COUNTERPOINT

AN OFFICIAL PUBLICATION OF THE PENNSYLVANIA DEFENSE INSTITUTE
An Association of Defense Lawyers and Insurance Executives, Managers and Supervisors JANUARY 2024

GUIDANCE, "GUIDEPOSTS" AND DUE PROCESS IN PUNITIVE DAMAGES AWARDS: THE RAMIFICATIONS OF THE PENNSYLVANIA SUPREME COURT'S DECISION IN BERT CO. V. TURK, 298 A.3d 44 (Pa. 2023)

By William J. (Bill) Ricci Esquire
RICCI, TYRRELL, JOHNSON and GREY[1]

OVERVIEW

In its seminal *BMW v. Gore* 517 U.S. 559 (1996) ruling, the United States Supreme Court established a framework for assessing the constitutionality of punitive damage awards and ensuring they comport with due process. The High Court established "guideposts" for reviewing such awards: the reprehensibility of the defendant's conduct, the amount of penalties that could be imposed for comparable conduct, and—most relevant issue here—the ratio between the compensatory and punitive damage awards. *Id*. at 580.On July 19, 2023, in its decision in *Bert Co. v Turk,* 298 A. 3d 44 (Pa. 2023), the Pennsylvania Supreme Court announced, to a significant extent, its own "guideposts" for dealing with juries' punitive damages awards in civil cases.

Justice Christine Donohue authored the Opinion, joined by Chief Justice Todd, and Justices Dougherty and Wecht. Justices Dougherty, Wecht, Mundy and Brobson each filed concurring opinions.

The Pennsylvania Supreme Court specifically addressed "the ratio calculation, first discussed in *BMW v. Gore*, , and developed further in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), namely, "[o]ur grant of allowance of appeal narrowly encompasses the appropriate ratio calculation measuring the relationship between the amount of punitive damages awarded against multiple defendants who are joint tortfeasors and the compensatory damages awarded." *Bert v Turk* characterized that ratio as "one of the considerations in assessing whether an award of punitive damages is unconstitutionally excessive."

First, the Pennsylvania Supreme Court expressly declined to create a bright-line rule limiting the ratio of punitive and compensatory damages, notwithstanding *Gore* and progeny. In the process, the justices held that ratios of punitive to compensatory damages higher than 10 to 1 do not inherently violate dues process.

In addition, the Pennsylvania Supreme Court endorsed the "per-defendant" approach utilized by the trial court and approved by the Superior Court, rather than a "per-judgment" approach, for calculating the actual ratio of punitive to compensatory damages. The Court labeled this approach "consistent with Federal Constitutional principles that require consideration of a defendant's due process rights." The court ruled that "reprehensibility" had to be determined on an individual basis, as an individual analysis would allow the jury to determine a punitive damages award necessary to punish a particular defendant for his or her egregious conduct. Calculating the ratio on a per-judgment basis would undermine the jury's individualized analysis.

Finally, the Pennsylvania Supreme Court decided that "under the facts and circumstances" of the case at bar, it was "appropriate to consider the potential harm that was likely to occur from the concerted conduct of the defendants in determining whether the measure of punishment was both reasonable and proportionate."

These holdings necessarily have signifi-

On The Inside

We encourage comments from our readers
Write: Pennsylvania Defense Institute
P.O. Box 6099
Harrisburg, PA 17120
Phone: 800-734-0737 FAX: 800-734-0732
Email: cwasilefski@padefense.org or lgamby@padefense.org

Carol A. VanderWoude, Esquire . . . . . Co-Editor
Tiffany Turner, Esquire . . . . . Co-Editor

Counterpoint has been designed by the Pennsylvania Defense Institute to inform members of developments in defense-related legislation, relevant and significant cases and court decisions, and any other information which is of interest to the membership.

cant ramifications for evaluating the potential for sustainable punitive damages awards in Pennsylvania. They also mark a departure from what many practitioners considered to be the normative approach to and predictable range of any potential punitive damages award.

THE UNDERLYING FACTS

The underlying facts are most significant. Plaintiff Northwest Insurance Services ("Northwest") was an insurance brokerage firm located in northwestern Pennsylvania and western New York. Defendant Matthew Turk ("Turk") was employed by Northwest in 2005 as an insurance broker, eventually becoming a senior vice president in 2013 until he left the company in 2017. Defendant First National Insurance Agency, LLC ("FNIA") is an insurance brokerage firm. Defendant FNB Corporation ("FNB Corporation") is the parent corporation of defendants National Bank ("FNB") and FNIA (collectively and with FINA "First National").

In 2016, the First National Bank companies had a minor market share in northwestern Pennsylvania. To grow in that region, they developed a "nefarious" plan to takeover Northwest by convincing key employees to leave Northwest for defendant FNIA and to bring their clients with them, with the resultant loss of business calculated to force Northwest to accept a takeover at a fire-sale price. FNIA worked closely with Turk to facilitate this scheme.

In fact, defendants managed to persuade several Northwest employees to switch over to FNIA. Turk remained at Northwest to convince the company to sell the remaining business to FNIA. Northwest refused to do so once it fortuitously discovered Turk's scheme, firing him and filing suit. Northwest also named FNIA and its parent and affiliate, seeking compensatory and punitive damages.

THE TRIAL

At trial, b*y express agreement of the parties,* the jury was instructed that if the jury found liability, then it was to impose a single lump sum compensatory damages award for which *all defendants would be jointly and severally responsible.*

The jury found Turk liable for breach of contract and fiduciary duty and FNIA liable for conspiracy and unfair competition.

The jury awarded the plaintiff $250,000 in compensatory damages and then awarded a total of $2.8 million in punitive damages in varying amounts and percentages among the four defendants ($300,000 against Turk, $1,500,000 against FINA, $500,000 against the FNB, and $500,000 against FNB Corp.)

THE PENNSYLVANIA SUPERIOR COURT

In Post-trial motions and on appeal to the Pennsylvania Superior Court, the defendants challenged the constitutionality of the jury's award of punitive damages, arguing that the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits, as grossly excessive, the punitive damages assessed against them, namely that the aggregate ratio of punitive to compensatory damages was 11.2 to 1, which they claimed to be *per se* unconstitutionally excessive based on decisions of the U. S. Supreme Court.

In doing so, defendants argued that the United States Constitution requires the trial court to cumulate all punitive damages that the jury imposed and use this total as the "numerator" in its ratio calculation. Stated otherwise, defendants argued the trial court erred by allowing the jury to impose punitive damage based on a per-defendant rather than a per judgment basis.

Defendants argued that the trial court further erred by considering potential rather than actual harm caused as a pertinent consideration for assessing the propriety of a punitive damages award. They claimed the jury's punitive damages awards "shocks the conscience," and requested reduction of the punitive damages awards to a total amount that would not exceed the $250,000 award of compensatory damages.

