30 Years in Publication

DEFENSE DIGEST

Vol. 30, No. 1, March 2024

INSIDE THIS ISSUE

PAGE

MARSHALL DENNEHEY

Take a Closer Look: The Precise Language of an Out-of-State Coverage Provision Leads To Varying Results

Noah E. Blake, Esq.

Key Points:

- Where the language in an insurance contract is plain and unambiguous, the courts must interpret the terms of the contract according to their plain meaning as written.
- Florida Statute §627.733 only requires a nonresident owner of a vehicle to maintain PIP coverage after they have been within Florida for more than 90 days of the preceding 365 days.
- Due to Florida's presence requirement under Fla. Stat. §627.733 for nonresidents, an out-of-state coverage provision that only applies to unconditional out-of-state compulsory insurance laws will not provide PIP benefits in Florida.

The recent ruling by the Fourth District Court of Appeal in *T.I.O. Medical Intervention LLC a/a/o Mary Faison v. Liberty Mutual Fire Insurance Company*, 373 So. 3d 341 (Fla. 4th DCA 2023) serves as a reminder to pay very close attention to the exact wording in insurance policy provisions. This case involved an insured that maintained a Georgia-based insurance policy but was involved in an accident in Florida. The insured was treated in Florida, and the plaintiff, a medical provider, submitted medical bills to the defendant insurer for reimbursement under Florida Personal Injury Protection (PIP) benefits.

The insurer argued that the Georgia policy did not provide for Florida PIP benefits per the policy language. At the county court level, the insurer was granted summary judgment because the court found that the "clear and unambiguous" language of the Georgia policy did not provide for Florida PIP benefits. The plaintiff appealed.

On appeal, the Fourth District analyzed the specific out-of-state coverage provision. Specifically, the court noted, "Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written." *Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So.3d 943, 948 (Fla. 2013). Looking first to the subject out-of-state coverage provision, the Georgia policy stated:

> If an auto accident to which this policy applies occurs in any state or province other than the one in which 'your covered auto' is principally garaged, we will interpret your policy for that accident as follows:
>
> If the state or province has:
>
> …
>
> A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever

> the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage.

The Fourth District then looked to the presence requirement under Fla. Stat. §627.733(2) which governs PIP coverage for nonresidents:

> Every nonresident owner or registrant of a motor vehicle which, whether operated or not, has been physically present within this state for more than 90 days during the preceding 365 days shall thereafter maintain security as defined by subsection (3)…

Fla. Stat. §627.733(2).

In comparing the policy provision and the relevant Florida statute, the Fourth District concluded that the Georgia policy did not provide for Florida PIP benefits. Specifically, the court noted that the Georgia policy would only provide out-of-state coverage if the state's compulsory insurance laws require a nonresident to have insurance "whenever" they use a vehicle. Florida law does not require a nonresident owner of a vehicle to maintain PIP coverage every time they drive, only when they have been in Florida for 90 out of the last 365 days.

The plaintiffs did not present any evidence that the insured met the nonresident presence requirement under Fla. Stat. §627.733(2), but the Fourth District stated that it would make no difference to the court's conclusion since Florida law does not "unconditionally require" nonresidents to have PIP coverage when they drive in Florida as considered by the policy.

The Fourth District contrasted the Georgia policy language with out-of-state coverage provisions interpreted by the Fifth and Second District Court of Appeals. In *Meyer v. Hutchinson*, 861 So.2d 1185, 1186-87 (Fla. 5th DCA 2003) and *Jiminez v. Faccone,* 98 So.3d 621 (Fla. 2d DCA 2012), the Fifth and Second Districts analyzed an out-of-state coverage provision of an insurance policy which stated:

> If an insured is in another state or Canada and, as a nonresident, becomes subject to its motor vehicle compulsory insurance, financial responsibility, or similar law:
>
> This policy will be interpreted to give the coverage required by the law…

The Fourth District distinguished the policy provisions interpreted by the Fifth and Second Districts from the Georgia policy provision on the basis that the former policy provision would allow coverage for nonresidents who "became subject" to Florida's PIP statute by virtue of maintaining presence in Florida for 90 days. In comparison, the Georgia policy provision does not include the same language that would afford coverage to nonresidents who maintain presence in Florida for 90 days pursuant to Fla. Stat. §627.733(2). Therefore, the Fourth District held that the Georgia policy did not provide for Florida PIP benefits, and the lower court's entry of summary judgment in favor of the insurer was affirmed.

In light of this case, it is recommended that insurance companies review the out-of-state coverage provisions in their respective policies. As shown by this case, these provisions need to be carefully constructed so as not to afford coverage when it is not intended. They are easy to overlook, but every word is vital since courts interpret these policy provisions by their plain meaning. That is why it is important to look closely at each provision and make sure the clear meaning of the provision is what is intended. ◆

Noah is an associate in our Tampa, Florida, office. He can be reached at (813) 898-1817 or NEBlake@mdwcg.com

Vetoed New York State Legislation Maintains Status Quo to Favor Out-Of-State Defendants: No Consent to Jurisdiction by Registration

Taylor A. Bourguignon, Esq.

Key Points:

- Corporation that registers to do business in New York does not necessarily consent to general personal jurisdiction.
- Proposed amendment to New York Business Corporation Law § 1301(e) would have overturned that law but was vetoed by the Governor.

A recent New York Court of Appeals case held that a corporation registering to do business in New York State does not necessarily mean it consents to general personal jurisdiction in the state. A proposed amendment to New York Business Corporation Law § 1301(e) would have overturned that law. The Bill was vetoed by the Governor, who determined that the change would have overburdened New York courts and deterred foreign corporations from doing business in New York.

Developing case law in both New York state courts and the Supreme Court of the United States has created uncertainty regarding the scope of a court's jurisdiction over out-of-state defendants. The recent veto of a New York Bill, at least temporarily, provides clarity on New York State's position and protects foreign corporations from being subjected to litigation based solely on their registration to do business in New York.

In general, a defendant can only be sued in a given location if the court has "personal jurisdiction" over that defendant. There are two types of personal jurisdiction: specific and general. First, specific personal jurisdiction exists when the cause of action arose in the state. Essentially, the defendant did something within the state which is the basis of the litigation against it. Second, general personal jurisdiction exists when the defendant does not specifically act within the state, but has sufficient "connections" with the state to be sued there. For a corporate defendant, those connections are generally the place of its incorporation and its principal place of business.

Historically, New York expanded the scope of general personal jurisdiction over a corporation to also include when the corporation is registered to do business with the Secretary of State and consented to service of process. Essentially, when a corporation became licensed to conduct business in New York, it automatically consented to general personal jurisdiction of New York courts. That standard changed in 2021 with the New York Court of Appeals decision *Aybar v. Aybar*, 37 N.Y.3d 274, 280, 282 (2021). ▸

In *Aybar*, the court affirmed the appellate court's decision in *Aybar v. Aybar*, 169 A.D.3d 137 (2d Dep't 2019), which had held that an out-of-state corporation's registration in New York does not necessarily mean it consents to the court's personal jurisdiction. The court recognized that registering in New York does mean the corporation can be served with a lawsuit there; however, its registration does not per se mean it can be sued there for any cause of action, considering that the corporation may not even have a direct contact with New York State.

This issue was recently addressed in the Supreme Court of the United States in *Mallory v. Norfolk Southern Railway*, 600 U.S. 122 (2023). The Supreme Court upheld consent by registration, holding that Norfolk Southern was subject to personal jurisdiction in Pennsylvania on the basis of being registered in the state. The *Mallory* case stirred uncertainty as to New York's opposing views.

Adding to that uncertainty was New York State Senator Michael Gianaris' proposed amendment to Business Corporation Law section 1301(e). Gianaris' Bill 7476 would have changed Section 1301 to read:

> (e) A foreign corporation's application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

Essentially, this change would have codified the Supreme Court's *Mallory* holding into New York law and overruled the effect of *Aybar*. However, New York Governor Hochul was not ready to support such a change and vetoed Bill 7476 on December 22, 2023. In the memo discussing the Bill's veto, the Governor stated:

> I vetoed substantially similar legislation in 2021 due to the concerns that the proposal would represent a massive expansion of New York's law governing general jurisdiction, likely deterring out-of-state companies from doing business in New York because it would require them to be subject to lawsuits in the State regardless of any connection to New York. This bill would cause uncertainty for those businesses and burden the judicial system.

