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MARSHALL DENNEHEY



Under Pressure: Delaware Court Rejects Workers' Compensation Claim for Performance Review Stress

Alexander C. Landolfi, Esq.

Key Points:

- Always subpoena a claimant's decade-long medical files immediately.
- Ensure medical experts are aware of a claimant's comorbidities and whether they are being properly controlled.
- Review the literature relied on by the claimant's expert(s) and expose any reliance on unrelated medical conditions.
- Remember to use the more stringent *Duvall* substantial cause standard when there is no identifiable work accident.

The Delaware Superior Court recently affirmed a major defense victory by holding that routine workplace evaluations do not constitute an identifiable work accident solely because they may induce stress. In *Johnson v. Christiana School District*, 2026 Del. Super. LEXIS 324 (Del. Super. Ct. July 16, 2026), the Court upheld the Industrial Accident Board's denial of workers' compensation benefits, clarifying that claims regarding occupational anxiety must meet a more rigorous causation standard than other workplace injuries. Specifically, the Court explained that, absent an identifiable work accident, claimants must demonstrate that workplace stress was a substantial cause of injury under the *Duvall* standard, rather than relying on the more lenient "but for" test that typically applies. This decision illustrates how employers and insurers can shield themselves from claims involving occupational stress caused by normal work activities.

Angelina Johnson ("Ms. Johnson" or "Claimant") worked as a third-grade teacher for the Christina School District ("District" or "Employer"). Ms. Johnson was scheduled for a performance evaluation, which occurred twice a year. If a teacher consistently received a poor rating, they would be placed on an "improvement plan," and failure to improve could eventually result in the teacher's termination. However, throughout her career at the District, Ms. Johnson had never received a poor rating nor was she ever placed on an improvement plan. Ms. Johnson was given a day's notice that the school's principal would conduct an evaluation. That night she began experiencing back spasms and pain. On January 6, 2026, the day of the evaluation, Ms. Johnson suffered a spinal stroke, which left her a paraplegic.

At the hearing before the Industrial Accident Board (the "Board"), Claimant's medical expert testified that the stress related to the performance evaluation triggered the spinal stroke. Claimant's medical expert relied on generalized cerebral stroke studies, only partially evaluated Claimant's prior medical history, and never performed a physical examination of Claimant. The District's medical expert testified that the stroke was unrelated to the work event. The District's medical expert first explained that

Claimant's medical expert relied upon literature that linked stress as a cause to cerebral strokes, not spinal strokes. Second, the District's medical expert pointed out that Claimant had an extensive history of preexisting comorbidities, such as poorly controlled diabetes and hypertension, and that the literature suggests that Claimant's comorbidities are high-risk factors for both spinal and cerebral strokes.

The Board determined that there was no identifiable work event and thus applied *Duvall* substantial cause standard. The District's medical expert was more credible than Claimant's for two reasons: (1) Claimant's medical expert's opinions were unsupported by the literature; and (2) Claimant's medical expert did not have a sufficient understanding of Claimant's medical history. Relying upon the District's medical expert's testimony, the Board found no evidence that stress was the contributing factor to her stroke and, therefore, her injury was not compensable.

On appeal, the primary issue before the Court centered on causation and which standard should apply. Under Delaware's Workers' Compensation Act, typically, the "but for" standard is applied when determining whether an accident or injury is causally related. Under the "but for" standard, a work accident is compensable and causation is satisfied as long as the work event serves as the setting or trigger for the injury, regardless of pre-existing conditions or whether the accident is the sole or substantial cause of harm. *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. 1992). However, when there is no identifiable work accident, the *Duvall* substantial cause standard is applied. Under the *Duvall* standard, an injury is compensable if the ordinary job stress is a substantial cause of the injury, regardless of any pre-existing condition, as established by the "usual exertion rule." *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1136 (Del. 1989).

Ms. Johnson argued that the performance evaluation constituted a specific, identifiable event that triggered her stress, and thus that the Board should have used the more lenient "but for" test to asses causation. In contrast, the District maintained that the evaluation was a routine aspect of employment, not an "accident," and that the board properly applied the more stringent "substantial cause" standard. The Court ultimately agreed with the District, concluding that the annual performance evaluation did not constitute a work accident and that the Board applied the correct legal standard. The Court emphasized that none of Ms. Johnson's circumstances met the criteria for a work accident under Delaware Workers' Compensation Act. Although Ms. Johnson experienced a distressing event at work, she failed to demonstrate a "work-related specific and identifiable, physical, and unexpected event."

This case serves as a significant guideline for insurers, employers, adjusters, and defense counsel, underscoring the necessity of systematically reviewing a claimant's long-term medical history when handling occupational stress claims. Practically, this decision demands that legal and insurance professionals rigorously document all relevant medical information to accurately evaluate causation and potential liability. Furthermore, it reinforces the requirement that the claimant must establish unmistakable evidence of an industrial work accident or, if such evidence is lacking, to argue that the *Duvall* substantial cause standard should apply. In practice, isolating pre-existing conditions and scrutinizing the medical literature cited by claimant's experts may not only inform case strategy but can directly influence both settlement negotiations and litigation outcomes. As a result, this decision is likely to influence how future claims are investigated, defended, and adjudicated, promoting more stringent evidentiary standards for stress-related workers' compensation cases. ◆

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Appellate Division Affirms Increased Permanency Award Despite Petitioner's Refusal of Recommended Surgery

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Key Points:

- A refusal of recommended treatment does not automatically preclude an increased permanency award on a re-opener claim.
- Objective medical evidence remains essential in re-opener claims. Petitioners must still prove a material increase in disability through objective findings, not subjective complaints.
- Credibility findings carry significant weight on appeal. The Appellate Division will defer to a workers' compensation judge's supported factual and credibility determinations, making them difficult to overturn.
- Respond promptly to requests for settlement authority to facilitate meaningful negotiations and minimize the risk of increased attorney's fees and costs.

Can a petitioner obtain an increased permanency award while refusing recommended surgery? According to the Appellate Division's recent unpublished decision in *Grasso v. Monmouth County Sheriff's Department*, 2026 N.J. Super. Unpub. LEXIS 1029 (N.J. Super. App. Div. May 18, 2026), the answer is yes. The decision is important as respondents often cite a petitioner's refusal of treatment as evidence that no material increase in disability has occurred.

Jason Grasso, a corrections officer employed by the Monmouth County Sheriff's Department, injured his right great toe while attempting to break up an inmate altercation in 2016. After undergoing surgery in 2019, he resolved his claim in 2021 for an award of 27.5% permanent partial disability of the right foot. Less than one year later, Grasso filed an application for review or modification, alleging increased pain and disability. Subsequent MRI imaging showed degenerative changes within the toe, and the authorized treating podiatrist recommended a fusion surgery. Grasso declined the procedure, testifying that he believed the prior surgery had worsened his condition and that he feared the proposed fusion would further impair his ability to play with his children and continue working as a corrections officer.

At trial, petitioner's orthopedic expert testified that objective MRI findings demonstrated progressive degeneration since the original award and that the condition would continue to worsen absent surgery. Respondent's orthopedic expert acknowledged the progression of degenerative changes reflected on the MRI, but nevertheless concluded there had been no material worsening in permanent disability since the original award.

The workers' compensation Judge found petitioner had established a material increase in disability supported by objective medical evidence and increased the award to 35% permanent disability of the right foot.

The Judge also assessed increased attorney's fees and costs against the employer after finding that the respondent failed to extend any settlement offer, which the Judge viewed as a failure to "negotiate in good faith".

On appeal, the employer principally argued that petitioner should not receive an increased permanency award after refusing recommended surgical treatment. The Appellate Division rejected that argument and affirmed the increased award, emphasizing both the reasonableness of the petitioner's decision and the deference afforded to factual findings made by the workers' compensation judge.

