We are a full-service Civil Litigation Defense firm serving Western/Central Pennsylvania and West Virginia.

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Walsh, Barnes, & Zumpella, P.C. represents insurance carriers, their insureds, and corporations in actions encompassing the entire civil litigation spectrum. We provide defense of wrongful death and personal injury claims in addition to property losses resulting from:

- **Automobile and Tractor Trailer Accidents**
- **Catastrophic Fire Losses**
- **Construction Accidents**
- **Employment Practices Liability**
- **Executive Liability**
- **Insurance Coverage**
- **Premises Liability**
- **Product Liability**
- **Professional Liability**

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Nuances of Giving Notice of Injury under the Pennsylvania Workers' Compensation Act

In a pair of recent cases, the Commonwealth Court addressed the timing of notice to the employer of a work injury. *Holy Redeemer Health Sys. v. Workers' Compensation Appeal Board (Figueroa)*, 2020 WL 7778193, A.3d (Pa.Cmwlth. 2020) and *Stahl v. Workers' Compensation Appeal Board (E. Hempfield Twp.),* 242 A.3d 320 (Pa.Cmwlth. 2020).

Under the Workers' Compensation Act, 77 P.S. § 631, no compensation is owed if the employee does not give notice of the injury to his employer within 120 days.

In *Holy Redeemer*, the issue was straightforward. The employee was an emergency room nurse who experienced leg pain during a shift on a Saturday. Her physician diagnosed her with aggravation of underlying degenerative disc disease in the lumbar spine, and took her off work. The employee received long term disability benefits for a period of time. On the 121st day after her injury, however, a Monday, she gave notice that her injury was caused by her work. There was no dispute regarding the date of notice. The dispute focused on whether the notice was timely under the Act despite not being given by the 120th day after the injury.

The employer argued, based on its operation as a 24 hour facility, that there was no reason the employee could not have given notice within the requisite 120 days.

The employer contended it was open all the time, and there was no justification for the employee's late notice. Relying on principles of statutory construction regarding the calculation of time, the Court held the employee's notice was timely. When the final day of a time period falls on a Sunday, courts construe the deadline as the following Monday. Thus, notice on the 121st day was timely, notwithstanding the fact that there was no impediment to the employee's ability to give notice within the 120-day period.

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In *Stahl*, the issue was more complicated, and involved § 613's "discovery rule." Under § 613, in cases where "the nature of the injury or its relationship to the employment is not known to the employee, the time for giving notice shall not begin to run until the employee knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to his employment."

The employee was a volunteer firefighter who was diagnosed with stomach cancer in 2006. He suspected and/or wondered if the cancer was related to exposure to carcinogens related to his firefighting work. In 2011, he read an article about cancer in firefighters and how their workers' compensation rights might be affected. He retained an attorney approximately one year later, in 2012, to discuss his workers' compensation rights. In 2014, a doctor confirmed the employee's suspicions of a work relationship, and the employee then promptly filed a claim petition, via which he also gave notice of his injury.

The Court held the employee did not give notice within 120 days, and that his claim was barred. In reaching its conclusion, the Court explored the "discovery rule," and concluded the firefighter suspected the causal relationship for seven or more years before giving notice to the employer. In 2011, his suspicion was heightened when he received information on the workers' compensation rights of firefighters diagnosed with cancer, and he retained an attorney. Under these circumstances, the firefighter did not act with reasonable diligence. Of note, the Court rejected a bright line rule that the notice period does not begin to run until an employee receives an expert opinion/ medical diagnosis setting forth a causal relationship. Instead, the court used a totality of circumstances test. The Pennsylvania Supreme Court denied the employee's petition for allowance of appeal.

Liability in Pennsylvania for Sidewalk Maintenance

A number of premises liability cases involve a trip and fall on a sidewalk. One of the first issues is determining which persons or entities were responsibility for maintaining and repairing the sidewalk. In Pennsylvania, the general rule is the property owner abutting the sidewalk has primary liability for injuries due to a defective or dangerous sidewalk. *See e.g., Flynn v. City of Chester,* 239 A.2d 322 (Pa. 1968); *Borough of West View v. North Hills School District,* 418 A.2d 527 (Pa.Super. 1980).

