

DEFENSE DIGEST

Vol. 31, No. 2, June 2025

INSIDE THIS ISSUE

PAGE

2	From 'Brownish' to Baseless: Florida Court Reinforces Slip-and-Fall Standards
5	Be Specific to Avoid Waiver of Subrogation Rights
8	Proposed Expert's Qualification to Proffer Standard of Care Opinions Must Be Evaluated Under the Entirety of Section 512 of the MCARE Act
11	On App: Good to Go! Off App: No Bueno! How Rideshare Companies Are Defeating Vicarious Liability in Florida
13	A Costly Mistake
15	Tsunami or Business as Usual: What Does the New Motorcycle Lemon Law Hold for Pennsylvania?
17	Getting the Gist: The Evolution and Application of Pennsylvania's Gist of the Action Doctrine in Legal Malpractice Actions
20	The Pay Transparency Act Makes Its Splash this Summer in New Jersey
22	Driving the Workday: The Third Circuit Clarifies Compensable Travel Time Under the FLSA
24	The Nature of Attorney Disciplinary Proceedings
26	All Bark and All Bite

ON THE PULSE...

Recent Appellate
Victories

Defense Verdicts and
Successful Litigation
Results

The Blitz Is Coming:
Pranks, Perception and
the Risk of Draft Day

Other Notable
Achievements





From ‘Brownish’ to Baseless: Florida Court Reinforces Slip-and-Fall Standards

Matthew R. Wykes, Esq.

Key Points:

- Recent case clarifies Florida premises liability law and the burden on plaintiffs under Section 768.0755, Florida Statutes.
- A plaintiff must establish that a business had actual or constructive knowledge of a dangerous condition.
- A plaintiff needs to demonstrate more than just the presence of a substance—he or she must show how long it was there or why it should have been discovered.

In *Duran v. Crab Shack Acquisition, FL, LLC*, 384 So. 3d 821 (Fla. 5th DCA 2024), the Florida Fifth District Court of Appeal affirmed summary judgment in favor of the defendant, emphasizing the plaintiff’s failure to establish actual or constructive knowledge of a dangerous condition. This case clarifies Florida’s premises liability law and highlights the burden on plaintiffs under Section 768.0755, Florida Statutes.

Factual Background

Jose Duran sued Crab Shack Acquisition, FL, LLC, d/b/a Joe’s Crab Shack, after allegedly slipping on a “brownish” liquid in the restaurant’s dining area. The color and identity of the liquid became a focal point in the case—not because it revealed anything about the restaurant’s conduct, but because it revealed a lack of clarity and specificity in the plaintiff’s evidence. Duran himself referred to the substance only as “brownish,” and no witness could describe it with more detail or identify its source.

There was no evidence of footprints, track marks, or drying patterns indicating how long the liquid had been present. Witnesses did not see the spill before the fall, and Crab Shack employees followed routine

inspection and cleaning practices. The plaintiff failed to provide records or testimony showing that inspections had been neglected.

Legal Analysis

Under Florida law, business owners are not strictly liable for invitee safety, but they must maintain their premises in a reasonably safe condition. Florida Statute Section 768.0755 requires a plaintiff to prove a business had actual or constructive knowledge of a hazard to recover for a slip-and-fall injury.

The court found no evidence that the restaurant knew about or should have known about the liquid. While constructive knowledge can be proven through circumstantial evidence, such as the substance’s condition or duration, no such evidence existed here. Citing *Welch v. CHLN, Inc.*, 357 So. 3d 1277 (Fla. 5th DCA 2023) and *Encarnacion v. Lifemark Hosps. of Fla.*, 211 So. 3d 275 (Fla. 3d DCA 2017), the court reiterated that merely showing the presence of a substance is insufficient.

The plaintiff’s claim that the liquid originated from employees’ shoes lacked competent evidence. The court also rejected the argument that an employee’s ►

slip after the incident indicated prior notice, as no evidence showed when the liquid first appeared or whether it was visible before the fall.

One of the most important takeaways from this case is the PLUS factor—plaintiffs must provide something more than just the presence of a substance on the floor. Courts require additional proof, such as evidence that the hazard existed for a measurable period or that it had a noticeable, deteriorated condition that should have been detected by ordinary diligence. Without this extra proof, the claim cannot proceed past summary judgment.

Applying Florida Rule of Civil Procedure 1.510(a), the court emphasized that summary judgment is appropriate when no genuine dispute of material fact exists. The defendant met its burden by demonstrating the absence of evidence that the liquid had been present long enough for discovery and remedy. Without conflicting evidence requiring jury determination, the appellate court affirmed summary judgment.

Implications for Florida Premises Liability Law

This decision reinforces the strict burden on plaintiffs in slip-and-fall cases. Business owners must exercise reasonable care, but liability does not attach without proof of actual or constructive knowledge of a hazard. Since 1942, the Florida Supreme Court has been crystal clear -- negligence will not be presumed merely because of the happening of an accident. Defense counsel can cite *Duran* to argue for summary judgment when plaintiffs fail to provide sufficient circumstantial evidence.

The ruling also underscores the importance of proper training and documentation for businesses. Routine inspections and clear maintenance records significantly strengthen defenses against premises liability claims.

Additionally, *Duran* highlights the necessity for plaintiffs to provide tangible evidence that a business

had a reasonable opportunity to detect and address a hazard. Mere speculation or assumptions regarding a hazardous condition's duration are insufficient.

The decision also clarifies that an employee's presence in an area or a general duty to inspect does not create a presumption of knowledge. Courts require affirmative evidence showing that a condition was visible, had been present long enough to be discovered through ordinary diligence, or was recurrent enough to infer constructive notice.

For defense counsel, *Duran* serves as a roadmap for crafting dispositive motions in similar cases. By emphasizing gaps in the plaintiff's evidence regarding the hazard's duration, businesses can successfully argue against liability. Florida courts are likely to continue scrutinizing slip-and-fall claims under this framework, reaffirming the need for concrete evidence.

Key Takeaways for Insurance Professionals

- **Strict Notice Requirement:** Plaintiffs must show that a business knew or should have known about a hazard before liability attaches.
- **Speculation Is Insufficient:** Assumptions about how long a spill was present will not survive summary judgment.
- **The 'PLUS' Factor Matters:** Plaintiffs need more than just the presence of a substance—they must show how long it was there or why it should have been discovered.
- **Business Protections:** Routine inspections, clear maintenance records, and employee training significantly strengthen defense strategies.
- **Legal Precedent:** Plaintiffs must provide tangible evidence that a hazardous condition existed long enough for its discovery—an employee's presence alone does not establish liability. ▶

Conclusion

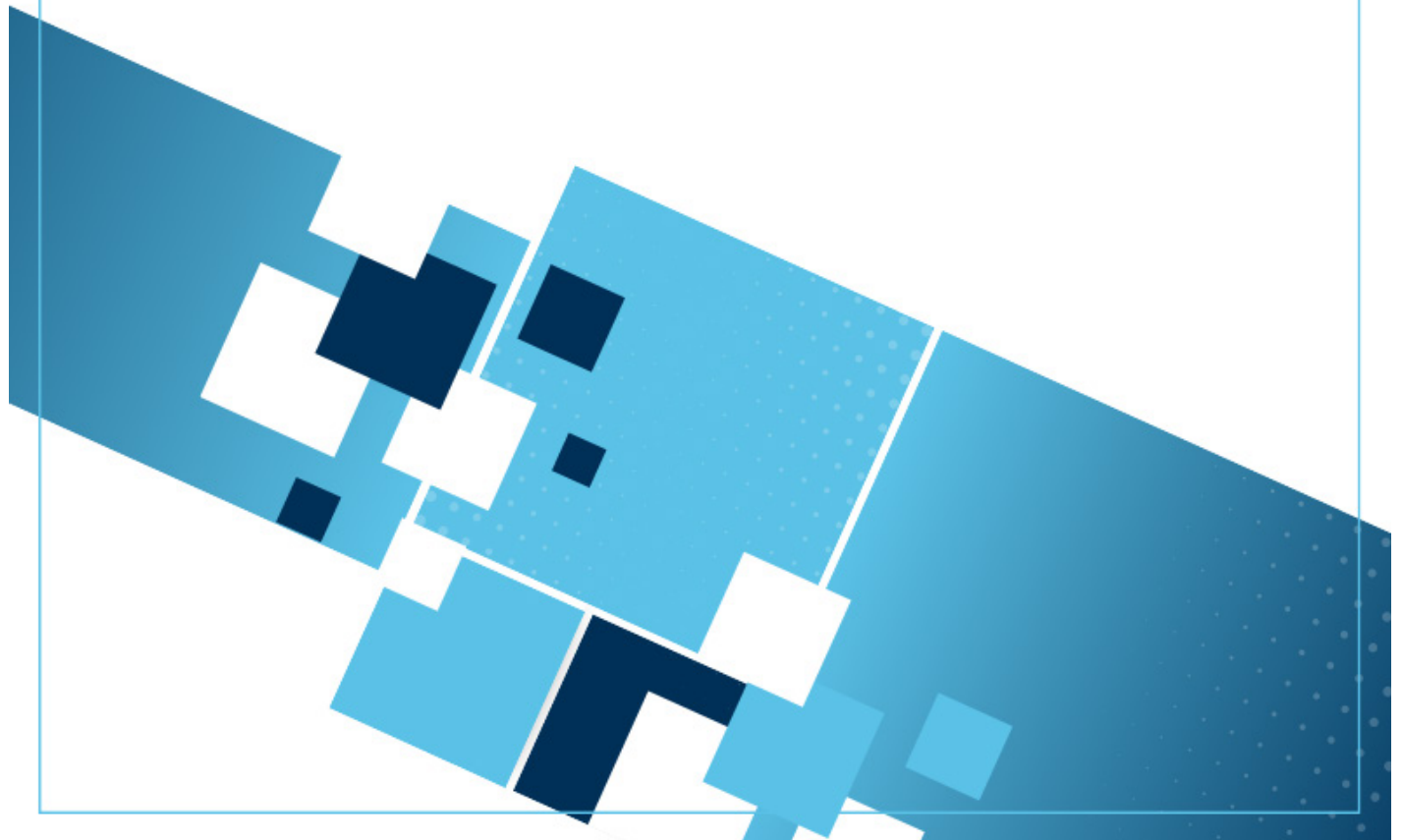
The ruling in *Duran v. Crab Shack Acquisition, FL, LLC*, underscores the necessity for plaintiffs to establish actual or constructive knowledge of a hazard to survive summary judgment. Florida courts continue to require strong evidence rather than mere speculation. The PLUS factor is key—without

evidence beyond the presence of a substance, plaintiffs cannot proceed. For business owners and defense practitioners, *Duran* is a critical case in evaluating and defending slip-and-fall claims under Florida law. ♦

**Matthew is a member of our Casualty Department and works in our Orlando, FL office.*

Save the date for our Workers' Compensation Seminar on October 23, 2025.

Stay tuned for more details.





Be Specific to Avoid Waiver of Subrogation Rights

Jessica W. Gordon, Esq.

Key Points:

- New Jersey Workers' Compensation Statute includes provisions for employers to seek subrogation in claims involving third-party recoveries by employees.
- The employer is entitled to reimbursement for up to two-thirds of medical expenses and compensation payments.
- To fully maximize subrogation rights, it is important to perfect liens in order to prevent unintended waivers of future lien rights.

The New Jersey Workers' Compensation Statute includes provisions for employers to seek subrogation in claims involving third-party recoveries by employees. Employers or carriers often fail to take full advantage of the subrogation rights and leave money behind. To fully maximize subrogation rights, it is important to perfect liens in order to prevent unintended waivers of future lien rights.

Section 40 of the Statute states that when a third person is liable for the injury or death of an employee and the employee obtains a third-party recovery, the employer is released from liability. This release, however, is limited to the extent of recovery, and the employer is entitled to reimbursement of medical expenses and compensation payments.

The amount of any lien recovery depends on benefits paid and the third-party recovery amount. The maximum lien that can be asserted is two-thirds of the total third-party recovery, minus costs. This calculation presumes that a one-third counsel fee is paid on a third-party litigation, leaving the two-thirds net as payment to the petitioner for injuries. An employer/carrier is entitled to obtain reimbursement for up to two-thirds of the medical expenses and

compensation benefits, including permanent disability, paid on a claim.

When the third-party recovery is minimal, liens will often be exhausted by medical expenses and temporary disability benefits paid. However, where large third-party recoveries are received, lien credits may apply to permanent disability benefits or future benefits on reopener applications. These future lien credits can easily be unintentionally waived.