Relying upon N.J.S.A. 34:15-23, *Robinson v. Jackson*, 184 A. 811, 812 (E. & A. 1936) and *Lorenc v. Chemirad Corp.,* 179 A.2d 401, 412-413 (N.J. 1962), the court reiterated that an employee's refusal of surgery does not automatically justify reducing or denying benefits. Rather, the inquiry is whether the refusal was reasonable under the circumstances.

Here, the workers' compensation judge credited the petitioner's testimony regarding his increased functional limitations, his belief that the prior surgery had failed, and his reasonable fear that undergoing an additional surgery could jeopardize both his employment and quality of life. Because credibility determinations and factual findings are entitled to substantial deference on appeal, the Appellate Division declined to disturb those findings.

Finally, the Appellate Division affirmed the award of attorney's fees and costs, concluding the judge did not abuse his discretion after finding respondent failed to "negotiate in good faith" by declining to make any settlement offer before trial. Although attorney's fees are commonly allocated on a 60/40 split, workers' compensation judges have discretion to deviate from that practice based on the circumstances of the case.

Grasso reinforces several important principles governing re-openers and provides valuable guidance for evaluating permanency exposure.

First, objective medical evidence remains critical. Subjective complaints alone are not enough. Petitioners continue to bear the burden of proving, through objective medical evidence, a material increase in disability since the prior award. MRI findings, diagnostic studies, changes in physical examination findings, and documented functional loss remain significantly more persuasive than increased subjective complaints alone.

Second, a petitioner's refusal to undergo recommended surgery is not dispositive when evaluating increased permanency. Respondents should not assume that declining recommended treatment will automatically limit exposure. Rather, the relevant inquiry is whether the refusal was objectively reasonable under the circumstances.

Third, develop a complete record. Defense experts should be asked to address more than whether permanency has increased. When there has been no increase, experts need to explain why. When surgery has been recommended, experts should explain: whether the proposed procedure offers a reasonable likelihood of improving function; the expected risks and recovery; whether refusing surgery materially contributes to ongoing disability; and whether any worsening is attributable to the original work injury, normal aging, or unrelated degeneration. A well-developed expert opinion assists respondents in their arguments and also provides workers' compensation judges with a fuller record when evaluating both the reasonableness of refusing treatment and whether a petitioner has met the burden of proving increased disability.

Fourth, the Appellate Division repeatedly emphasized the highly deferential standard afforded to compensation judges. Once a workers' compensation judge makes supported credibility determinations and factual findings, reversal on appeal becomes difficult.

Finally, maintain active communication regarding settlement authority. While the Workers' Compensation Act does not define "good-faith" settlement negotiations, *Grasso* illustrates that a court may consider the absence of any settlement offer when exercising its discretion to assess attorney's fees and costs. Promptly providing settlement authority, even where the claim remains disputed, allows defense counsel to engage in meaningful negotiations and helps reduce the risk of a higher fee award.

In summary, *Grasso* serves as an important reminder that the focus remains on whether the petitioner has established a material increase in disability through objective medical evidence and whether the refusal of treatment is reasonable under the circumstances. The decision also highlights the substantial deference afforded to workers' compensation judges' factual and credibility determinations and demonstrates the importance of timely settlement authority to facilitate meaningful negotiations and reduce the risk of increased attorney's fees and costs. ◆

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Is Your Independent Contractor Actually a "Secret" Agent?

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Key Points:

- A principal is vicariously liable for the negligence of an agent, but not that of an independent contractor.
- If an employer's right to control extends to the manner in which a task is completed, then an employee is an agent rather than an independent contractor.
- Even though agency is generally a question for a jury to resolve, where the record is devoid of evidence to support a finding of agency, then summary judgment is appropriate.

In many cases involving the alleged negligence of an independent contractor we may think the liability analysis is simple: there is no vicarious liability for an independent contractor's negligent actions. However, this analysis does not consider whether that "independent contractor" could be considered an agent. Under Florida law, "[A] principal is vicariously liable for the negligence of an agent, but not of an independent contractor." *Del Pilar v. DHL Glob. Customer Sols. (USA), Inc.,* 993 So. 2d 142, 145 (Fla. 1st DCA 2008). The First District Court of Appeals' recent ruling in the case of *James v. Hernandez et al,* 2026 Fla. App. LEXIS 3878 (Fla. 1st DCA May 20, 2026) provides clear guidance on the determinative test used to evaluate whether a person/entity is an independent contractor or an agent.

In *James*, the plaintiff, Jeffrey James, was on a bicycle when he was struck by a vehicle operated by Abraham Hernandez, Jr. Hernandez owned Premier Waterproofing & Painting ("PWP"), which was a painting subcontractor for Premier Construction-Residential, LLC ("Premier"). Hernandez was traveling between Premier job sites at the time of the accident. Premier moved for summary judgment on the basis that Hernandez was an independent contractor. The plaintiff opposed the motion and asserted that Hernandez was Premier's agent and, thus, Premier was vicariously liable for Hernandez's negligence. At the trial court level, Premier's motion for summary judgment was granted, but the plaintiff appealed, leading to this opinion from the 1st DCA.

The 1st DCA began their analysis by considering Premier's right to control Hernandez, and not the actual control exercised over Hernandez. They cited to *Del Pilar v. DHL Glob. Customer Sols. (USA), Inc.*, 993 So. 2d 142, 146 (Fla. 1st DCA 2008) for the proposition that, "If the employer's right to control the activities of an employee extends to the manner in which a task is to be performed, then the employee is not an independent contractor, but rather is an agent … ."

For the purpose of analyzing Premier's right to control, they looked at the written agreement between Premier and Hernandez. The agreement governing the relationship among Premier, Hernandez, and ▸

PWP expressly provided that Hernandez was an independent contractor. The 1st DCA specifically highlighted provisions that were consistent with Hernandez being an independent contractor such as requirements that Hernandez have his own general liability, workers' compensation, and auto liability insurance and that Hernandez be paid in one lump sum rather than a salary or hourly wage.

In addition to the agreement, the court also looked to the actual practice among the parties to determine if the relationship was one of principal or agent. The Court noted that Hernandez drove his own truck, purchased his own paint and equipment, hired and paid his own workers, and he controlled how he got to and from Premier jobsites.

Despite these facts, the plaintiff tried to argue that Hernandez was Premier's agent because Hernandez worked almost exclusively for Premier. They also argued that Premier exercised control over Hernandez's painting methods by indicating the order in which he should paint homes in the Fletcher Oaks subdivision and which paint colors to use. Counter to these assertions, the Court recognized that Hernandez and PWP contracted with and were compensated by other companies and individuals besides Premier. Likewise, Premier contracted with other painters to paint houses in the Fletcher Oaks subdivision as well.

As to the direction given to Hernandez by Premier, the court indicated that the instructions to Hernandez were essential to the work generally assigned by a build contractor to a specialty subcontractor. Considering that there were other subcontractors working within the Fletcher Oaks subdivision, Premier needed to provide instruction as to the sequence of homes to be painted and which paints to use on those homes. The court stated that these actions by Premier did not point to control over Hernandez's methods of painting but rather control over outcomes of the job assigned.

Typically, the question of whether there is an agency relationship is a question for a jury to resolve, but, in this instance, the court ultimately ruled that the plaintiff failed to present any significantly probative evidence pointing to Premier's control over Hernandez's painting methods to show that there was an agency relationship. As such, the 1st DCA affirmed the trial court's ruling that Premier had no vicarious liability since Hernandez was an independent contractor.

This ruling serves as a reminder not only of the agency exception to the general independent contractor rule but also the standards for ruling on a motion for summary judgment. Even though the question of agency is generally considered a question of fact for a jury, the test on summary judgment is whether there is evidence such that a reasonable jury could return a verdict for the nonmoving party. As this case demonstrates, when there is not sufficient evidence on a question of fact, then summary judgment is appropriate. ◆

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The Ever-Evolving Landscape of Corporate Successor Liability in Products Cases

James P. Cullen, Esq.

