Welcome from the Chair

Hello, fellow members of the Civil Litigation Section. It’s my honor to serve as your chair this year. Please allow me a brief minute of personal privilege to introduce myself. I am a partner at Margolis Edelstein in our Philadelphia office and have practiced in this office for more than 14 years, nearly my entire professional career. I am a proud alum of my two alma maters, the University of Maryland College Park and Temple University Beasley School of Law, and I serve in the leadership of both alumni associations. I currently live in southern New Jersey, outside of Philadelphia, along with my husband of nearly 14 years and my two young sons, ages 5 and 9. However, both my husband and I grew up in Bucks County, Pennsylvania.

Our section is quite diverse, members practice in all areas of civil litigation from employment to personal injury to commercial and business litigation and more. Through the section, we come together to exchange ideas about substantive law and civil procedure. The section is also committed to improving civil practice in the state and federal courts across the commonwealth. We accomplish this by actively authoring recommendations and reports for the PBA governing bodies and taking positions on recommendations of other sections and committees that are applicable to civil litigators. Ultimately, these positions are advocated through PBA staff and lobbyists to the legislature and Supreme Court committees to protect our members’ interests.

The section also boasts a robust communication structure. We have this quarterly newsletter that provides news about the section and a recap of recent events. However, it also provides case notes and articles about updates to substantive and procedural laws so that our members can stay current in recent trends and changes applicable to our practice. We also have a listserv where our members can communicate, seeking recommendations for experts or advice on specific local procedures in a particular court or information about a particular area of substantive law with which they are not familiar. We are a community that is here to help each other and provide guidance utilizing these tools.

We also build community and network within the section through our innovative, informative and fun programming! We have an annual retreat where we have the opportunity to get to know each other and our families by spending a weekend at a high-end resort, taking advantage of the local surroundings, while earning nearly all the yearly required CLE credits in creative and educational seminars. We host annual regional dinners throughout the commonwealth, which feature keynote addresses by highly sought-after judges, legislators and leaders of the legal community. For instance, last year in Pittsburgh...
**Pittsburgh Regional Dinner**

The Civil Litigation Section will host its Pittsburgh Regional Dinner on Tuesday, Sept. 24, at the Duquesne Club (325 Sixth Avenue) in Pittsburgh. Third Circuit Judge David J. Porter will be the guest speaker. Judge Porter will discuss insights and trends from his first year on the bench, which began Oct. 15, 2018. The event begins at 5:30 p.m. with a reception, followed by dinner and Judge Porter’s remarks at 6:15 p.m. The deadline to register is Sept. 17. Go to [https://www.pabar.org/site/Events-and-Education/Event-Info/sessionaltcd/CLS919](https://www.pabar.org/site/Events-and-Education/Event-Info/sessionaltcd/CLS919) for more information and to register.

The PBA Civil Litigation Section 2020 Retreat is April 24-26 at the Grand Hotel in Cape May, N.J. Save the date and stay tuned for details.

Our section will once again hold a general membership business meeting during PBA’s Committee Section Day on November 14, 2019 at the Red Lion Hotel.

See more Section News on page 5.

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**2019 Civil Lit Retreat**

The 2019 Civil Litigation Retreat was held in Baltimore. Attendees were able to receive up to 7.0 hours of CLE credit. Judges from the Third Circuit Court of Appeals, Superior Court, federal district courts, and courts of common pleas shared their insights. Below are photos from the weekend, including the Kentucky Derby-themed dinner. The 2020 Retreat in Cape May, N.J. promises more great events and speakers.

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**Welcome from the Chair**

CONTINUED FROM PAGE 1

We heard from Hon. Thomas Hardiman of the Third Circuit and a potential SCOTUS nominee; in Harrisburg, Jonathan Goldman, executive deputy attorney general of the civil law division, spoke at the regional dinner; and in Philadelphia, the keynote address was presented by Hon. Jack Panella, President Judge of the Superior Court.

