



# In Summation

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### **SUPERIOR COURT RULES THAT "ERROR IN JUDGMENT" JURY INSTRUCTION IN MEDICAL MALPRACTICE CASES IS IMPROPER**

By: *John P. Shusted*



An *en banc* panel of the Superior Court of Pennsylvania recently ruled that it was improper for trial courts to instruct juries that a physician should not be held liable if he exercised his best medical judgment in treating the patient. [Pringle v. Rapaport](#), 2009 Pa.Super. 171, 2009 Pa.Super. LEXIS 3267 (Pa. Super. Ct. 2009). The "error in judgment" jury instruction had advised juries that a physician was not liable for medical judgments that were shown ultimately in error as long as the judgment was reasonable under the circumstances. This instruction had been controversial because several previous panels of the Superior Court had issued contradictory and irreconcilable opinions on the question, and the Pennsylvania Supreme Court has never addressed this issue. The effect of the [Pringle](#) decision is to raise yet another obstacle in defending the medical and clinical decision making of physicians in the courtroom. (See author's discussion of this topic in a prior edition of *In Summation*, Winter, 2008 ([link](#))).

#### **Standard Of Care Jury Instruction**

Before discussing the "error in judgment" jury instruction, it is important to review the Pennsylvania standard suggested jury instruction on a physician's duty of care. This standard jury instruction states as follows:

A physician must have and use the same knowledge and skill and exercise the same care as that which is usually had and exercised in the medical profession. A health care provider whose conduct does not meet this professional standard of care is negligent.

It is noteworthy that there is no reference in this standard proposed jury charge to the exercise of a physician's judgment.

#### **Error In Judgment Charge**

The Superior Court in numerous prior decisions had split on whether an "error in judgment" charge should be given in particular cases. The heart of the "error in judgment" jury instruction was highlighted in [Blich v. Jacks](#), 864 A.2d 1214 (Pa. Super. 2004), in which the Superior Court affirmed the following jury instruction given by the trial court:

Furthermore, a physician is not liable for a mere error of judgment. The medical judgment itself of a doctor must be based on the same degree of skill, knowledge and care as that normally exercised in the medical profession. If the physician does employ the required skill, knowledge and care customarily exercised in his profession to make a judgment, then this will not render him or her liable.

#### **Pringle v. Rapaport Decision**

In [Pringle](#), a defendant obstetrician was faced with a birth complication known as shoulder dystocia, a condition where the baby's shoulder becomes stuck behind the mother's pubic bone. It was agreed among plaintiff and defense experts that there are three maneuvers that ought to be employed by the physician in seeking to address a shoulder dystocia. There was no dispute that all three methods were used by the obstetrician, Dr. Rapaport. The only dispute between the experts concerned whether the amount of force used during the third

procedure, known as the "corkscrew" procedure, was below the standard of care. Plaintiff's experts opined that the injury would not have occurred absent the negligent application of excessive force by the obstetrician. The defense expert agreed that the amount of force in a corkscrew procedure is a skill learned through training and experience, and that the amount of force Dr. Rapaport exerted was excessive and caused the injury. However, the defense expert also stated that, in his professional opinion, Dr. Rapaport's application of excessive force was not negligent. The defense expert stated that there was no evidence that the force used by Dr. Rapaport was any more than what was usually done in normal deliveries and the injury to the baby could have occurred even when proper (non-negligent) care was provided. Dr. Rapaport testified that this was the most severe case of shoulder dystocia that he had ever encountered and that he applied the same amount of force as he did in every delivery. Dr. Rapaport insisted that his actions saved the baby's life. Accordingly, the main issue in dispute was whether Dr. Rapaport executed the corkscrew procedure in a negligent manner.

At the conclusion of the trial, the court instructed the jury that, "Under the law, physicians are permitted a broad range of judgment in their professional duties, and they are not liable for errors of judgment unless it is proven that an error of judgment was the result of negligence." The jury subsequently entered a verdict in favor of the defendant obstetrician.

In her Opinion on behalf of the majority in Pringle, Judge Donohue surveyed Pennsylvania case law for the past 150 years on the issue of the error in judgment charge, as well as the "two schools of thought" jury instruction." After freely acknowledging that the Superior Court's prior decisions were "irreconcilable" the *en banc* panel of the Superior Court reversed the trial judge, finding that the error in judgment charge is improper in medical malpractice cases. The Superior Court listed two primary reasons for its holding. First, the Court stated that the "error of judgment" charge wrongly suggests to the jury that a physician is not liable for one type of negligence, namely the exercise of his or her judgment. The Court noted that this would be improper because in medical malpractice cases, "The proper focus is whether the physician's conduct (be it an action, a judgment, or a decision) was within the standard of care." The Court stated that after a jury has been charged on the fundamental principles regarding a physician's standard of care, adding an "error of judgment" instruction only confuses, and does not clarify the question of whether there was a deviation from the standard of care.

