SIDEBAR

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In This Issue...

PA Supreme Court Rules Impairment Rating Evaluations Unconstitutional.

By Michael T. Dolan, Esq.

On June 20, 2017 the Pennsylvania Supreme Court issued its long-awaited ruling in Protz v. WCAB (Derry Area School District) finding unconstitutional Section 306(a.2) of Act 57 as an impermissible delegation of authority thereby eliminating the legislatively created impairment rating evaluation (IRE) provision to assess degrees of bodily impairment under AMA Guidelines. When adopted in 1996 as a state-wide economic reform measure designed to control costs, the IRE option of Act 57 provided employers with an additional method to alter an injured employee's status from temporary total to temporary partial disability thereby limiting indemnity exposure to 500 weeks of benefits. Prior to the court's ruling, authored by Justice Wecht and joined by four other justices with one dissent and one concurrence, IRE's utilized the "most recent addition" of the AMA Impairment Guidelines to determine whether, after receipt of 104 weeks of total disability benefits, a claimant's injury fell within a standardized and calculable percentage of whole body impairment. Impairments of less than 50 percent could trigger, either administratively or through litigation, a change to partial disability that would continue regular disability payments for a maximum of 500 weeks or approximately 9.6 years. Needless to say, the elimination of this IRE provision as unconstitutional has significantly impacted claims handling efforts leaving a number of questions as to whether the ruling will be retroactively implemented by future Court Decisions. While the one unmistakable prospective effect of this ruling is that all future efforts at employing this exposure capping

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provision will be completely eliminated, there are multiple questions as to how to address its effect retroactively where the statutory provision has been in effect for almost 21 years.

In understanding the prospect of retroactive application, it merits a review of how the court came to decide the constitutional issue and how, after its decision, what factors will likely control its future spectrum of interpretation issues.

The case began in 2007 with a Ms. Protz sustaining a right knee injury while employed with the Derry Area School District. Temporary total disability benefits were paid for 4 years when an IRE was performed under the Sixth Edition of the AMA Disability Guidelines concluding that the claimant had a 10 percent whole body impairment. Employer's modification petition to establish temporary partial disability was granted by the WCJ and appeal to the Board was perfected with claimant arguing that Section 306(a.2) was an unconstitutional delegation of legislative authority to the AMA in violation of Article II, Section 1 of the Pennsylvania Constitution. The Board affirmed the decision of the WCJ and a petition for review was filed with the Commonwealth Court.

The Commonwealth Court, sitting en banc, reversed the WCAB finding Section 306(a.2), requiring that physicians use "the most recent edition" the Guidelines violated the state constitution. While the court concluded that the General Assembly may delegate authority and discretion in connection with execution and administration of a law, such as here to the AMA, it must ensure first that the basic policy choices are made by the legislature and second, the legislation must contain adequate standards to guide and restrain the exercise of the delegated function. In its analysis the court found the legislature's delegation to the AMA to conduct impairment ratings unconstitutional beyond the Fourth Edition of the Guidelines which were applicable at the time of statutory enactment. In further appeal to the Pennsylvania Supreme Court claimant argued that the use of the AMA Guidelines violated the non delegation doctrine and gave the AMA unfettered discretion over Pennsylvania impairment rating methodology. Such delegation it argued effectively empowered the AMA to implement disability criteria without restraint in their prospective ability to make laws controlling who would fall above or below or above the 50 percent impairment rating.

In its decision the Supreme Court affirmed the Commonwealth Court's decision that the AMA Guidelines provided for under Section 306(a.2) were unconstitutional but went further finding that the language conferring approval for the 4th Edition could not be utilized or extended under subsequent edition rendering the entire provision unconstitutional.

