DEFENSE DIGEST

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Did the Cat Move the Ladder?

Keith M. Andresen, Esq.

Key Points:

- New York appellate decision gives defense counsel firm ground on which to defend a standard § 240(1) case.
- In *Simpertegui v. Carlyle House Inc.,* 209 N.Y.S.3d (1st Dept. May 9, 2024), a "ladder-fall" case, the First Department found that the defendants raised triable issues of fact by identifying inconsistencies in plaintiff's account of the accident and "calling into question his overall credibility and circumstances underlying his claimed injuries."

In 2024 there were several important New York labor law decisions across the Appellate Divisions and even at the Court of Appeals. It is easy to ignore some of these cases given the ongoing "Fraudemic." However, in the midst of this storm, one appellate decision has given defense counsel some firm ground on which to defend a standard § 240(1) case, particularly one involving a fall from a ladder. So, what does a cat have to do with anything? Let me explain.

New York Labor Law § 240(1), also known as the scaffold law, provides in relevant part:

> All contractors and owners and their agents, except owners of one- and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Once judgment under this statute is granted, liability is absolute, and it doesn't matter what the plaintiff was doing or if they were comparatively negligent.

While there are some limited defenses available—such as an uncovered worker, a non-covered activity, a recalcitrant worker, sole proximate cause—these are all very fact-specific and are typically not available in a standard fall-from-a-ladder case. Unfortunately, the majority of cases involving a fall from a ladder are simply liability dead-ends, where the plaintiff testifies they climbed up the ladder to do work, it shook, and they fell. Often times the plaintiff will testify they knew the ladder was unsafe, but they "wanted to get the job done." These facts pled bare in an affidavit are enough for a plaintiff to move for early summary judgment after joinder of issue and before any depositions or initial discovery have taken place.

Again, defendants are hard pressed to come up with a defense. The purpose of the statute itself, which was created to protect workers by charging owners and general contractors with absolute liability, seems to fall by the wayside. Ladder cases in recent years seem to follow the same exact fact pattern. Still,

the courts seem to simply adopt the circular logic without even looking at the underlying facts—the plaintiff fell because there was a violation; there was a violation because the plaintiff fell.

Anyone who has defended a ladder case has found it extremely frustrating. The testimonies are usually the exact same: “The ladder moved.” “The ladder shifted.” “The ladder shook.” This testimony is enough to trigger liability, no matter how ridiculous or unbelievable the remainder of the plaintiff’s testimony may be or what led up to the ladder mysteriously moving. I am tempted, sometimes, to ask the plaintiff, “Did a cat move it? Were there cats on the jobsite?” Because, frankly, that would be a much more credible explanation than the ladder just moved.

Enter *Simpertegui v. Carlyle House Inc.,* 209 N.Y.S.3d (1st Dept. May 9, 2024). In this matter, the plaintiff alleged he fell from a ladder while performing brickwork. He claimed that the ladder “suddenly shook” while he was about seven feet off the ground (shocking) and he fell. The plaintiff moved for summary judgment pursuant to Labor Law § 240(1), which was granted by the Bronx Supreme Court.

The defendants appealed to the First Department. In a short, but powerful decision, the Appellate Division found the defendant raised triable issues of fact to defeat the summary judgment motion and reversed the lower court’s ruling.

First, the plaintiff provided two separate dates of accident. He cited July 28, 2017, as the accident date in a workers’ compensation form and at a hearing. Later, at his deposition, he stated his accident date was on July 31, 2017. While mixing up accident dates is usually not dispositive, video evidence shows the plaintiff working on both days. Furthermore, no accidents were reported on those days.

Second, he claimed he personally reported his accident to his supervisor, Abraham Diaz. Mr. Diaz confirmed the plaintiff did not report an accident to him on either date. He also provided phone records to prove the plaintiff never called him to report the accident.

Finally, the court noted the plaintiff first went to the hospital just days after the employer fired him for absenteeism.

The defendants also argued on appeal that the plaintiff never put forth any evidence that the ladder itself was defective, either from his own recollection or witnesses. Specifically, the plaintiff testified he was not aware if his feet came off the ladder. The court did not mention these issues, and it seems they were more concerned with his overall credibility: “Defendants raised triable issues of fact sufficient to defeat the motion by identifying various inconsistencies in plaintiff’s account of the accident, thus calling into question his overall credibility and circumstances underlying his claimed injuries.”

This decision is important because it highlights the importance of getting all specific facts surrounding the plaintiff’s accident, not just those facts focusing on the happening of the accident itself. Defendants should seek to obtain testimony from all co-workers, supervisors, or anyone else at the jobsite who can testify as to whether an accident happened or was reported at all. Even if an accident was reported, the initial complaints or accident reports, workers’ compensation filings, testimony provided by the plaintiff, and the first medical treatment should all be compared and analyzed when assessing the plaintiff’s credibility. Obviously, phone, video, and metadata also must be scrutinized to the extent they are available.

This may be the first in a significant line of cases where the New York State courts start seriously looking at the circumstances of ladder falls, not just providing the typical rubber-stamp treatment. After all, a cat was not on the jobsite. ◆

**Keith is Co-Chair of our New York Construction & Labor Law Practice Group and works in our New York City office.*

A Deadly Encounter: Court Clarifies Use of Force in Police Shooting of Mentally Ill Individual

D. Connor Warner, Esq.

Key Points:

- Use of Deadly Force: The court upheld the police officers' use of deadly force, which is relevant for insurance coverage in similar incidents.
- Municipal Liability: No liability for the defendant as there was no constitutional violation, impacting municipal coverage decisions.
- State-Law Claims: Dismissal of wrongful death and emotional distress claims highlights the importance of reasonable officer actions in defending state-law claims.
- Ongoing Appeal: The case is under appeal, potentially influencing future police liability coverage and claims.

On August 3, 2021, Plymouth Township police officers responded to a crisis involving Michael Paone, a 22-year-old with a history of mental illness, which tragically resulted in his death. The case addressed the complex intersection of mental health, police use of deadly force, and constitutional rights. Judge Joshua Wolson granted the defendants' motion for summary judgment, concluding the law enforcement officers acted within their rights when responding to a perceived deadly threat, thus providing crucial guidance on police decision-making in such high-stakes encounters.

The Facts of the Case

On the evening of August 3, 2021, Michael Paone was exhibiting erratic behavior and appeared to be armed with a firearm outside an apartment complex. Paone had previously been diagnosed with multiple mental health disorders, including bipolar disorder and schizophrenia. Paone's sister called 911, reporting he was armed with a knife and experiencing a mental health crisis, and she informed the dispatcher that Michael had a "fake toy gun."

Police arrived at the scene and found Paone positioned between two buildings. Officers took positions at varying distances and instructed Paone to drop the weapon. Paone initially complied and dropped the BB gun, but when officers moved closer, he appeared to bend toward the weapon. Fearing for their safety, and believing the object was a real firearm, Officer Doe 1 fired three shots at Paone, who then briefly rose to reach for the weapon, prompting additional shots from Officer Doe 1 and other officers.

Following the incident, Paone was transported to the hospital, where he was pronounced dead from multiple gunshot wounds. ▶

Legal Standard for Use of Deadly Force

The central issue was whether the officers' use of deadly force violated the Fourth Amendment, which protects against unreasonable searches and seizures, including excessive force. The court applied the *Graham v. Connor* standard, which assesses the reasonableness of force based on the circumstances at the time.

Judge Wolson found no factual dispute that would allow a reasonable juror to conclude the officers violated Paone's rights. Citing *Lamont v. New Jersey*, Judge Wolson emphasized that officers must prioritize their safety when faced with a lethal threat. Paone's actions of raising and pointing a weapon—whether real or not—created an objectively reasonable belief that deadly force was warranted.

The Mental Health Factor

The plaintiff argued that Paone's mental illness should have influenced the officers' response. Judge Wolson acknowledged Paone's mental health issues but clarified that mental illness does not eliminate the possibility that an individual can pose a deadly threat in a high-stress situation.

Judge Wolson explained, the case was not about Paone's mental health or whether he had a toy gun, but whether the officers' use of deadly force was justified. He noted that Paone's mental illness did not grant him additional constitutional protection or remove the potential danger posed by his actions. The Constitution does not require officers to "gamble with their lives" in situations involving mental illness, especially when facing a perceived deadly threat.

Dismissal of Remaining Claims

Having determined that the police officers' use of deadly force was justified, Judge Wolson dismissed several remaining claims. The municipal liability claim against Plymouth Township failed because there was no underlying constitutional violation. Under Section 1983, a municipality can only be held liable if a constitutional violation occurred.

The state-law claims—survival and wrongful death, assault and battery, negligent infliction of emotional distress, and intentional infliction of emotional distress—were also dismissed. The survival and wrongful death claims failed as the officers' actions were deemed reasonable. The assault and battery claim was dismissed because the use of force was justified. Similarly, the emotional distress claims were dismissed for lack of an underlying tort or extreme conduct.

Implications and Conclusion

The court's decision in this case highlights the critical balance law enforcement must strike when responding to high-risk situations, especially those involving individuals with mental health disorders. The case reinforces that police officers must act based on their assessment of an immediate threat, without the benefit of time for detailed evaluations. While mental illness is an important factor, it does not negate the potential danger posed by an individual holding a weapon.

This ruling emphasizes the need to protect both the constitutional rights of individuals and the safety of law enforcement officers. The court's decision ensures that officers are able to make split-second decisions in the face of perceived threats, with a focus on their safety and the safety of others.

The case is now being appealed to the U.S. Court of Appeals for the Third Circuit, where it may further shape legal standards surrounding police use of force in similar encounters. ◆

**Connor is a member of Public Entity & Civil Rights Litigation Practice Group and works in our Philadelphia, Pennsylvania, office.*

Reimbursement of Pennsylvania Department of Human Services Lien Is Found Not Automatic by Pennsylvania Commonwealth Court

Daniel W. Deitrick, Esq.

Key Points:

- No formal liability for payment of work-related medical expenses is triggered on the part of the employer/insurer until such expenses are properly submitted in accordance with the terms and provisions of the Pennsylvania Workers' Compensation Act and the Medical Cost Containment Regulations.
- The terms of the Workers' Compensation Act place the burden on the claimant and their health care providers to produce and submit proper billing forms and related medical records to employers/insurers when seeking payment for medical expenses for compensable work injuries, even where the injured worker is a Medicaid recipient and a lien is asserted.

The Pennsylvania Commonwealth Court has addressed the circumstances under which a defendant's liability to reimburse expenses incurred for medical treatment, including a Department of Human Services (DHS) lien, is formally triggered. In its precedential holding in *Dura-Bond Coating, Inc. v. Ryan Marshall and PI&I Motor Express (WCAB),* 328 A.3d 559 (Pa. Cmwlth. 2024), the court held that any obligation on the part of the defendant to pay for medical expenses, including a DHS lien, is not formally established until proper submission of same by the health care provider in accordance with the Medical Cost Containment Regulations and Reduction Provisions of the Pennsylvania Workers' Compensation Act. In summary fashion, the court held the insurer was not required to pay any such medical expenses "unless and until the bills in question are submitted to them."

Procedurally, the facts giving rise to the claim were not in dispute. Ryan Marshall, the claimant, sustained an injury while in the course of his employment on June 27, 2014, which resulted in amputation of both of his lower extremities, as well as related injuries. Litigation ensued, involving issues that included the proper employer for purposes of the Workers' Compensation Act, culminating in a decision and order of the workers' compensation judge deeming Dura-Bond and PI&I to be the claimant's statutory employers. The former entity was ordered to pay the full amount of workers' compensation benefits with entitlement to indemnification from the latter. Consequently, Dura-Bond reimbursed a health lien asserted by DHS for medical expenses paid on the claimant's behalf up until that date.

