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NEW JERSEY DEFENSE

PRESIDENT'S LETTER

As we embark on 2023, in lieu of "New Year, New You," I implore you to adopt the mentality of "New Year, MORE you." What do I mean?

The New Jersey Defense Association is comprised of over 650 members who actively devote their time to litigated matters in the defense of damage suits. We have some of the most prominent defense attorneys, insurance company executives and self-insurers in the state affiliated with our organization. Hundreds of our members take advantage of the many benefits the NJDA offers, including but not limited to: this newsletter, our seminars, conventions, discounted CLE opportunities, access to our expert database and members-only medical directory, affiliation with sponsors that offer a wide array of professional services, and our increasingly popular and active ListServe, a forum where members actively exchange information and resources. However, we are only as strong as our collective efforts, which is why we need MORE of you—more members and more active engagement in our organization.

There is a flurry of activity and proposals in both the legislature and Supreme Court Rules Subcommittees which may directly affect the defense bar. We urgently need you, our members, now more than ever to help identify and stay up-to-date on these concerning topics. As the representative organization for the defense bar, it is important that we are apprised of and united in responding to various proposals, including recent efforts to increase the retirement age for members of the judiciary, modifications to our model civil jury charges, implementation of mandatory pro bono assignments, revisions to the Rules of Evidence, undertakings to address diversity, inclusion and community engagement and more. I encourage you to review the latest Notices to the Bar and reach out to our committee chairs if there is a significant issue that you believe we should be addressing. Better yet, join a substantive committee or invite an associate or colleague to join in our collective effort to make sure the voice of the NJDA is heard throughout the State in response to changes and developments in the rules and case law alike. Then, write an article and keep our members up-to-date on your efforts, the outcome and your success!

Further in line with the "MORE you" mentality, we continue to promote our year-long membership drive aimed at increasing the visibility and participation of our members. We need your help to seek out new members and encourage increased participation from our current members to help foster and promote fairness and the interest of justice. What better location to kickstart this initiative, than at our annual convention? Please join us **June 22-25, 2023**, for the 57th Annual Convention in Washington, D.C., as we retreat to our nation's capital. This is a wonderful opportunity to meet and enjoy the company of new and seasoned members, exchange ideas, collaborate on efforts and introduce yourself to our diverse group of sponsors, all in an effort to promote the growth and succession of our organization. Please save the date! More details on registration to follow!

Finally, I wish to extend sincere congratulations and appreciation to Marie Carey, a past President and long-time member, who was recently recognized by the Women and the Law Committee for her positive influence in the recruitment and retention, advancement and promotion of women and diverse attorneys, as well as her dedication to mentorship and sponsorship. The Committee bestowed upon Marie the first annual Marie A. Carey "Ladder Down" Award. Over the years, Marie has had a positive influence on many members and non-members and continuously exemplifies the "MORE you," mentality that I impart upon each of you moving forward in 2023.

As always, be sure to keep apprised of other current events, upcoming opportunities, and seminars by following the New Jersey Defense Association on Facebook, Instagram, Twitter and LinkedIn.

Michelle O'Brien

MICHELLE O'BRIEN, ESQ.

FRAUD ON THE MARGINS?: APPELLATE DIVISION ADDRESSES MATERIAL MISREPRESENTATIONS IN FIRST PARTY CLAIMS IN MARGIN HOLDINGS LTD, LLC V. FRANKLIN MUTUAL INSURANCE CO.

BY CHRISTIAN BAILLIE, ESQ.[1]

In Margin Holdings, Ltd., LLC v. Franklin Mut. Ins. Co., A-4224-18, 2022 WL 433231 (N.J. Super. Ct. App. Div. Feb. 14, 2022), the Appellate Division re-examined the issue of what constitutes a post-loss material misrepresentation made to an insurer that will forfeit coverage regarding a first-party claim, and revisited the Supreme Court's seminal decision in Longobardi v. Chubb Ins. Co. of New Jersey, 121 N.J. 530 (1990). The Appellate Division ultimately reversed the trial court's grant of summary judgment in favor of Franklin Mutual Insurance Company ("FMI"), on both its material misrepresentation defense and its affirmative claims under the New Jersey Insurance Fraud Prevention Act, and remanded. As the Appellate Division noted, "[a]t the heart of this appeal [was] the question of who owned the insured property and the auto parts at the time of the vandalism and theft claims, and whether appellants' representations about ownership were untruthful." Id. at *1.

FMI issued a businessowners policy to Margin Holdings Ltd, LLC ("Margin") in several commercial condominium units and the business personal property contained therein. The units were previously owned by Branchburg Commerce Park, LLC ("BCP"), a company owned and solely controlled by Samuel Ornstein ("Ornstein"), who purportedly served as a "consultant" for Margin. On September 28, 2014 and October 11, 2014, certain of Margin's units were allegedly vandalized. Additionally, during the October 2014 loss, certain contents within one of the units were allegedly stolen—specifically, vintage auto parts sold to Margin by Turner Resources, Ltd, a company also owned by Ornstein, approximately one month before the alleged theft. Margin submitted claims to FMI for both dates of loss. FMI ultimately denied the claims, relying on the "Concealment/Misrepresentation/Fraud" provision in the policy.