Key Points:

- The "product line exception" in Pennsylvania is a multi-factored, flexible test wherein no one factor is mandatory or determinative.
- Practicality over technicality is key.
- Acquiring another company's product line and goodwill comes at a two-fold price.

Generally, Pennsylvania law holds that when one corporation transfers all of its assets to a successor corporation, the successor is not responsible for the transferor's liabilities. Several exceptions to this general rule apply, like express/implied agreement or fraud.

A more unique exception to this general rule is the "product line exception,"which is periodically raised in products liability cases.

This exception was adopted into Pennsylvania law in 1981 by the Superior Court in *Dawejko v. Jorgen Steel Co.*, 434 A.2d 106 (Pa.Super. 1981).

The Pennsylvania Supreme Court has never directly addressed the viability of the "product line exception" since its adoption into Pennsylvania law. Thus, the Superior Court's evolving, flexible application holds.

Recently, the Superior Court attempted to clarify its flexible application of the "product line exception" in *Burnley v. Loews Hotel*, 355 A.3d 328 (Pa. Super. 2026).

In *Burnley*, the plaintiff, Dana Burnley, fell on a defective cable protector at the Loews Hotel in Philadelphia, PA, while attending a conference on September 26, 2014. Mrs. Burnley alleged serious personal injuries as a result. At trial, the jury awarded Mrs. Burnley and her husband, $18,111,250 (molded by the trial court to $6,037.083.33).

The cable protector was manufactured by Industrial Advanced Technologies, Inc. ("IAT"). IAT produced Firefly brand cable protectors by supplying molds to FallLine, who poured polyurethane into molds to form two pieces of the cable protector. An error occurred in the manufacturing process, which caused a batch of defective protectors to contain mismatched lengths of the protector sides. Some of these defective protectors was rented to Loews Hotel for the conference Mrs. Burnley attended in September of 2014.

Checkers Industrial Products, LLC ("Checkers") acquired IAT's cable protector business through an asset purchase agreement in April of 2015, approximately eight months *after* Mrs. Burnley's fall. There was no evidence that Checkers knew about the defective batch at the time of the agreement.

Throughout litigation, Checkers argued it could not be liable because Checkers merely purchased the assets of IAT without assuming any of IAT's debts or liabilities. The plaintiffs argued that the "product line exception" applied.

At trial, the jury heard the following evidence related to the transaction between Checkers and IAT: (1) Checkers purchased all of IAT's equipment, customer lists, intellectual property, patents, trade shows, and trade names; (2) IAT entered into a non-compete preventing IAT from manufacturing, marketing, or selling cable protectors (3) Checkers publicly announced its purchase; (4) Checkers continued to use the IAT stamp and Firefly logo; (5) Checkers handled ongoing customer complaints about IAT/Firefly products (including those before its asset purchase of IAT); (6) IAT agreed to retain all liabilities before the sale, including "product liability"; (7) IAT remained in business after the sale; (8) IAT had no insurance with respect to its cable protector business; and (9) IAT's only assets were the Firefly brand and associated inventory, trademarks, and intellectual property.

The jury returned a verdict, determining among other things, that Checkers was a successor corporation to which the "product line exception" applied. Checkers appealed to the Superior Court.

The Superior Court affirmed the judgment based on the core principle of the exception. It held that, when a successor purchases substantially all manufacturing assets of another company and continues the same operation, strict liability in the same product will apply.

The Superior Court explained that "several factors" are relevant to whether the exception is applicable. No one factor is mandatory or determinative, dubbed the "flexible" approach.

The Superior Court's recitation of the factors in *Burnley* is lengthy, but boils down to the following considerations: the successor's acquisition of goodwill and customer lists; continuation as ongoing enterprise; same product, name, management, personnel, and clients; and use of same equipment, molds, and/or designs.

Further, special consideration was given to the *policy-based* factors: virtual destruction of a plaintiff's remedies against the original manufacturer; the successor's ability to assume the risk; and the fairness of requiring the successor to assume responsibility.

In applying these factors, the Superior Court found that Checkers purchased IAT's goodwill and customer lists; advertised as an ongoing enterprise of the Firefly product line; profited from this goodwill; used the same product, equipment, molds, and designs; solicited IAT customers; and IAT ceased its cable protector operation, while Checkers continued it.

More importantly, the Superior Court rejected Checkers' argument that IAT technically remained in business after the sale and, therefore, a viable entity that the plaintiffs could recover from. However, IAT was in debt and financially unable to pay any judgment against it. Therefore, the jury was permitted to infer the destruction of the plaintiffs' remedies against IAT and hold Checkers responsible under the "product line exception." "Practicality over technicality" won the day.

A corporation must look beyond mere technicalities when defending against the "product line exception." A fact-intensive analysis will apply, which will often be left at the feet of a jury. As a result, companies such as Checkers, who had no hand in manufacturing or distributing the defective product, or even any ownership interest in the company that made the product at the time of the accident, can still be found strictly liable.

This potential liability appears boundless. Checkers acquired the Firefly product line from IAT some eight months *after* Mrs. Burnley's fall. However, no temporal consideration appears to have been baked into the Superior Court's analysis. Thus, a plaintiff can viably argue the exception applies even multiple years removed from an incident or acquisition. Any time-based argument will be one of many non-dispositive factors considered by the jury.

Corporations should be on notice of the potential effect of the "product line exception" on corporate transactions. Asset purchasers cannot escape ▸

liability, even strict liability, through technical structures. And acquiring assets comes at a cost, sometimes a two-fold cost.

The majority's holding in *Burnley* is not without criticism, with three judges dissenting. One dissenting judge, Mary Jane Bowes, advocated for a "wholesale rejection of the product line exception," an issue that was not before the Superior Court due to Checkers' failure to properly preserve it. ◆

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Christopher Reeser | Kacey Wiedt | Justin Johnson | Leonard Leicht



Even When You Think You Have The Perfect Jury, You Can Still Be Surprised

Taylor E. Kosko, Esq.

Key Points:

- Jury selection matters, but it is not predictive. Even an attentive and seemingly favorable jury can return an unexpected or internally inconsistent verdict, particularly in complex cases.
- Verdict slips deserve careful attention. The structure and wording of a verdict slip can significantly affect the outcome of a case. Clear verdict sheets can be just as important as the evidence presented at trial.
- Expect the unexpected. Even the most carefully selected jury can return a surprising verdict. It is a reminder that while jury selection is essential, no panel is ever completely predictable.

A recent Pittsburgh trial serves as a stark reminder that even when jury selection has resulted in a seemingly favorable panel, a jury can still deliver an unexpected result. While careful jury selection remains crucial to proper trial preparation, no amount of voir dire completely eliminates the possibility of inconsistent or unpredictable verdicts.

In 2023, a lawsuit was filed by Michaeleen Lee in the Court of Common Pleas of Allegheny County against numerous defendants, including Johnson & Johnson, alleging that she developed mesothelioma as a result of her exposure to talcum powder products. The case proceeded to trial in late 2025, continued by her estate after Ms. Lee passed away from her mesothelioma prior to trial.

Following a one-and-a-half-month long trial, the jury rendered its verdict. The jury found Johnson & Johnson negligent, but did not find that Johnson & Johnson's negligence was a factual cause of Ms. Lee's diagnosis. The jury then shockingly attempted to award $22 million in punitive damages to Ms. Lee's estate.

How could a jury award millions of dollars in punitive damages against Johnson & Johnson despite failing to find causation? Looking back, the wording and format of the verdict slip laid the groundwork for juror confusion, and provides a cautionary example of why the selection of a favorable jury may not be enough to ensure success at trial. In its deliberation, the jury found Johnson & Johnson negligent, but did not find that the negligence caused Ms. Lee's mesothelioma.

Further, the jury found that Ms. Lee relied to her detriment upon statements of material fact made by Johnson & Johnson that allegedly concealed or omitted material information about the safety of the product at issue, but did not find that her reliance on those statements caused her mesothelioma. Finally, the jury found that Ms. Lee relied to her detriment on ▸

statements or conduct of material fact, intentionally or negligently made by Johnson & Johnson, which misrepresented the safety of the product at issue, but again did not find that her reliance on such statements or conduct of material fact caused her mesothelioma.