Thereafter, the claimant's treating health care providers continued to remit medical expenses to DHS. DHS, in turn, continued to pay the claimant's medical expenses, including both medical treatment causally connected to the work injury and treatment

not formally deemed to have been work-related. Dura-Bond was ultimately notified by DHS of its lien, which eventually reached a figure exceeding $153,000.

A review petition was ultimately filed by PI&I, which Dura-Bond joined, due to the aforementioned DHS lien. The petition averred the claimant failed to ensure that the health care provider(s) formally submitted all medical expenses in accordance with Section 306(f)(1) of the Workers' Compensation Act, governing the payment process for medical expenses that are or have been deemed causally connected to the work injury.

The workers' compensation judge granted the review petition, finding that the health care providers—and DHS—were, or should have been, aware the employer was liable for the claimant's medical expenses but continued to submit medical expenses directly to DHS. The judge, while recognizing the employer's statutory duty to reimburse the lien asserted by DHS under Section 1409 of the Fraud and Abuse Control Act (FACA), specifically concluded that employers "are not obligated to reimburse the DHS lien…unless and until the bills in question are submitted to them for review, payment, denial, and/or utilization review in accordance with the…Act."

On the claimant's appeal to the Workers' Compensation Appeal Board, the Board reversed, finding the erroneous submission of the claimant's medical expenses to DHS did not invalidate DHS's entitlement to repayment. Thereafter, the employers appealed to the Commonwealth Court.

The court, noting this issue was one of first impression, reviewed the employer's obligation to pay for reasonable and necessary medical expenses that are causally related to treatment for a compensable work injury under Section 306(f.1) of the Workers' Compensation Act. The employers contended that, until they receive proper documentation commencing their statutory obligation to pay the expenses embodied in the DHS lien, any such obligation on their part is not formally established. Put another way, they argued that FACA and DHS regulations did not supersede their rights under the Workers' Compensation Act. Conversely, the claimant submitted that the documentation requirements under the Act pertained only to providers, not lien holders—in this case, DHS.

With respect to an employer's liability for payment of medical expenses, the court noted that Section 306(f.1)(5) sets forth that the employer/insurer "shall make payment and providers shall submit bills and records in accordance with provisions of this section." This has been interpreted to establish that an employer's liability to pay providers for particular medical expenses for treatment incurred does not trigger until they receive and are afforded the opportunity to review medical reports and make an informed determination as to whether the treatments are causally connected to the work injury, and are reasonable and necessary.

However, the court also referenced pertinent provisions of the Medicaid Act, as well as DHS regulations, which prohibit Medicaid from being the primary insurance when a third party is legally liable for the expenses incurred for medical treatment, wherein DHS must "vigorously seek reimbursement from third parties liable for causing injuries to Medicaid recipients," citing *Miller v. Lankenau Hosp.,* 618 A.2d 1197, 1198 (Pa. Cmwlth. 1992). The court further maintained that DHS regulations require DHS to identify and use third-party liability sources to the fullest extent possible before making payment. Such third-party liability sources include employers and their workers' compensation insurers.

The court found that the Workers' Compensation Appeal Board erred in interpreting FACA to supersede the Worker's Compensation Act, which would result in employers being unable to challenge causality or reasonableness or necessity of the medical services for which DHS paid. The court further found that the Workers' Compensation Act does not bar a valid DHS lien from being asserted but, rather, specifies when an employer/insurer must pay same. Specifically, an employer/insurer is

responsible for reimbursing a DHS lien, but only when it receives the proper billing forms and related medical reports.

Furthermore, the court noted the substantial evidence of record supported the workers' compensation judge's original finding, that the claimant's health care providers circumvented Section 306(f)(1) of the Act and DHS paid the provider's bills despite the workers' compensation judge's adjudication regarding the compensability of the work injury itself. Insofar as neither DHS nor the claimant's providers had offered the employers the statutorily mandated billing forms and medical reports, the employers were deprived of the opportunity to review, reprice, deny, and/or seek utilization review of said expenses. Consequently, it can be asserted that the Act places the onus on the injured worker and his provider(s) to produce proper billing forms and related medical reports, and to formally submit same to the culpable employer once the work injury is deemed compensable. It was noted that, insofar as the claimant's providers were paid by DHS for all medical treatments, notwithstanding any causal connection, or lack thereof, to the work injury itself, the providers were in possession of no incentive to submit proper billing and medical reports to the proper party, i.e., the employer/insurer.

Other than the claimant obtaining the billing reports and related medical records from the providers, or having the providers send them directly to the employer/insurer, the court theorized that the parties could alternatively seek a "mutually agreeable solution" that satisfies both Section 306(f)(1) of the Act and Section 1409 of the FACA. As such, the court remanded the matter to the Appeal Board for further remand to the workers' compensation judge to determine the best way to accomplish this.

Importantly, the court did not issue a specific directive or prospective resolution for proper submission of the medical expenses. One may theorize that the court's holding places an obligation on the health care provider to properly submit expenses incurred for treatment to the appropriate and liable party, i.e., the employer/insurer. Regardless, the ruling can reasonably be construed to mean that no formal liability is triggered on the part of the employer/insurer until such medical expenses are properly submitted in accordance with the terms and provisions of the Workers' Compensation Act and Medical Cost Containment regulations. ◆

**Dan, who works in our Pittsburgh office, is a member of our Workers' Compensation Department.*

Michael Bradford is a Finalist for Maritime Attorney of the Year

Congratulations to Michael Bradford, shareholder in our Tampa office and co-chair of the firm's Maritime Litigation Practice Group, on being named a 2025 Florida Legal Awards finalist for Maritime Attorney of the Year! The award recognizes outstanding leadership and accomplishment in the field of maritime law. The Florida Legal Awards are produced by American Lawyer Media, parent company of the *Daily Business Review* legal newspaper. Winners will be announced at an awards ceremony in Miami on April 3.

A Double Take: Workers' Compensation Liens Render UIM Non-Duplication Clauses Unenforceable

Joshua D. Scheets, Esq.

Key Points:

- Delaware Superior Court permits injured plaintiffs-employees to board medical bills and lost wages already paid by the workers' compensation carrier in subsequent UIM claim related to the same incident, despite a non-duplication clause in UIM policy.
- In *John Henry, et al. v. The Cincinnati Ins. Co.,* C.A. No. N18C-03-092 (December 23, 2024) (Brennan, J.), the court resolved seeming conflict of public policies between those underlying subrogation rights under the Workers' Compensation Act and those behind the Uninsured Motorist Statute.

In a departure from historical precedent, the Delaware Superior Court permits injured plaintiffs-employees to board medical bills and lost wages that were already paid by the workers' compensation carrier in a subsequent underinsured motorist (UIM) claim related to the same incident, despite the inclusion of a non-duplication clause in the UIM policy. *John Henry, et al. v. The Cincinnati Ins. Co.,* C.A. No. N18C-03-092 (December 23, 2024) (Brennan, J.) (*Henry III*). In so doing, the court resolves the seeming conflict of public policies between those underlying subrogation rights under the Workers' Compensation Act (the Act) and those behind the Uninsured Motorist Statute.

Even though it may appear there is a duplicate recovery by the plaintiff-employee recovering these damages in a workers' compensation claim and then boarding them in a subsequent UIM claim, functionally there is no duplication of damages since the recovery in the UIM context is now subject to a statutory right to subrogation of those recovered amounts by the workers' compensation carrier/employer. The new paradigm created is best described as one in which the injured plaintiff-employee is permitted access to an advanced payment by the tortfeasor, but through the workers' compensation carrier, with the ability to put on a full damages case against the employer's UIM carrier where the third-party tortfeasor's coverage in insufficient. Under the court's rationale, by permitting this new category of damages in the UIM claim, Delaware law puts the workers' compensation carrier or the employer as whole as reasonably can be accomplished while still fully compensating the injured plaintiff-employee.

The *Henry III* case involves an employee who was seriously injured in an automobile crash and then collected significant workers' compensation benefits. The plaintiff-employee then filed third-party claims against the tortfeasors and collected the relatively modest policy limits and reimbursed the workers'

compensation carrier with a portion of those proceeds. The employee next filed a claim with his employer's UIM carrier. The UIM carrier attempted to have the UIM claim dismissed pursuant to the workers' compensation exclusivity provision. The Delaware Supreme Court held that the UIM carrier itself was not an employer under the Act and, instead, stepped into the shoes of the tortfeasor, thus, eliminating the exclusivity bar under the Act. *Henry v. Cincinnati Ins. Co. & Fritz v. Cincinnati Ins. Co.,* 212 A.3d 285 (Del. 2019) (consolidated appeal) (*Henry I*).

In the wake of *Henry I,* and following a robust procedural history, the workers' compensation carrier eventually filed an action seeking declaratory judgment, which was dismissed and appealed, and then ultimately led to the Supreme Court's holding, for the first time, that the Act "expressly allows the employer and its workers' compensation carrier to assert a subrogation lien against benefits paid to the employee under the employer's uninsured motorist policy." *Horizon Servs., Inc. v. Henry*, 304 A.3d 552, 555 (Del. 2023) (*Henry II*). The Supreme Court then remanded the case to the trial court to develop the facts and determine the impact of the UIM non-duplication clauses.

Back to *Henry III*, the Superior Court was faced with reconciling the statutory right of a workers' compensation carrier/employer to subrogation with the contractual language of the non-duplication clause in a UIM policy. The controversy implicated competing public policies between the right to subrogation under the Act and the policy behind mandating UIM coverage through. Faced with resolving this question, Judge Brennan reasoned, given the statutory right to subrogation announced in *Henry II* combined with the fact that the workers' compensation carrier was not a party to the contract with the non-duplication clause, the non-duplication clause could not be upheld. *Henry III*, at 12. The court noted that the way to resolve this supposed clash of public policies was to "harmonize the statutes" in a way to give both public policies meaning and effect. The simplest way to do this, the court reasoned, was to allow the plaintiff "to bring an action for all damages with the workers' compensation lien against any damage award." Id. at 15. In this context, there is no double recovery or duplication of indemnity since the monies paid in the UIM claim were subject to the subrogation rights of the workers' compensation carrier/employer.

As of this writing, *Henry III* is the law of Delaware and necessitates a modification of the handling of UIM claims in this and similar situations. At the very least, it requires a careful review of release language in order to ensure a resolution of **all** claims and liens moving forward. ◆

**Joshua works in our Wilmington, Delaware, office and is a member of our Casualty Department.*

Change Is in the Air: A Shift in Pennsylvania Judge's Role in Jury Selection Effective April 1, 2025

Nicholas D. Bowers, Esq.

Key Points:

- Effective April 1, 2025, the Supreme Court of Pennsylvania has amended Pa.R.C.P. 220.3, pertaining to *voir dire* of jurors.
- Amended Rule 220.3(a) now provides: "***Judge's Presence Required***. *Voir dire* of prospective jurors shall be conducted, and the jurors shall be selected, ***in the presence* of a judge**, unless the judge's presence is waived by all parties with the consent of the court."

The right to a trial by jury is a hallmark of the justice system in the United States. Juries consist of eight or twelve individuals from a given geographic area, generally lacking legal training, who are asked to decide facts and render verdicts, often of great consequence to the litigants. While jurors must follow the directions of the court, each juror has broad discretion in deciding, among other things, whether or not to believe a witness, how heavily to weigh competing evidence, and in determining whether they are or are not persuaded by arguments of counsel. In light of this, it is perhaps rightly said that many cases are won or lost during jury selection.