Among other things, FMI's investigation uncovered that the deed transferring certain of the units from BCP to Margin was signed by Andrew Sprecher as the purported "Director/Secretary/Treasurer of Creweonline.com, Ltd ("Creweonline"), the sole member of BCP. Id. at *8. During Sprecher's deposition, he testified that he could not remember whether he was ever a director, secretary, or treasurer of Creweonline and did not know or remember anything about the entity. Ibid. Additionally, during Ornstein's pre-suit Examination Under Oath ("EUO"), he claimed to not know who the individual members of BPC were, despite the fact that he was the owner of Creweonline, which at the time of the EUO was the sole member of BCP. It is these two alleged misrepresentations—the submission of the deed signed by Sprecher and the EUO testimony by Ornstein—that were central to the court's determination as to whether FMI had established materiality as a matter of law.

After a lengthy discovery process, FMI moved for Summary Judgment on its material misrepresentation defense and its affirmative claims against Margin and Ornstein (as a third-party defendant) under the New Jersey Insurance Fraud Prevention Act, N.J.S.A. § 17:33A-1 to -30 ("IFPA"). Margin and Ornstein cross-moved for Summary Judgment, seeking dismissal of FMI's affirmative defense under the fraud clause and the counterclaim and third-party complaint in their entirety. The trial court granted FMI's motion and denied the cross-motion. The trial court thereafter entered a final order of judgment against Margin and Ornstein, jointly and severally, for $108,163.51 under the IFPA. Margin and Ornstein appealed the summary judgment orders and final judgment, as well as several discovery orders.

The Appellate Division, focusing heavily on the issue of materiality regarding the question as to ownership of the units and auto parts, primarily looked to Longobardi v. Chubb Ins. Co. of New Jersey, 121 N.J. 530 (1990). There, our Supreme Court established that "concealment or fraud" clauses apply when an insured misrepresents facts to an insurer during a post-loss investigation, as opposed to only in the application process, and set forth the standard for materiality of a post-loss misrepresentation. Chubb's investigation in Longobardi stemmed from the alleged theft of valuable art from the insured's home. During the insured's EUO, he falsely denied that he personally knew two individuals, one of whom prepared an appraisal for his stolen artwork. Both individuals were previously convicted of fraud under circumstances similar to those in the Chubb claim. The insured also falsely stated that he had never previously field an application with another insurer for the stolen items. Chubb denied coverage and the insured filed suit. The jury found that Longobardi had been burglarized, had not conspired to defraud Chubb, and had not made a material misrepresentation in his application for insurance. Id. at 536. However, the jury found that he made material misrepresentations during his EUO "'in an effort to or for the purpose of hindering, deflecting or misleading defendant in the course of its investigative process.'" Ibid.

The Appellate Division in Longobardi reversed, finding that Chubb could only be excluded from paying the claim if it

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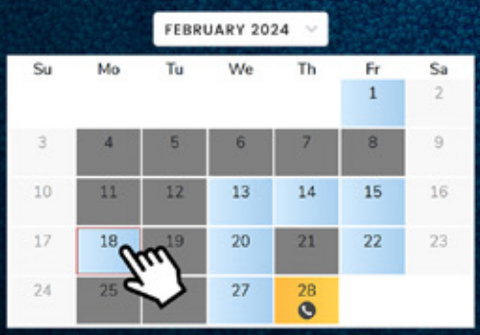

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was prejudiced. Ibid. The Supreme Court reversed and reinstated the judgment of the trial court dismissing the Complaint. The Court held that prejudice was unnecessary, as the better rule was one that induced insured to answer truthfully. The Court, quoting and agreeing with the Second Circuit Court of Appeals, said: "'The law is clear that the materiality of false statements during an insurance company investigation is not to be judged by what the facts later turn out to have been. . . . Thus the materiality requirement is satisfied if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding." Id. at 541 (quoting Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179, 183 (2d Cir.1984), cert. denied, 474 U.S. 826, 106 S.Ct. 86, 88 L.Ed.2d 70 (1985)). The Supreme Court reiterated this point in its now seminal holding: "An insured's misstatement is material if when made a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action. In effect, materiality should be judged according to a test of prospective reasonable relevancy." Id. at 542 (internal citations omitted).

The Supreme Court concluded that the insured's misrepresentations regarding knowing the two individuals with fraud convictions was material, despite the jury's determination that the theft claim was legitimate, as Chubb was legitimately concerned about the insured's relationship with them. It did not matter that the insured's lies were ultimately immaterial to the underlying issue being investigated, i.e. whether the theft was staged. As the Court noted, "Materiality should be judged as of the time when the misrepresentation is made. . . . Hindsight . . . is irrelevant to the materiality of an insured's misrepresentation to an insurer." Id. at 541.

In Margin Holdings, the Appellate Division ultimately disagreed with the trial court's conclusion that FMI had established that material misrepresentations had been made as a matter of law and held that the issue of materiality should have been left to a jury to determine. The Appellate Division noted that it had previously held that "materiality 'generally is a question of fact to be determined by a jury.'" Margin Holdings, 2022 WL 433231 at *6 (quoting Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 178 (App. Div. 2000)). As to the deed transfer from BCP to Margin, the panel was not persuaded that FMI had established that Margin made material misrepresentations, "[d]espite the suspicions raised by Sprecher's deposition testimony." Id. at *9. The panel looked at the issue of materiality through the lens of whether FMI had established that an actual legal defect existed in the deed and whether Margin lacked an insurable interest. Ibid. The panel found that FMI had proved neither. As to the issue of Ornstein's EUO testimony regarding knowledge of individual members of BCP, the panel did find that there were issues of fact regarding whether Ornstein made knowing misrepresentations, while "recognizing that these professions of ignorance or lack of recollection could be found by a trier of fact to be untruthful," as this was an issue of credibility assessment left for the jury. Id. at *11. However, the panel's focus was on materiality, which again centered on questions as to whether Margin lacked an insurable interest, which was for a jury to determine.