We seek to grow our membership by making a concerted effort to attract younger members of the profession. We have a YLD liaison who sits on our executive council. Our newsletter editor is a young lawyer, and we have many young lawyers on the editorial staff of this newsletter. This provides attorneys who are relatively new to the profession the opportunity for exposure by getting their work published. Several years ago, we developed the Civil Litigation Section Trial Mini Camps, which provide practical trial advocacy skills at a more basic level and are geared toward younger lawyers. We have rotated this program throughout the commonwealth, using active experienced section members from the region as our distinguished panelists. We also have attracted some very prominent keynote speakers to these programs including Justices David Wecht and Debra Tod, Judge Vic Stabile, and Judge Larry Stengel (ret.).

If you are interested in volunteering, please do not hesitate to reach out to me. We are always looking for new volunteers and ideas. I look forward to meeting you at our upcoming program.

Jennifer S. Coatsworth, Section Chair, 2019-2020
Pennsylvania Superior Court Decides Venue for Online Defamation

By Erin K. Aronson

In Fox v. Smith, --- A.3d ---, 2019 PA Super 166 (May 23, 2019) (Pellegrini, J.), the Pennsylvania Superior Court ruled that in the case of defamation arising from an internet post, the injured party may file suit in any county where a third party knows the injured party personally and understands the post to be harmful to the injured party’s reputation. The court’s holding is a matter of first impression in Pennsylvania.

In so holding, the court relied on persuasive federal court opinions, including Capital Corp. Merch. Banking v. Corp. Colocation, Inc., 2008 WL 4058014 (M.D. Fla. Aug. 27, 2008), where the court observed, “[H]arm from an online defamatory statement can occur in any place where the website is viewed.” Capital Corp. Merch, supra at *2. As a result, the Pennsylvania Superior Court declared that venue is not limited to the injured party’s place of residence. The court, however, also recognized that allowing suit to be filed wherever a defamatory post is viewed could effectively make venue possible anywhere in the world, especially given modern technology.

In an effort to hewn a more exacting rule, the court ultimately clarified that in addition to the defamatory post being viewed and understood to be defamatory, the foregoing must be done by a third party who actually knows the injured party. In so holding, the court declined to limit venue to the area where harm would be most impacted and instead held venue existed anywhere the plaintiff alleges to have suffered reputational harm and the defendant knew or should have known the allegedly scandalous material would be available.

A concurring opinion by Judge Murray requested that the Pennsylvania Supreme Court, its rules committees, and the Pennsylvania legislature provide further guidance on the question of venue in defamation cases in the evolving area of electronic communications.

Pennsylvania Supreme Court Split on Widow’s Ability to Raise Waived Claims

By Erin K. Aronson

An equally divided Pennsylvania Supreme Court with one justice recusing himself reached an impasse and issued a per curiam order in Valentino v. Philadelphia Triathlon LLC, 209 A.3d 941 (Mem) (Pa. 2019) that affirmed the Superior Court’s 2016 Order upholding summary judgment in a wrongful death case for a defendant seeking to enforce a waiver provision in a release signed by the plaintiff’s decedent. Justice Baer authored the opinion in support of affirmance; Justices Dougherty and Donohue authored opinions in support of reversal.

In Valentino, a triathlete perished while competing after executing a waiver of liability form, which specifically assumed the risks inherent in competing. In 2016, an en banc panel of the Pennsylvania Superior Court held that the waiver bound the decedent’s heirs, including his widow, despite the fact that they did not execute the waiver themselves. While the waiver did not expressly preclude the widow from commencing a wrongful death lawsuit, the waiver and assumption of the risk by the decedent prevented the widow from establishing the required tortious conduct by the event organizer because it eliminated their duty of care. On appeal, Justice Wecht did not participate in review of the matter, leaving the Pennsylvania Supreme Court split 3-3 on the issue.