In Pennsylvania, attorney control of jury composition is generally limited to *voir dire* and peremptory challenges. Traditionally, *voir dire* procedures in Pennsylvania have varied from county to county—with some counties involving judges in the process more than others. In particular, Allegheny and Philadelphia Counties, for example, generally utilized court officers who controlled the *voir dire* process in the absence of the judge or court reporter.

Recently, however, a significant change in these procedures was adopted, with an effective date of April 1, 2025. Specifically, the Supreme Court of Pennsylvania amended Pa.R.C.P. 220.3, pertaining to *voir dire* of jurors, to include amended Rule 220.3(a), which now provides the following: "***Judge's Presence Required***. *Voir dire* of prospective jurors shall be conducted, and the jurors shall be selected, ***in the presence of*** a judge, unless the judge's presence is waived by all parties with the consent of the court." (***emphasis*** added).

The adoption of amended Pa.R.C.P. 220.3 was preceded by the case of *Trigg v. Children's Hospital of Pittsburgh of UPMC,* 187 A.3d 1013 (Pa. Super 2018), which involved an Allegheny County trial where jury selection occurred in the presence of a court clerk as opposed to the trial judge. The plaintiff appealed the jury verdict on, among others, the basis that three jurors should have been stricken for cause due to bias, as evidenced in *voir dire*, which occurred outside of the presence of the trial judge. The appellant argued the court's decision not to strike

was reversible error, while the appellees took the position that the trial court was entitled to the palpable error deference standard announced in *McHugh v. Proctor & Gamble,* 776 A.2d 266 (Pa. Super. 2001). Thus, no error warranting overturning the verdict occurred.

The *Trigg* court took note of the fact that jury selection took place outside of the presence of the judge thus, depriving the trial court of the opportunity to assess the credibility of the proposed jurors to any extent beyond reading a transcript. Accordingly, per *Trigg*, the trial judge had no greater insight into the credibility of the proposed jurors—having not viewed the questioning live and, thus, lacked insight into the reactions of the proposed jurors to the questioning, including hesitation, eye movement or other physical manifestations impacting credibility—than the appellate court. Therefore, *McHugh* deference was not warranted.

The Superior Court overturned the verdict accordingly.

The Pennsylvania Supreme Court took up the case on appeal from the Superior Court in *Trigg v. Children's Hospital of Pittsburgh of UPMC*, 229 A.3d 269 (Pa. 2020). While the Pennsylvania Supreme Court found that the issue in question had been waived due to counsel's failure to object to the jury selection proceeding in the absence of the judge, the Supreme Court still found the procedure problematic, leading to adoption of amended Pa.R.C.P. 220.3.

Amended Rule 220.3 will likely lead to greater uniformity in the jury selection process across counties in Pennsylvania. Unless waived by the parties, *voir dire* must now occur in the presence of a judge. It is important for practitioners to understand that each party is entitled to have the judge present for *voir dire*, and this right should not be waived absent an affirmative decision to do so approved by a client.

The Amended Rule may also assist litigants in the preservation of appellate issues, including those relative to a trial court's decision to strike or decline to strike a juror for cause. The judge will be present along with a court reporter. ◆

**Nick is a member of our Casualty Department. He works in our Philadelphia, Pennsylvania, office.*

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Adequate Notice Requires More Than the Delivery of a Policy

M. Claire McCudden, Esq.

Key Points:

- Supreme Court of Idaho on December 31, 2024, reversed and remanded district court's grant of summary judgment in favor of builder who asserted negligence claims against its insurance company and sought damages for the insurance agent's failure to include the real property at issue in renewal of insurance policy.
- In *BrunoBuilt, Inc. v. Auto-Owners Insurance Co.,* 2024 WL 5250025 (Idaho 2024), court held, once coverage is procured, an agent can be deemed to be acting as an agent of the insurer when the agent promises to renew a policy, and that something more than the delivery of an insurance policy is required to satisfy notice of policy change.

A recent decision from the Supreme Court of Idaho on December 31, 2024, reversed and remanded the district court's grant of summary judgment in favor of a builder who asserted negligence claims against its insurance company and sought damages for the insurance agent's failure to include the real property at issue in the renewal of the insurance policy.

In *BrunoBuilt, Inc. v. Auto-Owners Insurance Co.,* 2024 WL 5250025 (Idaho 2024), BrunoBuilt asserted claims against various parties following the reactivation of a landslide that damaged the Dempsey home. The Dempseys had entered into a construction contract with BrunoBuilt in 2014 for the construction of a residence on property located on a pre-existing landslide. In February of 2016, BrunoBuilt's civil and geotechnical engineering expert observed the landslide had reactivated. BrunoBuilt continued working on the construction of the home that was mostly complete. The landslide eventually indicated earth movement and became visible on the Dempsey property. No certificate of occupancy was issued for the residence. BrunoBuilt then initiated the underlying lawsuit.

Prior to the litigation, BrunoBuilt contracted with Randy Richardson of Richardson Insurance Services to advise on available insurance coverage and obtained a "Tailored Protection Policy" that included builders' risk coverage, which covered "direct physical loss or damage caused by a covered peril to 'buildings or structures' or while in the course of construction, erection or fabrication." The Dempsey project was added to the policy in August of 2015. At that time, the policy contained a coverage exclusion for loss resulting from landslide. The exclusion did not specify the type of landslide that was excluded. Prior to the renewal date in 2016, the agent sent an email to BrunoBuilt inquiring into whether the Dempsey home would be completed and was informed the job would

likely be done by the end of March. The agent did not include the Dempsey property in the 2016 renewal, which revised the exclusion for damage resulting from landslides and provided that damage from both naturally-occurring landslides and landslides caused by human activity were excluded from coverage.

Damage to the Dempsey property from the landslide became noticeable between April and June of 2016. BrunoBuilt and Richardson filed a claim with Auto-Owners. Auto-Owners then informed BrunoBuilt that Randy Richardson deleted the Dempsey property from the renewal. BrunoBuilt claimed that was the first time they were informed that the property was not included in the 2016 renewal, and they requested that coverage be reinstated. Auto-Owners declined and closed BrunoBuilt's claim.

BrunoBuilt sued Richardson and Auto-Owners, asserting Randy Richardson was negligent and Auto-Owners was liable for Richardson's negligence based on the doctrine of respondeat superior. BrunoBuilt alleged Richardson was negligent in that he failed to properly advise BrunoBuilt regarding the existence, cost, and need for landslide coverage and that he failed to include the Dempsey property in the 2016 renewal.

The Idaho Supreme Court considered the district court's granting of Auto-Owners' motion for summary judgment that dismissed the claims because Richardson was not acting as Auto-Owners' agent and Auto-Owners did not provide coverage for landslides. BrunoBuilt argued on appeal that the district court's decision dismissing the failure-to-renew claim was erroneous because the motion only sought summary judgment on the claim related to the alleged failure to procure landslide coverage. In deciding and reviewing the district court's decisions, the Idaho Supreme Court considered whether Richardson could have been acting as an agent of Auto-Owners for purposes of the failure-to-renew claim. In doing so, the court reviewed the holding in *Bales v. General Insurance Company of America,* 53 Idaho 327, 24 P.2d 57 (1933), which stated that an insurance company was an agent at the time the insurance broker failed to renew the policy. Therefore, the Idado Supreme Court held that the *Bales* case suggests that once coverage is procured, an agent can be deemed to be acting as an agent of the insurer when the agent promises to renew a policy.

The court then identified "the generally accepted legal principle that, if insurers fail to provide notice of a reduction in coverage upon renewal, then coverage under the preexisting policy continues." *BrunoBuilt, Inc.,* 2024 WL 5250025, *8 *citing, Thomas v. Nw. Nat'l Ins. Co.,* 973 P.2d 804, 807 (Mont. 1998) ("[W]hen an insurer renews a previously issued policy, it has an affirmative duty to provide adequate notice to the insured of changes in coverage."); D. C. Barrett, Annotation, *Insurance company as bound by greater coverage in earlier policy where renewal policy is issued without calling to insured's attention a reduction the policy coverage*, 91 A.L.R.2d 546 § 3 (2024 update) ("The general rule is that an insurance company is bound by the greater coverage in an earlier policy where the renewal policy is issued without calling to the insured's attention a reduction in the policy coverage."). In their consideration, the court relied on Idaho Code Section 41-1842(5), which requires an insurer to notify a named insured of, among other things, reductions in limits or reductions in coverages. In doing so, they found that statute applied to the policy at issue here.

The court then turned to the policies to determine whether there was a change in policy and, in doing so, applied the well-established rules of interpreting insurance contracts. The court found the policies were ambiguous as to the interpretation of landslide and looked to other courts that interpreted similar policy language to only exclude coverage for naturally occurring landslides. It, therefore, concluded that the 2016 policy reduced the coverage available for landslides by excluding human-caused landslides.

In determining whether notice was provided, the Idaho Supreme Court found there was a requirement for something more than the delivery of an insurance

policy and held, "it is a broadly accepted rule that insurers must provide adequate notice of changes in coverage to insureds in the context of a renewal because the law does not impose a duty on the insured to scour a renewal policy for changes absent notice from the insurer… ." As Auto-Owners only mailed a copy of the policy, the court held it did not fulfill the written requirement notice and the coverage provided in the 2015 policy remained in effect until 30 days after notice was given or BrunoBuilt obtained replacement coverage.

This case demonstrates that insurance agents in Idaho can be deemed to be acting as an agent of the insurer when the agent promises to renew a policy. Further, this case sets forth the written notice requirement that can come into play that requires insurers to take additional steps above and beyond mailing a copy of the policy when there is a change in coverage in the context of a renewal. ◆

**Claire is a member of our Professional Liability Department and works in our Wilmington, Delaware, office.*

A Carrier May Have No Duty to Defend an Intentional Injury Claim Against an Employer Arising from a New Jersey Workers' Compensation Case

Robert J. Fitzgerald, Esq.

Key Points:

- A workers' compensation insurance carrier normally does not have a duty to pay benefits for an intentional injury claim.
- Depending on the policy language, a carrier may not be obligated to defend against an intentional injury claim, regardless of its merit.
- An insurance policy exclusion against owing a duty to defend an intentional injury claim is not against public policy.

The New Jersey Supreme Court has affirmed lower court decisions regarding an insurance carrier's obligations with regard to defending intentional injury claims in workers' compensation cases.

In *Dionicio Rodriguez v. Shelbourne Spring, LLC*, 259 N.J. 385 (Dec. 12, 2024), SIR Electric, an electrical contractor, employed Dionicio Rodriguez. The Hartford had issued a Workers' Compensation and Employers' Liability Policy to SIR. Part One of the policy provided "benefits" under workers' compensation law for New Jersey. Part Two of the policy provided employers' liability insurance for "damages because of bodily injury," but it excluded from coverage bodily injury intentionally caused by SIR.

After suffering compensable work injuries while working for SIR, Rodriguez received New Jersey workers' compensation benefits from Hartford. Rodriguez also filed a personal injury complaint against SIR, alleging negligence, gross negligence, and reckless behavior by SIR. SIR requested that Hartford also defend the personal injury complaint.

