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The Appeals Attorneys

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IN THIS EDITION

NEWS ALERT

New York Governor Andrew Cuomo has the opportunity to shape the bench of the New York Court of Appeals during his first term and, if re-elected, second term. The New York Senate recently confirmed the governor's first nomination, Judge Jenny Rivera. The nomination sparked minor discontent from select senators because Judge Rivera has no experience sitting as a judge at any level beyond the administrative forum. Judge Rivera has impressive credentials, though. She is a professor of law at the City University of New York School of Law in New York. Judge Rivera also clerked for then District Judge Sonia Sotomayor.

Judge Rivera is certainly not the first non-judge or justice to sit on a court of last resort. In New York, former Chief Judge Kaye and Judge Robert Smith immediately come to mind. Despite the lack of judicial experience, Judge Kaye contributed immensely to the New York Court of Appeals' decisions and procedure at oral argument. Similarly, Judge Smith has brought an extremely practical point-of-view to the court's procedural rules. He also has written numerous plain-language decisions (whether in the majority or dissent) pointing out the impact the court's holdings have on practitioners and litigants.

Much like Justice Elena Kagan of the United States Supreme Court, Judge Rivera does not have prior written judicial decisions to predict how she will view certain issues concerning civil litigation (e.g., insurance law, New York's Scaffold Law, duty of care issues in tort cases, etc.). Therefore, we will have to watch and analyze Judge Rivera's questioning style at oral argument and writing style in decisions she authors in the coming few months, starting with the March session during the week of March 18.

Because of Judge Theodore Jones' untimely death, the governor has another opportunity early this year to nominate another judge to New York's high court. New York's Commission on Judicial Nomination recently forwarded its list of judicial candidates to the governor. The candidates endorsed by the commission are: Justice Sheila Abdus-Salaam, Appellate Division, First Department; Justice Eugene Fahey, Appellate Division, Fourth Department; Justice John Leventhal, Appellate Division, Second Department; Justice Dianne Renwick, Appellate Division, First Department; David Schulz, partner, Levine Sullivan Koch & Schulz; Maria Vullo, partner, Paul, Weiss, Rifkind, Wharton & Garrison; and Rowan

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EDITOR
Matthew S. Lerner

The Appeals Attorneys provides timely summaries and access to cases that the highest courts in New York, Connecticut, New Jersey, and Pennsylvania will decide. For ease of reference, we have divided the cases by subject area. Links to jurisdictional information and links to full-text decisions are contained in each summary.

The Appeals Attorneys is the collaborative effort of Goldberg Segalla's Appellate Advocacy Practice Group. We appreciate your interest and welcome your feedback. Please share this publication with your colleagues. If others in your organization are interested in receiving *The Appeals Attorneys*, please contact Matthew Lerner.

Wilson, partner, Cravath, Swaine & Moore. Governor Cuomo has up to the first week of April to nominate one of the candidates.

In November 2014, Judge Graffeo's term expires. Republican Governor George E. Pataki nominated Judge Graffeo to the bench. Judge Graffeo can seek re-appointment, but the decision to approve the re-appointment will be in Governor Cuomo's hands. Notably, if he runs and is successful in getting elected for a second term, Governor Cuomo would appoint a new chief judge at the end of 2015, because Judge Lippman turns 70, the mandatory retirement age. He will also have an opportunity to replace two former Governor Pataki appointees. Judge Pigott, Jr. turns 70 years old in 2016 and Judge Read's 14-year term expires at the end of 2017.

All the changes in personnel can certainly change the court's views on certain important civil litigation issues that have developed through the past several years. Governor Cuomo certainly has the opportunity to shape the judiciary for many years to come, greatly impacting the makeup of New York's highest court.

[Editor's Note: On April 5, 2013, Governor Cuomo nominated Sheila Abdus-Salaam to serve on the New York Court of Appeals. Her nomination awaits confirmation by the state senate.]

NEW JERSEY

EMPLOYMENT LAW

Early-Bird Employee Injured While Entering Work Half an Hour Before Shift Starts Seeks Retirement Benefits

Nichols v. Board of Trustees, Public Employees' Retirement System, 2012 N.J. Super. Unpub. LEXIS 1599, Docket No.: A-5615-10T4 (2012) (Petition for certification granted on Nov. 16, 2012)

In what may wind up lending proof to the old adage that "no good deed goes unpunished," the New Jersey Supreme Court will decide whether a conscientious state employee, who arrived at work 45 minutes early in view of concerns about heavy snowfall and slipped and fell on snow upon entering, is entitled to accident disability retirement benefits under N.J.S.A. 43:15A-43. The precise legal issue in the case — the single issue that the highest state court in New Jersey will need to decide — is whether the employee's injury occurred "during and as a result of the performance of h[er] regular and assigned duties."

By way of brief procedural history, after the Board of Trustees of the Public Employees' Retirement System (PERS) denied the petitioner's initial application for benefits, the decision was appealed to the New Jersey Appellate Division. The petitioner argued to the Appellate Division that her early arrival at work was "not in violation of any valid work rule of the employer or otherwise prohibited by the employer." She also argued that her employer's initial decision to award her Sick Leave Injury (SLI) benefits showed that her injury occurred "during and as a result of" her regular duties. The Appellate Division, however, rejected these arguments and affirmed the decision by PERS denying her the disability benefits.

In deciding *Nichols*, the New Jersey Supreme Court will need to revisit one of its prior decisions, *Kasper v. Board of Trustees of the Teachers' Pension & Annuity Fund*, 164 NJ 564 (2000), a case that the Appellate Division in *Nichols* distinguished. *Kasper* examined a similar state statute governing accidental disability pension benefits for teachers, N.J.S.A. 18A:66-39. In *Kasper*, 164 N.J. at 570, the plaintiff, an education media specialist, was assaulted on the stairway entrance to the school before the school day. The court concluded that the plaintiff's injury was "as a result of" her employment because she had "completed her commute … [and] was at the school at the expected time to distribute media materials as she was required to do."

Importantly, the plaintiff in *Kasper* — unlike the plaintiff in *Nichols* — had been expected to arrive early on the day of her accident. Indeed, the court in *Kasper* distinguished the plaintiff teacher from other employees, who it stated may "arrive at work long before the required hour for a card game in the teachers' lounge, to avoid the traffic, read the paper, pay bills, or socialize." The New Jersey Supreme Court will now get to further consider whether a conscientious employee who leaves home early due to snowy conditions fits within the hypothetical group of employees that it felt the need to distinguish in *Kasper*.

TORT LAW

Determining Applicable Standard of Care for Alleged Negligent Fire Sprinkler Inspections and Whether Expert's Opinion Is Net Opinion

Davis v. Brickman Landscaping, Ltd. 2012 N.J. Super. Unpub. LEXIS 1601, Docket No.: A-1945-11T1 (2012) (Petition for certification granted on Nov. 9, 2012)

In *Davis*, the New Jersey Supreme Court will need to "pick a standard of care" to determine whether fire-sprinkler system inspectors negligently carried out inspections at a hotel, which later caught fire and resulted in the death of two

children and serious injury to their mother. New Jersey's high court will also consider whether the opinion of the plaintiff's expert regarding the standard of care was an impermissible net opinion.

The underlying facts of *Davis* are tragic. The plaintiff and her children, then ages 16 and 11, were residing in a second-floor suite at a hotel. Their primary means of ingress and egress was a staircase that had a storage closet located underneath it. The closet was not part of the hotel's original construction and, unlike the rest of the hotel, did not contain sprinklers. A fire occurred at the hotel, which spread to the storage closet and up the stairs to the plaintiffs' second-floor suite. Notably, none of the three defendant inspection companies had noted the absence of a sprinkler in the storage closet during any of their prior inspections of the hotel.