The opinion in support of affirmance, written by Justice Baer, credited the Superior Court’s reasoning as set forth above, and observed that to rule otherwise would “afford a decedent’s heirs more rights than those possessed by a decedent while alive.” Justice Baer noted that the opinions in support of reversal “would sua sponte hold that express assumption of the risk agreements are void and unenforceable in violation of public policy in cases involving claims brought pursuant to the Wrongful Death Act.” In the 3-3 split, the Pennsylvania Supreme Court declined to make such a ruling on public policy grounds.
Racial Epithet Not Basis for Cause of Action by Itself

By Thomas F. Cocchi

In John v. Philadelphia Pizza Team, Inc., 209 A.3d 380 (Pa. Super. 2019) (Opinion by Murray, J.), the Superior Court affirmed the trial court’s dismissal of the plaintiff’s complaint, which asserted a claim for emotional distress as the result of a pizza shop employee’s alleged use of a racial epithet. The plaintiff, who was delivered a pizza by the defendant’s employees, insisted on a refund because the pizza was burnt. The request for a refund sparked an argument, during which defendant’s employee referred to the plaintiff with an offensive racial epithet, according to plaintiff’s complaint.

The plaintiff’s complaint alleged negligent training, supervision and hiring, intentional infliction of emotional distress, and negligent infliction of emotional distress. The trial court sustained the defendant’s preliminary objections on all counts.

John forced the Superior Court to consider whether to uphold or overturn its prior decision in the factually similar case of Dawson v. Zayre Department Stores, 499 A.2d 648 (Pa. Super. 1985). In Dawson, a customer at a department store became involved in a dispute with an employee of the store over a lay-away ticket and, in the course of that dispute, the defendant’s employee was alleged to have used the same racial
Racial Epithet Not Basis for Cause of Action by Itself

Continued from Page 4

epithet that was the subject of the complaint in John. Dawson noted that the comments to Restatement (Second) of Torts § 46 precludes insults and indignities from the definition of extreme and outrageous for the purposes of an IIED claim.

According to the Superior Court, one-time use of a racial epithet in a commercial setting does not qualify as “continuous malicious actions” and the parties in such a setting do not have “a special relationship.” Dawson further opined that the law “does not invoke liability in a situation where, without other aggravating circumstances, one hurl an epithet at another during the course of a disagreement.” The plaintiff asked the Superior Court to reconsider its 30-plus year old precedent, arguing it was outdated.

John upheld the precedent of Dawson. The opinion ended by underscoring the Superior Court’s “role as an intermediate appellate court” and noted that precedential change would have to come from the Pennsylvania Supreme Court or statutory change would have to come from the legislature.

Thomas F. Cocchi is an associate with Swartz Campbell LLC, Pittsburgh. He focuses his practice in toxic tort and workers’ compensation defense litigation. Contact him at tom.cocchi@gmail.com.

Section News

Council members attending the council meeting during the retreat are, from left: Pamela A. Van Blunk; Henry E. Van Blunk; Brian H. Simmons; Jennifer S. Coatsworth; Judge Stephanie Domitrovich; Kathleen D. Wilkinson; Philip K Miles III; Erin Siciliano; Jonathan B. Stephanian; Nancy Conrad; Kimberly S. Tague; Ellen D. Bailey; David S. Cohen; and Larry E. Coploff.

Speakers from the “Emerging Issues in Civil Litigation” session of the retreat are, from left: Thomas G. Wilkinson Jr.; Pamela A. Van Blunk; William G. Roark; Judge Stephanie Domitrovich; and Joshua A. Mooney.

Speakers from the “Federal and State Civil Procedures” session are, from left: Jennifer Menechini; Judge Maria McLaughlin; Judge Stephanie Domitrovich; Judge D. Michael Fisher; and Karen E. Grethlein.

Speakers from the “Federal and State Civil Procedures” session are, from left: Jennifer Menechini; Judge Maria McLaughlin; Judge Stephanie Domitrovich; Judge D. Michael Fisher; and Karen E. Grethlein.

Enjoying the Kentucky Derby in style are, from left: Carol Lindsay; Jennifer S. Coatsworth; Judge Stephanie Domitrovich; Kathleen D. Wilkinson; and Nancy Conrad.