Therefore, the Appellate Division reversed the trial court's ruling on FMI's Motion for Summary Judgment, vacated the order of judgment against Margin and Ornstein, and remanded. The panel declined to address any other issues raised in the appeal, including whether any alleged post-investigation misrepresentations, to wit, misrepresentations made by Margin during litigation, can void coverage and/or support a claim under the IFPA, as affirmatively held in Thomas v. New Jersey Ins. Underwriting Ass'n (NJIUA), 277 N.J. Super. 630 (Law. Div. 1994).

The Margin Holdings decision is unreported, and it is important to not allow this decision to be used as a basis for misinterpreting the established standards set forth in Longobardi. The Margin Holdings decision focuses heavily on whether FMI had established that Margin lacked an insurable interest rather than whether the alleged misrepresentations were relevant to FMI's concerns over insurable interest and important in determining its course of action. Arguably, whether Margin actually had an insurable interest or not is irrelevant. The Margin Holdings decision mentioned that "Franklin Mutual has the burden of proving that Ornstein's alleged misrepresentations, if their falsity had not been uncovered, would likely have caused the loss claim to be paid to the wrong owner." Id. at *12. Longobardi, on the other hand, does not hold that materiality necessitates that the insurer's investigation be affected by the misrepresentation. That is the animating purpose of Longobardi's dual rejection of the hindsight approach and the necessity of demonstrating prejudice. The Supreme Court only required that the misrepresentation be "important in *determining* the insurer's course of action" as of the moment the insured "let loose the lie." Longobardi, 121 N.J. at 542 (emphasis added). Nothing in this standard suggests that a misrepresentation must alter the trajectory of the investigation or claim decision. As our Supreme Court put it, in quoting the Second Circuit with approval, "'[f]alse sworn answers are material if they *might have* affected the attitude and action of the insurer . . . [or] they may be said to have been *calculated* either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate.'" Ibid. (citing Fine, 725 F.2d at 184) (emphasis added).

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DISCOVERY END DATE CONFUSION: HOLLYWOOD CAFÉ DINER INC. VS. JAFFREE AND ITS APPLICATION TO DISCOVERY END DATE EXTENSIONS

BY ANGEL MANUEL HIERREZUELO, ESQ. OF METHFESSEL & WERBEL P.C.

No matter the type of case one might be defending, a discovery schedule will ultimately be set by the court to naturally progress the case to its conclusion. Understanding the differing standards that apply to discovery extension requests therefore serves of utmost importance to avoid potential prejudice to your client should an extension need to be sought.

Recently, the Appellate Division decided Hollywood Café Diner, Inc. v. Jaffee, 473 N.J. Super. 210, 217 (App. Div. 2022), where it was held that the "good cause" standard, rather than "exceptional circumstances" standard, applied to motions to extend discovery even after a judge sets an arbitration date or trial date prior to the end of the discovery period. Based upon the plain reading of R. 4:24-1(c), this holding seems puzzling, but, as always, the devil may be in the details.

By way of background, R. 4:24-1(c) governs extensions of discovery and the applicable standard that is to apply to a motion judge's review of an application to extend discovery. The rule sets out three distinct situations that can occur when a discovery extension is sought. The first is situation is where both parties consent to an extension of discovery for a period of 60 days. In this instance, the parties must merely file a stipulation with the court representing that all parties consent to the extension and file such stipulation prior to the expiration of the discovery period. The second situation is where one of the parties disagrees as to the extension, or where the parties seek to extend discovery for a period longer than 60 days. To obtain the requested relief, a motion for an extension of discovery must be submitted, and such motion must have appended all previous orders granting or denying an extension of discovery. As the rule clearly states, the "good cause" standard is to apply to such a motion. The final situation is where an arbitration or trial date has been previously fixed. In this instance, the rule makes clear that an applicant must show "exceptional circumstances" to obtain the requested extension.

The differences between the "good cause" and the "exceptional circumstances" standards are stark. The good cause standard is "more lenient" and "'flexible . . .' without a fixed or definite meaning." Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 480 (App. Div. 2012) (quoting Tynes ex rel. Harris v. St. Peter's Univ. Med. Ctr., 408 N.J. Super. 159, 169 (App. Div. 2009)). Nine factors have been identified as a non-exhaustive list a court may consider in determining whether "good cause" exists in the contexts of discovery extensions. The factors include:

> (1) the movant's reasons for the requested extension of discovery; (2) the

> movant's diligence in earlier pursuing discovery; (3) the type and nature of the case, including any unique factual issues which may give rise to discovery problems; (4) any prejudice which would inure to the individual movant if an extension is denied; (5) whether granting the application would be consistent with the goals and aims of "Best Practices"; (6) the age of the case and whether an arbitration date or trial date has been established; (7) the type and extent of discovery that remains to be completed; (8) any prejudice which may inure to the non-moving party if an extension is granted; and (9) what motions have been heard and decided by the court to date.
> [See ibid. (citing Tynes, 408 N.J. Super. at 169–70).]

In contrast, under the more rigorous exceptional circumstances standard, the movant must demonstrate:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
> [Rivers v. LSC P'ship, 378 N.J. Super. 68, 79 (App. Div. 2005).]