The verdict slip required the jurors to answer "yes" to having found that Johnson & Johnson's negligence, statements of material fact, and/or misrepresentations were a factual cause of Ms. Lee's mesothelioma diagnosis before they could award punitive damages. The jurors did not do so. Despite not finding causation, the jury still attempted to award Ms. Lee's estate $22 million in punitive damages.

Ultimately, the trial court molded the verdict, finding for Johnson & Johnson and awarding Ms. Lee's estate no punitive damages.

The decision to mold the verdict found itself before the Superior Court of Pennsylvania, which just recently issued a non-precedential opinion, affirming the trial court's decision. Because the jury clearly found that Johnson & Johnson's conduct was not a factual cause of Ms. Lee's injuries, the punitive damages award could not stand as a matter of Pennsylvania law.

Although the appellate decision focused on correcting a seemingly inconsistent verdict, the case offers a valuable lesson for trial lawyers. Jury selection is critical, but but relying upon the selection of a seemingly favorable jury is insufficient to guarantee success at trial. Even a carefully selected panel may struggle with complex verdict slips, nuanced legal standards such as causation, or the distinction between disapproving of a defendant's conduct and finding that conduct legally caused a plaintiff's injury. Cases involving multiple claims and multiple defendants only increase the likelihood that jurors may reach conclusions that appear difficult to reconcile. For trial counsel, this underscores the importance of not only selecting a thoughtful jury, but also presenting a clear narrative, simplifying complex legal concepts whenever possible, and paying close attention to the structure and wording of the verdict sheet. ◆

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New York's Consumer Litigation Funding Act: New Protections, Continuing Questions

Deeba Haeri, Esq.

Key Points:

- The Consumer Litigation Funding Act establishes New York's first comprehensive regulatory framework governing consumer litigation funding transactions.
- The Act strengthens consumer protections through fee caps, attorney-independence safeguards, and limitations on funders' involvement, among others, in litigation.
- Despite these reforms, questions remain regarding the discoverability of litigation-funding arrangements and the scope of the Act's new confidentiality protections.

New York has joined a growing number of jurisdictions seeking to regulate the rapidly expanding litigation funding industry. On December 19, 2025, Governor Hochul signed the Consumer Litigation Funding Act ("CLFA"), A804-C/S1104A, into law. Following amendments in 2026, the statute took effect on June 17, 2026.

The CLFA provides a regulatory framework to govern consumer litigation funding transactions, in which a third-party funding company advances money to an individual with a pending or anticipated civil claim in exchange for a contingent right to repayment from any future recovery. The statute requires funding companies to register with the State, provide specified disclosures, use plain-language contracts, and comply with restrictions governing fees, recoveries, and business practices.

The CLFA's most significant consumer protection is its limitation on recoveries. A funding company cannot require a consumer to pay charges exceeding 25% of the gross proceeds of the legal claim, plus the funded amount. This cap encompasses all charges, including administrative fees, origination fees, underwriting fees, and interest, regardless of how those charges are denominated. Furthermore, the funded amount and charges are only payable from the proceeds of the resolution of the claim. As such, consumers are prohibited to pay anything that exceeds the available proceeds, establishing a true nonrecourse structure. Consumers are also afforded a 10-business-day right of rescission and may prepay without penalty.

The CLFA defines a consumer litigation funding company as one that enters into a contract of no more than $500,000 with a consumer. This figure operates as both a definitional ceiling and a substantive prohibition: transactions exceeding that amount fall outside the statute's regulatory framework and thus, are not governed by the statute. Consequently, high-value cases involving larger funding arrangements are not guaranteed the protections afforded by the CLFA.

Beyond regulating fees and recovery, the CLFA includes provisions designed to preserve attorney independence and ensure that litigation decisions remain exclusively with the consumer and its attorneys. To that end, litigation funding companies are prohibited from entering into contracts with consumers represented by attorneys holding a financial interest in the funding company. The law further prohibits funding companies from influencing, or attempting to influence, decisions concerning litigation strategy, settlement, or the disposition of a claim. Those decisions remain exclusively between the plaintiff and its attorney.

The statute also provides confidentiality protections for certain communications between attorneys and litigation funding companies. It provides that all communications between the consumer's attorney and the funding company pertaining to the legal funding fall within the scope of attorney-client privilege and the work-product doctrine. While intended to facilitate funding-related discussions and protect sensitive information, those protections raise a question the CLFA does not directly answer: to what extent are litigation funding arrangements discoverable in civil litigation?

Even before the CLFA took effect, New York courts had begun addressing those questions. In *Lituma v. Liberty Coca-Cola Beverages LLC*, the First Department held that litigation funding information was discoverable because the defendants established that it was "material and necessary" to their defense. *Lituma v. Liberty Coca-Cola Beverages LLC*, 243 A.D.3d 504, 505 (1st Dep't 2025). The court relied on evidence suggesting a broader scheme involving suspicious accidents, medical providers, and other participants, concluding that funding information could reveal a financial motive for fabricating the accident.

Just three months later, however, the First Department clarified that litigation funding information is not automatically discoverable. In *Perdomo v. 361 E. Realty Assoc. LLC*, the court rejected efforts to compel disclosure absent a factual basis suggesting that the requested materials would reveal an improper motive or fraudulent conduct. *Perdomo v. 361 E. Realty Assoc. LLC*, 246 A.D.3d 541, 541-542 (1st Dep't 2026).

Together, *Lituma* and *Perdomo* establish that litigation funding agreements are neither automatically discoverable nor categorically protected from disclosure. Rather, discoverability depends on whether a defendant presents sufficient evidence suggesting fraud or an improper financial motive. Absent such a showing, courts are unlikely to permit broad inquiries into a plaintiff's funding arrangements. However, the enactment of the CLFA complicates this landscape by extending attorney-client privilege and work-product protections to communications regarding legal funding, leaving open questions regarding the interaction between those protections and existing discovery standards.

The CLFA represents an important step toward regulating an industry that previously operated with limited statutory oversight. By imposing consumer protections through its capped fees and recoveries, restrictions in funding company involvement in litigation decisions, and preservation of attorney independence, the statute creates a framework that did not previously exist. Yet significant questions remain. The statute does not resolve how litigation funding arrangements will be treated in discovery, particularly in light of its newly-enacted confidentiality provisions. As litigation funding continues to expand in New York, courts will play a central role in defining the practical limits of both the CLFA and the evolving case law surrounding third-party litigation funding more broadly. ◆

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The Third Circuit Clarifies Article III Standing in Website Replay Litigation

Saynyenoh B. Warner, Esq.

Key Points:

- The collection of ordinary website browsing activity does not constitute concrete injury as needed to have standing to bring a claim;
- The unauthorized capture of complete payment card information or similarly sensitive data may constitute a concrete privacy injury sufficient to establish standing;
- Allegations involving anonymous browsing behavior, standing alone, may not satisfy Article III's concreteness requirement, and;
- Businesses using session replay, analytics, or similar website monitoring technologies should evaluate what information those tools collect, whether sensitive information is masked or excluded, and whether appropriate disclosures and consent mechanisms are in place.

On May 11, 2026, the United Stated Court of Appeals for the Third Circuit issued an important published, precedential opinion in *In re BPS Direct LLC*, 175 F. 4th 423 (3d. Cir. 2026) for companies that use website analytics and session replay technologies. The main issue in the case concerned whether website users have Article III standing to sue over the unauthorized capture of their online activity through session replay code. The Third Circuit held that plaintiffs who alleged their complete payment card information was secretly captured by website session replay software sufficiently alleged a concrete injury to establish Article III standing. However, plaintiffs who only alleged that their anonymous browsing activity was recorded failed to establish standing.