Hartford denied the request to the defend the personal injury complaint, determining it was not required to defend the intentional injury claims as they were essentially all intentional injury claims. SIR then filed a third-party complaint against Hartford, claiming that, while Rodriguez's complaint included allegations of intentional wrongdoing, it also included specific allegations of "gross negligence" and "simple negligence," which SIR contended were covered by the policy. After several motions and appeals, the New Jersey Appellate Division affirmed the orders dismissing SIR's third-party complaint against Hartford, denying SIR's cross-motion for summary judgment, and denying SIR's motion to amend its third-party complaint. SIR then appealed to the New Jersey Supreme Court. ▶

The Supreme Court began its analysis by reviewing some long-standing principles. A carrier's duty to defend is broader than its duty to indemnify. *Danek v. Hommer,* 100 A.2d 198, 204 (App. Div. 1953). A duty to defend "comes into being when the complaint states a claim constituting a risk insured against," regardless of the claim's likelihood of success. *Voorhees v. Preferred Mut. Ins. Co.,* 607 A.2d 1255, 1259 (N.J. 1992). The duty to defend will arise even if "the claims are poorly developed and almost sure to fail," *id*., so long as they "comprehend an injury which may be within the policy," *Abouzaid v. Mansard Gardens Assocs. LLC*, 23 A.3d 338, 346 (N.J. 2011). But a carrier has no duty to defend against a claim, "which measured by the pleadings, even if successful, would not be within the policy coverage." *Danek*. Courts cannot "engage in a strained construction to support the imposition of liability or write a better policy for the insured than the one purchased." *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.,* 307 A.3d 1174, 1184 (N.J. 2024) (quoting *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.,* 948 A.2d 1285, 1289 (N.J. 2008)).

In a workers' compensation claim in New Jersey, an injured employee's recovery is limited to medical, disability, and permanency benefits. The only exception to the "exclusivity bar" or "workers' compensation bar" is for injuries caused by "intentional wrongs," for which an employee may still seek redress under common law causes of action. *Schmidt v. Smith,* 713 A.2d 1014, 1016 (N.J. 1998). In *Laidlow v. Hariton Mach. Co., Inc*., 790 A.2d 884, 897-899 (N.J. 2002), the court clarified the test to determine when an employer's conduct rises to the level of an "intentional wrong" under N.J.S.A. 34:15-8. The court held: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize. The "substantial certainty" test is still a high standard to meet: to avoid allowing employees to circumvent the Act, courts "must demand a virtual certainty" before employees can proceed under the intentional wrong exception to sue their employer in tort. *Van Dunk v. Reckson Assocs. Realty Corp.,* 45 A.3d 965, 978 (N.J. 2012).

Here, the Supreme Court noted that the trial judge concluded the entirety of Rodriguez's allegations amounted to a *Laidlow* claim. The court disagreed and concluded the negligence-based claims were different from Rodriguez's intent-based *Laidlow* claims. The court then went into a detailed review of Rodriguez's complaint, which had included more than 70 individual counts.

The court next reviewed Part One of the Hartford policy, which covered workers' compensation claims. The court noted that Part One excluded money damages for negligence-based tort claims as they do not fall under the policy language, "benefits . . . required by a workers' compensation law," which, instead, include recovery of medical benefits under N.J.S.A. 34:15-15; death benefits for dependents under N.J.S.A. 34:15-13; and temporary disability benefits, permanent total benefits, or permanent partial benefits under N.J.S.A. 34:15-12(a) to (c), regardless of fault. Because money damages based on tort claims are not "benefits" and, thus, are not a covered risk, the court found that Hartford had no duty under Part One to defend SIR against Rodriguez's claims seeking such damages. Rodriguez's personal injury lawsuit did not seek benefits as defined by the Act; instead, it sought money damages as compensation for his workplace injuries. Rodriguez already recovered those benefits available under Part One of the Hartford policy for his injury, and Hartford satisfied its contractual obligation to SIR by providing Rodriguez with those workers' compensation benefits separate from this action. Therefore, Part One of the Hartford Policy imposed no duty to defend SIR against any of Rodriguez's claims. ▶

The court then addressed Part Two of the policy that provided employers' liability insurance, which is intended to serve as a gap-filler providing protection to the employer in those situations where the employee has a right to bring a tort action despite provisions of the workers' compensation statute. This would include claims against the employer for sexual harassment or discrimination. After examining the policy language and exclusions in Part Two, the court also found no obligation to defend in this case.

The C4 exclusion thus aligns with the purpose of requiring employers to carry both workers' compensation insurance and employers' liability insurance: it is a logical reflection of the gap-filling purpose of employers' liability insurance because it excludes from coverage under Part Two claims that are already covered under Part One. There was no gap to be filled here for the negligence, gross negligence, and recklessness claims against SIR because Part One already provided the required workers' compensation coverage—the exclusive remedy available—for those claims. *See Rodriguez*, 327 A.3d at 145 (citations omitted).

Turning to Rodriguez's claims of intentional wrongdoing, Part Two imposed no duty on Hartford to defend SIR because those claims were not covered by the Hartford policy. The C5 exclusion specifically excluded from insurance coverage any claims for "[b]odily injury intentionally caused or aggravated by [SIR]." The EII exclusion elaborated on C5 by excluding "all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8 including . . . bodily injury caused or aggravated by an intentional wrong . . . which is substantially certain to result in injury." The *Laidlow* claims of intentional wrongdoing in the complaint were expressly excluded under the plain language of the Part Two exclusions as "intentionally caused or aggravated" by SIR under the C5 exclusion and as "substantially certain to result in injury" under the EII exclusion endorsement. Because the claims were not covered by the Hartford policy, they could not trigger a duty to defend on the part of the insurer. In sum, none of Rodriguez's claims—whether for negligent, grossly negligent, or recklessly indifferent conduct or for intentional wrongdoing—fell within the coverage established in either Part One or Part Two of the Hartford policy. *Rodriguez*, 327 A.3d at 145-146.

The court finally denied SIR's request to amend its third-part complaint against Hartford, indicating it would be futile. An amendment is futile "when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." *Id.* at 146 (citation omitted).

At oral argument, SIR acknowledged that it filed its motion to amend only after the trial judge found Hartford did not owe it a duty to defend under Part Two. Contrary to SIR's contention, the EII exclusion did not violate public policy. Amending the pleading to bring that argument would, therefore, have been futile. Exclusions from coverage for intentional acts are common. The New Jersey Supreme Court has consistently reiterated the principle that "[p]olicy provisions that exclude coverage resulting from intentional wrongful acts are 'common,' are 'accepted as valid limitations' and are consistent with public policy." *Id.* (citing *Harleysville Ins. Cos. v. Garitta*, 785 A.2d 913, 917 (N.J. 2001)).

While the Supreme Court's decision now affirms when a carrier has a duty to defend, it also reinforces the employers' defense against intentional injury claims. Intentional injury claims make up a large share of litigation that is tangentially related to workers' compensation. There are no shortages of claims that attempt to pierce the workers' compensation bar, while the courts have continuously upheld the high bar that is required to overcome the bar.

While the impact of this decision remains to be seen, it would seem that it will increase litigation costs for employers since they will now have to pay for their own defense of intentional injury claims, despite their chances of success, as this court here acknowledges. ▶

If you have questions about how defend these claims, or if you have insufficient insurance coverage, reach out to your legal counsel now. Once a claim occurs, it may be too late. ◆

**Bob is the managing attorney of the Workers' Compensation Department in our Mount Laurel, New Jersey, office.*

District Court of Appeals Tell Plaintiffs They 'Can't Have Their Cake and Eat It Too'

Jacksonville, Florida Casualty Department

Key Points:

- In *Mickler v. Triplett*, 397 So.3d 188 (Fla. 5th DCA Nov. 15, 2024), the Court of Appeal thwarted a new strategy from the plaintiffs' bar to remove the causation question from the hands of the jury.
- Ruling helps shield defendants from having to sacrifice their expert witnesses in order to preserve the causation question for a jury.

The question of causation is often the crux of personal injury litigation, particularly in cases involving pre-existing conditions. In *Rebecca Diley v. Bonnie Lee Mickler*, a 2023 trial in the Circuit Court of the Fourth Judicial Circuit in Duval County, Florida, the defense confronted this challenge head-on. The plaintiff, Rebecca Triplett, alleged injuries from a 2019 rear-end motor vehicle accident, yet her medical history revealed strikingly similar injuries from prior accidents in 2009 and 2017. The defense argued that her injuries predated the 2019 accident and, furthermore, that she suffered no new harm. However, an unexpected trial ruling significantly altered the trajectory of the case—removing the issue of causation from jury consideration and leading to a substantial plaintiff's verdict. This decision ultimately set the stage for an appellate battle, culminating in a Florida Fifth District Court of Appeal ruling that reaffirmed the jury's role in determining causation and reshaped defense strategy in bodily injury cases statewide.

In 2020, Rebecca Triplett sued the defendant, claiming injuries arising from a rear-end motor vehicle accident occurring on September 6, 2019. Notably, the injuries being claimed as arising from this accident were similar to injuries Triplett suffered in two prior motor vehicle accidents—one in 2009 and the other in 2017. One of the defenses focused on these prior injuries. The defendant contended, at least in part, that Triplett's alleged injuries pre-existed the September 6, 2019, motor vehicle accident. Additionally, going one step further, the defendant argued Triplett did not suffer any injuries as a result of the 2019 accident.

Through years of litigation and discovery, the defendant refined the key issues for trial. Specifically, one of the primary issues that remained to be litigated was whether the defendant's negligence, if any, was a legal cause of loss, injury, or damage to Triplett.

The trial lasted a full week, including substantial testimony from the plaintiff, retained experts, and treating physicians. On Thursday, April 20, 2023, Triplett's counsel moved for directed verdict as to causation. The plaintiff argued, since the defendant's own expert witnesses testified that Triplett suffered and was treated for a strain or sprain of her neck as a result of the motor vehicle accident, the defendant's negligence was the legal cause of at least some damage to the plaintiff. ▶

On the final day of trial, although initially denied, the court ultimately granted the partial directed verdict. This decision had an immense prejudicial effect on the defense.

Typically, and prior to the court granting Triplett's motion in this case, the first question on the verdict form is some version of, "Was the negligence of the defendant, a legal cause of loss, injury or damage to plaintiff?" This initial question posed to a jury precedes any additional questions regarding the amount of monetary damages the plaintiff may be entitled to as a result of such negligence.

By granting the plaintiff's motion, the court removed the issue of causation from the jury instructions and that initial question from the verdict form. As a result, the jury was simply asked to essentially answer "how much" money Triplett was entitled to. The jury subsequently returned a large verdict, arguably, in part, due to the court's decision to remove the issue of causation from the jury.

The defense moved for a new trial as a result, which the court denied, and the issue was taken up to Florida's Fifth District Court of Appeal.

In *Mickler v. Triplett*, 397 So.3d 188 (Fla. 5th DCA Nov. 15, 2024), a big win for defense counsel, the Fifth District Court of Appeal concluded the trial court erred in granting a directed verdict, and the case was reversed and remanded for a new trial. This ruling, and the growing trend of other Florida district courts following suit, thwarted this new plaintiffs' strategy to remove the causation question from the hands of the jury.

In *Lancheros v. Burke*, 375 So. 3d 927 (Fla. 6th DCA 2023), a case with similar facts, the trial court granted the plaintiff's motion for a directed verdict on causation, stating: "[a] jury is not free to reject uncontradicted expert findings by multiple doctors. And because [Appellants' expert] said, yes, the chiropractic care was reasonable and necessary and related to the accident, then that establishes legal cause." *Id.*, 375 So.3d at 928. The defense in *Lancheros* contested causation, refuted the plaintiff's causation evidence, and offered their own evidence showing the plaintiff's injuries could have occurred for reasons not related to the incident at issue in the case. In *Lancheros*, the Sixth District Court of Appeal reversed the directed verdict, siding with the defense.