Past Chair Kathleen Wilkinson Now VP of PBA

Immediate Past Civil Litigation Section Chair Kathleen D. Wilkinson, a partner at Wilson Elser Moskowitz Edelman & Dicker LLP, is now the vice president of the PBA. This new role for Wilkinson will be followed by tenures as the association’s president-elect in 2020-21 and president in 2021-22. To read the PBA press release, go to: https://www.pabar.org/pdf/2019/WilkinsonKathleen2019.pdf.
Trial Court Erred in Refusing to Give Adverse Inference Instruction After Videotape Lost

By Daniel E. Cummins

In the case of Marshall v. Brown’s IA, LLC, -- A.3d --, 2019 PA Super 191 (June 19, 2019) (Bowes, J.), the Pennsylvania Superior Court reversed a trial court ruling after finding that the trial court erred in refusing to give an adverse inference instruction based upon a defendant supermarket’s alleged spoliation of videotape evidence in a grocery store slip and fall case.

According to the opinion, the plaintiff allegedly slipped and fell on water in the produce aisle of a ShopRite located in Philadelphia. The ShopRite employees came to the plaintiff’s aid immediately after the incident and summoned medical assistance. The manager also completed an incident report at that time.

Approximately two weeks after the incident, the store received a letter of representation from the plaintiff’s attorney demanding that the store retain any surveillance video of the accident and/or the area in question for six hours prior to the incident and three hours after the incident.

The court noted that the letter from the plaintiff’s attorney also cautioned that any failure on the part of the store to secure and preserve that video surveillance evidence until the disposition of the claim, would give rise to an assumption by plaintiff that the store intentionally destroyed and/or disposed of the evidence. The attorney also advised the store that it (the store) was not permitted to decide what evidence the plaintiff would like to review for the case. As such, the plaintiff’s attorney specifically indicated in the letter to the store that “discarding any of the above evidence will lead to an adverse inference against you in this matter.”

The Superior Court confirmed in its opinion that the plaintiff’s slip and fall was indeed captured on the store’s video surveillance system. However, according to the record before the court, the store decided to preserve only 37 minutes of footage on the video leading up to the plaintiff’s fall and approximately only 20 minutes after. The store otherwise permitted the remainder of the film to be automatically overwritten after 30 days.

The court additionally noted that, during the course of the trial, defense counsel for the store told the jury in an opening statement that, “it is impossible to tell from the video if there was water on the floor, how it got there or when it got there.”

At trial, the store’s manager testified that it was the store’s “rule of thumb” to preserve video surveillance from twenty minutes before and twenty minutes after a fall. The store’s risk manager also testified that, in his opinion, the video produced was sufficient to exhibit any defective condition, if it could be seen at all. He additionally asserted that, since the substance on the floor could not be seen on the retained portion of the video, it would have been a “fool’s errand” to go back and save several more hours as requested by plaintiff’s counsel. The store manager also asserted that it was impractical and costly to retain the requested six hours of pre-incident video.

The trial court initially found that the fact that the video was requested did not, in and of itself, make the video relevant. The trial court also concluded that there was no bad faith conduct on the part of the store.

As such, the trial court refused to give the requested adverse inference charge. However, the trial court did allow the plaintiff’s counsel to assert to the jury in the plaintiff’s closing argument that it should infer from the store’s decision not to retain more of the video prior to the fall that such video footage would have been damaging to the store’s defense. At trial, the plaintiff’s attorney did indeed make such an argument to the jury.

The jury entered a defense verdict, finding no negligence on the part of the defendant supermarket. On appeal, one issue was raised for the Superior Court’s review, that being whether the trial court abused its discretion by failing to give a spoliation evidence instruction to the jury at trial.

The Superior Court noted that defense counsel argued that, given the quality of the video, there was a question as to whether there was any valid expectation that, if more video had been saved, something else would have been seen.

The Superior Court reviewed the current status of the law of Pennsylvania pertaining to spoliation of evidence and available sanctions therefore. Marshall noted that the Pennsylvania Supreme Court defined spoliation of evidence in Pyeritz v. Commonwealth, 32 A.3d 687, 692 (Pa. 2011), as “the non-preservation or significant alteration of evidence for pending or future litigation[,]” and authorized “trial courts to exercise their discretion to impose a range of sanctions against the spoliator.”