The decision provides meaningful guidance for the types of alleged privacy harms that may support federal jurisdiction in the growing wave of website tracking and session replay litigation.

Background

Bass Pro Shops and Cabela's (BPS) embedded JavaScript "Session Replay Code" developed by a third-party provider on their retail websites. The code operated invisibly in users' browsers and captured the user's interaction on the website, including mouse movements, clicks, scrolls, keystrokes, and text entries, while recording data at intervals of just milliseconds. Critically, the Session Replay Code intercepted text inputs even if the user did not click "submit" or "enter," allowing BPS and the third-party providers to create video replays of each user's website visit.

Eight named plaintiffs filed a putative class action suit claiming that defendant BPS's use of a JavaScript computer code known as "session replay code" without users' consent violated various state and federal privacy laws.

Two of the plaintiffs completed purchases on the websites and entered personal identifying information, including names, addresses, and complete payment card information. The remaining six plaintiffs merely browsed the websites and did not submit identifying or financial information. The district court dismissed the action for lack of Article III standing. The Third Circuit affirmed in part, reversed in part, and remanded.

Holding

The Third Circuit held that for plaintiffs to have standing to bring their claim, they must first demonstrate a concrete injury that is closely related to traditional common law privacy torts such as intrusion upon seclusion or public disclosure of private facts. Browsing activity alone was insufficient to prove concrete injury. The court held that although the session replay technology allegedly captured browsing interactions, the information was neither particularly sensitive nor connected to the plaintiffs' identities. As a result, the alleged injury was not sufficiently analogous to the common-law privacy torts relied upon by the plaintiffs.

The court reached a different conclusion for the two plaintiffs who entered their names, addresses, and complete credit or debit card numbers during online checkout. For these plaintiffs, the court found that the alleged injury closely resembled the common-law tort of intrusion upon seclusion. The court emphasized that complete payment card numbers are private financial information that individuals reasonably expect to remain free from unauthorized observation. Allegations that third-party software secretly recorded that information without the user's knowledge constituted the type of unauthorized intrusion historically recognized by the common law.

This decision further develops the growing body of federal appellate authority addressing standing in website privacy litigation involving session replay technologies and similar tracking tools. ◆

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ON THE PULSE



Marshall Dennehey's Connecticut Anchor: The View From State Street

Charles T. Gura, Esq.

Marshall Dennehey's New Haven, Connecticut office marked its fourth year in operation earlier this year. Over the past four years the office has seen growth in the number of attorneys, support staff, and areas of practice.

The attorneys in the New Haven office litigate matters both in State and Federal Courts across the entire state of Connecticut. Some lawyers in this office are also admitted to practice in New York and handle cases there in portions of the state contiguous to western Connecticut.

The casualty group makes up the largest contingent of attorneys in the office. There are also attorneys who specialize in healthcare litigation who represent healthcare providers ranging from physicians to therapists as well as long term care facilities. The matters handled in the office range from professional liability, construction defect and liability, premises liability, retail liability, trucking, insurance coverage, healthcare litigation, and complex defense litigation.

As our office handles cases in all jurisdictions throughout the state, collaboration is a key part of the culture at Marshall Dennehey and in the New Haven office. We have benefited from having litigators skilled in multiple areas of practice. This has resulted in the development of relationships with new clients and expansion of our long-standing clients of the firm.

In addition to an increase in the number of attorneys there have been additions to the paralegal and administrative staff which have helped us provide our clients the highest level of litigation support. The smooth operation of the office is made possible by the capable leadership of our office manager, Amanda Britton, who has been on staff since the office opened in 2022.

Conveniently located in the center of coastal Connecticut, and fueled by the best pizza around, the New Haven office is positioned for a bright future and continued success. ◆

Charles is the New Haven Office Managing Attorney and may be reached at CTGura@mdwcg.com.

ON THE PULSE



Profile of the Intellectual Property, Technology & Media Litigation Practice Group

David J. Shannon, Esq.

The Intellectual Property, Technology & Media Practice provides comprehensive, end-to-end litigation and counseling services to national and global insurance carriers. We are committed to delivering a disciplined, cost-effective, and creative defense tailored to each client's needs. Our attorneys combine deep litigation experience with technical and scientific backgrounds, enabling us to understand our clients' technologies and effectively communicate complex concepts to adversaries, judges, and juries. We also assist clients with risk management, pre-suit dispute resolution strategies, and, when necessary, the litigation of claims and complaints in courts across all 50 states through trial.

In addition, we work closely with our eDiscovery team to address complex issues involving electronically stored information, including data preservation, electronic discovery, computer imaging, and allegations of spoliation. These issues are often critical to the intellectual property and technology matters we handle every day, and our integrated approach helps clients navigate them efficiently and effectively. Our attorneys represent clients in patent infringement, copyright, trademark, and trade secret disputes in the state and federal courts in jurisdictions throughout the United States. Many of our clients also face highly technical professional liability claims involving computer systems, software, cybersecurity, data management, and other technology-related services.

We take a proactive approach to managing risk and controlling exposure, working with clients and their insurers to develop effective pre-suit strategies and avoid litigation whenever possible through mediation, settlement conferences, and other alternative dispute resolution methods. When litigation cannot be avoided, we remain steadfast in serving our clients' legal and business objectives, recognizing the significant costs and operational burdens that complex litigation can impose. We work closely with insurance carriers to help protect our clients' brands, intellectual property, and business interests while delivering a thorough and cost-effective defense.

We additionally maintain a strong Media Practice. Our attorneys have extensive experience handling First Amendment and media-related disputes, including claims involving defamation, libel, privacy rights, injunctions, gag orders, and prior restraints on speech. Clients benefit from our practical litigation strategies and thoughtful approach to managing matters that often attract significant public attention and scrutiny.

With 19 offices throughout Pennsylvania, New Jersey, New York, Delaware, Florida, Ohio, and Connecticut, we maintain a strong presence across the East Coast. We serve as national counsel for insurance carriers and have handled matters throughout the United States, from Hawaii to Washington, and virtually every jurisdiction in between. Our national reputation ensures that our clients receive not just the best skilled legal representation but also practical business-minded guidance in determining the proper legal response to all claims and lawsuits. ◆

David chairs both the Privacy and Data Security Practice and the Intellectual Property, Technology and Media Litigation Practice. He may be reached at djshannon@mdwcg.com.

ON THE PULSE

Recent Appellate Victories



Kimberly Berman (Fort Lauderdale) and **Sontho SaintGermain** (Orlando) succeeded in obtaining an affirmance by the Second District Court of Appeal of a final judgment in a slip-and-fall premises liability matter on behalf of a business establishment and property owner. The plaintiff was a business invitee who sued the property owner for negligence after she fell while riding her electric bicycle through its landscaped parking lot. During discovery, the plaintiff claimed the fall occurred while she was traversing through a section "covered heavily in leaves" though she could not identify how she fell nor whether there were any objects or foreign substances causing her fall. The property owner moved for summary judgment, asserting the accumulation of leaves on the parking lot was an open and obvious, naturally occurring condition that could not constitute a dangerous condition to impose liability on a property owner. The court granted summary judgment in the property owner's favor. After oral argument, the Second District Court affirmed *per curiam* the final judgment in the property owner's favor. *Carrie Collier v. Cars MTI-4 L.P. d/b/a Lazydays RV Resort*, No. 2D2025-1980 (Fla. 2d DCA May 13, 2026).

Kimberly House (Philadelphia) succeeded in obtaining a victory in the Superior Court of Pennsylvania that reversed the trial court's decision and remanded the case for reinstatement of the jury verdict which was originally won by Gary Samms (King of Prussia/Philadelphia). (The underlying medical malpractice case involved claims seeking more than $5 million in damages for serious eye injuries including a detached retina and macular hole.) At trial, the jury returned a defense verdict finding that the defendant's negligence was not a cause of the plaintiff's injuries. The trial judge granted the plaintiff's post-trial motions and ordered a new trial solely on the issue of damages. The Superior Court found that the trial court abused its discretion in finding that causation was not disputed and that the jury's finding of no causation was against the weight of the evidence. *Busanic v. Premier Orthopaedic & Sports Medicine Physical Therapy*, 2026 Pa. Super. Unpub. LEXIS 1140 (Pa. Super. Apr. 28, 2026).