A panel of the Pennsylvania Superior Court affirmed, rejecting defendants' challenge to the constitutionality of the punitive damages awards. The Superior Court agreed with the trial court's approach to calculate the punitive damages imposed on each defendant against the lump sum compensatory damages imposed by agreement jointly and severally on each defendant. That calculation would lead to a ratio that the superior court held was not so outrageous as to shock the conscience. Specifically, that methodology resulted in ratios of 1.8 to 1 for Turk, 2 to 1 for FNB, 2 to 1 for FNB Corp., and 6 to 1 FNIA. See *Bert Co. v. Turk*, 257 A.3d. 93, 118-19 (Pa. Super. 2021). In so doing, the Superior Court found that "the punitive damages are not so outrageous as to shock the trial court's conscious." Id.

The Superior Court noted that there was no "bright-line ratio" articulated by the U. S. Supreme Court for a constitutionally valid punitive damages award.

Finally, the Superior Court emphasized extensive evidence of record showing that FNIA intended to do as much eco-

nomic harm to Northwest as possible to convince it to sell its business to FNIA.

The Superior Court repeatedly reiterated the punitive damages served the "important state interest of deterring and punishing egregious behavior." See, e.g., *Bert Co*. 257 A.3d. at 119. The court noted further that while the United States Supreme Court determined that the Fourteenth Amendment limits punitive damages based on "general concerns of reasonableness," the High Court did not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. See *Bert Co*., 257 A.3d. at 120-21 (quoting *Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1, 18-19 (1991)).

THE PENNSYLVANIA SUPREME COURT MAJORITY OPINION

At defendants' request, the Pennsylvania Supreme Court granted allocator, and accepted three questions for *de novo* review, each focusing on the constitutional requirement that a punitive damages award bear a reasonable ratio to the compensatory damages award:

(1) Whether, in cases where the compensatory damages award is substantial, a punitive-to-compensatory damages ratio exceeding 9:1 is presumptively unconstitutional under U.S. Supreme Court precedent?

(2) Whether in cases involving joint and several liability-where compensatory damages are awarded, cumulatively, against all defendants and not on an individualized basis-the constitutionally permissible ratio of punitive-to-compensatory damages is calculated on a per-judgment basis or – as done at trial and affirmed by the Superior Court – on a per-defendant basis? and

(3) Whether, in reviewing the constitutionality of a punitive damages award, a trial court may consider the potential harm that the plaintiff could have suffered and introduce it as a post hoc justification for the award?

The Supreme Court described its essential focus as follows:

> We specifically address the ratio calculation first discussed in [*BMW* and *State Farm*]. Our grant of allowance of appeal *narrowly encompasses* the appropriate ratio calculation measuring the relationship between the amount of punitive damages awarded against multiple defendants who are joint tortfeasors and the compensatory damages awarded. *The ratio is one of the considerations in assessing whether an award of punitive damages is unconstitutionally excessive.*

298 A. 3d at 48 (emphasis added).

Defendants, joined by six separate Amici Curiae, strenuously attacked the Superior Court panel's decision, and made the following arguments to the Pennsylvania Supreme Court:

(1) in cases like this one, where the compensatory damage award is "substantial," a 9:1 ratio is presumptively unconstitutional, and a 1:1 ratio is the maximum the Constitution allows;

(2) that ratio must be calculated on a per-judgment basis. Imposing punitive damages on a per-defendant basis would lead to disproportionate, duplicative, and unconstitutional punishments;

(3) a court may not consider speculative potential harm when reviewing the amount of a punitive damage award, but must confine its analysis to the evidence that was presented to the jury;

(4) after awarding Plaintiff $250,000 in compensatory damages, the jury imposed punitive damage awards totaling $2,800,000 against the four defendants. The ratio of punitive to compensatory damages reflected in the judgment is more than 11:1; and

(5) the Pennsylvania Supreme Court should hold that the punitive damage awards at issue violate due process and order that the total amount of punitive damages be reduced to an amount that does not exceed the $250,000 award of compensatory damages.

Drawing on decisions of the U.S. Court of Appeals for the 9th Circuit, Texas and Ohio appellate courts, and extensive discussions (including *dicta* and dissents) in the seminal U.S. Supreme Court decisions, the Pennsylvania Supreme Court rejected the defense arguments in the context of the facts of the case at bar, and held as follows:

- "We adopt the per-defendant approach to calculate the ratio,

where the punitive damages award is the numerator and the compensatory damages award is the denominator. This methodology reflects the impact of the punitive verdict on each of the Defendants as required under the Due Process Clause . . . The calculation for each of the Defendants includes the total compensatory damages award as the denominator and the individual punitive damages awards as the numerator. This methodology for calculating the ratio in this case *reflects the instruction to the jury that the harm to Northwest was indivisible [specifically agreed upon by the parties]* and stays true to both the purpose of assessing the Defendants' individual due process rights and joint and several liability principles incorporated by the parties." 298 A.3d at 78-79 (emphasis added).

- "While the [U.S.Supreme Court] has developed various 'guideposts' and factors to consider in challenges to punitive verdicts based on excessiveness, its instructions are clear on two points: *there is no bright line ratio that a punitive damages award cannot exceed; And the guideposts and factors do not operate mechanically because the facts and circumstances of each case are determinative in assessing the constitutionality of a punitive damages award. Id*. at 61 – 62 (citations omitted) (emphasis added).
- "The second *Gore* guidepost anticipates consideration of the *potential harm* likely to occur from the Defendants' conduct. Where, as here, the record includes evidence of the potential harm intended by the Defendants and the jury was instructed that such harm could be considered in its award of punitive damages, *the Superior Court did not err in considering the amount*

of potential harm as part of its consideration of the relationship between the punitive damages awards and the compensatory damages award. While the value of the potential harm is not directly added to the compensatory damages award to create a new denominator in the ratio, it is a relevant factor to consider in evaluating whether a punitive damages award is excessive." *Id*. at 79-80 (emphasis added).

- In the absence of any other basis to review the constitutionality of the punitive damages awards *based on the scope of our allowance of appeal*, we affirm the order of the Superior Court *Id (emphasis added)*.

The Court made a very significant observation in a footnote:

> Observing that Restatement (Second) of Torts Section 908(2) did not include a requirement that "an award of punitive damages be proportional to compensatory damages," this Court maintained that it was the jury's function to determine whether and in what amount punitive damages should be awarded without a proportionality restriction. *Kirkbride, 555 A.2d at 803*. Consistent with this, the Suggested Standard Civil Jury Instructions informed juries that the "amount you assess as punitive damages need not bear any relationship to the amount you choose to award as compensatory damages." Former Pa.S.S.Civ.J.I. § 14.02 (Punitive Damages-Amount of Award). *After Haslip and its progeny, this was a misstatement of the law.*
>
> Former S.S.Civ.J.I. § 14.02 was renumbered in 2005 to § 8.2 and edited to exclude the provision that an award of punitive. damages "need not bear any relationship to the amount" awarded as compensatory damages. Inexplicably—in that the Defendants requested the current version of the instruction in their proposed jury instruction number 52—the trial court used the former version, to which the Defendants objected. N.T., 12/19/2018, at 277; N.T., 12/20/2018, at 198. On appeal, the Defendants challenged the ratio of compensatory to punitive damages *but did not otherwise challenge the jury instruction*.

298 A.3d at 61, fn. 28 (emphasis added).

CONCURRING OPINIONS

In his concurring opinion, Justice Dougherty emphasized that courts may consider a defendant's wealth when determining whether a punitive damages award was excessive.