The Governor's veto slows down New York's adoption of the *Mallory* decision. For the time being, pursuant to the *Aybar* court's 2021 decision, corporations are protected from automatically consenting to the general personal jurisdiction of New York courts simply based on registration to do business in the state. However, given the *Mallory* holding and recent attempts to incorporate consent by registration into the Business Corporation Law, the *Aybar* ruling may be on very thin ice. Corporations, and their attorneys, should keep a close eye on developments involving the scope of New York personal jurisdiction moving forward. ◆

Taylor is an associate in our New York City office. She can be reached at (212) 376-6426 or TABourguignon@mdwcg.com.

Pennsylvania Superior Court Discounts Big-Box Retail Sales for Determining Venue

John F. Yaninek, Esq.

Key Points:

- Superior Court decision in Walton v. Baby Trend provides relief from pro-plaintiff venue decisions.
- For court venue purposes, where a company does regular business does not include its product sales in big-box retail stores.

The Pennsylvania Superior Court has held that, for court venue purposes, where a company does regular business does not include its product sales in big-box retail stores. This pro-defendant decision in *Walton v. Baby Trend, Inc*., 2024 WL 133697 (Pa. Super. Jan. 12, 2024), was issued shortly after a November Pennsylvania Supreme Court pro-plaintiff venue decision in *Hangey v. Husqvarna Professional Products, Inc.,* 304 A.3d 1120 (Pa. 2023), that made it easier to bring suit in preferred venues.

The plaintiff in *Walton v. Baby Trend* attempted to bring suit in the Philadelphia Court of Common Pleas. Mr. Walton, a Bucks County resident, brought a product liability suit over the alleged death of his infant daughter who suffocated in her car seat, which was manufactured by Baby Trend. Baby Trend did not have a physical presence in Philadelphia. However, it derived 5% of its annual gross national business from its sales in big-box Philadelphia retailers.

The Superior Court discounted the big-box retail sales in calculating Baby Trend's connection to Philadelphia. The court opined, "Once Baby Trend sells its products to big-box retailers, it has no control where the retailers sell the products." Once the big-box sales were discounted, Baby Trend's sales in Philadelphia comprised less than 1% of its total sales. There was no other connection to Philadelphia. The Superior Court then upheld the trial court's ruling transferring the case to Bucks County because it concluded Baby Trend did not do "regular business" in Philadelphia.

The Philadelphia Court of Common Pleas is long recognized, year after year, as one of the nation's premier "Judicial Hell Holes." It has gained this reputation for excessive verdicts and an overall plaintiff-friendly judiciary.

The recent Superior Court ruling in *Walton* provides certain businesses with an argument to use to gain relief from the unfavorable Pennsylvania venues – by showing lack of regular business activity. This decision bucks the previous trend from the Supreme Court that has made it easier for plaintiffs to bring suits in their venue of choice. ◆

John is a shareholder in our Harrisburg, Pennsylvania, office. He can be reached at (717) 651-3515 or JFYaninek@mdwcg.com.

Third Circuit Holds There Is No Right to Intervention in a Medical Context

John R. Ninosky, Esq.

Key Points:

- There is a constitutional right to medical care for those individuals in custody.
- Although there is a right to have a government actor intervene when the underlying constitutional violation involves excessive force or sexual assault of a person in custody or detention, the Third Circuit, in *Thomas v. City of Harrisburg*, 88 F.4th 275 (3d Cir. 2023), has definitively stated that there is no cause of action for a failure to intervene in a medical context.

In correctional medicine, the Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." With respect to prisoner confinement, the Eighth Amendment obligates the government "to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Thus, for decades those individuals in custody have had a constitutional right to medical care.

Creative plaintiffs' lawyers have since brought federal civil rights claims seeking to create a cause of action for a failure to intervene against both law enforcement and medical staff personnel, arguing those individuals had a duty to prevent a violation of the right to medical care where medical care was not provided or adequately provided to a person in custody. For years there had been conflicting case law as to whether there was a cause of action for a failure to intervene in the medical context in correctional facilities.

Older authority stood for the proposition that medical providers could not be liable for failing to intervene in situations involving excessive force. *See, e.g., Ali v. McAnany,* 262 Fed. Appx. 443, 446 (3d Cir. Jan. 25, 2008); *Goldsmith v. Franklin County*, 2016 WL 6440141, at *7 (M.D. Pa. Sept. 30, 2016) ("[T]he [Third Circuit] has expressly declined to extend its holding in Smith beyond correctional officers to impose a duty to intervene upon medical employees working within a prison setting."); *Harris v. Hershey Med. Ctr.,* 2009 WL 2762732, at *6 (M.D. Pa. Aug. 27, 2009). In Goldsmith, the District Court explained:

> [A]lthough [the Third Circuit in] Smith announced that corrections officers have a legal duty to intervene . . . the court clearly grounded its decision in the fact that a corrections officer, like a police officer, is a law enforcement officer, sworn to uphold the law, and authorized to use force if necessary.

2016 WL 6440141, at *7. Thus, a medical provider has "no legal duty to intervene on behalf of an inmate in the midst of physical altercations with staff." *Id*.

More recent decisions have been decided differently. District courts have found plausible causes of action for failure to intervene against medical professionals where they have allegedly failed to provide emergency medical care. *See Thomas v. Harrisburg City Police Dep't,* 2021 WL 4819312 (M.D. Pa. Oct. 15, 2021) and *Cyr v. Schuylkill Cnty.*, 2023 WL 1107879 (M.D. Pa. Jan. 30, 2023).

The *Thomas* decision was appealed to the Third Circuit by individual police officers on qualified immunity grounds after their motion to dismiss was denied. *See Thomas v. City of Harrisburg*, 88 F.4th 275 (3d Cir. 2023). The decedent in *Thomas* ingested cocaine at the time of his arrest. The plaintiff argued that the arresting police officers had a duty to intervene to prevent the violation of the decedent's constitutional right to medical care. Specifically, it was alleged that the police officers should not have taken the decedent to the county booking center but, rather, should have taken the decedent to the hospital for evaluation. The police officers argued that they had qualified immunity.

The Third Circuit found that the District Court properly denied the police officers' motion to dismiss as to the failure to render medical care. However, the Third Circuit held that the District Court erred in denying the motion to dismiss on the failure to intervene claim. The court stated:

> The Officers contend that the District Court improperly denied their motion to dismiss because (1) Sherelle Thomas cannot adequately plead a violation of failure to intervene to prevent a violation of the right to medical care where no such cause of action exists and (2) there is no clearly established right to intervention in the context of medical care.
>
> The District Court does not directly address whether individuals have a clearly established right to intervention. We agree with the Officers that we have not recognized any such right, nor has the Supreme Court. Though we have recognized a right to have a government actor intervene when the underlying constitutional violation involves excessive force or sexual assault of a person in custody or detention, we have since concluded that our precedent does not establish, let alone clearly establish, a right to intervention in other contexts.

Thomas, 88 F.4th at 285.

Thus, the Third Circuit has definitively stated that there is no cause of action for a failure to intervene in a medical context, and this holding has been followed by at least one subsequent district court case where such a claim was pursued. *See Rossman v. PrimeCare Medical, Inc.*, 2024 WL 115203 (M.D. Pa. Jan. 10, 2024). As such, neither medical professionals nor law enforcement should be required to defend a failure to intervene claim arising from medical care, and these claims should be challenged. ◆

John is a shareholder in our Harrisburg, Pennsylvania, office. He can be reached at (717) 651-3709 or JRNinosky@mdwcg.com.

The Political Subdivision and Torts Claim Act's Sexual Abuse Exception: Application to Post-Assault in School Harassment

Carl A. Fejko, Esq.

Key Points:

- The Political Subdivision and Torts Claim Act still provides immunity to school districts in cases where a student adjudicated of sexual assault continues harassment of a student in the school setting because no additional duty is imposed.
- The ninth sexual abuse exception to the PSTCA is only intended to apply to the criminal statutes referenced.
- The PSTCA still provides immunity to school districts for incidents that occur outside of the school setting that are not caused by negligence by the school.

Since the addition of the ninth immunity exception for sexual abuse to the Pennsylvania's Political Subdivision and Tort Claims Act (PSTCA) in 2019, we are beginning to see courts decide when the exception applies. Recently, in *Doe by Nied v. Riverside Sch. Dist.*, 2023 WL 8549035 (M.D. Pa. Dec. 11, 2023), the District Court for the Middle District of Pennsylvania decided that the ninth exception did not apply to conduct that did not occur on school property and found no duty was imposed on a school district after the sexual assault occurred.