The court confirmed that, “[w]here a party destroys or loses proof that is pertinent to a lawsuit, a court may...
**Trial Court Erred**

CONTINUED FROM PAGE 6

impose a variety of sanctions, among them “entry of judgment against the offending party, exclusion of evidence, monetary penalties such as fines and attorney fees, and adverse inference instructions to the jury.” *Marshall, supra at 3, citing Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1281 (Pa. Super. 2018).

*Marshall* noted that the doctrine of spoliation of evidence “attempts to compensate those whose legal rights are impaired by the destruction of evidence by creating an adverse inference against the party responsible for the destruction.” Id., quoting *Duquesne Light v. Woodland Hills Sch. Dist.*, 700 A.2d 1038, 1050 (Pa. Cmwlth. 1997).

*Marshall* confirmed that the test for the proper sanction in a case of spoliation of evidence involves the assessment of three factors, including: “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.” *Marshall*, quoting *Parr v. Ford Motor Co.*, 109 A.3d 682, 701 (Pa. Super. 2014).

After applying the current status of Pennsylvania law on spoliation of evidence claims and the penalty of an adverse inference, the Superior Court ruled in *Marshall* that the trial court should have given such an instruction as the store’s conduct in only saving a portion of the video constituted spoliation.

The Superior Court noted that other evidence presented at trial confirmed that another 50 minutes of time had passed between the last time that a store employee had inspected the area and the time noted on the video. The Superior Court pointed out that no valid explanation was given by the defendant store as to why it only saved 37 minutes of pre-incident video as opposed to 50 minutes or more. The court also noted that there was no testimony from anyone at the store that anyone had watched the video for the six hour period prior to the fall to determine that it did not contain any other relevant evidence. Rather, the Superior Court noted that the record before the court confirmed that the store unilaterally determined that there was no relevant evidence on the deleted tape.

In this regard, the Superior Court noted that, even if a video did not show the plaintiff’s actual fall, the video could be relevant in other respects. The court noted that, for example, such a video could show how, when, or by whom a dangerous condition was created on the floor. Even if a video does not show something visible on the floor, it could show someone dropping something on the floor. Such a video could also show someone else slipping in the area who may not have reported that event. A video of the area could also be utilized by one party or another to prove how often or how little the area is monitored or inspected by store personnel.

Overall, the Superior Court in *Marshall* concluded that the trial court’s finding that there was no spoliation because the store did not act in bad faith was based upon an incorrect application of the doctrine of spoliation. Bad faith is not necessary for an adverse inference instruction to be warranted. Spoliation may be negligent, reckless, or intentional.

The Superior Court emphasized that the party’s good faith or bad faith in the destruction of potentially relevant evidence instead goes to the type of sanction that should be imposed, not whether a sanction is warranted in the first place. As such, the court vacated the judgment entered below in favor of the defense and remanded the case for a new trial.

This decision raises some questions for defense counsel concerning the scope of the trial court’s discretion in assessing the adequacy of a party’s efforts to preserve potentially relevant evidence, and the circumstances where an adverse inference instruction may be warranted. Members of the plaintiffs’ bar view the decision as a signal that a defendant is at risk if it unilaterally decides what evidence to preserve, particularly in the fact of a preservation letter.

According to Thomas Wilkinson of Cozen O’Connor, the *Marshall* ruling itself was fact specific, but is an important caution to counsel that a client’s internal preservation policy may not satisfy discovery obligations. “The decision should not read to mean that trial judges risk reversal whenever they deny a motion for an adverse inference instruction where the producing party provided a videotape with less footage than the opposing party requested. For example, if the request is for four hours of video, will the trial court still comfortably conclude after *Marshall* that two hours is sufficient? What are the limits of the trial court’s discretion in assessing the reasonableness of the preservation efforts, and what guidance should lawyers convey to their clients?”