In her concurring opinion, Justice Mundy agreed that it was acceptable to calculate the punitive to compensatory damages ratio on a per-defendant basis in a case involving a joint and several compensatory damages award. However, Justice Mundy suggested that other approaches to calculating the ratio (presumably including a per-judgment approach) may be constitutionally permissive in different factual contexts.

In his concurring opinion, Justice Brobson agreed that the per-defendant approach to assessing the punitive-to-compensatory damages ratio was permissible, but rejected the majority's conclusion that defendants in this case could have avoided a per-defendant approach by having the jury allocate fault among defendants.

Finally, in his concurring opinion, Justice Wecht acknowledged that although the majority correctly applied the legal High Court standards, the current U. S. Supreme Court precedent lacks sufficient clarity. Rather, he suggested that a plausible approach may be a focus not on Due Process but instead on protecting unenumerated rights under the Ninth Amendment.

RAMIFICATIONS, QUESTIONS AND PRACTICE STRATEGY:

Like most cutting-edge Pennsylvania Supreme Decisions, *Bert v. Turk* leaves room for extensive analysis and advocacy. Topics and issues to consider:

1) to what extent is the analysis of the Pennsylvania Supreme Court in *Bert* dependent on the parties' stipulation that there would be lump sum compensatory awards (with joint and several liability) and the egregious nature of the conduct at issue?

2) if, and under what circumstances can the "per-judgment" approach be applied to cases where there are multiple joint tortfeasor defendants, but no "indivisible" compensatory damages award of joint and several liability?

3) what are the parameters for "substantial" compensatory damages awards, necessitating a much smaller punitive to compensatory damages ratio?

4) what role and under what circumstances should the traditional common law "shocks the conscience" test be applied to the court's evaluation of the constitutionality of a punitive damages award, regardless of the punitive to compensatory damages ratio? In other words, what arguments can be made where the sheer amount of the punitive damages award "shocks the conscience?"

5) what arguments can be made regarding awards having "jaw dropping" punitive to compensatory damages ratios well in excess of single digits?

6) what is the optimal requested jury charge regarding potential punitive damages, to preserve due process and other potential concerns?

7) how and when to preserve arguments to the constitutionality and due process issues, well in advance of and of course including the charge conference?

8) beyond the Due Process of *BMW* and *State Farm*, are there other constitutional bases to challenge excessive punitive damages awards?

9) are there any legislative options for the defense bar to pursue, and if so, how and when?

Would the current U.S Supreme Court still apply the *BMW*/*State Farm* Due Process approach, and if so, when will it clarify these critically important constitutional issues?

ENDNOTE

[1] The author wishes to express his appreciation to Amicus Curiae brief authors Jim Beck Esquire (Reed Smith) and Matt Vodzak Esquire (Fowler Hirtzel McNulty & Spalding) for their tireless efforts, insights and support.

PENNSYLVANIA LAW CAUSATION DISMISSALS OF WARNING CLAIMS BASED ON A PLAINTIFF'S FAILURE TO READ THE WARNING

By James M. Beck, Reed Smith LLP,
Senior Life Sciences Policy Analyst, REED SMITH, LLP

In warning-based tort litigation, a common fact pattern that should just as often lead to summary judgment is when plaintiff did not in fact rely on the allegedly inadequate warning because s/he simply did not read the warning at all. In Sherk v. Daisy-Heddon, a Div. of Victor Comptometer Corp., 450 A.2d 615 (Pa. 1982), the Pennsylvania Supreme Court held that the plaintiff "cannot prevail" on a warning theory because any causal link between the alleged failure to warn and the ultimate injury was severed by the critical actor's – in Sherk, the parents of a minor − failure to read the allegedly inadequate warning:

> [Plaintiff] cannot prevail on the theory that if the parents of [the product user] had known of the [product's risks], they would not have permitted [the user] to have possession of the [product] and thus be in a position to misuse it. . . . When the [product] arrived in the mail, [the mother] **did not** open the box or **read the instructions**. Instead, the box "was put away," and [she] directed her sons that the [product] was not to be used until their father had instructed them in its use.

Id. at 619 (citations omitted) (emphasis added). Given the critical failure to read, "[o]n this record it is clear that the alleged "defect" in the warnings accompanying the [product] did not cause [plaintiff's decedent's] death." Id. (citations omitted).

In typical warning-related litigation, the plaintiff product user is usually the critical actor. For instance, in Kenney v. Watts Regulator Co., 512 F. Supp.3d 565 (E.D. Pa. 2021), the plaintiff's warning claim against a product manufacturer failed because "no one in [plaintiff's] home knew of the [product's] existence or had ever seen or read the instructions." Id. at 579. It was therefore "irrelevant whether the instructions were ambiguous." Id. "[N]o reasonable juror could find the ambiguity in the instructions could have caused the [plaintiff's] injuries." Id. at 580.

> [Plaintiff] adduced no evidence of anyone in the home reading the warning. . . . [N]ot only did [plaintiff] not see the instructions accompanying the [product], he did not know [it] existed. Given no one knew of the [product] and its instruction, the level of detail in the warning could not have prevented the injury.

Id. at 584-85 (footnote omitted).

Similarly, Allstate Property & Casualty Insurance Co. v. Haier US Appliance Solutions, Inc., 2022 WL 906049, at *9-10 (M.D. Pa. March 28, 2022), neither of the insurer's subrogors in a fire case had read the defendant's product warnings. The husband "never read the instructions and expresses doubt as to whether the stove even came with a manual." Id. at *9. The wife "admits there was a manual and asserts she read at least some portions of it," but not the key portion that contained that allegedly inadequate warnings. Id. Summary judgment was proper in Allstate v. Haier due to causation being "speculative" in light of the plaintiffs' failure to read the relevant warnings:

> [Insurer] insists a warning would have made a difference but offers no theory as to how a different or additional warning could have prevented the fire. Without even a theory of causation, we must find [its] contention that a different warning could have prevented the fire . . . to be mere speculation. Mere speculation about causation is insufficient for a failure-to-warn claim to survive a motion for summary judgment.

Id. at *10 (citations omitted).

Other Pennsylvania cases standing for the same proposition – that the alleged inadequacy of an unread warning cannot possibly be causal – are: Nelson v. American Honda Motor Co., 2021 WL 2877919, at *6 (Mag. W.D. Pa. May 17, 2021) (where plaintiff "never received, read, or relied on" warnings, "no matter how robust the warnings . . . could or arguably should have been, their deficiencies could not have been the cause" of his injuries), adopted, 2021 WL 2646840 (W.D. Pa. June 28, 2021); Elgert v. Siemens Industry, Inc., 2019 WL 1318569, at *14 (E.D. Pa. March 22, 2019) (summary judgment granted under Restatement §388 negligent warning claim where plaintiff "admits that he never read the service manual, even though he had access to it"); Chandler v. L'Oreal USA, Inc., 340 F. Supp.3d 551, 562 (W.D. Pa. 2018) (summary judgment granted in part because "the record is undisputed that Plaintiff did not read the warnings on the exterior of the [product's] box"; other warnings ignored), aff'd, 774 F. Appx. 752 (3d Cir. 2019); Flanagan v. MartFive LLC, 259 F. Supp.3d 316, 321 (E.D. Pa. 2017) (summary judgment granted against warning claim; "[t]he jury would then have to speculate that Plaintiff would have heeded a warning . . . even though he testified under oath that he did not read these materials"; "there is no genuine issue of material fact regarding whether Plaintiff would have heeded a warning"); Wright v. Ryobi Technologies, Inc., 175 F. Supp.3d 439, 454 (E.D. Pa. 2016) ("[a]s [plaintiff] admits he never read the Operator's Manual, the purported inadequacy of the unread warnings therein could not have caused his injury"); Hartsock v. Wal-Mart Stores East, Inc., 2009 WL 4268453, at *2 (E.D. Pa. Nov. 23, 2009) ("Plaintiff admits that he does not remember receiving a manual, nor would he have requested or read one, so the contents therein cannot have caused Plaintiff's