The defendant sprinkler inspection companies filed motions for summary judgment, arguing that National Fire Protection Association (NFPA) 25, which sets forth the requirements for inspecting sprinkler systems, established the standard of care for such inspections and that they did not violate the standard. Notably, NFPA 25 requires a sprinkler inspector to conduct only a visual examination of the sprinkler system to verify that it appears to be in operating condition and free of physical damage, but does not require that scrutiny be given to any installation flaws or code compliance violations.

In response, the plaintiffs' expert argued that NFPA 25 was the minimum standard of care and that inspectors have a higher standard to use reasonable care to note life-safety hazards and report them to the building owner. The plaintiffs' expert opined that the defendants violated this standard by not reporting the hazardous condition of the storage closet to the hotel. Although the plaintiffs' expert could not point to any publication or other expert in the fire-protection industry that applied the reasonable-care standard in New Jersey, he opined that it was common knowledge in the industry and referenced numerous highly publicized building fires over the last century with similar facts to the subject fire.

The trial judge granted the defendants' motion, but the Appellate Division reversed. Citing to *Black v. Pub. Serv. Electric & Gas Co.*, 56 N.J. 63, 76-79 (1970), the Appellate Division noted that the New Jersey Supreme Court "has made clear that compliance with a safety regulation is not dispositive on the issue of negligence." The Appellate Division also noted, citing to *Wellenheider v. Rader*, 49 N.J. 1, 7-8 (1967), that "an industry's customs of inspection are evidence of reasonable care, but they are not dispositive on the issue of whether defendant utilized a proper standard of care."

The New Jersey Supreme Court's decision in *Davis* will certainly have an impact on future legal disputes, particularly because it will weigh in on important issues relating to the standard of care to apply in fire cases (and potentially other cases, as well) and what constitutes a net opinion. In order to reverse the Appellate Division, however, it appears that it will need to somehow distinguish, if not entirely turn a blind eye to, its prior decisions in *Black* and *Wellenheider*.

NEW YORK

INSURANCE COVERAGE

The Proper Analysis for Causation Regarding a Negligence Claim of Failing to Procure Sufficient Policy Limits for Business Interruption Coverage

Voss v. The Netherlands Ins. Co., 98 AD3d 1325 (4th Dept. 2012) (Motion for leave to appeal granted on Feb. 14, 2013)

Does an insured's business need to resume operations in order to receive payment of insurance policy benefits for business-interruption coverage? Justice Carni of New York's Fourth Judicial Department disagreed with the majority in *Voss* on this issue.

The plaintiff commenced an action against CH Insurance Brokerage Services, Co. alleging, among other things, negligence and breach of contract in connection with business interruption coverage that CH Insurance obtained for the plaintiff. The parties stipulated that The Netherlands Insurance Company was substituted for CH Insurance after the plaintiff commenced the action.

The matter concerns a commercial building that housed the corporate plaintiff and a corporate tenant. The building was damaged on three separate occasions in connection with water leaking from the roof. The leak caused a portion of the roof to collapse on two of those occasions. Notably, the first two incidents occurred while the limit for business interruption coverage was $75,000. The third incident occurred after the policy was renewed and the coverage for business interruption had been reduced to $30,000.

The plaintiff alleged in its amended complaint and supplemental bill of particulars that the defendant failed to provide adequate coverage and was negligent in reducing the coverage. The issue that the New York

Court of Appeals will most likely address is whether the proximate cause analysis concerning the failure to provide adequate business-interruption coverage hinges on whether the business would resume operations if it was timely paid the full, but allegedly insufficient insurance coverage limits.

The majority concluded that the defendant's negligence in failing to obtain sufficient business interruption coverage for the plaintiff was not the proximate cause of their damages as a matter of law, relying on the plaintiff's testimony that, if the policy limit of $75,000 had been paid in a timely manner for each of the two incidents, the plaintiff corporation would have been able to remain operational and continue its business operations. As such, the majority's conclusion hinged on whether the plaintiff actually resumed operations.

Justice Carni was the lone dissenter on this issue. He concluded that whether the plaintiff actually resumed operations was irrelevant to the proximate cause analysis concerning the plaintiff's claim that the defendant failed to procure adequate business-interruption coverage limits. Justice Carni concluded that whether the defendant was negligent in failing to procure adequate insurance coverage was measured by the amount of the plaintiff's business income losses when compared to the policy limits determined and procured by the defendant broker. He also concluded that the defendant had failed to establish that the policy limits were sufficient to cover the amount of the plaintiff's business income losses during the relevant policy periods.

The New York Court of Appeals' resolution of this appeal will impact the insurance industry writing business interruption coverage in New York. Moreover, the Court of Appeals might address and further explain the boundaries of a "special relationship" between an insurance broker and the insured.

Resolving a Motion to Dismiss the Complaint Based on the Documentary Evidence Concerning An Insurance Coverage Dispute

Ragins v. Hospitals Ins. Co., 96 AD3d 819 (2d Dept. 2012) (Motion for leave to appeal granted on Dec. 11, 2012)

How many practitioners struggling with New York practice are unsure whether they can append evidence to a pre-answer motion to dismiss? This appeal will hopefully discuss the outer boundaries of CPLR 3211(a)(1) and the submission of documentary evidence on a motion to dismiss.

The appeal concerns a professional-liability insurance dispute. The defendants Hospitals Insurance Company, Inc. and HANYS Company, Inc. (HIC) issued an Excess Professional Liability Insurance Policy to the plaintiff. The policy provided coverage in excess of an underlying professional liability policy, which had a policy limit of $1 million per claimant.
An underlying action entitled *Villanueva v. Kahn* was commenced against the plaintiff in New York Supreme Court. The plaintiff's primary counsel became insolvent, and the Superintendent of Insurance of the State of New York was appointed as that insurer's liquidator. A jury in the underlying action returned a verdict against the plaintiff in the principal sum of $1.1 million. The superintendent and HIC (excess insurer) paid $1 million and $100,000, respectively. Thereafter, the Supreme Court, in the underlying action, entered an amended judgment against the plaintiff for costs and the accumulated interest. HIC paid its proportional share of the interest, based on that portion of the underlying judgment that it had been obligated to pay under the excess policy.

The plaintiff commenced an action against HIC, alleging, among other things, that HIC breached the excess policy by failing to indemnify him for costs and the remaining amount of unpaid interest. Before answering, HIC moved, among other things, to dismiss the complaint under CPLR 3211(a)(1) and (5). The plaintiff sought to dismiss so much of the complaint as sought to recover damages for breach of the subject insurance policy and for a judgment declaring that they were not obligated to indemnify the plaintiff for costs and the remaining amount of unpaid interest incurred in connection with the underlying action.

HIC submitted, among other things, the insurance policies and a check payable to the plaintiff in the underlying action (representing HIC's proportional share of the costs and interest set forth in the amended judgment) in support of the motion to dismiss. The Appellate Division granted HIC's motion, concluding that HIC was only responsible for prejudgment interest on that portion of the underlying judgment that it was obligated to pay under its policy. The Appellate Division further reasoned that the excess policy conclusively established that HIC had no obligation to pay post-judgment interest or costs.

The likely issue on appeal to the New York Court of Appeals is whether an issue concerning an insurer's payment of costs and interest can be concluded as a matter of law via documentary evidence within the context of a CPLR 3211 motion. As stated, the Court of Appeals will hopefully provide further guidance on a motion to dismiss based on documentary evidence.