Prior to the appellate decisions, not only did these trial court rulings jeopardize the defense's legal strategy, but the retained experts were becoming increasingly concerned with potential credibility issues. In many motor vehicle accident cases, expert witnesses testify a plaintiff only suffered a sprain or strain, which would require approximately six to eight weeks of conservative treatment. This testimony, while denying the existence of a permanent injury, allowed defense experts to strike a middle ground in explaining a plaintiff's initial pain complaints experienced after an accident.

However, these trial court rulings forced the defendants to sacrifice their expert witnesses in order to preserve the causation question for a jury, even if it resulted in an uphill (if not near impossible) battle; to argue causation without expert witness testimony.

Thankfully, these recent Florida Appellate Court decisions on this topic shield defendants who were being boxed into an impossible corner. Defendants will no longer have to decide whether to forgo a causation defense at trial when their experts testify that a plaintiff suffered a sprain or strain. ◆

ON THE PULSE

Recent Appellate Victories

Kimberly Berman (Fort Lauderdale, FL) and **Bradley Blystone** (Orlando, FL) succeeded in obtaining a *per curiam* affirmance in the Fifth District Court of Appeal of a final order dismissing the plaintiff's claim for violation of a nursing resident's rights against a hospice care provider. After oral argument, the Fifth District affirmed the trial court's finding that the hospice care provider had no duty to the plaintiff under Section 400.022, Florida Statutes. The claim was for vicarious liability against the hospice care provider's nurses, and without complying with the pre-suit requirements of Florida's Medical Malpractice Act, the claim could not proceed.

Audrey Copeland (King of Prussia, PA) convinced the Pennsylvania Superior Court to affirm the trial court's order sustaining the defendant's preliminary objections to venue in Philadelphia County. The Superior Court affirmed that the defendant—a logistics company—has no physical location, nor undertook any direct action in Philadelphia, and performed its business of providing logistics services in Delaware County, which is outside of Philadelphia. There were no business activities in Philadelphia simply because other Philadelphia transportation companies were used to pick up the defendant's customers' cargo from a Philadelphia port, and hiring transportation companies was not in aid of a main purpose or necessary to the defendant's existence.

Audrey also convinced the Commonwealth Court to affirm the order of the Workers' Compensation Appeal Board and workers' compensation judge granting an employer's termination petition. The court concluded the employer had not "re-characterized" the claimant's injuries in arguing a full recovery as, although the purported symptom (limited mobility) was previously attributed by the judge in the claim petition proceeding to the then-existing lumbar strain, the judge found in the termination proceeding that there was a full-recovery from that strain, and that the current limited mobility was due to diabetes and advanced age. The court also rejected application of *res judicata* and the law of the case because the issues were not identical—the prior proceeding was a claim petition not a termination petition—and additional issues, including expert competency, were also decided in the employer's favor.

Christopher Woodward (Harrisburg, PA) and **Thomas Specht** (Scranton, PA) secured affirmance from the Third Circuit Court of Appeals of the Middle District Court's grant of summary judgment in favor of the firm's client. Our client/insurer had originally offered the UIM claimant the unstacked UIM limits of $300,000, but the claimant and insurer disagreed as to whether the claimant was entitled to stacked limits of $900,000. After the claim went into litigation—which included a claim for statutory insurance bad faith—**Brigid Alford** (Harrisburg, retired) and **Chris** recognized a threshold coverage issue (though living in the same household, the claimant and the named insured were not related by blood, marriage, or adoption; thus, the claimant did not qualify as an insured). Chris and Bridget litigated the claim and obtained summary judgment in favor of the insurer. On appeal, the Third Circuit agreed with Chris and Tom Specht that the UIM claimant did not qualify as an insured under the policy, and that, since the claimant was not an insured, there had been no breach of contract and no bad faith by the insurer.

Matthew Behr and **Walter Kawalec** (both of Mount Laurel, NJ) received a favorable decision from the Third Circuit Court of Appeals in a First Amendment case. The Court of Appeals affirmed the District of New Jersey's denial of a preliminary injunction in which the plaintiff claimed that federal and local officials violated her First Amendment rights through censorship and retaliation after she posted comments on Facebook. In a published decision, the Third Circuit agreed with our arguments that the plaintiff lacked standing since she could not demonstrate a substantial risk of future harm specific to our client, the former chief of police of a local municipality, as well as the other co-defendants. ◆

ON THE PULSE

Defense Verdicts and Successful Litigation Results

CASUALTY DEPARTMENT

Christopher Power (Melville, NY) obtained a defense verdict for a tow truck company in an "open and obvious" case in Nassau County, New York. The tow truck company was called to the plaintiff's workplace to tow a broken-down minibus for scrapping. Our client attached a tow rope to the bus and began operating the winch, but was asked to stop so the mirrors could be removed. The plaintiff removed the passenger-side mirror and, instead of walking around the bus, walked between the tow truck and the bus, tripping over the tow rope and breaking his hip. Chris prepared a motion for a directed verdict based on precedent from a previous Nassau County case involving a plaintiff who tripped over a tow rope, where the judge ruled the condition was open and obvious, with no duty to warn. However, the trial judge in this case denied the motion. Chris then requested a curative charge instructing the jury that the defendant had no duty to warn of an open and obvious condition, citing language from the prior summary judgment decision. While the trial judge declined to charge the jury, she permitted Chris to make the argument himself during summation, to which plaintiff's counsel did not object. During summation, Chris argued the condition was open and obvious and there was no duty to warn, and he asked the jury to dismiss the case. The jury deliberated for just 15 minutes before returning a verdict for the defendant.

Evan Saltzman (Philadelphia, PA) received a defense verdict in a hotly-contested, slip and fall case where the plaintiff admitted on cross to lying under oath. The plaintiff's demand was $800,000 before being remanded to arbitration.

Melanie Foreman, **Thomas Wagner**, and **Thomas Nardi** (all of Philadelphia, PA) successfully defended a transportation authority in a wrongful death and survival case in the Philadelphia County Court of Common Pleas. The case involved the death of a pedestrian who was struck by a transportation authority bus. The plaintiff, the decedent's father, disputed the city medical examiner's suicide ruling. The defense presented a forensic psychiatrist's testimony confirming the decedent's high suicide risk. Although our client was found 40% negligent, the decedent's 60% negligence barred recovery of damages. The claim was further limited by statutory caps applicable to Commonwealth entities.

Jack Delany and **Andrew Ciganek** (both of Philadelphia, PA) successfully secured summary judgment in a product liability case involving an "exploding" wine bottle. The plaintiff alleged injuries from a broken bottle containing

blueberry fruit wine. Our client was the distributor of the bottle and was brought in the case as a third-party defendant. The plaintiff testified that on Thanksgiving Day, she attempted to open the bottle with the handle of a wooden spoon when the bottle unexpectedly and suddenly exploded in her hands. In her product liability claim, the plaintiff asserted defects with the design of the bottle—the use of unusually thin glass prone to breakage. The plaintiff additionally argued the wine bottle had no warnings instructing her to only use a corkscrew opener. As the plaintiff did not produce any liability expert reports, we were able to argue that expert testimony was necessary for the plaintiff to prove her case, as the subject matter was one involving special skills and training not common to the ordinary layperson.

Raychel Garcia and **Matthew Wykes** (both of Orlando, FL) won a premises liability case involving allegations of negligent sidewalk design. The plaintiff, a quadriplegic who has been in a wheelchair since 1984, entered our client's convenience store using the designated wheelchair ramp without issue. However, upon leaving the store, he inexplicably failed to use the same ramp and, instead, attempted to go directly over the curb, resulting in a fall and a fractured leg. During his deposition, conducted by Matt, the plaintiff: admitted he successfully navigated the wheelchair ramp upon entering the store; acknowledged seeing and knowing the ramp was there but did not use it upon exiting; confirmed there were no defects in the sidewalk or curb; admitted that raised sidewalks in front of stores are common, particularly at gas stations; and conceded that nothing obstructed his view of the curb or ramp. At the hearing, Raychel argued our motion, effectively countering the plaintiff's last-minute attempt to introduce new testimony: claiming he was discouraged from using the sidewalk due to merchandise being present—an assertion he never made during his deposition—and that the store should have used a color to distinguish the curb from the parking lot. The judge requested competing orders and ultimately agreed with our application of the law, granting our motion.

Matthew Noble (Philadelphia, PA) successfully defended our client, a car manufacturer, in a contract dispute in Bucks County, Pennsylvania. In 2021, amid the COVID-19 pandemic, the plaintiff purchased a new vehicle for $37,000. Seven months later, the car was involved in a crash caused by the plaintiff's daughter. Repairs for collision damage, which were not covered under the vehicle's express written warranty, were delayed due to global supply chain disruptions caused by the pandemic. Despite our client's efforts to locate, obtain, and expedite delivery of repair parts to the collision repair shop, it took seven months to fully complete the repairs. The plaintiff alleged the manufacturer violated the implied warranty of merchantability under the Magnuson-Moss Warranty Act and breached the Pennsylvania Unfair Trade Practices and Consumer Protection Law, citing the repair delays as the basis for the claims. Ultimately, the court returned a defense verdict, rejecting the plaintiff's claims. ◆

ON THE PULSE

Defense Verdicts and Successful Litigation Results

HEALTH CARE DEPARTMENT

Ryan Gannon and **Maura Brady** (both of Roseland, NJ) received a unanimous defense verdict for their client in a high-exposure birth injury case. The plaintiff, the mother, alleged the obstetrician defendant was negligent in failing to identify her baby as large for gestational age in the prenatal period, in failing to proceed with a cesarean section during the labor, and in negligently performing a forceps delivery. The plaintiff claimed that, as a result of her injuries from the delivery, she suffered pelvic organ prolapse, incontinence, and ongoing pain and suffering. The plaintiff underwent two subsequent gynecologic surgeries and alleged, as result of her ongoing pain, she would never be able to return to work for the remainder of her life. Through the testimony of our client and experts, we were able to establish the care provided by the obstetrician was within accepted standards of care and the decision to proceed with the delivery as performed was the safest option for the mother and baby. The jury returned a unanimous verdict in favor of our client.

Leslie Jenny (Cleveland, OH) and **Missy Minehan** (Harrisburg, PA) obtained a medical malpractice defense verdict on behalf of a skilled nursing facility in the Cuyahoga County Common Pleas Court in Cleveland, Ohio. The children of an 82-year-old skilled nursing resident brought a lawsuit after their mother developed shingles and associated meningitis and passed away. They claimed the facility had inadequate infection control and failed to identify signs/symptoms of developing changes in their mother's condition. Leslie and Missy proved the facility offered the appropriate vaccinations that were required by the state of Ohio and that the standard of care did not require the facility offer or administer the Shingrix vaccine to its residents. They also proved the facility properly monitored the resident's signs and symptoms; that she did not exhibit any classic signs or symptoms of shingles at the facility; and that the facility timely sent her to the ER for evaluation when her condition changed. In closing arguments after a five-day trial, the plaintiffs asked the jury for $3 million. The jury deliberated for 75 minutes and returned with a defense verdict.

Donna Modestine and **Kevin Majernik** (both of King of Prussia, PA) received a defense verdict for an emergency room physician in a medical malpractice case after a six-day trial. The plaintiffs alleged the physician failed to diagnose and treat a transient ischemic attack in the emergency department and that this failure caused the plaintiff's ischemic stroke 48 hours later. The plaintiff at the time was 44 years old. Following an hour and a half of deliberations, the jury found the emergency room physician did not violate the standard of care.