The second reason given for reversal by the Superior Court was that the "error of judgment" charge wrongly injects a subjective element into the jury's deliberations. The Court found that this would improperly focus the jury's attention on the physician's state of mind at the time of treatment "even though the physician's mental state is irrelevant in determining whether he or she deviated from the standard of care."

A dissenting opinion was authored by Judge Orié Melvin. The dissenting opinion, which was joined by one other judge, would have upheld the trial court's instruction, finding that it accurately reflected that doctors are liable if they deviate from the standard of care, but if a judgment turns out to be wrong, the doctor should not automatically be found to be negligent. The dissent noted that the expert testimony revealed that there was no way to determine when excessive force was being applied. Even plaintiff's expert had admitted that it was impossible to quantify how much force was being used because there was no way to measure that force while the doctor was performing a delivery. The dissent stated that it was appropriate, given the facts, that the jury should have been given an instruction regarding the role of medical judgment in making treatment decisions.

### **An Alternative Approach**

In its decision, the Superior Court noted that other states have not adopted Pennsylvania's formulation of the "error of judgment" charge. However, other states do have jury instructions regarding "medical judgments". In New Jersey, for example, the standard suggested jury instruction for cases which involve medical judgment states as follows:

The doctor may have to exercise judgment when diagnosing and treating a patient. However, alternative diagnoses/treatment choices must be in accordance with accepted standard medical

practice. Therefore, your focus should be on whether standard medical practice allowed judgment to be exercised as to diagnosis and treatment alternatives and, if so, whether what the doctor actually did to diagnose or treat this patient was accepted as standard medical practice. If you determine that the standard of care for treatment or diagnosis with respect to [specify what type of treatment or diagnosis is involved] did not allow for the choices or judgments the defendant doctor made here, then the doctor would be negligent.

### **Conclusion**

In its decision, the Superior Court noted that the concept of errors in judgment typically involves choices in treatment that could eventually be covered by the "differing schools of thought" jury instruction. Under that instruction, the defendant has the burden of proof to show that the course of treatment chosen was accepted by a considerable number of physicians. However, practically speaking, trial courts are reluctant to give the differing schools of thought instruction. For example, in the Pringle case, the Superior Court noted that the differing schools of thought instruction would not have been applicable because there was no dispute that Dr. Rapaport did follow the generally accepted procedures for the situation which he confronted.

Why has the "error in judgment" charge been important and highly debated? It is important because it meets at the intersection between law and medicine. In the typical lawsuit, plaintiff presents proof through expert testimony that the medical judgments of defendant were negligent and below the standard of care. However, the practice of medicine involves the exercise of judgments. A physician typically defends his actions and judgments by placing those judgments in the medical context that existed, and was known or knowable, at the time of treatment. After the Superior Court's decision in Pringle, juries will no longer be instructed regarding those medical judgments. Rather, the focus will solely be on the objective "conduct" of the physician. While the physician can still explain the medical judgments he or she made during the treatment, the jury will not be instructed regarding those medical judgments.

## **TO FILE A REVIEW PETITION OR NOT TO FILE, THE SUPREME COURT OF PENNSYLVANIA WEIGHS IN**

*By: Jeffrey Laudenbach*



In Cinram Manufacturing, Inc. and PMA Group v. Workers' Compensation Appeal Board (Hill), 975 A.2d 537 (Pa. 2009), the Pennsylvania Supreme Court recently clarified the Workers' Compensation Judge's ("WCJ") discretionary ability to expand the nature and extent of accepted injuries set forth in a Notice of Compensation Payable ("NCP") and lessened the obligation for Claimant's counsel to properly plead their case in a filed Petition. Effectively, the WCJ is now permitted to modify or correct an injury description set forth on the Notice of Compensation Payable, regardless of whether Claimant's counsel has made any allegation to that fact or filed a Petition to Review Compensation Benefits. There are limitations to the WCJ's discretion in that the changes must be "corrective" and not merely an addition of a distinctly new injury and some notice or due process is owed to the Employer.

Jeanes Hospital v. WCAB (Hass), 582 Pa. 405, 872 A.2d 159 (Pa. 2005) was a prior Pennsylvania Supreme Court decision which held that a Review Petition must be filed by Claimant's counsel as a prerequisite to amend or change the injuries listed on the Notice of Compensation Payable. This was a key case forcing Claimant's counsel to actually plead new injuries or injury descriptions in a Petition to Review or Claim Petition and to litigate them fully before the Court. In other words, if Claimant's counsel sought to add a knee injury to a low back sprain that had been previously accepted, a Review or Claim Petition had to be filed and litigated. The same requirement was present if the original injury was a lumbar strain that was sought to be expanded into an L4-5 disc herniation. The result was that, at a minimum, proper due process and notice was given to the Employer that Claimant and Claimant's counsel were seeking to add and change the description of the injury.