Hollywood Café is simplistic in its procedural history. The case concerned a legal malpractice action that was initiated by the Café following its representation by the defendants in a dram shop case. In the malpractice action, both parties served demands for written discovery in October 2019, but neither answered their adversary's requests. About a year later, the court notified the parties that the discovery end date was to be December 13, 2020, and the defendants therefore supplied the Cafe with thousands of pages of documents. On November 4, 2020, although the discovery end date had not expired, the court sent the parties notice that trial was set for March 8, 2021.

Counsel for the Café, with consent from their adversary, then wrote the judge requesting a 60 day extension of the discovery end date to February 11, 2021 which was ultimately granted. On December 7, 2020, defendants moved to dismiss the complaint without prejudice because the Café still had not served discovery responses; however, the motion was withdrawn ten days later when the discovery arrived. On January 6, 2021, while still asserting deficiencies in the Café's responses, defendants moved to extend discovery arguing that they had "good cause" to do so. The motion judge ultimately denied this discovery extension request, recognizing that the "exceptional circumstances" standard applied given that arbitration and trial dates had been previously fixed. Shortly after, defendants submitted a motion for summary judgment which was granted due to the Café's failure to obtain an expert opinion regarding the defendant's alleged professional negligence.

When considering the issue of whether the trial court applied the correct standard to the application to extend discovery, the Appellate Division first looked to the interplay of other court rules with that of R. 4:24-1(c), finding that, to give proper effect to rules such as R. 4:36-2 and R. 4:46-1, the "good cause" standard should be applied even when an arbitration or trial date notice is sent to the parties during the discovery period. The court specifically stated that "when [a] court chooses to send out arbitration and trial notices during the discovery period, judges evaluating a timely motion to extend discovery may not utilize the 'exceptional circumstances' standard, but rather the judge 'shall enter an order extending discovery' upon a showing of 'good cause.'" Hollywood Café, 473 N.J. Super. at 220.

At first glance, the holding of Hollywood Café seems simple; however, following the decision, trial judges have continuously been confronted concerning the case's applicability to motions to extend the discovery period. Interestingly enough, the judges seems to be at odds concerning exactly when the holding of Hollywood Café is implicated. Some have interpreted the case as simply mandating that the "good cause" standard apply in instances where the arbitration or trial date is fixed, but only with respect to when the original discovery end date was assigned. Others have found that Hollywood Café granted trial judges the discretion to determine that, after the parties have received the benefit of previously granted days of discovery and multiple discovery extensions, the "exceptional circumstances" standard would apply to any further extension of discovery. This lack of uniformity from the trial judges on the case's applicability has therefore caused confusion among civil practitioners, an issue that can have significant implications on a defense counsel's ability to properly explore the theory of plaintiff's case in discovery.

My recommendation is simply to understand the details of the procedural history in Hollywood Café, and consider those details when interpreting the holding. When doing so, you will find that, despite the Appellate Division's absolutist language in its holding, the Appellate Division perhaps did not seek to broadly prohibit a trial court from applying the "exceptional circumstances" standard in all contexts where a trial or arbitration date had been established by the court during the discovery period.

There are three considerations that the Appellate Division cited to aid them in rendering their decision. The first was the fact that the trial court in the case had assigned a trial date very early in the litigation, which essentially rendered the "good cause" standard in R. 4:24-1(c) meaningless. In reconciling the trial court's decision to establish the early trial date with the fact that the court rules did not forbid a court from doing so, the Appellate Division found that court rules are to construed so as "to avoid rendering any part . . . inoperative, superfluous or meaningless." MasTec Renewables Constr. Co. v. SunLight Gen. Mercer Solar, LLC, 462 N.J. Super. 297, 318 (App. Div. 2020).

The second consideration was the interplay between R. 4:36-2 and R. 4:24-1(c). In this regard, the Appellate Division found that trial judge's decision to set a trial date about halfway through the sixty day period during which the court was to notify the parties of their need to file an application to extend discovery before the discovery end date pursuant to R. 4:36-2, was problematic. In recognizing the issues this may cause, the court remarked "[t]he mixed messages caused by these two notices might cause nothing more than confusion, except, as occurred here, the setting of a trial date triggered the 'exceptional circumstances' standard for a discovery extension request essentially sought by both parties in a timely manner as permitted by Rule 4:24-1(c)." Hollywood Café, 473 N.J. Super. at 219.

The last consideration made by Appellate Division was perhaps the most simplistic, but carried the most weight. As, right before the court recited its holding, the Appellate Division considered the intent and purpose of the court rules as expressed by Judge Pressler:

> The Best Practices rules were "designed to improve the efficiency and expedition of the civil litigation process and to restore state-wide uniformity in implementing and enforcing discovery and trial practices." They were not designed to do away with substantial justice on the merits or to preclude rule relaxation when necessary to "secure a just determination." [Tucci v. Tropicana Casino & Resort, Inc., 364 N.J. Super. 48, 53 (App. Div. 2003).]

The court then found that, in sending out arbitration and trial notices during the discovery period, the use of such a tool "only fosters the unintended, adverse consequences cited by Judge Pressler if Rule 4:24-1(c) is applied mechanistically."

These above three considerations by the Appellate Division likely serve as a roadmap for practitioners when they seek to utilize Hollywood Café in support of a discovery extension motion. At the most basic of levels, if a trial court sets a trial date relatively too early in the life of a case, assigns the trial date during the sixty day period before the expiration of the discovery end date, or applies the "exceptional circumstances" standard without ever reviewing an extension of discovery under the "good cause" standard, the Appellate Division might perhaps, at the very least, call into question and examine whether any of these actions by the trial court produced an inequitable result. Though the practical application of Hollywood Café to requests for extensions of discovery is somewhat unclear, one thing does remain clear: the case seems to have restricted a trial court's ability to simply apply the "exceptional circumstances" standard mechanically, without any consideration of other factors.