Gary Samms (Philadelphia, PA/King of Prussia, PA) received a defense verdict on behalf of an anesthesiologist after a six-day trial in Philadelphia. The plaintiffs had contended the anesthesiologist failed to deal with internal bleeding and blood pressure issues and failed to communicate with the surgeon during a Cesarean section and in the Post Anesthesia Care Unit, leading to the plaintiff almost bleeding out and causing the loss of her uterus during an emergency hysterectomy. The matter involved seriously conflicting experts and was a well-tried case by all parties. Fortunately, the jury was receptive to the defense arguments that, in fact, the doctor not only complied with the standard of care, but exceeded it. Instrumental in the victory were **Raymond Petruccelli** (King of Prussia, PA) and paralegal **Nancy Farnen** (Philadelphia, PA). ◆

PROFESSIONAL LIABILITY DEPARTMENT

John Gonzales, **Connor Warner** and paralegal **Dawn Duffin** (all of Philadelphia, PA) obtained summary judgment on behalf of several narcotics police officers in a Section 1983 malicious prosecution and fabrication of evidence lawsuit. The U.S. District Court for the Eastern District of Pennsylvania dismissed the case, with prejudice, finding the record was barren of any evidence fabricated by any of the defendant officers that was ever used in or influenced any criminal proceeding against the plaintiff, the officers possessed probable cause to charge the plaintiff, and the plaintiff tendered no evidence of an underlying constitutional violation.

Ian Glick (Melville, NY) successfully obtained a permanent stay of arbitration for uninsured motorist benefits in Kings County Supreme Court. In doing so, the court found that our petition made the requisite *prima facie* showing that our client was entitled to a permanent stay of arbitration. The court agreed with Ian's arguments that our client had properly disclaimed coverage because there was no evidence of contact between the respondent's vehicle and the alleged uninsured's vehicle, as required for uninsured motorist coverage under the policy, and that the respondent failed to cooperate in our client's investigation of his claim. In opposition, the respondent did not dispute there was no contact between the vehicles or that he failed to cooperate in the investigation of his claim. Instead, he argued his notice of intention to make a claim triggered the 20-day statutory period to seek a stay of arbitration and that our petition was not filed within 20 days of the respondent's service of this notice. The court rejected the respondent's arguments and agreed with Ian's arguments that the respondent's notice failed to contain the required statutory language necessary to trigger the 20-day period and that, instead, the respondent's demand for arbitration triggered the 20-day statutory period and the petition was timely made within 20 days of the respondent's service of his demand. ◆

Dante Rohr (Orlando, FL) obtained summary judgment in favor of our client on the plaintiff's general contractor's contractual indemnity and defense claims. The general contractor claimed it was owed a defense and indemnity under its subcontract with our client. In a prior proceeding, the court entered judgment in favor of the owner against the general contractor for breach of contract and breach of warranty, but rejected the owner's claims of negligence and violation of the Florida Building Code. The court agreed with our arguments that the general contractor was estopped from bringing its contractual defense and indemnity claims against the subcontractor because there was a prior judicial determination that neither the general contractor nor our client was negligent, and the general contractor's liability was based on its breach of contract and warranties. The court further agreed that the general contractor could not show that the subcontractor was negligent, a condition triggering the indemnity obligation, where it had taken the position that there was no negligence in the construction and it did not present any affirmative evidence to support a claim of negligence on the part of the subcontractor.

Matthew Flanagan (Melville, NY/New York, NY) and **Jack Yau** (New York, NY) secured a dismissal of Judiciary Law § 487 claims against an insurance defense firm and its attorneys. The plaintiffs sued our clients—a partner and associate at a well-known insurance defense firm—alleging violations of Judiciary Law § 487(1), which provides that an attorney who engages in "deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . is guilty of a misdemeanor and may be liable to the injured party for treble damages in a civil action." The plaintiffs alleged the defendants engaged in deceit in asserting false positions on behalf of their clients in the underlying action and in falsely representing to the court that the plaintiffs had not opposed a motion to dismiss, even though they had. We argued that mere advocacy does not give rise to a cause of action under Judiciary Law § 487 and, even if a misstatement had been made to the court regarding whether the plaintiffs had opposed a motion, there was no indication it was intentional or that it caused the plaintiffs any damages. The court agreed and granted the pre-answer motion to dismiss.

Aaron Moore and **Claire McCudden** (both of Wilmington, DE) obtained a summary judgment dismissal on behalf of their client, a law firm, that was sued by its former clients for legal malpractice. The plaintiffs, seven affiliated companies and their owners in the business of developing property, had been sued by their bank for defaulting on multiple lines of credit. The bank filed several lawsuits against the property developers, claiming approximately $7 million in damages, plus attorneys' fees, which were recoverable pursuant to the terms of the promissory notes. The property developers retained our client to defend the lawsuits, arguing the amounts claimed to be owed to the bank were significantly overstated. Our client vigorously defended the bank's underlying lawsuits. Ultimately, the property developers settled the bank's

lawsuits for the entire amount owed, plus interest, and the bank's legal fees. The developers argued that its attorneys should have advised them to settle the bank's claims after the lawsuits were commenced and that, had they done so, they would not have had to pay the bank's legal fees ($825,000), our client's legal fees ($485,000), expert witness fees ($335,000), or the additional interest on the loan. The property developers also claimed that not settling with the bank earlier caused them lost business opportunities valued at nearly $1 million. The plaintiffs' legal malpractice claims were dismissed because their expert witness, a Maryland attorney with no business litigation experience, was not qualified to serve as an expert and because their damages claims were speculative.

After four hearings, **John Slimm** (Mount Laurel, NJ) obtained dismissal of a complex legal malpractice action arising out of litigation in the U.S. District Court over the failed purchase of a car dealership in New Jersey. The plaintiff's claims against our client, a well-known transactional lawyer with one of the largest firms in the United States, involved hundreds of thousands of dollars in fees and losses related to the investment in the dealership. Following the hearings, and a re-hearing, Jack obtained the dismissal because the plaintiff's expert failed to tie in the damages to the alleged deviations in connection with the handling of the underlying transaction. Following the hearings, the court rejected the expert's opinion on damages, and then granted our application for a dismissal of the entire case.

Jillian Dinehart (Cleveland, OH) successfully defended an appeal of a trial court decision dismissing a defamation claim against a suburban mayor. The plaintiff, a former police officer, brought actions against a former city mayor and related defendants, asserting defamation, false light, and related claims. The plaintiff alleged that statements made during a press conference disparaged him and violated a non-disparagement clause in his separation agreement. The court ruled the defamation and false light claims were correctly barred by the one-year statute of limitations under R.C. 2305.11(A) where the saving statute, R.C. 2305.19(A), permitted refiling in federal court, but did not toll limitations for subsequent state filings after the federal court dismissal. The appellate court also found the former mayor's statements, regarding police leaders who allegedly retaliated against her, were deemed truthful and, thus, not defamatory or disparaging. Additionally, the court found these statements did not violate the separation agreement's non-disparagement clause because they reflected factual conclusions of an internal investigation. ◆

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

WORKERS' COMPENSATION DEPARTMENT

Linda Farrell (Jacksonville, FL) successfully contested a claimant's request for authorization for a van equipped with a wheelchair lift, arguing its medical necessity following a severe work-related injury. Testimony revealed the claimant's significant mobility challenges were due to a work-related traumatic brain injury and spastic hemiplegia. However, the employer/carrier contested the request, asserting it was neither reasonable nor medically necessary based on the authorized treating physician's assessment. Ultimately, the judge of compensation claims found the claimant did not meet the burden of proof to establish the necessity of the van, siding with the employer/carrier's argument, and denied the authorization request along with the claims for attorney's fees and costs.

Anna Jaoudi (King of Prussia, PA) successfully settled a Medicare compliance matter. Our workers' compensation insurance carrier client received a conditional payment demand from the Center for Medicare and Medicaid Services (CMS) and the Commercial Repayment Center (CRD). This demand sought reimbursement for over 90 Medicare payments, which Anna negotiated as unrelated, resulting in a complete resolution of the lien with no balance outstanding.

Michael Duffy (King of Prussia, PA) successfully defended against two review petitions in a case in which our client had accepted the claim as a right shoulder injury. As the claimant was lowering a trailer to a hitch, the trailer fell a few inches, causing the hand crank to spin and jerk the claimant's shoulder. The claimant filed a review petition seeking to expand the description of injury to include orthopedic and psychiatric injuries. The claimant's second review petition sought to increase his average weekly wage to include an expectant rate based on his communications with his dispatcher about potentially working more hours in the future. Mike argued the claimant did not seek treatment for the additional injuries until months after the work injury. The claimant had prior work injuries that were not disclosed to the providers. The claimant's diagnostic studies were degenerative and not acute. With regard to the psychiatric injuries, Mike argued the claimant's expert did not have a full understanding of the claimant's past and did not discuss his prior substance abuse issues, familial/marital issues, or how he had dealt with prior workers' compensation injuries. Furthermore, through cross examination, the claimant

conceded he did not really understand what psychiatric treatment he was receiving. The workers' compensation judge found the employer's orthopedic and psychiatric experts more credible and persuasive than the claimant's; therefore, the judge did not expand the injury to include the cervical, lumbar, and psychiatric diagnoses. She further did not find right brachial plexopathy or right frozen shoulder. Additionally, the judge found there was no evidence to support a higher average weekly wage and compensation rate as the claimant's wages reflected what he actually earned.

In a workers' compensation case of first impression in Pennsylvania, **Anthony Natale** (King of Prussia, PA) successfully defended a Berks County mushroom canning facility from a claim petition alleging repetitive trauma injuries to the upper extremities. The claimant worked as a machine operator and alleged that over time his duties caused nerve injuries to both upper extremities. Tony presented medical expert testimony supporting the existence of these nerve damage conditions in the upper extremities but challenging causation. In a modified *Frye* challenge to the claimant's medical expert opinions, Tony argued through expert testimony that the state of science and medicine overwhelmingly supports the fact that "repetitive trauma" is not a substantial contributing factor to the development of carpal tunnel and cubital tunnel syndromes. While the court allowed the claimant to present expert testimony to the contrary, it ultimately found Tony's expert's testimony opinions to outweigh the claimant's expert's testimony. The court concluded for the first time in Pennsylvania that carpal tunnel syndrome and cubital tunnel syndrome is not borne out through alleged repetitive trauma. This was a complete defense verdict.

Rachel Ramsay-Lowe (Roseland, NJ) successfully completed a trial in New York on the issue of whether the claimant had a cognitive disorder and whether the insurance carrier should authorize medical treatment for a spinal cord stimulator. After taking testimony of both our doctors, the court agreed with Rachel's argument that the claimant's doctor's report lacked objective medical findings to reach the diagnosis of cognitive disorder, and dismissed this from the overall claim. The claimant also requested a hearing to address the insurance carrier's denial of a spinal cord stimulator. Rachel made the argument that the claimant's injuries are merely a strain/strain of the lumbar spine and that he failed to meet the medical treatment guidelines, which require the claimant to receive a psych evaluation to determine if they are a good candidate for the stimulator. In addition, Rachel successfully argued the treatment currently rendered does not show either a failed back surgery or a special circumstance where a stimulator should be granted. The court agreed with Rachel's arguments and found the carrier does not have to provide a spinal court stimulator. ▶

Andrea Rock (Philadelphia, PA) received a favorable decision where the workers' compensation judge terminated the claimant's wage loss and medical benefits based on the opinion of an independent medical examiner. The employer had accepted that the claimant sustained a contusion to multiple body parts when she slipped and fell in the course of her employment. The carrier began paying her wage loss and medical benefits. On November 3, 2023, the employer filed a termination petition, alleging she was fully recovered as of April 26, 2023. Subsequently, the claimant filed a petition to review to amend her work injury to include cervical radiculopathy, requiring surgical intervention, as well as disfigurement. After reviewing deposition testimony from the claimant, her treating physician, and the independent medical evaluator, the judge granted the termination petition and denied the review petition. The judge was specifically persuaded that the claimant did not sustain a cervical spine injury; thus, the surgery was not related as her complaints to her neck did not begin until nearly a week after the original fall. Therefore, the claimant's medical and indemnity benefits were terminated and the review petition was dismissed in its entirety.