In *Riverside School District*, the court granted the school district, its superintendent, and its principals' motion to dismiss with respect to state law tort claims for negligence, negligence *per se*, intentional infliction of emotional distress, and negligent infliction of emotional distress.

The plaintiff brought these claims against the school district, alleging they fell within the ninth exception because the injuries suffered were caused by the actions or omissions of the defendants.

Jane Doe alleged she was sexually assault by another Riverside student while off campus. After the assault, the Riverside student was adjudicated a delinquent of Felony 2 Sexual Assault pursuant to 18 Pa. C.S. § 3124.1.

While the case was pending against Doe's assailant, her mother was in direct communication with the school district regarding the proceedings and also made sure the school was aware of the student-assailant's adjudication. Doe's mother voiced concerns regarding the contact between Doe and the student-assailant, but the school district informed Doe's mother that nothing could be done to protect Doe from the other student.

After the adjudication, assailant continued to attend the same lunch period as Doe, and he attended the same semi-formal dance where he

was alleged to have harassed, embarrassed, and threatened Doe. The harassment continued after the dance, with the Doe's assailant verbally harassing her in school hallways and mockingly shouting at her. Doe's mother informed the school of the harassment and met with officials.

However, the meeting did not yield any action from the school because Doe's mother was told there was nothing the school district could do. As a result of the harassment, Doe alleged she suffered from various psychological and physical damages.

The defendants filed a motion to dismiss that raised immunity under the PSTCA. The plaintiffs responded by raising the ninth sexual abuse exception. Under the sexual abuse exception, immunity is waived for conduct that is an offense listed under a referenced criminal statute and the injuries to a plaintiff are caused by the *actions or omissions* of the local agency which constitute negligence. 42 Pa. C.S. § 8542(b). In this case, Doe's assailant was found guilty of an applicable criminal statute.

The court began its analysis by determining whether the ninth sexual abuse exception imposed a duty on the school to prevent the harassment from Doe's assailant. The court reviewed case law holding that the sexual abuse exception applies where the sexual abuse occurred on school property and the negligent action of the school or its employees were the proximate cause of the plaintiff's injuries. *Riverside Sch. Dist.*, 2023 WL 8549035, at *9. The court also reviewed case law supporting the position that the sexual abuse exception does not apply in cases where the agency's duties arose after the abuse. *Id.*

The court held that the sexual abuse waiver did not apply to the facts of this case because the sexual assault occurred outside the school setting and no duty was imposed on the school district to prevent further contact between the students. The court noted that if the drafters of the PSTCA wanted the exception to apply more broadly than the referenced criminal statutes, they did not say so. *Id.* The court also found that the individual defendants were entitled to immunity because they did not commit any willful misconduct towards Doe.

In conclusion, this ruling seems to reign in the applicability of the ninth exception by not imposing a duty on a school district for actions that occurred outside of the school setting. While case law is still being developed on the application of this exception, it is important for Pennsylvania school districts to remain vigilant in ensuring its students are equipped to understand sexual assault and what to do if it is occurring to them. Further, school districts should remain vigilant and take all allegations of sexual assault seriously. ◆

Carl is an associate in our Pittsburgh, Pennsylvania, office. He can be reached at (412) 803-1174 or CAFejko@mdwcg.com.

Lack of Insurance Coverage Does Not Defeat Workers' Compensation Bar for New Jersey Workers' Compensation Intentional Injury Claim

Robert J. Fitzgerald, Esq.

Key Points:

- The New Jersey Workers' Compensation Act requires all employers to obtain workers' compensation insurance coverage or be subject to both criminal and civil penalties.
- The New Jersey Uninsured Employer's Fund provides injured employees both medical and disability benefits, but not permanency benefits.
- Claims for intentional injuries are very difficult to sustain as they require proof of that the employer's conduct was substantially certain to result in the employee's injuries.

In *Glen and Donna Heuman, v. Wayne Heuman*, *et al.*, 2023 WL 8539709 (NJ Super. App. Div. Dec 11, 2023), the New Jersey Appellate Division addressed an intentional injury claim with a twist—lack of workers' compensation insurance coverage.

In December 2017, Deejon Builders LLC, a general contracting company, entered into an agreement to build a new home. Deejon retained Wayne Heuman Masonry—owned and operated by Glen Heuman's cousin, Wayne Heuman—as a contractor to perform masonry work. Although Wayne primarily worked alone, he would occasionally hire Glen to assist with masonry jobs. Glen was paid in cash, and his employment was never "formally recorded."

Wayne contacted Glen to work onsite on February 13 and 14, 2018. During those two days, Glen mixed mortar and grout for the foundation of the home using a mortar mixer, which Wayne modified due to a missing recoil spring. To start the mixer in its altered state, the operator had to remove the protective cover, wrap a pull cord with a handle around a pulley section of the machine, and tug, similar to a lawnmower.

Glen used the mixer without incident on February 13, 2018, and approximately 15-20 times before lunch the following day. After lunch, however, when Glen attempted to start the mixer using the modified system, the pull cord became caught in the machine's rotating motor, and its handle struck him in the eye. Glen received emergency treatment for fractures in his right orbital lobe as well as the rupture of the globe of his right eye. He underwent two surgeries, ultimately resulting in the removal of the right eye and his permanent need for a prosthetic.

Glen then filed both third-party negligence and intentional injury claims against Wayne. During discovery, Glen testified he had assisted Wayne at

approximately five masonry jobs and most of them involved mixing mortar. He used Wayne's modified mixer on those other occasions without incident. Glen conceded he was familiar with use of similarly modified machines from his prior experience in masonry. Additionally, Glen admitted he was not wearing safety glasses when he was operating the mixer, which was not proper protocol.

Glen also testified Wayne indicated to him that he possessed insurance, although Glen did not request proof of insurance or inquire what specific insurance Wayne had purchased. However, Wayne testified that he was unaware of the statutory requirement to obtain workers' compensation insurance.

Specifically, Wayne explained, he "mostly worked by [himself]" and, therefore, did not understand "the sense of [him] having workman's comp if [he was] only covering [himself]." Wayne also testified that wrapping the cord to start the machine in that manner was common practice in the industry, and he further stated he had seen this solution for similarly broken machines during his 30-year tenure in the business.

Both parties obtained contradictory expert reports disputing whether the modification of the mortar mixer and Glen's injuries were attributable to an intentional act. Following discovery, Wayne moved for summary judgment, arguing that the actions did not give rise to an intentional injury claim. Glen opposed summary judgment, arguing that Wayne's failure to maintain insurance coverage defeated the workers' compensation bar. Additionally, Glen argued there was a genuine issue of fact as to whether Wayne's modification of the mortar mixer was substantially certain to lead to Glen's injuries. The trial court granted summary judgement to Wayne, and Glen appealed.

The Appellate Division first noted that the lack of insurance coverage does not preclude the employer from asserting the workers' compensation bar. It specifically noted that the New Jersey Uninsured Employer's Fund (UEF) was created to pay for the payment of awards against uninsured defaulting employers. The Appellate Division also noted there are both criminal and civil penalties for uninsured employers. In an interesting footnote, the Appellate Division noted that, whatever difficulties there were in obtaining benefits from the UEF, it can only be resolved by the legislature.

As to the intentional injury claim, the court stated Wayne's actions did not satisfy the high bar to apply the intentional wrong exception. Specifically, the evidence did not show Wayne knew that the use of the modified mixer was substantially certain to result in injury. Wayne had not received any formal OSHA citation about the machine or any previous complaints from employees, including Glen. Further, Glen did not protest use of the modified mixer or request that it be repaired at any point. He testified to using it multiple times in the past and 15-20 times on the day of the incident. No evidence in the record demonstrated any prior injuries or "close calls" resulting from use of the mixer, or even similarly modified mixers. Finally, Wayne did not conceal the machine's alteration from Glen or regulatory authorities.

The court also noted that Glenn failed to overcome the "high threshold" of the context prong, as there was no record evidence that the defendant's actions were not "a simple fact of industrial life or are outside the purview of the conditions that the Legislature could have intended to immunize employers under the Workers' Compensation bar." The testimony of both Glen and Wayne reflected this type of modification of a mortar mixer was common practice among the industry. "At bottom, plaintiffs fail to establish defendant's conduct qualified as an intentional wrong under the statute or the case law."