injuries."); Mitchell v. Modern Handling Equipment Co., 1999 WL 1825272, at *7 (Pa. C.P. Philadelphia Co. June 11, 1999) ("the fact that Plaintiff failed to read the existing instructions confirms the conclusion that any allegedly inadequate instructions were not the proximate cause of Plaintiff's accident"), aff'd mem., 748 A.2d 1260 (Pa. Super. 1999).

Additional authority for failure to read being fatally dispositive in Pennsylvania warning litigation comes in the context of prescription medical product liability litigation, where the critical actor is almost always the prescribing physician rather than the plaintiff. See Demmler v. SmithKline Beecham Corp., 671 A.2d 1151, 1155 (Pa. Super. 1996) ("In the duty to warn context, . . . plaintiffs must further establish proximate causation by showing that had defendant issued a proper warning to the learned intermediary, he would have altered his behavior and the injury would have been avoided.").

Thus, Russell v. Ethicon, Inc., 2020 WL 5993774 (M.D. Pa. Oct. 9, 2020), recognized "that if the physician does not read the warnings provided, the failure to provide an additional warning cannot be the proximate cause of an injury." Id. at *6. Further, it did not matter whether the physician affirmatively denied reading the warnings or simply did not remember doing so. Since plaintiff bears the burden of proof, lack of memory testimony requires a plaintiff to "point[] to contrary evidence in the record that would suggest that [prescriber] did read and rely upon [defendant's] inadequate warning." Id. (footnote omitted). "[F]ail[ure] to do so" led to summary judgment on causation. Id.

A surgeon's failure to read medical device instructions for use was likewise fatal in Ebert v. C.R. Bard, Inc., 2020 WL 2332060 (E.D. Pa. May 11, 2020).

> [T]here is no room for such disagreement; [the surgeon] did not read the [device's] IFU in its entirety, nor could he recall whether he read it before implanting the filter. . . . Thus, even assuming that the warnings were inadequate, more detailed warnings . . . such as comparative failure rates, would have made no difference.

Id. at *7 (citation omitted).

Ebert relied on the similar result in Kline v. Zimmer Holdings, 2015 WL 4077495 (W.D. Pa. July 6, 2015), aff'd, 628 Fed. Appx. 121 (3d Cir. 2016), the plaintiff's implanting surgeon "admitted that he did not read the package insert that accompanied the device, because he never reads them for any device he implants." Id. at *7. That testimony was fatal to the plaintiff's warning claim. "Thus, even if the warning in this case were insufficient, it would not have made a difference. Other courts have come to the same conclusion[.]" Id. at *25 (citations omitted).

One of those other courts was Mazur v. Merck & Co., 767 F. Supp. 697 (E.D. Pa. 1991), aff'd, 964 F.2d 1348 (3d Cir. 1992), in which a nurse's failure to read allegedly inadequate vaccine warnings warranted entry of summary judgment for lack of causation:

> It seems [plaintiffs] contend that unless there is affirmative proof the learned intermediary actually read the package circular, the vaccine manufacturer must be held liable. No case supports this contention; the law and common sense are just the opposite. The vaccine manufacturer is not responsible for how the learned intermediary chooses to do her job. . . . [Defendant] is not vicariously liable for [the nurse's] failings, if there were any. That [the nurse] may not have seen the package circular does not implicate [defendant]. . . . To suggest [defendant] had to have someone present at each [use of the product] to double-check that the appropriate precautions were taken is ludicrous.

Id. at 712-13 (citations omitted). See also Ferrara v. Berlex Laboratories, Inc., 732 F. Supp. 552, 553, 555 (E.D. Pa. 1990) (prescriber "did not consult the warning inserts" and his "failure to remember" the relevant warnings "was the causal link"), aff'd without opinion, 914 F.2d 242 (3d Cir. 1990).

Numerous Pennsylvania trial court opinions grant summary judgment where a prescribing physician did not read relevant drug warnings. For example, in Pettit v. Smithkline Beecham Corp., 2012 WL 3466978 (Pa. C.P. June 12, 2012), aff'd mem., 2013 WL 11273055 (Pa. Super. March 4, 2013) (in table at 69 A.3d 1280), "[the prescriber] repeatedly testified he could not recall ever reviewing the [drug's] label or PDR." Id. Summary judgment was appropriate because "when a physician fails to read or rely on a drug manufacturer's warnings, such failure constitutes the intervening, independent and sole proximate cause of the plaintiff's injuries, even where the drug manufacturer's warnings were inadequate." Id. See Nelson v. Wyeth, 2007 WL 4261046 (Pa. C.P. Dec. 5, 2007) ("[defendant's] alleged failure to adequately warn could not have been the factual cause of [plaintiff's injuries] since the prescribing physician did not read nor rely upon any of [defendant's] warnings as contained in the label accompanying the prescription drug"); Berry v. Wyeth, 2005 WL 1431742, at *5 (Pa. C.P. June 13, 2005) (summary judgment granted based on failure to establish proximate causation when one physician failed to read the drug's labeling or the information in the PDR and the plaintiff failed to secure testimony from another prescribing physician that he had relied on the labeling to prescribe the drug to plaintiff).

A couple of cautionary notes – First, in employment situations plaintiffs are entitled to rely upon a "heeding presumption" in warning cases. Moroney v. General Motors Corp., 850 A.2d 629, 634 & n.3 (Pa. Super. 2004) (heeding presumption "authorized only in cases of workplace exposure"); Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 538 (Pa. Super. 2003) ("where the plaintiff is not forced by employment to be exposed to the product causing harm, then the public policy argument for an evidentiary advantage becomes less powerful"), aff'd, 881 A.2d 1262 (Pa. 2005) (*per curiam*); Goldstein v. Phillip Morris, 854 A.2d 585, 587 (Pa. Super. 2004) (same as Viguers). In cases where the heeding presumption applies, defendants must come forward with affirmative evidence of a plaintiff's failure to read in order to rebut this presumption and prevail on causation.

Second, in general, failure to read is not a defense to allegations that a warning –

whatever its substance – was insufficiently conspicuous to attract the plaintiff's attention. E.g., Moore v. Combe, Inc., 2023 WL 7089940, at *2 (E.D. Pa. Oct. 26, 2023) (plaintiff allowed to proceed, despite his "deposition [testimony] that he never read the existing warnings," on a theory that the "borderline illegible" warning was not "prominently located and conspicuous"). Thus, defendants asserting failure to read need to anticipate situations where the plaintiff might be able to raise conspicuity as an exception.