A municipality's liability, if any, is called secondary liability, which is an indirect obligation, that does not arise unless the primarily liable party fails to honor its obligation. The *Political Subdivision Tort Claims Act, 42 Pa.C.S. §8541 et seq.,* provides an exception wherein local agencies can be secondarily liable for damages resulting from personal injuries due to a dangerous condition on a sidewalk. The recovery against the city is based on the theory that the city has neglected to perform its duty in requiring the property owner to maintain the sidewalk in a safe condition. *Borough of West View,* 418 A.2d at 529 (quoting *Brady v. City of Philadelphia,* 41 A.2d 355 (Pa.Super. 1945)).

To determine a landowner's and/or municipality's responsibility for the sidewalk, it is imperative to look at the local ordinance. As an example, the City of Pittsburgh Code of Ordinances *Section 417.02* titled "sidewalk and curb maintenance" states: "[i]t shall be the duty of all owners of property abutting or adjoining streets to maintain all sidewalk pavements and curbing in proper and safe condition." As such, the City of Pittsburgh is secondarily liable to landowners for maintaining property. In other municipalities, there may be local ordinances that set forth specific duties and responsibilities the landowner and municipality have regarding sidewalk maintenance in the area, as well as snow and ice removal. Thus, it is important to research all applicable codes and/or statutes when determining liability for a sidewalk.

Use of Audit Trails in Medical Malpractice Claims

Given the rising use of electronic health records (EHRs), new information is available to establish the details of care and treatment provided to a patient, and what individual clinicians knew or should have known at the time. This new information includes audit trails. The following paragraphs briefly describe audit trails and the role they occupy in litigation.

Why Audit Logs and Audit Trails Exist?

The Health Insurance Portability and Accountability Act (HIPAA) Security Rule requires healthcare providers utilizing EHRs to have systems in place to review and audit access to the records and to prevent unauthorized access. 45 C.F.R. §§ 163.308 (a)(1)(ii)(c); 163.312(1)(b). The Health Information Technology for Economic and Clinical Health Act (HITECH) also includes provisions requiring the maintenance of EHRs, including conducting audits. 45 C.F.R. § 164.404(a)(2). Healthcare providers comply with these requirements via audit logs and trails, which track the HIPAA-required information and allow for identification of a security breach. These audit logs and trails may be subject to discovery. Thus, clinicians should consider the electronic footprint they create with each log in to a patient's EHR.

What are Audit Logs and Audit Trails?

An audit log is a form of metadata, computer-generated and computer-stored data commonly referred to as "data about data." It is not part of the EHR. Audit log data is not used by healthcare providers to make treatment decisions or otherwise impact patient care. The data provides a record of sequential activities as maintained by the software application or system. An IT expert may be needed to translate the audit information. While there is variety involving available information and formatting among EHR vendors, an audit log commonly provides a record of:

The identity of the patient's EHR accessed;

The identity of the person who accessed the EHR by name and role (i.e.: nurse, therapist, etc.);

The specific date and time the person accessed the EHR;

The part of the EHR or patient data the person accessed (i.e.: orders, flowsheet, etc.);

The particular computer/workstation the person utilized to access the EHR; and

The action or operation the person undertook (i.e.: read, update, print, etc.).

An audit trail consists of the audit log records related to a particular event. For example, a one-day audit trail is an excerpt of an audit log of a patient's 30-day residency at a skilled nursing facility.

What Role do Audit Trails have in Litigation?