With the court's unequivocal elimination on constitutional grounds as to IRE's there have been only two possible alternatives to obtain a rule reversal; either through an appeal to the US Supreme Court or a corrective/modified legislative response by the Pennsylvania General Assembly. While the appeal to the US Supreme Court was considered unlikely, and is now time-barred, and the General Assembly's address of the impairment issue is still unknown, practitioners are left to speculate as to the practical repercussions of the court's ruling impact on claims both closed and continuing. As to ongoing disability claims, after the elimination of the IRE option, the only existing alternative to modified disability status from total to partial is through petition with evidence of earning power assessment through Labor Market Survey or offers of modified employment with the time of injury employer. Cases where a claimant is currently on a 500 week partial disability status, through a now unconstitutional IRE, will likely be the subject of a reinstatement petition seeking immediate status returned to temporary total disability. If the modification to partial disability was judicially determined without appeal we will argue against reinstatement on the theory that the ruling has no retroactive applicability and would otherwise be barred by the doctrine of res judicata. In cases where the claimant has submitted to an IRE examination before June 20, 2017 but modification has not been judicially decided, these matters will be governed by the court's ruling and continue on total disability status. Existing IRE cases established through an administrative filing (notice of change in status) to partial disability will likely be subject to reinstatement orders to temporary total status.

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Superior Court Reaffirms Standards for Legal Malpractice in Criminal Cases

By Josh T. Byrne, Esq.

Pennsylvania law regarding legal malpractice is constantly evolving. However, for nearly twenty-five years, the standard for a legal malpractice claim arising out of an underlying criminal representation has been unwavering. The Pennsylvania appellate courts have steadfastly upheld Bailey v. Tucker, 533 Pa. 237, 621 A.2d 108 (Pa. 1993), and the requirements set forth therein for a legal malpractice claim based upon criminal representation. In Horton v. Bruno, 2017 Pa. Super. Unpub. LEXIS 2540 * (Pa. Super. July 2017), the court again upheld Bailey finding summary judgment was appropriately granted in favor of the defendant.

In the relatively short opinion in Horton, Judge Ott tackled a number of issues worth unpacking. Bruno was appointed to serve as Post Conviction Relief Act ("PCRA") counsel to Horton following a conviction for second-degree murder, aggravated assault, robbery, criminal conspiracy, and possessing an instrument of crime. Prior to Bruno's appointment, Horton retained private counsel to file a PCRA application which was dismissed by the trial court. The PCRA application filed by Bruno came nearly ten years after the judgment of sentence became final. The PCRA application filed by Bruno on behalf of Horton was dismissed as untimely. The dismissal of the PCRA application was upheld by the Superior Court.

Horton, unhappy with the representation, reported Bruno to Disciplinary Board of the Supreme Court of Pennsylvania. Horton's complaint was one of eleven separate claims raised with the Disciplinary Board against Bruno. Bruno subsequently received a two year suspension from the practice of law. Horton then filed a legal malpractice claim against Bruno with counts sounding in trespass and breach of contract/ negligence. The essence of Horton's claim was Bruno breached a duty to Horton due to a failure to obtain medical records and affidavits of treating medical providers. This relatively straight-forward case provides some insights into a number of important issues in legal malpractice cases.

Lack of a Contractual Relationship

Historically in Pennsylvania, significant differences existed between legal malpractice cases sounding in negligence and those sounding in contract. Over the last number of years Pennsylvania courts have largely eroded those differences, while federal courts applying Pennsylvania law have maintained them. The Pennsylvania state courts have recently treated legal malpractice breach of contract cases as nearly indistinguishable from negligence cases, other than the statute of limitations. However, the Horton case does discuss one fundamental difference between legal malpractice cases sounding in negligence and those sounding in contract, the existence of a contract. The trial court found, and the Superior Court agreed that no claim for breach of contract could be maintained because Bruno was Horton's court appointed lawyer and did not maintain a contract with Horton.