Nevertheless, as the abundant precedent cited above demonstrates, a plaintiff's failure to read purportedly inadequate warnings can be a valid, and dispositive, defense in many cases raising inadequate warning claims.

UNDOCUMENTED MIGRANT WORKERS UNDER THE PENNSYLVANIA WORKERS' COMPENSATION ACT

By Neil T. Dombrowski, Esquire
THE DOMBROWSKI GROUP, P.C.

In light of the increased number of Pennsylvania Workers' Compensation claims involving undocumented migrant workers, we wish to share with you controlling case law and strategies.

The Pennsylvania Workers' Compensation Act with respect to undocumented workers has addressed the issue in 2 key cases, Reinforced Earth Company and Kennett Square Specialties.

The Reinforced Earth Company v. WCAB (Astudillo), 810 A.2d 99 (Pa. Cmwlth. 2002) decision found that undocumented workers are considered employees under the Act. Pennsylvania has developed case law with respect to the issue of undocumented workers. In 1998, the Pennsylvania Commonwealth Court held that in the context of employers' Petition for Suspension with respect to an undocumented worker that an employer need only establish a change in medical condition and does not need to establish work availability for undocumented workers to be entitled to compensation.

More recently, the Pennsylvania Supreme Court in Cruz v. WCAB (Kennett Square Specialties), 627 PA. 28 (2014) held that an adverse inference as to a Claimant's citizenship drawn by a WCJ from Claimant's assertion of the 5th Amendment privilege is not *on its own* sufficient to support finding that the Claimant was an undocumented worker. Therefore, benefits could not be suspended. The fact that a worker is undocumented does not preclude the individual from being found an employee entitled to benefits under the Act.

If that individual is undocumented and is receiving workers' compensation benefits accepted under Notice of Temporary Compensation or Notice of Temporary Compensation and Carrier believes that the Claimant lacks work eligibility, Carrier may initiate Petition for Suspension and would need to establish first that Claimant has a medical release allowing the Claimant to return to some type of alternative work, and second, the burden is on the employer to establish that Claimant is not eligible to work in the United States and is indeed undocumented. Employer may initiate a Petition for Suspension and the Workers' Compensation Judge will then rule at the conclusion of litigation whether wage loss benefits should be suspended under the Act. The rationale for which is that employer does not need to establish work availability where work availability cannot be established for the individual who is undocumented.

The second scenario where this arises in the context of a Claim Petition where Claimant seeks out benefits. In the context of a Claim Petition, if employer can establish that Claimant is undocumented and ineligible to work, and further, that Claimant has a medical release credited by the Workers' Compensation Judge that permits Claimant to perform some type of work even with restrictions, the WCJ may in the event of an award of a compensable claim suspend benefits as of the date of the medical release that permitted Claimant to return to alternative work.

CASE LAW ANALYSIS

The case law in this area highlights the difficulty Employer's can have in their efforts to establish the undocumented status of a Claimant. Several cases, however, provide examples of the types of evidence which have been found to be sufficient and that evidence which has been rejected.

In Bryn Mawr Landscaping Co. v, WCAB (Cruz-Tenorio), 219 A.3d 1244 (Pa. Cmwlth. 2019), Employer attempted to establish the undocumented status of Claimant through testimony of Employer's witness that he "believed" Claimant's visa had expired in 2015, but acknowledged he was "not sure" of Claimant's immigration status after his injury. Claimant was working legally pursuant to his H-2B visa when he was injured at work. Under these facts, the WCJ determined that Employer failed to establish that Claimant's loss of earning power was caused solely by his immigration status.

In Juan U. Martinez v. Bisconti Farms, Inc., 2017 PAWCLR (LRP) LEXIS 5518, Defendant offered the deposition testimony of Michelle Brown, FCLS, a special investigations representative and fraud analyst for Highmark. Ms. Brown's job duties include investigating possible fraud or misstatements by workers' compensation claimants, as well as performing background checks and surveillance. Ms. Brown testified that she was asked to perform an investigation regarding Claimant's residency status. First, Ms. Brown checked Claimant's

permanent resident card and determined that it was not valid. Additionally, she checked the social security number (SSN) on Claimant's social security card, and determined that it had been issued in 2011, despite Claimant's claim that he had been using that SSN for 20 years. She also noted that Claimant's social security card had numbers different from the SSN written on his W-4 form and the Bureau documents. Ms. Brown stated that she checked the SSN printed on the W-4 and Bureau Documents and found out that the number belonged to someone who died in 2010. During cross-examination, Ms. Brown stated that she performed the background checks using ISO, Clear report, Yellow report, and ssnvalidator.com, none of which are websites that were created by her company. She also acknowledged that she had no personal knowledge of how Defendant received copies of any of Claimant's identification documents, and how the information was generated by the various search tools that she used.

The WCJ found Ms. Brown's testimony did not affirmatively establish that Claimant was an undocumented worker. The WCJ stated that while Claimant's social security card had numbers different from the SSN written on his W-4, the WCJ noted that the SSN on the W-4 was written by someone other than Claimant and it could have been a transcription error. The WCJ also indicated that the websites Ms. Brown used were non-governmental, and that she failed to testify as to how the websites obtained their information. Additionally, the WCJ indicated that Defendant failed to offer Claimant's I-9 form or any testimony from Defendant's human resources representative who met with Claimant and allegedly received the falsified documents. The WCJ explained that her testimony and the results of her internet searches were based on inadmissible hearsay and, thus, had no probative value. Therefore, Defendant failed to present substantial, competent evidence sufficient to meet its burden.

In Rojas v. Mack-Donahoe Contractors Inc., 2017 PAWCLR (LRP) LEXIS 5764, Employer succeeded in obtaining a ruling that a Claimant was an undocumented worker and obtained a grant of their Petition to Suspend Benefits. In this case, Employer submitted surveillance video of Claimant and also a Digg-IT report which consisted of a background search of Claimant, which was admitted into the record. The document indicated that the investigator had searched numerous databases, including addresses, bankruptcy records, PA and NJ civil and criminal records and PA and NJ Department of Transportation records and that no records associated with Claimant were found. When asked if Claimant was legally permitted to work in the US, he took the Fifth Amendment. Also in evidence was a statement from Employer's IME physician, Dr. Wetzel, that Claimant had presented a Costa Rican driver's license as his identification at the IME. Based on Claimant's invocation of the 5th Amendment, the Digg-IT report and Dr. Wetzel's testimony regarding Claimant's Costa Rican driver's license, the WCJ found that Claimant was an undocumented worker who cannot legally work in the US, entitling Employer to a Suspension. The decision was upheld by the Workers' Compensation Appeal Board.

In Alredo Garcia-Lopez v. Bran Mawr Landscaping Co., 2017 PAWCLR (LRP) LEXIS 5773 the Appeal Board held that the WCJ did not err in suspending Claimant's benefits when the WCJ accepted the testimony of Defendant's owner that Claimant's visa, authorizing him to work in the US, had expired as of 12/23/14. Employer witness testified that every year for the past 7 years, Claimant had gone through a temporary visa program that brings workers to the US for a 10 month period around March or April through December. The Employer witness testified that the visa expires each year, and Claimant is required to return to Mexico and then the progress begins again for the next year. Based on this testimony, the WCJ suspended benefits as of 12/23/14.

