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The Evolution of Political Subdivision Immunity in Ohio

Morgan A. Henderson, Esq.

Key Points:

- *A.W. v. Board of Education of Twinsburg* discusses political subdivision immunity in Ohio.
- Appellate court discussed application of political subdivision immunity to public school districts.

In June 2024, in *A.W. v. Board of Education of Twinsburg*, 2024 WL 3220270 (Ohio Ct. App. 9th Dist. June 28, 2024), an Ohio appellate court issued a decision shedding light on political subdivision immunity in the state. More specifically, the court discussed its application to public school districts.

The case stems from a physical altercation that took place between two minors, referred to as A.W. and M.G., on school property. Shortly after the fight began, school personnel intervened to break up the students. After the altercation, A.W. was sent home from school without receiving medical attention. Within 24 hours of the attack, A.W. sought treatment at an emergency room because she was suffering from severe headaches, nausea, and vomiting. She was ultimately diagnosed with a concussion.

On March 17, 2023, A.W. and her parents filed a complaint in the Summit County Court of Common Pleas against M.G., his parents, and the Twinsburg City School District Board of Education. The complaint alleged causes of action against the Board for recklessly failing to exercise control of a student, negligently failing to exercise control of a student, recklessly failing to provide necessary medical attention, and negligently failing to provide necessary medical attention.

After the complaint was filed, the Board filed a motion for judgment on the pleadings, arguing that, as a political subdivision, it was entitled to immunity pursuant to Chapter 2744 of the Ohio Revised Code. The plaintiff did not respond to the motion, but it was, nonetheless, denied by the trial court. In its denial, the trial court found that the complaint pled sufficient material allegations to show the Board was not entitled to political subdivision immunity.

The Ohio Political Subdivision Tort Liability Act is codified in R.C. 2744.01, and it establishes a three-tiered analysis for determining whether a political subdivision is immune from liability. “Under the first tier of the analysis, political subdivisions enjoy a general grant of immunity for any injuries, deaths, or losses allegedly caused by any act or omission of the political subdivision or [its] employee in connection with a governmental or proprietary function.” *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 196–197 (2006). The second tier requires an analysis as to whether an exception applies to a

political subdivision's comprehensive immunity. The exceptions are as follows:

> (1) injury, death, or loss caused by the negligent operation of any motor vehicle by a political subdivision's employee;
>
> (2) injury, death, or loss caused by the negligent performance of acts with respect to proprietary functions;
>
> (3) injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads;
>
> (4) injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function; and
>
> (5) injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code.

Under the third tier, immunity may be restored, and the political subdivision will not be liable if one of the defenses enumerated in R.C. 2744.03(A) applies. *Moss v. Lorain Cty. Bd. of Mental Retardation*, 185 Ohio App.3d 395, 401 (Ohio Ct. App. 9th Dist. 2014).

As for the first tier, it was undisputed that the Board is a governmental agency/organization and, therefore, is granted broad governmental immunity. With regard to the second tier, however, the plaintiff argued that the Board was not entitled to immunity because it was engaged in a proprietary function—the second exception under R.C. 2744.01. Specifically, the plaintiff argued that the Board engaged in two proprietary functions: Failing to control M.G., thereby allowing him to attack A.W., and failing to provide A.W. with medical attention following the attack. The trial court agreed, holding that the Board may be liable for injury to a person caused by negligent performance of acts by their employees with respect to providing a public school education.

On appeal, the Ninth District disagreed with the trial court's conclusion, holding that "neither the Board nor its employees were engaged in proprietary functions as required." The appellate court further explained that R.C. 2744.01(C)(2)(c) specifically designates "[t]he provision of a system of public education" as a governmental function. The Board's exercise of control over the students and its provision of medical care for the students cannot be deemed proprietary functions under existing law. These functions must be strictly categorized as governmental functions. Therefore, the Board must be granted immunity under R.C. 2744.01. ◆

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Marshall Dennehey Expands Florida Workers' Compensation Practice With Addition of Shareholder Blake J. Hood in Jacksonville

Attorney's Representation of Treating Physician Prohibits Ex Parte Communication When the Attorney's Firm Already Represents a Named Defendant

Daniel Dolente, Esq. and John Farrell, Esq.

Key Points:

- A law firm that represents a named defendant cannot also represent a non-party treating physician for that physician's deposition.
- The Pennsylvania Rules of Civil Procedure prohibit counsel from communicating with a non-party treating physician outside of the parameters of discovery.
- The Pennsylvania Supreme Court ruled that the "client exception" to Rule 4003.6 is inapplicable where the treating physician's attorney is from a firm that already represents a named party.

The Supreme Court of Pennsylvania recently solidified developing precedent regarding the limits of the attorney-client relationship, interpretation of Rule 4003.6, and a law firm's ability to engage in deposition-only representation of a non-party treating physician.

The court's June 2024 decision confirms that a law firm representing a named defendant physician cannot circumvent Rule 4003.6's prohibition against *ex parte* communications in order to obtain information from a non-party treating physician by way of establishing an attorney-client relationship through representation of that non-party physician for his or her deposition. *Mertis v. Oh*, 2024 WL 3033416 (Pa. June 18, 2024). The court's decision affirms the Pennsylvania Superior Court's 2022 holding in *Mertis v. Oh*, 2022 WL 3036698 (Pa. Super. Aug. 2, 2022).

In *Mertis*, the plaintiff brought medical negligence claims against an anesthesiologist who gave her nerve blocking medication during her knee surgery. Suit was filed against that anesthesiologist, the anesthesia company, and the hospital where the surgery occurred. During discovery, the plaintiff subpoenaed the surgeon, who was not a named party, for deposition. The surgeon sought counsel for the deposition from his insurer, which assigned an attorney from the same firm as the attorney representing the defendant anesthesiologist.

The plaintiff contended that, because the surgeon's attorney was from the same firm as the anesthesiologist's attorney, the firm was violating Pennsylvania Rule of Civil Procedure 4003.6's prohibition against *ex parte* communications with a treating physician.

For context, Rule 4003.6, regarding "Discovery of Treating Physicians," is designed to prevent defense counsel from communicating directly with a plaintiff's treating physician. Under Rule 4003.6, defense counsel can seek information from a treating physician only by obtaining the party's written consent or through formal discovery. The Rule's aim is to avoid *ex parte* communications between defense counsel and the plaintiff's physician in favor of conventional means of discovery, such as interrogatories or depositions, where all parties can participate. Essentially, the Rule is designed to prevent a defendant from obtaining information from a doctor who treated the plaintiff which the plaintiff or co-defendants and their counsel are not privy to.

However, Rule 4003.6 does have exceptions. That is, an attorney can seek information from a treating physician who is (1) their client, (2) an employee of their client, or (3) an ostensible employee of their client. The "client exception" was specifically at issue in *Mertis*. The firm whose attorneys represented the anesthesiologist and the surgeon contended that, because they established an attorney-client relationship with the surgeon, their communications with the surgeon fell under the scope of the Rule 4003.6(1) client exception.

The Pennsylvania Supreme Court ruled to the contrary. The court held that the client exception was inapplicable in this situation as the attorneys for both the named defendant and the non-party treating physician were from the same firm. Even though the defendant anesthesiologist and non-party surgeon were represented by different individual attorneys from the same firm—who entered the case at different stages and for different purposes—the court made certain that Rule 4003.6 commands a firm wide effect. Essentially, once a law firm enters for a named defendant, Rule 4003.6 prevents a different attorney within the same law firm, who was initially uninvolved in the firm's defense of a named defendant, from representing the non-party treating physician.

The court's holding creates a clearly defined rule. Only with written consent from a plaintiff's counsel can a law firm represent both a defendant and non-party treating physician.

Although the Pennsylvania Superior Court's 2022 decision flagged this issue, the Supreme Court's 2024 holding solidifies this interpretation of Rule 4003.6. The practical effect of this decision is that defense firms must be aware of situations like the one in *Mertis*, where a non-party physician seeks, or is assigned, representation for their deposition from an attorney at a firm which already represents a named defendant.

In a practice area where medical providers and their insurers often have existing relationships with counsel, and where non-party treating physicians could foreseeably be employed by named defendant providers who are already represented by that same counsel, this situation is by no means far-fetched. For example, the surgeon in *Mertis* sought an attorney for his deposition based on the attorney's previous representation of the surgeon in an unrelated case. Those same circumstances may arise when a past client is implicated as a fact witness in a subsequent case and seeks familiar counsel for their deposition.

In that event, the *Mertis* court's holding demands that, unless the attorney obtains written consent from the plaintiff, the attorney cannot accept representation if their firm is already representing a defendant. It has now been made certain that doing so would constitute prohibited *ex parte* communication under Rule 4003.6.

In conclusion, the *Mertis* rule is a strong warning that large defense firms, generally speaking, should not represent a non-party physician when their firm has already been retained to represent a named defendant in a medical malpractice case. The likely result? The defense firm will be disqualified. ◆

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When a Hotel Swim Becomes a Work Duty: The Implications of *Terhune v. Port Authority*

David P. Levine, Esq.

Key Points:

- Employees required to stay at specific off-site locations by their employers for work-related purposes may be covered by the New Jersey workers' compensation statute, under the Special Mission Rule.
- Defense that an injury occurred during a recreational activity may not hold if the employee is fulfilling a directive related to their employment.
- Insurance policies should account for scenarios where employees are on special missions.

A recent decision by the New Jersey Superior Court, Appellate Division, in *Albert Terhune Jr. v. Port Authority of New York and New Jersey*, 2024 WL 2042233 (N.J. App. Div. May 8, 2024), provides valuable insights into the application of the "special mission" rule in New Jersey workers' compensation cases. This article breaks down the case and its implications for employers and insurance professionals in the realm of workers' compensation.

On December 14, 2013, Albert Terhune Jr., the petitioner, an employee of the Port Authority of New York and New Jersey, was required to report for mandatory snow duty and was assigned to stay at a Marriot Hotel in the area. Following his snow removal shift, the petitioner returned to the hotel and completed some light exercises in the hotel gym, in accordance with his physician's recommendations. The petitioner subsequently slipped and fell while attempting to enter the hotel pool. He filed a workers' compensation claim, which the Port Authority denied, arguing that the accident did not arise out of and in the course of his employment with the Port Authority.

The New Jersey workers' compensation court ruled in favor of the petitioner, a decision that was appealed and upheld by the Superior Court. In upholding the workers' compensation court's decision, the Superior Court found that the petitioner's presence at the hotel was a direct result of his employment duties and, thus, gave rise to a "special mission" as defined by the applicable New Jersey workers' compensation law.

Analysis

The Superior Court first analyzed application of the Special Mission Rule. The court emphasized that the petitioner was engaged in a special mission since he was required by his employer to stay at the hotel and effectively be on standby for snow removal. This aligns with the provision of N.J.S.A. 34:15–36, which states that an employee is considered to be in the course of employment when required by the employer to be away from the usual place of employment.

The court next looked at employer compulsion and benefits. The court noted that the petitioner was not given a choice in selecting his accommodations and

was compensated for the *entire* stay, including meal vouchers and other expenses. This sort of directive and structure of compensation reinforced the Superior Court's applicability of the Special Mission Rule.

While the Port Authority argued that the petitioner's use of the hotel pool was a recreational activity and, thus, not compensable, the court rejected this notion. It highlighted that the petitioner was where he was supposed to be and doing what he was expected to do as part of his employment duties.

Key Points for Insurance Professionals

Understanding the Scope of "Special Mission": This case illustrates that employees required to stay at specific off-site locations by their employers for work-related purposes may be covered by the New Jersey workers' compensation statute, under the Special Mission Rule, even if injured during personal activities, such as exercising.

Employer Responsibilities: Employers must recognize that directing employees to a specific off-site location for work-related purposes naturally extends their liability for any injuries sustained by those employees during such assignments.

Recreational Activity Defense: The defense that an injury occurred during a recreational activity may not hold if the employee is fulfilling a directive related to their employment, even during an entirely recreational activity, underscoring the importance of context in New Jersey workers' compensation claims.