This case illustrates once again the very high burden the petitioner has to meeting an intentional injury claim. Even in a case where the employer did not maintain the requisite workers' compensation

insurance, the court still required proof that the employer's conduct was substantially certain to result in the employee's injuries in order for the employee to prevail. Further, where the injury sustained is viewed as "a simple fact of industrial life," the employee's recovery will be limited to the benefits under the workers' compensation scheme.

If you have questions about your workers' compensation insurance coverage, or whether you are protected against an unexpected intentional injury claim, contact your insurance professional immediately. ◆

Bob is a shareholder in our Mount Laurel, New Jersey, office. He can be reached at (856) 414-6009 or RJFitzgerald@mdwcg.com.

Kimberly Boyer-Cohen | Tom Specht | Carol Vanderwoude | Shane Haselbarth
John Hare, Chair | Audrey Copeland | Kimberly House | Josh Brownlie



Limiting the Opinions of Plaintiff's Non-Retained Expert Witnesses Regarding Injury Causation and Permanency

Thomas J. Slogar, Esq., Frank L. Madia, Esq., and Heather Cain Truitt, Esq.

Key Points:

- Plaintiff's non-retained experts are treating physicians, and their testimony at trial should be limited to their scope of treatment, diagnosis, and prognosis with respect to the injuries alleged.
- Plaintiff's treating physicians lack the proper foundation to provide expert opinion testimony on medical causation and permanency unless they take the plaintiff's history relating to an incident and review the records of the plaintiff's other physicians.

When a plaintiff discloses a treating physician as a non-retained medical expert, this non-retained expert's testimony should be limited to exclude testimony regarding medical causation and permanency unless there is a proper predicate for such testimony. To lay the proper predicate, the physician must have reviewed the plaintiff's medical records from other treating physicians, and the physician should obtain a history from the plaintiff that describes the manner in which the plaintiff was allegedly injured.

For instance, in a slip and fall case, the history should include the manner in which the plaintiff allegedly slipped and fell. Where the treating physician fails to review the medical records from the plaintiff's other medical providers and fails to obtain a history of how the plaintiff allegedly came to be injured, there is an argument that the non-retained expert/treating physician should be precluded from testifying about injury causation and permanency.

Pursuant to § 90.702, Fla. Stat., *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993), and other applicable Florida law, a trial court must make two preliminary factual determinations prior to permitting expert testimony: (1) whether the expert testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue; and (2) whether the witness is qualified by knowledge, skill, experience, training, or education to express an opinion on the matter.

Under *Daubert*, the trial court is specifically assigned a gatekeeper task of ensuring that an expert's testimony, whether scientific or non-scientific, rests

on a reliable foundation and is relevant to the task at hand. Id. *See also Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141, 148-49 (1999); *Corwin v. Walt Disney World Co.,* 475 F.3d 1239, 1250 (11th Cir. 2007).

In Cooper v. Marten Transp., Ltd., 539 Fed. Appx. 963, 967 (11th Cir. 2013), the Eleventh Circuit explained that causation "could not be determined through a physical examination and the chronology of events alone." The court further noted in that case that neither physician explained the basis for their opinions. *Id*.

Courts frequently exclude causation opinion testimony of expert witnesses who base their opinions on a plaintiff's account of the facts without consideration of other possible causes of injury. *See Carmody v. State Farm Mut. Auto. Ins. Co.,* 2015 WL 5542534, at *3 (M.D. Fla. Sep. 18, 2015).

Moreover, even if an expert is qualified, the expert must have a sufficient factual predicate underlying those opinions. Florida Statute § 90.705(2), explicitly states: "[i]f the [opposing] party establishes *prima facie* evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data."

The legislative history of the rule emphasizes that this subsection intends to provide protection for opposing counsel so that expert opinions that are completely unqualified will not be admitted and risk prejudicing the jury. *See* Florida Statute § 90.705, Law Revision Counsel Note (1976). "In this instance, the protection of using cross-examination to expose the flaws in the opinion is not sufficient in all cases." *Id*.

In a recent slip and fall case in Broward County, Florida, the plaintiff disclosed a non-retained expert/treating physician who was a pain management specialist. This doctor had not been provided and had not otherwise reviewed any medical records regarding the plaintiff's post-incident treatment, other than his own records. He had not obtained a history from the plaintiff of how the plaintiff had allegedly slipped and fallen or how the plaintiff was allegedly injured. In this particular case, the physician admitted in deposition that he was not retained to provide any opinion testimony regarding any permanent injury.

The opinions of the physician regarding the plaintiff's medical condition were based solely on subjective statements made by the plaintiff, that the alleged injuries occurred as a result of the incident (without any history of the incident itself or how the plaintiff came to be injured as a result of the incident), together with the medical treatment related to the physician's care of the plaintiff (in a vacuum, without any medical treatment history related to the care and treatment provided by the plaintiff's other treating physicians).

There was no record evidence of any attempt by the non-retained expert/treating physician to eliminate other possible causes of the plaintiff's conditions. Additionally, there was no record evidence that this physician conducted a review of the plaintiff's pre- or post-incident medical history. Accordingly, it was reasonable to conclude that the doctor intended to identify the condition for treatment purposes rather than to determine its exact source. *See generally*, *Turner v. Iowa Fire Equipment, Co*., 229 F.3d 1202, 1205 (8th Cir. 2000). Furthermore, none of the plaintiff's medical records revealed information to demonstrate that the doctor made any "attempt to consider all the possible causes, or to exclude each potential cause until only one remained, or to consider which of two or more non-excludable causes was more likely to have caused the condition." *Id*. at 1208 (holding that the trial court did not abuse its discretion in excluding treating physician causation opinion, based exclusively upon the medical history obtained from the plaintiff, which indicated no respiratory problems, and the temporal relationship between the incident and the onset of symptoms); see also, e.g., *State, Div. of Risk Mgmt. v. Martin*, 690 So.2d 651 (Fla. 1st DCA 1997)

(holding that a doctor's testimony did not constitute competent substantial evidence as to causation because it was based on speculation, made without knowledge of claimant's relevant medical history, and based "virtually entirely" upon claimant's false report of causal connection between the accident and a subsequent surgery); *In re Paoli R. R. Yard PC'B Litigation,* 35 F.3d 717 (3d Cir. 1994) (holding that for purposes of determining admissibility of expert medical testimony, part of differential diagnosis is using standard techniques to rule out alternative causes and, thus, where defendant points to a plausible alternative cause and the doctor offers no explanation for why he or she has concluded that was not the sole cause, the doctor's methodology is unreliable); *Berry v. CSX Transp. Inc.,* 709 So.2d 552, 571 (Fla. 1st DCA 1998) (holding that expert witness' testimony regarding causation of a railroad employee's malady was admissible in toxic tort litigation, as the expert employed a scientifically acceptable differential diagnosis method in an attempt to eliminate other possible causes of symptoms and his opinion was not based upon the employee's personal history, medical records, physical examinations, and medical tests, but upon sufficient epidemiological data, facts, and personal observations); *David v. Nat'l R.R. Passenger Corp.,* 801 So. 2d 223, 227 (Fla. 2d DCA 2001).

On the other hand, in the recent Broward County case, we argued that the defendants' experts could opine regarding issues of causation because they actually applied standard techniques of differential diagnosis through the review of prior medical records, examinations, diagnostic films, discovery, depositions, investigation, statements, and photographs.

The Circuit Court in Broward County granted the defendants' motion in limine to preclude causation opinions from the plaintiff's treating non-retained physician. In our case, we had the perfect storm of the physician not having taken a history as to how the incident occurred or how the alleged injuries were caused by the incident, coupled with the plaintiff's attorney not having provided any other treatment records to the physician, as well as the physician's concession that he was not retained to provide an opinion on permanency. However, based on the case law, the argument to preclude opinion testimony by a treating physician as to causation and permanency should not hinge on whether the latter concession is made by the physician during deposition. ◆

Tom is special counsel in our Orlando, Florida, office. He can be reached at (407) 420-4418 or TJSlogar@mdwcg.com.

Frank Madia is an associate in our Orlando office who can be reached at (407) 420-4410 or FLMadia@mdwcg.com.

Heather, also in our Orlando office, is an associate who can be reached at (407) 505-4680 or HCTruitt@mdwcg.com.

Coming this June:

The Defense of Appellate Counsel in Legal Malpractice Actions

Join Jack, Jeremy and Alesia for a webinar presentation on recent and emerging case law in New York, New Jersey and Pennsylvania, where they will highlight effective strategies for defending appellate counsel when facing legal malpractice lawsuits.