An employee's counsel will often request a compromise of a lien to effectuate settlement of the third-party claim. When the workers' compensation claim remains open with only medical and temporary disability benefits paid at the time of the third-party recovery, a compromise of the lien could potentially waive any right to assert a lien on permanent disability benefits paid or future benefits. Unless specified as part of a compromise, that no waiver of future lien rights is agreed upon, the employee's counsel will seek to deem the compromise as a "full satisfaction of the lien" and deny future reimbursement.

There is no obligation to agree to compromise any subrogation. If the chance of a third-party recovery ►

is low, due to weak issues of liability or the amount of an anticipated recovery is small, a compromise may be practical. A compromise could assist to effectuate the third-party recovery and guarantee at least some reimbursement of benefits paid rather than risk no recovery should the third-party litigation be unsuccessful. In cases of anticipated large third-party recoveries, a compromise may have no benefit to a carrier.

If the parties agree to a compromise, it is imperative to specify what is included in the compromise. For example, in a recent workers' compensation opinion, lack of specificity led to a waiver of future subrogation rights.

In that matter, the employee received workers' compensation benefits and then initiated a third-party suit. The third-party resolution occurred before an award of permanent disability was entered. The third-party resolution included a compromise of workers' compensation benefits paid to date. The carrier forwarded correspondence to the employee's counsel confirming the agreement to compromise the lien to date; however, the letter was silent as to any future lien rights. The employee's attorney issued payment of the lien to the carrier and attached correspondence stating that the check issued was in "full and final payment of the outstanding workers' compensation lien." The carrier cashed the check without dispute as to the notation that payment was "full and final."

The judge of compensation opined that there is an established practice in cases where the total value of the workers' compensation lien exceeds the third-party recovery to agree to an equal division of the third-party recovery among the employee, employee's counsel, and employer/workers' compensation carrier. Such an agreement is known as a "one-third, one-third, one-third" settlement. The judge held that the lack of specific reservation of future subrogation rights and the acceptance of "full and final" payment constituted a waiver of future lien rights. An appeal has been initiated by the employer.

While a "one-third, one-third, one-third" split is often the preferred compromise of employees' counsel, there is no established practice to require agreement with same. There is no legal obligation to agree to any compromise, much less this proposal. Lien compromises should always be assessed on an individual basis to determine what makes the most practical decision for that claim. An agreement to the "one-third" compromise should only be done in cases where it is the most beneficial for that claim.

When the parties agree to a compromise, correspondence to all counsel that the compromise only pertains to the lien amount to date is imperative. The correspondence should also expressly specify that the compromise is NOT a waiver of future subrogation rights. This will prevent any future dispute as to the reimbursement as the result of any additional benefits paid.

It is also important to ask for the third-party counsel fee agreement or the third-party disbursement documentation to ensure that proper calculation of future lien credits can be made at the necessary time. When the future subrogation rights are preserved, reimbursement of future benefits paid, including any permanent disability award or additional medical or temporary disability benefits, can be received. In cases where employees obtain a permanent disability award, a large future lien credit that has been properly preserved can act as a deterrent to reopen applications. If additional medical benefits are sought as part of the reopener, the petitioner will be responsible for payment of two-thirds of the benefits from the proceeds of their third-party recovery until the full lien is exhausted. This can be a powerful tool to mitigate future litigation costs. Special consideration should be taken in cases of large third-party recoveries to ensure the preservation of the future lien.

Any questions as to whether a compromise is beneficial should be addressed with counsel, who can assist in determining what is in the best interest of the employer/carrier. In addition, any agreement to ►

compromise should be reviewed by counsel to confirm preservation of all rights to avoid missed opportunities for future reimbursement. Remember, specificity is best to prevent unanticipated waivers. ♦

**Jessica is a member of our Workers' Compensation Department and works in our Mount Laurel, NJ office.*



Marshall Dennehey Earns Prestigious Chambers USA Rankings for Product Liability & Appellate Law



Vlada Tasich and the firm's Pennsylvania Product Liability Practice Group Earn Band Two Honors



John J. Hare is Recognized as Band One in Appellate Law



Marshall Dennehey, P.C.



Proposed Expert's Qualification to Proffer Standard of Care Opinions Must Be Evaluated Under the Entirety of Section 512 of the MCARE Act

Tyler R. Price, Esq.

Key Points:

- Standard of Care: Patient assessment and discussion of procedures to be performed to evaluate the patient prior to surgery fall under the purview of the standard of care, not informed consent.
- Expert Qualifications: Proper analysis of an expert's qualifications encompasses more than the expert's board certification, as directed by the MCARE Act.
- Superior Court remanded to trial court with instructions to revisit its decision regarding the gastroenterologist's qualifications to offer standard of care opinions against a colorectal surgeon.

An alleged failure to assess a patient via non-surgical interventions prior to performing a surgical procedure may result in a breach of the standard of care. A recent trial court opinion addressed the proper analysis of an expert's qualification to proffer standard of care opinions as instructed by the MCARE Act. The Pennsylvania Superior Court, in *McAleer v. Geisinger Medical Center*, 332 A.3d 38 (Pa. Super. 2025), reversed and remanded the trial court's decision to grant summary judgment in favor of the health care defendants. The Superior Court directed the lower court to revisit the standard of care expert's qualifications to determine if he is qualified to offer such testimony.

Facts

A colonoscopy revealed the patient had a large polyp that was unable to be completely removed due to its size and the patient's anatomy. The

patient was referred by the primary care physician to a colorectal surgeon for evaluation of either a possible partial colectomy or a repeat colonoscopy under full anesthesia.

At the initial evaluation with the colorectal surgeon, the surgeon discussed laparoscopic, possible open right hemicolectomy, possible ostomy, and the risks of each procedure. Of note, these were all surgical interventions, and the assessment prior to surgery—a colonoscopy—was never discussed. The colorectal surgeon performed a laparoscopic right hemicolectomy, and the patient was discharged two days later.

Six days after surgery, the patient presented to the emergency department with abdominal complaints. Post-surgical complications, including a blood clot and tissue death, resulted in the patient undergoing several surgical procedures to remove the damaged tissue. ►

The patient filed a lawsuit alleging negligence and claiming the colorectal surgeon recommended and performed a procedure that was counter-indicated for the patient's condition.

Standard of Care Includes Proper Assessment and Discussions of Assessment Procedures Prior to Surgery

In order to set forth a cause of action in negligence, a plaintiff is required to plead sufficient facts which would establish that: (1) the doctor owed them a duty of care; (2) the doctor breached that duty; (3) the patient was injured; and (4) the injuries were proximately caused by the doctor's breach of duty.

Here, the patient claimed the colorectal surgeon recommended and performed the wrong procedure without properly assessing the patient prior to performing the surgery to remove the polyp. The patient's experts opined: the colorectal surgeon breached the standard of care by failing to properly assess the patient; had the colorectal surgeon properly assessed the patient, then a colonoscopy would have been performed; and, consequently, the patient would not have suffered post-surgical complications. Further, the court noted there was no evidence that the patient would have refused the colonoscopy under general anesthesia or an endoscopic procedure. Both procedures are non-surgical assessments performed prior to surgery.

The court concluded that the patient was not given any option within the standard of care. Thus, the patient did not have the opportunity to even choose or reject an assessment option within the standard of care.

Qualifications to Offer Expert Testimony Requires Analysis Beyond Proposed Expert's Board Certification

Through discovery, the patient submitted the expert report of a physician who was board certified in internal medicine and gastroenterology. The

gastroenterologist concluded that the colorectal surgeon failed to fully assess the patient prior to surgical intervention, violating the standard of care. The trial court disqualified the gastroenterologist from offering standard of care opinions of a colorectal surgeon based solely on his curriculum vitae and for failing to practice in the same subspecialty as the colorectal surgeon. The appellate court disagreed.

The Superior Court recognized that the trial court failed to consider expert qualifications under the MCARE Act as a whole. Specifically, the trial court made no determination of whether the gastroenterologist and the colorectal surgeon had substantially similar standards of care for the specific care at issue. Furthermore, the trial court made no determination as to whether the gastroenterologist possessed sufficient training, experience, and knowledge to provide testimony as a result of his involvement in a related field of medicine.

In reversing the judgment and remanding for a new trial, the Superior Court held that it was improper to disqualify the gastroenterologist's opinions based solely on his certification and curriculum vitae.

Implications and Conclusions

The Superior Court's decision in this case highlights the critical balance between the standard of care at every step in patient care and when experts may be qualified to offer opinions as to each standard of care. This case highlights the importance of physicians consistently advocating for their patients throughout every stage of care and ensuring that all alternatives to surgical intervention are thoroughly explained, in alignment with the appropriate standard of care.

The Superior Court's ruling emphasizes the need to analyze an expert's qualifications to render standard of care opinion beyond the same specialty analysis and said expert's curriculum vitae. The court's decision reminds us that we must expand our analysis of an expert's qualifications to consider the MCARE Act entirely, including whether a proposed expert possesses sufficient training, experience, and ►

knowledge to provide testimony as a result of involvement in a related field of medicine.

This case was remanded to the trial court with instructions to revisit its decision regarding the

gastroenterologist's qualifications to offer standard of care opinions against a colorectal surgeon. ♦

**Tyler is a member of our Health Care Department and works in our Philadelphia, PA office.*



Marshall Dennehey Earns Two Litigation Department of the Year Honors at the 2025 Pennsylvania Legal Awards

APPELLATE LAW
PROFESSIONAL LIABILITY

The Legal Intelligencer | Law.com



On App: Good to Go! Off App: No Bueno! How Rideshare Companies Are Defeating Vicarious Liability in Florida

Sheri-Lynn C. Corey-Forte, Esq.

Key Points:

- Innovative technologies being utilized by rideshare companies are raising their chances of defeating vicarious liability claims in Florida and throughout the United States.
- In *Campo v. Uber Technologies, Inc.*, 2025 WL 15388, Florida's Third District Court of Appeals affirmed a motion for summary judgment in favor of Uber after the court was presented with evidence that the former Uber driver was "off app" at the time of the accident.

Florida, along with many other jurisdictions throughout the country, has seen a dramatic uptick in the amount of litigation involving rideshare and food delivery companies, such as Uber, Lyft, and DoorDash. While the increasing number of rideshare and food delivery drivers on the roads has certainly contributed to the dramatic surge in litigation, plaintiff firms have also become increasingly daring in the nature of their allegations against these companies. However, the innovative technologies being utilized by these gig economy companies are raising their chances of defeating vicarious liability claims in Florida and throughout the United States. A recent Florida case demonstrates exactly this scenario.

In *Campo v. Uber Technologies, Inc.*, 2025 WL 15388 (Fla. 3d DCA Jan. 2, 2025), Florida's Third District Court of Appeals affirmed a motion for summary judgment in favor of Uber after the court was presented with evidence that the former Uber driver was "off app" at the time of the accident. The plaintiff, as personal representative of the estate of Arlevys Molina, brought claims against Uber and Orlando

Baez Castillo, a former Uber driver, in a wrongful death action after a tragic accident in Molina's driveway. The plaintiff argued that Uber was vicariously liable for Castillo's negligent acts as Castillo was acting within the course and scope of his purported employment with Uber at the time of the accident.

Uber moved for summary judgment based on the fact that Castillo was not logged in to the Uber application at the time of the accident and, in fact, had not logged on to the Uber application for nearly five months. In support of its summary judgment, Uber attached internal data records, amongst other things, showing that Castillo was not logged in to the application at the time of the accident nor had he logged in to the Uber application in months. Castillo also attested several times that he was logged out of the application and driving his personal car when the accident occurred.

After reviewing the evidence, the trial court granted summary judgment in Uber's favor, finding that the record evidence demonstrated that Castillo was not ►

logged in to the Uber application at the time of the accident. Thus, it held that Uber could not be held liable for conduct outside the scope of any alleged employment because “[w]hen a driver goes offline, it is analogous to a traditional worker ‘clocking out’ or being ‘off the clock.’”

The plaintiff appealed the trial court’s grant of summary judgment to Uber and argued that a genuine dispute of material fact existed as to whether Castillo was logged in to the Uber application on the day of the accident. In support of her argument, the plaintiff argued that Castillo had two cell phones in his vehicle at the time of the accident and could have been using the Uber application on one of the two phones. The plaintiff, however, offered no evidence and nothing more than speculation for this assertion.

Despite being presented with this speculative argument, the appellate court ultimately agreed that the trial

court had correctly considered all of the record evidence in the case and had correctly entered summary judgment in favor of Uber. The appellate court reiterated that all of the record evidence conclusively showed that Castillo was logged off of the Uber application for months and was driving his own vehicle at the time of the accident. As a result, Uber could not be held vicariously liable for Castillo’s negligent actions.