Comprehensive Coverage Considerations: Insurance policies should account for scenarios where employees are on special missions, ensuring that there is clarity about coverage in cases of injuries sustained during such assignments.

Conclusion

The *Terhune v. Port Authority* decision highlights the importance of understanding the nuances of the Special Mission Rule under New Jersey workers' compensation law. For insurance professionals, this case demonstrates the need for careful evaluation of employee assignments and the potential liabilities that come with directing employees to work away from their usual place of employment. ◆

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What Makes a Disease a Compensable Occupational Disease?

Linda L. Wilson, Esq.

Key Points:

- COVID-19 *can* be a compensable occupational disease in Delaware.
- There is a two-prong test to determine if a disease is a compensable occupational disease.
- Both prongs must be met.

The Delaware Supreme Court discusses what makes an ailment a compensable occupational disease in its recently issued decision in *Fowler v. Perdue, Inc.,* 2024 WL 3196775 (Del. June 24, 2024).

Carl Fowler worked at a chicken processing plant where, it was determined, he contracted COVID-19. According to the employer's medical expert, Fowler became "as sick as will be seen with COVID-19 and still survive." Not unexpectedly, Fowler filed a petition with the Industrial Accident Board for medical and disability benefits.

The Board acknowledged that COVID-19 *can be* an occupational disease. However, after much litigation, the Board determined that Fowler failed to present sufficient evidence that COVID-19 was a compensable occupational disease *in this case*. The Delaware Superior and Supreme Courts affirmed.

In *Fowler*, the Supreme Court discusses the tests it has established for determining whether a disease qualifies as a compensable occupational disease. That discussion starts with *Air Mod Corp. v. Newton*, 215 A.2d 434 (Del. 1965), where the court defined a compensable occupational disease as "one resulting from the peculiar nature of the employment, *i.e.*, from working conditions which produce the disease as a natural incident of the particular occupation, attaching to that occupation a hazard different from, and in excess of, the hazards attending employment in general."

Years after *Air Mod*, the court restated the test as follows:

> [F]or an ailment or disease to be found to be a compensable occupational disease, evidence is required that the employer's working conditions produced the ailment as a natural incident of the employee's occupation in such a manner as to attach to that occupation a hazard *distinct from* **and** *greater than* the hazard attending employment in general.

Anderson v. General Motors, 442 A.2d 1359, 1361 (Del. 1982) (emphasis added).

The court in *Fowler* emphasizes that both the "distinct from" and "greater than" prongs of the test must be met. Satisfying only one is insufficient to prove a compensable occupational disease. To prove his case, Fowler had to prove that Perdue's working conditions produced his COVID-19 as a natural incident of his occupation in such a manner as to attach to it "a hazard distinct from and greater than the hazard attending employment in general."

Fowler did establish that the cafeteria at Perdue presented a hazard "greater than" that attending employment in general. However, he failed to introduce sufficient evidence to support a finding that the cafeteria at Perdue was a hazard "distinct from" that attending employment in general because the record evidence was that contracting COVID-19 in the lunchroom of Perdue was no different than contracting it at Home Depot or Lowes, or a non-work environment, such as a wedding. Compare this to *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1061–65 (Del. 1999), where O'Neal's chronic interstitial nephritis was determined to be an occupational disease because his job, servicing oil burner equipment, required exposure to fuel oil #2 more frequently and in larger amounts than individuals would normally be exposed. Similarly, in *Evans Builders, Inc. v. Ebersole*, 2012 WL 5392148 (Del. Super. Oct. 11, 2012), it was found that an employee's pneumonia, which was caused by exposure to mycobacterium avium intracellulare (MAI), was a natural incident of his employment at a poultry house because working as a carpenter in a poultry house exposed him to MAI at a higher volume and more often than if he was not employed in the poultry industry.

So, while COVID-19 can be an occupational disease in Delaware, insufficient evidence was introduced to support such a finding in *Fowler*. ◆

Linda, a shareholder in our Workers' Compensation Department, works in our Wilmington, Delaware, office.

Student Athlete or Employee? The Ball Is Still Up in the Air

Alexandra O. Freeman, Esq.

Key Points:

- College athletes are not precluded from bringing FLSA claims as "employees."
- Courts could find that college athletes are employees under the FLSA under the Third Circuit's new test.
- Colleges could reduce or eliminate their athletic programs due to financial burden.

Following the Third Circuit's ruling in *Johnson v. National Collegiate Athletic Association*, 2024 WL 3367646 (3d. Cir. July 11, 2024), despite their decades' long standing as "student athletes," Division I college athletes may now—under certain circumstances—be considered college employees and may be subject to the federal wage and hour laws. Specifically, the court in *Johnson* determined that Division I college athletes are not barred from bringing suit under the Fair Labor Standards Act (FLSA), which mandates that "employees" receive minimum wages and non-exempt employees are paid overtime for more than 40 hours worked during a workweek. As a result, courts may find that they are considered employees under the FLSA, and, therefore, that these student athletes (numbering approximately 190,000) would be entitled to compensation in the form of minimum wages, overtime pay, and other rights for their participation in intercollegiate athletic programs.

In 2019, Ralph Johnson and five other former and current Division I college athletes filed suit against the National Collegiate Athletic Association (NCAA) and 13 Division I colleges (as representatives of a defendant class of all private and semi-public NCAA Division I member schools). Mr. Johnson and his fellow plaintiffs filed suit for unpaid wages under FLSA and various state wage and hours, arguing that their participation in Division I intercollegiate athletics should be compensated because they were, in fact, "employees," as defined under the applicable laws.

Following the filing of the lawsuit in the Eastern District of Pennsylvania, the NCAA and the colleges moved to dismiss the claims, but the court ultimately denied the motion. The court did, however, certify the matter for an interlocutory appeal, and the Third Circuit Court of Appeals accepted the appeal.

Ultimately, the Third Circuit's review was to determine "whether college athletes, by nature of their so-called amateur status, are precluded from ever bringing an FLSA claim." The Third Circuit concluded that their "answer to this question is no." This, however, means that, while the Third Circuit did not decide whether

college athletes are employees under the FLSA, colleges athletes could be considered employees. This decision is a departure from the rulings in the Seventh and Ninth Circuits, which in 2016 and 2019 had determined that student athletes are not able to bring suit under the FLSA.

In so holding, the Third Circuit went through the history of intercollegiate sports, beginning with the first intercollegiate competition—a rowing competition held between Harvard and Yale in 1852. Interestingly, this competition was not proposed by either school. Rather, it was the superintendent of a railroad who suggested the race, motivated by his financial interest to increase ridership on his railroad by transporting spectators to and from the race. The financial motivation behind college athletics has only grown since its inception, with the Third Circuit noting that, today, some colleges and universities make millions of dollars in revenue from their sports teams (mainly from their football and/or basketball programs) each year.

In concluding that college athletes may ultimately be deemed employees under the FLSA, the Third Circuit remanded the case back to the trial court with the direction to apply "an economic realities analysis grounded in common-law agency principles." The district court had previously applied the seven-factor test from *Glatt v. Fox Searchlight Pictures, Inc.,* 811 F.3d 528 (2d Cir. 2016) (determining that unpaid interns should not be classified as employees). However, in rejecting this test, the Third Circuit reasoned that "the *Glatt* test has limited relevance to athletes because it compares the benefits that an intern might receive at an internship with the training received at the intern's formal education program. In comparison, interscholastic athletics are not part of any academic curriculum." The Third Circuit, instead, fashioned a new test, deciding that "college athletes may be employees when they (a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits.'" Therefore, in analyzing any of these claims, these are the elements which must be evaluated by the lower court to determine if an athlete is an employee, which will be the subject of significant discovery as the case proceeds in order to make a record for summary judgment.

This ruling may have a huge impact on NCAA-affiliated colleges across the country, which may now find themselves defending against student athlete claims under the FLSA and state wage and hour laws. In departing from the rulings of the Seventh and Ninth Circuits, the Third Circuit has potentially opened the door for new suits to be filed across the country.

Additionally, not all sports, nor all schools, generate the million-dollar revenues mentioned by the Third Circuit. While the court references the revenue brought in by large football and basketball programs, college athletic programs consist of more than just the football and basketball programs and players. Though some schools may benefit financially from a couple of their athletic teams, the majority of sports programs cost more than they bring in. Adding the payment of wages to already existing costs of athletic programs may prove prohibitive for some, or many, schools.

The full impact of this decision is still unclear, but, ultimately, schools may find themselves defending lawsuits, eliminating athletic scholarships, cutting less financially lucrative sports teams, or getting rid of their athletic programs entirely in order to manage their finances. ◆

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Multiple Entities, But One Claim – The Issue of Corporate Negligence

Gabor Ovari, Esq.

Key Points:

- Courts have wrestled with the issue of what types of entities may be liable under theory of corporate liability pursuant to *Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991).
- In *Newlin v. Vita Healthcare Group, et al.,* the Delaware County Court of Common Pleas decided whether multiple entities may all be liable under a theory of corporate negligence, and whether the liability of multiple entities may be a basis to reduce a corporate liability award.

Corporate liability is a frequently pursued claim in the medical malpractice arena in Pennsylvania. It is used by plaintiffs because it gives them another mechanism to get a "deep pocket" involved in their case. Under this theory, plaintiffs can claim that a hospital itself was directly negligent.

Pennsylvania courts have adopted this doctrine as a theory of hospital liability. Corporate negligence provides that the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety at the hospital. *Thompson v. Nason Hosp.,* 591 A.2d 703, 707 (Pa. 1991).

The *Thompson* case was the first to outline this theory, which creates a non-delegable duty that the hospital owes directly to a patient. It was a major departure from previous jurisprudence because a patient could directly pursue the hospital itself, rather than trying to tie the hospital to liability through the traditional theory of *respondeat superior* and vicarious liability.

The Superior Court of Pennsylvania established that a hospital has a duty to (1) use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) select and retain only competent physicians; (3) oversee all persons who practice medicine within its walls as to patient care; and (4) formulate, adopt, and enforce adequate rules and policies to ensure quality care for the patients.

For a hospital to be found liable under this theory of liability, the plaintiff must show that the hospital had actual or constructive knowledge of the issue that created the harm. Further, the hospital's negligence must have been a substantial factor in bringing about the harm to the injured party.

However, there are limits to liability. Importantly, courts have wrestled with the issue of what types of entities may be liable under this theory of liability. Of course, since *Thompson*, a hospital can certainly be liable under this theory. Beyond that, the picture is not so clear. The answer to the question boils down to the similarity of the care provided by that entity

compared to care in a hospital setting. Courts will examine whether an entity is responsible for a patient's total health care. For example, nursing homes were found to owe a direct duty because the degree of involvement in the care of patients in skilled nursing home facilities is markedly similar to that of a hospital and, thus, subject to corporate liability. See *Scampone v. Highland Park Care Ctr., LLC,* 57 A.3d 582, 584 (Pa. 2012).

But what happens when there are multiple entities named as defendants? Can they all be liable under a theory of corporate negligence? Can this be a basis for an argument to reduce an award? These issues were addressed by the Delaware County Court of Common Pleas in a recent case.

In *Newlin v. Vita Healthcare Group, et al.,* the Court of Common Pleas entered an order on December 20, 2023, that reduced a $19 million verdict against four defendant entities. Two entities were operators of a skilled nursing facility and two other entities were providers of management services.

The plaintiffs in *Newlin* alleged that a nursing home resident fell at the facility and sustained a hip fracture and subsequently developed pressure ulcers, leading to her death. The case involved multiple theories of recovery and also included a claim for punitive damages. At the conclusion of the trial, the jury returned a verdict for the plaintiff. The jury awarded $4 million in compensatory damages and $15 million in punitive damages, including $7 million against the operators and $8 million against the management entities.

Post-trial motions were filed following the verdict. As it relates to the concept of corporate negligence, the court analyzed the Supreme Court of Pennsylvania's decision in *Scampone*. There, the Supreme Court stated that a plaintiff could not recover against both a management company and the operator of the facility because only the owner/operator could be liable for corporate negligence. The owner of the entity could not delegate the legal responsibility under this theory of liability to another corporate entity. The duty under corporate liability is a non-delegable duty, and the owner of the facility cannot pass this responsibility to someone else. This is different from vicarious liability, under which both entities could be found liable.