Audit trails may assist with investigation. They may be requested in discovery. The validity and appropriateness of requesting and the obligations of responding to a request for production of an audit trail or other electronically stored information (ESI) discovery is beyond the scope of this article; however, it is important to be aware of the data's existence and that it *may* become the subject of discovery. Even if produced, audit trails need an explanation to bring the data to life. For example, an audit trail may provide support for the date and time a clinician reviewed diagnostic testing information entered by another clinician in the EHR. Yet, the audit trail will reflect only that the diagnostic record section of the EHR was "viewed." It will not reflect the specific information reviewed. Discovery deposition testimony is needed to establish what specific diagnostic information the clinician reviewed. Likewise, the audit trail notes only that a clinician made an "update" to the EHR. To see the update or documentation change, a comparison must be made between the actual EHR and the audit trail.

Another problem is the accuracy of the audit trail itself. Clinicians are educated to log off the EHR system and not to share log on credentials. However, users often fail to log off and another user will begin interacting with the EHR system under the initial user's credentials. Both users entered information; however, audit log and trail data will reflect the identification of a single clinician.

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Finally, EHRs and the audit trail data collected by the operating applications create new considerations for clinicians upon notice of a claim and otherwise. Clinicians should be mindful that every keystroke leaves an electronic footprint. If necessary, clinicians may make a late/out of sequence entry or enter an addendum or clarification to a prior entry in the EHR. Typically, healthcare providers have policies and procedures addressing the manner in which these entries should be completed. Omissions in documentation should be addressed as soon as possible because the greater the length of time between the original entry and the late/addendum/clarifying entry the less reliable it becomes. As with paper health records, a clinician must avoid altering or deleting any original entries in the EHR. The Medical Care Availability and Reduction of Error (Mcare) Act, 40 P.S. § 1303.511, provides, in part:

(c) Alteration of records.—In any medical professional liability action in which the claimant proves by a preponderance of the evidence that there has been an intentional alteration or destruction of medical records**, the court in its discretion may instruct the jury to consider whether such intentional alteration or destruction constitutes an adverse inference**.

(d) Licensure sanction.—Alteration or destruction of medical records for the purpose of eliminating information that would give rise to a medical professional liability action on the part of a health care provider **shall constitute a ground for suspension**. A health care provider who is aware of alteration or destruction in violation of this section **shall report any party suspected of such conduct to the appropriate licensure board**.

In our experience clinicians often are unaware of the audit trail feature of EHRs and that mere viewing, as well as changes or alterations, of the records will leave an electronic footprint that they may be called upon to explain in discovery or at trial.

In sum, the role of audit trails in claim investigation and litigation is evolving. It is important to understand that all EHRs have an operational audit trail feature and to realize that every keystroke leaves an electronic footprint. As with other ESI discovery, production of audit trails adds to the cost, complexity, and burden of litigation.

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Recent Pennsylvania Superior Court Holding Affirms Standards and Respective Parties' Burdens in Establishing Damages Involving Defective Residential Construction or Property Damages

In *Woullard v. Sanner Concrete and Supply, 241 A.3d 1200 (Pa.Super. 2020)* the plaintiff homeowners brought breach of contract, promissory estoppel, and unjust enrichment claims against the defendant subcontractors based upon the allegedly defective construction of their residential home and detached garage. Following a non-jury trial the trial court entered a verdict in favor of the plaintiffs. The defendants appealed arguing that the trial court had erred as a matter of law in calculating damages by awarding the cost of repair and rejecting the diminution in value to the home.

The Superior Court noted the measure of damages in cases where a homeowner sues for defective construction is the difference between the market value of the house as constructed and the market value that the house would have if constructed as promised (diminution in value), unless it is reasonably practical to repair the structure provided the cost of repair does not exceed the difference in market value (diminution in value). *See Id. at 1207.* The Court noted that where the cost of repair is clearly disproportionate to the probable diminution in value, damages are limited to diminution in value.

In addressing the burden of providing proof of diminution value the Court stated that the injured party is required to present evidence of diminution in value of the real property in order to demonstrate that the cost of repair, if awarded as damages, would not result in a windfall. However, where the cost of repair is not grossly disproportionate on its face to the market value of the real property (purchase price of the home) the injured party is not required to present evidence of diminution in value. The burden then shifts to the allegedly responsible party for the defective construction to demonstrate that the cost of repair is disproportionate to the diminution in value of the property.