Date to be announced soon. Stay tuned!

Denial of Insurer's Petition for Limited Intervention in Trial Court Action Against Insured to Determine Whether Coverage Exclusion Applies Is Immediately Appealable

Thomas A. Specht, Esq.

Key Points:

- Trial court's denial of insurer's petition for limited intervention to determine whether coverage exclusion applied was immediately appealable pursuant to Pa. R.A.P. 313(b).
- Trial court's denial of petition to intervene under Pa. R.C.P. 2327(1) was erroneous because, unless insurer was permitted to intervene for the limited purpose of submitting a special interrogatory to the jury, the entry of a judgment in the action would impose liability upon insurer to indemnify insured.
- Pennsylvania Superior Court remanded to trial court to determine whether intervention should be refused under Pa. R.C.P. 2329.

In *Hannibal v. Solid Waste Services, Inc.,* 2023 WL 8761934 (Pa. Super. Dec. 19, 2023), the Superior Court reversed a trial court order that had denied Admiral Insurance Company's (Admiral) petition for limited intervention in an action brought by Ahmed Hannibal (Hannibal) against Admiral's insured, Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons, Inc. (Mascaro), and remanded for further proceedings. The appeal was an immediate interlocutory appeal as of right pursuant to Pa. R.A.P. 313, which permits immediate appeals from collateral orders of trial courts.

Admiral had issued a commercial general liability insurance policy to Mascaro that provided defense and indemnity coverage. The policy excluded coverage for "'bodily injury,' ... allegedly or actually arising out of, related to, caused by, contributed to by, or in any way connected to or with the ownership, maintenance, use, or entrustment to others, by or on behalf of any insured of an 'auto,' ... 'Use' includes, but is not limited to, operation and 'loading or unloading.'"

Hannibal was injured when a trash dumpster platform he was standing on moved and caused him to fall and sustain injuries. At the time of the accident, the trash dumpster platform was connected to a dumpster being serviced by Mascaro.

Hannibal filed suit against Mascaro, asserting that Mascaro was responsible for the maintenance, care, and upkeep of the dumpster; that Mascaro was negligent and careless; and that such negligence and carelessness caused his injuries. The complaint asserted a claim for premises liability and a claim for negligence but no claim based on the ownership, maintenance, or use of an auto. ▶

Mascaro tendered to Admiral, seeking defense and indemnity coverage under the policy. Admiral agreed to provide a defense to Mascaro subject to a full reservation of rights to deny coverage and withdraw its defense should evidence reveal that the policy did not cover Hannibal's claims.

Discovery revealed that the platform on which Hannibal was standing moved because it was resting on a dumpster attached to a Mascaro truck that was pulling away, thereby causing the accident. Admiral subsequently filed a federal declaratory judgment action that was dismissed as premature.

Admiral thereafter sought to intervene in the state trial court action for the limited purpose of submitting a special interrogatory to the jury as to whether Hannibal's injuries and damages were caused by the ownership, maintenance, or use of any auto. Admiral alleged that, if intervention were denied, the jury would simply be asked if Mascaro was negligent and if such negligence was the proximate cause of Hannibal's injuries and damages, without specifying the precise manner of such negligence or whether such negligence involved the ownership, maintenance, or use of a vehicle. The special interrogatory would only be submitted if the jury found that Mascaro had been negligent and that such negligence was the proximate cause of Hannibal's injuries and damages.

Both Hannibal and Mascaro opposed intervention, and the trial court denied intervention without a hearing. Admiral filed a notice of appeal from the putatively interlocutory order to the Superior Court of Pennsylvania.

Since most interlocutory orders in Pennsylvania are not immediately appealable, the Superior Court preliminarily dealt with the issue of whether it had appellate jurisdiction over the order denying limited intervention. The court noted that such an order might be appealable as a collateral order or as an interlocutory order by permission. However, Admiral only appealed on the basis that the order was appealable as a collateral order pursuant to Pa. R.A.P. 313(b).

Rule 313(b) provides that an interlocutory order is collateral and, therefore, immediately appealable if: (1) it is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost. *See Pa. R.A.P. 313(b).* The Superior Court determined that the order denying limited intervention was immediately appealable under Rule 313(b).

Relying on *Bogdan v. Am. Legion Post 153 Home Ass'n.,* 257 A.3d 751, 756 (Pa. Super. 2021), it concluded that the order denying the petition satisfied the separability prong under Rule 313(b) because Admiral's right to intervene was peripheral to the ultimate resolution of the action brought by Hannibal. Admiral merely sought to ensure that, when the jury would reach its determination as to whether Mascaro was liable to Hannibal, it would make certain factual findings which would resolve the coverage issues.

The Superior Court also found that the order satisfied the second prong of Rule 313(b)—that the right involved was too important to be denied review. The court noted that Admiral sought limited intervention to obtain a clear determination of the basis for any potential jury verdict to assist with subsequent coverage determinations regarding its indemnity obligations in a declaratory judgment action. The court indicated that the petition to intervene was "the only way for Admiral to secure the specific factual reasons for any potential verdict against Mascaro, and, if appropriate, to sustain its burden of establishing—in a subsequent declaratory judgment action—whether any policy exclusions apply to preclude indemnity coverage for any verdict that Hannibal may secure against Mascaro."

The Superior Court also decided that if review of the

order denying intervention were postponed until after final judgment, the claim would be irreparably lost. Citing *Butterfield v. Giuntoli*, 670 A.2d 646, 658 (Pa. Super. 1995), the court stated that, if the jury were to return a general verdict against Mascaro, without making any factual determinations necessary to resolve the coverage issues, Admiral would be permanently deprived of the ability to establish whether a policy exclusion applied and precluded indemnity coverage for any judgment against Mascaro. In *Butterfield*, the Superior Court had affirmed summary judgment in favor of the insured in a declaratory judgment action brought by the insurer because it was the insurer's burden to prove that the claim was excluded from coverage, and the insurer had failed to seek intervention or request special interrogatories, rendering it impossible to determine the basis of the jury's findings in order to determine whether a policy exclusion applied.

Finding that the appeal was properly before it, the Superior Court looked to the denial of the petition to intervene. The court stated that who may intervene in an action and when that intervention may be prohibited is determined by Pa. R.C.P. Nos.: 2327 and 2329.

Pursuant to Pa. R.C.P. 2327, "at any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered." *Pa. R.C.P. 2327(1).* Pursuant to Pa. R.C.P. 2329:

> [u]pon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or (2) the interest of the petitioner is already adequately represented; or (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R.C.P. 2329.

The trial court had found that Admiral failed to satisfy Rule 2327(1), but the Superior Court disagreed. It concluded that, "unless Admiral is permitted to intervene for the limited purpose of submitting a special interrogatory to the jury, the entry of a judgment in this action will impose liability upon Admiral to indemnify Mascaro." The court noted that, when the insurer relies upon exclusionary language in the policy as a defense to coverage, the burden shifts to the insurer to prove that the exclusion applies to the facts of the case and that, to sustain that burden, Admiral was required to prove that Hannibal's injuries and damages were caused, in whole or in part, by the ownership, maintenance, or use of an auto, and sought limited intervention in this action for the sole purpose of submitting a special interrogatory to the jury to make this narrow factual determination.

The Superior Court opined that, as per *Butterfield*, 670 A.2d at 658, Admiral would be unable to determine the applicability of its potential coverage defense to any claim asserted against its insured if it was not not permitted to intervene. And Admiral would be obligated to indemnify Mascaro for any judgment imposed against it in the action.

The Superior Court, therefore, concluded that the trial court manifestly abused its discretion in determining that Admiral failed to satisfy the requirements of Rule 2327(1). It remanded for the trial court to conduct a hearing pursuant to Rule 2329.

So, in sum, there are two large takeaways from *Hannibal*. First, orders denying coverage counsel petitions for limited intervention into underlying actions are immediately appealable pursuant to Pa. R.A.P. 313. Second, coverage counsel would be wise to attempt to intervene in underlying actions against insureds, pursuant to *Butterfield*, where there are fact issues relating to whether coverage defenses apply and there is a danger that the verdict could be ambiguous as to those coverage issues. ◆

Tom is a shareholder in our Scranton, Pennsylvania, office. He can be reached at (570) 496-4612 or TASpecht@mdwcg.com.

Welcome to Our New Lateral Shareholders!