Robert Schenk (Philadelphia, PA) was successful in having a claim petition denied where the workers' compensation judge rejected the claimant's testimony as not credible. In doing so, the judge pointed out the claimant did not report a work-related injury until after she had been advised that light-duty work was only available for employees injured on the job. Surveillance video from the employer's premises showed the claimant returning to the yard on the date of injury with no apparent injury. The claimant's testimony about prior injuries was also in conflict with contemporaneous hospital records submitted into evidence. Those medical records showed the claimant had prior low back problems, with no new trauma being reported to the emergency room on the alleged date of injury. The claimant's testimony was also inconsistent with the history she gave to her own medical expert and the employer's medical expert. Once the claimant's testimony was rejected, there was no basis for an award of benefits.

Michael Sebastian (Scranton, PA) received a decision denying a claim petition that alleged the claimant suffered a work-related cervical injury on June 29, 2023. The claimant testified that he felt a snap but did not feel the pain right away and continued to work until July 17, 2023. He then went to the emergency room and subsequently had surgery on July 20, 2023. During cross-examination, the claimant agreed he only suffered a cervical injury, not a low back injury. He further noted he had a prior low back injury on October 19, 2022, for which he filled out an accident report and was sent to a doctor and received treatment. However, the claimant first reported the June 29, 2023, injury on September 1, 2023, and at that time could not recall a specific event that occurred on June 29, 2023. However, he did confirm he heard a snap in his back when the injury did occur. The claimant also agreed

he worked full duty, without reporting the incident, until July 17, 2023. The claimant's expert testified the claimant was a partial quadriplegic in the upper and lower extremities. Our expert found no evidence of a work-related injury on June 29, 2023, and that the claimant's symptoms are consistent with cervical stenosis with myelopathy, which is a degenerative condition. The workers' compensation judge found the claimant not credible to the extent he testified he suffered a work-related injury on June 29, 2023, or any disability related to it. He noted his demeanor during the hearing was not credible and his testimony was called into question based upon the employer's policy that you must immediately report injuries, as he had in the past. The judge also noted that subsequent treatment notes indicate the injury or condition pre-dated the June 29, 2023, work injury date. The judge accepted the testimony of our expert over the claimant's expert, and where the claimant's expert's testimony conflicted, it was specifically rejected.

Kacey Wiedt (Harrisburg, PA) secured a decision denying the claimant's claim and penalty petitions. The claimant, a mechanic, alleged he sustained a right ankle fracture, right ankle abscess, and avulsion fracture of the lateral talus as a result of falling off the back of a pickup truck while removing a truck-cap at work. The claimant asserted he was on the clock and on the employer's premises when the fall occurred and that he was assisting his employer's friend in removing his truck-cap from his pickup truck. Through employer witness testimony, Kacey was able to show the claimant was not in the course and scope of employment when he injured his ankle. Kacey proved the claimant assisted the individual with removal of the truck-cap for a purely personal reason, not at the direction of his employer. Kacey also showed that the injury occurred shortly after the claimant's work shift ended and he had clocked out for the day. ◆

ON THE PULSE

Insurance Fraud & Special Investigations Practice Group

Jeffrey G. Rapattoni, Esq. | James H. Cole, Esq.

Insurance fraud is, understandably, intolerable, and its impact on insurers and insureds alike can be devastating. We work very closely with our clients in furtherance of that philosophy through relentless investigation, aggressive defense, and prosecution in response to false and inflated insurance claims.

The attorneys in this practice group supplement their litigation experience with up-to-date knowledge of the current trends in insurance fraud detection and prosecution areas by regularly attending and participating in seminars given by such educational agencies as the National Insurance Crime Bureau (NICB), International Association of Special Investigation Units (IASIU), and The Coalition Against Insurance Fraud. In addition, they also attend and present at numerous local and national conferences and association meetings throughout Pennsylvania, New Jersey, Delaware, Ohio, Florida, and New York.

As part of our fraud practice, we regularly handle PIP matters for our clients. Our team of attorneys are familiar with all local PIP regulations and have significant experience handling all facets of PIP litigation, including IME cut-offs, opinions on absences of injury, and EUO investigations of prior medical history. Other PIP practice areas include UCR litigation, medical necessity defense, and provider and claimant regulatory compliance. We routinely partner with our clients to help create PIP protocol and manage the defense of PIP litigation. Our attorneys are knowledgeable and focused on an array of contemporary medical procedures and codes that often flood the PIP industry.

The increase in auto glass claims have changed the industry's perception. Our attorneys are focused on glass litigation in both the defensive and affirmative ligation recovery model against fraudulent actors. Our team has national experience in defending and civilly prosecuting these claims.

Aggressive Fraud Defense

As a part of an overall aggressive fraud defense, the Insurance Fraud & Special Investigations Practice Group members believe that the "best defense is a good offense." Our trial attorneys are experienced in the investigation, defense, and affirmative prosecution of fraudulent claims. The scope of their practice is not only focused on the individual claimant, but also on organized groups or "rings." We routinely file suits and collect judgments against perpetrators of insurance fraud, including both insureds and medical providers. Our team works with local and federal agencies to make sure our clients' interests are protected and made whole.

We have considerable experience with cases involving:

- Medical Provider Fraud
- New York Labor Law
- Staged Accidents – Trucking & Transportation; Auto; Slip and Fall
- RICO
- Arson
- Vehicle "Give Ups" & Fraudulent Theft Claims
- Application/Rate Evasion Fraud

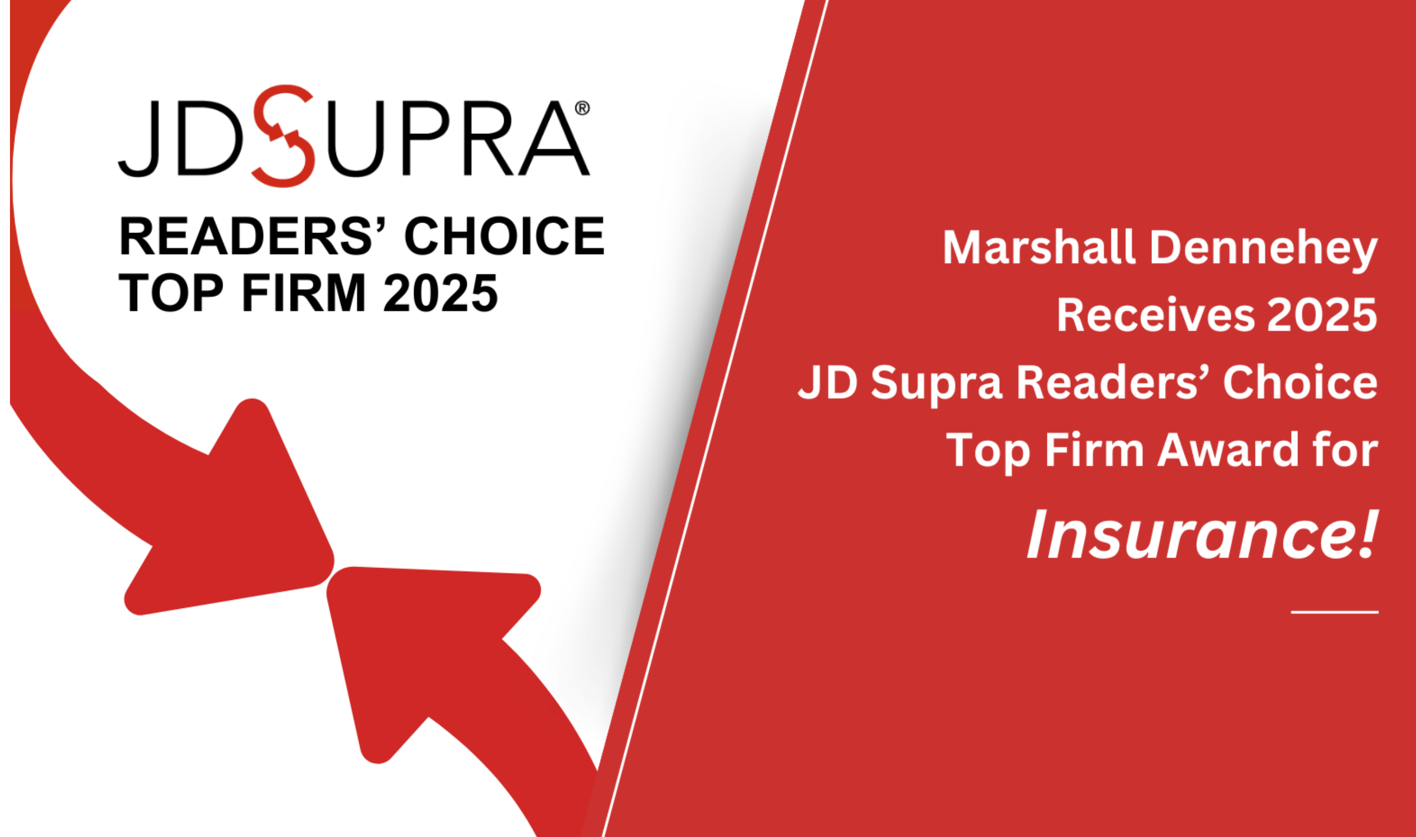
We maintain a centralized **Fraud Library** that catalogs fraud schemes, investigations, and known perpetrators. By sharing this information with our team and fostering ongoing dialogue among our attorneys, we ensure that emerging legal developments and industry trends are swiftly integrated into our defense strategies. In turn, we keep our clients informed with timely updates on fraud-related developments, empowering them to enhance their own investigative efforts. Our collaborative approach is highly valued by our clients as it allows us to align strategies, coordinate efforts, and effectively combat fraud together.

Stay tuned for new insights from our fraud practice on **staged accidents in commercial auto and trucking and transportation**. As fraud schemes grow more sophisticated, criminals are increasingly targeting commercial vehicles with carefully orchestrated collisions designed to exploit insurers and businesses. Our team is at the forefront of uncovering these fraudulent claims, leveraging cutting-edge investigative techniques and legal strategies to protect our clients. **Our attorneys will be featured in a podcast discussing staged accidents this May —more details to come!** ◆

**Jeff Rapattoni and Jim Cole are co-chairs of our Fraud/Special Investigation Practice Group.*

Jeff, Assistant Director of our Casualty Department, works in our Mount Laurel, New Jersey, office.

Jim is the Assistant Director of our Professional Liability Department and works in our Philadelphia office.



ON THE PULSE

Sun, Sand and Suits... Lawsuits That Is

Michael Packer, Esq.

Known as the "Venice of America," Fort Lauderdale, Florida, sits along the Atlantic Ocean, halfway between the cities of Miami and West Palm Beach. In addition to 1,765 miles of inland waterways, visitors to Fort Lauderdale enjoy more than seven miles of beaches and can view the massive yachts that fill the Intracoastal Waterway.

In 2002, responding to the ever-growing needs and requests of our clients, Marshall Dennehey joined the masses of northerners migrating to the paradise of South Florida and opened its 18th office in downtown Fort Lauderdale, joining the firm's existing Florida offices in Tampa and Orlando. (Jacksonville was yet to come in 2004.)