The Court found that the market value of the property was $528,000.00. The estimates of cost to repair the defective work was $61,000.00 and $39,700.00. As the cost of repairs was not grossly disproportionate when compared with the present value of the home the Court held that Plaintiffs were not required to provide evidence of diminution in value. As the defendants provided no evidence in diminution in value the Court affirmed the trial court's damage calculation.

Announcements

■ **Paul Walsh, Adam Barnes, and Gina Zumpella** have been named 2020 Pennsylvania Superlawyers, a list comprised of the Top 5 Percent of Attorneys in Pennsylvania.

■ **Gina Zumpella** recently spoke at a CLE entitled *Joint and Several Liability in 2020* which included topics regarding the Fair Share Act, negotiating settlements in cases involving Joint Tortfeasors, and trying cases with remaining Defendants.

■ **Adam Barnes** served as an author for a Continuing Legal Education program conducted by the National Business Institute titled *"Insurance Coverage Litigation Boot Camp"*, presenting on the topics of insurance contract interpretation, the rights and duties of insureds and insurers, and insights into how insurers investigate and evaluate first-party and third-party claims.

■ **Gina Zumpella** moderated a panel entitled *"Behind the Mask: Trying a Case in a Pandemic"* which including sitting Judges in both Allegheny and Blair County and the importance of moving forward with jury trials safely and efficiently.

Results

■ **Susan Kostkas** tried a 2-day binding arbitration on a nursing home case wherein Plaintiff-Estate claimed both compensatory and punitive damages which included reimbursement of an $117,000.00 medical lien. Plaintiff asserted the nursing home's nurses, therapists and medical providers were negligent in failing to investigate the cause of Plaintiff-Decedent's pain and continuing to provide therapy. Allegedly, the delay in diagnosis foreclosed surgical treatment options. This resulted in chronic pain and early admission to another nursing home for custodial care where she died. The Board of Arbitrators rejected the claim for punitive damages and entered an award for Plaintiff in the amount of $75,000 compensatory damages.

■ **Paul Walsh** obtained Summary Judgment in a head injury case arising from a falling tree limb. The insured tree removal service cut a large limb while Plaintiff concurrently walked into a drop zone. Due to his injuries, Plaintiff was unable to testify about the events immediately leading up to and during the incident. Plaintiff claimed brain damage resulting in cognitive injuries and demanded $1 Million to settle.

■ **Adam Barnes** obtained summary judgment on behalf of a client in 7 cases involving asbestos litigation filed in Allegheny County, Pennsylvania, based upon the lack of evidence that the plaintiffs ever came into contact with any asbestos-containing product sold by the client.

■ **Gina Zumpella** successfully tendered a defense from the insured General Contractor to its Subcontractor. This incident involved Plaintiff tripping and falling over a metal plate placed by the subcontractor and located on the side of the road. Plaintiff sustained significant injuries, including a torn right rotator cuff, concussion and a frontal periorbital facial hematoma.

■ **John Polena** obtained dismissal of a tungsten carbide product manufacturer involving claims for negligence and strict liability for its product allegedly having caused pneumoconiosis (hard metal lung disease) in the Plaintiff due to exposure at his employer's facility

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■ **Paul Walsh** obtained dismissal of a premises liability case arising out of a slip and fall. Plaintiff claimed she sustained a TBI and concussion which resulted in her inability to speak for months. She alleged she may never fully recover and submitted a life care plan of $1,474,456.04 for her future medical needs. The demand was $1.75 Million to settle this case. Summary Judgement was denied by the Trial Court; however, our appeal was granted by the Pennsylvania Superior Court, the case was dismissed and judgment entered in our client's favor.

■ **Susan Kostkas** was successful in enforcing an agreement for binding arbitration entered into by her nursing home client and the resident's power of attorney. Summary Judgment was granted in favor of the nursing home client with the Plaintiff's claim of corporate negligence dismissed.

■ **Adam Barnes** secured the voluntary dismissal of a client from asbestos litigation filed in Kanawha County, West Virginia. A Motion for Summary Judgment was filed averring lack of evidence that the plaintiff ever came into contact with any asbestos-containing product sold by the client.