The *Campo* case demonstrates that obtaining and utilizing the innovative technology available to companies in the gig economy space can be vital to the effective and early resolution of these cases. In rideshare cases, do not forget to inquire as to whether the driver was “off app” at the time of the accident. ♦

**Sheri-Lynn is a member of our Casualty Department and works in our Fort Lauderdale, FL office.*



Bill Gianaris

Named **Managing Attorney**
of the Firm’s Westchester County, NY Office



A Costly Mistake

Michael R. Duffy, Esq.

Key Points:

- A workers' compensation judge is **not required** to correct a mistakenly-issued Notice of Compensation Payable, but they **may** correct a mistakenly-issued Notice of Compensation Payable.
- The court would not overturn a workers' compensation judge's refusal to correct a mistakenly-issued Notice of Compensation Payable.
- The decision to correct a mistakenly-issued Bureau document is in the workers' compensation judge's discretion.

The Commonwealth Court of Pennsylvania recently issued an opinion finding that, although a workers' compensation judge **may** correct a mistakenly-issued Notice of Compensation Payable, it is within the judge's discretion and is **not required**.

In *City of Philadelphia and PMA Management Corp. v. John Bell (WCAB)*, 2025 WL 980776 (Pa. Cmwlth. April 2, 2025), the claims handler incorrectly issued a "partial denial," or a Medical-Only Notice of Compensation Payable (Medical-Only NCP), after the determination was made to issue a denial. After working 17 years as a firefighter for the City, the claimant was diagnosed with colon cancer. He requested that the City recognize his cancer as job-related and pay workers' compensation benefits. After issuing the Medical-Only NCP, the employer filed a review petition, alleging it mistakenly issued the Medical-Only NCP when it intended to issue a Notice of Compensation Denial.

The employer/carrier presented an affidavit from the City's Risk Management and Employee Disability Manager in which she noted that, after an investigation, it was recommended that PMA deny the claimant's claim. The employer/carrier also presented an affidavit from the claims handler which noted that she had begun working for PMA on June 6, 2022, and processing workers' compensation claims on June 27, 2022. She received the claimant's claim on September 12, 2022. She contacted the aforementioned risk manager and was advised to issue a denial because there was no evidence of a causal relationship between the claimant's condition and his employment as a firefighter. She understood the Claims Center's software allowed her compensability choices of: fully accept, temporarily accept, undetermined, partially deny, and fully deny. The claims handler did not understand the Electronic Data Interchange (EDI) system's process or the automatic generation of compensability-▶

establishing documents through these choices. She chose to “partially deny” the claim because she believed she was agreeing to pay for only the medical appointments to any posted panel physician. She did not understand that the form generated would accept liability on the claim. She did not intend to issue a Medical-Only NCP, although that is what clicking “partially deny” generated. Emails exchanged between the claims handler and the risk manager established the intent to deny the claim.

The workers’ compensation judge found both the adjuster and the claims handler credible and accepted that the adjuster made a mistake and did not intend to generate a Medical-Only NCP. However, the judge was not willing to set aside the Medical-Only NCP. The judge noted that EDI has been around for approximately 10 years, the adjuster should have received better training, and she should have sought advice before taking the action. The judge stated that allowing Bureau documents to be set aside when mistakes are made is not a precedent she was going to set. The judge also found this was distinguishable from cases where information has been made available prior to the completion of an investigation where the claim has already been accepted. The Workers’ Compensation Appeal Board affirmed.

On appeal, the Commonwealth Court noted that the judge and the Board incorrectly relied on *Beissel* and *Barna*, which addressed changing a Bureau document after information was gained prior to the completion of an investigation. The court noted that this case was distinguishable because it was the insurer’s intention at the onset to deny the claim after it conducted its investigation. The issuance of the Medical-Only NCP was a mistake. The court looked at whether Section 413(a) of the Act **requires** a judge to set aside a mistakenly issued NCP.

The court looked at the language in Section 413(a), which it determined was unambiguous and permissive in nature. Section 413(a) states: “a workers’ compensation judge may, at any time, review and modify or set aside a notice of compensation payable...if it be proved that such notice of compensation payable...was in any material respect incorrect.” The court analyzed whether “may” could mean “shall” in some circumstances and determined that because “may” and “shall” are both used throughout the Act, and are not used interchangeably, “may” is permissive rather than mandatory. Thus, the judge had the discretion to decide whether to set aside the mistakenly issued Medical-Only NCP, which the judge elected not to do, even after she had found it was incorrectly issued. The court would not overturn that decision.

This decision reinforces the possibility of reversing an incorrectly and mistakenly-issued Bureau document by way of a review petition. However, the decision also reinforces the judge’s discretion to make that correction. As the judge noted in this case, most judges are hesitant to change a Medical-Only NCP or an NCP to a denial even if the mistake was clearly established. Therefore, the claims handler or whomever issues the EDI transaction should take the proper precautions and exercise due diligence before issuing any Bureau document. More often than not, the judge will not correct a Bureau form. Proper training and safeguards should be exercised prior to issuing a Bureau document to avoid these issues. ♦

**Michael is a member of our Workers’ Compensation Department and works in our King of Prussia, PA office.*



Tsunami or Business as Usual: What Does the New Motorcycle Lemon Law Hold for Pennsylvania?

Christian A. Weimann, Esq. and Dylan J. Smith, Esq.

Key Points:

- Effective May 18, 2025, purchasers of new motorcycles in Pennsylvania may bring Lemon Law suits.
- A nonconformity in a newly-purchased motorcycle must manifest “within a period of one year following the actual delivery of the motorcycle to the purchaser or during the term of the warranty, whichever may occur first.”
- The applicable Lemon Law period for newly-purchased motorcycles in Pennsylvania will typically be one year.

After multiple legislative attempts and years of effort, effective May 18, 2025, purchasers of new motorcycles in Pennsylvania may bring Lemon Law suits. Most recently reintroduced in the Pennsylvania State Senate by Republican State Senator Michele Brooks in January 2023, Pennsylvania’s Lemon Law now provides similar consumer protections to purchasers of new motorcycles in Pennsylvania as those afforded to purchasers of new cars. Receiving bipartisan support, the addition of motorcycles to Pennsylvania’s Lemon Law was signed into law by Governor Josh Shapiro in November 2024.

Pennsylvania is far from the first state to allow buyers of new motorcycles to bring Lemon Law suits. Pennsylvania now joins Arizona, Hawaii, Kansas, Maine, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin,

and Wyoming as states that permit the filing of motorcycle Lemon Law suits.

State Lemon Laws throughout the country, including Pennsylvania, are intended to supplement federal consumer protection remedies—such as the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act and the Uniform Commercial Code—and to provide stronger protections for consumers. Under these state laws, consumers are given an avenue in civil court to enforce warranties issued by manufacturers of new motor vehicles.

In Pennsylvania, manufacturers have a duty to “repair or correct, at no cost to the purchaser, a nonconformity which substantially impairs the use, value or safety” of a new motor vehicle purchased for personal, family, or household use. 73 Pa.C.S. § 1954(a). If there is a nonconformity in a new motor vehicle within the first 12 months or 12,000 miles of ownership, whichever comes first, and the ►

manufacturer fails to repair the nonconformity after more than three repair attempts, or if the vehicle is out of service by reason of any nonconformity for a cumulative total of 30 or more days, then the vehicle is a presumptive lemon. 75 Pa.C.S. § 1956. Under Pennsylvania's Lemon Law, a purchaser of a new motor vehicle that is a presumptive lemon can demand a repurchase of the vehicle by the manufacturer or have the vehicle swapped with a vehicle of comparable value. 75 Pa.C.S. § 1955.

As of May 18, 2025, purchasers of new motorcycles in Pennsylvania for personal, family, or household use can now make the same demand if there is a nonconformity in the newly-purchased motorcycle. A distinct difference, however, is that the nonconformity in the motorcycle must manifest "within a period of one year following the actual delivery of the motorcycle to the purchaser or during the term of the warranty, whichever may occur first." 75 Pa.C.S. § 1954. As most motorcycle manufacturers provide limited warranties for newly purchased motorcycles ranging from one to three years, the applicable Lemon Law period for newly purchased motorcycles in Pennsylvania will typically be one year.

So what does this change to Pennsylvania's Lemon Law mean for motorcycle manufacturers? Will motorcycle manufacturers be swept up in a tsunami of Pennsylvania Lemon Law suits now that the Commonwealth's Lemon Law covers motorcycles? While it is too soon to say for sure, the answer is likely no.

Recent motorcycle registration data is instructive. In 2021, there were 8,575,569 motorcycles registered in the United States, but only 18,226 new motorcycles were purchased that same year, or 0.2% of all registered motorcycles. Eric Teoh, *Motorcycles Registered in the United States, 2002–2021*, 7 (Insurance Institute for Highway Safety) (March 2021). By way of stark contrast, there were 15,016,030 new cars and light trucks sold and leased in the United States in 2021. *New and Used Passenger Car and Light Truck Sales and Leases*, Bureau

of Transportation Statistics, <https://www.bts.gov/content/new-and-used-passenger-car-sales-and-leases-thousands-vehicles>.

While the addition of motorcycles to Pennsylvania's Lemon Law is worth highlighting and keeping an eye on, at this juncture, motorcycle manufacturers need not panic. Rather than lawsuits, perhaps motorcycle manufacturers should really be worried that they are not selling enough new motorcycles. ♦

**Christian and Dylan are members of our Casualty Department and work in our Philadelphia, PA office.*



Getting the Gist: The Evolution and Application of Pennsylvania's Gist of the Action Doctrine in Legal Malpractice Actions

James D. Greco, Esq.

Key Points:

- While legal malpractice actions can be brought as a negligence or contract claim, the gist of the action doctrine serves to limit those instances.
- Application of the doctrine can be used to prevent shopping for favorable limitations periods.

For litigators defending colleagues in legal malpractice actions, the prospect of being faced with causes of action for negligence and breach of contract is not out of the ordinary. Most often, legal malpractice suits involve claims for negligence and breach of contract, and it is well settled that such actions may be brought in either form. *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 570 (Pa. Super. 2007). However, simply because they “may” be brought in either form does not *ipso-facto* mean they should. That is where the gist of the action doctrine comes into play, preventing plaintiffs from recasting torts claims as breach of contract and vice versa. The application of the doctrine can be a helpful tool in malpractice litigation, often used as an offensive tactic, preventing plaintiffs from shopping for favorable limitations periods.

The gist of the action doctrine has evolved significantly since the early 1990s. Surfacing in *Bash v. Bell Telephone Company of Pennsylvania*, 601

A.2d 825 (Pa. Super. 1992), the court analyzed a plaintiff's claims that sought damages for emotional distress, mental anguish, embarrassment, and depression for a defendant's alleged failure to perform a contract duty. The pleading of tort damages as a result of an alleged failure to comply with an advertising contract found Pennsylvania's Superior Court looking to the federal courts for an analysis of the difference between a tort and a contract. Following the guidance of the federal bench, the *Bash* court noted that to be construed as a tort, the wrong ascribed must be the gist of the action, the contract being collateral. *Bash*, 601 A.2d at 829. It was based on this language that the court opined that the obligations at issue were a matter of contract law, not tort, resulting in dismissal of the plaintiff's negligence claim.

The doctrine later evolved in 2002, with the Superior Court's decision in *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10, 15 (Pa. Super. 2002), ►

where the court first analyzed the doctrine's application to claims for fraud. Recognizing the various, yet similar, ways courts throughout the Commonwealth applied the doctrine, the *eToll* court opined that their analysis hinged on whether the alleged fraud concerned the performance of contractual duties.

Analyzing allegations that the appellant engaged in fraudulent schemes in the course of the parties' contractual relationship, the *eToll* court noted that the alleged acts arose in the course of the parties' contractual relationship and that the duties at issue were grounded in that contract. Thus, the court concluded the claims were "inextricably intertwined," or that the gist of the action lay in contract. Again, the doctrine evolved. What started as a consideration as to the source of the duty in question turned to whether the actions in question were so tangential, or slightly connected, to the parties' contractual relationship.

After *eToll*, varying approaches were taken with respect to the doctrine's application. *Bash*'s approach being used in some matters, while the "inextricably intertwined" approach of *eToll* being used in others. The Commonwealth Court, too, had its own analysis, using a "misfeasance vs. nonfeasance" approach. Where there was "misfeasance," being the breach of a duty imposed by the law of social policy, the gist of the action sounded in tort. For "nonfeasance," or breach of a duty under the terms of the contract, the action sounded in contract.

This mixed-bag approach continued until the Pennsylvania's Supreme Court decision in *Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa. 2014), where the court recognized that, at the core of the doctrine, the critical determinative factor is the duty that is alleged to have been breached. As the Supreme Court opined:

... the substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by

the plaintiff of a claim as being in tort, e.g., for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

Bruno, 106 A.3d at 68 (2014).