FEDERAL CONSTITUTIONAL LAW

Handgun Permit for Part-Time Resident of New York

Osterweil v Bartlett, 2013 U.S. App. LEXIS 2010 (2d Cir. 2013) (Certified to the New York Court of Appeals by the United States Court of Appeals for the Second Circuit on Feb. 19, 2013)

Coming on the heels of the passage of the New York SAFE Act (Secure Ammunition and Firearms Enforcement Act), the New York Court of Appeals accepted this certified question concerning handgun permits in New York. The certified question from the United States Circuit Court of Appeals for the Second Circuit addresses an extension of the United States Supreme Court's holding in *District of Columbia v. Heller,* 554 U.S. 570 (2008) that the Second Amendment protects an individual's right to bear arms, and that the core of this right is the right to self defense in the home.

The certified question stems from Alfred Osterweil's application for a handgun license in 2008. Following the directions set forth in New York's Penal Law, Osterweil applied for a license in the county where he resided at the time. At that time, Osterweil's primary residence and domicile was Schoharie County. Notably, while his application for a permit was pending, Osterweil moved his primary residence to Louisiana. Nevertheless, he kept his home in Schorarie County as a part-time vacation residence.
After his move, Osterweil sent a letter to the Schoharie licensing authorities inquiring whether this move made him ineligible for a license. Shortly thereafter, Osterweil sent another letter suggesting that if his change of domicile foiled his license application, a constitutional problem would result. This subsequent letter came after the United States Supreme Court's holding in *Heller* that the Second Amendment.

Osterweil's application was ultimately forwarded to a judge of the county court in Schoharie, who was the licensing officer for the county. In rejecting Osterweil's application, the Judge interpreted the New York Penal Law's apparent residence requirement as a domicile requirement. He reasoned that Osterweil candidly advised the court that New York State is not his primary residence and, thus, not his domicile. The judge concluded that a domicile requirement was constitutional under the Second Amendment, even after the *Heller* decision, because of New York State's interest in monitoring its handgun licensees to ensure their continuing fitness for the use of deadly weapons.

Osterweil filed a federal suit alleging that New York's domicile requirement violated the Second and Fourteenth Amendments and seeking, among other remedies, an injunction ordering the state to give him a license. The district court first determined that intermediate scrutiny applied to the Second Amendment issue. The court then held that a domicile requirement satisfied the intermediate-scrutiny standard because the law allows the government to monitor its licensees more closely and better ensure the public's safety. It thus granted summary judgment to the state.

On appeal to the Second Circuit, Osterweil maintains that a domicile requirement for handgun ownership is unconstitutional. The Second Circuit found that certification of the issue to the New York Court of Appeals was appropriate. Therefore, it certified the following question to the New York Court of Appeals: "Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?"

The resolution of the certified question will have noted impact on Second Amendment arguments in New York State as well as throughout this nation.

EMPLOYMENT LAW

Challenge to Starbucks' Policy as to its Tip Pool for Employees

Barenboim v. Starbucks Corp., 698 F3d 104 (2d Cir 2012) (Certified to New York Court of Appeals by the United States Court of Appeals for the Second Circuit on Oct. 23, 2012)

This matter concerns two appeals, heard in tandem. They challenge awards of summary judgment entered in the United States District Court for the Southern District of New York in favor of defendant Starbucks Corporation on the plaintiffs' complaints that Starbucks violates New York Labor Law § 196-d in the distribution of tip pools maintained at stores in New York State. In each store, Starbucks employs four types of workers. At the bottom of a Starbucks store's hierarchy are "baristas," the line workers responsible for taking customers' orders and serving the company's coffee- and tea-based drinks. Immediately above baristas are "shift supervisors," who are principally responsible for serving customers, but who also have limited supervisory responsibilities. Above the shift supervisors are "assistant store managers," who serve as deputies to the highest-ranking employees, the store managers.

Each Starbucks store posts a Plexiglass box at the counter where customers may leave tips. Starbucks' policy provides for these tips to be pooled and distributed among baristas and shift supervisors. Starbucks does not permit its store managers or "assistant store managers" to receive any share of a tip pool.
The appeals present two unresolved questions of New York law:

First, what types of employees are eligible to participate in a tip-pooling arrangement, and what factors should inform a court's consideration of eligibility? Section 196-d prohibits an "agent," defined elsewhere as a "supervisor," N.Y. Lab. Law § 2 (8-a),

from retaining tips. New York law does not define "supervisor." Here, shift supervisors and assistant store managers both exercise supervisory roles, although in differing degrees, and it remains unclear how many or what kind of supervisory responsibilities are dispositive to the § 196-d analysis. Moreover, although the statue permits employers to require tip sharing by "a waiter with a busboy or similar employee," § 196-d, it is unclear whether an employer may mandate a tip-pooling arrangement between a waiter and another customer-service employee of higher rank.

Second, if an employee is not an agent and therefore is eligible to receive tips, may an employer deny him tip-pool distributions even though customers paid gratuities into the pool in compensation for his service? Although § 196-d establishes who is ineligible to receive a share of tips, New York law does not clearly state whether an employer may exclude an otherwise eligible tip-earning employee from any share of the business's tip pool. The Second Circuit certified the following questions to the New York Court of Appeals:

1. What factors determine whether an employee is an "agent" of his employer for purposes of N.Y. Lab. Law § 196-d and, thus, ineligible to receive distributions from an employer-mandated tip pool? In resolving this question for purposes of this case, the Court of Appeals may also consider the following subsidiary questions:

    a. Is the degree of supervisory or managerial authority exercised by an employee relevant to determining whether the employee is a "manager [or] supervisor" under N.Y. Lab. Law § 2(8-a) and, thus, an employer's "agent" under § 196-d?

    b. If an employee with supervisory or managerial authority renders services that generate gratuities contributed to a common tip pool, does § 196-d preclude that employee from sharing in the tip pool?

    c. To the extent that the meaning of "employer or his agent" in § 196-d is ambiguous, does the Department of Labor's New York State Hospitality Wage Order constitute a reasonable interpretation of the statute that should govern disposition of these cases?

    d. If so, does the Hospitality Wage Order apply retroactively?

2. Does New York Labor law permit an employer to exclude an otherwise eligible tip-earning employee under § 196-d from receiving distributions from an employer-mandated tip pool?

Enforcing a Judgment Through a Turnover Order Against an Entity that Does Not Have Actual Possession or Custody of a Debtor's Assets

Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce, 693 F3d 274 (2d Cir 2012) (Certified to New York Court of Appeals by the United States Court of Appeals for the Second Circuit on Sept. 5, 2012)

This certified question will resolve a novel issue concerning the enforcement mechanisms regarding judgments. Generally, there is scant case law explaining the CPLR sections regarding the enforcement of judgments, so these certified questions are extremely important to business and commercial-law litigators.

In this case, the plaintiff, the Commonwealth of the Northern Mariana Islands (CNMI), is a judgment creditor as to two tax judgments obtained against the two individual defendants, the Millards, nearly two decades ago. It moved in the district court for a turnover order, under Rule 69 of the Federal Rules of Civil Procedure and N.Y. CPLR § 5225, as well as a preliminary injunction and additional discovery. CNMI alleged that the Millards have funds in accounts housed in Cayman Islands subsidiaries of garnishee Canadian Imperial Bank of Commerce (CIBC) and that CNMI is entitled under New York law to an order compelling CIBC to turn over the money.

The district court concluded that the text of the New York CPLR limits the ability of the court to issue a turnover order to instances in which the entity to which the order is directed has "possession or custody" of property. Because CIBC does not have "possession or custody" within the meaning of the statute, the district court denied CNMI's motion. Nevertheless, the district court noted that there is significant merit to CNMI's argument, which involves an unsettled question of state law. The district court noted that, absent interim relief, there would be a substantial risk that the funds in question would be dissipated during any appeal. Accordingly, the district court granted an injunction requiring maintenance of the status quo pending appeal.