Accordingly, the court held that, because the non-delegable duty of care under corporate liability lies with the licensed operator only, a plaintiff cannot recover against both the licensed operator of a skilled nursing facility and a management company as well. Because the court found that only the owner/operator of the facility could be liable under corporate negligence, it vacated the punitive damages awards against the management entity.

Scampone is significant because it illustrates how corporate negligence has evolved in the Commonwealth. It also illustrates that just because plaintiffs name multiple corporate entity defendants in a case does not mean that, suddenly, the value of the case has increased. Corporate liability involves a non-delegable duty, and courts will not find multiple entities liable under it.

This issue should be addressed early on in each case where corporate negligence has been pled. Preliminary objections should be used to highlight the issue at an early stage of the litigation, and if those are not successful, it is a good idea to revisit this with a motion for summary judgement or even with motions in *limine*. The *Newlin* case demonstrates that it is absolutely vital to outline the nature of various entities during the course of litigation in order to ensure that the court can distinguish between the roles of various defendant entities in order to preclude excessive recovery. ◆

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Defending Against Undocumented Construction Workers' Future Wage Loss Claims in Pennsylvania

Jack A. Bennardo, Jr., Esq.

Key Points:

- Defending against an undocumented worker's future wage loss and/or loss of future earnings capacity claim in a personal injury action filed in Pennsylvania in such a volatile area of practice is fraught with difficulty and uncertainty.
- In light of the indeterminate state of Pennsylvania law, effectively defending against such future wage loss claims involving undocumented workers will necessarily require extensive and strategic written discovery, careful factual investigation, effective deposition questioning and tactics, close monitoring of sister-state jurisdictions for persuasive authority and added guidance, and (likely) significant pre-trial motion practice.

June 2024 Bureau of Labor Statistics' data indicates that foreign-born workers comprised nearly 19.2% of the entire civilian labor force in the United States. Undocumented immigrant workers, in particular, appear to make up a disproportionate percentage of the construction workforce, with one recent study by The Century Foundation suggesting undocumented migrants, nationally, commanded roughly 23% of all construction site jobs. In 2020 alone, construction laborers accounted for 11.9% of all reported fatal falls, slips, or trips across all occupations. Defending against an undocumented worker's future wage loss and/or loss of future earnings capacity claim in a personal injury action filed in Pennsylvania in such a volatile area of practice is fraught with difficulty and uncertainty.

Hoffman Plastics and Subsequent Court Confusion

In a significant decision handed down in 2002, the U.S. Supreme Court, in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002), overturned an award of back pay to an undocumented migrant worker, Jose Casto, who was found to have been unlawfully discharged by his employer, in violation of the National Labor Relations Act, for engaging in union organizing activities. In reaching this determination, the court reasoned that awarding such back pay to Castro would run afoul of the comprehensive employer sanctions scheme of the Immigration Reform and Control Act of 1986 (IRCA). It noted the IRCA constitutes a "comprehensive scheme prohibiting the employment of illegal aliens in the United States" and that it mandated "an extensive employment verification system . . . designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States[.]" The high court emphasized:

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional

> policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

It further cautioned a contrary ruling would have set the stage for the grant of back pay to undocumented workers "for years of work not performed, for wages that could not lawfully have been earned" in the first place.

Much ink has been spilled by courts across the nation since *Hoffman Plastic* was first decided in an effort to decipher whether, and to what extent, its core holdings apply in the context of state-based tort claims filed by undocumented migrants seeking damages for future wage losses. Courts in different jurisdictions have reached inconsistent conclusions and findings in this regard.

Some courts have held that undocumented tort claimants should be precluded altogether from pursuing future lost wages/earning capacity damages. For example, in *Rosa v. Partners in Progress, Inc.,* 868 A.2d 994, 1002 (N.H. 2005), the New Hampshire Supreme Court held that "an illegal alien may not recover lost United States earnings." Similarly, in *Hernandez-Cortez v. Hernandez,* 2003 WL 22519678, *7 (D. Kan. 2003), the District of Kansas determined that the plaintiff's undocumented status prohibited any recovery for alleged lost income based on his projected wage earnings in United States.

Other courts, by contrast, have determined that undocumented tort claimants' recovery of such wage loss/lost earning damages should be limited in their recovery as measured at wage levels based upon the prevailing wage rates in their home countries (as opposed to being measured at United States wage levels). For instance, *Ayala v. Lee*, 81 A.3d 584, 597 (Md. Ct. Spec. App. 2013) highlighted that the plaintiff's immigration status was relevant to the claim for lost wages since the ability to obtain legal work impacted the likelihood of future earnings in United States and whether the plaintiff was entitled to lost wages at a United States pay rate or home country rate. Also, in *Cruz v. Bridgestone/Firestone North America Tile, LLC,* 2008 WL 5598439, at *6–7 (D. New Mexico 2008) the plaintiff's economics experts were barred from offering opinions at trial on the undocumented claimants' loss of future earnings based upon United States wage levels due to failing to make "any attempt to acknowledge the Mexican citizenship of [the claimants] or the legal barriers to their earning the average American wages which are the foundations of both experts' studies."

To date, the Pennsylvania Supreme Court has not expressly weighed in on the scope or availability of such future wage losses for undocumented workers pursuing personal injury claims. But, it has previously found, albeit in the context of a workers' compensation matter, that a plaintiff's immigration status and work authorization bears direct relevance to her loss of future earnings and loss of earning capacity. In *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.,* 810 A.2d 99, 108 (Pa. 2002), the Pennsylvania Supreme Court specifically announced "the loss of earning power" of a non-citizen, who entered the United States unlawfully and who did not otherwise have authorization to work in the United States, was "caused by his immigration status, not his work-related injury."

Since *Reinforced Earth*, Pennsylvania courts have handed down rulings consistent with the notion that "an [undocumented worker] without current, valid USCIS work authorization, is not legally available for work" and, consequently, cannot recover damages for loss of future earnings. *See Ruiz v. Unemployment Comp. Bd. of Review,* 911 A.2d 600, 605, (Pa. Cmwlth. 2006). The Pennsylvania Commonwealth Court in *Mora v. Workers' Comp. Appeal Bd. (DDP Contracting Co.)* elaborated on the consequences of the *Reinforced Earth* decision, stating:

> What our Supreme Court, in effect, held [in *Reinforced Earth Co.*] is that loss of earning

> power need not be shown because it is going to be presumed that Claimant cannot work in this country and there can be no way to measure his/her earning power. Even though, in this case, Claimant found other illegal employment, that position cannot be used as a measure of earning power because **only employers who fail to follow the federal immigration laws can offer him a position.**

845 A.2d 950, 954, (Pa. Cmwlth. 2004) (emphasis added).

Further muddying the waters, the Pennsylvania Supreme Court has now adopted Pennsylvania Rule of Evidence 413 (effective as of October 1, 2021), which provides, in relevant part: "In any civil matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the action, or to show bias or prejudice of a witness pursuant to Rule 607." The rule, as worded, appears to indicate that evidence of a litigant's immigration status should be admissible in a case involving a claim for future wage losses.

Still, there is a dearth of appellate guidance as to:

1) whether such evidence would be permitted to be introduced to a jury prior to its rendering a decision on liability;

2) the precise meaning of the phrase "an essential fact to prove an element of, or a defense to, the action";

3) whether a jury should be limited in calculating such losses to consideration of evidence of the prevailing wage rates in the undocumented litigant's home country; and

4) whether a jury may consider evidence an undocumented migrant is facing deportation proceedings or imminent deportation.

In light of the indeterminate state of Pennsylvania law, effectively defending against such future wage loss claims involving undocumented workers will necessarily require extensive and strategic written discovery, careful factual investigation, effective deposition questioning and tactics, close monitoring of sister-state jurisdictions for persuasive authority and added guidance, and (likely) significant pre-trial motion practice. ◆

Jack is a member of our Casualty Department and works in our Philadelphia, Pennsylvania, office.

Marshall Dennehey Bolsters Florida Casualty Practice With Addition of Litigation Trio in Orlando

Raychel Garcia
Shareholder

Brian Catelli
Special Counsel

Matthew Wykes
Associate

Even While the Snow Is Falling, You May Be Liable

Taniesha K. Salmons, Esq.

Key Points:

- The Middle District Court affirms the viability of the "hills and ridges" doctrine in Pennsylvania.
- The Middle District Court provides insight into the factual inquiries necessary to reap the benefits of this longstanding doctrine.

The "hills and ridges" doctrine is a long-standing and well-entrenched legal principle in Pennsylvania that protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow where the owner has not permitted the ice and snow to unreasonably accumulate in ridges or elevations. *Convery v. Prussia Associates*, 2000 WL 233243, at *1 (E.D. Pa Mar. 1, 2000) (quoting *Morin v. Traveler's Rest Motel, Inc.,* 704 A.2d 1085, 1087 (Pa. Super. 1997)). Oftentimes, the factual inquiry to determine the applicability of this doctrine is whether the ice and snow were permitted to unreasonably accumulate. In other words, the factfinder must first determine how long the ice and snow were permitted to remain on the land once the icy or snowy weather conditions subsided, and whether that time was reasonable.

A concurrent and lesser-known factual inquiry is whether the slippery condition resulted from ice and snow. For this inquiry, the factfinder must determine whether the snow and ice on the land was related to an entirely natural accumulation or whether it was influenced by human intervention. It is based on this latter inquiry that the court denied the summary judgment motions of the defendant landowners and the defendant snow remediation contractor in the very recent personal injury action. *Sanner v. Airbnb, Inc., et. al.,* 2024 WL 1356693 (M.D. Pa. Mar. 29, 2024).

Therein, the facts taken in favor of the plaintiff established that the plaintiff, Ms. Sanner, and her friends secured the short-term rental of Elona and Xhemali Lopari's property via Airbnb. When Sanner arrived on February 5th, there were patches of ice on the driveway. On February 6th, when she arrived back from snow tubing, there were patches of ice on the driveway that she was aware of and could avoid. On February 7th, the date her friends were scheduled to depart from the property, during heavy snow, Sanner went outside to assist her two friends in clearing snow from their cars. Sanner recalled that the driveway was covered in snow when she fell. Sanner did not inspect what caused her to fall or observe ice on the driveway on February 7th. The Loparis had a verbal contract with the defendant Harry Amato to perform ice and snow removal services at the subject property.

In finding that a genuine issue of material fact remained, thus defeating summary judgment, the court acknowledged the possible applicability of the hills and ridges doctrine during a snowstorm but noted that the doctrine does not apply to localized patches of ice or circumstances when the icy condition is created by human intervention. *Sanner*, 2024 WL 1356693, at *4 (quoting *Williams v. United States,* 507 F. Supp. 121, 123 (E.D. Pa. 1981). The court explained that the doctrine only applies to situations where the ice is the result of an entirely natural accumulation. While the fact that it was snowing heavily on the day of Sanner's fall indicated that the hills and ridges doctrine could be applicable, Amato's role in previously clearing the driveway raised a question as to whether the driveway's condition on February 7th was influenced by human intervention. The parties had not provided definitive evidence establishing either that Sanner fell on ice that existed prior to February 7th, or because of new icy conditions caused by the morning storm, or even because of new icy conditions caused by the clearing of the snow from the two vehicles. In *Sanner*, the possibility of a causal link between the human intervention causing the hazardous condition created enough of an issue of material fact to defeat the defendants' motions.

The question now remains for both the plaintiff and the defendants: How will they specifically identify whether the icy and snowy conditions originated artificially or naturally? Stay tuned. ◆

Taniesha is a member of the Casualty Department and works in our Philadelphia, Pennsylvania, office.

Holly M. Hamilton | Kathleen A. Carlson | Sean J. Reeves | Robert E. Demeusy | Carolin A. Pacheco
Holli K. Archer | Taylor E. Kosko | Michael D. Winsko | Jennifer A. Robinson

Slip and Fall Summary Judgment Equation: Transitory Foreign Substance + Footprints, Prior Track Marks or Drying of Liquid = No Summary Judgment for Premises Owner

Alicia M. Corbo, Esq.