In the end, Wilkinson noted that the plaintiff’s issuance of an early preservation demand letter played a key role in the Superior Court’s response: “While such preservation letters are not self-effectuating pre-litigation in this state, after *Marshall* counsel clearly should not ignore them in favor of a corporate risk management policy.”

Paul Oven of the Moosic office of the plaintiff’s personal injury firm of Dougherty, Leventhal & Price noted that the facts of this case begged for a finding of spoliation and a need
Don’t Forward that Email: Avoiding Waiver of the Work Product Doctrine and Attorney-Client Privilege When Communicating with Consultants

By Philip Miles and Ethan Wilt

Recently, in BouSamra v. Excela Health, 210 A.3d 967 (Pa. 2019), the Pennsylvania Supreme Court considered whether the attorney work product doctrine and attorney-client privilege were waived when a company’s general counsel forwarded an email from its outside counsel to its public relations consultant. In light of BouSamra, Pennsylvania now has an established waiver analysis for the work product doctrine, and attorneys and litigants have better guidance on circumstances where the involvement of a third party may waive the attorney-client privilege.

Following a number of accusations between 2008 and 2010, Excela hired two companies in 2011 to peer review whether physicians at Westmoreland Regional Hospital, including Dr. George R. BouSamra, were performing medically unnecessary cardiology procedures. Excela planned to publicly announce the results of the peer reviews, and it hired a public relations consultant to help manage the publicity stemming from the announcement. The peer review results, which concluded that BouSamra had performed a number of medically unnecessary stents, were announced on March 2, 2011. BouSamra filed a complaint against Excela Health one year later. In it, he asserted claims of defamation and tortious inference with existing and prospective contractual relations.

During discovery, Excela created a privilege log. One item on the privilege log was a Feb. 26, 2011, email from Excela’s outside counsel to its general counsel containing legal advice about whether Excela could publicly name BouSamra as one of the doctors who had performed medically unnecessary cardiology procedures. The waiver issues in this case arose from Excela’s general counsel forwarding the email to its public relations consultant. Excela’s public relations consultant then forwarded the email to its employees. BouSamra filed a motion to compel Excela to produce a number of emails, including this one. Excela refused to produce it on the grounds of privilege. BouSamra, however, argued that Excela waived both a counter-balance in place to ensure it’s not simply a haphazard and arbitrary decision by a defendant to keep or destroy evidence at will.

In addition to serving as the latest appellate court decision on the current status of Pennsylvania law on the issue of spoliation of evidence and the propriety for sanctions related to the same, the Marshall decision may be a start of a battleground over the extent to which injured parties may attempt to control the type and extent of evidence that must be preserved in anticipation of litigation.

Daniel E. Cummins is an insurance defense litigator with the Scranton firm of Foley, Comerford & Cummins. He is also the sole creator and writer of the Tort Talk Blog (www.TortTalk.com) and also offers private mediations through Cummins Mediation Services.
Don’t Forward that Email

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tant?; and (2) Does a third party need to provide legal advice and have the lawyer or client control its work in order to qualify as a privileged person under the attorney-client privilege?

At the outset of the court’s opinion, Justice Mundy emphasized that evidentiary privileges are not favored in Pennsylvania, and therefore, courts should only permit their utilization when the exclusion of evidence serves a public good that far outweighs allowing discovery of the evidence. First addressing the waiver of the work product doctrine, the court acknowledged that it had not yet articulated a proper test. After reviewing the text of Pennsylvania’s work product rule (Pa.R.C.P. 4003.3) and surrounding jurisprudence, the court determined that confidentiality is not a foundational element. Accordingly, even though a disclosure to a third party waives the attorney-client privilege, the court explained that the same disclosure may not waive the work product doctrine. Rather, the court held “that the work product doctrine is waived when the work product is shared with an adversary, or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it.” The court concluded, however, that it could not apply its newly pronounced test because the factual record before it was insufficient. Thus, the court remanded the matter to the trial court.

With respect to the second issue, the court recognized that because the Feb. 26, 2011 email was sent from Excela’s outside counsel to its general counsel, which the court equated to a communication between Excela’s attorney and an employee authorized to act on Excela’s behalf, the email was originally a protected communication under the attorney-client privilege.