Pointing out that the district court's opinion was well-reasoned and thorough; the Second Circuit certified the following two questions to the New York Court of Appeals:

1. May a court issue a turnover order pursuant to N.Y. C.P.L.R. § 5225(b) to an entity that does not have actual possession or custody of a debtor's assets, but whose subsidiary might have possession or custody of such assets?

2. If the answer to the above question is in the affirmative, what factual considerations should a court take into account in determining whether the issuance of such an order is permissible?

MEDICAL MALPRACTICE

Whether Plaintiff's Medical Experts Established a Departure and Causation

Callistro v. Michael W. Bebbington, M.D., 94 AD3d 408 (1st Dept. 2012) (Motion for leave to appeal granted on July 17, 2012)

This appeal demonstrates that a party opposing summary judgment in a medical-malpractice case must have their own expert's opinions directly refute the prima-facie showing established by the movant's expert in order to raise a triable issue of fact.

The plaintiff alleged medical malpractice in conjunction with childbirth by failing to perform a cesarean section despite evidence of repeated heart decelerations, allegedly resulting in various developmental disorders. The defendant doctor and hospital moved for summary judgment, arguing that no departure or hypoxic incident occurred during the birth and, in fact, the plaintiff's injury could not have been the result of the defendant's acts or omissions. The defendant's expert evidence included the assertion that the infant's post-natal cord-gas measurements and speedy discharge from the hospital were "entirely inconsistent" with an alleged hypoxic injury occurring during delivery.

A four-justice majority held that the plaintiff's expert evidence in opposition failed to raise a triable issue of fact. The plaintiff's expert obstetrician affirmed that a cesarean section should have been ordered after a fetal heart rate monitor showed a pattern of late and variable decelerations. But the court found that this opinion failed to rebut the defendant's expert's claim that the cord-gas measurements "ruled out" hypoxia, and amounted to bare conjecture. The court found similar flaws in the plaintiff's second expert, who offered the conclusory statement that there was nothing in the child's medical history other than the abnormal labor and delivery that would account for his developmental disorders.

The dissent focused on the plaintiff's expert's opinion that the multiple late decelerations constituted a hypoxic event, and that such evidence was sufficient to raise a triable issue as to a deviation from good and accepted medical practice and causation.

The Court of Appeals' resolution of this case will clarify for both the plaintiffs' and defense bars the burden of production within the summary judgment context for malpractice claims.

FREEDOM OF INFORMATION LAW

The Freedom of Information Law Exempts Disclosure of Material That May Endanger Life or Safety

Matter of Bellamy v. New York City Police Department, 87 AD3d 874 (1st Dept. 2011) (Motion for leave to appeal granted on July 17, 2012)

This appeal relates to disclosure of witness statements from a prior criminal prosecution. The petitioner, Bellamy, was convicted in 1986 of the premeditated murder of a New York City Parole Officer based in part on his own inculpatory statements regarding the planning of the murder. During a subsequent federal prosecution of several accomplices, one or more of these accomplices testified that the petitioner was not involved in the murder. The petitioner's instant FOIL request relates to his efforts to obtain unredacted witness statements to support his motion for a new trial.

The Supreme Court granted the petition to compel the NYPD to disclose police reports containing the names and statements of witnesses who did not testify at trial, but the Appellate Division reversed. Public Officers Law § 87 (2)(f) permits an agency to deny access to records that, if disclosed, would endanger the life or safety of any person. The Appellate Division further noted that under this safety-related provision, "[t]he agency in question need only demonstrate a possibility of endanger[ment]" in order to invoke the exemption. The court held that such standard was clearly met in this case, where the witnesses who spoke to the police did so in the course of an investigation into a gang-related homicide, and "all one would need is an internet connection to determine where they live and work."

WHISTLEBLOWER STATUTE FOR PRIVATE EMPLOYEES

Whether School Nurse's Report of Suspected Child Abuse by Student's Parent Constitutes Whistleblowing Activity

Villarin v The Rabbi Haskel Lookstein School, 96 AD3d 1 (1st Dept. 2012) (Motion for leave to appeal granted on Sept. 11, 2012)

The plaintiff, a private-school nurse, commenced this action under to New York's private-employee whistleblower statute, Labor Law § 740. After a parent admitted striking the child and causing a significant injury, the plaintiff advised the school of her duty under Social Services Law § 413 to report the suspected child abuse to the State Registry, but according to the plaintiff, school personnel actively discouraged her from reporting the incident and ultimately fired her in retaliation for such report.

After the plaintiff commenced the action for wrongful and retaliatory termination, the defendant moved to dismiss the action under CPLR 3211(a)(7) on the ground that the alleged abuse was committed by a third party (the father), not the defendant, and that this single incident did not present a substantial and specific danger to public health or safety. The plaintiff opposed the motion, arguing that her refusal to join the defendant in illegally declining to report the suspected abuse constituted whistle-

blowing activity under Labor Law § 740, and the defendant retaliated against her in response to that activity. Supreme Court dismissed the discrimination claim, but denied dismissal of the retaliation claim.

On appeal, New York's Appellate Division affirmed the denial of dismissal of the retaliation cause of action, rejecting the defendant's argument that because the alleged violation of the law was not "ongoing," it did not substantially endanger the public health or safety. The court found that the school's refusal to comply with Social Service Law § 413 reporting requirements was a clear violation of the law, and that such violation presented substantial and specific danger to the public health and safety. The court emphasized that a "large-scale threat" or multiple victims was not required to establish a danger to public health and safety.

The dissenting justice took the odd position that no threat to the public safety was established by this single instance of a school's failure to report suspected child abuse. It is unlikely this position will attract any support from the Court of Appeals.

EXCLUSION OF CONSQUENTIAL DAMAGES

Lost Profits Incurred by Breach of Distribution Agreement Fell Within Exclusion for Consequential Damages

Biotronik A.G. v Conor Medsystems Ireland, Ltd., 95 AD3d 724 (1st Dept. 2012) (Motion for leave to appeal granted on Sept. 25, 2012)

The plaintiff alleged that the defendant, a medical-device manufacturer, breached the parties' distribution agreement by ceasing the sale and distribution of coronary stents to the plaintiff before the agreement's expiration. The plaintiff sought, as breach of contract damages, the profits it would have made from reselling the stents to third parties if defendants had continued to furnish them to the plaintiff. The agreement included a limitation-of-liability clause that expressly excluded either party from recovering consequential damages. The Supreme Court ultimately dismissed the action, finding that the lost profits claimed by the plaintiff were consequential damages and, thus, were barred by the terms of the contract.

The appellate court affirmed the finding that lost profits of the type alleged in this case constituted consequential damages. The court held that a plaintiff suing to recover lost profits it would have made by reselling the defendant's goods to third parties is, in fact, seeking consequential damages, not general damages. According to the court, lost profits only constitute general damages where the non-breaching party seeks to recover money owed directly by the breaching party under the parties' contract. The court further found that that the limitation of liability was not unconscionable, given the sophistication of the parties, and that no showing of bad faith was demonstrated as against the defendant for its breach.

WRONGFUL TERMINATION BASED ON DISABILITY

Termination not Wrongful Where Plaintiff Could not Perform Essential Functions of Position

Jacobsen v New York City Health & Hosp. Corp., 97 AD3d 428 (1st Dept. 2012) (Motion for leave to appeal granted on Oct. 2, 2012)

The plaintiff alleged he was wrongfully terminated from his position because of a disability in violation of New York State Human Rights Law, Executive Law § 296(1)(a), and the New York City Human Rights Law. He was employed as a Health Facilities Planner by New York City Health & Hospitals Corp. (HHC), where his primary duties involved monitoring independent contractors on construction and renovation projects at facilities operated by HHC. These duties required the plaintiff's physical presence at various construction sites on a daily basis.