Since the Jeanes Hospital decision in 2005, a flurry of Review and Claim Petitions were filed attempting to clarify and expand the specific accepted work injuries. It seemed that every Petition to Suspend/Modify or Terminate Compensation Benefits by the employer was countered with a Petition to Review Compensation Benefits or Claim Petition seeking to add or change the description of the injury. The requirement to file these Petitions forced Claimant's counsel to specifically allege the proposed changes in their Petitions, which were essential for an Employer to prepare an appropriate defense without having to guess how the injury description would be modified.

In Cinram Manufacturing v. WCAB (Hill), the Employer filed a Termination Petition alleging full recovery based upon a "lumbar strain/sprain" injury set forth on the Notice of Compensation Payable. The only Petition pending before the Court was a Petition to Terminate Compensation Benefits; however, the WCJ denied the Petition to Terminate Compensation Benefits and expanded the description of injury from lumbar strain/sprain to include "aggravation of a pre-existing disc herniation resulting in nerve impingement." This decision to expand the description of injury was essentially a unilateral decision by the Judge since no Petition to Review had been filed or litigated. The experts had testified on the Petition to Terminate and had addressed those specific diagnoses, but there was no new pleading asserting any change, addition or correction to the Notice of Compensation Payable.

The Employer appealed to the WCAB relying on Jeanes Hospital, which had held that a Claimant must file a Petition to Review Notice of Compensation Payable. The Appeal Board affirmed the WCJ's decision citing §413(a) of the Workers' Compensation Act, which provides:

A workers' compensation judge may, at any time, review, modify, or set aside a notice of compensation payable...or in the course of the proceedings under any petition pending before such workers' compensation judge, if it be proved that such notice of compensation payable or agreement was in any material respect incorrect.

77 P.S. §771 (emphasis added).

The Commonwealth Court affirmed the WCAB in Cinram Manufacturing and the Supreme Court accepted this appeal to address the conflict between the Jeanes Hospital decision and the above quoted statutory provisions.

The Supreme Court of Pennsylvania initially noted that the Jeanes Hospital decision had not focused on the distinction between corrective amendments and amendments addressing subsequently arising medical or psychiatric conditions related to the original injuries (also known as consequential conditions). The Court stated that, "Corrective amendments and amendments to address consequential conditions require independent consideration, since the Legislature treated them in separate and distinct passages of §413(a). Corrective amendments are covered by the first paragraph, codified at §771 of Title 77 of the Pennsylvania Statutes, 77 P.S. §771, which applies only in circumstances in which there was an inaccuracy in the identification of an existing injury." Cinram Manufacturing v. WCAB (Hill), 975 A.2d at 580-81.

In Jeanes Hospital, the injuries sought to be added to the Notice of Compensation Payable included fibromyalgia and depression which were considered consequential or additional conditions and not injuries existing at the time of the Notice of Compensation Payable's issuance. However, in Cinram, the accepted injury was a lumbar sprain and strain and it was sought to be expanded to include a pre-existing disc herniation with resulting nerve impingement. Essentially, this was considered a corrective amendment seeking to change the original description of the work injury.

The net result after Cinram is that a WCJ may at any time change the injury description on a Notice of Compensation Payable without a Petition to Review or Claim Petition pending in the exercise of his/her discretion pursuant to 77 P.S. §771 for "corrective amendments." Each party must be given a reasonable period of notice and fair opportunity to respond to any allegation or change to the injury description as a corrective amendment. Also, the burden of proof for such corrective amendment or change to the original NCP rests with the Claimant and Claimant's counsel to prove the existence of additional compensable injuries giving rise to the corrective amendment.

In a Concurring Opinion written by Justice Eakin in Cinram, he commented that a WCJ may correct a materially incorrect Notice of Compensation Payable. However, the WCJ should not be permitted to change the NCP in every circumstance. When the NCP does not correctly reflect the actual injury, a Claimant must file a Petition to Review Notice of Compensation Payable. However, in the Cinram case, Justice Eakin felt that the medical evidence showed that the Claimant's disc herniation worsened after his work-related injury. Thus, "Amending the NCP to include aggravation of the Claimant's disc herniation - - a diagnosis more accurately and fully reflecting Claimant's original injury - - remedied the materially incorrect NCP."