One practice point to remember is that only the Claimant can invoke his/her 5th Amendment rights. An objection by Claimant's counsel is insufficient and should not end the Defense counsel's questioning until the Claimant has invoked the 5th Amendment directly.

CONCLUSION

Our firm has significant experience in handling these types of cases. A WCJ's view of the immigration process may influence their fact finding. In cases where Claimant has produced by subpoena or otherwise purported documentation of eligibility, we have had success in verifying whether those documents are valid or fraudulent. We have utilized immigration experts to present testimony where documents may be invalid or fraudulent. Where claimants take the 5th Amendment and there is no documentation as to eligibility, it is considerably more difficult for Carrier to establish that Claimant is indeed undocumented and ineligible for work. We would add a word of caution that it is foreseeable that some Employers may be secretly assisting workers in securing less than valid documentation. Defense counsel might wish to be mindful of that possibility and its ramifications.

PROPERTY AND CASUALTY CASE LAW UPDATE NOVEMBER, 2023

By Thomas A. McDonnell, Esquire
SUMMERS, McDONNELL, HUDOCK, GUTHRIE & RAUCH, P.C.

IN MEMORANDUM OPINION PENNSYLVANIA SUPERIOR COURT REMANDS SWIMMING POOL VERDICT TO TRIAL COURT TO DETERMINE WHETHER THERE WAS SUFFICIENT EVIDENCE THAT THE DEFENDANTS VIOLATED A DUTY TO PLAINTIFF. TRIAL COURT'S DENIAL OF ALL REMAINING POST TRIAL MOTIONS AFFIRMED

Fraser v. O'Black, No. 1200 WDA 2022 (Memorandum-Pa. Super, 10/6/23)

The 21 year old Plaintiff was catastrophically injured while attending a pool party at the Defendants' home. The injury occurred when the Plaintiff either dove or jumped onto a round inflatable raft which was designed to be towed behind a boat. Plaintiff apparently hit the raft and was propelled into the shallow end of the pool where his head struck cement rendering him a quadriplegic. The raft had a warning to "never allow diving on to this product." However, the warning was not visible due to a cover which had been placed on the raft by the Defendants.

Plaintiff sued the Defendants for negligently allowing the raft in the pool and for failure to warn him to not jump or dive on it. At trial the jury awarded the Plaintiff $19,000,000 including $9,000,000 for future medical expenses, $3,000,000 pain and suffering, $3,000,000 embarrassment and humiliation and $3,000,000 for loss of enjoyment of life. There was also an award of $1,000,000 for disfigurement. The verdict was molded to $13,300,000 taking into account Plaintiff's comparative negligence of 30 percent.

The Defendants filed post-trial motions on a variety of issues including whether or not the Plaintiffs proved that Defendants knew of the dangerous condition, whether Plaintiff failed to establish that any failure to warn caused the harm and whether the verdict should be reduced as the award of future medical expenses exceeded the amount calculated by the Plaintiff's expert. The trial court denied all post-trial motions and an appeal was filed to Superior Court.

On appeal the Superior Court agreed with the Defendants that they had preserved the issue of whether the verdict was against the weight of the evidence with respect to any finding that the Defendants owed a duty to the Plaintiff. The appellate court found that the trial court did not consider whether the verdict was contrary to the evidence with respect to the duty issue. As such the case was remanded to the trial court for a ruling on whether the verdict was against the weight of the evidence.

With respect to the remaining post-trial motions, the Superior Court affirmed the trial court. In doing so the Superior Court refused to extend to premises liability cases the legal premise that the user of a product would have avoided the risk had it been warned. The court also found that any admission of hearsay testimony constituted "harmless error." Finally, the Superior Court affirmed the jury's award of future medical expenses in excess of that testified to by Plaintiff's expert. Precise mathematical certainty is not required. The verdict must only bear a reasonable relationship to the loss suffered by the Plaintiff and the expert's calculations of future medical expenses.

PENNSYLVANIA SUPERIOR COURT REFUSES TO EXTEND CAUSE OF ACTION FOR INTERFERENCE WITH DEAD BODY TO AFTER THE FACT ACCESSORIES WITH NO INVOLVEMENT WITH THE DECEASED REMAINS

Rouse v. Rosenberg, 295 A.3d 272 (Pa. Super. 2023)

This case involved Plaintiff's cause of action for emotional distress resulting from interference with a dead body. In this case the Defendants' son murdered the Plaintiff's son and hid his body in a lot near the Defendants' house where it was undiscovered for over two months. During that time the Defendants came into possession of the handgun used to commit the murder. Rather than take it to the police, the Defendants took it to their marriage counselor, who turned it over to the police under false pretenses. Plaintiff filed suit against the Defendants alleging that their conduct delayed the proper disposition of her son's body.

The Plaintiff filed suit against the Defendants and the Defendants filed Preliminary Objections contending that there was no cause of action for interference with a dead body as Defendants never touched or controlled the body, let alone knew of its location. The Preliminary Objections were granted and the case was appealed to Superior Court.

On appeal the Plaintiff contended that she had pleaded sufficient facts to withstand the Defendants demurrer based upon the Pennsylvania Supreme Court's decision in Papieves v. Lawrence which adopted the tort of mishandling of a body as defined by Section 868 of the Restatement (First) of Torts. According to Papieves' interpretation of the Restatement, recovery may be had for serious mental or emotional distress directly caused by the intentional and wanton acts of mishandling a decedent's body.

In addressing the issue the Court set forth Section 868 of the First Restatement as follows:

> Section 868 Restatement of Torts (First):
>
> A person who wantonly mistreats the body of a dead person or who without privilege intentionally removes, withholds or operates upon the dead body is liable to the members of the family of such person who is entitled

to the disposition of the body (adopted by the Pennsylvania Supreme Court in Papieves)

Using Section 868 as a guideline, the Court first found that the trial court's decision should be upheld as Papieves does not extend to situations where the Defendants did not handle the body or withhold the location of the body. In this instance there was no "hands on" interference with the decedent. The Plaintiffs argued that there should be no such requirement however the Court refused to accept this argument. Plaintiff also argued that Papieves should be extended to cases involving "after the fact" accessories. The Defendant contended that Section 868 required some type of physical contact or control over the decedent's body. This was not alleged in the Complaint.

In affirming the trial court's decision the Superior Court held that Section 868 of the Restatement, by its plain language, does not apply to Defendants' alleged conduct. This section requires a Defendant to intentionally "withhold" the body. This requires that the Defendants have possession or control of the body, which was not alleged.

The Court further held that it would not extend the holding in Papieves to situations where accessories after the fact never actually came in contact with the body. Any adoption of Section 868 of the Restatement (Second) of Torts must come from the Pennsylvania Supreme Court.

