VOLUME 9 ISSUE 1

PROFESSIONAL LIABILITY DEFENSE QUARTERLY

WINTER 2017

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SURVEY OF OPTOMETRIC MALPRACTICE DEVELOPMENTS, BY THOMAS D. JENSEN, ESQ.

Professional liability claims are occasionally brought against optometrists when eye damage or loss follows optometric care. We review here a summary of the status of this litigation.

Three specialties address eye healthcare. An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses and contact lenses. An optometrist's scope of practice differs from opticians and ophthalmologists. The optician is an artisan qualified to shape lenses, fill prescriptions, and fit frames. An ophthalmologist is a physician who specializes in the medical and surgical management of eye disease and injury. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 486, 75 S. Ct. 461, 463 (1955).

Optometric Scope of Practice

Optometry is a branch of health care that deals with the diagnosis and measurement of the optical system including the prescription of certain medicines and corrective lenses. Sam A. Macke, *Negligence of Optometrist*, 16 Am. Jur. Proof of Facts 3d 49, 56 (1992). (In other words, optometrists treat vision disorders; ophthalmologists, on the other hand, treat disorders of the eye itself.) *Id*. In evaluating standard of care compliance, optometric examinations should include the following: taking of a history, performance of visual acuity measurements, use of a ophthalmoscope[1] to examine the interior portion of the eyes, use of a phoropter to examine the retina, subjective examination of the eye, use of a muscle balance examination to evaluate near and distant vision, and a glaucoma[2] test. *Id*., at 62-63. Examinations may also employ a tonometer (used to measure intraocular pressure), retinoscope (used to measure vision accuracy), fundoscope (used to gain a two-dimensional view of the back of the eye), or a biomicroscope (a slit lamp to enlarge the eye's interior structures). *Id.*, at 64-65. Diseases that are also discoverable by proper optometric examination include brain tumors, diabetes, kidney disorders, hypertension and infections. *Id*. at 66.

Duties of Optometrists

The following deviations from the standard of care my subject the optometrist to liability: failure to obtain informed consent, failure to take accurate history, failure to conduct appropriate examinations, failure to recognize pathological disease, failure to recognize cataracts, amblyopia, strabismus, nearsightedness, farsightedness, astigmatism, presbyopia, or retinal detechment,[3] failure to prescribe or fit proper corrective lenses leading to falls, vehicular collisions, or

Continued on next page

WORKING WITH EXPERT WITNESSES: TIPS THAT ARE NOT IN THE CIVIL RULES, BY: LOUIE CASTORIA, ESQ., AND FREDERICK J. FISHER, J.D., CCP

Insurance defense attorneys inhabit a confusing world in which even the "routine case" may need an expert witness for trial or a consultant to help with an early evaluation for settlement purposes. The legal precedents, regulations, and such don't often say what the profession's standard of care in the community is in the exact situation.

For the past six years I have been writing a quarterly column on avoiding errors and omissions ("E&O") exposures for *National Underwriter Property & Casualty 360* magazine and its predecessor, *American Agent & Broker*. The column explains to insurance professionals the looking-glass world that we lawyers inhabit, and in which brokers and agents occasionally find themselves. Looking back on those columns, there are themes that emerge from the cautionary tales of actual court decisions over those years.

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OPTOMETRIC MALPRACTICE, CONT'D

corneal damage, failure to apply topical pharmaceutical solutions properly, failure to refer, failure to timely diagnose, failure to provide continuing care, or attempting to provide medical diagnoses beyond the optometrist's scope of practice. *Id*., at 83-83. Optometrists have a duty to refer to medical specialists when they discover pathology requiring care beyond their scope of practice. *See, e.g., Tempchin v. Sampson*, 277 A.2d 67 (Md. App. 1971) (involving failure to diagnose uveitis leading to blindness); *Steele v. United States*, 463 F. Supp. 321 (D. Alaska 1978) (involving delayed referral to ophthalmologist resulting in eye loss). With respect to the prescription of pharmaceuticals to treat conditions within the optometrist's scope of care, the optometrist is obligated to choose the correct medication, and to closely monitor the patient's reaction to the drug. Macke*, supra,* at 71-72.

As in any professional liability action, plaintiff must establish the standard of care. *See McCarter v. Lawton*, 44 So. 3d 342 (La. App. 2010) (involving failure to perform dilated eye examinations). An optometrist must exercise the degree of skill expected of an optometrist acting under the same or similar circumstances. *Morrison v. MacNamara*, 407 A.2d 555, 561 (D.C. App. 1979).

Expert Testimony

Due to some overlap between the optometric and ophthalmological professions, a number of cases have evaluated whether one profession may testify against the other. In general, ophthalmologists may not provide standard of care opinion testimony against optometrists. *Bates v. Gilbert*, 736 N.W.2d 566, 571 (Mich. 2007) (finding that ophthalmology is not the "same health profession" as optometry so affidavit of merit was ineffective); *Evans v. Griswold*, 935 P.2d 165, 169 (Idaho 1997) (noting that the ophthalmologist testified he was not familiar with the optometric SOC).