Having evolved from *Bash* to *Bruno*, application of the doctrine to a legal malpractice action was more-recently analyzed in *Outerlimits Techs., LLC v. O'Connor*, 311 A.3d 569 (Pa. Super. 2023), where the plaintiff filed a legal malpractice action based solely in breach of contract. In its opinion, the trial court noted:

[defendant's] shortcomings constitute a failure to exercise the requisite skill and knowledge that is expected of all attorneys. Therefore, while Appellee failed to adhere to the general standard of care lawyers owe to every client, Appellee did not breach a specific contractual provision or promise. In line with Pennsylvania case law, an action in assumpsit simply was not available to Appellant. As such, any genuine issue of fact as to whether an implied contract existed is immaterial because, regardless, Appellee failed to adhere to a generalized standard of care.

Outerlimits, 311 A.3d 569 (Pa. Super. Ct. 2023). The appellate court agreed, relying on *Bruno* and noting the contract in question was merely a vehicle creating the relationship between the parties, during which counsel allegedly committed malpractice, as opposed to the breach of a duty specifically created by the contract. ►

This decision further supports the position that, while legal malpractice actions **can** sound in both tort and contract, it is not always the case. While attorneys do owe a general standard of care to their clients, this does not make every malpractice action sound in contract simply based on the relationship between the parties. *Bruno* continues to dictate that the key to the analysis in all matters is the source of the duty allegedly breached. In a profession such as the law, where relationships are defined by both written and oral contracts, such a differentiation is key. In situations where both claims are brought, or even actions where one such claim is brought improperly, preliminary objections or dispositive motions raising the doctrine can help limit a client's exposure.

After years of evolution and application, we would all like to think that we are finally getting the gist. But, uncertainty lurks in the form of the pending Superior Court decision in *Poteat v. Asteak*, a legal malpractice action involving a breach of a contract allegedly implicitly imposing a duty to provide services

consistent with the profession at large. On appeal in *Poteat*, the Superior Court disagreed with the lower court's use of the gist of action doctrine to re-characterize the claim as one sounding in tort. *Id.*, 2024 WL 1202926 (Pa. Super. Mar. 21, 2024). Undoubtedly signaling the far-reaching implications of its decision, the Superior Court's opinion was subsequently withdrawn and the matter submitted for reargument *en banc*. See *Poteat*, 2024 WL 2813104 (Pa. Super. June 3, 2024).

And now, we wait. The *Poteat* decision will be yet another event in the continuing evolution of the gist of the action doctrine. Without question, it will have a significant impact on the doctrine's application in legal malpractice actions, potentially requiring further instruction from the Supreme Court to ensure we all are truly getting the gist. ♦

**Jim is a member of our Professional Liability Department and works in our Scranton, PA office.*

Congratulations to our 2025 Pennsylvania Super Lawyers & Rising Stars!

16 Super Lawyers | **17** Rising Stars

Super Lawyers®



The Pay Transparency Act Makes Its Splash this Summer in New Jersey

Kimberlin L. Ruiz, Esq.

Key Points:

- June 1, 2025, the Pay Transparency Act takes effect in the state of New Jersey.
- Under the Act, employers are required to include the salary and/or hourly wage range being considered for a vacant position.
- Employers must also disclose in job postings a general description of the benefits and other compensation programs to which the employee would be eligible.
- Failure to comply can result in monetary fines for each violation.

New Jersey has officially joined a number of other states in adopting a pay transparency law, and the time has officially come for the Pay Transparency Act to take effect in New Jersey. As you may recall from last year, on November 18, 2024, Governor Phil Murphy signed the Pay Transparency Act into legislation (Bill S2310/A4151), which largely affects employers both within New Jersey or who do business in New Jersey.

The Act, which officially becomes effective on June 1, 2025, requires employers to include as a part of a posting for a job position, the hourly wage or salary range being considered for the position. Employers will also now be required to include in any job posting a general description of the benefits and other compensation programs for which the employee would be eligible. The Act applies to jobs that are both internal and external, as well as positions available through promotion or transfer opportunities. Employers are required to “make reasonable efforts to announce,

post, or otherwise make known opportunities for promotion,” to all current employees in the affected department(s) before a promotion decision is made.

The Act applies to an employer in any form of a business that has ten or more employees for a period of more than 20 calendar weeks per year. Additionally, the Act applies to any businesses that conduct business in New Jersey, employ individuals within New Jersey, or even accept employment applications from individuals within New Jersey. It expands to explicitly include employment agencies and/or other third-party agencies, such as referral agencies, as employers who are required to abide by the transparency laws.

As of June 1, 2025, if a business fails to comply with these transparency requirements, the Act includes penalties for any violations. Such penalties include fines of \$300.00 for the first violation and \$600.00 per subsequent violation. Under the Act, a ►

particular job opportunity is deemed one violation, regardless of the number of platforms the position may be advertised across or number of individual postings within the post. Any and all fines will be received by the the Commission of Labor and Workforce Development.

While the Act requires that salary and hourly wage ranges be disclosed, these ranges should be the baseline for what an employee may receive as compensation in that position. Of course, if the employer decides to offer an applicant higher compensation than what was disclosed on the job posting, they are permitted to do so at the time of hire.

There are a few exceptions, which are laid out by the Act, such as how these requirements apply to promotions. The Act specifically defines a promotion as “a change in job title and an increase in compensation.” In circumstances where a promotion for a current employee is awarded based upon performance and/or years of experience, there is no notification requirement to post the position. Additionally, there is an exception, although narrow, that allows an

employer to promote an employee on an “emergent basis due to an unforeseen event.” However, at this time, no guidance is provided as to what qualifies as an “emergent basis” or an “unforeseen event,” which leaves room for interpretation.

It is important for employers to recognize that, while the Pay Transparency Act does not create a private cause of action for any employee or individuals who may apply for a position, there is still the possibility an individual may bring a cause of action under the Conscientious Employee Protection Act (CEPA) if they report their employer’s failure to comply with Act and afterwards feel they have been a victim of retaliation by the employer for their reporting.

Employers should be mindful of this law in New Jersey, as well as other states that may have adopted similar legislation or already have similar legislation in effect. Pay transparency is now the rule in New Jersey. ♦

**Kimberlin is a member of our Professional Liability Department and works in our Roseland, NJ office.*

Kyle McGee

Joins Marshall Dennehey as
a Shareholder in our Pittsburgh office





Driving the Workday: The Third Circuit Clarifies Compensable Travel Time Under the FLSA

Michael C. Burke, Esq.

Key Points:

- Travel during the workday between clients' homes is compensable under the Fair Labor Standards Act.
- The key is whether the employee is considered on-duty at the time of travel—that is, whether the employee can use the time effectively for personal purposes.
- Travel to a job site following an off-duty period is only compensable if “integral and indispensable” to the employee's duties.
- The Third Circuit's ruling is sure to impact any industry with mobile employees engaged in providing in-home services.

As the demand for in-home care grows, so do questions about how federal labor laws apply to the home health care workforce. In *Sec'y U.S. Dep't. of Labor v. Nursing Home Care Management, Inc.*, 128 F.4th 146 (3d Cir. 2025), the Third Circuit offered key guidance on the compensability of the travel time associated with the provision of at-home health care services.

In the underlying litigation, the Department of Labor sued a home health care service provider, Nursing Home Care Management, Inc. d/b/a Prestige Home Care Agency (Prestige), in the United States District Court for the Eastern District of Pennsylvania, asserting various violations of the federal Fair Labor Standards Act (FLSA), a federal law regulating how employers compensate their employees for work they perform. Among other things, the FLSA codifies the federal minimum wage, right to overtime pay, and various record keeping requirements imposed upon employers relating to those obligations.

In the instant case, the Department alleged, in relevant part, that Prestige failed to pay its Home Health Aides (HHAs) for time spent traveling between client homes. Specifically, it alleged that Prestige: (1) did not compensate HHAs for travel time from one client's home to another during the workday; and (2) did not compensate HHAs for travel time to and from clients' homes before and after an off-duty period.

At the conclusion of discovery, both parties moved for summary judgment. In support of its claim regarding travel time, the Department relied on the “continuous workday doctrine,” which states that “time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked.” 29 C.F.R. § 785.38. By contrast, Prestige argued that travel time constitutes off-duty time under the federal Portal-to-Portal Act of 1947, which provides that an employer need not compensate an employee for “. . . traveling to and from the actual place of performance ►

of the principal activity . . . which such employee is employed to perform.” 29 U.S.C. § 254.

The District Court granted summary judgment to the Department on its FLSA claims, concluding that Prestige’s practices amounted to willful violations of the FLSA. To resolve the travel time issue, the court re-focused the question. It noted that in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005), the United States Supreme Court held that “any activity that is ‘integral and indispensable’ to a principal activity is itself a principal activity under § 4(a) of the Portal-to-Portal Act.” Thus, the court concluded that travel is a necessary, integral, and indispensable part of a HHA’s principal activities as, were an HHA not to travel, it would be impossible to provide Prestige’s services in its clients’ homes. Thereafter, Prestige appealed the decision to the Third Circuit Court of Appeals, which affirmed the judgment.

In its analysis, the Court of Appeals took a slightly different approach, centering the discussion of travel time around two key questions—first, whether travel is compensable when the employee lacks the time to go off duty; and second, if the employee has the time to go off duty, must he still be compensated for the time necessary to travel between job sites?

In addressing the first question, the court distinguished its analysis from those of the District Court and the parties. It explained that the analysis of whether the travel time was compensable was not a question of whether travel, itself, is a principal activity. Rather, the court grounded its analysis in the federal regulations interpreting the FLSA, which make two key points clear—(1) employees are working for purposes of the law (in other words, are “on-duty”) when idle so long as “they are unable to use the time effectively for [their] own purposes,” and (2) under the continuous workday doctrine, “time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the work day, must be counted as hours worked.” 29 C.F.R. §§ 785.15, 785.38. For these reasons, the court held that HHAs are entitled to compensation when they are on duty and traveling.

Nevertheless, on the second question, the court returned to the “integral and indispensable” analysis. It noted that, though not necessary for those HHAs who were already on duty such as in the first inquiry, the test remained appropriate for those employees who traveled to a client’s home following an off-duty period. The court explained that such employees are entitled to compensation, but only for travel that was necessary to travel between job sites. Put differently, such employees are only entitled to travel that was “integral and indispensable” to the principal activities of HHAs. On this point, the Court of Appeals agreed with the District Court’s analysis that **necessary** travel to a client’s home is integral and indispensable as, were an HHA not to travel, it would be impossible to provide services in clients’ homes. Still, the court took care to set boundaries. It explained that an employee’s marginal travel that is unnecessary to move between job sites, such as to travel home, to another job, or to go shopping, is not compensable under the FLSA.

The result of this decision is twofold. First, at least with respect to travel, compensability under the FLSA is not a question of whether the activity, itself, is a principal activity or is integral and indispensable to a principal activity. Rather, the question is whether the employee is able to use the time effectively for their own purposes—or put differently, whether the employee is “on duty”—and whether the travel occurs during the broader continuous workday. Second, for employees traveling following an off-duty period, compensability turns on whether any or all of that travel is “integral and indispensable” to their job duties. Though applied here in the home health care context, employers engaged in providing any services at clients’ homes, such as real estate services, cable and utility services, landscaping, and home cleaning services, should note that such time may be compensable under the FLSA. ♦

**Michael is a member of our Professional Liability Department and works in our Philadelphia, PA office.*



The Nature of Attorney Disciplinary Proceedings

Jacob H. Schultz, Esq.

Key Points:

- The Pennsylvania Supreme Court has clarified that the standard of proof required for a finding of attorney misconduct is “clear and convincing evidence.”
- Attorney disciplinary matters “are in the nature of quasi-criminal proceedings.”

The Supreme Court of Pennsylvania earlier this year issued an opinion examining the standard of proof to be applied in attorney disciplinary proceedings to establish that misconduct has occurred. In *Office of Disciplinary Counsel v. Anonymous Attorney*, 331 A.3d 523 (Pa. 2025), the court not only clarified that the standard of proof required is “clear and convincing evidence” but, also, that attorney disciplinary matters “are in the nature of quasi-criminal proceedings.” *Id.* at 525.

The attorney in *ODC v. Anonymous Att’y* had previously represented a corporate creditor which had been assigned a loan guaranteed by debtors. After the creditor sued to collect on the loan, the parties attempted to negotiate a settlement over some years. The debtors eventually filed for Chapter 7 bankruptcy, which generally automatically stays all related civil proceedings and enforcement of judgments. *Id.* at 526.