FEDERAL DISTRICT COURT DISMISSSES THIRD PARTY COMMON LAW INDEMNITY CLAIM AS THIRD PARTY PLAINTIFF NOT FREE FROM FAULT

Roamingwood Sewer and Water Association v. National Diversified Sales, Inc. v. James T. O'Hara, Inc., 2023 U.S. Dist. LEXIS 137242 (M.D. Pa. 2023)

Plaintiff brought an action over defective check valves manufactured by the Original Defendant (NDS). NDS then filed a third party Complaint against O'Hara for its failure to properly test the check valves prior to installation.

NDS filed a Second Amended Complaint against O'Hara for common law indemnification for the negligent testing. As O'Hara failed to test the valves that had been furnished, it was jointly and severally liable with NDS.

O'Hara filed a Motion to Dismiss arguing that "common law" indemnification was only available to a party that is without fault. As the original Plaintiff Roamingwood had obtained partial summary judgment against NDS, that entity was not free from fault as a matter of law. NDS contended that the original Plaintiff never attributed any fault for check valve failure to NDS; NDS was only liable because the valves did not pass the Consumer Expectation Test.

In dismissing the third party complaint against O'Hara, the Federal District Court found that NDS' Second Amended Complaint failed to state a cause of action for common law indemnity. There were no factual allegations to show that NDS was without fault, therefore that entity was not strictly "secondarily liable." As such there was no indemnification claim and its complaint was dismissed with prejudice.

FEDERAL DISTRICT COURT FOLLOWS PENNSYLVANIA STATE COURT DECISIONS IN HOLDING THAT RULE 238 DELAY DAMAGES NOT SUSPENDED DURING COVID-19 EMERGENCY

Lynch v. Ducasse, 2023 U.S. Dist. LEXIS 128504 (M.D. Pa. 2023)

This action arose out of Plaintiff's injuries due to the Defendant's discharge of a handgun. In June of 2023 a verdict was rendered for Plaintiff in the amount of $4,750,000 which was molded to $3,087,500 to reflect Plaintiff's 35 percent comparative negligence. The Plaintiff then filed a Motion for Rule 238 Delay Damages totaling $982,873.

The Defendant did not contest the calculation of the delay damages but instead contended that the COVID-19 pandemic and resultant suspension of proceedings in the Federal District Court should exclude delay damages during that prohibited period (472 days). Rule 238 damages are only excluded where the verdict was less than 125 percent of the last written offer or where the Plaintiff caused delay of the trial. Rule 238 does not provide for any other periods where delay damages would be excluded.

The Court held that Defendant's argument was unsupported by the language of Rule 238 and the case law. In ruling that the COVID-19 prohibition period should be included in the calculation of delay damages, the Court followed the Pennsylvania Superior Court's decision in Getting v. Mark Sales and Leasing. In that case the Superior Court held that delay damages were not excluded during the period of the COVID-19 emergency. The Court noted that the Defendant could have tried to resolve the case during this period.

FEDERAL DISTRICT COURT DENIES RETAILERS MOTION FOR SUMMARY JUDGMENT FINDING THAT ISSUE OF "OPEN AND OBVIOUS" CONDITION FOR JURY TO DETERMINE

Pusateri v. Wal-Mart Stores, E., L.P., 2022 U.S. Dist. LEXIS 230782 (W.D. Pa. 2022)

Plaintiff was involved in a trip and fall incident at a Wal-Mart store in suburban Pittsburgh. According to the evidence of record, the Plaintiff had walked past a partially empty pallet or "stock base" on at least four occasions. The first 18 inches of the stock base was empty but it was in the middle of the aisle and rose to a few inches above the floor. At some point an employee entered the aisle with another stock cart. To avoid the second stock cart the Plaintiff backed up and tripped on the protruding stock base. Plaintiff's Complaint alleges that she sustained a left arm fracture and nerve damage and had surgery to repair the fracture. Both parties agreed that the Plaintiff was a "business invitee" at the time of the loss.

At the close of discovery Wal-Mart moved for summary judgment contending that the danger presented by the "stock base" was open and obvious thus no duty owed to the Plaintiff was breached. The Plaintiff contended that

whether or not this condition was "open and obvious" was a jury question which precluded summary judgment.

In denying the Defendant's Motion for Summary Judgment the Court cited to § 343 of the Restatement of Torts (Second) which holds that a possessor of land is subject to liability for harm caused to his invitees, but only if the possessor knew, or by the exercise of reasonable care, would discover the condition and realize that it involves an unreasonable risk of harm. This provision also requires that a Plaintiff prove that a possessor of land should expect that Plaintiff will not discover or realize the danger, or fail to protect themselves against it. In this case the evidence presented raised a jury question on the obviousness of the danger given the distraction presented by Wal-Mart's employee "walking directly toward Plaintiff pushing a large top stock cart." Moreover, a jury could reasonably conclude that Wal-Mart should have anticipated the harm of a floor level obstruction in the middle of an aisle when moving merchandise to restock shelves.

As the issue of "open and obvious" was a jury question, Wal-Mart's motion was denied.

FEDERAL DISTRICT COURT ORDERS RETAILER TO PRODUCE STORE SURVEILLANCE FOOTAGE AND UNREDACTED INCIDENT REPORT PRIOR TO PLAINTIFF'S DEPOSITION

Dietzel v. Costco Wholesalers, No. 22-0035 (E.D. Pa. 2022)

The Plaintiff allegedly tripped and fell on an uneven sidewalk while entering the tire center at a local Costco. The Defendants discovered that the fall was not captured on video surveillance cameras because there was no camera in the area of the fall. However, the claim notes from Costco's insurer contained an instruction for the store to retain footage from the nearest camera one hour before and one hour after the time of the fall.

The Defendant scheduled the Plaintiff's deposition. However, prior to the deposition the Plaintiff sought to compel the Defendant to produce all video surveillance in the store on the date of loss.

In addition, the Defendant had prepared a Confidential Warehouse Incident Report and provided a redacted version in discovery. Plaintiff's moved to compel an unredacted copy of the report.

It was Defendant's position that it did not have to provide any video surveillance footage until after the Plaintiff's deposition so that the deposition testimony reflected the Plaintiff's memory rather than what he viewed on the store's surveillance footage. Defendant also contended that the warehouse Incident Report was privileged as Attorney-Client Work Product. Specifically, Defendant argued that the report was prepared by a Costco employee for Costco's legal counsel in anticipation of a future lawsuit.

The Court first addressed the difference between "security" footage and "surveillance" footage. The Court found that security footage is discoverable as opposed to surveillance footage of a person under suspicion obtained as part of litigation. Since regular camera footage is kept in the normal course of business, it is not "surveillance" footage and Costco was ordered to produce 30 minutes of video before and after the incident prior to Plaintiff's deposition.

With respect to the warehouse incident report, the Court found that this document was created in the ordinary course of business. There was no evidence that any attorney reviewed the report therefore the report does not fall within the definition of "Attorney Work Product." As such an unredacted copy had to be produced.

LYCOMING COUNTY COURT HOLDS THAT VICTIM OF DOG ATTACK MUST PROVE "PROXIMATE CAUSE" TO RECOVER FROM DEFENDANT EVEN THOUGH DEFENDANT WAS NEGLIGENT PER SE FOR VIOLATING THE PENNSYLVANIA DOG LAW

Godell v. Stroble, No. 22-00906 (C.C.P. Lycoming Co., 2023)

In June of 2022 the Defendant attended an estate sale. While she was putting purchased items into her car, her dog escaped from the car and attacked the Plaintiff. The dog was not on a leash or otherwise restrained at the time.