However, the court found that Excela waived the attorney-client protection when its general counsel forwarded the email to Excela’s public relations consultant. The court reasoned that the case law cited by Excela, United States v. Kovel, 296 F.2d 916 (2d Cir. 1961) and Commonwealth v. Knoll, 662 A.2d 1123 (Pa. Super. 1995), was unpersuasive and distinguishable.

In particular, the court stated that both of those cases involved situations where the third party’s presence was either indispensable to the lawyer giving legal advice or facilitated the lawyer’s ability to give legal advice to its client. Here, in contrast, the court found that the forwarding of the email to Excela’s public relations consultant did not assist either Excela’s outside counsel or general counsel in providing legal advice to Excela. Importantly, the court noted that the forwarded email did not solicit advice, opinion, or input from Excela’s public relations consultant, and there was insufficient evidence to establish that the consultant and its employees were indispensable to Excela’s outside counsel and general counsel’s giving of legal advice to Excela.

In sum, because a high ranking officer permitted to act on behalf of Excela forwarded a privileged communication to a third party (that neither was indispensable to the legal representation nor facilitated the lawyer’s ability to give legal advice), Excela waived the attorney-client privilege.

Although she agreed with the majority’s decision to adopt a proper test for waiver of the work product doctrine and finding that Excela waived the attorney-client privilege, Justice Donohue wrote a separate concurring opinion to suggest a refinement to the majority’s waiver test. Specifically, Justice Donohue wrote that the manner of disclosure should be an important consideration by trial courts. Thus, on remand, Justice Donohue explained that the trial court should focus on whether Excela’s general counsel took any and all of the necessary and available precautions possible to reduce or eliminate the likelihood that the information it sent to Excela’s public relations consultant would be obtained by BouSamra. For Justice Donohue, the manner in which Excela’s general counsel disseminated the information would possibly be dispositive of whether the work product doctrine was waived.

Justice Wecht also wrote a concurring opinion. He commented on the majority’s new waiver test, emphasizing that attorneys are often required to disclose work product to third parties in the course of zealously advocating for their clients. Thus, even though the majority’s new test expanded the work product protection, Justice Wecht cautioned that a less forgiving waiver analysis may result in a chilling effect, which in turn would undermine the primary aim of the doctrine—i.e., to provide attorneys with a zone of privacy to effectively advocate for their clients. Justice Wecht advised the Supreme Court and intermediate appellate tribunals to respect and adhere to the protective purpose underlying the work product doctrine as they apply the waiver test in future controversies.

BouSamra expands the scope of the work product doctrine protection as it relates to disclosures to third parties. However, attorneys and parties disclosing work product should still exercise caution when making such disclosures. For example, a disclosure to an adverse party will waive it. Likewise, to ensure that the disclosure does not significantly increase the likelihood that an adversary or anticipated adversary will obtain it, attorneys and disclosing parties need to take affirmative steps to prevent this from happening. One possible solution is to enter into a nondisclosure and confidentiality agreement with the third-party recipi-
ent. As far as preventing a waiver of the attorney-client privilege, *BouSamra* reinforces the proposition that a communication to a third party destroys the privilege in all but the most limited cases. While it often makes sense to forward legal advice from an attorney to a consultant, companies and litigants need to be aware that this type of conduct will often destroy the attorney-client privilege.

**Phil Miles** is a shareholder in McQuaide Blasko’s State College office, practicing primarily in employment law and civil litigation. He also publishes an employment law blog, Lawffice Space (www.LawfficeSpace.com), and is the section delegate for the PBA Civil Litigation Section.

**Ethan Wilt** is an associate in McQuaide Blasko’s State College and Hollidaysburg offices. He concentrates his practice in the areas of business law, labor and employment law, and civil litigation.