Suzanne Tighe (Scranton/Philadelphia), **Allison Krupp** (Harrisburg) and **Christopher Woodward** (Harrisburg) succeeded in obtaining an affirmance by the Superior Court of Pennsylvania of a non-jury trial decision in favor of an insurance company. Plaintiffs asserted claims under the Pennsylvania Bad Faith Statute, 42 Pa.C.S. § 8371, following a statutory arbitration award in excess of the available underinsured motorist (UIM) coverage. The trial court held the plaintiffs failed to prove bad faith in the handling of the UIM claim and entered judgment in favor of the insurer. The Superior Court rejected the plaintiffs' contentions that the trial court misapplied the applicable bad faith law, set forth in *Rancosky v. Washington Nat'l Ins. Co.* 170 A.3d 364 (Pa. 2017), and affirmed the trial court. The Superior Court further held that plaintiffs' waived their requests for judgment notwithstanding verdict (JNOV) and new trial by failing to properly preserve these issues at trial and in post-trial motions. *Brown v. U.S. Auto. Ass'n,* 2026 Pa. Super. Unpub. LEXIS 1393 (May 27, 2026). ◆

**Results do not guarantee a similar result.*

ON THE PULSE

Other Notable Achievements

THOUGHT LEADERSHIP



Dana Gittleman (Philadelphia) authored the article, "The Importance of Memorializing Settlement Terms," appearing in the *PLUS Blog* on April 27, 2026. In the article, Dana discusses a new Pennsylvania Superior Court decision that shows how overlooked or undocumented terms can unravel even routine negotiations, especially when parties have differing expectations or one side is unrepresented.



Jordan Mazzoni (Scranton) authored the article, "The Best Defense is Already in the File Documentation in Civil Rights Litigation," published on *PLUS Blog* on July 27. The article discusses how documentation is an essential defense to public entity & civil rights litigation. ◆

SPEAKING ENGAGEMENTS



John L. Slimm (Mount Laurel) moderated and presented on claims and defenses involving lawsuits against the plaintiffs' bar at the 2026 Legal Malpractice Update for the New Jersey Institute for Continuing Legal Education. The seminar offered practical strategies to prevent ethical grievances and legal malpractice, along with sharing expert insights on issues from electronic payments and fee splitting to the impact of AI.



Heather Carbone (Jacksonville) was a panelist for a webinar hosted by The Workers' Compensation Claims Professionals (WCCP) Association. As part of the "Meet the Experts" Series, the speakers addressed "Afterthoughts that Undermine a Successful Mediation," highlighting the pitfalls and challenges of underprepared or unprepared mediation participants.



A. Judd Woytek (King of Prussia) joined a panel at the CLM Alliance (Claims and Litigation Management Alliance) Work Comp Conference in Nashville to present "We See You How Employee Engagement Enhances Work Comp Outcomes." Judd and his fellow panelists discussed the positive impact of employee engagement on claim outcomes, return-to-work timelines, and overall claim costs.



Joe Lesinski (Pittsburgh), **Jim Cole** (Philadelphia), **Matt Flanagan** (New York), and **Adam Fogarty** (Mt. Laurel) presented several continuing education (CE) programs to claims professionals for our client. The team hosted two one-hour panel discussions on "The Art of Mediation", attended by more than 80 claims professionals. In the afternoon Adam Fogarty and Joe Lesinski presented a CE program on "The Fundamentals of Premises Liability in New Jersey and Pennsylvania" while Matt Flanagan and Jim Cole led a presentation on "Trends in Claims" against attorneys and the evolving issues impacting the legal profession. ▶



Julia Klubenspies (Roseland) was invited to speak to the 2026 class of incoming resident physicians at The Valley Hospital on ways to reduce the risk of being named in litigation.



Jon Cross (Philadelphia) and **Sara Mazzolla** (Roseland) spoke at the 5th Annual ideal3 Summit in Minneapolis on "Information Gathering for New Claims and Prevention of Spoliation." The program explored the ethical and legal obligations surrounding the collection and preservation of evidence once a claim is anticipated.



Sara Mazzolla (Roseland) presented at the annual Roller Skating Association Conference on "The Pros and Cons of Waivers in Your Rink," sharing insights on the use of liability waivers as a risk management tool for skating rink operators and discussing considerations that may impact their effectiveness.



James Hanratty and **Erica Cagan** (both of Jacksonville) presented at the Florida Defense Lawyers Association's Florida Liability Claims Conference. Their session, "Supporting the Next Generation: Connecting with Associates," explored communication best practices from the perspectives of both a senior shareholder and a newer associate.



Lindsay McCormick (Tampa) was a panelist at the West Coast Casualty Construction Defect Seminar in Anaheim. Lindsay's session, "It May Not Be All Wrapped Up with Your OCIP/CCIP," examined key considerations surrounding Owner-Controlled and Contractor-Controlled Insurance Programs. Attendees gained insight into risk management strategies and coverage issues impacting construction defect litigation and related claims.



Gary M. Samms (King of Prussia and Philadelphia) was a featured speaker at the American Legal Connections (ALC) 2026 Seventh Annual Healthcare Symposium in Atlanta, Georgia. Gary joined a panel discussion titled "The Modern Plaintiff Machine." Designed for medical professional liability defense attorneys, claims professionals, underwriters, carriers, and health system risk executives, the symposium addressed some of the most pressing challenges in today's healthcare litigation landscape.



Josh J.T. Byrne (Philadelphia) was a featured panelist at the Philadelphia Bar Association CLE program, "Ethics & Legal Malpractice Avoidance." The program provided a comprehensive overview of strategies for avoiding legal malpractice, including ethical considerations, client communication best practices, and common pitfalls that can lead to malpractice claims.



Casey Coyle (Harrisburg and Philadelphia) presented "Recent Civil Law Decisions and Civil Rule Updates" at the Pennsylvania Conference of State Trial Judges in Hershey. The session provided attendees with insights into recent developments in Pennsylvania civil law and examined updates to the rules governing civil practice, helping practitioners stay informed on significant changes affecting litigation and courtroom procedure. ◆

PUBLISHED WORKS



Josh J.T. Byrne (Philadelphia) and **Alesia S. Sulock** (Philadelphia) authored the article, "Whither the Private Reprimand," published in *The Legal Intelligencer* on July 22, 2026. In the article, Josh and Alesia examine the notable absence of private reprimands issued by the Pennsylvania disciplinary authorities in 2025, discussing the important role that informal admonitions and private reprimands have historically played in addressing attorney misconduct and considering what this trend may signal for the future of attorney discipline in Pennsylvania.



Blake Hood (Jacksonville) authored the article, "Fla. Workers' Comp Physician Dispensing Ruling Could Produce New Legislative Fight," published on August 5 in *Insurance Journal* . The article discusses Florida's First District Court of Appeal's decision in *Publix Super Markets, Inc., et al. v. Department of Financial Services, et al*., holding that while injured workers have an absolute right to choose their own pharmacy or pharmacist, that right does not extend to physicians who dispense medications directly to their patients.



Kimberly Kanoff Berman and **Seth Altman** (Fort Lauderdale) authored the article, "A Unified, Single Claim for Damages Requires Apportionment in a Joint Proposal: What the Decision in 'Trace Elements' Means for Property Insurance Claims," published on August 6 in the *Daily Business Review*. The article analyzes the Florida Supreme Court's decision in *Trace Elements v. MacKensen* and examines its implications for property insurance claims in Florida, particularly regarding the apportionment of damages in joint settlement proposals. ◆

RECOGNITION



Tiere Phillips (Pittsburgh) was elected to the Allegheny County Bar Association's Judicial Committee for a Diverse Seat. As one of only three attorneys elected to this role, Tiere will help ensure fairness and equality in representation during judicial evaluations and recommendations for election and reelection in Allegheny County.