Bailey Factors

As noted above, our Supreme Court's decision in Bailey sets forth a unique set of requirements for a legal malpractice case arising out of an underlying criminal representation. The Bailey court held:
[W]e hold that a plaintiff seeking to bring a trespass action against a criminal defense attorney, resulting from his or her representation of the plaintiff in criminal proceedings, must establish the following elements:

(1) The employment of the attorney;

(2) Reckless or wanton disregard of the defendant's interest on the part of the attorney;

(3) the attorney's culpable conduct was the proximate cause of an injury suffered by the defendant/plaintiff, i.e., "but for" the attorney's conduct, the defendant/plaintiff would have obtained an acquittal or a complete dismissal of the charges.

(4) As a result of the injury, the criminal defendant/plaintiff suffered damages.
(5) Moreover, a plaintiff will not prevail in an action in criminal malpractice unless and until he has pursued post-trial remedies and obtained relief which was

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dependent upon attorney error; additionally, although such finding may be introduced into evidence in the subsequent action it shall not be dispositive of the establishment of culpable conduct in

Bailey, supra, 621 A.2d at 114-115 (footnotes omitted). In its opinion, the Horton court concentrated on the third Bailey requirement. The court noted the record did not support a contention that Horton was innocent of the crimes he was charged with.

Although not addressed by the Superior Court, there is nothing in the opinion to suggest that Horton was able to meet the fifth Bailey requirement either. Horton did not obtain post-trial relief which was dependent upon attorney error. Indeed, Horton's claim was based upon an allegation of an inability to obtain post-trial relief. It is important to note the Bailey requirements are unique to a legal malpractice action arising out of an underlying criminal action. A legal malpractice negligence claim arising out of an underlying civil action has the same essential elements as any other negligence claim (duty, breach of duty and actual damages).

The Grant of Summary Judgment

Although not specific to legal malpractice, the other interesting argument raised by Horton was the trial court erred in granting the motion for summary judgment before he had an opportunity to respond. The Superior Court noted that while Pennsylvania Rule of Civil Procedure 1035.3 requires an opposing party to file a response to a motion for summary judgment, there is nothing in the Rules to prevent the court from issuing an order on a motion for summary judgment before the required response is filed. The Superior Court found no error in the court granting summary judgment prior to the opposing party filing its response.

As can be seen in the Horton opinion, even most apparently simple legal malpractice cases can contain a myriad of interesting issues for the watchful practitioner. The most important takeaway from Horton is the continued viability of the Bailey requirements in legal malpractice cases involving an underlying criminal case.

Josh Byrne is a partner in the firm's Philadelphia office and is a member of the Professional Liability Department.

Current Status of the New York Asbestos Personal Injury Litigation – A Jurisdiction in Flux

By Edmund John, Esq.

New York City has been active in the asbestos injury litigation since 1986 when the New York State Legislature passed a bill revising the statute of limitations for asserting asbestos personal injury claims and extending a one-year statute of limitations grace period to those tort victims who developed diseases with long latency periods, resulting in a massive influx of asbestos personal injury actions. See, Richard A. Solomon, Clearing the Air: Resolving the Asbestos Personal Injury Litigation Crisis, 2 Fordham Env. L. Rev. Issue No. 2 (2011). NYCAL (New York City Asbestos Litigation) was created in response to the

thousands of cases that flooded the New York City court system. Since the late 1980s, NYCAL has consistently remained one of the more active jurisdictions in the United States asbestos personal injury litigation.

Because of the volume of cases filed, the size of the jury verdicts returned and the ever-increasing number of companies that have filed for bankruptcy protection, the NYCAL litigation has always been challenging for the non-bankrupt defendants active in the litigation. To help manage the litigation, in 1988, the Honorable Helen Freedman issued the first Case Management Order ("CMO") governing the NYCAL litigation.

In an attempt to level the NYCAL playing field in a jurisdiction tilted in favor of plaintiffs, in 1996, the Court issued a negotiated revised CMO. The 1996 revised CMO added Section XVII deferring the disposition of punitive damages claims in NYCAL in exchange for the addition of provisions modifying the New York Civil Practice and Rules ("CPLR") that benefited the plaintiffs.