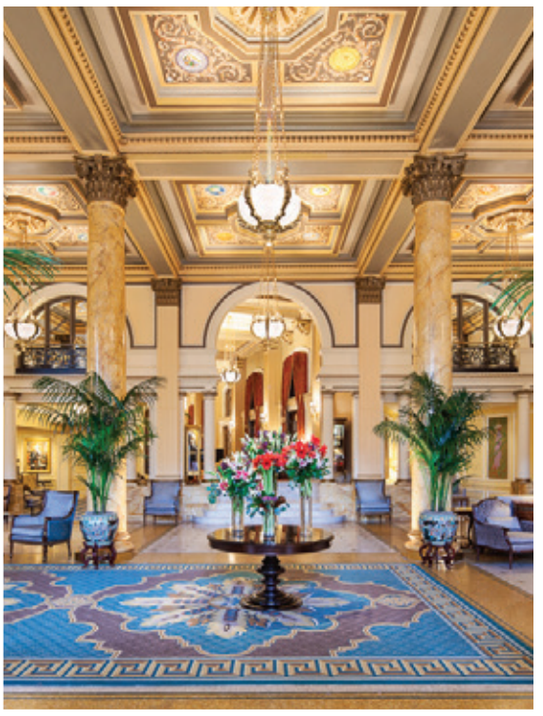
DEFENSE WINS

Lobzhanidze v. McCarthy, et al.: Trial January 17, 2023 – February 3, 2023. Sussex County Vicinage. Plaintiff motorcyclist struck the rear of a stopped vehicle in the left lane of Route 15 South and was ejected off his motorcycle sustaining serious injuries requiring medevac transport; open reduction internal fixation of an open comminuted fracture of the radius and ulna; and conservative care for injuries to his face, leg, neck and back. Plaintiff brought suit against the driver of the stopped vehicle alleging she was negligent in stopping to make an illegal turn across a paved median and alleged the phantom driver was negligently weaving in and out of traffic, blocking the motorcyclist's view of the stopped vehicle. Thirteen witnesses testified including the parties, two accident reconstruction experts and two eyewitnesses to the crash. A jury of six deliberated for nearly five hours before returning a verdict finding Plaintiff was 64% liable and, as such, entitled to no recovery. Defense Attorney Allison M. Kane, Esq. of Kennedys (Basking Ridge, New Jersey) represented the stopped defendant. Tiffany Testa, Esq. of Voss, Nitsberg, DeCoursey & Hawley represented the phantom vehicle.

Gilchrist v. Lindenau: Trial January 17, 2023 – January 19, 2023. Mercer County Vicinage. Plaintiff was attempting a left turn from a stop sign onto Route 1 north in Lawrence, NJ. She claimed to have been waived into the turn by a phantom garbage truck traveling on Route 1 south. During the execution of her turn, she was struck by a car traveling in the left lane of Route 1 south. Plaintiff's suit against the phantom driver was dismissed via summary judgment motion prior to trial, however a similar motion as to the known defendant-driver was denied. After 3 days of trial, and following the conclusion of plaintiff's case, the trial judge granted defendant's motion for a directed verdict. Defense attorney Rob Luthman, Esq. of Weir Attorneys, Ewing, NJ.

Nguyen v. Jones: Trial February 15, 2023 – February 17, 2023. Mercer County Vicinage. Plaintiff claimed permanent injuries as a result of a hit and run accident. He underwent cervical injections and conservative care. Verdict: 7-0 no cause on permanency. Length of deliberations: Approx. 45 minutes. Defense attorney Rob Luthman, Esq. of Weir Attorneys, Ewing, NJ.

Muhsin v. Dringas: Trial February 27, 2023 – March 2, 2023. Mercer County Vicinage. Plaintiff claimed permanent injuries back injuries as a result of a motor vehicle collision. She sought damages for lost wages and pain-and-suffering. Plaintiff's neurosurgical expert, Nirav Shah, M.D., testified that plaintiff would need spinal surgery in the future. Defendant offered the nominal wage loss amount to settle the case, which was rejected. Verdict: 6-1 no cause on permanency; wage loss amount that had been offered pre-trial was awarded. Defense attorney Jeff Dunn, Esq. of Weir Attorneys, Ewing, NJ.



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NEW TRENDS IN FRAGMENT BILLING: NON-FACILITY COMPANIES BILLING FOR FACILITY-BUNDLED SERVICES[1]

BY MARIYA JOLDZIC, ESQ. & PAT PONTORIERO, ESQ., KENNEDYS LAW, LLP

When one receives surgery, it is common to receive a separate invoice from the physician and the facility. The physician bills for performing the surgery, and the facility bills for providing the products and services necessary for the surgery to be performed. The latter is known as a "facility fee," which often includes the operating room, drugs, diagnostic tests, scalpels, electrodes, etc.