Ophthalmologists may, however, testify about causation in optometric malpractice cases. *See Ribeiro v. Rhode Island Eye Institute*, (R.I. 2016) (involving delay in reacting to retinal detachment risk). They may also testify in optometric failure-to-refer cases. *Christopherson v. Lenscrafters, Inc*., 2009 N.Y. Slip. Op. 30593 (Sup. Ct. March 13, 2009) (involving ophthalmologist who opined that referral delay did not cause adverse outcome). In *Moss v. Miller*, 625 N.E.2d 1044, 1054 (Ill. App. 1993) the court allowed an ophthalmologist to testify about the optometrist's referral error on grounds that physicians who are not capable of providing necessary treatment should not be preferred over those who know "a referral should be made").

Similarly, optometrists may not provide expert opinion standard of care testimony against ophthalmologists. *See Davis v. Webb*, 246 S.W.3d 768, 776 (Tex. App. 2008) (concurring opinion questioned whether the same outcome should occur "where the optometrist is well trained in post-operative treatment"). Yet it was also held in Texas (which has a special statutory test) that a therapeutic optometrist is held to the same SOC as an ophthalmologist. *See Whittley v. Heston*, 954 S.W.2d 119, 123 (Tex. App. 1997) (adding that a testifying expert cannot establish the SOC by simply stating the course of action she or he would take in similar circumstances). *See also Davis v. U.S*., 2012 WL 424887 *6 (E.D. Ky. 2012) (ruling that optometrist may be qualified to give SOC expert testimony in an ophthalmology malpractice case for patients "who have recently received cataract surgery").

Although expert testimony ordinarily is required to establish standard of care breach and causation, the "common knowledge" or "obvious occurrence" exception to the rule may apply. *See Heimer v. Privratsky*, 434 N.W.2d 357, 361 (N.D. 1989) (involving toxic substance placed in eye while fitting contact lens).

Other Evidentiary Issues

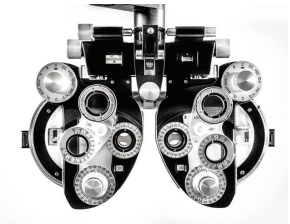
In states involving medical review panel findings of malpractice, an optometrist may not rely on conclusory, mere restatements of pleading denials to avoid patient summary judgment motions. *See Scripture v. Roberts*, 51 N.E.3d 248 (Ind. App. 2016) (affirming patient summary judgment in case involving eye injury leading to corneal transplant). Indiana also ruled that statutorily a medical review report is admissible in a subsequent malpractice civil suit where the panel members may be cross-examined about the findings. *See Dickey v. Long*, 575 N.E.2d 339 (Ind. App. 1991) (involving failure to observe that a child's optic discs were elevated).

SOC Breach and Causation

As expected a number of cases have upheld optometric malpractice liability in failure to refer contexts. *See, e.g., Fairchild v. Brian*, 354 So. 2d 675 (La. App. 1977) (involving delay in discovery of detached retina); *Steele v. United States*, 463 F. Supp. 321 (D. Alaska 1978) (involving granulomatous retinitis leading to enucleation). In a "missed appointment" case it was held that an optometrist is not negligent for delaying performance of a glaucoma test due to an irritated eye condition, when the patient failed to appear at the reset appointment. *See Treharne v. Dunlap*, 565 N.Y.S.2d 664 (Sup. Ct. Feb. 1, 1991).

In a case involving Pennsylvania's "corporate negligence" case law, it was held that an optometrist's corporate employer could not be held liable because unlike hospitals patients have full freedom to choose where to receive optometric care. *See Milan v. American Vision Center*, 34 F. Supp. 2d 279 (E.D. Penn. 1998).

In regard to causation no cause verdicts will be set aside when the evidence shows conclusively that eyesight failure could have been forestalled or delayed had the optometrist promptly diagnosed glaucoma.



"Due to some overlap between the optometric and ophthalmological professions, a number of cases have evaluated whether one profession may testify against the other."

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OPTOMETRIC MALPRACTICE, CONT'D

Romero v. Riggs, 24 Cal. App. 4th 117, 29 Cal. Rptr. 2d 219 (App. 1994) (involving three optometrists and three ophthalmologists who testified that had the patient's glaucoma been timely diagnosed vision loss would have been reversible). Even if failure to diagnose a cataract constitutes a breach of duty, claim will fail if plaintiff cannot prove cognizable injury causation. *See Boothe v. Weiss*, 107 App. Div. 2d 730 (N.Y. Sup. Ct. Jan. 22, 1985).

Causation may be established per the "lost chance" theory by demonstrating that the optometrist's negligence increased the risk of harm. *See Keir v. United States*, 853 F.2d 398, 416 (6th Cir. 1988) (reversing a defense summary judgment on grounds the "overwhelming evidence" required ophthalmological referral when tumor discovery was delayed).