Judge Freedman's rationale for deferring the disposition of punitive claims in NYCAL is provided in her 2012 Southwestern University Law Review article (Helen E. Freedman, Selected Ethical Issues in Asbestos Litigation, 37 Sw. U. L. Rev. 511, 527-28) as follows:

Many courts, including mine, long ago decided that punitive damages had little or no place in the asbestos litigation .... Because New York allows imposition of punitive damages in tort cases, rather than merely dismissing the claims, I deferred all punitive claims indefinitely....

It seemed like the fair thing to do for a number of reasons. First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states did not permit punitive damages, and the federal [multidistrict litigation] court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong. However, deferral of all punitive damages claims by judicial fiat despite the fact that other jurisdictions allowed them, and,

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indeed, New York juries had previously awarded them, clearly raises ethical and possibly equal protection issues.

Judge Freedman's decision on this point was not unique since similar deferral orders were issued in other high-volume jurisdictions. By way of example, both the United States District Court for the Eastern District of Pennsylvania and the Philadelphia County Court of Common Pleas have deferred punitive damages since the mid-1980s, the MDL 875/MARDOC litigation has deferred punitive damages since the early 1990s , and since approximately 1992 for the asbestos personal injury cases pending in the Baltimore, Maryland asbestos personal injury litigation. (See, Mark A. Behrens, Punitive Damages In Asbestos Personal Injury Litigation: The Basis For Deferral Remains Sound, Rutgers Journal of Law & Public Policy, Vol 8:1, (Fall 2011) for a more detailed discussion on the benefits of deferring the disposition of punitive damages claims in the asbestos personal injury litigation).

However, the Honorable Sherry Heitler in Matter of New York City Asbestos Litig., 2014 N.Y. Misc. LEXIS 5933 (NY Sup April 8, 2014,) entered on April 15, 2014, found that NYCAL landscape has so dramatically changed since 1996 that the policies and considerations underlying Judge Freedman's deferral of punitive damages no longer applied. Judge Heitler's decision resulted in the December 16, 2014 headline, "New York City's Asbestos Court is #1 "Judicial Hellhole" in the 2014 annual report of "Judicial Hellholes" published by the American Tort Reform Foundation ("ATRA"). (See http://www.judicialhellholes.org/2014/12/16/new-york-citys-asbestos-court-is-1-judicial-hellhole)

On June 20, 2017, the Honorable Peter H. Moulton, after unsuccessfully engaging in discussions with plaintiffs' and defense counsel to reach a revised CMO agreed to by the parties, unilaterally entered a revised CMO and supporting decision. The revised CMO removed the deferral of punitive damages without instituting the required protocols or establishing the due process deficiencies identified by the appellate Court in its 2015 decision. The revised CMO expressly states that it supersedes the CPLR and, where the provisions of the CPLR and revised CMO differ, the provisions of the revised CMO control.

Suspending the provisions of the CPLR without the consent of the defendants adversely affects their procedural and substantive due process rights in the scope of pleadings, interrogatories, depositions, clustering, prioritizing and scheduling of cases for trial, sanctions, and disclosure of bankruptcy trust information. The revised CMO mandates the continued use of a court appointed and mandated special master to resolve a variety of issues of pretrial matters without the consent of the defendants. On September 5, 2017, the defense bar appealed Judge Moulton's revised CMO to the New York Supreme Court Appellate Division, First Department.

Instead of refining and building on the methodology used to process, evaluate and dispose of the cases in NYCAL following the 1996 CMO issued by Judge Freedman, the parties unfortunately have regressed into a state of partisan tribalism. The plaintiffs and defendants are the true victims of the politicization of NYCAL since the cases are not being addressed in a timely, efficient, cost effective and fair manner. While the members of the NYCAL bar squabble among themselves, the cases filed by plaintiffs in other high volume jurisdictions where punitive damages have been deferred are being resolved.