In the 23 years since then, the office has grown from two to 26 attorneys, undergone multiple expansions, moved three times, and been led by four managing attorneys. In addition to myself, the office is managed by Alan "A.C." Nash, who supervises the casualty group, and Andrew Marchese, who manages the professional liability group. Office manager, Sandy Doersam, who has been there since the beginning, is the glue that holds us all together.

Located just north of downtown—less than a mile from the beach—the attorneys in the Fort Lauderdale office defend clients in professional liability and casualty matters from Key West in the south, to Lee County in the west, to Martin County in the north, and everything in between.

Our property and coverage group handles insurance coverage matters statewide. I am privileged to lead this dedicated group of attorneys who routinely secure outstanding results in courtrooms, arbitrations, and settlement negotiations across the region. We represent and defend Florida-based insurance companies and national insurance companies, both authorized and surplus, as well as market companies in first-party property cases. We also provide coverage analysis on third-party matters, prosecute and defend declaratory actions, and defend lawsuits alleging bad faith against insurance companies.

Shareholder Kimberly Berman is one of approximately 217 Board-Certified Appellate Attorneys in the entire state of Florida and serves as a critical resource for attorneys in all of our Florida offices who rely on her to assist in handling their most significant post-trial motions and appeals.

Board Certified in Condominium and Planned Development Law by The Florida Bar, shareholder Andrew Marchese, is a go-to attorney for condominium associations, homeowners associations, directors, officers, and property managers when facing claims and lawsuits. He routinely handles matters involving breach of fiduciary duty, breach of the declaration, real estate liens, real property document disputes, Fair Housing Act (FHA), HUD claims, and more. Under his supervision, our professional liability group represents attorneys and accountants in malpractice

cases, insurance agents and brokers in errors and omissions claims, and companies of all sizes in employment law matters.

A.C. Nash and the attorneys in our casualty group represent a wide range of clients, including some of the biggest retail companies in the world, the largest supermarket chain in Florida, and municipalities throughout South Florida. The group is also experienced in rideshare litigation matters and the unique legal issues they bring for the rideshare platform, the drivers, riders and their insurers, and other involved vehicles. Construction is another area of focus, and our attorneys represent companies in every component of the industry that operate around the clock as South Florida continues to expand in the post-pandemic era.

Marshall Dennehey's Fort Lauderdale office, working in conjunction with our additional 18 offices throughout the firm, is committed to the firm's culture of family, collaboration, excellence, and striving to exceed our clients' expectations. We just happen to do it where the weather is always better. ◆

**Mike, a shareholder and Co-Chair of our Insurance Services Practice Group, is the managing attorney of our Fort Lauderdale, Florida, office.*

ON THE PULSE

Other Notable Achievements

RECOGNITION

Heather Byrer Carbone (Jacksonville, FL) was honored with the John J. Schickel Professionalism and Excellence Award by the E. Robert Williams Inn of Court.

Peggy Smith Bush (Orlando, FL) and **Heather Byrer Carbone** (Jacksonville, FL) have been recognized as 2024 *Florida Trend* "Legal Elite NOTABLE - Women Leaders in Law." Both were honored for their impact in the field of law, mentorship, and leadership in professional organizations and civic/community service initiatives.

Congratulations to **Jeremy J. Zacharias, RPLU**, (Mount Laurel, NJ office) on his election to the Board of Trustees of the Professional Liability Underwriting Society. Jeremy has been an active member of PLUS since 2016. ▶

ON THE PULSE

Other Notable Achievements

PUBLISHED ARTICLES

February 18, 2025 – The *New Jersey Law Journal* published **David Levine's** (Roseland, NJ) article "Navigating Preexisting Conditions in New Jersey Workers' Compensation Claims." Read his article **here**.

January 28, 2025 – **Jillian Dinehart** (Cleveland, OH) authored, "'I Was Just Following Orders' – Ohio's Sixth Circuit Court of Appeals Applies Fourth Amendment's Good-Faith Exception to First Amendment Retaliation Claims," published in PLUS Blog. The article discusses *Hall v. Navarre*, where the Sixth Circuit found that a police officer who ticketed a protestor for disorderly conduct, despite not personally witnessing the conduct, had qualified immunity for the plaintiff's First Amendment retaliation claim. Read Jillian's article **here**.

November 27, 2024 – The *Insurance Journal* published **Sean Greenwalt's** (Tampa, FL) article "Florida Appeals Court Nods Enforceability of Forum Selection Clauses in PIP Cases." You can read Sean's article **here**.

November 27, 2024 – The *New Jersey Law Journal* published "Opportunity Knocks: Modern Trends with Business Email Compromise in a Changing Cyber World" by **David Shannon** (Philadelphia, PA) and **Jeremy Zacharias** (Mount Laurel, NJ). You can read their article **here**.

SPEAKING ENGAGEMENTS

February 24, 2025 – **Mohamed Bakry** (Philadelphia, PA) co-moderated "Behind the Bench: A Candid Look at What Federal Judges Expect from Lawyers" at the Federation of Defense & Corporate Counsel's (FDCC) Annual Winter Meeting.

February 23–27, 2025 – **John Delany, III** (Philadelphia, PA), chair of our Catastrophic Claims Practice Group, moderated a compelling session at the Federation of Defense & Corporate Counsel Winter Meeting. Jack joined author Colum McCann, American Book Award-winning author of *Let the Great World Spin*, to discuss his book, *American Mother*. The session's theme focused on how a more empathetic approach to practicing law cannot only increase understanding and good will between plaintiffs and defendants, but also lower the likelihood of a nuclear verdict and bring about resolutions that all parties can feel better about. ▸

February 19, 2025 – **Jeffrey Rapattoni** (Mount Laurel, NJ) co-presented the webinar "Bad Faith Legal Update" to members of International Association of Special Investigation Units (IASIU). Topics included current legislation affecting the SIU and anti-fraud professionals, case-specific legal decisions affecting the SIU community, as well as trending decisions and pending legislation.

February 12, 2025 – **Michele Punturi** (Philadelphia, PA) joined a panel at Claims Litigation Management's (CLM) 2025 Focus Conference: Work Comp, Casualty and Risk Management. In "Workers' Comp Risk Management Best Practices: Insights from High-Risk Industries," the panel addressed the ongoing challenges of workers' compensation in high-risk industries.

February 11, 2025 – **Rachel Insalaco** (Scranton, PA) co-presented "Special Education Law: The Ultimate Guide" at a National Business Institute CLE. Rachel's presentation addressed bullying and/or harassment involving students with special needs.

February 10, 2025 – **Sara Mazzolla** (Roseland, NJ) joined a panel of International Amusement & Leisure Defense Association professionals to present "Risk Management and Understanding the Claims Process" at the NAFDMA Agritourism Association Convention & Expo.

January 30, 2025 – **Jacqueline Reynolds** (King of Prussia, PA) co-presented "The Lawyer's Guide to Mitigating Burnout: Caring for Ourselves and Our Clients in Challenging Times 2025" for the Pennsylvania Bar Institute.

January 28, 2025 – **Samuel Cohen** (Philadelphia, PA) participated in the session "Best Interest Reviews: Decoding FINRA 2330" at Level Up at OneVoice Annual Kickoff 2025.

January 16, 2025 – **Josh J.T. Byrne** (Philadelphia, PA) was a featured speaker in the Philadelphia Bar Association's webcast "Recent Ethics Developments 2024." Hosted by the Professional Guidance and Responsibility Committee, the program highlighted key cases, ethics opinions, disciplinary decisions, and changes in the rules of professional conduct from 2024.

January 16, 2025 – **Jon Cross** (Philadelphia, PA) and **Thomas Brown** (Orlando, FL) were speakers during the three-hour presentation at the "Legal Roundtable" held at the Amusement Industry Manufacturers and Suppliers (AIMS) Conference.

January 16, 2025 – **Jeffrey Rapattoni** (Mount Laurel, NJ) discussed "Ethical Considerations for the SIU" at the National Insurance Crime Bureau's (NICB) Mid-Atlantic Major Medical Fraud Task Force Training Event. Designed for NICB agents covering Pennsylvania, New Jersey and Delaware, the program provided information and strategies related to the prevention, detection, and prosecution of insurance fraud and crime. ▶

January 15, 2025 – **A.C. Nash**, **Ryan Burns** and **Edwyna Estime** (all of Fort Lauderdale, FL) headlined at the RIMS - Broward County chapter meeting. They co-presented "New Year, New Rules – Florida's New Civil Procedure Rules," which examined the Florida Supreme Court's changes to the Florida Rules of Civil Procedure.

January 10, 2025 – **Josh J.T. Byrne** (Philadelphia, PA) co-presented "Dealing with Difficult Opposing Counsel 2025" for the Pennsylvania Bar Institute.

December 18, 2024 – **Josh J.T. Byrne** (Philadelphia, PA) presented "Legal Malpractice Avoidance" at a Dauphin County Bar Association CLE webinar.

December 18, 2024 – "Restoration After the Data Breach!" In the final episode of his 2024 PLUS podcast series, **David Shannon** (Philadelphia, PA) spoke with disaster restoration expert Heath Renfrow about managing sophisticated cyber attacks. Listen to the PLUS podcast **here**.

December 17, 2024 – **Sara Mazzolla** (Mount Laurel, NJ) participated in the Sports and Entertainment Risk Management Alliance (SERMA®)'s webinar "Roller Skating and Ice Skating Risk Management."

December 9, 2024 – **Matthew Keris** (Scranton, PA) was a panelist for a webinar hosted by the Pennsylvania Coalition for Civil Justice Reform. In "A-Z on AI! Artificial Intelligence Litigation Trends and Ethical Issues," Matt and his co-panelists led a discussion on AI from a medical liability perspective, including how the defense can weaponize AI and the ethical issues of AI in legal practice.

December 6, 2024 – **Jack Delany** (Philadelphia, PA) presented "Empathy in High-Stakes Trials" at the Litigation Counsel of America's Renaissance Symposium XVIII. The symposium offered a full day of trial tactics and strategies, led by some of the country's leading trial lawyers with years of experience, successes, and verdicts.

November 26, 2024 – **Kimberly Kanoff Berman** (Fort Lauderdale, FL) of our Florida Appellate Law practice presented at the National Business Institute course, "Obtaining Evidence From Electronic Devices in Florida." The program focused on how to gather evidence from electronic devices and get it authenticated when hiring an expert is not feasible.

November 21, 2024 – **Sara Mazzolla** (Mount Laurel, NJ) and her International Amusement & Leisure Defense Association (IALDA) colleagues presented a Legal Roundtable at the International Association of Amusement Parks & Attractions (IAAPA) Expo 2024. The panel covered topics including including a three-part presentation on demystifying the science of acceleration forces; combatting reptile theory; using AI for demonstrative exhibits and jury consultants; updates on ASTM proposals and waivers; and case law in various jurisdictions. ▶

November 20, 2024 – **Anthony Natale** (King of Prussia, PA) was one of the key speakers at the annual Delaware Valley Workers' Compensation Trust's (DVWCT) Claim Prevention seminar. This live event was attended by risk control employees, managers, police chiefs, command staff, department heads, and local government leadership in the townships and municipalities that are administered by the DVWCT. Tony spoke on the importance of presenting unified and global defenses between workers' compensation, unemployment compensation, internal grievance arbitration, and employment law where applicable in cases involving workplace injuries. Tony was able to give examples of this unified directive, citing a current case in litigation involving all of these areas of law and the blue print used to provide a global defense. ◆

Defense Digest, **Vol. 31, No. 1, March 2025**, 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.

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