The respondent would later file a claim against the debtors in the bankruptcy proceeding. One of the filings in support of the claim included “an edited

photograph of one of the debtors to show that the debtors had an expensive lifestyle, as the debtor was wearing a watch worth more than \$26,000 in the photograph.” *Id.* at 527. The debtors then filed a motion to enforce the automatic stay and for sanctions against the creditor and the respondent. The debtors contended that the date of the photo had been cropped to make it seem as if it were a more-recent photo. The respondent replied that “he had edited the photo to protect the privacy of the unknown individual who was standing with one of the debtors.” After two days of hearings, the Bankruptcy Court held the respondent jointly and severally liable for \$354,777.75 in damages.

The Pennsylvania Office of Disciplinary Counsel (ODC) then filed a petition for discipline, contending the respondent had “violated several Rules of Professional Conduct.” The ODC later filed a motion to preclude the respondent from re-litigating findings of fact in the bankruptcy proceeding. The respondent objected, arguing, essentially, “...that the ‘clear and satisfactory’ standard required to establish attorney misconduct was more stringent than that required ▶

to find a willful violation of an automatic stay by the bankruptcy court judge.” *Id.* at 528. The Hearing Committee ultimately granted the ODC’s motion.

In adopting much of the Hearing Committee’s findings, the Disciplinary Board concluded that the respondent had not actually been prevented from litigating the issue of whether his conduct violated the rules of professional conduct. *Id.* at 528-29. Only one lone Disciplinary Board member dissented, “explaining that the Hearing Committee should not have applied collateral estoppel in light of the differing burdens of proof between the disciplinary and bankruptcy proceedings.” *Id.* at 529. The respondent then appealed to the Pennsylvania Supreme Court.

The existence of differing standards of proof does not necessarily preclude application of collateral estoppel; however, where “the standard of proof in a prior proceeding is a lesser burden of proof than what is required in the subsequent proceeding, the outcome in the subsequent proceeding may not be the same as the first.” In deciding for the respondent, the Pennsylvania Supreme Court concluded that articulation of the burden of proof (“a preponderance of the evidence through clear and satisfactory evidence”) was heretofore confusing because the words “preponderance of the evidence” are used “in conjunction with the phrase ‘with proof that is clear and satisfactory.’” Amazingly, this standard utilized language applicable to widely different standards recognized at the time. The court further explains that additional confusion arose over a decade ago due to a “scrivener’s error” in the case *ODC v. Cappuccio*, 48 A.3d 1231 (Pa. 2012), which unintentionally omitted the portion of the rule statement that requires that proof of the conduct at issue “must be clear and satisfactory.”

In concluding that “preponderance of the evidence” is unacceptable for attorney disciplinary proceedings, and that the correct standard is “clear and convincing evidence,” the court fascinatingly reiterates that “[d]isciplinary proceedings are not strictly civil nor criminal in nature, but rather have been styled

quasi-criminal.” *Id.* at 535. One can see how this might be, given that such proceedings are not “civil disputes for money damages,” and the interests in play are simply not minimal. The very ability to practice is itself at issue in such a case. But beyond the ability to practice, one’s professional reputation is on the line. Our reputation follows us everywhere, well beyond any office space or courtroom.

On the one hand, the court’s decision may be taken as positive news, as renewed guidance in application of a standard can lead to improved clarity with respect to litigation strategy. On the other hand, the decision may provide for some unpredictable consequences down the line.

The case adds weight to the notion that an attorney disciplinary proceeding lands squarely between standards of review and burdens of proof necessary in civil and criminal proceedings. Such a notion may draw prosecutors to scrutinize instances of both public and anonymous discipline more deeply. There could also be attempts during a prosecution to utilize findings in disciplinary cases for some level of heightened persuasive effect based on the “quasi-criminal” nature of the proceedings.

As discussed by the Pennsylvania Supreme Court, attorney disciplinary proceedings “...are not lawsuits between parties but are in the nature of an inquest or inquiry as to the conduct of an attorney...[and] the proceedings can have a severe impact on the attorney’s career and livelihood.” *Id.* at 534. The Supreme Court reasonably took issue with the notion that a mere preponderance of the evidence standard is all that it should take to subject an attorney to discipline. *ODC v. Anonymous Att’y* cements for the foreseeable future the notion that a heightened standard of proof is what is required to establish attorney misconduct in Pennsylvania. ♦

**Jacob is a member of our Professional Liability Department and works in our Philadelphia, PA office.*



All Bark and All Bite

Keith M. Andresen, Esq.

Key Points:

- In New York, if the owner of an animal knew or should have known the animal had vicious propensities, a plaintiff may seek to hold the owner strictly liable.
- After *Flanders v. Goodfellow*, 2025 WL 1127772 (N.Y. Apr. 17, 2025), a New York plaintiff may now also rely on rules of ordinary negligence and seek to prove that the defendant failed to exercise due care under the circumstances which caused the plaintiff's injury.

The New York Court of Appeals just did away with the “one-bite rule” and opened the possibility for finding dog owners liable in negligence for the “first bite” by a dog. In a case where a postal carrier was bitten by a dog while delivering a package to the dog owners’ residence, the court reinstated causes of action for strict liability and negligence against the dog’s owners.

Anyone who has litigated a dog bite case in New York is aware of the so-called “one-bite rule.” This rule provides that, absent a history of prior acts showing vicious propensities on the part of the dog or other domestic animal, such as a prior bite, the owner may not be held liable in negligence for a “first bite” by the animal or charged with knowledge of vicious propensities. See *Bard v. Jahnke*, 848 N.E.2d 463, (N.Y. 2006).

In a recent decision, the New York Court of Appeals in *Flanders v. Goodfellow*, 2025 WL 1127772 (N.Y. Apr. 17, 2025), overruled *Bard, supra*, to the extent that it precluded negligence liability for harm caused by domestic animals and reinstated the plaintiff’s

negligence cause of action. It held that the owner of a domestic animal who either knows or should have known of that animal’s vicious propensities will be held liable for the harm the animal causes as a result of those propensities. It noted that a vicious propensity includes the propensity to do any act that might endanger the safety of the persons and property of others in a given situation, and it indicated that once an owner’s actual or constructive knowledge of their animal’s vicious propensities is established, the owner faces strict liability for the harm the animal causes as a result of those propensities.

Knowledge of vicious propensities “may of course be established by proof of prior acts of a similar kind of which the owner had notice,” a triable issue of fact “might be raised—even in the absence of proof that the dog had actually bitten someone—by evidence that it had been known to growl, snap or bare its teeth.” *Collier v. Zambito*, 807 N.E.2d 254, 255-256 (N.Y. 2004); see also *Bard*, 848 N.E.2d at 466-467. A “vicious propensity” should be understood to include “any behavior that ‘reflects a proclivity to ►

act in a way that puts others at risk of harm,” see *Hastings v. Sauve*, 989 N.E.2d 940, 941 (N.Y. 2013), quoting *Bard*, 848 N.E.2d at 467.

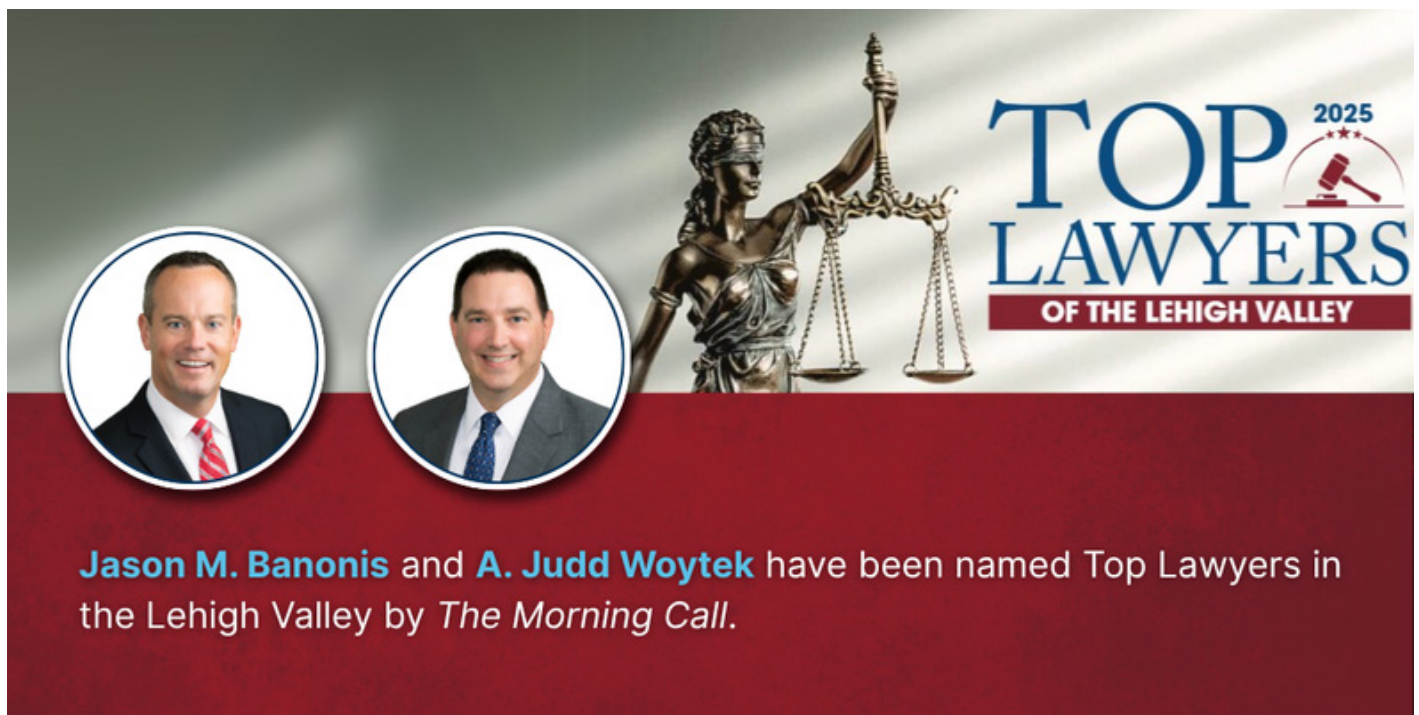
If there is a question of fact as to whether the dog owner should have known that the dog’s behavior reflected a proclivity to act in a way that puts others at risk of harm, see *Collier*, 807 N.E.2d at 256, this would preclude a grant of summary judgment on the strict liability cause of action. See *Flanders*. In *Flanders*, postal workers who had been to the dog owners’ residence stated that anyone in the defendants’ home would have been aware of the dog’s aggressive behavior, which included growling, snarling, barking, slamming into windows, and trying to bite at postal workers through the glass, 2025 WL 1127772, at *2. Although the defendants contended that they did not know of the dog’s behavior and emphasized that the postal workers did not report the dog’s behavior to them or the post office, that response merely presented questions of credibility about the defendants’ claimed ignorance of the dog’s behavior and the postal workers’ reasons for not reporting it. *Id.* Moreover, the defendants admitted that the dog got into a fight with another dog during its brief stint with its trainer. *Id.* Given all of this

evidence, the New York Court of Appeals concluded that there was a triable issue of fact which precluded a grant of summary judgment for the defendants on the strict liability cause of action. *Id.* It also held that “to the extent we previously held that a plaintiff may not assert a common-law negligence cause of action against the owner of a domestic animal for harms caused by that animal, we now overrule that precedent.” *Id.* at *8.

A New York plaintiff who suffers an animal-induced injury, therefore, now has a choice. If the owner knew or should have known the animal had vicious propensities, the plaintiff may seek to hold the owner strictly liable. Or the plaintiff may now rely on rules of ordinary negligence and seek to prove that the defendant failed to exercise due care under the circumstances that caused their injury. A plaintiff may assert both theories of liability pursuant to *Flanders*.

Dog bite law is now all bark and all bite. Sounds “ruff” to us. ♦

**Keith is a member of our Casualty Department and works in our New York City office.*



Jason M. Banonis and **A. Judd Woytek** have been named Top Lawyers in the Lehigh Valley by *The Morning Call*.

ON THE PULSE

Recent Appellate Victories



Kimberly Berman (Fort Lauderdale, FL), **Michael Bradford** (Tampa, FL) and **Mark McCulloch** (Orlando, FL) succeeded in obtaining an affirmance in the Second District Court of Appeal of a judgment entered in favor of a peer-to-peer car-sharing service and the host/owner of a vehicle. The plaintiff was injured in an automobile accident with a guest who had rented a host's automobile thru a peer-to-peer car-sharing platform. The plaintiff sued the guest, the host, and the peer-to-peer car-sharing company for negligence, vicarious liability under the dangerous instrumentality doctrine, and joint venture. The trial court granted summary judgment for the host based on the Graves Amendment, which preempts vicarious liability claims against an owner of a vehicle where a person or entity is engaged in the business of renting or leasing a motor vehicle and is not alleged to have been negligent or to have had any criminal wrongdoing. The court also found there was no joint venture. After oral argument, the Second District Court agreed and affirmed the final judgment in our clients' favor.