Steven A. Johnston (Roseland) received the "Pride of Essex County Award" at the 2026 Essex County LGBTQ+ Pride Celebration on June 17 at the Essex County Martin Luther King, Jr. Justice Building in Newark. Hosted in conjunction with the Essex County Office of LGBTQ+ Affairs and the Essex County Lesbian, Gay, Bisexual, Transgender and Questioning Advisory Board, Steven was recognized for his service to the community and his support of equality for members of the LGBTQ+ community.



Jason Banonis (King of Prussia) was honored with the Pennsylvania Defense Institute's 2026 Attorney of the Year Award at the organization's annual conference. A longtime leader and contributor to the organization, Jason was recognized for his dedication and service. ◆

ON THE PULSE

Defense Verdicts and Successful Litigation Results









CASUALTY DEPARTMENT

Kevin Hexstall (Philadelphia), **Alicia Calaf** (Roseland), and **Patricia McDonagh** (Roseland) secured a no-cause verdict on behalf of a national home improvement retailer in a personal injury action. The plaintiff alleged that on May 20, 2019, she was injured at one of the retailer's stores when an associate moved a lumber cart, causing a PVC pipe to fall and strike her head and right shoulder. She claimed permanent traumatic brain injury, concussion, and spinal injuries, supported by her orthopedic and neurologic experts. Our defense orthopedic and neurologic experts testified that the plaintiff's reported symptoms were more consistent with malingering or a somatoform disorder. After a one-week trial and approximately 45 minutes of deliberation, the jury unanimously found the defendant was not negligent.

Adam Fogarty and **Ashley Davis** (both of Mount Laurel) obtained summary judgment in a construction site accident matter in which the plaintiff alleged he was injured after lifting a cover and falling into a hole at an active worksite. Our client was the owner of the building under construction at the time of the accident. Based on the contractual agreements and testimony of the parties involved, we successfully argued that the subcontractors and the plaintiff's employer were solely responsible for worker safety, supervision, and site conditions. We further argued that our client could not be held liable for the alleged negligence of independent contractors. The court agreed, finding that our client owed no duty to the plaintiff, and dismissed all claims against our client.

Steven Christman and **Allison Snyder** (both of New York) obtained summary judgment prior to discovery in a premises liability action on behalf of a retail store tenant. The plaintiff alleged that she tripped and fell on a sidewalk abutting our client's retail store. The action was commenced against multiple defendants, including New York City, the owner of the premises, and the owners and managers of an adjacent property where the client leased storage space. On behalf of the tenant, we moved for summary judgment before any discovery had taken place. The motion was supported by an affidavit from the client establishing that it neither created the alleged sidewalk defect nor made any special use of the sidewalk that could give rise to liability. In opposition, the plaintiff did not offer evidence raising a triable issue of fact and instead argued that the motion was premature because discovery had not yet been conducted. The Supreme Court rejected the plaintiff's argument and granted summary judgment, dismissing all claims against our client, finding that the plaintiff failed to demonstrate that discovery might lead to evidence supporting liability.













Kevin Hexstall (Philadelphia) and **Sara Mazzolla** (Roseland) with assistance from **Patricia McDonagh** (Roseland), **Tim Jaeger** (Roseland), and **Dillon Payne** (Philadelphia), obtained a unanimous defense verdict in a New Jersey premises liability case involving claims of traumatic brain injury and significant cognitive impairment. The case arose after a six-foot drill bit weighing less than two pounds fell from a display and struck the plaintiff after an unidentified customer inadvertently bumped the shelving with a shopping cart. Although the plaintiff later underwent brain surgery to address two previously undiscovered, unruptured aneurysms, she alleged that the incident caused a concussion, post-concussion syndrome, and lasting cognitive deficits. The defense successfully demonstrated that the falling merchandise resulted from the unforeseeable actions of an unknown third party rather than any negligence by store employees. Through store surveillance video, witness testimony, and contemporaneous documentation, the defense established that the item had likely been misplaced by another customer and that there was no evidence any employee knew or should have known it posed a hazard. Expert testimony further established that the impact generated forces well below those typically associated with a concussion, while cross-examination of the plaintiff's medical experts highlighted alternative explanations for her claimed injuries, including the subsequent craniotomy. Following a six-day trial, the jury found no negligence on the part of the defendant, returning a 6-0 verdict in favor of the defense.

Robert McCormick and **Evan Saltzman** (both of Philadelphia) secured a unanimous defense verdict in a premises liability case in the Philadelphia County Court of Common Pleas. The matter involved allegations arising from a claimed sidewalk defect near the Port Richmond section of Philadelphia. The plaintiff alleged that our client failed to properly maintain the sidewalk adjacent to its property and sought damages of $875,000. Following a three-day jury trial, the jury returned a unanimous verdict in favor of the defense, finding that our client was not liable for the plaintiff's alleged injuries.

Keith Andresen (New York) and **Ashley Davis** (Mount Laurel) secured a voluntary dismissal of all claims against their clients in a Labor Law matter in Suffolk County, New York. The plaintiff sustained injuries while working on a residential construction project at the insured homeowner's property. The plaintiff commenced suit under the New York Labor Law Sections 240(1), 200, and 241(6). The homeowners had hired a general contractor to complete an addition to their home, and the general contractor retained the plaintiff's employer as a subcontractor. The defense established early in the litigation that the homeowners were entitled to the Labor Law homeowner's exception because they did not direct, control, or supervise the work. After filing an early motion for summary judgment, the defense secured a stipulation of discontinuance as to their clients before any depositions were conducted, sparing the homeowners years of costly litigation.

Kevin McKeon and **Eric Glass** (both of Mount Laurel) successfully obtained dismissal of all claims against their client in a personal injury action arising from a December 22, 2021, workplace accident. The plaintiff alleged injuries sustained while unloading pharmaceutical products from a tractor trailer and sought to add the client as a defendant more than two years after the statute of limitations had expired. The defense demonstrated that records identifying the client as the shipper were available to the ▸

plaintiff's employer before the limitations period expired, and argued that the plaintiff failed to exercise the diligence required to preserve claims against an unidentified party. The court agreed and dismissed all claims against the client as time-barred. ◆











HEALTH CARE DEPARTMENT

Suzanne Utke, with the assistance of **Tyler Price** (both of Philadelphia), obtained a defense verdict on behalf of an addiction medicine psychiatrist following a 12-day Philadelphia trial arising from the overdose death of a 26-year-old patient. The decedent, who had a history of chronic pain treatment and alleged opioid addiction, was referred to the client for detoxification and rehabilitation treatment. After completing a detox program, he was scheduled to begin Vivitrol therapy, but was found deceased days later. Toxicology testing revealed the presence of multiple substances, including heroin, fentanyl, morphine, Valium, and xylazine. Following two days of jury deliberations, the jury found the client was not negligent. While negligence was attributed to a co-defendant physician and the decedent, the jury assigned 65% of the fault to the decedent, resulting in no recovery for the plaintiffs.

Gary Samms, **Adam Fulginiti**, and **Ryan Harvie** (all of Philadelphia) successfully obtained a defense verdict during arbitration in a medical malpractice case involving complex foot reconstruction surgery. The plaintiff alleged that the surgery was improperly planned and performed, resulting in foot misalignment and the need for three subsequent corrective procedures. The defense demonstrated that the plaintiff presented with a lengthy history of severe foot problems and related orthopedic issues, requiring a highly complex surgical procedure with known risks and potential complications. Medical records, operative documentation, and imaging confirmed that the surgery was performed appropriately and in accordance with the standard of care. The defense further established that the plaintiff's postoperative issues were recognized risks and outcomes associated with the procedure. The arbitration panel returned a verdict in favor of the client.