Christina Gonzales, Esq.
Casualty
Philadelphia, PA

Alyson Kirleis, Esq.
Health Care
Pittsburgh, PA

Scott Taffett, Esq.
Casualty
Westchester County, NY

ON THE PULSE

In-Step with Our Consumer Financial Services Litigation Practice Group

Danielle M. Vugrinovich, Esq.

The multitude of federal and state consumer protection laws present challenges for consumer financial services companies seeking to remain compliant with the laws while avoiding claims and lawsuits.

The attorneys in Marshall Dennehey's Consumer Financial Services Litigation Practice Group understand the challenges financial institutions, creditors, debt collectors, and others face in this very specific field of litigation. Our attorneys defends individual and class action lawsuits arising from claims under the Fair Credit Reporting Act (FCRA); Fair Debt Collection Practices Act (FDCPA); Telephone Consumer Protection Act (TCPA); Equal Credit Opportunity Act (ECOA); Electronic Funds Transfer Act (EFTA); state consumer statutes, and more.

Additional clients represented include debt servicers, debt buyers, auto finance companies, repossession companies, student lenders and servicers, telecommunication providers, collection attorneys, mortgage lenders, and credit reporting agencies.

Attorneys across our 19 offices are on the front lines representing clients against claims brought by the increasingly sophisticated consumer plaintiffs' bars in Pennsylvania, New Jersey, New York, Ohio, Delaware, Florida, Maryland, Connecticut, and the District of Columbia. Primary attorneys handling these matters include Jeremy Zacharias in New Jersey; myself, Aaron Moore, Stephen Keim, and Maureen Fitzgerald in Pennsylvania; Caroline Pacheco, Holly Hamilton, and Joe Hess in Florida; and David Lane in New York.

Members of our practice group maintain active memberships in the Association of Credit and Collection Professionals (ACA International) and the National Creditors Bar Association (NCBA). We often attend and speak at these conferences to keep abreast of the ever-changing regulatory environment impacting our clients.

Marshall Dennehey's Consumer Financial Services Litigation Practice Group offers cost-effective, intelligent, and pragmatic representation to our clients. While we aggressively defend claims in litigation, we understand that the most critical component of litigation is an open line of communication. We never lose sight of our clients' goals, and we meet their expectations with focused attention arising from our extensive knowledge of the law. Our principal focus is to empower our clients to make informed decisions and to develop an appropriate defense strategy. ◆

Danielle is a shareholder in our Pittsburgh, Pennsylvania, office. She can be reached at (412) 803-1185 or DMVugrinovich@mdwcg.com

ON THE PULSE

Working In the "First State" – Spotlight on Wilmington

Sarah B. Cole, Esq.

Wilmington, Delaware, is small but mighty. It is a city on the upswing and a great place to practice law. Many companies choose to incorporate in Delaware and, as a result, the courts and litigators keep plenty busy with disputes that originate in and out of the state.

The Delaware office of Marshall Dennehey opened in 1995 and, since that time, has represented clients in casualty, professional liability, workers' compensation, and medical malpractice matters. For the first 25-plus years of its existence, this office was led by Kevin Connors, who maintains a busy practice to this day. During his tenure, the office grew to roughly 20 attorneys in the firm's four major departments. Our Wilmington office maintains a robust practice throughout all three counties in the state.

The strength of the Delaware office is in its people. The office, like the firm itself, makes a commitment to each person who joins us to provide apprenticeship, guidance, comradery, and support. We want people to succeed here, and we are committed to their advancement. If you were to walk down the hallways of our office, you would see open doors, friendly faces (for the most part), some odd artwork, and fantasy football draft posters. You will also likely come across our main kitchen and probably find some donuts and a vending machine that works fairly well. Most importantly though, you will find a welcoming atmosphere that serves as the foundation for our firm's and our office's success.

The attorneys in our office have a few time-honored traditions, most notably, the annual Crab Trip. Every June, attorneys board a bus (hopefully equipped with a bathroom) and make the journey down to Leipsic, Delaware, for an afternoon of crabs, hush puppies, fried-everything, and Prairie Fires. The bus then usually takes a meandering route back to Wilmington, stopping at various well-heeled establishments along the way. It is on this trip that bonds are formed and friendships are solidified. We are a team, and we enjoy each others company.

The Wilmington office is growing, both with the type of litigation work we take on and the attorneys who come on board. We added a new shareholder and three associates in all four litigation departments in the last two years and hope to add more in 2024. The future is bright. We welcome you as well and invite you to come and visit. Feel free to bring donuts. ◆

Sarah is a shareholder and the managing attorney of our Wilmington, Delaware office. She can be reached at (302) 552-4364 or SBCole@mdwcg.com

ON THE PULSE

Recent Appellate Victories

Walter Kawalec (Mount Laurel, NJ) succeeded in obtaining an affirmance by the Court of Appeals for the Third Circuit of a judgment as a matter of law for the firm's client, a local school district. This was an employment discrimination case in which the plaintiffs alleged they suffered age discrimination and unlawful retaliation. The matter concerned the implementation of new rules for teachers' evaluations. Under the new rules, certain negative performance evaluations would result in the referral of a tenure charge of inefficiency, which has the potential of resulting in the dismissal of the educator. In this case, a number of teachers who faced potential charges of inefficiency chose to resign rather than face tenure charges, as doing so precluded any negative impact on their pensions. Because those teachers resigned, they could not demonstrate that they suffered an adverse employment action, which is necessary to assert a viable discrimination cause of action. The mere fact that they received negative evaluations, without more, does not constitute adverse employment action, and their resignations precluded them from being discharged for inefficiency. The court affirmed the grant of summary judgment in the District Court. *Goode v. Camden City School District,* 2024 WL 107887 (3d Cir. Jan. 10, 2024).

Michael Salvati, David Wolf, Shane Haselbarth, and **John Hare** (all Philadelphia, PA) won a unanimous precedential decision from the Pennsylvania Superior Court that upheld the venue transfer of a significant case from Philadelphia to Butler Countyunder the doctrine of forum non conveniens. The decision breaks a recent string of appellate reversals of venue transfers out of Philadelphia and distinguishes those contrary cases based upon the substantial record of hardship developed by Mike and Dave in the trial court. The decision also found that Mike and Dave satisfied the necessary showing of why the hardship witnesses were important to the case, a showing that was not even mandated until after Mike and Dave had built their trial court record. The decision has been reported as creating the new standard that defendants must meet to secure a venue transfer based upon forum non conveniens. *Smith v. CMS W., Inc.,* 305 A.3d 593 (Pa. Super. 2023).

Carol Vanderwoude (Philadelphia, PA) and **Ray Freudiger** (Cincinnati, OH) and won a decision from the U.S. Sixth Circuit Court of Appeals, which affirmed a jury verdict in favor of their client, a municipal housing authority. After written briefing and oral argument, the Sixth Circuit affirmed the jury verdict in which the appellant developer failed to prove that the housing authority discriminated against it (in violation of ADA and FHA) by refusing to apply to HUD for VASH vouchers on behalf of the developer. The developer failed to prove it asked the housing authority for VASH on behalf of disabled persons, the request was not reasonable, and the request was not necessary to enable disabled persons to enjoy their residences as non-disabled persons could. ▶

ON THE PULSE

Recent Appellate Victories (cont.)

Kimberly Berman, Jonathan Kanov, and **Alan C. Nash** (all Fort Lauderdale, FL) succeeded in obtaining an affirmance by the Fourth District Court of Appeal of a venue order obtained by our client, a school board member. The plaintiff/petitioner/appellant, a convicted felon, had run for a seat on a school board before his rights had been restored and won the election but refused to be sworn in with the other newly elected board members. Since he failed to qualify and refused to accept the seat within 30 days, the Governor issued an executive order that declared a vacancy and appointed our client to the school board instead. The plaintiff filed a writ of quo warranto and a declaratory judgment action in Broward County, urging the trial court to void the executive order and order that the plaintiff take and hold the office of the school board immediately. The Governor and our client moved to transfer the case to Leon County based on the home venue privilege. The trial court granted the motion, and the Fourth District affirmed the nonfinal order on appeal. *Velez v. DeSantis*, 2023 WL 8636899 (Fla. 4th DCA Dec. 14, 2023).

