

- Section 1705 of the statute, "Election of Tort Options," provides that the first-party insurer must send two notices to the named insured to select a choice of tort option. If the named insured does not return a choice within 20 days of either of these notices, the named insured and those bound by the policy "are conclusively presumed to have chosen the full tort option." The notices must advise that if no selection is made, those bound under the policy are conclusively deemed to be "full tort." Therefore, the default setting in the absence of a statutory waiver actually made by the named insured is full tort, and only proof of a knowing waiver will result in a limited tort "selection."
- Plaintiffs will argue that lack of a signed waiver form would essentially require "proof of a negative" as to the non-existence of a limited tort selection.
- The party raising an affirmative defense has the burden of proving that defense. *See*, *DiLucia v. Clemens*, 541 A.2d 765, 768 (Pa. Super. 1988).

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***Pennsylvania—Workers' Compensation***

# I QUIT! AND I WANT COMP!

By J. Jeffrey Watson, Esq.*

## KEY POINTS:

- Termination of an employment relationship does not necessarily bar receipt of workers' compensation benefits.
- If a person is "furthering the interest of an employer" at the time of injury, he or she remains elibile for benefits.

*J. Jeffrey Watson*

Generally speaking, the Pennsylvania Workers' Compensation Act does not provide benefits for injured workers who are outside of the course and scope of employment at the time of injury. Considering this general principle, the Pennsylvania Commonwealth Court recently decided that an injured worker who quit his employment prior to suffering a work injury was still eligible for benefits. The worker was ultimately found to be in the furtherance of his employer's interest, even though he had already unequivocally quit his job and handed over company property. The court cemented precedent, holding that termination of an employment relationship does not operate as a bar to workers' compensation benefits. It also provides employers with instruction when separating workers from employment.

In *Marazas v. WCAB (Vitas Healthcare Corp.)*, 29 PAWCLR (LRP) 145 (Pa.Cmwlth. Aug. 11, 2014), the claimant was employed as a driver responsible for delivering medical equipment. Following a weekend in which he was on-call, the claimant returned to the employer's premises to receive his itinerary and became unhappy with his upcoming posted driving schedule. After the manager refused to change the assignment, the claimant told his manager that he quit. At the same time, the claimant turned in his keys and phone. The manager then instructed the claimant that he had to remove his personal belongings from his truck and personally escorted the claimant to the truck. After the claimant removed his personal belongings as instructed, he tripped on a pallet jack (injuring himself), which was witnessed by the manager. The claimant was then escorted to his vehicle, at which time the claimant left the employer's premises.

In finding a work-related injury and awarding workers' compensation benefits, the Workers' Compensation Judge had found that there was no dispute that the claimant was on the employer's premises at the time of the injury. The adjudicating judge had also determined that, although the claimant had quit before he was injured, he was acting under the direction and supervision of the manager when required to clean out his truck and was within the scope of his employment.

In reinstating the judge's decision that had been reversed by the Workers' Compensation Appeal Board, the Commonwealth Court found that the claimant was in the "course and scope of employment" at the time of the injury. However, the court instructed that this catchphrase is shorthand for language contained in Section 301(c)(1) of the Pennsylvania Workers' Compenation Act and that the "operative" phrase is whether the injured worker is "actually engaged in the furtherance of the business or affairs of the employer." That element is established if, by nature of the claimant's employment, the worker sustains an injury caused by the premises or the employer's affairs thereon. The court reasoned that this can include situations where the employment relationship has ceased.

"Furthering the interest of the employer" is to be liberally construed, and focus should be on the purpose of the claimant's activities at the time of injury. In *Marazas*, despite that the claimant had quit his job prior to suffering an injury, the definition was met. The claimant was still under the control of the employer while removing his belongings from the employer's truck under the manager's supervision.

The court held that the facts and circumstances of *Marazas* are to be distinguished from situations where a work injury relates only to a final act altering the employment relationship. In this regard, the court did not disturb prior precedent and distinguished cases where alleged injuries did not occur on the employer's premises or were temporally removed from the separation from employment.

In reaching its conclusion, the court also declined to apply judicial estoppel—a doctrine established to ensure that parties "do not play fast and loose with facts in order to suit their interests in different actions before different tribunals." In simultaneously defending a civil action also filed by the claimant, the employer had filed an answer asserting the exclusivity provisions of the Act by averring that the plaintiff/claimant was an employee at the time of the injury. However, the court found that the claimant voluntarily withdrew his civil action and there was no adjudication of the issue to estop the employer from denying an employment relationship at the time of the injury in the compensation litigation.