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While it would be a "fool's errand" to underestimate the creative pleadings or imaginative ideas of the claimant's bar in the aftermath of the Protz ruling there are nevertheless compelling arguments to prevent wholesale retroactive application and eliminate a medically-based impairment rating system that has been utilized for the past two decades. We will be watching for opportunities to implement constructive alternatives to ensure a constitutionally sound legislative remedy and vigorously defend against what we anticipate to be a wholesale effort to reinstate cases on partial disability to temporary total disability status.

Mike Dolan is an associate in the firm's Philadelphia office and is a member of the Workers' Compensation Department.

Underinsured Motorist Benefits under Delaware Law: the right to bodily injury liability and underinsured motorist benefits under the same policy, for the same motor vehicle accident

By Shae Chasanov, Esq.

The Delaware Superior Court was recently tasked with considering whether a passenger is permitted to collect Underinsured Motorist Benefits ("UIM") under the same policy after he already received the bodily injury liability limits, in a single vehicle collision. For instance, consider the following scenario:

Jane has an automobile insurance policy that provides for $15,000 per person in bodily injury liability limits, as well as $15,000 per person in underinsured motorist benefits. Jane drives her friend John to the store, when Jane loses control over the vehicle, ultimately striking a telephone pole. As a result of the accident, John sustains various injuries and receives medical treatment. John sues Jane for her negligence, collecting the $15,000 in bodily injury liability limits, exhausting the policy. However, as John believes this settlement is not enough compensation for the injuries he sustained, he presents a claim for UIM benefits against Jane's insurer.

The Delaware UIM statute, 18 Del. C. § 3902, was amended in 2013, and the amended provisions became effective on January 3, 2014. Prior to the amendment, such a recovery would not be permitted. However, since the amendment, this issue has arisen frequently.

Many insurance policies provide exclusionary language that prevents a UIM recovery for someone like John when a recovery for bodily injury liability has already been made for the same accident. In addition to the policy exclusion, another argument advanced by insurers is that the purpose behind UIM coverage is to allow a driver to protect himself from other vehicles on the roadway that may carry insufficient insurance, or no insurance at all. Lastly, insurers have relied upon the fact that other jurisdictions, including Pennsylvania, had already ruled on this issue, and held that a plaintiff may not recover both liability and UIM coverage under the same policy, for the same collision.

The Delaware Superior Court considered these arguments, but ultimately held that even if the language is clear and unambiguous, the statute does not support such an exclusion. To hold otherwise would insert an exclusion for single-vehicle collisions where the General Assembly does not indicate its intentions to do so. Therefore, John, as described in the above scenario, would be entitled to pursue UIM benefits after already collecting the bodily injury liability limits against Jane.

In Tillison v. GEICO, the presiding judge, Judge Carpenter, sympathized with the insurer's position, finding that the insurer's positions were not unreasonable, and may in fact reflect the legislature's intent at the time the statue was enacted. He indicated that clarification should be sought from the legislature on this issue. It should be pointed out that this issue has not been presented to the Delaware Supreme Court.

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News & Firm Notes

Swartz Campbell Wins Appeal In Contract Case

Greg Stokes and Patrick Fitzmaurice, representing a multi-national telecommunications company, prevailed on appeal before the Pennsylvania Superior Court in a dispute over whether an arbitration clause within a contract for services applied to claims of non-payment stemming from a breach of contract. The Pennsylvania Superior Court in United Telephone Company of Pennsylvania, LLC v. M2J2S, LLC, 1517 MDA 2016 (Pa.Super.Ct. 2017) reversed the trial court's order overruling preliminary objections to compel arbitration and remanded the case for further determination by the trial court.