Kimberly Berman (Fort Lauderdale, FL) and **Andrea Diederich** (Orlando, FL) obtained an affirmance by the Fifth District Court of Appeal for the firm's client in an appeal of a nonfinal order denying the plaintiff's motion to disqualify counsel. The plaintiff's counsel moved to disqualify our firm and defense counsel for their communications with a post-incident treating physician employee/agent of the client's owner during the course of a premises liability lawsuit. Our client argued there was no conflict of interest and no violation of the patient-physician privilege to communicate with a post-incident treating physician, who was also an employee/agent of our client. The trial court agreed and denied the motion. The Fifth District affirmed the denial of the nonfinal order on appeal and granted our client's motion for appellate attorney's fees on a provisional basis. *Figueroa v. OHRI, LLC*, 2024 WL 166910 (Fla. 5th DCA Jan. 16, 2024).

Audrey Copeland and **Judd Woytek** (both King of Prussia, PA) successfully defended the claimant's appeal from a workers' compensation judge's decision (that had been affirmed by the Workers' Compensation Appeal Board), which found that the claimant's temporary total disability benefits should be reinstated as of the date he filed his reinstatement petition based upon Protz following a pre-*Protz* IRE. ◆

Walter Kawalec | Audrey Copeland | Judd Woytek | Michael Salvati | David Wolf | Shane Haselbarth | John Hare | Carol Vanderwoude
Ray Freudiger | Kimberly Berman | Jonathan Kanov | Alan C. Nash | Andrea Diederich

ON THE PULSE

Defense Verdicts and Successful Litigation Results

CASUALTY DEPARTMENT

Mohamed Bakry and **Kimberly House** (both Philadelphia, PA) secured a jury defense verdict in a general liability lawsuit brought against a Pennsylvania moving equipment rental company. The plaintiffs were in their car at a McDonald's drive-thru in Delaware when their vehicle was struck by an unattached trailer that had blown from an adjacent parking lot during a storm. The trailer was blown from the parking lot of the adjacent gas station, which rented trailers to the public as part of a dealership agreement with a Delaware moving equipment rental company that had the same parent corporation as the client. After the accident, a gas station employee provided the plaintiff with an old business card for an employee of the Delaware equipment rental company, but which identified the employee as an agent of the Pennsylvania moving equipment company. The plaintiffs contended that the business card established agency, and we argued that an old business card was not enough to establish agency and that the testimony of the parties directly contradicted the wording on the business card. The plaintiffs claimed to have suffered neck and back injuries, and one contended she would have future medical expenses in excess of $100,000. The first question on the verdict slip asked the jury to state whether the Delaware company employee was also an employee and/or agent of the Pennsylvania moving truck rental company at the time of the accident, and the jury answered "No." That eliminated the need for the jury to answer any further questions, and a defense verdict was rendered.

Stuart Sostmann and **Michael Winsko** (both Pittsburgh, PA) obtained a defense verdict following a three-day jury trial in a slip-and-fall injury case in the Court of Common Pleas of Allegheny County. The plaintiff slipped in the lobby of a commercial building and claimed a serious and ongoing injury to her right shoulder. The plaintiff alleged she fell due to a wet floor caused by the facilities management's cleaning process and the lack of sufficient visible wet floor caution signs. The plaintiff underwent two surgeries, claimed ongoing pain and suffering, and sought $500,000 prior to trial. Mike and Stu, representing the building ownership and the facilities management company, persuaded the jury to find for the defense by establishing a consistent and credible history of habitual practice in the placement of wet floor signs across the lobby in highly visible areas. They also won the credibility battle through their well-prepared witnesses. Although faced with a sympathetic plaintiff with a substantiated history of medical treatment, Mike and Stu succeeded by presenting the case using "old school" personal injury defense tactics that were necessary due to the lack of video, photographs and documentation.

Adam Levy (Mount Laurel, NJ) and **Pauline Tutelo** (Roseland, NJ) tried a construction-site-related personal injury case to verdict in Hudson County, New Jersey. After a month of trial, Adam and Pauline successfully placed the entirety of the plaintiff's $4.2 million jury verdict against the remaining co-defendant. By way of post-trial motions, Adam and Pauline also successfully placed all of their client's costs and attorney's fees on the co-defendant. In total, including the plaintiff's success on an offer of judgment and based on Adam and Pauline's post-trial motions, the judgment against the co-defendant was in excess of $7 million.

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

Coryn Hubbert (Harrisburg, PA) obtained a defense verdict before the York County Magistrate Court. While riding a bicycle through a shopping center parking lot, the plaintiff collided with our client, who was driving a vehicle, at an intersection that did not have stop signs. The plaintiff alleged that our client was responsible for his medical damages, as well as property damage to his bike and clothing. At the hearing, Coryn elicited testimony from the plaintiff that his medical bills had been fully covered by his health insurance, with no out-of-pocket costs, and demonstrated that the plaintiff did not have sufficient evidence to prove that his alleged property damage was tied to the incident, nor that it occurred at all. The judge agreed and granted a defense verdict. ◆

Mohamed Bakry | Kimberly House | Stuart Sostmann | Michael Winsko
Adam Levy | Pauline Tutelo | Coryn Hubbert

HEALTH CARE DEPARTMENT

William Banton and **Tara Fung** (both Philadelphia, PA) obtained a defense verdict in Delaware County, Pennsylvania, on behalf of an extended care facility. The plaintiff filed a nursing home malpractice case, alleging negligence regarding the development and progression of certain wounds that the plaintiff's decedent developed throughout her treatment at various medical facilities. The evidence presented to the jury supported the argument that the decedent's development of wounds occurred prior to her arrival at our client's facility and that, while at the facility, the wounds were properly treated. Furthermore, the decedent's wound progression was the result of her pre-existing conditions and reaching the end stage of life. The trial lasted four days, and the jury returned a verdict in approximately 30 minutes.

Lynne Nahmani and **Jessica Wachstein** (both Mount Laurel, NJ) successfully defended a chiropractor, obtaining a directed verdict on informed consent and a no cause, 7-0, on standard of care. The plaintiff claimed the defendant was negligent in failing to obtain an MRI before adjusting the lumbar spine with a differential diagnosis, which included a herniated or bulging disc. The plaintiff had claimed increased risk of harm for foot drop, surgery, pain and suffering, and alteration in work and life enjoyment. ▶

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

Suzanne Utke (Philadelphia, PA) won a summary judgment motion in a failure to diagnose breast cancer case on behalf of an imaging company. The plaintiff had four mammograms between July 2011 and January 2015, all of which read as negative for abnormalities by four radiologists, who were all named defendants and were alleged to be employed by the insured imaging company. In October 2015, after a fall that led to an urgent care visit and an MRI, a metastatic lesion was seen on the plaintiff's hip. She was subsequently diagnosed with Stage IV metastatic breast cancer. Suit was filed for a missed diagnosis of breast lesions allegedly appearing on each of the four prior mammograms. The imaging company was named for theories of corporate and vicarious liability. After multiple mergers, acquisitions, and contractual relationships with all of the corporate co-defendants, the non-involvement of the imaging company was hotly contested and a stipulated dismissal could not be secured. After complex discovery, the motion for summary judgment was finally granted, with prejudice, for our client. ◆

William Banton | Tara Fung | Lynne Nahmani | Jessica Wachstein | Suzanne Utke

PROFESSIONAL LIABILITY DEPARTMENT

Scott Dunlop and **Nathan Marinkovich** (both Pittsburgh, PA) received a complete defense verdict in favor of their client in an equity action involving property rights in our client's public safety building. The plaintiff, a volunteer fire company, moved its operation into public safety building space constructed for it by the Borough, our client. The fire company refused to execute a lease that would have provided it with occupancy for 100 years, unwisely holding out for better terms. Thus, the Borough adopted a resolution making the fire company a tenant at will, with its space allocation subject to the discretion of the Borough Council. Thereafter, the fire company donated $50,000 to the Borough toward construction costs for its space. The fire company enjoyed its space for 10 years, during which it brought into its space, without the Borough's consent, a for-profit ambulance service with which it is affiliated, but which has no business relationship with the Borough. When the Council voted to convert some of the fire company's space for use by the police department, the fire company filed suit under the theory that it had been promised control of the space during negotiations over ▸

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

ten years earlier. The plaintiff's theories were "joint venture" ownership, promissory estoppel, and unjust enrichment/quantum meruit. The Borough, through its solicitor, counterclaimed for quiet title, ejectment of the ambulance company, and unjust enrichment due to the unauthorized sublease. All negotiations involved offers and demands for space usage within the public safety building.