In September 2005, the plaintiff was diagnosed with pneumoconiosis, an occupational lung disease. Over the next 18 months, the plaintiff was granted a medical leave of absence and a six-month unpaid leave, during which he was in contact with HHC regarding whether his medical condition permitted him to perform the essential functions of his position. Although the plaintiff requested that he be assigned exclusively to perform office duties at HHC's central office, HHC took the position that the essential duties of his position required the plaintiff to be physically present at the construction sites in the field. After the plaintiff's own medical doctor confirmed that the plaintiff could no longer perform these tasks, he was terminated by HHC.

The Supreme Court granted HHC's motion for summary judgment and the appellate court affirmed. The latter court found that after the plaintiff made a prima facie showing of disability discrimination, HHC had met its burden of establishing that the termination was justified because the plaintiff could not perform the essential functions of his position, even with a reasonable accommodation. The court noted that a reasonable accommodation does not require an employer to find another job for the employee, create a new job, or create a light-version duty of his current job. The court also noted that HHC had engaged in an "interactive process" in evaluating the plaintiff's condition while on two separate medical leaves and only terminated him after definitive evidence existed that the plaintiff could not perform the essential duties of his position.

The dissent found that the plaintiff's evidence that he could have performed the duties of his position with proper respiratory equipment, and that the provision of such

equipment could have been a reasonable accommodation that HHC failed to exercise, raised triable issues of fact.

The New York Court of Appeals' resolution of this appeal will likely define the boundaries of what constitutes a "reasonable accommodation" under New York State Human Rights Law and the New York City Human Rights Law. The decision will no doubt impact employers in New York State.

NEW YORK LABOR LAW § 240(1)

Dusting by Employee of Commercial Cleaning Company Was Routine Maintenance

Soto v. J. Crew, Inc., 95 AD3d 721 (1st Dept. 2012) (Motion for leave to appeal granted on Oct. 2, 2012)

The plaintiff, an employee of a commercial-cleaning company that contracted with the defendant to provide daily cleaning and maintenance to its store, was injured when he fell from an A-frame ladder while dusting the top of a shelf. The Supreme Court granted the defendant's motion for summary judgment dismissing the complaint and the Appellate Division affirmed. The Appellate Division held that Labor Law § 240(1) claim was properly dismissed because (1) the dusting of a shelf constituted routine maintenance, which is not protected under the statute; and (2) the term "cleaning" should not be construed as broadly as to cover this type of routine activity, citing *Dahar v. Holland Ladder & Mfg. Co.,* 18 NY3d 521 (2012) (statute did not cover cleaning of manufactured product by factory worker).

The dissent correctly noted that the *Dahar* holding appeared to be inconsistent with the Court of Appeals' prior holdings in *Swiderska v. New York Univ.*, 10 NY3d 792 (2008) and *Broggy v. Rockefeller Group, Inc.,* 8 NY3d 675 (2007), both of which held that commercial cleaning in the form of interior window cleaning was a covered activity under the Labor Law § 240(1). The dissent further noted that the *Dahar* court's focus on the nature of the product being cleaned (a manufactured product) has never been the basis for the prior Court of Appeals' holdings, and that the proper emphasis should be placed on whether the "cleaning" involves a gravity-related risk that a statutory safety device would have alleviated. The dissent might have the better argument in this instance.

This appeal gives the New York Court of Appeals an opportunity to clarify the inconsistency of its holding in *Dahar* and its prior holdings concerning commercial cleaning.

TOXIC TORTS — EXPOSURE TO MOLD

Plaintiff Raised Triable Issue That Exposure to Mold Caused Respiratory Illness

Cornell v. 360 West 51st Street Realty, LLC, 95 AD3d 50 (1st Dept. 2012) (Motion for leave to appeal granted on Oct. 2, 2012)

On this appeal, the plaintiff produced substantial and persuasive evidence demonstrating that she became ill and suffered adverse health consequences due to the presence of toxic mold and other fungi in and around her residential apartment, which was one floor above a damp basement that had experienced flood problems in the recent past. At issue was whether the plaintiff produced sufficient expert evidence of general and specific causation that satisfied the test set forth in *Frye v. United States*, 293 F 1013 (1923). Although the First Department held in a recent case involving toxic mold that the plaintiff's evidence failed to establish causation and failed satisfy the *Frye* test, see *Fraser v. 301-52 Townhouse Corp.*, 57 AD3d 416 (1st Dept. 2008), appeal dismissed 12 NY3d 847 (2009), in this case the majority reached the opposite conclusion, holding that *Fraser* was distinguishable based on the expert evidence adduced in this case.

The plaintiff moved into the apartment in 1997 and noticed that the basement level below her apartment was damp, musty and had vermin. Basement flooding during the summer of 2002 and 2003, and a broken steam pipe in her apartment in July 2003, led to additional dampness problems. The plaintiff noticed mold in the apartment bathroom and began to feel ill and experienced other symptoms. Evidence adduced during discovery, including specimen samples from the basement and the plaintiff's apartment, demonstrated the presence of numerous species of mold and other fungi, and that a basement tenant had complained about such a condition as early as 1998.

Both parties produced experts during discovery and both parties subsequently moved for summary judgment. The defendant's medical expert opined that molds are common and in this case did not cause any documented illness to the plaintiff. The plaintiff submitted expert medical evidence that the type of symptoms the plaintiff was experiencing could be caused by exposure to excessive mold exposure, and that causation was established in this case by the plaintiff's undisputed exposure to these toxins in the defendant's building. The plaintiff's expert relied on a "differential diagnosis" theory to support his opinions. Supreme Court granted the defendants' cross-motion for summary judgment, finding that because similar evidence adduced by the same expert in *Fraser* justified dismissal, the same must be true here.

The Appellate Division reversed, holding that the trial court misinterpreted the *Fraser* holding, which itself made clear that it was not categorically rejecting the connection between mold exposure and the plaintiff's type of illness. The four-justice majority closely analyzed the plaintiff's expert

evidence and found that it satisfied the *Frye* test. Taking a relaxed view of the *Frye* "general acceptance" standard, the majority stated that the focus "should not be upon how widespread [a] theory's acceptance is, but should instead consider whether a reasonable quantum of legitimate support exists in the literature for [an] expert's views." The majority further noted that contrary to the Supreme Court's holding, the First Department has never categorically rejected differential diagnosis, since the proper focus is on whether the given agent is capable of causing the harm.

The dissent took the contrary view, noting that even if the plaintiff's expert evidence and supporting studies demonstrated some support of general causation, such evidence fell well short of the "general acceptance" standard that the First Department required in *Fraser*. This issue is ripe for the Court of Appeals review. A decision from the Court of Appeals will likely reach beyond the toxic tort context to further clarify the application of the *Frye* standard to expert testimony in a number of disciplines.

EMPLOYMENT DISCRIMINATION

Whether Triable Issue Raised as to Retaliation Claim

Sandiford v. City of New York, 94 AD3d 593 (1st Dept. 2012) (Motion for leave to the appeal granted on Oct. 4, 2012)

The plaintiff, a lesbian employed as a school aide by the New York City Department of Education (DOE), sued the DOE alleging discrimination and retaliation in violation of city and state anti-discrimination laws. The basis of the plaintiff's discrimination allegations was that the principal at her school repeatedly made derogatory comments about gays and lesbians in her presence. Her retaliation claim emanates from her prior termination from employment by the DOE, after an administrative finding that she engaged in inappropriate conduct by propositioning an 18-year old college student, also employed by the DOE. The plaintiff filed a grievance against the DOE, and was eventually reinstated with back pay (less two weeks), but a warning letter was placed in her file prohibiting inappropriate conduct with any DOE student. In this action, this plaintiff denied engaging in inappropriate conduct with any student.