When billing for New Jersey Personal Injury Protection ("PIP") benefits, both the facility and the physician use the Current Procedural Terminology ("CPT") codes, developed by the American Medical Association. In PIP, these CPT codes have explicit fee-scheduled amounts, as determined by the New Jersey Department of Banking and Insurance ("DOBI"). DOBI requires facilities to bill CPT codes only. DOBI also prohibits facilities from fragment-billing or "unbundling" the CPT codes by billing the itemized products and service, listed in N.J.A.C. 11:3-29.5. This is different from non-PIP billing, where facilities often use Revenue Codes to additionally bill for specific accommodations, ancillary services, unique billing and arrangements relevant and additional to a procedure.

Recently there has been a rise in companies independent from the facility billing PIP insurance carriers for products and service that are fragmented from the facility fee. These companies maintain unique Tax ID numbers and at times even a separate business address from the facility. However, the products and services, such as intermittent limb compression devices and COVID testing, are provided on the same day as the surgery and performed at the facility itself.

With regard to intermittent limb compression devices, we have noticed instances where the facility's durable medical ("DME") equipment company supplies an intermittent limb compression device to the facility, which the facility staff then provides to its patients regularly during surgery to prevent pulmonary embolisms and blood clots. However, the facility does not bill its PIP insurance carrier codes E0676 or E0673 in addition to the correct CPT code, as it is clearly prohibited from doing so. Instead, the DME supplier bills the patient's PIP carrier directly in hopes of obviating the PIP regulations' prohibition.

With regard to COVID testing, we are seeing instances where a laboratory company maintains the same exact address as the facility but a different legal identity. This company then bills for independent COVID testing that is performed at the facility, by the facility staff, and on the same day as the surgery so that the surgery can move forward. However, the laboratory bills CPTs 87635, 86328 86769 or 99072 to the patient's PIP insurance carrier directly, again hoping to avoid the prohibition on fragment billing.

Providers are using these new strategies in the hopes that PIP insurance carriers overlook the very language of *N.J.A.C.* 11:3-29.5:

> 11:3-29.5 Outpatient surgical facility fees
>
> (a) [Ambulatory Surgical Center or "ASC"] facility fees are listed in Appendix, Exhibit 1, by CPT code. Codes that do not have an amount in the ASC facility fee column are not reimbursable if performed in an ASC. The ASC facility fee include services that would be covered if the services were furnished in a hospital on an inpatient or outpatient basis, including:
>
> 1. Use of operating and recovery rooms, patient preparation areas, waiting rooms, and other areas used by the patient or offered for use to persons accompanying the patient;
> 2. All services and procedures in connection with covered procedures furnished by nurses, technical personnel and others involved in the patient's care;
> 3. Drugs, biologicals, surgical dressings, supplies, splints, casts, appliances, and equipment;
> 4. Diagnostic and therapeutic items and service…
> 5. Administrative, recordkeeping, and housekeeping items and services;
> 6. Blood, blood plasma, platelets, etc.;
> 7. Anesthesia materials, including the anesthetic itself…and
> 8. Implantable DME and prosthetics.
>
> (b) [Hospital Outpatient Surgical Facility or "HOSF"] fees are listed on subchapter Appendix, Exhibit 7 by CPT code. The hospital outpatient surgical facility fee is the maximum that can be reimbursed for outpatient procedures performed in an HOSF. The hospital outpatient facility fees in Appendix Exhibit 7 include services that would be covered if furnished in a hospital on an inpatient basis, including those set forth in (a)1 through (8) above.

As one case see, it is the products and services to which the prohibition against fragment billing applies. Nothing in the PIP regulations restricts the application of the fragment billing prohibition to a facility only. Any vendor that provides these products and services is also impermissibly fragment billing the facility fee.

COMMENT

PIP insurance carriers should be mindful of billing from independent companies for services provided on the same day as a surgical procedure. The best way for a PIP carrier to avoid paying a double recovery is to take extra care in considering, when it reviews bills for such products and services, whether they are properly part of the facility fee.

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[1]An earlier version of this article appears on the Kennedys Law website, https://kennedyslaw.com/thought-leadership/article/new-trends-in-fragment-billing-non-facility-companies-billing-for-facility-bundled-services/

HOW TO FIND THE RIGHT PHYSICIAN EXPERT WITNESS AS A YOUNG LAWYER

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It's no secret that as a young attorney sometimes you feel lost. Whether you are assigned a project about something you briefly recall learning as a 1L, or you are being asked to do something that sounds like a foreign language (pro tip - it's usually Latin), it is not abnormal to find yourself learning as you go. As a young attorney I found myself in that exact situation when I was asked to find physicians in various specialties to serve as potential expert witnesses in a Multi-District Litigation (MDL) with over 250,000 claims. To help you avoid that daunting situation, I have broken down the steps I take to find the right physician to serve as an expert witness, which apply not only in MDLs, but in every case that requires a medical expert.

1. IDENTIFY THE RELEVANT MEDICAL SPECIALTY BASED ON THE FACTS OF THE CASE

A. Testifying experts

Like attorneys, physicians typically specialize in a specific area. Apart from Internal Medicine Physicians who practice general medicine, according to the American Board of Medical Specialties, there are hundreds of specialties and sub-specialties of medical areas in which physicians can certify.[1]

As a result, to find the best expert witness to testify in your case, you must determine precisely what type of physician is necessary to support your client's position. First, identify the injuries that the plaintiff claims your client caused. What type of doctor did the plaintiff see to treat those injuries? If you are defending a medical product liability case, what type of doctor prescribed the medicine or device for the plaintiff? If you are defending a medical malpractice case, what type of doctor allegedly committed the malpractice? Think about the sequence of events that led to the plaintiff's alleged injury, and ask yourself whether there are any other types of physicians who can help your client defend the case.