Key Points:

- Under Florida's Transitory Foreign Substance Statute, Fla. Stat. § 768.0755(1), constructive notice may be inferred from either the amount of time a substance has been on the floor or the fact that the condition occurred with such frequency that the owner should have known of its existence.
- Florida courts have held that plaintiff's testimony accompanied by a "plus" in the form of additional facts from which a jury can establish constructive knowledge is enough to defeat a motion for summary judgment.
- Testimony regarding footprints or track marks are sufficient "plus" factors.

In July 2010, the Florida Legislature enacted Florida's Transitory Foreign Substance Statute, Fla. Stat. § 768.0755, which requires that a plaintiff "prove the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it." One of the ways a plaintiff can establish constructive notice is to show that "the dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition." To this end, numerous appellate courts, as well as federal courts, have established and acknowledged the "plus" factor test. In the "plus" factor test, the plaintiff's testimony of a substance on the ground, plus some additional facts from which a jury can reasonably conclude that the substance was on the floor long enough to constitute constructive knowledge, is enough to defeat a motion for summary judgment.

In *Valdes v. Verona at Deering Bay Condo. Ass'n, Inc., et al.,* 2024 WL 3049788 (Fla. 3d DCA June 19, 2024), the Third District Court of Appeals reversed the trial court's final judgment entered in favor of Verona at Deering Bay. In this case, Valdes was helping a friend who lived at Verona return Christmas decorations to his friend's storage unit. While in the storage unit, Valdes slipped and fell on a puddle right below a storage locker. While Valdes did not know how long the water was on the floor, he testified that the puddle appeared green, dirty, large, and dried up in certain areas. There were also smudge marks and footprints on the floor near the puddle but he acknowledged that they could have been his. Verona moved for summary judgment, arguing that the mere presence of the puddle did not establish constructive notice. The trial court granted its motion and entered final summary judgment in its favor.

In its analysis, the district court indicated, "In trying to assess how long a substance has been sitting on a floor, courts look to several factors, including 'evidence of footprints, prior track marks, changes in consistency, [or] drying of the liquid,'" citing *Welch*

v. CHLN, Inc., 357 So. 3d 1277, 1278–1279 (Fla. 5th DCA 2023). In *Sutton v. Wal-Mart Stores, E., LP,* 64 F. 4th 1166, 1170 (11th Cir. 2023), the court stated, "Florida's appellate courts have found constructive notice when the offending liquid was dirty, scuffed, or had grocery-cart track marks running through it, or if there was other evidence such as footprints, prior track mars, changes in consistency, or drying of the liquid."

While the court agreed with Verona that the mere presence of the puddle was not sufficient to establish constructive notice, the trial court should have considered the "plus" factors in the plaintiff's testimony and denied Verona's motion for summary judgment. Here, Valdes established more than just the presence of a puddle. Rather, his testimony that the puddle was green, dirty, large, and dried up in certain areas satisfied the "plus" factor that the courts have established and acknowledged.

However, where there is evidence supporting that the transitory foreign substance was not present long enough for constructive notice to be established, the "plus" factors will not be taken into consideration. In *Publix Super Markets, Inc. v. Safonte,* 2024 WL 3057561 (Fla. 4th DCA June 20, 2024), an invitee completed a delivery for a contractor who was performing repairs on Publix's premises and then began shopping in his personal capacity. While shopping, a yogurt container fell out of his shopping cart and spilled onto the floor. The container made a faint sound when it hit the ground. A Publix employee was nearby stocking shelves but had his back to the invitee and the area where the yogurt spilled. The employee did not turn around or take any action that indicated he was aware of the spill. Approximately two minutes later, Safonte slipped and fell on the yogurt. The employee stopped stocking the shelf and assisted the plaintiff. A trail of yogurt was seen starting at the location where it was spilled and running through the dairy department. Safonte sued Publix for his injuries.

At trial, a jury found both Publix and the plaintiff negligent, apportioning 40% of the fault to Publix and 60% to the invitee, and awarding the plaintiff total compensatory damages of $241,460.00. Publix moved for a directed verdict, arguing that there was not sufficient evidence to establish actual or constructive notice, which the trial court denied.

The District Court of Appeal reversed. It held that, despite there having been a trail of yogurt from the plaintiff's shopping cart, the yogurt was only on the ground for two minutes and, thus, was not on the floor long enough to impute constructive knowledge on Publix.

All in all, courts look to "plus" factors in a plaintiff's testimony to determine if they have established constructive knowledge. If there is evidence showing the substance was not there long enough to constitute constructive knowledge, the "plus" factors will not be considered.

Alicia, an associate, is a member of our Casualty Department and works in our Fort Lauderdale, Florida, office.

Overcoming the *Daubert* Challenge with Your Billing and Coding Expert

Frank L. Madia, Esq. and Thomas J. Slogar, Esq.

Key Points:

- The Florida Standard Jury Instructions pertaining to plaintiff's medical expenses instruct the jury to consider and award damages for the **reasonable value** or expense of medical care and treatment necessarily or **reasonably obtained** by plaintiff in the past or future.
- It is plaintiff's burden at trial to prove the **reasonableness** of his or her medical expenses. Once he or she testifies to the amount of the medical bills and introduces them into evidence, it is a **jury question** whether the bills and charges represent **reasonable and necessary** medical expenses.
- If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if: the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case.

In a recent slip and fall case we handled in Broward County, Florida, the plaintiff moved to strike a retail store's billing and coding expert under *Daubert* from testifying at trial as to the *usual, customary, and reasonable charges* of the plaintiff's medical-related expenses. Among other things, the plaintiff alleged the billing and coding expert relied on incomplete, unverifiable information, including her own opinion testimony, which the plaintiff averred would only confuse the jury.

In opposition, we argued the billing and coding expert had sufficient specialized knowledge, experience, and training and was adequately qualified to express her expert opinions regarding the plaintiff's medical bills and how those bills compare to the prevailing and customary rates charged in the medical community and specific geographical location where the services were performed and that such testimony would assist the trier of fact in understanding the evidence related to those reasonable charges for the alleged treatment provided to the plaintiff.

The plaintiff's position would make it impossible for a defendant to contest whether the charges claimed are usual, customary, and reasonable. It would also be contrary to Florida law, which acknowledges a defendant's right in personal injury litigation to argue to a jury that a plaintiff's medical bills are unreasonable. *See e.g., Katzman v. Rediron Fabrication, Inc.,* 76 So. 3d 1060, 1065 (Fla. 4th DCA 2011) (sufficiently explained below why certain hospital billing information was necessary as part of determining whether a treating doctor billed non-litigation patients at a lower rate for the same

medical services is "admissible evidence regarding the reasonableness of medical expenses"); *Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc.,* 8 So. 3d 1232, 1235 (Fla. 2d DCA 2009) (stating that reasonableness of bills can be determined by looking at: (1) the relevant market for services, including the rates charged by other similarly situated providers for similar services; (2) the usual and customary rate the provider charges and receives for its services; and (3) the provider's internal cost structure).

The plaintiff in our case also argued that the medical and billing coding expert did not employ a sufficiently reliable scientific methodology in forming the basis for her expert opinion. In *pertinent* part, the plaintiff cited testimony from the expert that, as part of her methodology, she would input data from the medical billing charges (CPT coding) into a nationally recognized data base in order to obtain what the *usual, customary, and reasonable* charges were, in her expert opinion, for the plaintiff's medical treatment. This method, according to the plaintiff, was not sufficiently reliable under *Daubert* and was, therefore, inadmissible. Simply inputting data into a database, according to the plaintiff, does not survive *Daubert*.

In response, we cited *Cordero v. Target Corporation,* 2019 WL 13080580 (2019), where the federal court had already spoken on the same legal challenge under Rule 702 of the Federal Rules of Evidence as it relates to the admissibility of expert opinion testimony from a medical and billing coding expert.

The *Cordero* court held that the medical billing and coding expert who specifically utilized the *Context 4 Healthcare UCR database*—the exact same database used by the billing and coding expert in our case—was qualified to render expert opinions on the reasonableness of the medical charges based on, among other things, the expert's nine years of experience in reviewing the reasonableness of medical charges and nearly thirteen years of experience in establishing and reviewing "**fee schedules using standards such as UCR databases and negotiating out-of-network reimbursement amounts (based on UCR data and commercial insurance allowable fees.**" Id. at 23-24.

In applying *Cordero* and *Daubert* to our case, we referred the court to the testimony of our billing and coding expert, who testified at length as to the methodology utilized to determine the reasonable value of past medical bills uniformly employed by medical billing professionals based on proper CPT coding for the medical services performed, together with the sources and data obtained, which, in her expert opinion, were not arbitrary. It was further argued that our expert utilized the same methodology throughout her 30 years in the medical billing and coding industry.

Our expert relied on nationally recognized medical billing and coding standards, federal regulations, and geographically specific modifiers based on the particular categories of medical care. The expert's methodology was "based on billing rules and coding standards that dictate how medical services are billing in the United States, which are federally regulated, and the application of pricing databases specific to the category of care, community and year in which the service was provided." As part of her methodology, as indicated above, the billing and coding expert utilized the nationally recognized and generally accepted UCR database (Context 4 Health Care) to review, analyze, and determine what the UCR charges should have been for the medical treatment and services provided to the plaintiff.

Additionally, our expert testified that she reviewed the plaintiff's medical records and billing, including a review and verification of the CPT codes inputted by the providers, to determine if the providers listed and billed the services under the correct CPT codes. In essence, the methodology employed in our case was the same methodology utilized by thousands of medical providers throughout the United States inasmuch as those same or similar databases were used to establish and implement their fee schedules.

Overall, we were able to successfully establish that our medical and billing coding expert relied on sufficient and reliable data, the testimony was based

on reliable and verifiable methods, and the expert applied those nationally recognized scientific methods to the facts of our case.

As a consequence, the Circuit Court denied the plaintiff's motion in its entirety and ruled that our medical and billing coding expert was permitted to testify at trial and to provide expert opinion testimony on what the *usual, reasonable, and customary charges* should be for the plaintiff's medical treatment and related expenses. The court's decision led to a favorable settlement of the litigation shortly thereafter. ◆

Frank and Tom are both members of our Casualty Department and work in our Orlando, Florida, office.

ON THE PULSE

Cleveland Office Profile

Leslie M. Jenny, Esq.
Cleveland Office Managing Attorney

Marshall Dennehey's Cleveland, Ohio, office is in the heart of the city's downtown. Its location, right on historic Public Square, provides a benefit of convenient access to the courts, airports, and major traffic arteries and everything else that the downtown Cleveland area has to offer.

In combination with our Cincinnati office, we litigate matters in both state and federal courts across the Buckeye State. A number of our Ohio attorneys are admitted to practice in Kentucky and handle matters there as well.

Our Cleveland attorneys provide representation in all manner of civil defense litigation under all four of the firm's core departments—Casualty, Professional Liability, Health Care and Workers' Compensation. The office's practices range from retail liability, premises liability, professional liability, and health care litigation to special investigations/insurance fraud and other complex defense litigation matters. In addition to successfully obtaining numerous summary judgment victories on behalf of clients, our trial practice has produced many defense verdicts and arbitration victories.

The office has doubled in size since its opening in 2003 and continues to grow. Seven of the office's eight attorneys, including myself, have been recognized in the 2025 Editions of The Best Lawyers in America®. We are all members of the Cleveland Metropolitan Bar Association and the Ohio State Bar Association, and still others are active members of the Ohio Association of Civil Trial Attorneys, the Cleveland Association of Civil Trial Attorneys, and more.

With recent additions to paralegal and administrative staff, we look forward to additional growth in this beautiful city. Cleveland is a dynamic location full of art, music, professional sports and beautiful lake views, and we're proud to serve clients from this vibrant location. ◆

ON THE PULSE

Marshall Dennehey's National EMR and Audit Trail Practice Group Is Ready to Assist with Health Care Technology Litigation Issues

Matthew P. Keris, Esq.