As a practical matter, the determination as to what is a corrective amendment and what is a consequential amendment and the requirement to file a Review Petition or not is still unclear given the complexity of medicine and work injuries. Claimant's counsel will continue to file Petitions for Review simply to protect their client's interests and most likely WCJs will avail themselves of Cinram to support a unilateral change to the injury description if a Petition is not filed. Employers need to plan ahead in the defense of claims and should address potential future injuries or progressions of injuries at the outset. Medical experts are able to distinguish between acute injuries, aggravations of degenerative conditions, new injuries and subsequent injuries based upon their review of medical records, diagnostic studies, and medical protocols. During the litigation of a Petition, it is essential to address all injuries and put them into their specific category: work-related, non-work-related, pre-existing, or aggravation. Simply limiting inquiries to only the injuries listed on the NCP could leave the Employer without evidentiary support on appeal from an adverse decision or a later challenge to expand the accepted injuries. It remains Claimant's burden of proof but the Employer must anticipate potential expansion to the accepted injuries and be prepared to challenge them at all times

regardless of whether or not a Petition is pending.

## INTERNET RELATED DEFAMATION CLAIMS DISMISSED FOR LACK OF PERSONAL JURISDICTION

By: *Phillip A. Ryan*



Dr. Jack Gorman, a Pennsylvania podiatrist, was originally interviewed in connection with an online publication, *Phillyburbs.com*. A portion of that article was then reproduced in the malpractice news section of the *Podiatry Management Online News Forum, PM News, The Voice of Podiatrists*. Subsequently, several other podiatrists posted comments on the interview on the *PM News* website. Their comments blamed the rising cost of medical malpractice insurance, in part, on individuals such as Dr. Gorman since Dr. Gorman was willing to "travel anywhere and say anything to support frivolous claims." He was also referred to as a "leech on the system." Dr. Gorman sued these doctors for defamation, intentional infliction of emotional distress, and invasion of privacy. The suit was filed in the United States District Court for the Eastern District of Pennsylvania. GG&M associate, Chad Goebel, and I represented one of the podiatrists, Dr. Allen Jacobs, who lives and works in Missouri. All defendants were non-residents of Pennsylvania and all defendants filed Motions to Dismiss for lack of personal jurisdiction and for failure to state a claim on which relief could be granted.

United States District Judge Stewart Dalzell held that Dr. Gorman had failed to establish the requisite minimum contacts with the Commonwealth of Pennsylvania and, accordingly, dismissed all claims against defendants for lack of personal jurisdiction. Gorman v. Jacobs, 597 F.Supp. 2d 541 (E.D. Pa. 2009).

Judge Dalzell held that in order to obtain personal jurisdiction over an out-of-state defendant who made an allegedly defamatory statement, plaintiff must first satisfy the "effects test" set forth in the United States Supreme Court decision in Calder v. Jones, 465 U.S. 783 (1984). Under the Calder effects test, the plaintiff must show that: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum state such that the forum state can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; and (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity. In the instant case, Judge Dalzell held that while Dr. Gorman satisfied the first two prongs of the effects test, he did not satisfy the third prong. Judge Dalzell closely examined the website in question and stated that there was nothing about the website from the user's point of view which would establish an intent on the part of the user to interact with Pennsylvania. Specifically, Judge Dalzell held:

"But nothing about the website from the user's point of view announces that the website would direct user comments into Pennsylvania or any other particular state, and thus mere use of the PM News website does not establish intent to interact with Pennsylvania. Although PM News culled the article that instigated the defendants' comments from a Pennsylvania source, nothing on the PM News website identifies the website or its newsletter as Pennsylvania specific. To the contrary, everything about the website confirms that it is directed to the national podiatry community at large."

597 F. Supp 2d at 549-56.

Judge Dalzell also noted that even if a significant number of subscribers and visitors to the website were Pennsylvania residents, the Court could not infer from this that a user intentionally interacted with Pennsylvania via the website because a user does not have access to information concerning the location of the subscribers or users of the website.

Dr. Gorman argued that the content of the defendants' comments, which contain references to Pennsylvania, establish that they expressly aimed at activities in Pennsylvania. However, Judge Dalzell carefully reviewed the comments at issue and found them to be general in nature and that nothing specifically implicated Pennsylvania. The Court held that a defendant must do more than refer to, or know of, the fact that the plaintiff resides or works in the forum state in order to establish personal jurisdiction in the state.