In practice, employers should heed the lessons of *Marazas* when instructing individuals during a separation from employment. The *Marazas* court, in reviewing the record of the Workers' Compensation Judge, singled out that the claimant was performing a "required task" at the time of injury. A vigilant employer will use discretion in directing an individual who has been separated from employment. Whether an employee is being fired or voluntarily quits, caution should be given to avoid any unnecessary supervision and control over the worker.

In particular, when a separation from employment takes place with the ex-employee on the premises, it would be advisable to have the individual removed with as little haste as possible and with attention given to any tasks that might need to be completed, such as returning company property and communication with supervisors, subordinates, co-workers, administrators, vendors, clientele or other third parties. Off-premises employees must also be instructed accordingly.

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## MEETING THE PROOF REQUIREMENTS

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awareness that the intentional falsehood will cause the desired result of fraudulently obtaining benefits." The Appellate Division emphasized, "[t]he anti-fraud provision is intended to root out fraudulent claims, not merely test an injured person's ability to remember every detail of a lengthy medical history or to accurately determine what may be material for purposes of receiving treatment or other benefits."

Interestingly, the court also pointed out that, even if a petitioner's statements satisfy the requirements of the anti-fraud provision, "denial is not mandatory." The court stated that where no causal connection exists between a lie and an injury, courts will generally look beyond a false statement and award compensation.

The *Bellino* decision illustrates that merely establishing that a petitioner made inaccurate, false or misleading statements is not enough to negate a respondent's liability under the anti-fraud provision. It is critical that the respondent go a step further and establish "intent" in order for the defense to prevail. Nevertheless, respondents should continue to assert the defense when fraud is suspected. Just be prepared for the steep uphill climb. ■

*"When you're climbing Mount Everest, nothing is easy. You just take one step at a time, never look back and always keep your eyes glued to the top."*

– Jacqueline Susann, *Valley of the Dolls*

## LIMITED TORT PROOF

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- Given the "default setting" of the statute for full tort, it would be illogical to hold that a plaintiff has the obligation to prove that full tort status was selected in the absence of signed forms. (*Donnelly v. Bauer*, 720 A.2d 447 (Pa.1998)(the Pennsylvania Supreme Court refused to invalidate an actual signed limited tort selection form for lack of required cost comparison on the basis that the appellants had actually signed a waiver form).

Disappointingly, therefore, the third-party case can be determined partially on this very crucial issue by a first-party carrier. The third-party defendant has no real control over the accuracy and completeness of the record supporting the defense.

In an analogous situation involving a signed waiver form for "stacked" UIM coverage, a Philadelphia trial court held that, where the carrier could not produce a signed waiver form, it could not prevail. This decision was reached even though the declarations page stated "non-stacked" coverage. *See*, *George v. AIG Ins. Co*., C.C.P. Philadelphia, PICS No. 030720.

Consequently, on behalf of defendants, the only apparent argument is the lack of any specific case law requiring production of the actual signed waiver form to prove the limited tort defense. Tort defendants should argue that *prima facia* proof of the declarations and premium discount, particularly as to a "forgetful" named insured, creates a credibility issue and constitutes some evidence of the defense sufficient to allow a fact finder to determine whether a limited tort selection was or was not made. Testimony will be necessary to document the declarations and premium discount in order to avoid a hearsay objection under a business records exception. Admittedly, this argument will be difficult to make. Therefore, the best practice is to obtain the actual signed waiver form from the first-party carrier at the earliest possible opportunity. ■

## I QUIT! AND I WANT COMP!

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If at all possible, it would be wise to issue verbal and written instructions alerting that the employer-employee relationship has ceased and advising the worker to refrain from engaging in any and all activities on the employer's behalf. In doing so, the individual should be directed by the employer that no further communication or action is expected of the employee. Not only would such a policy firmly establish a separation from employment, but it would also lay the foundation for additional litigation defenses, such as a violation of a positive work order.

Whether the holding of *Marazas* would have been the same but for the claimant's "incident" being on the premises and witnessed is up for debate. The Commonwealth Court, in cases such as *Little v. WCAB (B&L Ford/Chevrolet)*, 23 A.3d 637 (Pa.Cmwlth. 2011) and *Hepp v. WCAB (B.P. Oil Co.)*, 447 A.2d 337 (Pa.Cmwlth. 1982), has looked at post-termination cases with much more scrutiny. In these and other similar off-premises cases, the injured worker has had a more difficult time establishing that the alleged post-termination injury occurred in the course and scope of employment.

Consider that, when the "final act" to alter the employment relationship continues to perpetuate the employer's business interests, the risk remains for a compensable injury. If a truck or a desk needs to be cleared, the price of a box and postage will be far less than the potential exposure for an injury. ■

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