Several years ago, Marshall Dennehey recognized the plaintiff bar's increased interest in pursuing two types of medical negligence cases: one on the medicine and the other on the electronic medical record (EMR). In response, it became one of the first, if not the first, defense firms to devote a practice group to assisting health care clients and other counsel with EMR and audit trail preservation, production, expert, and discovery issues. With the widespread integration of AI into health care, it is readily apparent that medical malpractice cases will become even more complex and expensive to litigate and will involve third-party technology vendors as parties. We can provide efficient and sound advice in this regard, in addition to the services we already provide.

Our specialized and experienced practice group can assist health care systems and their counsel in many ways from discovery through trial. Our group routinely assists with formulating responses to novel discovery requests. In addition, we involve third-party electronic medical record vendors in the litigation when their assistance is necessary in discovery, whether it be to explain a production issue or include them in an ongoing discovery dispute. Along those lines, our group has had success compelling plaintiffs' early disclosure of their EMR and audit trail experts for purposes of challenging their qualifications and representations to the court and counsel.

Deposition preparation is another area where this practice group provides focused assistance. We can help to correlate a provider's involvement in the documentation in comparison to the audit trail, as well as provide support with respect to a corporate designee's deposition relating to the preservation and production of the EMR. As the chart becomes more complex, witnesses need to be adequately prepared not only on the medicine, but on the EMR and AI as well.

Advice on the retention of the most qualified, effective, and experienced experts is also a frequently provided service of the group. As chair of this practice subgroup, I have established a working relationship with the American Medical Informatics Association (AMIA) and its leadership on the provision of qualified expert services in the field of clinical informatics in health care litigation. Far too often, courts and counsel are relying on "junk science" from persons who claim to be EMR and audit trail experts, but who have sketchy and limited experience. By retaining appropriately trained clinical informatics (whom I refer to as "chart physicians") to assist in their cases, health care systems can get a better handle on record production, reduce litigation expenses, and diminish discovery motion practice through the objective and qualified advice of a true expert on EMR-related issues.

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On-site inspections and interactions with the EMR during discovery by plaintiff's counsel is also becoming more of a regular request and is expected to occur more frequently. Our practice group will identify the appropriate records custodian to navigate the chart and prepare them in advance if they are asked questions during the inspection. We will also mandate acceptable inspection protocols well in advance of the event so it is conducted in a scientifically appropriate manner that is least intrusive and inconvenient to health systems.

Since the mid-2000s, we have monitored and reported legal precedent for new discovery and trial issues associated with the EMR, audit trail, and AI. Very few can boast a greater legal acumen than our group. As the EMR becomes more of a tool that augments medicine, rather than an information repository with the integration of AI, new legal thought and litigation strategies need to be considered in cases, particularly where a medical error may be due to the EMR or AI. We can assist with the strategic decision of whether and how to include EMR and AI vendors in your cases, and we can outline the legal benefits and pitfalls to be considered prior to doing so.

Medical negligence cases are not going to become less complex as AI is utilized within the EMR. To the contrary, they are going to become more complex,

with novel factual and legal issues facing your counsel that have never been raised before. Going into these cases with the right guidance and experience is necessary. Please consider Marshall Dennehey's EMR and Audit Trail Discovery Practice Group in the future when the necessity of specialized legal services are required. It is not a matter of if you will come across a complex EMR or AI issue, it is just a matter of when. Let us help you or your counsel. ◆

Matthew is a shareholder in our Scranton, Pennsylvania, office.

ON THE PULSE

Recent Appellate Victories

Kimberly Kanoff Berman (Fort Lauderdale, FL) and **James Hanratty** and **Sean Reeves** (both in Jacksonville, FL) succeeded in obtaining a *per curiam* affirmance in the First District Court of Appeal of a final summary judgment order entered in a negligent security case. Following oral argument before Chief Judge Osterhaus and Judges Bilbrey and Nordby, the court affirmed the trial court's finding that our client had no duty to maintain the premises in a reasonably safe condition or to warn employees of an unforeseeable criminal attack by a third party in the parking lot. The court issued a citation opinion, relying on the seminal case of *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992) and the Florida's Supreme Court's decision in *United States v. Stevens*, 994 So. 2d 1062, 1066–67 (Fla. 2008), reaffirming *McCain*. *Thompson v. Hillside Building, LLC,* 386 So.3d 612 (Mem) (Fla. 1st DCA April 24, 2024).

Also, **Kimberly**, along with co-counsel, C. Ryan Jones and Scot Samis of Traub Liberman Straus & Strewsberry, LLP, succeeded in obtaining a *per curiam* affirmance in the Fourth District Court of Appeal of a non-final order denying the plaintiffs' motion for leave to amend the complaint to add a claim for punitive damages in a bad faith case. Kimberly and **Michael Packer** (Fort Lauderdale, FL) successfully convinced the trial court that the plaintiffs' proffer fell short of the standard in bad faith cases where punitive damages are allowed. Section 624.155, Florida Statutes, requires a showing that the acts giving rise to the bad faith violation occurred with such frequency to indicate a general business practice. The appellate court rejected the plaintiffs' arguments on appeal and affirmed the order denying leave to amend.

Audrey Copeland and **Tony Natale** (both in King of Prussia, PA) obtained the Commonwealth Court's affirmance of the workers' compensation judge's and the Appeal Board's decisions denying a fatal claim petition in a workers' compensation matter. The court found the denial to be supported by substantial evidence. The workers' compensation judge had accepted the opinion of the employer's expert, that the decedent's death was not work-related. The claimant's expert's opinion, that the fatal heart attack was caused by the decedent driving a heavier tractor trailer for the first time for more than two days, was rejected by the judge as unsubstantiated and in direct contradiction to the evidence, which included the decedent's pre-existing risk factors, a severely compromised cardiovascular condition, and a history of silent heart attack.

Audrey, along with **Judd Woytek** (both in King of Prussia, PA) convinced the Commonwealth Court to reverse the grant of a sole proprietor claimant's claim petition. The claimant did not give the workers' compensation ▸

insurer notice of his injury within the statutorily required period under Section 311. The insurance carrier was notified approximately 18 months after the injury. The court held that, where a claimant is both the injured employee and the sole proprietor/employer, the particular "employer" whom the claimant must notify of a work-related injury is the insurer bearing the ultimate liability for the claim. The court's reasoning included an examination of the two definitions of "employer" in the Act, one of which includes the insurer, which was found to be applicable here. Allowing the claimant to pursue a claim after only notifying himself would result in an absurdity and put the insurer at a disadvantage in the investigation of the claim. ◆

Kimberly Kanoff Berman | James Hanratty | Sean Reeves | Michael Packer
Audrey Copeland | Tony Natale | Judd Woytek

Welcome to Our New Lateral Shareholders In New York

Matthew Flanagan, Esq.
Professional Liability | Melville, NY

Keith Andresen, Esq.
Casualty | New York, NY

ON THE PULSE

Defense Verdicts and Successful Litigation Results

CASUALTY DEPARTMENT

Walter Klekotka, with assistance from **Daniel Zachariah** and **Adam Fogarty** (all of Mount Laurel, NJ), secured a defense jury verdict on behalf of a major propane company where it was claimed they provided negligent service to a stove which allegedly caused a trailer fire. The plaintiffs lost everything in the fire, including their pets, and sustained serious and permanent burn injuries. Total medical bills were in excess of $1.5 million, and there was a $227,000.00 Medicare lien. The plaintiffs' demand was $5 million. In less than two hours, the jury returned a verdict in favor of the defense.

Adam Calvert and **Taylor Bourguignon** (both of New York, NY) successfully obtained summary judgment after oral argument in Kings County Supreme Court in New York. This case involved a motor vehicle accident where the plaintiff was a backseat passenger in an Uber that rear-ended a vehicle owned and operated by our clients. Summary judgment was granted by establishing that our clients were stopped for 10–15 seconds at a light when they were rear-ended by the Uber driver, who was precluded and could not submit any testimony in this matter. Further, by establishing that the plaintiff was asleep at the time, she could not offer any evidence of how the accident happened. Thus, there was no non-negligent explanation for the collision, and our clients had no liability.

Adam and **Taylor** obtained summary judgment in favor of their client, a ridesharing platform that connects vehicle owners (hosts) with travelers and locals (guests) seeking to book those vehicles for a fee. The hosts list their vehicles on our client's website to be rented by the guests. The plaintiff alleged that he sustained serious injuries when he was involved in an automobile accident that collided with a vehicle listed on our client's website. The Bronx County Supreme Court granted summary judgment in favor of our client, ruling that the defendant demonstrated that it is a peer-to-peer car sharing service; it does not provide rental services; it does not own, maintain, or repair any of the vehicles on its platform; it is not responsible for the acts and omissions of the hosts or guests; and there is no agency relationship between the defendant and the hosts or guests.

Adam and **Taylor** won summary judgment in New York County, New York, where the plaintiff filed suit, claiming that she slipped and fell on stairs in our client's building. The plaintiff alleged that she slipped on a wet condition on landing in an inadequately illuminated stairway. The defendant demonstrated that lighting conditions within the stairway were not inadequate by submitting the affidavit of its expert, wherein the expert stated that the lighting measurements taken in the stairway complied with code. The defendant also demonstrated that it did not create the condition by submitting an affidavit of the building's porter, who stated that neither he nor any other porter mopped that morning. The affidavit further established that the defendant did not have notice of the alleged wet condition or defective lighting as it did not receive any complaints about a hazardous condition on the floor at any time before the accident, and that the porter inspected the premises approximately two hours prior to the plaintiff's incident and did not observe any defective condition. The

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Defense Verdicts and Successful Litigation Results (cont.)

plaintiff's testimony and expert report, stating that the landing was not adequately illuminated, was insufficient to rebut the defendant's expert report that the lighting at the landing of the stairway was sufficient and the photographs revealing that the area where the plaintiff fell was illuminated. Moreover, the plaintiff's claim that the area was mopped by the defendant was speculative, as she was unable to present any facts sufficient to establish when the stairway was mopped or if the cause of the wet stairway was due to the defendant's mopping the stairway.

Carolyn Bogart, with assistance from **Amy Fox** (both of Mount Laurel, NJ) on the briefing, won summary judgment in a challenging dram shop liability case against a large restaurant chain where the demand was $1 million. The plaintiff alleged our client was responsible for overserving the co-defendant driver prior to the subject motor vehicle accident. The court agreed with our defense arguments that the plaintiff failed to establish a violation of the New Jersey Dram Shop Act. N.J.S.A. 2A:22A-3-5(b). The court had previously ordered the plaintiff's expert reports to be served on or before March 15, 2024. The plaintiff failed to present an expert report until opposing our motion for summary judgment. The expert report, which was submitted as an exhibit to the plaintiff's opposition brief, was that of a former law enforcement officer. This report did not extrapolate the defendant's BAC at the time he left the defendant's establishment. Nor was there eyewitness testimony on the issue of whether the co-defendant driver was visibly intoxicated when he was served alcohol at the defendant's establishment. The court rejected the plaintiff's arguments that there was sufficient circumstantial evidence to support a jury's conclusion that the co-defendant driver was visibly intoxicated at the time of service based on police observations at the scene of the accident and a (.17) BAC reading, which was administered approximately one hour and 30 minutes after he left the restaurant. Distinguishing between prior case law and the subject circumstances, summary judgment was awarded based on the lack of either direct testimony or expert opinion as to the co-defendant's state of intoxication at the time of service.

Sean Greenwalt (Tampa, FL) won a motion for entitlement to attorney fees and costs. The defendant had previously prevailed on a final motion for summary judgment where the plaintiff rejected a previously served proposal for settlement. The plaintiff argued that the proposal for settlement was served in bad faith due to the nominal amount offered and, therefore, could not entitle the defendant to attorney fees and costs. Sean argued that the plaintiff was using the wrong standard to dispute entitlement because a nominal offer is a factor the court considers when awarding an amount of attorney fees, but not entitlement itself. The only consideration for the entitlement right to attorney fees and costs is whether a proposal for settlement is rejected and if it meets the 25% recovery threshold. The court agreed with Sean's argument and granted entitlement to attorney fees and costs to the defendant.