The Supreme Court dismissed the plaintiff's retaliation claim but denied dismissal of the discrimination claims. The Appellate Division modified to reinstate the retaliation claim. The court's analysis of the discrimination claim appears sound, as the plaintiff's testimony regarding the principal's derogatory comments about gays and lesbians certainly raise a triable issue that any adverse employment action was based on discriminatory animus. In addition, the court properly rejected the DOE's assertion of collateral estoppel, since the plaintiff did not have a full opportunity to contest any implicit finding of non-discrimination by the DOE.

The majority's discussion of the retaliation claim however is less convincing. Although it argues that a triable issue exists as to whether DOE's finding of inappropriate conduct was a pretext, the majority overlooks the issue, raised by the dissent that the plaintiff's suspension for misconduct preceded her complaints to DOE, and therefore, they could not have been in retaliation for them.

CONTRACT INTERPRETATION

Majority and Dissent Offer Conflicting Interpretations of Lease Provision

JFK Holding Company LLC v. City of New York, 98 AD3d 273 (1st Dept. 2012) (Motion for leave to appeal granted Oct. 11, 2012)

This appeal arises out of the defendant Salvation Army's role as lessee and conduit on behalf of the New York City Department of Homeless Services (DHS) regarding the operation of a homeless shelter on property owned by the plaintiff-landlord JFK Acquisition (JFK). Two separate, but related, agreements governed the parties' relationship — a lease agreement between JFK and the Salvation Army and a services agreement between JFK and DHS, whereby DHS funded the Salvation Army's operation and maintenance of the shelter.

The agreements included two key provisions relevant to the appeal. First, the lease provided that it could be terminated if the city terminated the services agreement, provided that the Salvation Army gave 30 days written notice, paid JFK a $10 million early termination fee, and restored the property to the same condition as at the commencement of the lease.

Second, paragraph 31 of the lease provided that if DHS failed to pay amounts owing under to the services agreement, the Salvation Army would use "commercially reasonable efforts" to enforce its rights against DHS under the agreement. But the same provision also included a clause limiting the Salvation Army's liability to amounts paid under to the services agreement (by DHS).

DHS terminated the services agreement, which caused the Salvation Army to terminate the lease. But, the Salvation Army did not restore the property to its pre-lease condition, as it had badly deteriorated

during its tenancy. Although DHS paid a $10 million termination fee to JFK, JFK commenced the instant action alleging that the Salvation Army had breached the lease provision requiring it use commercially-reasonable efforts to obtain necessary funding from DHS to restore the property's condition in compliance with the agreements. The Supreme Court dismissed the action against the Salvation Army.

In a 3-2 decision, the majority at the Appellate Division held that in construing the agreements to give them full meaning and effect, paragraph 31 required the Salvation Army to use commercially-reasonable efforts to restore the property. Since it was undisputed that the Salvation Army failed to do so, JFK's action for breach of the lease could not be dismissed. The dissenting justices relied on the limitation-of-liability language in the lease to conclude that the Salvation Army's liability was expressly limited to amounts paid by DHS. The dissent further noted that JFK did receive its contractually-bargained $10 million early termination fee, and therefore was not without any remedy.

NOTICE OF CLAIM — G.M.L. § 50(e)

Medical Records did Not Constitute Essential Facts Constituting a Claim

Plaza v. New York City Health & Hospitals Corp., 97 AD3d 466 (1st Dept. 2012) (Motion for leave to appeal granted on Oct.16, 2012)

The issue in this case is the applicability of the exception to the notice of claim rule that requires a claimant to serve a notice-of-claim on the municipality within 90 days of the loss. General Municipal Law § 50-e(5) provides a discretionary exception allowing the late filing of a notice of claim where the municipality "acquired actual knowledge of the essential facts constituting a claim within the time specified in subdivision (1) or within a reasonable time thereafter." Under this exception, the court must consider: (1) whether the movant has a reasonable excuse, (2) whether the municipality has actual notice of the essential facts of the claim, and (3) whether the delay would substantially prejudice the municipality.

The facts of this case involved the alleged medical malpractice of the defendant hospital during childbirth. The plaintiff alleges that the acts of malpractice occurred between November 2002 and July 2003, when the mother gave birth to the infant plaintiff. The plaintiff did not file a notice of claim until June 5, 2006, two years and eight months after the birth and without leave of court. The plaintiff's main argument regarding the late filing was that the hospital records provided actual knowledge of the essential facts of the medical malpractice claim, given that they include references to "fetal distress" and heart rate fluctuations. The Appellate Division majority rejected this argument, finding that while the hospital records revealed some difficulties in the delivery, they did not show any act or omission by the medical staff that resulted in injury to the child, citing *Williams v. Nassau County Med. Ctr.* (6 NY3d 531 [2006]). The majority distinguished *Perez v. New York City Health & Hosp. Corp.* (81 AD3d 448 [2011]), where there was significantly more evidence of heartbeat irregularities and variable decelerations denoting compression of the head or umbilical cord. Further, the records in *Perez* also showed additional complications shortly after birth.

The dissenting justice undertook a painstaking analysis to conclude that the evidence of fetal distress was more than sufficient to raise a triable issue as to HHC's actual knowledge of facts constituting the plaintiff's malpractice claim.

Holdings as to notices of claim address often picayune issues. The resolution of this issue, however, will certainly apply beyond the parties to the appeal. The Court of Appeals' holding in this case will assist attorneys who commence and defend against malpractice actions.

PENNSYLVANIA

CONTRACTS

What Is the Applicable Limitations Period for a Guaranty

Osprey Portfolio, LLC v. Izett, 32 A3d 793 (2011) (Petition for allowance of appeal granted on Aug. 13, 2012)

In this appeal, the Supreme Court will address whether a guaranty is an "instrument" under seal governed by a 20-year statute of limitations in 42 Pa.C.S. Section 5529 or a "contract" under seal governed by a four-year statute of limitations in 42 Pa.C.S. Section 5525.

On September 9, 1999, Osprey Portfolio's predecessor in interest, First Union National Bank, entered into a commercial loan transaction with Izett Manufacturing, Inc. The loan was evidenced by a promissory note, whereby First Union National Bank agreed to lend the business up to $50,000. Izett signed the note in his capacity as the vice president of the business and also signed a guaranty under seal in which he agreed to "unconditionally guarantee timely payment of all sums due under the loan to the bank and its successors or assigns." Upon Izett's alleged default on the loan, Osprey filed a complaint in confession of judgment and obtained a judgment in 2012 for $85,473.42, plus interest. Izett filed a petition to strike/reopen alleging that the judgment was void because the note constituted a "contract" under seal and the action was not commenced within the four-year statute of limitations.

The trial court denied the petition, holding that the guaranty was an "instrument" under seal, applying the dictionary definition of the term "instrument." Superior Court

noted that the term "instrument" was not defined in the judicial code or previously interpreted by the Supreme Court and cited to, inter alia, the Black's Law Dictionary meaning of the term instrument — a "'written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note,' or 'in fact, any written or printed document that may have to be interpreted by the courts.'" Superior Court declined to adopt the UCC definition pertaining to "negotiable instruments." In a concurring opinion, Judge Fitzgerald concurred in the result, opining that the guaranty was "similar" to an "instrument" under the statutory authority.

Ultimately, the Supreme Court's ruling will provide additional clarity regarding the interplay between 42 Pa.C.S. § 5529 and 42 Pa.C.S. § 5525 as well as what constitutes an "instrument" as opposed to a "contract." The careful commercial contracts practitioner will be well-served to review the Supreme Court's decision when it is handed down for guidance on how to properly draft similar loan-related documents.