Since the claims in question arose from the posting of allegedly defamatory statements on the internet, Judge Dalzell also considered the "sliding scale" analysis established in Zippo Manufacturing Co. v. Zippo Dot Com., Inc., 952 F.Supp. 1119 (W.D. Pa. 1997). The Zippo "sliding scale" test has won wide acceptance as the best approach for courts to use in assessing whether a non-resident's internet activities would justify the exercise of personal jurisdiction. The Zippo sliding scale test examines how the particular website works. At one end of the scale are commercial interactive websites that "involve the knowing and repeated transmission of computer files over the internet," and through which individuals actively engage in business with residents of a foreign jurisdiction. Id. at 1124. Exercise of personal jurisdiction over individuals actively engaged in such internet activity is proper. Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003). At the other end of the scale are passive websites where information is posted and users can only view it. Activities related to such websites do not have sufficient contacts with the forum to warrant the

exercise of personal jurisdiction. Zippo, 952 F.Supp. at 1124. In the area between these two poles, the courts examine the "level of interactivity and commercial nature of the exchange that occurs on the website" to decide whether the exercise of personal jurisdiction is proper. Id. Under the Zippo test, how individuals use the website is equally, if not more, important than the features of the website itself. Because one can access websites from anywhere, the defendant's internet activity - - whether it be website operation or use - - must show an intent to interact with the forum to justify the exercise of personal jurisdiction. The mere posting of information or advertisements on any internet website does not confer nationwide personal jurisdiction. Remick v. Manfredy, 238 F.3d 248, 259.(3d Cir. 2001).

Judge Dalzell noted that most cases applying the Zippo test concern the operators of websites, but non-operator users of a website can also be subject to personal jurisdiction. However, for a Court to exercise personal jurisdiction based on the use of a website (rather than its operation) something about the website must suggest to the user that residents of the forum state are the target audience. A statement found on the internet that simply mentions the forum state and the plaintiff's relation to it, without some other indication that the forum was the intended target of the statement, is not sufficient to establish personal jurisdiction over the statement's author.

After examining the individual comments made by each of the defendant doctors, Judge Dalzell concluded that their comments were not aimed at Pennsylvania, but rather all comments were directed to the national podiatry community at large. Since Judge Dalzell concluded that the Court did not have personal jurisdiction over the defendants, he did not reach the other question raised by defendants as to whether Dr. Gorman had even stated a claim upon which relief could be granted. No appeal was pursued by plaintiff from the order dismissing the case for lack of personal jurisdiction.

## **PENNSYLVANIA SUPREME COURT EXPANDS CERTAIN ASBESTOS PLAINTIFFS' RIGHT TO PURSUE MALIGNANCY CLAIMS**

By: Tiffany Giangjudio

The Pennsylvania Supreme Court has issued a significant ruling, adverse to the interests of defendants, in asbestos litigation in the case of Abrams/Shaw v. John Crane, Inc., 681 A.2d 198 (Pa. 2009). The Supreme Court held that a plaintiff's prior recovery for increased risk and fear of the development of asbestos-related cancer does not preclude a subsequent recovery, *from a new defendant*, of damages for the actual development of asbestos-related lung cancer. The ultimate effect of this ruling could result in defendants (as a class) paying full compensation for a second time to a plaintiff who had previously recovered for fear and risk of cancer when Pennsylvania had such remedies available (prior to 1992). Of significant concern, the Supreme Court also expressly held that no statutory or common law right of repose exists with respect to asbestos cases.

### Brief Pennsylvania History of Claims/Remedies Available for Plaintiffs

Pennsylvania initially was a "one disease" jurisdiction. A plaintiff was required to file a single cause of action for all present and future harm within two (2) years of the initial diagnosis of any asbestos-related condition. Cathcart v. Keene Industrial Insulation, 471 A.2d 493 (Pa. Super. 1984). Under the one disease rule, plaintiffs diagnosed with non-malignant asbestos-related diseases were able to recover damages for risk and fear of developing an asbestos-related cancer in the future. Pennsylvania subsequently became a "two disease" jurisdiction. In Marinari v. Asbestos Corp. Ltd., the Superior Court of Pennsylvania held that an asbestos plaintiff may assert, in a second lawsuit, a claim for a distinct separate disease if and when it develops at a later time. 612 A.2d 1021 (Pa. Super. 1992). In this case, the plaintiff had been diagnosed with asymptomatic pleural thickening in 1983 and did not file suit. He subsequently filed a suit in 1987 after being diagnosed with lung cancer. Therefore, as a result of the Marinari decision, from 1992 forward, a Pennsylvania plaintiff's discovery of a non-malignant asbestos-related disease did not trigger the statute of limitations with respect to a later, separately diagnosed cancer.

Following Marinari, significant rulings came down regarding non-malignant claims. First, in Giffear v. Johns Manville, the Pennsylvania Superior Court held that pleural thickening, absent disabling consequences or manifest physical symptoms, is a non-compensable injury. 632 A.2d 880 (Pa. Super. 1993). The Pennsylvania Supreme Court subsequently affirmed the Giffear decision in Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996). The Supreme Court held that *asymptomatic* pleural thickening was not a compensable injury. Further, plaintiffs with asymptomatic pleural thickening did not have claims for emotional distress or fear of cancer as these claims were too speculative. Id.