Benjamin Goshko (Philadelphia, PA) successfully won summary judgment in Monroe County, Pennsylvania, where the plaintiff filed suit claiming he contracted a fungal infection from staying at the defendant's hotel. The plaintiff produced an expert microbiologist's report, in addition to his treating physician's records, in support

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Defense Verdicts and Successful Litigation Results

of his claims. Summary judgment was sought on the grounds that the plaintiff's expert was not competent to identify a specific fungus from photographs of the hotel room and the treating physician's records were equivocal as to the cause of the plaintiff's infection. The judge entered judgment in favor of the defendant. In conformity with the defendant's motion, the judge found the plaintiff's microbiologist's opinion speculative and not based on the facts of the case as the microbiologist did not conduct an inspection of the hotel, obtain fungal samples, or perform any lab testing. The judge further held that the plaintiff's claim of a fungal infection was not sufficiently supported by his treating doctor's diagnosis that was not definitely stated.

Vlada Tasich and **Oswald Clark** (both of Philadelphia, PA) won summary judgment in a premises liability case in Northampton County, Pennsylvania, where all claims against a national sporting goods retailer were dismissed. The plaintiff claimed he slipped and fell on a slippery substance inside the store while testing out bicycles. The plaintiff and his wife admitted that after he fell, they did not inspect the floor and quickly left the store. Months later, and after filing suit, the plaintiff and an engineer visited the store and claimed that there was an open can of bicycle grease in the area where the fall had occurred. Based on this evidence alone, the plaintiff theorized, through an expert report, that he must have fallen on bicycle grease negligently left on the floor by the store staff. Summary judgment was sought on the grounds that no witnesses to the fall ever actually identified bicycle grease, let alone any substance on the floor, and that the expert's opinion was based on pure speculation about what was allegedly on the floor months earlier. The court agreed with the defense arguments, holding that the plaintiff's theory could not be submitted to a jury because it was based on speculation and conjecture. Accordingly, the court dismissed all claims against our client. ◆

Walter Klekotka | Daniel Zachariah | Adam Fogarty | Adam Calvert | Taylor Bourguignon | Carolyn Bogart
Amy Fox | Sean Greenwalt | Benjamin Goshko | Vlada Tasich | Oswald Clark

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

HEALTH CARE DEPARTMENT

Carolyn DiGiovanni (King of Prussia, PA) obtained a defense verdict on behalf of her client, a surgical oncologist, in a binding high/low arbitration. The plaintiff alleged that the surgeon performed unnecessary surgery on a mass in her left arm, causing permanent scarring, continuous throbbing pain, and severe depression and anxiety. Two imaging studies were highly suspicious for malignancy, but the pathologic examination ultimately determined the mass to be benign and an allergic reaction to Lupron injections, which were given by the co-defendant gynecologist.

Brett Shear (Pittsburgh, PA) obtained a defense jury verdict on behalf of his client, a cardiologist. The patient came to the hospital with chest pain radiating to his arm and shortness of breath. The attending physician ordered a stress test, which was performed by the defendant cardiologist, that was interpreted as normal. The patient was then discharged from the hospital and, less than two weeks later, died from a heart issue. An autopsy found significant narrowing of all of the arteries of the heart, including a 90% narrowing in the LAD (i.e., the "widowmaker"). The pathologist and coroner opined that the decedent had a cardiac event caused by the significant narrowing of the arteries, which caused his death. The ensuing claim was that the stress test was misinterpreted by the defendant cardiologist. The plaintiff's cardiology expert criticized the defendant doctor, who graduated from Yale University. Our expert, a local cardiologist, testified that our client properly interpreted the stress test and that 10% of patients with coronary artery disease will still have a normal stress test. The jury returned a verdict finding no negligence by the defendant cardiologist.

Justin Johnson, **David Tomeo**, **Victoria Pepe** (Roseland, NJ) and **Walter Kawalec** (Mount Laurel, NJ) obtained summary judgment on behalf of an obstetrician in a medical malpractice action. The plaintiff alleged that our client did not obtain the requisite informed consent from the plaintiff to undergo a trial of labor after having two prior cesarean section deliveries (TOLACx2). The court found that the plaintiff's lack of informed consent claim was without foundation as she had an awareness of the risks of TOLAC x2. Rather, the court found that her claim was premised on the assertion that the physician performing the TOLAC x2 failed to convert the TOLACx2 to a C-section quickly enough when complications arose. The court held that, as a matter of law, our client had no obligation to discuss the risk that the doctor in the delivery room may wait too long to pivot to a C-section, which was the actual cause of the plaintiff's alleged harm. ◆

Carolyn DiGiovanni | Brett Shear | Justin Johnson | David Tomeo | Victoria Pepe | Walter Kawalec

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

PROFESSIONAL LIABILITY DEPARTMENT

Robert Morton (King of Prussia, PA) and **Joseph Santarone** (Philadelphia, PA) won a defense verdict after a seven-day jury trial in a case involving a defamation claim based on an article published in a local community newspaper. The defendants were the local Community Council and the two individuals who wrote and published the article. According to the plaintiff, the article named him and implied he wrote an anonymous letter that threatened legal action, which was seen as contrary to the community's interest. The demand had been $1.75 million, and the plaintiff was offered $50,000. The jury answered "no" to the first question on the verdict sheet, "Do you find that the April 2020 article contained a defamatory statement about (plaintiff)?"

James Hanratty (Jacksonville, FL) secured a directed verdict in favor of his client in a high-exposure and high-risk defamation lawsuit. He was called to try the case on behalf of the CEO of a local chapter of a well-known national nonprofit after the plaintiff was permitted to amend the complaint to seek punitive damages from the CEO personally. When Jim received the case, the trial was set to begin in four weeks. Jim secured a brief continuance and built a client-specific defense focused on the CEO while working with a team of other firms representing other defendants, including the nonprofit organization which had formerly represented all of the defendants jointly.

The plaintiff was a volunteer at a camp. A decision was made to separate him from the camp and the organization. The plaintiff alleged the CEO personally defamed him by alerting other volunteers and committees of the decision. He demanded an eight-figure sum prior to trial.

After a six-day trial and several hours of argument at the close of the plaintiff's case, the court granted our motion for directed verdict, ruling that the evidence presented confirmed that the communications by the CEO were covered by a qualified privilege and that, based on cross examination of the plaintiff and his witnesses, the defense established that there was no malicious conduct by the CEO.

The case had been pending since 2020, and in fewer than 100 days, Jim was able to become familiar with the factual and legal details to bring home a win for the client.

After a seven-day bench trial, **Martin Schwartzberg** (Melville, NY) achieved dismissal of a breach of contract and professional malpractice claim against a professional engineering firm that provided construction monitoring services for a lender. When the project went south (for a multitude of reasons unrelated to the engineer's services), the project developer, who had obtained an assignment of rights from the lender, sought to hold the engineer responsible for project cost overruns.

After a bench trial and testimony from nine witnesses, the court dismissed the complaint in its entirety. In dismissing the breach of contract claim, the court held that the plaintiff failed to establish any breach of contract by the engineer, finding that the reports prepared by the engineer during the course of the project complied with its contractual obligations, with the terms of the contract being clear and unambiguous. This included a

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Defense Verdicts and Successful Litigation Results (cont.)

contract provision which stated that the engineer was not responsible for the malfeasance of others, including the general contractor, or the errors and/or omissions of the project architect. The court further found that, even had the plaintiff proven that there was a breach of contract by the engineer, the plaintiff still failed to prove that the lender sustained any actual damages.

In dismissing the professional malpractice cause of action, the court found that the expert testimony by the plaintiff was insufficient to establish a *prima facie* case. Specifically, the trial testimony on the plaintiff's direct case failed to establish any deviation from the accepted standards of practice in the services the engineer provided as the lender's representative.

Jillian Dinehart's (Cleveland, OH) motion to dismiss was affirmed on appeal after the Ninth District Court of Appeals found that the plaintiff had sued a *non sui juris* entity by suing a county department in a personal injury suit. The plaintiff initially filed suit against the department, which was later dismissed without prejudice to allow more time to develop the plaintiff's medical records. When he refiled his suit, he again named a county department as the defendant. Jillian filed a motion to dismiss, arguing that a county department does not have the capacity to be sued. The plaintiff then filed a motion to amend the complaint and again named the county. In her motion to dismiss the amended complaint, Jillian argued that the plaintiff was outside of the statute of limitations and that the change in defendant could not relate back to the originally filed suit. The plaintiff's argument, that naming the department was merely a misnomer and that the amended complaint should relate back to the original filing, failed, and the trial court dismissed the case. After oral argument, the appellate court affirmed the decision.

Jack Slimm (Mount Laurel, NJ) obtained a dismissal of a RICO action against a well-known commercial law firm. This case resulted from an underlying case in the Court of Common Pleas and another underlying case in Camden County arising out of the plaintiff's claims, that the majority shareholders and their attorneys masterminded a scheme in several jurisdictions and abused the court systems in order to seize control of the plaintiff's shares of the company. The court granted our motion and dismissed the action, with prejudice.

Josh J.T. Byrne (Philadelphia, PA) achieved dismissal of disciplinary claims where the IP address from the account which accessed sealed criminal dockets was related to the attorney's address. Josh was able to work with the attorney to explain to the Office of Disciplinary Counsel's satisfaction that the attorney was unaware of the access or the leaked information, and that it appeared that his login information had been compromised. Josh and the attorney explained the steps the attorney had taken before and after the incident to maintain cyber security.

Josh also achieved dismissal of a disciplinary claim where a client alleged his attorney failed to communicate with him, asserting he was not informed about what was going on in the case. Josh and the attorney were able to present a narrative regarding the totality of the communications, while acknowledging that the attorney did not do a particularly good job at documenting his many oral discussions with his client.

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Defense Verdicts and Successful Litigation Results (cont.)

Josh J.T. Byrne (Philadelphia, PA) achieved dismissal of a disciplinary claim arising out of an underlying divorce action. In the divorce action, it was alleged the attorney did not take action on the divorce and charged an excessive fee. Josh and the attorney were able to explain the breadth of work that had been done and were able to rebut many incorrect allegations in the complaint.

Alesia Sulock (Philadelphia, PA) successfully defended an attorney in a disciplinary matter arising from the client's alleged failure to properly maintain client funds and records of the attorney's IOLTA account. By emphasizing the client's long history of practice without disciplinary history, mitigating factors, and remedial measures, Alesia was able to secure dismissal of the disciplinary complaint on behalf of her client.

Ian Glick (Melville, NY) successfully obtained a permanent stay of arbitration for uninsured motorist benefits in Kings County Supreme Court. Following oral argument, the court granted a permanent stay of the respondent's demanded arbitration for uninsured motorist coverage pursuant to an insurance policy issued by our client. In doing so, the court agreed with Ian's arguments that the petition and the attached exhibits made a *prima facie* showing that the vehicle the respondent operated was not insured by our client's policy on the date of the accident because it had been removed from the policy the day before and was covered by a policy issued by another insurer at the time of the accident. The court rejected the respondent's arguments that he was entitled to coverage under our client's policy because his claim for coverage for the accident was denied by this other insurer; no uninsured motor vehicle was involved in the subject accident; he failed to cooperate in the investigation of his claim; and he made material misrepresentations as to where the subject vehicle was being garaged at the time the policy was obtained in order to acquire a lower premium.

Jack Slimm and **Jeremy Zacharias** (both of Mount Laurel, NJ) successfully defended an appeal in a multi-million dollar legal malpractice action arising out of an underlying dram shop case. In the dram shop case, the plaintiff suffered debilitating injuries, including skull fractures and brain injuries. The Appellate Division affirmedthe trial court's order and opinion, which found that the plaintiff's legal malpractice expert had offered net opinions in connection with what should have been done at the trial of the dram shop case, which resulted in a no cause for action. However, Jack and Jeremy were able to demonstrate, due to their attorney client's good lawyering, that he successfully negotiated a high-low agreement which provided the plaintiff with some recovery, even though the jury found against her.