PRIVILEGES AND CONFIDENTIALITY

Are the Records of an Opposing Party's Expert Discoverable?

Barrick v. Holy Spirit Hosp. of the Sisters of the Christian Charity, 32 A.3d 800 (2011) (Permission for allowance of appeal granted on Aug. 31, 2012)

The question at issue in this appeal is the scope and extent of an attorney's privilege in connection with communicating with a trial expert under the Rules of Civil Procedure.

The claim arises out of a personal-injury lawsuit in which the plaintiff, Carl Barrick, was injured when a seat upon which he was sitting at the Holy Spirit Hospital collapsed, resulting in spinal injuries. At the Superior Court level, the Barricks appealed an order of the Court of Common Pleas, which directed the Appalachian Orthopedic Center to produce "any and all documents pertaining to Barrick, including the correspondence between the Barricks counsel and Dr. Thomas Green," who was designated to testify as an expert witness. The order was prompted by a subpoena submitted by one of the defendants in the action and the Barricks did not object to the subpoena or seek a protective order once it had been served. Appalachian, however, initially refused to submit records that were "not created for treatment purposes" and, in response to the subpoena, argued that some of the records constituted materials created in preparation for trial. Following an in camera review, the trial court ordered Appalachian to comply with the subpoena.

Superior Court reversed. After reviewing the Pa.R.C.C. provisions, concluding that the subpoena at issue exceeded the scope of Pa.R.C.P. 4003.5(a)(1) because (1) the subpoena improperly attempted to "obtain written documents directly from an opposing party's expert witness," including correspondence between plaintiffs' counsel and the expert witness, and (2) because the information sought exceeded the scope of Pa.R.C.P 4003.5(a)(1) inasmuch as interrogatories under that provision to an expert witness are limited to inquiries that "state the substance of the facts and opinions to which the expert is expected to testify and [to] summar[ize] [] the grounds for each opinion." As such, the Superior Court concluded that "a discovery request for the content of any correspondence between an opposing party's attorney and the expert witness retained by that party falls outside the express language of Pa.R.C.P. 4003.5(a)(1)." Additionally, the court cited Pa.R.C.P 4003.3, which states, in part, "The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." In a concurrence/dissent, Judge Bowes concluded that Pa.R.C.P. 4003.5 precluded the use of a subpoena directed to the expert to obtain documents in the expert's file, but would decline to hold that Pa.R.C.P 4003.3 provided "blanket work-product protection to all communications vis-a-vis the attorney and his expert."

The Supreme Court's decision on this matter will be instructive on the scope of a defendant's ability to request or subpoena the records of a plaintiff's treating and expert physician, as well as the boundaries of discoverability under Pa.R.C.P. 4003.3 and 4003.5.

Discoverability of Mental-Health Records in Personal-Injury Action

Octave v. Walker, 2012 Pa. LEXIS 2964 (Permission for allowance of appeal granted Dec. 27, 2012)

In this action, the Supreme Court will be called upon to rule upon the scope of disclosure pertaining to prior mental-health issues in claims involving injured persons.

On June 21, 2007, James Octave was injured after he was struck by a tractor trailer driven by Walker while he was at or near a group of mailboxes near his home. Following an investigation by the Pennsylvania State Police Department, however, the state police issued a report in which it determined that Octave had attempted to commit suicide. Susan Octave, Octave's wife, brought an action sounding in negligence on her husband's behalf (as an incapacitated person) against several parties, alleging that the claimant suffered both mental and physical injuries as a result of the incident. Relying on the state police report, two of the defendants sought discovery concerning Mr. Octave's mental health records, including access to sealed files pertaining to involuntary commitments of Mr. Octave under the Mental Health Procedures Act (MHPA). Mrs. Octave resisted disclosure, and an amended complaint was filed alleging physical

injuries only. Based on the filing of the amended complaint, the trial court denied the motion for discovery and adhered to that conclusion on reconsideration.

On appeal, the defendants contended that the mental health of Mr. Octave was placed in issue by the filing of the complaint and asserted that the protections of the MHPA were waived, noting that depriving them of this information would deny them access to information that would potentially result in a finding of no liability. Citing Section 111(a) of the MHPA (50 P.S. Section 7111[a]), the Commonwealth Court noted that disclosure of such records was limited to "(1) those engaged in providing treatment for the person; (2) the county administrator, pursuant to section 110.10; (3) a court in the course of legal proceedings authorized by this act; and (4) pursuant to federal rules, statutes and regulations governing disclosure of patient where treatment is undertaken in a federal agency." But, it also noted that where a plaintiff puts his or her mental health in issue, these protections may be waived, citing prior authority.

The Commonwealth Court ultimately concluded that claimant had waived the protections of the MHPA "by filing a complaint alleging negligence by Walker and DOT in connection with the accident" and wrote that barring the defendants "from all access to James Octave's long history of mental health issues would be unfair and grossly prejudicial." In dissent, Judge Kelley opined that because the MHPA limits disclosure to the four enumerated circumstances listed above, the amended complaint did not seek damages for mental health issues, and the defendants could contest causation through other means (i.e., the testimony of the eyewitnesses, the introduction of the Pennsylvania State Police records, and divorce and PFA records on file), the court properly declined to find that there was a waiver. An en banc application for reargument was denied before leave was granted to the Supreme Court.

The Supreme Court's ruling in this matter will be of interest to defense counsel in claims in which a plaintiff's mental status may be at issue and will provide further instruction as to what constitutes a waiver of the protections of the MHPA.

INSURANCE LAW

Manifestation of Negligence and the "Multiple Trigger" Theory

Pennsylvania National Mutual Casualty Insurance Company v. John D. St. John, 53 A.3d 1316 (Permission for allowance of appeal granted Oct. 1, 2012)

In one of the more interestingly phrased issues to be addressed by the court, the Pennsylvania Supreme Court will be addressing whether a "'manifestation' of the 'property damage' to the St. Johns' dairy herd [took] place in late March 2006 when the cows were concurrently observed thrashing their heads about in their water bowls, refusing to drink, and giving dramatically less milk; rather than, as held by the trial court, in April 2004 based on a mere economic downturn from a decrease in milk production."

In terms of factual background, in 2002, St. John retained LPH Plumbing, the plaintiff's insured, to perform work at the St. John's dairy farm. LPH (and its subcontractor) performed negligent work resulting in contaminated water being supplied to the St. John's herd. The action had been completed before the first milking in July 2003; but, the contaminated water did not reach the herd until later. The contaminated water issue was resolved in March 2006. As a result, St. John sued LPH for its negligence and obtained a verdict for $3.5 million.

The plaintiff provided four policies of insurance to LPH as follows: one for the period of July 1, 2003 to July 1, 2004; one covering the period of July 1, 2004 to July 1, 2005; one covering the period July 1, 2005 to July 1, 2006; and an umbrella policy also covering July 1, 2005 to July 1, 2006. The plaintiff sought a declaration of its rights under the insurance policies, and St. John filed a counterclaim seeking a declaration that the full limit of each policy was available to cover the liability of LPH.

Initially, the trial court concluded that only the 2003–2004 policy applied as there was only one "occurrence." St. John appealed, alleging that the occurrence was in March 31, 2006, or that there were multiple occurrences which occurred in each policy period (i.e. the "multiple trigger" theory). The court concluded that there was an occurrence in 2004 when "obvious problems" with the herd occurred, including a decrease in milk and increased disease in the cow herd. The court also rejected St. John's argument that there were "multiple triggers" as "there was but a single cause, the negligence of LPH and its subcontractor, and, therefore, only one occurrence." The court also noted that the multiple trigger theory had only been applied by appellate court to "toxic torts (notwithstanding that from the cows' point of view, this case does, indeed, involve a toxic tort)."