### Abrams/Shaw History

Mr. Abrams filed a Complaint on March 20, 1986 alleging that he contracted asbestos-related "respiratory disease," diagnosed on April 12, 1984. John Crane, Inc. was not a named defendant in this matter. The case was marked "settled" on the docket as dated April 19, 1993. On February 25, 2003, Mr. Abrams again filed a Complaint alleging that he contracted asbestos-related lung cancer, diagnosed in December, 2002. John Crane, Inc. was a named defendant in the second lawsuit only.

In the companion case, Mr. Shaw filed a Complaint on September 24, 1985 alleging that he contracted asbestos-related "asbestosis and/or restrictive pulmonary disease," diagnosed on January 2, 1985. John Crane, Inc. was not a named defendant in this matter. The case was marked "settled" on the docket as of January 13, 1993. On February 25, 2003, Mr. Abrams filed a new Complaint alleging that he had contracted asbestos-related lung cancer, diagnosed in December, 2002. John Crane, Inc. was a named defendant in the second lawsuit only.

John Crane filed a joint motion for summary judgment in these matters. The basis of John Crane's motion was that plaintiffs were diagnosed with non-malignant diseases when Pennsylvania was a single cause of action jurisdiction and, therefore, the statute of limitations for all asbestos diseases, including cancer, commenced with the initial diagnoses. Again, this means that both Mr. Shaw and Mr. Abrams had the right to recover for risk and fear of cancer damages in their non-malignancy suits in the 1980s. Plaintiffs responded to John Crane's motion with the argument that the facts in these matters were indistinguishable from Marinari and, therefore, the question as to whether they could bring actions for cancer was governed by the separate disease rule of Marinari. Plaintiffs further asserted that this argument had already been decided in their favor in McCauley v. Owens-Corning Fiberglas Corp., 715 A.2d 1125 (Pa. Super. 1998). John Crane, Inc. replied in support of its motion, noting that these cases were distinguishable from Marinari in that the plaintiffs in these cases actually filed actions for their non-malignant diseases. John Crane, Inc. also noted that since these plaintiffs had the right to recover risk and fear of cancer damages in their non-malignancy actions, they could not recover cancer damages in the current actions.

Judge Ackerman of the Philadelphia Court of Common Pleas held that plaintiffs' failure to assert claims against John Crane, Inc. within two (2) years of their diagnoses with non-malignant diseases barred them from pursuing claims for their lung cancers. He distinguished these cases from Marinari and McCauley on the basis that those plaintiffs, unlike Mr. Abrams and Mr. Shaw, had never sought damages for asbestos-related disease, including risk of cancer or fear of cancer. Therefore, Judge Ackerman granted John Crane, Inc. motion for summary judgment.

The Superior Court affirmed Judge Ackerman's decision, holding that the Shaw/Abrams cases do not involve retroactive application of Marinari. The Superior Court held that plaintiffs had the opportunity to sue John Crane for increased risk and fear of cancer, but failed to do so despite knowing they were required to assert all claims for present and future harm within two years of the initial asbestos-related diagnosis. The Superior Court specifically noted that neither plaintiff in Giffear or McCauley was compensated for cancer-based claims in a prior asbestos lawsuit, as the plaintiffs were in this case. Judge Lally-Green issued a concurring opinion noting that in the pre-Marinari era, plaintiffs were required to file suit, within the applicable statute of limitations, against *all potential asbestos defendants* upon being diagnosed with an asbestos-related disease, even if they had not yet developed cancer.

There were two (2) dissenting opinions from the en banc Superior Court decision. Judge Stevens dissented, stating that damages for diagnosed cancer are separate and distinct from the damages the plaintiffs recovered in earlier actions. He further stated that the majority's holding goes contrary to the goal of Marinari, to avoid denying full damages to a cancer victim. Judge Musmanno also dissented, specifying that the plaintiffs in this matter never sued or recovered damages from John Crane prior to their cancer diagnoses. He stated that the plaintiffs are not barred by the statute of limitations against John Crane because Marinari clearly held that the diagnosis of a non-malignant asbestos-related disease does not trigger the statute of limitations for a later diagnosed cancer. Mr. Abrams and Mr. Shaw both brought their lung cancer suits within two (2) years of their cancer diagnoses.

#### Supreme Court of Pennsylvania Decision

The issue presented to the Pennsylvania Supreme Court was:

Does prior recovery of damages for increased risk and fear of cancer due to asbestos exposure, awarded under the one-disease rule, preclude a plaintiff from recovering damages for cancer that developed and was diagnosed after the separate disease rule was adopted in Marinari v. Asbestos Corporation, Ltd.?