Jack and **Jeremy** successfully defended an appeal from a trial court's order that granted our motion to dismiss a contribution claim filed by predecessor counsel against successor counsel. We represented successor counsel who tried to fix the error of the predecessor attorney in drafting and documenting a complex real estate transaction. This case reinforces the New Jersey Rule that successor counsel owes no duty to predecessor counsel.

Ray Freudiger and **Donielle Willis** (both of Cincinnati, OH) won a decision from the First District Court of Appeals, affirming the trial court's decision to grant their client's motion to enforce an oral settlement

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

agreement. Ray and Donielle defended a condominium owners association against a lawsuit filed by several unit owners. The parties went to mediation, and then their attorneys exchanged emails in which they agreed on the settlement terms. However, several of the plaintiff unit owners refused to sign the written settlement agreement. Ray and Donielle argued to the trial court that the oral agreement should be enforced because memorializing the agreement in writing was not a material term of the parties' agreement, and that the parties did not intend for the settlement agreement to only be enforceable upon the execution of the writing. Further, all the material terms of the agreement had been agreed on. The First District Court agreed and upheld the decision in favor of the condominium owners' association.

Ray and **Donielle** also won a decision from the Ohio Civil Rights Commission dismissing the charging party's complaint for discrimination against its client, a grocery store. Ray and Donielle defended the grocery store against a claim filed by a patron after a special needs employee of the grocer tried touching the African American patron's hair. Ray and Donielle argued the Ohio Civil Rights Act does not explicitly protect against hair discrimination; and, while the CROWN Act does, it has not been passed in Ohio nor has it become federal law. The Ohio Civil Right Commission agreed and determined it was not probable that the grocery store had engaged in an unlawful discriminatory practice.

Matthew Behr and **Katherine Chrisman** (both of Mount Laurel, NJ) were successful in obtaining summary judgment for our client, a homeowners association. Our client filed a lawsuit to enforce the Covenant of Restrictions banning barnyard animals and claiming that the homeowners failed to obtain necessary approvals to build a coup and run for six chickens. The homeowners claimed the six chickens were emotional support animals, pursuant to the Fair Housing Act (FHA) and New Jersey Law Against Discrimination (NJLAD). The court held that the chickens were not emotional support animals, pursuant to both FHA and NJLAD, and granted summary judgment. Whether non-domesticated animals could be considered emotional support animals was an issue of first impression in New Jersey.

Christopher Conrad and **Jacob Gilboy** (both of Harrisburg, PA) and **Thomas Specht** (Scranton, PA) obtained dismissal of a joinder complaint through successful presentation of a motion for reconsideration. The original cause of action arose from a Reading, Pennsylvania, real estate agreement occurring in the Spring of 2019. The plaintiff-buyer sued the defendant-seller on a breach of contract theory. The underlying action had been fully litigated for a period of three years and was ultimately resolved through arbitration. An arbitration panel issued an award in favor of the plaintiffs for $48,000. Thereafter, the original defendants filed a joinder complaint, seeking indemnification against the additional defendant, the real estate company involved in the real property transaction, but which had no involvement whatsoever in the case up to that point. Preliminary objections were filed against the joinder compliant. Although the judge originally overruled the objections without explanation, Chris, Jake, and Tom were successful in presenting their motion for reconsideration to the judge, arguing that the late joinder against the real estate company was improper, untimely, and prejudicial to their client. Following oral argument in Berks County, the judge dismissed the joinder complaint.

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Defense Verdicts and Successful Litigation Results (cont.)

Alesia Sulock (Philadelphia, PA) obtained judgment on the pleadings on behalf of their real estate agent clients. The plaintiff, a prospective home purchaser, entered into an Agreement of Sale to purchase a property which was purportedly being sold by a relocation company. The defendant was the relocation company's realtor. After the property owners backed out of the sale, the plaintiff sued the real estate agent, alleging a failure to disclose under the seller's disclosure law and detrimental reliance on representations allegedly made by the agent regarding the sale. We successfully argued that the plaintiff could not prove her claims because she could not establish that any material defect was not disclosed or that the real estate agents made any misrepresentation to her on which she relied to her detriment.

Christopher Conrad (Harrisburg, PA) successfully defended claims for alleged violations of the Individuals with Disabilities Education Act (IDEA) and the Family Educational Rights and Privacy Act (FERPA) included in a complaint filed in the Dauphin County Court of Common Pleas. The plaintiff, a former student of a local school district, claimed that while he was a student, the school district subjected him to discrimination, denied him equal opportunity to access his education, and violated his rights to privacy and confidentiality in his educational records. Chris filed preliminary objections in response to the complaint. As to the IDEA claim, Chris argued that the plaintiff failed to exhaust his administrative remedies under the IDEA, since he did not first file a special education due process complaint and pursue that case to conclusion before filing suit. As to the FERPA claim, Chris argued that because there is no private right of action under FERPA, the plaintiff could not maintain a claim under the statute. The court agreed with Chris's arguments, sustained the preliminary objections, and dismissed the IDEA and FERPA claims with prejudice.

Samuel Cohen (Philadelphia, PA) and **Jeremy Zacharias** (Mount Laurel, NJ) obtained an Appellate Division decision affirming the trial court's order dismissing a fraud and fraudulent concealment case filed against their clients, various attorneys, and broker dealers. In its decision, the Appellate Division agreed with the trial court's orders and opinions dismissing the case based on entire controversy, collateral estoppel, and litigation privilege grounds. In this comprehensive decision, the Appellate Division held that the plaintiff's claims were mirrored claims that had been fully litigated in a prior proceeding, where Sam's and Jeremy's clients either represented the litigants in the first case or were directly involved in the first case as defendants. ◆

Robert Morton | Joseph Santarone | James Hanratty | Martin Schwartzberg | Jillian Dinehart | Jack Slimm
Josh J.T. Byrne | Alesia Sulock | Ian Glick | Jeremy Zacharias | Ray Freudiger
Donielle Willis | Matthew Behr | Katherine Chrisman | Christopher Conrad | Samuel Cohen

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

WORKERS' COMPENSATION DEPARTMENT

Gregory Bartley (Roseland, NJ) successfully defended a motion to implead a staffing company. The petitioner's company, where he was injured, admitted the accident, paid for medical treatment and temporary disability benefits, and also moved the case to permanency with an agreed-to settlement. Approximately four and a half years into the case, the company filed a motion to implead the staffing company, alleging dual employment. In opposing the motion, Greg argued that there was no contractual agreement to implead and that, on the fairness side, waiting over four years to file such a motion was unduly prejudicial. The petitioner's company provided an alleged contract to support the motion to implead, and Greg argued it was not a contract but, rather, a nebulous one-page letter that did not even mention either party. The judge agreed and indicated that there was every likelihood that the motion would be denied if litigated. As a result, within a week, the petitioner's attorney advised that they were withdrawing the motion and moving ahead with the previously-agreed-upon settlement.

David Levine (Roseland, NJ) prevailed where a federal employee filed a claim petition for workers' compensation benefits under the New Jersey workers' compensation statute. David argued that, under N.J.S.A. 34:15–36, an employee eligible for workers' compensation benefits under the Federal Longshore and Harbor Workers' Compensation Act is not considered an "employee" under New Jersey workers' compensation Law. The workers' compensation judge agreed and granted our motion to dismiss.

Anthony Natale (King of Prussia, PA) successfully defended a claim petition for a Philadelphia-based vitamin/supplement producer, securing a complete defense verdict. The claimant alleged exposure to hazardous chemicals at the workplace when a batch of a proprietary blend of chemicals splashed into her face, eyes, nose, and mouth during the course and scope of her employment. The claimant alleged inhalation and dermatologic injuries, causing total and full disability. The parties presented competing medical evidence on the nature of injury and the claimant's disability status. The court found that the employer's evidence, which included medical treatment records and expert opinions, supported no identifiable injury whatsoever by a preponderance of the evidence. This was highlighted in Tony's cross-examination of the claimant's medical expert. The court further found the claimant to be less than credible based on her inability to recall the facts pertaining to the injury on cross-examination and her failure to follow up with her treating physicians after the incident.

Michele Punturi (Philadelphia, PA) successfully prosecuted a termination petition, the employer's petition to review compensation benefits, and also defended the claimant's petition to review compensation benefits on behalf of a well-known local hospital. Michele's evidence included a comprehensive physical examination by a Board Certified orthopedic surgeon along with a records review of all pre- and post-injury MRIs. Michele also cross-examined the claimant, establishing that the claimant's pre-existing condition, contrary to her testimony, was active up to seven days prior to the work injury. In addition, Michele presented surveillance capturing the claimant's physical activity for a significant time period without any observable difficulty or use of any

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Defense Verdicts and Successful Litigation Results (cont.)

orthopedic devices. Michele established the claimant's medical evidence completely failed to support that her disability had any relationship to the work injury. Cross-examination of the claimant also revealed her complaints contradicted her medical providers, none of whom could support a mechanism of injury beyond sprain/strain and contusion of the lumbar and cervical spine.

Kelly Scifres (Jacksonville, FL) obtained a workers' compensation defense verdict on behalf of an employer/carrier in a previously compensable claim. Kelly was able to prove the claimant knowingly and intentionally made false, fraudulent, and misleading statements under oath during two depositions and to two authorized treating providers, which were contradicted by surveillance and other evidence, ultimately barring the claimant from further benefits. The fraud/misrepresentation defense is an affirmative defense, and the burden was on the employer/carrier to prove same. The case involved multiple expert and fact witnesses and presentation of multiple days of surveillance to the court. The claimant was represented by a seasoned attorney who put forth an aggressive defense, considering the potential criminal implications for workers' compensation fraud.

Michael Sebastian (Scranton, PA) received a favorable decision dismissing a claim petition involving a claimant, a physician's assistant, who alleged CTS and a neck injury from working at home on a computer while sitting on her couch. The claimant had been allowed to prescribe medications in the past, but her new supervisor/doctor would not allow her to continue to prescribe the medications. The claimant was terminated for forging a doctor's signature on her state authorization form for prescribing medication. Mike submitted the claimant's testimony from the third-party litigation demonstrating conflicts with her testimony in the workers' compensation case in order to impact her credibility. Mike argued it did not make sense that the claimant, who was earning $2,000.00 a week, could not buy a desk to work at home and that she kept working from her couch for one year, despite her symptoms. The judge did not find the claimant credible in any material respect. In fact, the judge found her testimony, that she was forced to work from a couch while working from home, unconvincing, especially as she alleged experiencing progressive physical distress for over one year. He also did not understand why the claimant would not purchase a desk when she was earning $2,000.00 per week. The judge further acknowledged Mike's emphasis on the claimant's pre-existing condition, even though she told her medical expert that she was asymptomatic, which was untrue since she had been receiving chiropractic care for 38 years. Regarding the medical testimony, the judge found the defense medical expert more credible and competent than the claimant's medical expert, noting that the claimant's medical expert did not have an accurate history and did not review the prior treatment records. The judge further emphasized that the history relied upon by the claimant's medical expert was based upon what the claimant told him, which he found not credible. Important in the judge's finding was that the claimant's condition did not improve, even though she was no longer working. The judge dismissed the claim petition, deciding that the claimant did not meet her burden of proving that she suffered a work-related injury. ◆

Gregory Bartley | David Levine | Anthony Natale | Michele Punturi | Kelly Scifres | Michael Sebastian

109 Marshall Dennehey Attorneys Recognized in the 2025 Editions of *The Best Lawyers in America®* and *The Best Lawyers: Ones to Watch® in America*

82 Best Lawyers® | 27 Best Lawyers ONES TO WATCH

And our 2025 "Lawyers of the Year"

- Allison Krupp - Harrisburg: Insurance Law
- Christopher Reeser - Harrisburg: Personal Injury Litigation – Defendants
- Anthony Williott - Pittsburg: Litigation – Health Care
- Brad Blystone - Orlando: Medical Malpractice Law – Defendants
- Thomas Specht - Northeastern Pennsylvania: Insurance Law

Allison Krupp

Christopher Reeser

Anthony Williott

Brad Blystone

Thomas Specht

ON THE PULSE

Other Notable Achievements

RECOGNITION

Robert Aldrich (Scranton, PA) was recently elected to a five-year term to the Executive Board of the Pennsylvania Defense Institute. Rob has been a board member of PDI for the past eight years. With his elevation to the Executive Board, he will begin his term as PDI's secretary and will ultimately become PDI's president, following in the footsteps of many other Marshall Dennehey past presidents, including most recently Stuart Sostmann, Jason Banonis and Matthew Keris.