The Superior Court affirmed the decision. The Supreme Court granted permission of the allowance to appeal and will address three aspects of this claim including when the "manifestation" of the damage occurred (i.e., in 2004 based on a decrease in milk production, or in 2006, when the cows' symptoms had increased), whether the manifestation occurred when a party has the "ability to ascertain the course of injury or damage is traceable to something out of the ordinary and usual course of events for which another may bear responsibility," and whether the "multiple trigger" theory applies to "continuous, progressive 'property damage.'"

Ultimately, the Supreme Court's opinion will be instructive on whether the scope of the "multiple trigger" theory will be expanded

beyond toxic torts and what constitutes an occurrence sufficient to trigger liability under a commercial liability policy.

ACTUAL PREJUDICE AND THE DUTY TO DEFEND

Whether an Insurer Can Disclaim Coverage if the Insured Fails to Provide Timely Evidence

Vanderhoff v. Harleysville Ins. Co., 40 A3d 744 (Pa. Super. Ct. 2012) (Permission of allowance of appeal on Nov. 14, 2012)

When does an insured's lack of cooperation rise to a level of prejudice such that an insurance company no longer has the obligation to pay insurance benefits? In this appeal, the Supreme Court will address the meaning of "actual prejudice," the proof an insurance carrier needs to provide to show "material impairment of its ability to investigate and defend an uninsured claim," and what "constitutes a reasonable basis for a trial court finding that prejudice exists in a late report of a phantom vehicle."

In October 2001, the plaintiff, Venderhoff was involved in a motor-vehicle accident in which he was rear-ended by a vehicle driven by Piontkowski. Vanderhoff testified that a third vehicle had actually crossed an intersection, resulting in Piontkowski's vehicle stopping suddenly. Piontkowski denied the existence of the third "phantom" vehicle, and there was no evidence of the vehicle other than Vanderhoff's testimony, as the accident reports did not refer to it. Harleysville denied Vanderhoff's claim for uninsured motorist benefits which was filed in June 2002 and indicated that it received no notice of the phantom vehicle until that time. In a bench trial, it was determined that the third vehicle existed and that Vanderhoff reported the existence of the vehicle to the police. Upon Harleysville's appeal to Superior Court, that decision was reversed. Vanderhoff filed a petition for allowance of appeal to the Supreme Court, and the "Supreme Court held that a showing of prejudice was necessary before an insurer could deny coverage based upon untimely notice" (See *Vanderhoff v. Harleysville Ins.* Co., 606 Pa. 272, 997 A.2d 328 (2010)). On remand, Harleysville presented the testimony of Piontkowski, a responding police officer, a claim representative (who indicated that in phantom vehicle allegations in UI claims. Harleysville would immediately hire an investigator and take several affirmative steps to investigate which were not taken due to the delay), Harleysville's trial counsel (who testified that phantom vehicle cases were difficult because of potential memory lapses), an accident investigator, and an accident-reconstruction expert (who testified that his investigation would be hampered by the delay in reporting). The trial court concluded that Harleysville failed to establish "actual prejudice" because it did not show that the result of the claim would be different if there had been timely notice of the phantom vehicle.

The Superior Court reversed, concluding that the trial court's decision did not "comport with reason." Superior Court reasoned that the rationale for requiring a timely report of an unidentified vehicle to an insurer is to allow the insurer to investigate the accident and that the testimony presented by Harleysville established a significant loss of evidence based on the passage of eight months of time lost investigating the claim. Under the "specific circumstances" of the case, including that the only evidence of the third vehicle was provided by Vanderhoff, contemporaneous reports and eyewitness evidence did not indicate the existence of the vehicle, and the lack of physical evidence of the vehicle, Superior Court reversed and re-argument was denied before leave being granted to the Supreme Court.

This appeal will give the Supreme Court an opportunity to provide further clarification as to what an insurer needs to show in order to disclaim coverage in certain claims in which the insured fails to timely provide critical evidence in, at the very least, motor vehicle accidents.

TOXIC TORTS

Expert Affidavits Regarding Causation in Absbestos Products Litigation

Howard v. A.W. Chesterton Co., 31 A3d 974 (Pa. Super. Ct. 2011) (Permission for allowance of appeal granted on Oct. 11, 2012)

Practitioners in the field of asbestos litigation are recommended to look out for the Supreme Court's decision in this asbestos mass tort action.

This asbestos mass tort action was commenced on the basis that decedent Ravert contracted mesothelioma as a result of exposure to asbestos products, naming multiple defendants. Several of the defendants moved for summary judgment, arguing a lack of sufficient product identification under *Eckenrod v. GAF Corp.*, 375 Pa. Super. 187 (Pa. Super. 1988) and its progeny requiring evidence concerning frequency, regularity, and proximity.

The co-executors appealed, citing *Gregg v. V-J Auto, Inc.*, 596 Pa. 274 (Pa. 2007) and asserted that the trial court erred by requiring the co-executors to prove that decedent was exposed to "visible" rather than "respirable" dust and that there were genuine issues of material fact as to exposure to the defendants' asbestos products. As Superior Court noted, the *Gregg* decision indicated that it is the duty of a court, "at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of the plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury."

The Superior Court agreed with co-executors that the trial court failed to follow the "qualifying principles" of *Gregg* "regarding the flexibility of a plaintiff's burden as tailored to each specific case," including the particular diagnosis of mesothelioma in this particular claim. The Supreme Court also concluded that the trial court failed to engage in a "reasoned assessment" of the various expert affidavits submitted on behalf of the co-executors that were summarily rejected by the trial court as non-specific to the claim. Re-argument was denied on this appeal before the Supreme Court to grant leave.

The Supreme Court will once again have an opportunity to expound upon the plaintiff's burden in an asbestos-related claim under the guidelines of *Gregg* in terms of both evidence of specific dust exposure and in terms of the sufficiency of expert evidence needed to withstand a defendant's motion for summary judgment.

OUR APPELLATE TEAM:

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Partners

Jonathan M. Bernstein
Michael D. Brophy
Albert J. D'Aquino
Brendan T. Fitzpatrick
Christopher M. Hart
Anita Hotchkiss
Jonathan M. Kuller
Matthew S. Lerner
Paul D. McCormick
Brian W. McElhenny
Thomas M. Moll
William T. O'Connell
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Associates

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OFFICES

NEW YORK
780 Third Avenue, Suite 3100 | New York, New York 10017
OFFICE 646.292.8700

LONDON
No. 1 Cornhill | London EC3V 3ND
OFFICE +44.20.3427.6560

PHILADELPHIA
1700 Market Street, Suite 1418 | Philadelphia, Pennsylvania 19103
OFFICE 267.519.6800

PRINCETON
902 Carnegie Center, Suite 100 | Princeton, New Jersey 08540
OFFICE 609.986.1300

HARTFORD
100 Pearl Street, Suite 1100 | Hartford, Connecticut 06103
OFFICE 860.760.3300

BUFFALO
665 Main Street, Suite 400 | Buffalo, New York 14203
OFFICE 716.566.5400

ROCHESTER
2 State Street, Suite 805 | Rochester, New York 14614
OFFICE 585.295.5400

SYRACUSE
5786 Widewaters Parkway | Syracuse, New York 13214
OFFICE 315.413.5400

ALBANY
8 Southwoods Boulevard, Suite 300 | Albany, New York 12211
OFFICE 518.463.5400

WHITE PLAINS
11 Martine Avenue, Suite 750 | White Plains, New York 10606
OFFICE 914.798.5400

GARDEN CITY
100 Garden City Plaza, Suite 225 | Garden City, New York 11530
OFFICE 516.281.9800