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**PBA Civil Litigation Section 2020 Retreat**
**April 24-26, 2020**
**The Grand Hotel, Cape May, N.J.**

**Save the date**

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The Editorial Board for the *Civil Litigation Update*, the Civil Litigation Section’s newsletter, is now accepting submissions for publication in the fall 2019 issue. Appropriate topics include new/proposed legislation, rules, and jury instructions; case reports; interviews with prominent attorneys and judges; and other news and subjects of general relevance to Pennsylvania civil litigators. The *Civil Litigation Update* provides writers an opportunity to be published in a statewide publication. We look forward to reading your submissions. Send your articles to Bradley Smith at bsmith@galfandberger.com.
The General Assembly is considering numerous bills that would impact claims involving childhood sexual abuse.

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<th>Legislative Activity</th>
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<tr>
<td><strong>HB 962</strong></td>
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<tr>
<td>Introduced by Representative Mark Rozzi.</td>
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<tr>
<td>Passed by the House of Representatives on April 10, 2019 (187-5). Referred to the Senate Judiciary Committee on April 22, 2019.</td>
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<td>A link to the language of the bill can be found <a href="#">here</a>.</td>
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<td><strong>HB 963</strong></td>
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<tr>
<td>Introduced by Representative Jim Gregory.</td>
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<tr>
<td>Passed by the House of Representatives on April 10, 2019 (177-15). Referred to the Senate Judiciary Committee on April 22, 2019.</td>
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<td><strong>HB 1171</strong></td>
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<td>Introduced by Representative Tarah Toohil.</td>
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<td>Unanimously passed the House of Representatives on April 17, 2019. Referred to the Senate Judiciary Committee on April 22, 2019.</td>
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<td>A link to the language of the bill can be found <a href="#">here</a>.</td>
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*Contributed by Sebastian J. Conforto, McQuaide Blasko, Hershey, PA*

sjconforto@mqblaw.com
Pennsylvania Enacts HB 279 Providing for Immunity from Damages When Rescuing an Individual from an Automobile

By Sebastian J. Conforto

On May 15, 2019, Gov T om Wolf signed HB 279 into law, which amends 42 Pa.C.S. § 8340.3, titled Rescue from Motor Vehicle, to add provisions regarding the rescue of an individual from a motor vehicle. The new provisions provide that a person who damages a motor vehicle for the purposes of removing an individual from that vehicle shall not be liable for damages to the motor vehicle or the contents thereof.

This is not a carte blanche protection from damages; rather, the rescuer must: (1) have a good-faith, reasonable belief that the individual is in imminent danger of suffering harm if not immediately removed from the motor vehicle; (2) determine that the individual is unable to exit the motor vehicle; (3) make reasonable efforts to locate the driver and contact emergency responders prior to entry into the vehicle or, if that is not possible, shall attempt to make such contacts after entering the vehicle; (4) use no more force than necessary to enter the vehicle; (5) make a good-faith effort to leave notice on or in the vehicle stating the reason why entry was made, the location of the individual who was removed, and, if possible, identifying the emergency responders that are expected to respond; and (6) remain with the individual rescued from the vehicle in a safe location until emergency responders arrive.

Representative Karen Boback introduced HB 279, and the impetus behind this bill was to protect young children from heat-related injuries due to being trapped inside motor vehicles. Although the law’s intention is to prevent heat-related injuries to children, the law’s provisions are more broadly drafted and would encompass other scenarios.

A link to the text of HB 279 can be found here. This law became effective on July 14, 2019.

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New Form Notice Required for Claim of Adverse Possession Under 42 Pa.C.S. § 5527.1(c)-(d)

By Matthew Selmaska

On June 29, 2019, Rule 1065.1 became effective, requiring an adverse possession plaintiff to provide the defendant a notice set forth in subsections (c) and (d) of the Rule. The Pennsylvania Supreme Court approved this new form notice, that requires the following information: (1) the record property owners or their heirs, successors, or assigns shall have one year in which to respond by filing an action in ejectment against the plaintiff claiming adverse possession; (2) the disclosure of the metes and bounds of the property; (3) a reference to the deed; (4) a street address with zip code; and (5) a uniform parcel identifier or tax parcel number.

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