Kimberly Kanoff Berman (Fort Lauderdale, FL) was appointed treasurer of the Florida Supreme Court Historical Society at the 42nd Annual Board of Trustees meeting of the Florida Bar.

Melanie Foreman (Philadelphia, PA) has been appointed as a Hearing Committee Member for the Disciplinary Board of the Supreme Court of Pennsylvania. She will serve a three-year term that began on July 1, 2024, to run through June 30, 2027. Hearing Committee Members perform essential roles in Pennsylvania's disciplinary system, chief among them to review Disciplinary Counsel's recommended dispositions and to conduct hearings into formal charges of attorney misconduct and petitions for reinstatement. These efforts are critical to guiding the Board and the Supreme Court in their determinations.

Christopher Reeser (Harrisburg, PA) appeared on Pennsylvania Cable Network (PCN) as a commentator who introduced cases that were argued before the Pennsylvania Supreme Court. Chris and a local plaintiff's attorney alternated in describing the facts of a case, the procedural history, and the issues to be decided by the Court before oral argument of the case was televised on PCN.

Congratulations to **Seth Schwartz** (Philadelphia, PA), co-chair of our Construction Injury Litigation Practice Group, on being named a 2024 Client Service All-Star by The BTI Consulting Group. Seth is one of only 296 attorneys selected nationwide who were identified by corporate counsel for superior client service. Clients say, "Everything Seth does is very client service oriented. He makes us feel like his only client." Learn more about Seth's practice and approach to client service **here**. ◆

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Other Notable Achievements (cont.)

PUBLISHED ARTICLES

The Legal Intelligencer published "DOL's Retirement Security Rule Imposes New Fiduciary Standards on Financial Services, Insurance Industries," authored by **Samuel Cohen** and **Ryan Friel** (both of Philadelphia, PA). You can read their article **here**.

PLUS Blog published **Dana Gittleman's** (Philadelphia, PA) article "Insurance Agents and Brokers Get No Summer Vacation from Risk Management." You can read her article **here**.

PLUS Blog published **Dana Gittleman's** (Philadelphia, PA) and **Jeremy Zacharias'** (Mount Laurel. NJ) article "Insurance Agent Skorrs Victory in New Jersey's Appellate Division." You can read this article **here**.

Joslyn Restivo and **Oner Kiziltan** (both of Fort Lauderdale, FL) authored the article, "Florida High Court Clears Path for Insurance Companies to Utilize Payment Methodologies Enumerated in PIP Statute," which appeared in the *Daily Business Review.* The article discusses the Florida Supreme Court's decision in *Allstate Insurance v. Revival Chiropractic* regarding the "billed amount" issue—one of the most longstanding issues in Florida PIP law. You can read their article **here**.

InsuranceLawGlobal.com published **Alesia Sulock's** (Philadelphia, PA) article "The Assessment of Professional Liability Claims in the U.S." You can read Alesia's article **here**.

The Legal Intelligencer published "Your Well-Being Matters: Attorney Mental Health and Professional Competence" and "'But I Could Have Gotten More!'—Damages Speculation in Legal Malpractice Cases" by **Alesia Sulock** and **Josh J.T. Byrne** (both of Philadelphia, PA). Click **here** to read more.

David Tomeo (Roseland, NJ) and **Melissa Dziak** (Scranton, PA) authored the article, "Navigating a New Legal Landscape: Protecting the Corporate Veil in the Med Mal Suit," which appeared in the *New Jersey Law Journal's Medical Malpractice Supplement*. The article explores the historical roots and status of the "piercing the corporate veil" doctrine in New Jersey and Pennsylvania. You can read their article **here**. ◆

ON THE PULSE

Other Notable Achievements (cont.)

SPEAKING ENGAGEMENTS

Mohamed Bakry (Philadelphia, PA), in his role as president of The Lawyers Club of Philadelphia, hosted a CLE, "Communications with Parties and the Court," with **Josh J.T. Byrne** (Philadelphia, PA) as one of the panelists. This one-hour program was comprised of four 30-minute presentations by the panelists, followed by a discussion and Q&A from the audience. The presentations focused on how to determine whether a party is represented and specifically addressed the topic of current and former corporate employees. The discussion also included how to ethically communicate with unrepresented parties from the perspectives of an attorney and a judge.

We are proud to have two outstanding attorneys from our firm involved with DRI's annual Diversity for Success Seminar. **Mohamed Bakry** (Philadelphia, PA), a member of our DE&I Committee, served as the 2024 Program Chair, and **Christina Gonzales** (Philadelphia, PA) moderated a portion of the DRI Women of Color Roundtable discussion.

Josh J.T. Byrne (Philadelphia, PA) presented "Disciplinary and Reinstatement Cases You Should Know" at the Disciplinary Board of the Supreme Court of Pennsylvania's training for new hearing committee members. The presentation focused on the disciplinary process from the perspective of respondent's counsel.

Josh J.T. Byrne and **Alesia Sulock** (both of Philadelphia, PA) presented for Attorney Protective on the "Ethical Use of Social Media in the Practice of Law." The presentation attracted over 1,300 attendees.

Michele Frisbie (King of Prussia, PA) was a guest lecturer on "Avoiding Liability for Personal Trainers" at Montgomery County Community College's Health and Fitness Professional AAS Degree and Personal Training Certificate programs.

John Gonzales (Philadelphia, PA) presented a webinar entitled "An Introduction to Fourth Amendment Police Liability Claims" for the National Academy of Continuing Legal Education.

Sean Greenwalt (Tampa, FL), **Oner Kiziltan**, and **Joslyn Restivo** (both of Fort Lauderdale, FL) presented at the Florida Insurance Fraud Education Committee's annual conference. Their presentation, "No Tipping, Please: Responding to Gratuitous Payment, Coverage, and Policy Disputes," tackled all the new and old challenges to PIP exhaustion and policy limits. ▶

ON THE PULSE

Other Notable Achievements (cont.)

Matthew Keris (Scranton, PA) joined hundreds of the country's leading health care executives, clinicians, and other professionals at the 2024 American Hospital Association Leadership Summit. Matt co-presented the session "Multi-Disciplinary Evaluation of Liability Risks of AI in Health Care: The Board Focus," with Susan Boisvert, Senior Patient Safety Risk Manager at The Doctors Company. The session focused on how professionals can prepare for upcoming medicolegal challenges in light of anticipated increases in AI legal spend.

Julia Klubenspies (Roseland, NJ) was a featured speaker at the new resident orientation for the first class of resident physicians at The Valley Hospital in Paramus, New Jersey. Julia spoke on "Risk Management Topics and Strategies for the Resident Physician."

Leaders of our Trucking & Transportation Litigation Practice Group revealed the major employment law issues impacting the industry with AM Best Information Services. **Leonard Leicht** (Roseland, NJ), **Peggy Bush** (Orlando, FL), and **Harold Moroknek** (Westchester, NY) shared lessons learned from actual cases they have handled. Click **here** to listen now!

Harold Moroknek (Westchester, NY) was part of a group of presenters at this year's Auto Haulers Association Spring Conference.

Michele Punturi (Philadelphia, PA) was joined by Michelle Leighton, Vice President - Senior Claim Consultant at Connor Strong, and Robin S. Roeder, Senior Vice President Risk Management at Sedgwick, in presenting CLM's webinar "The Dream Team Approach to WC Case Management."

Jeffrey Rapattoni (Mount Laurel, NJ) spoke at the New England Chapter IASIU two-day training seminar, where he presented "Ethics and the Investigator."

Tune in to the latest Professional Liability Underwriting Society podcast, where **David Shannon** and **Ryan Friel** (both in Philadelphia, PA) discuss the new SEC rule for cybersecurity and its impact on compliance frameworks and reporting obligations. Click **here** to read more.

Jack Slimm (Mount Laurel, NJ) joined a panel to present the New Jersey State Bar Association's CLE program, "Legal Malpractice Update." The seminar touched on ethical issues in legal malpractice, including claims and proofs involving the New Jersey Lawyers Fund for Client Protection, problems arising from accepting electronic payments, fee splitting and referral fees, emotional distress damages, the impact of artificial intelligence on legal malpractice, and appellate malpractice.

ON THE PULSE

Other Notable Achievements (cont.)

Robin Snyder (Philadelphia, PA) joined a panel at the Pennsylvania Chamber of Business and Industry's Healthcare Summit to present "Navigating Medical Malpractice: Insights Into Pennsylvania's Legal Landscape."

Sunny Sparano (Roseland, NJ) joined a panel of fellow Insurance Law Global members to present "Navigating Liability for Design: Key Considerations for Contractors, Professionals, and Insurers." In this webinar, the panel of construction law experts contrasted the duties imposed on design and construction practitioners in the USA, France, and Australia respectively.

Alesia Sulock (Philadelphia, PA) joined an international panel of attorneys and members of Insurance Law Global to present the webinar "The Assessment of Damages in Professional Liability Claims." This panel of experts compared and contrasted how damages are calculated in Argentina, Australia, Italy, Spain, the UK, and the USA. **Alesia** also presented with the Pennsylvania Bar Association's Professional Liability Committee, "Avoiding Legal Malpractice," to the Monroe County Bar Association.

Suzanne Utke (Philadelphia, PA) lectured on the topic of "Medical Legal Issues" for the physicians assistant programs of Thomas Jefferson University.

Timothy Ventura (Philadelphia, PA) and **Christopher Block** (Roseland, NJ) presented "The Seven-Ten Split Mock Trial: Navigating Agent Errors & Omissions," at the Annual Professional Insurance Agents (PIA) Conference. The mock trial was designed to mimic a trial based on actual errors that arose under E&O liability for insurance agents. During the session, attendees were also provided with an overview of E&O liability, including an examination of how the agent could have avoided a lawsuit, and common causes of E&O claims against insurance agents.

Mark Wellman (New York, NY) hosted "AI - The Future of Litigation," at the CLM Alliance (Claims and Litigation Management) New York City local chapter event.

Jeremy Zacharias (Mount Laurel, NJ) was a panelist for a New Jersey Institute CLE seminar entitled, "Solving Problems in Commercial Real Estate Transactions," where he discussed 21st Century ethical considerations in commercial real estate transactions. The seminar, geared towards individuals handling commercial real estate matters, also discussed commercial real estate transactions in New Jersey and how one can craft and negotiate contracts and leases that protect your clients against excessive risk.

ON THE PULSE

Other Notable Achievements (cont.)

Lary Zucker (Mount Laurel, NJ) joined a panel to present a webinar, "Managing Bowling & Pickelball Claims," for the Sports and Entertainment Risk Management Alliance. This webinar provided an in-depth review of the most common risks in bowling and provided guidance on how to identify, manage, mitigate, investigate, and defend these cases. It also covered risks associated with America's fastest-growing sport, pickleball. The panel discussed the dos and don'ts of liability and exposure. ◆

Stuart Sostmann

Named Managing Attorney of Our Pittsburgh Office

Marshall Dennehey Wins First Place at the 2024 *Philadelphia Business Journal* Best Places to Work Awards

PHILADELPHIA BUSINESS JOURNAL 2024 BEST PLACES TO WORK BPtW MARSHALL DENNEHEY RANKED #1

Marshall Dennehey was named the **first-place winner** in the extra-large company category at the Philadelphia Business Journal's Best Places to Work Awards, held July 25 at Rivers Casino in Philadelphia. The firm has been recognized among the Philadelphia region's Best Places to Work every year since 2013 and this is the firm's fourth time winning their company-size category.

Defense Digest, Vol. 30, No. 3, September 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.