After the Defendant's deposition the Plaintiff moved for summary judgment contending that as Defendant's dog was not on a leash, the Defendant violated Section 459-305 of the Dog Law dealing with confinement and control or animals; therefore the Defendant was negligent per se.

The Court agreed that the Defendant was negligent per se as she clearly violated that provision of the Dog Law. However this liability is not absolute. The Court held that a fact finder still had to find that this negligence was the proximate cause of Plaintiff's injury. The fact that the defendant was negligent per se did not remove the factual cause issue from the case.

LYCOMING COUNTY COURT ALLOWS EVIDENCE OF POSSIBLE FUTURE MEDICAL CARE AS IT IS A RELEVANT COMPONENT OF JURY'S DECISION ON PAST AND FUTURE PAIN AND SUFFERING

Hamm v. Perano/GSP Management Co., No. 20-598 (C.C.P. Lycoming Co., 2022)

Plaintiff was seriously injured when she fell through an unsecured manhole cover. At the time of the loss the Plaintiff was a tenant at a mobile home park owned and managed by the Defendants. The Plaintiff filed suit contending that the Defendants negligently failed to secure the manhole cover and protect individuals from falling into the hole.

Prior to trial the Defendant filed a Motion in Limine to preclude evidence of Plaintiff's future prognosis or future medical care. Plaintiff's medical expert apparently testified that there was a "possibility" that she would need medical care in the future. Therefore, such evidence was speculative and should be precluded.

The Plaintiff conceded that the medical experts had not established future medical expenses with any certainty.

Plaintiff was not seeking to recover monetary costs for future treatment but contended that she should be allowed to introduce evidence of future treatment with respect to her claim for future pain and suffering.

The Court found that the Standard Jury Instructions state that "in determining past and future damages, the jury should consider, among other factors, the type of medical treatments the Plaintiff has undergone and how long treatment will be required." Further, Pa. R.C.P. 223.3 sets forth required jury instructions in actions for bodily injury and death. This rule incorporates the standard jury instructions and contemplated the introduction of evidence of the need for future medical treatment as being relevant to the question of noneconomic damages. Therefore, the Motion in Limine was denied and the jury was free to consider how long the Plaintiff will be required to undergo medical treatment into the future as this was an appropriate component of "pain and suffering." According to Rule 223, one of the factors to be considered is arriving at an award of pain and suffering is the duration of medical treatment.

HOMEOWNER'S CROSSCLAIM FOR CONTRIBUTION/ INDEMNITY AGAINST TOWNSHIP DISMISSED AS NO ALLEGATIONS OF NEGLIGENCE AGAINST TOWNSHIP IN UNDERLYING COMPLAINT AND NO ALLEGATIONS DEMONSTRATING AN EXCEPTION TO GOVERNMENTAL IMMUNITY

Owens v. Huffman/Wayne Township, et al., No. 10612 of 2021 (C.C.P. Lawrence Co. 2022)

This case involved the failure of the septic system on the Huffman property which caused raw sewage to be discharged across the Plaintiff's property into a nearby creek. The Plaintiff notified Wayne Township officials including the Sewage Enforcement Officer. The Plaintiffs also made complaints to the State Department of Environmental Protection Agency (DEP) and the Federal Environmental Protection Agency (EPA). This resulted in a violation handed down by the DEP.

Attempts were made to correct the problem by the Township and various contractors but these were unsuccessful. The Wayne Township officials then informed the Plaintiffs that it could not help rectify the situation.

The Plaintiff filed suit against the Huffmans, the Township and various contractors. In its Answer and New Matter the Huffmans asserted a crossclaim for contribution/indemnity against Wayne Township. The Township filed Preliminary Objections to the contribution/indemnity claim on the basis that there were no allegations of negligence against the Township in the underlying Complaint. As such, the Township could not be a joint tortfeasor with the Huffmans.

The Court agreed with Wayne Township and dismissed the Huffmans' crossclaim for contribution and indemnity agreeing that there were no tort claims asserted against the Township in the original Complaint filed by the Owens. Also, the Court found that there was nothing of record to demonstrate an exception to Wayne Township's governmental immunity therefore the Township could not be primarily liable to the Huffmans and there could be no claim of contribution or indemnity.

PENNSYLVANIA DEFENSE INSTITUTE
Application for Membership

Eligibility for Membership:
Those persons shall be qualified for membership and may continue to hold membership herein who are:

Members of the Pennsylvania Bar actively engaged in the practice of civil law, who individually devote a substantial portion of their time on litigated matters, to the defense of damage suits on behalf of individuals, insurance companies or corporations.

Full-time executives, managerial or supervisory employees, of insurance companies, self-insurers, or corporations who individually devote a substantial portion of their time to claim administration or to matters with a direct impact upon claims administration including legislation activities.

Please complete the information requested on this form and mail or fax this application with your check (payable to the Pennsylvania Defense Institute) to: **Pennsylvania Defense Institute, P.O. Box 6099, Harrisburg, PA 17112, FAX: 800-734-0732**

To ensure proper credit, please supply all names of applicants or have each new member complete a copy of this application.

Annual Membership Fees
- ☐ 1-9 members per organization: $265 per member
- ☐ 10 or more members per organization: $240 per member
- ☐ Retired members: $25 per member

Name _____

Firm or Company _____

Address _____

_____

E-mail Address _____

Telephone Number _____

If you are an attorney, please provide the following information:

(1) Name, address, telephone number and company affiliation for two current clients you represent in defense litigation matters:

_____

_____

_____

_____

_____

_____

(2) Name, address, telephone number of two members of the Pennsylvania Bar who can confirm that you devote a substantial portion of your practice on litigation matters in defense of damage suits on behalf of individuals, insurance companies or corporations.

_____

_____

_____

_____

_____

_____

_____
Signature

_____
Date

Description of Present Responsibitilies _____

_____

_____

PENNSYLVANIA DEFENSE INSTITUTE

Committee Preference

Please select up to three committees in which you would like to serve, numbering them in order of preference.

Amicus Curiae & Appellate Practice . . . . . ____

Bad Faith. . . . . ____

Civil Practice and Procedure. . . . . ____

Employment and Civil Rights. . . . . ____

General Liability . . . . . ____

House Counsel . . . . . ____

Insurance Coverage and Subrogation . . . . . ____

Motor Vehicle Law . . . . . ____

Products Liability . . . . . ____

Professional Liability . . . . . ____

Publications. . . . . ____

Transportation and Trucking. . . . . ____

Workers' Compensation . . . . . ____

Young Lawyers . . . . . ____

FROM COUNTERPOINT'S EDITORS:

Future publications of Counterpoint will be published by e-mail. Over the next several issues we will accumulate an e-mail database of subscribers. To continue to receive *Counterpoint* and enjoy its scholarly and informative articles, please take just a second and send your e-mail address to:

Charles Wasilefski, Esquire
cwasilefski@padefense.org OR
lgamby@padefense.org

We appreciate your cooperation.