Jack Slimm (Mount Laurel, NJ) obtained a defense jury verdict in Burlington County, New Jersey, in a complex legal malpractice action arising out of two wrongful termination trials. This extremely complicated legal malpractice action arose out of two underlying employment trials for wrongful termination claims, as well as an appeal, and involved intellectual property. **Jeremy Zacharias** (Mount Laurel, NJ) handled a significant amount of the pretrial and key motions in this case. In addition, **Sydney Larsen** (Mount Laurel, NJ) handled evidence exhibits at trial. There were numerous evidence issues as there were two underlying trials. However, in a pretrial hearing, we successfully limited the plaintiff's proofs and barred significant damages claims asserted through the plaintiff's expert. The court entered an order dismissing the legal malpractice claims during trial. The jury rejected the plaintiff's claims and awarded all of our client's fees, with interest and costs.

Ray Freudiger and **Donielle Willis** (both Cincinnati, OH) won dismissal on behalf of their client, an insurance agency in Hamilton County, Ohio. The plaintiff entity alleged that it suffered monetary damages by having to pay for claims made against its California employees. It alleged the agency failed to obtain employment practices liability insurance for the company's California employees. In their motion to dismiss, Ray and Donielle successfully argued that the "economic loss doctrine" barred all claims against the agency. ◆

Scott Dunlop | Nathan Marinkovich | Jack Slimm | Jeremy Zacharias | Sydney Larsen | Ray Freudiger | Donielle Willis

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

WORKERS' COMPENSATION DEPARTMENT

Linda Farrell (Jacksonville, FL) successfully defended a petition at a final hearing on behalf of a road sign contractor and their carrier against a former employee who claimed a work injury. Linda presented four live witnesses before the judge of compensation claims to prove that no accident had been reported by the claimant. The judge found the claimant's argument, that his employer should have known because he claimed the supervisor was present, was not sufficient and denied the entire claim.

Rachel Ramsay-Lowe (Roseland, NJ) won a trial for a cable company where the claimant was injured while working at a one of the company's sites. The employer had hired a contractor to complete the work, and various parts of the job were subcontracted out to several different companies. The claimant was hired by one of the subcontractors. Rachel argued that the claimant was not an employee or special employee of the cable company. In addition, the court agreed that an owner who contracts with an independent contractor for construction on his own property is not a contractor within the meaning of section 56 of the New Jersey workers' compensation law. The court, therefore, dismissed our client from this claim.

Judd Woytek (King of Prussia, PA) successfully defended a survivor's claim for Federal Black Lung benefits. The miner had worked 11 years in the coal mine industry, and the parties stipulated that he had simple coal workers' pneumoconiosis at the time of his death. Judd presented credible medical evidence to show that the miner's pneumoconiosis did not cause or contribute to his death, and benefits were denied. ◆

Linda Farrell | Rachel Ramsay-Lowe | Judd Woytek

ON THE PULSE

Other Notable Achievements

APPOINTMENTS

Mohamed Bakry (Philadelphia, PA) has been named the first Muslim president of the Lawyers' Club of Philadelphia's Board of Directors. He has been a member of the club and served on its board since 2016.

Rebecca Doloski (Tampa, FL) has been named secretary of the Claims and Litigation Management Alliance (CLM) Western Florida Chapter Board, effective January 2024.

Rachel Insalaco (Scranton, PA) has been elected to the Board of Directors of the Young Lawyers Division of the Lackawanna Bar Association.

Valerie Lamb (Tampa, FL) has been accepted to Hillsborough Association for Women Lawyers (HAWL) Leadership Academy. HAWL's Leadership Academy is a multi-session professional development program designed for attorneys seeking to advance their self-advocacy skills, leverage their talent in current and future positions, identify leadership strategies and opportunities, and create a plan for personal and professional leadership.

Mark Wellman (New York, NY) on being selected to the Board of the CLM Alliance (Claims and Litigation Management Alliance)'s New York City Chapter. In this capacity, Mark helps to plan events and oversee membership activities. ◆

ON THE PULSE

Other Notable Achievements (cont.)

PUBLISHED ARTICLES

On December 26, 2023, the Insurance Journal published "Florida High Court Tapped Brakes on DangerousInstrumentality Liability" by **Kimberly Kanoff Berman** and **Sheri-Lynn Corey-Forte** (both Fort Lauderdale, FL).

On December 13, 2023, The Legal Intelligencer published **Lee Durivage's** (Philadelphia, PA) article "EEOC's Expansion of Accommodations Under the Pregnant Workers Fairness Act."

Jessica Gordon (Mount Laurel, NJ) authored the article "AI: Detecting Fraud and Improving Claims Handling" that appeared in the CLM's Workers' Compensation e-newsletter on December 20, 2023.

On December 11, 2023, Insurance Journal published "With Differing Court Rulings on Pre-Suit Notice of Intent, Florida Insurers Left Guessing" written by **Sean Greenwalt** (Tampa, FL).

Claire McCudden's (Wilmington, DE) article "New York Supreme Court Decisions Impart Lessons for Insurance Agents and Brokers" was published on PLUS Blog on January 30, 2024.

The Claims and Litigation Management Alliance issued its Top Ten Most Read Articles of 2023 and **Tony Natale's** (Philadelphia, PA) workers' compensation article, "Why Do Claimants Lie?" was #4 on the list!

David Shannon's (Philadelphia, PA) article "Cybersecurity Threats: A Year in Review and a Look Ahead" was published in The Legal Intelligencer on December 19, 2023. ◆

ON THE PULSE

Other Notable Achievements (cont.)

SPEAKING ENGAGEMENTS

Mohamed Bakry (Philadelphia, PA) presented at the Defense Research Institute's 2024 Product Liability Conference "You've Been Warned! The Future Is Coming for Labels." As more product warning labels and instructions are being provided to consumers in digital format (via QR codes, YouTube videos, and even TikTok), juries are left to determine what is (or is not) compliant with the applicable standards. Attendees learned more about the best practices for manufacturers to communicate with consumers about product warnings and instructions in this digital age.

Michael Bradford (Tampa, FL) co-presented "History of Marine Insurance and the Principles that Guide Us Now" at the Tampa Bay Mariners Club Seminar Sink or Swim in Marine Insurance 2024 Seminar Sink or Swim in Marine Insurance 2024.

Josh J.T. Byrne (Philadelphia, PA) joined a Pennsylvania Bar Institute panel to record the webinar "Continuity of Legal Services for Solo and Small Firm Attorneys 2023." Josh was also part of a panel which presented on avoiding legal malpractice at the Pennsylvania Bar Association's Mid-Year Meeting. The panel focused on the benefits and risks of generative AI in the practice of law.

James Cole (Philadelphia, PA) teamed up to co-present "Risky Business: New Trends in Insurance Fraud" at the CLM Alliance (Claims and Litigation Management Alliance)'s 2023 Focus Conference in NYC. The panelists addressed new trends in insurance fraud and how to detect and defend against the same.

Jay Habas, Patrick Carey (both Erie, PA), and **Christian Marquis** (Pittsburgh, PA) gave a presentation to the County Commissioners Association of Pennsylvania. The title of their presentation was "Local Government Immunity in Pennsylvania: A Study of the Political Subdivision Tort Claims Act."

John Hare (Philadelphia, PA) presented a seminar to the Superior Court of Pennsylvania entitled "Speak Easy and Write Stuff: Effective Communication Techniques for Appellate Courts." The CLE about how to draft effective judicial opinions and present oral arguments was mandatory for all 85 Superior Court legal staffers and law clerks and was attended by the majority of Superior Court judges.

ON THE PULSE

Other Notable Achievements (cont.)

Mark Kozlowski (Scranton, PA) presented the webinar "Employment Law Basics - 2023 Year in Review: What's New, What's Changed, and What Do I Need to Know?" This webinar was presented to the Northeastern Pennsylvania Chapter of the Society for Human Resource Management.

Sara Mazzolla (Roseland, NJ) discussed claims and waivers when she participated on a legal panel at the NAFDMA National Agritourism Convention and Expo (North American Farmers Direct Marketing Association).

Harold Moroknek (Westchester, NY) was a presenter to the American Bus Association/Bus Industry Safety Council at it 2024 Winter Meetings.

Jeffrey Rapattoni (Mount Laurel, NJ) presented "The Top 10 Cases Impacting Insurance Fraud" at the National Insurance Crime Bureau's 2024 Mid-Atlantic Training Event.

Alesia Sulock (Philadelphia, PA) co-presented for the Pennsylvania Bar Institute a CLE presentation on "The Business and Ethics Basics of Law Firm Management 2024." ◆

Defense Digest, Vol. 30, No. 1, March 2024, is prepared by Marshall Dennehey to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.