Kimberly Berman and **Michael Packer** (both of Fort Lauderdale, FL), as local counsel for an insurance company, along with many other law firms and insurance carriers, succeeded in obtaining an affirmance in the Third District Court of Appeal of a judgment entered in favor of various insurance carriers for business interruption claims stemming from the COVID-19 pandemic. The plaintiffs (business owners) sought a determination of whether their losses during the COVID-19 pandemic were covered under the Business Interruption provision of their insurance policies. The business owners claimed the plain language of the policy provided coverage for Business Interruption expenses without requiring "direct physical loss." The insurers moved for judgment on the pleadings, and the court granted the motion. After oral argument, the Third District Court affirmed the final judgment, finding that the policies did not provide coverage in the absence of "direct physical loss" or property damage.



Diane Toner and **Jack Yau** (both of New York, NY) successfully defended against the plaintiff's appeal in the Appellate Division, Second Department, which challenged an order that adhered to a prior ruling by the Supreme Court, Westchester County, that had granted the defendant's motion for summary judgment, dismissing the complaint. ►

In their brief, Diane and Jack argued the appeal should be dismissed due to the plaintiff's failure to assemble a proper record on appeal. The plaintiff omitted critical documents relied upon by the motion court, including submissions supporting and opposing the defendant's motion. At oral argument, Jack persuasively presented the case before a panel of four justices. The Appellate Division ruled in favor of the defendant and dismissed the appeal without reaching the merits. The court reaffirmed that it is the appellant's responsibility to provide a complete record containing all relevant materials from the lower court. The plaintiff's failure to do so, the court held, made meaningful appellate review impossible. The decision was unanimous, and no further appeal is available; thus, securing a decisive victory for our client.



In a case where an insurance broker faced claims of professional negligence, **Carol VanderWoude** (Philadelphia, PA) successfully defended the plaintiff's appeal from a verdict obtained by **Timothy Ventura** and **Dana Gittleman** (both of Philadelphia, PA). The verdict against our client, an independent insurance broker, was well below the lost value of UIM coverage (i.e., \$1 million), which the plaintiff sought to recover based on an alleged breach of the professional standard of care in failing to procure an endorsement for \$ 1 million in UIM coverage on the plaintiff's decedent's commercial auto policy. The verdict is notable because, at trial, the client gave unexpected testimony which impacted liability, and when confronted with the client's new trial testimony, our standard of care expert conceded a breach of the professional standard of care. Still, causation/damages were contested, and it was disputed at trial that the plaintiff's decedent would have actually received \$1 million in coverage. Tim elicited testimony on cross-examination of the plaintiff's expert that showed that there was no evidence establishing that the insurer would have provided additional UIM coverage even if the endorsement had been purchased. Prior to trial, the parties entered into a stipulation stating that damages were capped at the value of the lost coverage, \$1 million. Plaintiff's counsel challenged the low verdict on various grounds, focusing on the fact that our expert conceded a breach of a standard of care based on the client's unexpected trial testimony. He argued that, as a matter of law, the damages amount was the lost value of the coverage and the verdict should be increased to \$1 million. However, the trial court agreed with our arguments, raised in opposition to the plaintiff's post-trial motions, that the low verdict amount was supported by the record and that the plaintiff's requests for post-trial relief were otherwise waived for various reasons. The Superior Court affirmed in a unanimous decision. ♦

ON THE PULSE

Defense Verdicts and Successful Litigation Results

CASUALTY DEPARTMENT



Andrew Campbell (Philadelphia, PA) obtained a defense award in favor of our client, a prominent road and bridge constructor, at arbitration in Philadelphia. The plaintiff alleged a trip and fall in our client's construction zone, with knee and back injuries. Andrew argued that the plaintiff failed to prove any actionable defect, that the condition was open and obvious, and that the plaintiff's own negligence was the proximate cause of the fall.



Ana McCann (Wilmington, DE) was granted summary judgment on behalf of a national truck manufacturer in an asbestos case where the plaintiff claimed his mesothelioma diagnosis was the result of his work on his employer's trucks. The plaintiff had worked and resided the majority of his life in Mississippi; therefore, Mississippi law was applicable. In granting summary judgment, the court found that any alleged exposure to the manufacturer's trucks was *de minimis* in relation to his other alleged asbestos exposures. The court also found that under the "bare metal" defense, our client was not liable for third-party manufacturers' parts used in conjunction with their trucks, which our client did not manufacture or supply. The plaintiff had issued a six-figure demand in the matter.



Blake Wills (New York, NY) obtained dismissal and proved a fraudulent claim was made against our insurance carrier client in a New York No-Fault/PIP Action. Blake argued the medical provider's assignor was involved in a staged loss/fraudulent accident in order to obtain No-Fault/PIP benefits. In support of the defense, an SIU affidavit and the transcript of an Examination Under Oath (EUO) from the assignor (conducted by Marshall Dennehey) were submitted, which included facts that casted doubt on the legitimacy of the accident. These contained details such as the lack of an official police report, the insurance policy having been suspiciously purchased right before the accident, the later cancellation of the policy, and the inability of the assignor to remember key details of the accident at the EUO. After a successful argument at the arbitration, the arbitrator ruled in favor of our client, dismissing the claims.



Matthew Gray (Melville, NY) obtained full dismissal in a medical billing claim against our insurance carrier client in a New York No-Fault/PIP Action. The plaintiff, a major medical provider, filed suit seeking the total amount of \$22,610.79, claiming our client owed it for the claimant's unpaid medical billing. The claimant had been involved in a motor vehicle accident and sought payment for medical treatment. Counsel for the medical provider argued that, ►

since the billing was never paid by the insurer, it was due in full—despite the fact that the same matter had previously been fully exhausted and denied on the same or similar grounds. While there were evidentiary issues in our client’s case, our position was strong. After negotiations/arguments, and prior to the necessity of motion practice/trial on the issues in the matter, plaintiff’s counsel acquiesced to a full discontinuance and dismissal of the matter. Thereby, our client was absolved from any fiscal liability in this action.

Taniesha Salmons and **Bradley Remick** (both of Philadelphia, PA) obtained summary judgment on behalf of a homeowner in a 10-plaintiff negligence action arising from a house fire. In granting summary judgment, the Philadelphia Court of Common Pleas agreed that the plaintiffs’ failure to secure a cause-and-origin expert was fatal to their case as the fire was alleged to be electrical in nature and, thus, outside the purview of the average juror.

Ralph Bocchino and **Evan Saltzman** (both of Philadelphia, PA) successfully obtained dismissal of their client in a death-from-food-poisoning and hepatitis A case. The plaintiff, executrix of the deceased’s estate, alleged that the decedent passed away due to an outbreak of hepatitis A in southeast Pennsylvania, which was widely covered by the news at the time. The plaintiff, who claimed that the decedent passed away after eating at a pizzeria/restaurant, was seeking several million dollars from every food provider that served the restaurant, including our client. Fortunately, the plaintiff stipulated to our dismissal.

Timothy Hartigan (King of Prussia, PA) had a case dismissed on jurisdictional grounds. The plaintiff, a Philadelphia resident, was struck by a tractor trailer operated by our client, a Richmond, Virginia-based moving company that has never delivered to or picked up a delivery in Pennsylvania. The driver was also a Richmond, Virginia, resident, and the accident happened just outside of Richmond. We filed a motion to dismiss for lack of personal jurisdiction, which the Philadelphia Court of Common Pleas ultimately granted. The plaintiff had filed in Philadelphia CCP about a month before the statute of limitations ran, and we filed our objections promptly after the file assignment, about two weeks before the statute of limitations. The court’s decision came about three days after the statute of limitations, and the plaintiff filed a motion for reconsideration, which the court denied. Virginia has the same two-year statute of limitations as Pennsylvania. ♦



ON THE PULSE

Defense Verdicts and Successful Litigation Results

HEALTH CARE DEPARTMENT



Robert Aldrich (Scranton, PA) obtained a defense verdict on behalf of an anesthesiologist after a medical malpractice jury trial in Lehigh County, Pennsylvania. The plaintiff, who underwent an elective right-shoulder surgery, alleged that the anesthesiologist and the certified registered nurse anesthetist who performed his laryngoscopy intubated him too soon, and under suboptimal paralytic conditions, leading to permanent throat damage. After a five-day trial, the jury returned a defense verdict within 15 minutes.



Joseph Hoynoski (King of Prussia, PA) received a defense verdict at the Montgomery County Arbitration Center where the three-attorney panel found in favor of our clients, a pediatric primary care office and a pediatric nurse. The plaintiff claimed her median nerve was injured by a venipuncture procedure performed by the nurse. The case was originally filed in the Court of Common Pleas; however, after discovery revealed a weak damages claim—we found many TikTok videos helpful to our defense—it was dropped to the arbitration level.



Brett Shear (Pittsburgh, PA) received a defense verdict for his client, a general surgeon, who performed carpal tunnel surgery on the plaintiff's left hand. Following surgery, the plaintiff continued to complain of tingling, numbness, and weakness in his hand. He went on to have two additional surgeries, performed by two different surgeons. During the third surgery, the surgeon found a median nerve injury. The plaintiff claimed that this nerve injury was caused by the defendant cutting the median nerve during his initial operation, and that the injury resulted in permanent dysfunction such that he would no longer be able to work or use his hand normally. At trial, the defendant demonstrated how he performs carpal tunnel surgery and protects the median nerve, making it nearly impossible to cut or injure the nerve. We contended that the median nerve injury must have happened later, likely during the second surgery. The jury rendered a defense verdict in favor of our client.



Missy Minehan (Harrisburg, PA) obtained a defense award on behalf of a skilled nursing facility in a hotly contested “wound” case after a two-day arbitration. The 93-year-old plaintiff had been a resident at the nursing facility for over three years without having suffered any pressure injuries, despite a plethora of risk factors. In August 2019, she was transferred emergently to an acute care hospital where she was diagnosed with a myocardial infarction (MI) and cardiogenic shock. The hospital administered five days of a vasopressor, ▶

a life-saving medication that can increase the risk of pressure injuries, and recommended that she consult with palliative medicine due to her poor condition and prognosis. The family declined palliative medicine. Within several weeks of her return to our client's facility, she was found to have a Stage III left heel wound and a Stage II left buttocks wound. The wounds were treated and resolved within four and five months, respectively. The plaintiff did not suffer any additional pressure injuries until she was re-admitted to the acute care hospital in January of 2025. At 99 years of age, she still resides at the facility.

Adam Fulginiti (Philadelphia, PA) received a defense verdict in a nursing home malpractice matter involving the development and progression of pressure injuries the decedent experienced during her time in our client's facility. As a result of these injuries, the plaintiff claimed damages, including but not limited to pain, suffering, and death. Adam cited the resident's significant comorbidities and the noncompliance with pressure-reduction measures and nutritional support. Adam also cited documentation of the wound consultant, and he overcame potential liabilities, including several wounds that developed in-house, and documentation deficiencies. ♦



PROFESSIONAL LIABILITY DEPARTMENT

Josh J.T. Byrne (Philadelphia, PA) received a unanimous decision from the Supreme Court of Pennsylvania which both limits the use of offensive collateral estoppel in disciplinary matters and establishes that the standard of proof for disciplinary matters in Pennsylvania is clear and convincing evidence. The Office of Disciplinary Counsel had sought to utilize non-mutual offensive collateral estoppel to preclude the respondent from disputing fact determinations by a bankruptcy judge when she sanctioned the respondent and his client. The Supreme Court determined that the burden of proof for the judge in issuing sanctions was something less than clear and convincing evidence and, therefore, collateral estoppel did not apply. In making its decision, the Supreme Court noted that the previously expressed standard of "preponderance of clear and satisfactory evidence" was confusing and archaic but is the functional equivalent of "clear and convincing." A short concurrence by Justice Wecht leaves no doubt that going forward, the standard to be applied is "clear and convincing."

Jacob Schultz and **Josh J.T. Byrne** (both of Philadelphia, PA) obtained an order on a motion to dismiss the plaintiff's claims in a civil rights action brought against their attorney client in the Middle District of Pennsylvania. The plaintiff brought claims for Deprivation of Rights (42 U.S.C. § 1983), Conspiracy Against Rights (42 U.S.C. § 1985), and Civil Conspiracy. We filed a motion to dismiss pursuant to F.R.C.P. 12(b)(6), arguing that the plaintiff failed to state a claim ►





upon which relief could be granted. The magistrate judge agreed, issuing a report and recommendation for the claims to be dismissed, which the district judge then adopted as the court's decision. No timely appeal has been taken.