■ **Gina Zumpella** obtained the dismissal of the insured in a premises case. Plaintiff presented a claim for a fractured ankle requiring several surgeries after allegedly falling at our client's bar. She withdrew her claim after it was established in discovery that she was intoxicated at the time of her fall and there was no defect on the premises.

■ **John Polena** obtained a voluntary dismissal on behalf of a mechanical contractor in a subrogation claim on behalf of a law firm for property damage, lost profits and moving expenses. Plaintiff alleged faulty HVAC work that caused a toxic substance to be emitted into the law office. Investigation conducted in discovery disclosed evidence that a fire in an adjoining building was the cause of emissions.

Top Ten March Madness Moments

10. (#13) Vermont Stuns (#4) Syracuse (2005)— Vermont's T.J. Sorrentine hit one from across the court to finally bury Syracuse in a tough fought game. No 13 seed Vermont eliminated No. 4 ranked Syracuse with a final score of 59 to 55.

9. (#3) Texas A&M overcame a 12 point deficit to (#11) Northern Iowa in 35 seconds to force double OT and a victory (2016). When all seemed lost, in the final half minute of regulation, Texas A&M ran a score of 14-2 against Northern Iowa, forcing overtime. After the first overtime, the game went to a second OT with Texas A&M winning by 4 points with a final score of 92-88.

8. (#15) Middle Tennessee shocks (#2) Michigan State (2016). In the second round, Middle Tennessee came out of the gate swinging, keeping Michigan State, a perennial powerhouse, on its heels throughout the entire game, never giving up the lead to take the game 90-81. Middle Tennessee became one of the few 15 seeds to unseat a 2 seed in tournament history.

7. Fall of Undefeated (#1) Kentucky to (#1) Wisconsin (2015). Kentucky, having gone undefeated during the year, came up against Wisconsin, another strong team, for what is considered one of the best games of the decade. Wisconsin had fallen to Kentucky the year before, but, despite a close game throughout 60 minutes, Kentucky came up short and suffered their first loss of the season.

6. (#15) Florida Gulf Coast makes a bang in its debut (2013). With its first ticket to the dance, Florida Gulf Coast came up against No. 2 seeded Georgetown. After defeating Georgetown, they went on to defeat No. 7 seeded San Diego State to become the first ever No. 15 seed to advance to the Sweet 16.

5. Sister Jean and the Final Four Miracle (2018). (#11) Loyola Chicago, through the grace of their court-side saint, the 98-year-old Sister Jean, became only the fourth No. 11 seed to make it to the Final Four. Unfortunately, the magic faded when Loyola Chicago fell to (3) Michigan in the Final Four.

4. (#11) Virginia Commonwealth removes (#1) Kansas (2011). Virginia Commonwealth was heavily mocked upon their entry to the big tournament by analysts but came out with a huge win over Kansas to steam roll to the Final Four with a final score of 71 to 61.

3. No. 15 seeds Lehigh and Norfolk State defeat No. 2 seeds Duke and Missouri (2012). In one of the most stunning afternoons in NCAA history, two No. 15 seeds took out some of the most touted teams of the tournament that year, causing almost ever bracket to go into the trash in the first round.

2. (#16) University of Maryland Baltimore County topples (#1) Virginia in the first round (2018). In the biggest upset in the early rounds yet, a relatively unknown UMBC took on the dominant Virginia team. UMBC held their own in the first half, but began to distance themselves in the second, leading to a No. 16 seed taking down a No. 1 seed for the first and only time in the history of March Madness.

1. (#8) Villanova defeats (#1) Georgetown (1985). Georgetown, the defending national champion, and eventual first overall pick Patrick Ewing were favorites in the game. However, Villanova had already left a path of heavily touted teams such as Michigan, North Carolina and Memphis in their wake. In a miracle run, Villanova held on to win 66 to 64 and capture the NCAA Championship, pulling off one of the greatest upsets in NCAA tournament history.