Maura Brady and **Julia A. Klubenspies** (both of Roseland) obtained a defense verdict in a medical malpractice action involving allegations of anesthesia negligence during emergency surgery. The plaintiff, a 43-year-old woman, presented to the hospital in septic shock seven days after undergoing a robotic hysterectomy and required emergency surgery. She alleged that she aspirated during intubation, causing complications that ultimately resulted in lower extremity gangrene and the loss of all 10 toes. The defense disputed that aspiration occurred, pointing to the patient's stable vital signs and end-tidal CO_2 readings during the procedure, and argued that the toe amputations were caused by the severe sepsis she had upon arrival at the hospital rather than the anesthesia care provided. Despite a $12 million demand, no settlement offers were made. Following a six-week trial in Hudson County, New Jersey, the jury unanimously returned a defense verdict in favor of the defense. They were assisted by Karen L. Kankula and Jennifer Polowchena.

Jack Farrell and **Holli Archer** (both of Philadelphia) obtained a defense verdict in a medical malpractice action arising from the death of a 63-year-old patient following a cardiac ablation procedure. The plaintiff, acting as administrator of the patient's estate, alleged that the defendants were negligent after the patient suffered a coronary artery dissection during the procedure, which ultimately led to her death.

The defense established that coronary artery dissection is a well-known and accepted risk of cardiac ablation procedures and that the complication occurred through no fault of the electrophysiologist who performed the procedure. Following a four-day trial in the Montgomery County Court of Common Pleas, the jury returned a unanimous defense verdict in just 20 minutes, finding in favor of the defense. They were assisted by Charmaine Pinckney, Jennifer Cicchetti and Maureen Wagner. ◆

PROFESSIONAL LIABILITY DEPARTMENT





Danielle Robinson (Fort Lauderdale) and **Brendan Smith** (Orlando) successfully obtained a complete defense verdict in a breach of warranty case and appeal of a Florida Lemon Law arbitration decision. The plaintiffs alleged that a leased vehicle was a "lemon" and sought more than $500,000 in damages and attorney's fees under the federal Magnuson-Moss Warranty Act. The defense successfully upheld a prior Florida New Motor Vehicle Arbitration Board ruling that the plaintiffs were not eligible for relief under the Florida Lemon Law because they did not qualify as consumers. After less than 90 minutes of deliberation, the jury returned a defense verdict on all claims. The plaintiffs recovered no damages, final judgment was entered in favor of the client, and the plaintiffs waived their right to appeal.



Andrew Norfleet (Harrisburg) successfully obtained summary judgment in a federal civil rights lawsuit alleging false arrest and false imprisonment under the Fourth Amendment. The plaintiff claimed he was wrongfully arrested, but the defense demonstrated that the arresting officer had probable cause based on an on-scene identification made by another responding officer, who was also the victim of the underlying crimes. Both the trial court and the Commonwealth Court concluded that the arrest was based on a reasonable and reliable identification and that the officers acted appropriately under the circumstances. The courts further held that the officers were entitled to both federal and state law immunity, finding no evidence of malice, willful misconduct, or intentional wrongdoing. As a result, all claims against the client were dismissed.



Jillian Dinehart (Cleveland) successfully obtained a unanimous defense verdict in an age discrimination/wrongful termination matter in Ohio. The plaintiff was the former clerk of courts, serving for 12 years under the same mayor. However, when the mayor won a re-election campaign in 2024, he ended her at-will employment. She alleged wrongful termination and age discrimination. To support her claim, she cited several text messages from 2021, a Facebook post, and a birthday card all containing age jokes referring to the plaintiff as older than her actual age. Additionally, she alleged that the mayor called her "a grandma" throughout her tenure. The plaintiff was replaced by an inexperienced clerk who was 20 years younger. The defense included the mutual nature of some of the jokes, the lack of supporting evidence of the alleged verbal remarks made over the years, and the political nature of the position that allowed for annual turnover. The jury of eight issued a defense verdict on all charges – wrongful termination, hostile work environment, and aiding & abetting.





Matthew Behr and **Walt Kawalac** (both of Mount Laurel) obtained an affirmation in a disability discrimination case in the New Jersey Appellate Division. The plaintiff was a custodian working for the county library. He was observed using a cane for knee issues. He was sent for a fitness-for-duty examination and the doctor determined ▸

that he was not fit for duty, and he was terminated as a result. The plaintiff alleged disability discrimination and failure to accommodate the claim under the NJLAD. We filed for summary judgment, which was granted by the trial court and affirmed by the Appellate Division.



Seth Altman (Fort Lauderdale), secured a voluntary dismissal with prejudice in a first-party property insurance coverage dispute arising from alleged Hurricane Ian damage. The plaintiff sought $195,000, claiming the hurricane caused extensive damage to the insured property. The defense demonstrated that the claimed losses stemmed from pre-existing conditions, including unrepaired damage from prior claims, roof deterioration, rot, and structural issues that existed before the storm. After aggressively defending the case, deposing the plaintiff, and presenting extensive documentary and photographic evidence, the plaintiff agreed to dismiss the case with prejudice prior to mediation. The matter was resolved with no payment made on behalf of the client. ◆

WORKERS' COMPENSATION DEPARTMENT





Michele Punturi (Philadelphia) and **Alana Staniszewski** (Pittsburgh) successfully obtained the grant of a termination petition in a Pennsylvania workers' compensation case involving a hospital employee who claimed ongoing disability following a shoulder injury and multiple surgeries. The defense presented expert medical testimony establishing that the claimant had fully recovered from the work-related sprain/strain and that many of her ongoing complaints were unrelated to the work injury. Surveillance footage further contradicted the claimant's allegations of disability by showing her performing everyday activities without difficulty. The Workers' Compensation Judge found the defense evidence credible, granted the termination petition, and ended the claimant's entitlement to benefits.





A. Judd Woytek (King of Prussia) and **John Abda** (Scranton) successfully had a workers' compensation claim petition granted for medical benefits only for a close period with no wage loss awarded. The claimant alleged multiple injuries as the result of a very minor motor vehicle incident where a co-worker's delivery van rolled down an incline of approximately six feet, and bumped into the rear of the claimant's delivery van. He claimed he was thrown forward and suffered head and neck injuries, along with aggravating a pre-existing ankle injury. The claimant was also terminated following the accident for having a large hunting knife in his van, which was against the employer's workplace violence policy. The judge granted the claim for a mild concussion and an ankle contusion, but terminated medical benefits as of the date of our IME's. The judge found that no wage loss benefits were payable as the claimant was terminated for cause and work remained available to him. The judge found our medical experts to be more credible than the claimant's, along with finding our four employer witnesses to all be credible.



Eric Scott Thompson (Wilmington) successfully defended a Delaware workers' compensation claim involving allegations that a claimant's left knee condition and subsequent total knee replacement resulted from overuse caused by a compensable right knee injury. The Industrial Accident Board accepted the employer's medical evidence, finding the claimant failed to establish a causal connection between the ▸

left knee condition and the work injury. The Board also agreed that the claimant was capable of returning to sedentary work and that suitable employment opportunities were available. As a result, the claimant's entitlement to total disability benefits ended, and benefits were limited to partial disability.

Tony Natale (King of Prussia) successfully had a termination petition granted in a workers' compensation matter. The claimant sustained a work injury in the form of a "fractured back" when he slipped and fell on concrete during the course and scope of employment. Based on the opinions of a board-certified orthopedic surgeon, the claimant's condition improved to the point where it was clear that no objective findings on exam or diagnostic testing corroborated ongoing subjective complaints. The claimant pursued actions in both Pennsylvania and New Jersey. The claimant thumbed his nose at the court in Pennsylvania at two hearings and ultimately, expert testimony was presented on behalf of the carrier. The court found that the preponderance of the evidence supported full and complete recovery and the termination was granted in its entirety for a full defense verdict. ◆



For more results visit click here!

Defense Digest, **Vol. 32, No. 3, September 2026**, is prepared by Marshall Dennehey to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.

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