In a complex construction defect matter, **Gregory Kelley** (King of Prussia, PA) successfully defended an architect against a \$7 million claim brought by a general contractor in connection with the renovation of a historic, city-block-sized building in Philadelphia. The contractor alleged design errors and sought additional damages under the Contractor and Subcontractor Payment Act, inflating its claim to \$16 million. Through strategic early settlements, we eliminated a key subcontractor's claims, weakening the contractor's case. During contentious discovery, we exposed contradictions and falsehoods in the contractor's testimony, leading to a partial summary judgment that dismissed the bulk of claims against our client. Facing a looming trial and a remaining \$4 million claim, we worked with the building owner's counsel to convince the settlement judge of the claim's lack of merit. The plaintiff filed for bankruptcy, and the final settlement had to be approved in the Bankruptcy Court. The case settled for just \$362,500, with our client paying only \$181,250—an outstanding result in a high-stakes dispute.



Ray Freudiger (Cincinnati, OH) won summary judgment on behalf of a company that provided software for the overall design of roof trusses and sold truss connect plate hangers to one of the plaintiffs in this design defect case. The plaintiff owned the apartment complex being built and hired the co-defendant to construct the building. A national lumber company was subcontracted by the builder to build and install the roof trusses. The lumber company contracted with our client to use its software for the design of the roof trusses and to provide truss connect plate hangers. The building experienced severe water damage allegedly because the roof trusses were not sloped properly and the HVAC units were misplaced on the roof. Damages were estimated at over \$1.2 million. The lumber company demanded that our client defend and indemnify it against the builder's allegations. The court granted our motion for summary judgment.



Ray Freudiger and **Morgan Henderson** (both of Cincinnati, OH) won dismissal of two separate charges filed by the Ohio Civil Rights Commission (OCRC) against a public housing authority (PHA). In the first case, a tenant claimed the PHA discriminated against him based upon race, disability, sex, and sexual orientation or engaged in retaliation. He also claimed the PHA denied him a reasonable accommodation in violation of Ohio Revised Code 4112 and the Federal Housing Administration. The OCRC determined there was no discrimination and dismissed the charge against the housing authority. In the second case, the tenant claimed that in refusing to extend his housing voucher, the PHA failed to provide him a reasonable accommodation based on disability; thus preventing him from securing a home through the Housing

Voucher Program. Ray and Morgan responded that the tenant was responsible for his own failure to succeed in the homeownership program because he did not submit complete documentation. Further, the PHA allowed the tenant at least nine extensions, but he failed to engage the homeownership program. The OCRC found no probable cause of discrimination and dismissed the charge.

Eduardo Ascolese (Mount Laurel, NJ) won a motion dismissing all claims with prejudice against our clients in a case involving a major remediation project for environmental violations. We filed a motion for summary judgment to dismiss the plaintiff's complaint based on its failure to provide an affidavit of merit within the prescribed time and because the agreed-upon liability waiver clause precludes litigation against the individual defendants. The plaintiff attempted to pursue litigation against our client's individual employees in contradiction to the agreed upon exculpatory waiver clause in the agreement. We argued that public policy recognizes limitation of liability clauses when they are reasonable and when they incentivize the licensed professional to perform. The plaintiff was not without redress as it could pursue litigation against the employer, had equal bargaining power, and had entered into an arms-length transaction. Further, we argued that the affidavit of merit statute's text and legislative purposes require the affidavit to be served within 60 days (extendable for good cause to 120 days) from the date when the licensed professional files its answer, regardless of whether the pleadings are subsequently amended to name other defendants or assert additional claims. Under New Jersey law, the plaintiff's failure to provide an affidavit of merit confirmed that their claims must be dismissed with prejudice. The court agreed that: (1) the agreed-upon exculpatory waiver clause was reasonable and not against public policy; and (2) the plaintiff's failure to provide an affidavit of merit was fatal. The court dismissed all claims as to our client and their individual employees with prejudice.

Alesia Sullock (Philadelphia, PA) won a defense verdict in a legal malpractice case arising from an underlying civil rights claim. The plaintiff was arrested in August 2015 following a physical altercation with her daughter and her daughter's friends. The plaintiff alleged that, while she was being searched at the police detention unit, a city employee struck her, causing her to fall into a "split" and suffer a hamstring avulsion. The defendant attorneys represented the plaintiff in a lawsuit against the city. The underlying case was filed as an arbitration-level matter, and the plaintiff lost at arbitration. She was never able, during the underlying case, to identify the employee who allegedly assaulted her. She did not respond to communications from the defendant attorneys regarding the arbitration award and the appellate deadline; thus, no appeal was filed. This legal malpractice matter followed. During trial, we presented evidence that the plaintiff could not have won the underlying case within the case because she lacked corroborating evidence of the alleged assault and ►





the only medical expert testimony opined that she was more likely to have suffered the injury during the fight with her daughter than in the manner of assault described by the plaintiff. We also presented evidence that the plaintiff could not prove damages arising from the alleged injury. The court agreed and entered a defense verdict following a bench trial.

Jeremy Zacharias (Mount Laurel, NJ) successfully secured the dismissal of a counterclaim alleging legal malpractice and ethics violations against his client, a New Jersey matrimonial law firm. The counterclaim accused the firm of violating multiple court orders, committing professional malpractice, and breaching fiduciary duty in connection with a divorce case that ultimately led to the spouses reconciling and voluntarily dismissing their divorce complaint. Jeremy argued that the malpractice claim was merely a pretext to avoid paying the nearly six-figure attorney's fee owed to the firm, which had been the subject of a fee complaint filed against the couple.



Following pre-trial motions, **Jack Slimm** (Mount Laurel, NJ) obtained an order from the trial court barring the plaintiff's engineering expert's opinions as net and inadmissible in a multi-party action in which Jack represented a national management company. Once the court granted Jack's motion to strike the net opinions, the court then entered an order of dismissal in favor of our client.



Matthew Behr (Mount Laurel, NJ) successfully obtained summary judgment for a county in a lawsuit alleging disability discrimination and failure to accommodate under the New Jersey Law Against Discrimination. The plaintiff, a former custodian, used a cane while performing his job duties. After being sent for a fitness-for-duty examination, a medical professional determined he was not fit for duty, leading to his termination. The court ruled in favor of the county, granting summary judgment on all claims and dismissing the case with prejudice.



Sharon O'Donnell (Harrisburg, PA) achieved summary judgment on behalf of an art store chain in a racial discrimination suit over a caricature drawing of a Black woman and her infant son. She, her father, and her father's girlfriend, all visitors to an amusement park, sue the owner of the kiosk for race discrimination, retaliation, and interference under 42 U.S.C. Section 1981, alleging that they were drawn with exaggerated and offensive features rooted in harmful racial stereotypes. They also alleged they were kicked out of the amusement park. The kiosk owner argued that while the caricatures might have been poorly drawn, they were not drawn in any manner intended to be offensive, and while they were happy to see the angry father leave their kiosk, the family was not kicked out of the park. The court determined on summary judgment that no reasonable jury could find in favor of the plaintiffs on all three claims and dismissed the action. ►

ON THE PULSE

Defense Verdicts and Successful Litigation Results (cont.)

WORKERS' COMPENSATION DEPARTMENT

Michael Duffy (King of Prussia, PA) received a decision granting his review and termination petitions and denying the claimant's review petition. The claimant fell approximately 20 feet from a ladder while climbing off a roof. He landed on his feet and sustained bilateral calcaneal fractures. The employer issued a Notice of Compensation Payable, accepting bilateral ankle fractures. In his termination petition, Mike alleged a full recovery, and in his review petition, he sought to amend the description of injury to bilateral calcaneal fractures instead of bilateral ankle fractures. The claimant, too, filed a review petition to amend the description of injury to include traumatic neuropathic pain secondary to bilateral calcaneal fractures, lumbar spine strain, lumbar spine disc injury, and bilateral lumbar radiculopathy. The workers' compensation judge found our defense expert more credible than the claimant's expert.

Benjamin Durstein (Wilmington, DE) successfully persuaded the Industrial Accident Board to deny the claimant's assertion of a 40% permanent impairment to her left arm due to complex regional pain syndrome. The claimant's expert based this assessment on the 5th Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. However, the Board favored the testimony of the employer's medical expert, who referenced the 6th Edition of the *AMA Guides*. As a result, the Board determined that the appropriate impairment rating was 13% for the left upper extremity.

Michael McMaster (Philadelphia, PA) successfully had a petition for workers' compensation benefits denied. The claimant was at work installing a large garage door when the door fell and struck his leg, later requiring an amputation. The claimant alleged both physical injury and severe psychological injuries. The claimant was the 100% owner of the company, and when he purchased workers' compensation insurance, he signed an acknowledgement that, as the owner, he would not be considered an "employee" under the Act. At the first hearing, Mike moved to bifurcate the matter for a decision on whether the claimant was covered under the Act. The workers' compensation judge granted this motion. At the next hearing, Mike argued that the claimant was not an employee under the Act and, therefore, not entitled to receive any benefits. Mike submitted both the original application for insurance, where the claimant signed the acknowledgement, and a copy of the policy that was ►





effective at the time of the injury, which included a form stating that the claimant had previously agreed to not be considered an employee. With that evidence being admitted, claimant's counsel had no rebuttal, and the workers' compensation judge dismissed the petition.

Anthony Natale (King of Prussia, PA) successfully prosecuted a third level appeal on behalf of a New Jersey branch of a national assurance company regarding Medicare conditional payments after an auto accident injury. This appeal centered on the federal government's contractor who continually denied the company's initial level appeals to limit conditional payment recoupment based on policy exhaustion. The court found the evidence submitted supported the auto policy at issue, the payments made on the basis of the policy and exhaustion of the policy after paying numerous medical bills. The government sought additional conditional payments over and above the policy exhaustion amount (some of these payments were not even related to the underlying accident). After oral argument, the court found no additional conditional payments were due and granted the company's third level appeal.

Anthony Natale successfully defended a claim petition on behalf of a Philadelphia-based university. While working for the university as a janitor, the claimant slipped and fell down a flight of concrete stairs. He alleged multiple body part injuries. The employer's panel doctor did find work injuries limited to the claimant's extremities. The claimant was referred by his attorney to a pain specialist, who opined to significant injuries to multiple body parts. However, during the expert's trial deposition, he was forced to admit that he has been practicing medicine for less than two years and only offered opinions about neck and back injuries—nothing else. The claimant alleged serious disc herniation injuries in the neck and back, and pursued other body part injuries in the litigation, with no additional expert evidence. The employer presented an orthopedic surgeon who found no injuries on the date of his evaluation and opined that the claimant fully healed from any injuries he may have sustained. The court found only minor strains to the neck and back with a full and complete recovery (and no further benefits due). Allegations of multiple disc herniation injuries were dismissed as unrelated.

Anthony Natale successfully prosecuted a suspension petition on behalf of a national rehabilitation center. The claimant sustained an injury when she was kicked and spat upon by a resident of the center. The claim was accepted and treatment paid. The claimant was released to return to work with restrictions and ultimately to full duty. However, she failed to return to her pre-injury position upon release to full duty, but she did return to alternate employment. Any wage loss was argued to be unrelated to the work injury since the pre-injury job was open and available. The court granted a suspension of benefits on this basis, resulting in a full defense verdict. ►

Anthony Natale successfully defended a national interstate trucking company before the Workers' Compensation Appeal Board. The claimant originally sustained a head injury with post-concussive syndrome during a collision brought on by an epileptic seizure. The claimant was disqualified from ever returning to work as a truck driver based on his non-work-related epilepsy condition. He continued to allege symptoms of post-concussive syndrome and maintained his right to continue to collect workers' compensation benefits. In the underlying action, Tony presented evidence (including the claimant's own treating neuropsychologist) which the court found to prove full recovery from all injuries. The claimant appealed to the Board, alleging the workers' compensation judge disregarded substantial evidence in support of ongoing disability. Tony made a two-pronged argument, citing to the fact that the claimant's appeal did not conform to statutory requirements and that the evidence record demonstrated the claimant's work injury resolved and the driving force behind the appeal was to keep the claimant collecting benefits since he could not work due to a non-work-related condition. The Board affirmed the underlying court, and all benefits remained terminated.

Michele Punturi (Philadelphia, PA) successfully prosecuted a modification petition, establishing a significant reduction in dependent benefits. The claimant's daughter was over 18 and was not enrolled as a full-time student in any accredited educational institution, pursuant to § 307 of the Pennsylvania Workers' Compensation Act. Based upon documentary evidence and a sound legal argument, the judge granted the decrease in weekly benefits and awarded a 100% credit against future benefits for the employer to recoup the overpayment that occurred beginning in 2023.

A. Judd Woytek (King of Prussia, PA) successfully prosecuted our petitions for Review of Utilization Review Determinations, where the workers' compensation judge found the treatment by three of the claimant's medical providers to be unreasonable and unnecessary. These treatments included electrical stimulation, chiropractic manipulation, PRP injections, Botox injections, pain patches, trigger point injections, and office visits.