Remember that any expert you choose should be able to withstand a Rule 702 challenge. Thus, the expert must have scientific, technical or other specialized knowledge or expertise that will assist the trier of fact to understand the evidence or determine a fact in issue. *See* N.J.R.E. 702; Fed. R. Evid. 702. The expert must be qualified to testify based on specialized knowledge, skill, experience, training or education. *See id.* It is particularly important to find an expert in the right specialty to satisfy this standard. *See Anderson v. A.J. Friedman Supply Co., Inc.*, 416 N.J. Super. 46 (App. Div. 2010 (excluding physician who was not qualified to testify as an expert in peritoneal mesothelioma asbestos action because he was not an expert in gynecology, was not an epidemiologist or pathologist, and had never diagnosed mesothelioma or ovarian cancer); *see also Thompson v. Merrell Dow Pharm., Inc.*, 229 N.J. Super. 230, 254 (App. Div. 1988) (holding pharmacologist did not qualify as expert witness in case alleging medication caused birth defect because he had never performed research concerning the drug, studied developing embryos, or ventured outside cardiovascular field).

In addition, as you are selecting an expert, keep in mind that in 2018 the New Jersey Supreme Court incorporated the factors enunciated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), to assess the reliability of expert testimony in civil cases under N.J.R.E 702. *See In re Accutane*, 234 N.J. 340 (2018). These factors include deciding whether the scientific theory (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error; and (4) is generally accepted in the scientific community. *Id*. at 399.

B. Consulting experts

In addition to testifying experts, your client may also be interested in retaining consulting experts who can assist in defending the case, but who will not testify. In the right case, these experts can add tremendous value by evaluating claims of medical causation, and assisting with preparation for depositions, among other things. Moreover, a consulting expert's reports, notes, mental impressions and opinions are generally considered work product and are not discoverable. R. 4:10-2(d)(3) (precluding discovery of consulting expert's materials except "upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means"); *see also Fitzgerald v. Stanley Roberts*, Inc., 186 N.J. 286 (2006).

C. Independent Medical Examinations

Also consider whether you want the plaintiff to undergo an independent medical examination ("IME") pursuant to Rule 4:19. Under this rule, in a personal injury case, or where a party's mental or physical condition is in controversy, the adverse party may require a medical examination of said condition by a medical expert of the adverse party's choosing. R. 4:19. At least 45 days before the IME, the party seeking the IME (often the defendant) must serve a notice on the party to be examined (often the plaintiff) stating when, where and by whom the IME will be conducted, the nature of the IME, and any proposed tests. *See id*. Notably, the party who was required to submit to the IME has a right to demand any report prepared by the IME physician, even if that physician does not testify. *See Rincon v. Delapaz*, 279 N.J. Super. 682 (App. Div. 1995).

2.FINDING THE PHYSICIANS WHO CAN BE POTENTIAL EXPERT WITNESSES

Now that you have identified the type of physician you need, where do you find them? You could start by searching for top medical schools that offer programs in the relevant specialty. This can be easy as Googling "best medical school for gastroenterology." From there, read the profiles of the professors and make a list of those who best fit the type of expert needed and who have impressive credentials. Another approach is to conduct a medical literature search in the relevant specialty. Are there physicians who repeatedly

appear as authors on relevant papers? Have any distinguished themselves as prominent thought leaders in that area? You can also conduct a verdict search to determine who the defense experts were in similar cases. Then contact the defense counsel in those cases to get their thoughts on the expert's strengths and weaknesses. If your client has cost concerns or the jury will be persuaded by a local physician, you could also limit your search to certain geographic areas.

If you are looking for an expert to conduct an IME, try to find a physician in the same geographic location as the plaintiff. If the plaintiff will need to travel, confirm that your client will pay for the travel expenses (hint: if they won't, then you will need to find an IME physician near the plaintiff's residence). There are numerous resources to help you find an IME physician. NJDA has several sponsors who can identify potential physicians in the relevant specialty. Do your own due diligence though – ask other attorneys in your firm and other NJDA members about their experience with that physician.

3. FIND THE PHYSICIAN'S CONTACT INFORMATION.

I typically use email to contact the physician. Because physicians, like ordinary people, do not typically display their email addresses on the internet, there are different strategies for finding a physician's contact email. The first strategy is seeing if the medical school provides an online directory with the professor/physician's emails. Suppose they do not; try *West Law Public Records People Search*. On this search engine, you may find contact information by searching the physician's name and location. That said, if I cannot find an email address, I have found success calling the physician's office. Some physicians, particularly those who regularly conduct IMEs, have someone on their staff who handles scheduling and other expert witness communications.

4. VET YOUR POTENTIAL EXPERT WITNESS

Before contacting, and certainly before retaining, an expert, you should vet them to ensure that there are no red flags that could prevent them from serving as an expert for your client. To do so, confirm the following:

I. The physician has never treated the plaintiff or claimant.
II. The physician has an active medical license and they do not have any expired medical licenses, or disciplinary actions, including whether the expert has ever been sued for medical malpractice. This can be done by searching by particular state.[2]
III. The physician does not have a criminal record or any liens or judgments against them. This can be done by searching on Google or running a West Law Public Records People Search.
IV. The medical school or institution that employs them allows their physicians to be expert witnesses on independent matters.