The Supreme Court held that such a prior recovery does not preclude a subsequent recovery, *from a new defendant*, of damages for the actual development of asbestos-related lung cancer. In her majority opinion, Madam Justice Todd reversed the Superior Court's holding and specifically found that Mr. Abrams and Mr. Shaw were in a similar position to the plaintiffs in Marinari and, therefore, retroactive application of the Marinari decision applied.

However, Madame Justice Todd placed emphasis on the fact that plaintiffs did not recover for risk and fear of cancer from John Crane in their first suit. Specifically:

As it stands, however, Appellants' prior recovery and/or settlement in 1993 with defendants *other than Crane* does not preclude their current actions against Crane, and the critical factor in determining whether Appellants can maintain an action against Crane is whether Appellants' action against Crane for damages for lung cancer is timely under the applicable statute of limitations.

The Court reiterated that the plaintiffs' cause of action against John Crane in this case is an individual one,

separate and distinct from the causes of action asserted by the plaintiffs against other defendants in the 1980s. Therefore, the fact that plaintiffs asserted risk and fear of cancer claims against other defendants does not preclude a subsequent and timely lawsuit against John Crane for actual cancer.

The Supreme Court further rejected the Superior Court's conclusion that the plaintiffs' present claims for damages for lung cancer are identical to their previously litigated risk of cancer claims, and therefore had to have been raised at the same time as their risk of cancer claims. Madame Justice Todd specifically held that cancer and non-cancer diseases "clearly" give rise to separate claims. Furthermore, she specifically held that the plaintiffs' claims for damages for lung cancer are "clearly" separate and distinct from any claims for risk or fear of cancer that may have existed in the 1980s. Therefore, the statute of limitations for the plaintiffs' claims against John Crane for lung cancer did not begin to run until their respective diagnoses in December, 2002.

Of particular concern to defendants in asbestos litigation, the Supreme Court explicitly held that no statutory right of repose exists with respect to asbestos cases. The Court reasoned that if the legislature had intended for asbestos exposure cases to be subject to a statute of repose, it would have expressly indicated so in its enactment of 42 Pa.C.S.A. §5524(8). The Court also stated the common law theory of repose runs contrary to the holdings of Marinari, Giffear, and Simmons (citing Marinari with respect to latent disease cases, "that a potential defendant's interest in repose is counterbalanced and outweighed by other factors, including evidentiary considerations, securing fair compensation for serious harm and deterring uneconomical anticipatory lawsuits." Marinari v. Asbestos Corp. Ltd., 612 A.2d at 1026.)

Justice Saylor filed a dissenting opinion in which Chief Justice Castille joined. Justice Saylor noted that when the plaintiffs failed to name John Crane in the initial 1980s suits, John Crane became entitled to repose afforded by the statute of limitations. In the mid 1980s, Pennsylvania was a one disease jurisdiction and John Crane was potentially liable at that time. The statute of limitations defense was available to John Crane in the mid 1980s case, for example by third party joinder, and therefore, John Crane could have reasonably relied on it. Justice Saylor notes that the majority holding in this case undermines the important goal of repose and finality in the judicial system.

Justice Saylor further explained his dissent from the majority opinion in that under the one disease rule, plaintiffs recovered for increased risk of cancer *based on the fact that later recovery for actual development of cancer was unavailable*. Plaintiffs who filed claims under the one disease rule recovered for the expected harm that would come from a later diagnosis. Justice Saylor warned that if the Court permits recovery for this subset of plaintiffs that actually contract cancer after recovering for risk or fear of cancer, the Court will be requiring defendants, as a class, to provide full compensation a second time.

#### Outlook for Defendants in Pennsylvania Asbestos Litigation

The Supreme Court's decision in the Shaw/Abrams cases poses future problems in Pennsylvania asbestos litigation for defendants. First and foremost, the Supreme Court expressly held that asbestos defendants have no right of repose. Plaintiffs who have had previous non-malignancy claims when Pennsylvania was a one disease jurisdiction and did not sue a certain defendant in that first suit, are free to sue new defendants in a subsequent malignancy suit. Defendants have no right of repose even if they should have been sued in the first suit. With more and more entities filing for bankruptcy, the likelihood of new defendants being sued in second malignancy suits may rise.

In addition, plaintiffs who recovered damages for risk or fear of cancer in non-malignancy suit prior to 1992 (Marinari) may also fully recover damages for a later diagnosed malignancy. While the Court expressly held that these are indeed separate and distinct claims, the Court put great emphasis on the fact that Mr. Shaw and Mr. Abrams had brought the risk and fear of cancer claims against *other* defendants in the 1980s, *not John Crane*. Therefore, it appears that the Supreme Court, while not expressly holding it, implied that recovery for the subsequent lung cancer claims would not be proper against those defendants who had paid for fear or risk of cancer in the pre-1992 suits.