Several employees from Swartz Campbell LLC took part in the 38th Annual Philadelphia Bar Association 5k Run/Walk on May 21, 2017 at Memorial Hall. Those who participated included Jane Lombard, Lauren Burke, Kristin Mutzig, Andrea M. Graf, Rachel Hrynczyszyn, and Donna Evans. Proceeds from the event benefitted the Support Center for Child Advocates to help neglected children find more stable lives.

On June 9th, 2017, Josh T. Byrne, Esq., a partner in the firm's Professional Liability Department, made a presentation to the Delaware County Bench-Bar on avoiding legal malpractice.

Andrea M. Graf, Esq., an associate in the firm's Philadelphia office, recently spoke at a CLE for the Pennsylvania Bar Institute's "Tough Problems in Workers' Compensation 2017" program. The CLE explored advanced issues in practicing Pennsylvania Workers' Compensation law. Andrea specifically presented on the Heart and Lung Act, the difficulties in defending such claims, the interplay of Heart and Lung claims with workers' compensation law, and highlights of practicing before the Heart and Lung Arbitration Panel in Philadelphia.

On August 28th, 2017, Sharon McGrail-Szabo, Esq., Managing Partner of the firm's Allentown office, spoke at a meeting of the National Federation of Independent Businesses held in Easton PA. The topic was the recent Pennsylvania Supreme Court decision in the Protz case which rendered the Impairment Rating Evaluations provisions of Act 57 unconstitutional, and its impact on employers and their workers' compensation premiums.

On June 7 2017 Elizabeth Naughton-Beck, Esq., a partner in the firm's Media office, spoke at the Delaware County Bar Association Bench Bar Conference and a few weeks later, on June 24, 2017, she spoke to the Pennsylvania State Association of Township Commissioners Annual Conference in Lancaster PA on the Medical Marijuana Act and its impact on zoning regulations.

Swartz Campbell Named 2017 Litigation Department of the Year for Professional Liability Practice

Swartz Campbell LLC is pleased to announce that its "Professional Liability" Department has been named the Litigation Department of the Year 2017 by The Legal Intelligencer. The Legal Intelligencer is the oldest law journal in the United States and "is the most trusted source of Pennsylvania legal news, information and analysis."
Long regarded as one of the top professional liability practices in the country, Department Chair and Managing Partner Jeffrey McCarron said: "This recognition is wonderful and we are humbled by it. Winning for our clients is what we get up every day to do. Tomorrow we will work even harder to help our clients succeed."

In addition to McCarron, members of the Swartz Campbell Professional Liability Department include the following seasoned litigators: Joshua Byrne, Candidus Dougherty, Kathleen Carson, Nicole Graham and Caryn Steiger. They focus their practice on the defense of actions and proceedings against professionals arising out of professional practice. Many of the matters involve professional malpractice which accuses the professional of deviating from the standard of care. The matters handled by the Professional Liability Group also include claims for breach of contract, defamation, commercial torts, intentional torts such as fraud, conspiracy and illegal acts, and claims based on regulations of professional conduct.

On May 11th, 2017, William Salzer, Esq., a partner in the firm's Philadelphia office and Chairman of the Employment Law Department, made a presentation at the Perrin's Emerging Insurance Coverage seminar in Philadelphia on the topic of the right to independent counsel under an insurance policy. The session was devoted to addressing the scope of representation and ethical implications.

Products Liability Team Prevails on Motion to Transfer Venue

Greg Stokes and Dustin Martino prevailed on a Motion to Transfer Venue in an asbestos-related claim, successfully arguing that a mesothelioma case should be transferred from Philadelphia County to Allegheny County when all operative facts, including plaintiffs' residence, occupational history, exposure history, and medical history were centered in and around Allegheny County. In support of the Motion to Transfer Venue, the Products Liability Team interviewed former co-workers of the injured plaintiff's husband and obtained affidavits to establish that trial in Philadelphia County would be oppressive and vexatious. Sivak v. Owens Illinois, Philadelphia County Court of Common Pleas March Term 2017, No. 2043.

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