As a part of the vetting process, before contacting the expert, you should also:

I. Determine whether your client has ever retained them as a consultant outside of litigation, and whether the physician has received any payments from your client.
II. Determine whether the physician has ever been an expert witness.
    a. If so, analyze the expert's prior reports and testimony to determine whether anything is contrary to your client's position.
III. Determine whether the physician has published any relevant papers or peer-reviewed articles, or sat on any peer-review committees.
IV. If relevant to your matter, determine whether the physician has participated in any FDA Advisory Committees. You can search the FDA website for this information.
V. Determine whether the physician has prescribed or uses the product(s) at issue.
VI. Conduct a broad internet and social media search, including Google, Linkedin, Facebook, Instagram, and Twitter.

5. CONTACTING THE POTENTIAL EXPERT WITNESS

Regardless of the method of communication, you should always make sure to advise the physician of who you are, why you are reaching out, a brief description of the nature of the litigation, and ask whether they would be interested in consulting on the matter. It is also essential to confirm at the outset that the physician is not already involved in the litigation, particularly for the plaintiff(s) or another defendant. If they are, ask them to disregard the inquiry. Below is a sample initial email you could send to a potential consulting or testifying expert:

Dr._____,
I hope this is an acceptable way to contact you. My law firm represents ____ in litigation relating to ____. The plaintiff in this case alleges that _____. If you are serving as an expert for the plaintiff or another party in this litigation, please disregard this email.

We are interested in consulting with [type of medical specialists] regarding the issues in this case. Given your expertise in this area, I am contacting you to see if you are willing to arrange a brief call or Zoom to discuss the possibility of consulting in this matter.

If this interests you, can you please confirm that you do not have a conflict in this litigation? Also, would you please let me know your availability for a brief call or Zoom so that I can provide additional information?

Thank you in advance for your time.

Best regards,
_____

Tip: If the physician does not answer for a few weeks after your initial inquiry, follow up with an email or call. Physicians are incredibly busy and may miss an email or call now and then.

6. RETAINING YOUR EXPERT WITNESS

If you have made it this far, congrats! Once the physician is thoroughly vetted and has agreed to the proposed terms and compensation, you should draft a retention letter and provide any protective order that has been entered in the case. This step should be completed before the physician performs any work on the matter.

7. ASK FOR REFERRALS

Regardless of whether you retain a particular physician, always ask them if they can refer any other physician they believe may be interested in being an expert witness in your matter.

CONCLUSION

In conclusion, following these steps can not only help you to find the best expert for your case, but also to save time and do so more efficiently for your client.

[1]https://www.abms.org/member-boards/specialty-subspecialty-certificates/
[2]https://www.fsmb.org/siteassets/ua/x-pdfs/licensure-verification-information.pdf

THE MARIE A. CAREY "LADDER DOWN" AWARD

The Women & the Law Committee honored Marie Carey with the establishment of an annual award – The Marie A. Carey "Ladder Down" Award. This award will be presented annually at the Women & the Law seminar, and Marie was recently presented with the award.

Left to Right: Executive Director Maryanne Steedle presenting Marie Carey with the first annual Marie A. Carey "Ladder Down" Award.

O'TOOLE'S COUCH: THE NEIGHBORHOOD BLOCK PARTY

When Sunny and I got married we were looking for a neighborhood to accommodate our young family. Fairchild Place in Whippany ended up being the answer to our prayers. More than half the families had children as young as ours. (There were also four or five professional men, two of whom were lawyers, but that didn't deter me.) The closing process went smoothly and we were moved in within three months. Let the summer begin!

One of the early gatherings was an August Block Party. We were actually able to close the streets down for the event. This was a good way for newcomers like us to meet everyone. Most of the workforce men were assigned to the Cooking Brigade, with three barbecue pits going at one time. The spare ribs were delicious! While the women provided various entrees brought from home, they also prepared an abundance of appetizers, including clams on the half shell, shrimp cocktail, cheese platters and various dips. There were plenty of neighbors involved and running out of food or drink was never a problem. My assignment was relegated to setting up the bar area, and maintaining "adult customers only." (At some point it was discovered that the alcohol-free fruit punch meant for the entire family was mysteriously spiked. I must admit it was pretty good and certainly didn't last long, but NO I wasn't the one who spiked it!) My specialty included Manhattans and Old Fashions, which were quite popular and part of the adhered to "adult customers only" option. Desserts were also in abundance. You couldn't have a Cook Out without several home-made cakes, pies and puddings.

Our neighborhood was blessed to have two homes with in-ground pools. Swimming laps, diving and water-volleyball were all offered to the families; and the winners received ribbons. The kids really enjoyed this.

Near the close of the party, some of the teenagers played their guitars while the adults enjoyed their end-of-the evening coffee.

The party was a success and continued until midnight. Rumor has it that one guest lost his bathing suit when he dove into the pool, but thankfully the suit was quickly recovered. When the evening ended, some of the guests may have required some assistance in walking home; but no driving was involved.

Late Sunday afternoon, it was necessary for the adults to gather around the keg to finish the last of the party Budweiser – It couldn't go to waste.

When all was said and done, the Block Party was certainly a great way for the neighborhood to gather around and get acquainted in a leisurely way, and it continued for many years. Ask any of our now-adult kids about the Neighborhood Block Party, and they all will recount such happy memories.

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UPCOMING EVENTS

THURSDAY, MAY 25, 2023

YOUNG LAWYERS COMMITTEE SEMINAR & NETWORKING EVENT
McCarter & English
100 Mulberry Street
Newark, NJ 07102
4:00 p.m.

JUNE 22-25, 2023

NJDA 57TH ANNUAL CONVENTION
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