#### **Dean Murtagh**

Dean will be speaking at the ALFA International Client Seminar in Palm Desert, California on March 11-13, 2010 on the trial of product liability cases in different international venues. Dean was also chosen as one of the top 100 Philadelphia Area Super Lawyers for 2009. Dean's selection for this honor was based upon his receiving high point totals in the Pennsylvania peer nomination, research, and blue ribbon review process.

#### **Phil Ryan**

Phil will be attending the ALFA Retail Real Estate Practice Group Seminar in Palm Beach, Florida on June 2-4, 2010. Please contact Phil if you would like any more information about this seminar. Phil also recently attended a regional meeting of the International Association of Defense Counsel held in Philadelphia.

### **Robert Corbin**

Both Bob and Gary Gremminger will be attending the ALFA Transportation Practice Group Seminar in Marco Island, Florida on April 28-30, 2010. Please contact either Bob or Gary if you would like information about this seminar.

### **Gary Gremminger and Christina Westall**

The team of Gary Gremminger and Christina Westall has recently been successful in obtaining summary judgments in Philadelphia on two premises liability cases with significant damage exposure. In the first case, the plaintiff invitee brought suit against the property owner after she was attacked by an intruder within the premises and sustained serious orthopedic injuries when she jumped from a second floor window to escape the intruder. The second case involved a plaintiff who sustained catastrophic injuries, with projected medical expenses in excess of \$7 million, after he fell from a ladder while attempting to trim branches from an adjacent neighbor's tree which overhung his property. The plaintiffs in both cases have filed appeals to the Superior Court of Pennsylvania.

### **Kathy Dux**

Kathy was the Editor-in-Chief of the ALFA Insurance Law Compendium and was also a contributor to the Pennsylvania portion of the compendium. The compendium is a 50-state reference on significant cases and statutory law related to property and casualty claims and litigation and a second volume deals with life and health insurance claims and litigation. If you are interested in obtaining a copy of this reference material, please contact Kathy Dux.

### **Gary Hunter**

Gary has been selected to the Board of Directors of ALFA International for a three-year term. He is also acting as Chairman elect for the Pennsylvania Bar Association Workers' Compensation Section and is serving his third term on the planning committee for the annual Workers' Compensation Bureau Conference.

Gary has been very active in making presentations at a number of venues, including the ALFA International Client Seminar in March 2009, where he spoke on employer's rights to information in the United States and abroad. He also presented at the ALFA International Workers' Compensation Program in Nashville, Tennessee in September 2009 on the topic of "Strategies When the Employee's Job Has Been Eliminated." Gary also spoke at the Pennsylvania Bar Institute in connection with the "Tough Problems Course." He moderated a panel of judges and experts for the Bureau of Workers' Compensation Conference on the topic of "Settlements." Finally, Gary will be presenting at a meeting of the Philadelphia Chamber of Commerce in April 2010 on workers' compensation issues.

### **Jeff Laudenbach**

Both Jeff Laudenbach and Stacy Tees moderated a panel discussion in October 2009 on "Tricks and Treats of Workers' Compensation" for the Pennsylvania Self-Insurer's Association Regional Meeting. Jeff also presented as part of a panel in the "Practice Tips" section of the September 2009 ALFA Workers' Compensation Practice Group Seminar entitled "Workers' Compensation in the New Economy: Find Cost Cutting Strategies in the County Music Capital."

Jeff was selected as a Pennsylvania Super Lawyer for 2009 by statewide peer analysis.

### **Stacy Tees**

Stacy has been elected to the Philadelphia Bar Association Board of Governors for a three-year term. She has also been selected to the Executive Committee of the Philadelphia Association of Defense Counsel for a three-year term.

### **On Site Seminars:**

GG&M attorneys are available on request to conduct seminars at your offices. If you are interested in having a seminar conducted at your facility, please contact Phil Ryan at [ryanp@ggmfirm.com](mailto:ryanp@ggmfirm.com) to discuss any topics that you would like to include in your seminar.

### **American Law Firm Association (ALFA)**

ALFA is an international association of independent law firms with the basic objective of improving the quality and efficiency of legal services offered to clients. Membership in ALFA is by invitation only, and each member firm pledges to provide high quality service to its clients. GG&M is the ALFA representative for Eastern Pennsylvania and Southern New Jersey. More information concerning ALFA is available on the ALFA International website, [www.alfainternational.com](http://www.alfainternational.com)

## German Gallagher & Murtagh website

If you have not visited the firm's website, [www.ggmfirm.com](http://www.ggmfirm.com) recently, we hope that you will take some time to view all of the features which are available there. You can also arrange to receive future issues of "In Summation" newsletter via email by subscribing through our website.

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