A. Judd Woytek successfully had the claimant's workers' compensation benefits terminated. The claimant cut her thumb in a blender at work. The workers' compensation judge credited the opinions of our medical expert that the injury was nothing more than a simple laceration with no nerve or tendon damage. The judge awarded a small closed period of benefits and then terminated benefits completely as of the date of our IME. The judge also found that physical therapy treatment beyond the date of the IME was not reasonable, necessary, or related. ►





A. Judd Woytek successfully defended against the claimant's review/reinstatement petition. The workers' compensation judge favored the testimony of our medical expert, who concluded the claimant had fully recovered from the accepted low back strain and right shoulder strain and that the shoulder surgery was unrelated to the work injury. Additionally, the judge found the claimant's testimony inconsistent and not credible, leading to the approval of our termination petition.



Francis Wickersham (King of Prussia, PA) received a decision dismissing claim petitions for two separate injuries. The claimant worked as a delivery driver for the employer and allegedly suffered a concussion and injuries to his right shoulder on October 31, 2021, and November 2, 2022, from tripping and falling at locations where he had been making deliveries. The employer accepted his November 2, 2022, work injury, but only as to his left elbow. The claimant returned to his regular work after the November 2 injury and continued working until January 2023, when he took a severance from the employer. He then filed claim petitions for the two injuries. During litigation, Frank forced the claimant's expert orthopedic surgeon and neurologist to admit that no concussion or right shoulder injuries were suffered in either incident by confronting them with emergency room records, which showed that no such injuries had been reported by the claimant. Based on these experts' admissions, the workers' compensation judge found their testimonies to be not credible and dismissed the claim petitions. The judge also granted the employer's termination petition as to the November 2, 2022, injury. ♦

READ MORE



ON THE PULSE



The Blitz Is Coming: Pranks, Perception and the Risk of Draft Day

A.C. Nash , Esq.

In April, the high-stakes world of the NFL Draft took over the airwaves. Millions were made and fumbled away as each round unfolded. Scouting reports were dissected, 40-yard dash times debated, and the patience of each player was tested. Beyond the fanfare stood a cautionary tale for civil defense lawyers. In litigation, as in football, perception, reputation, and outside interference can blindside the best-prepared team.

Shadeur Sanders and his father, Deion, commanded headlines throughout the college football season and into the draft. However, it was Jaxson Ulbrich, son of Falcons defensive coordinator, Jeff Ulbrich, who stole a moment of spotlight both infamously and immaturely. After obtaining a private draft-day phone number, Jaxson prank-called Sanders, whose draft stock had unexpectedly fallen. He claimed that Sanders would be drafted by the Saints but would have to wait. While it was quickly revealed that he had been “trolled,” this event signifies how easily misinformation can spread and how pranks can carry real consequences. The NFL fined Jeff Ulbrich \$100,000, and the Falcons organization was fined \$250,000.

In civil defense cases, surprises, misinformation, public manipulation, and ambush tactics are commonplace. Plaintiff lawyers, while mostly ethical, can sometimes push the envelope. According to the ABA, almost 300,000 lawyers are publicly disciplined

for ethical misconduct each year. Therefore, a video that paints your client in unfavorable light, one that is selectively edited, like Shannon Sharpe alleges, or one that is outright misleading, may become the order of the day. Once public, the reputational harm spreads faster than the truth can catch up. Headlines follow, juries are tainted, and the reputation of your client can plummet overnight. Insurers then start asking hard questions.

The call to Sanders wasn't just a joke. It could be actionable. In Florida and many other jurisdictions, the actions of Ulbrich could possibly be considered tortious interference with a current or prospective business relationship. This tort occurs when a third party intentionally disrupts a known business relationship, thereby causing damages. More specifically, the elements of the tort for tortious interference with a business relationship includes: (1) the existence of a business relationship or contract, (2) knowledge of the business relationship or contract on the part of the defendant, (3) an intentional and unjustified interference with the business relationship, and (4) damages. See *Howard v. Murray*, 184 So. 3d 1155 (Fla. 1st DCA 2015). An action for tortious interference with a **prospective** business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which, in all probability, would have been completed had the ►

defendant not interfered. See *Ferguson Transp., Inc. v. North Am. Van Lines, Inc.*, 687 So. 2d 821, 822 (Fla. 1996).

Although numerous explanations for his draft slide exist (i.e., his lack of a real agent, combine opt-out, alleged poor interviews, etc.), Sanders could argue that the prank compounded doubt, shifted teams' perceptions about drafting him, and thereby contributed to his slide. The same dynamic applies in tort litigation. When perception turns, the liability profile of a company can collapse, even without wrongdoing.

In 2005, Anna Ayala alleged that she found a human finger in her chili at a Wendy's in California. After a month-long investigation, it was determined that the incident was a hoax orchestrated by Ayala. Unfortunately, Wendy's suffered work cutbacks as business fell as much as 50% in some areas.

In 2020, rumors began on Reddit that Wayfair was allegedly involved in child trafficking. The claims were that their throw pillows and storage cabinets were a front for these nefarious activities. Social media ran with this information, complete with photographs, screen shots, and celebrity statements. The rumors were a hoax.

In 2011, not even the Golden Arches was safe. A photo was captured and spread on social media that provided that, as an insurance measure due, in part, to a string of robberies, certain customers would be required to pay an additional fee of \$1.50 per transaction. This, too, was a hoax, and McDonald's stated: "This is, unfortunately, an example of how rumors can out speed the truth. Over the last 48 hours, we've been tweeting and striving to clarify that this is a hoax." Nevertheless, the public was slow to believe McDonald's statement, and the hashtag #SeriouslyMcDonalds trended.

The law is catching up to the age of virility and meme culture. However, as the aforementioned warnings demonstrate, hoaxes can have impacts that far outlive the "joke." It can be a draft-day prospect losing millions or a client losing trust; in all scenarios, narrative controls and perception matters.

Whether it is Sanders waiting for a life-changing call or a business defending its decades of good will, the threats aren't always head-on. Sometimes, the blitz is coming from your blindside. ♦

ON THE PULSE

Other Notable Achievements

PUBLISHED ARTICLES



April 17, 2025 – **Lauren Purcell's** (Pittsburgh, PA) article, "A Post-'Sullivan' World Requires a Strong Expert Report," was published by *The Legal Intelligencer*. You can read here article [here](#).



March 17, 2025 – *The Legal Intelligencer* published **Alesia Sulock's** and **Josh J.T. Byrne's** article "'Clear and Convincing' Is the New Standard for Attorney Disciplinary Matters." You can read their article [here](#).



February 27, 2025 – **Brad Haas** (Pittsburgh, PA) authored the article, "Pennsylvania's Expanding Vicarious Liability Standard," appearing in *The Legal Intelligencer*. The article discusses the Pennsylvania Superior Court's January 31st ruling in *Coryell v. Morris*, which represents an expansion in the state's approach to vicarious liability for franchisors. Read the article [here](#). ♦



SPEAKING ENGAGEMENTS



Jason Banonis (King of Prussia, PA) teamed up with William L. Roberts, MBA, ARM on May 7, 2025, to present "The Great Eight: 8 Questions Every Risk Professional, Claims Director or Litigation Manager Must Ask Defense Counsel Before Taking a Verdict" at the annual RIMS Conference.



Josh J.T. Byrne (Philadelphia, PA) participated in the Pennsylvania Bar Institute webinar "The New World of Immigration Under the Trump Administration: Sensitive Area and Worksite Enforcement" on April 22, 2025.



James Cole (Philadelphia, PA) co-presented "This Is Jeopardy!!! Unfair Claims Practices" at the 2025 PLRB Conference on March 31, 2025. Presented in the popular game show format, this interactive session provided an in-depth analysis of the Model Unfair Claims Practices Act. ♦



Lee Durivage (Philadelphia, PA) co-presented at the Pennsylvania Bar Institute's two-day "Employment Law Institute 2025," held in Philadelphia on April 15–16, 2025.



John Hare (Philadelphia, PA) joined a panel of judges and attorneys to present the live webcast "New Voir Dire Rule Pa.R.C.P. 220.3," on behalf of the State Civil Litigation Section of the Philadelphia Bar Association on March 19, 2025.



Kevin Hexstall (Philadelphia, PA) co-presented "The Art of Settlement: Techniques and Strategies for Choosing the ADR Option that Gets the Best Results for Your Client" for the Philadelphia Bar Association. Held on May 7, 2025, this webcast presented a comprehensive examination of the various options for dispute resolution, including mediation, ADR, and judicial settlement conferences.



Matthew Keris (Scranton, PA) presented "MPL Crossfire: How to Prepare for AI From a Medico-Legal Perspective" at the 2024 Medical Professional Liability Association conference on May 22, 2025. On May 5, **Matt** presented "Tips to Minimize and Manage Your Audit Trail Footprint" at the 33rd Annual New England Regional Healthcare Risk Management Conference. Finally, on May 2, **Matt** co-presented "Venue Shopping, Risk Management & Avoidance" with Curt Schroeder (PA Civil Justice Reform) at the Keystone Chapter American College of Surgeons.



Matthew Keris and **Nicole Tanana** (both of Scranton, PA) headlined at the Pennsylvania Association for Health Care Risk Management (PAHCRM) 2025 Annual Conference. On April 16, 2025, **Matt**, chair of our Electronic Medical Record and Audit Trail Practice Group (and also PAHCRM President-Elect), presented "Tips for Keeping a 'Clean' Medical Record in an Electronic World." On April 17, **Nicole** presented a "Legal/Case Law Update."



Andrew Marchese (Fort Lauderdale, FL) co-presented "Understanding Directors & Officers Liability and Insurance for Community Association Boards" for the Florida Bar Association on April 16, 2025. The Real Property, Probate & Trust Law Section's CLE webcast focused on potential liabilities for community association board members; how they have changed with Florida's new statutory requirements; and what liabilities are covered by insurance policies.



A.C. Nash (Fort Lauderdale, FL) co-presented "The Yellow Brick Road to Litigation Success: What Happens When Carriers and Defense Counsel Team Up?" on April 10, 2025, at the annual CLM Conference.



Jeffrey Rapattoni (Mount Laurel, NJ) presented "Ethics and the Investigator" at the 18th Annual New England Chapter of the IASIU Seminar. On April 16, **Jeff** co-presented "Update in Fraud - A Legal Panel" at the 2025 Pennsylvania Insurance Fraud Conference, a collaboration between the Insurance Fraud Prevention Authority and International Association of Special Investigation Units. Additionally, on March 4, **Jeff** presented at the Insurance Fraud Management (IFM) Conference where he spoke on two different panels during the conference: "Emerging Challenges in Insurance Fraud Investigations," and "Exploring the Past and Predicting the Future of the SIU Landscape." ►



Jacqueline Reynolds (King of Prussia, PA) co-presented “Give Us Liberty and Give Us Safety: Understanding Civics in the 21st Century Campus Conversations Series” at Gwynedd Mercy University on March 18, 2025. Hosted by the Montgomery Bar Association, this discussion on the enduring legacy of the U.S. Constitution, explored key amendments—including the 1st, 2nd, 4th, 5th, 6th, and 14th—examined their language, legal interpretation, and real-world impact. From safeguarding individual freedoms to limiting government overreach, these amendments continue to shape our society 238 years after the Constitution’s ratification. Also, on March 7, 2025, **Jacqueline** joined a panel to present “Preparing Your Bar Association for the Silver Tsunami: What Are the Roles and Opportunities for Bar Associations Related to Aging Members and an Aging Community.” This presentation was made at the Pennsylvania Bar Association’s Annual Conference of County Bar Leaders.



Alesia Sulock (Philadelphia, PA) joined a panel discussion at the American Bar Association Spring 2025 LPL conference, “By Young Professionals, For Young Professionals: YP Roundtable – Part Three – A Lunch Discussion” on April 3, 2025.



Elizabeth Underwood (Philadelphia, PA) presented as part of “Decoding the Doctor’s Notes: A Legal Guide to Medical Evidence,” a day-long webinar hosted by NBI. Held on March 20, 2025, the webinar focused on providing insights and skills to effectively utilize and challenge medical records and experts in litigation. Beth presented two sessions, one on “Getting the Most Out of Medical Experts” and the other on “Best Practices for Presenting Medical Records and Expert Testimony.” ♦

Defense Digest, **Vol. 31, No. 2, June 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.

ATTORNEY ADVERTISING pursuant to New York RPC 7.1.

© 2025 Marshall Dennehey. All Rights Reserved. This article may not be reprinted without the express written permission of our firm. For reprints, contact tamontemuro@mdwcg.com.