Limitations Statutes

Of course the statute of limitations often is a key defense in optometric malpractice actions. Some courts apply the occurrence rule, which bars claims regardless of discovery. *See, e.g., Homes v. Iwasa*, 104 Idaho 179, 657 P.2d 476 (1983) (ruling that the legislature's discovery exception did not apply to optometrists). Other courts adopt the discontinuation of treatment rule. *See, e.g., Wells v. Billars*, 391 N.W.2d 668 (S.D. 1986) (ruling that the duty continued up to the date of the follow-up appointment). In discovery rule states the statute expires if the patient becomes aware of the possibility of optometric error but does not sue until it is confirmed. *See Webb v. Ocularra Holding, Inc*., 232 Wis. 2d 495, 606 N.W.2d 552 (App. 1999) (involving failure to diagnosis brain tumor). *See also Booth v. Wiley*, 839 N.E.2d 1168 (Ind. 2005) (alleging negligent LASIK[4] recommendation and applying the discovery rule). A new symptom (or injury) may re-commence the running of the SOL in some states. *See, e.g., Zechmann v. Thigpen*, 437 S.E.2d 475 (Ga. App. 1993) (involving failure to refer to ophthalmologist and new symptoms developed four years later).

Some cases have evaluated whether medical malpractice limitations statutes apply to optometric cases. *Compare Whitt v. Columbus Cooperative Enterprises,* 415 N.E.2d 985 ((Ohio 1980) (ruling the medical malpractice one-year SOL did not apply to optometrists) *with Webb, supra* (ruling the medical malpractice SOL did apply to optometrists). If "optometrist" is not included in the statutory list of professions that affidavit of merit requirements apply to, the requirements may not apply. *See Mirow v. LeBovic*, 2009 WL 5206249 (D.N.J. 2009) (involving detached retina). Principles of statutory construction in each state may determine whether optometrists fall within the (typically shorter) medical malpractice limit, when optometry is not identified in the statute. *See Broussard v. Sears Roebuck and Co*., 568 So. 2d 225 (La. App. 1990); Annot., *When Limitations Period Begins to Run on Claim for Optometrist's Malpractice*, 70 A.L.R.4th 600 (1989) (noting that claimants may argue the bodily injury statute, or UCC statute (i.e., the sale of lenses), may apply if medical malpractice statutes arguably do not apply to optometrists).

Under the continuing wrong doctrine the SOL is tolled until the wrongful act ceases. *Smith v. Washington*, 716 N.E.2d 607, 615-17 (Ind. App. 1999) (holding the statute begins to run "on the last date the optometrist treated the patient"). Telephone calls subsequent to treatment, however, will not trigger the continuing wrong doctrine when the calls did not involve diagnosis or treatment. *See Coffer v. Arndt*, 732 N.E.2d 754 (Ind. App. 2000) (involving failure to detect glaucoma); *Flaherty v. Kantrowich*, 41 N.Y.S.3d 502 (Sup. Ct. Nov. 22, 2016) (ruling that routine exams are not a course of treatment). Failure to refer in 1981 when evidence of glaucoma was present was not barred by a two-year statute when the referral was made after a 1983 examination when advanced glaucoma was discovered. *Morgan v. Taylor*, 434 Mich. 180, 451 N.W.2d 852 (1990) (noting there was no discontinuation of treatment between the exams). On the other hand a court has held that routine examinations of a patient who appeared to be in good health was not a course of treatment triggering the continuing wrong doctrine. *See Cassara v. Larchmont-Mamaroneck Eye Care Group*, 600 N.Y.S.2d 107 (Sup. Ct. June 21, 1993). Arguments will arise as to whether post-examination acts of optometric staff in fitting eyeglasses and other encounters extend the limitations period. In a missed appointment case the court ruled that the limitations statute began to run when the optometrist scheduled a follow-up appointment that the patient failed because granting of the appointment involved "otherwise serving" the patient in the statue's statutory law. *See Thomas v. Golden*, 51 Mich. App. 693, 214 N.W.2d 907 (1974).

Fraudulent concealment may toll the running of a statute of repose. *Tigrett v. Linn*, 2010 WL 1240745 (Tenn. App. 2010) (involving optometrist who recommended LASIK surgery after informing patient he had no evidence of Keratoconus – a degenerative corneal condition).

Professional Liability Insurance

Professional liability insurance cases involve the usual coverage analytical templates. They include those in which an optometrist treats outside the scope of practice (in which coverage has been denied). *See Kime v. Aetna Cas. & Sur. Co*., 66 Ohio App. 277, 33 N.E.2d 1008 (1940) (involving optometrist who attempted to remove a foreign particle from patient's eye using a surgical instrument). Optometry is a professional service that may trigger the professional services exclusion in a general liability policy. *See National Fire Ins. Co. v. Kilfoy*, 874 N.E.2d 196 (Ill. App. 2007).

Professional Liability Defense Federation's eleven substantive committees include:

- **Medical**
- **Legal**
- **Accounting**
- **Investment**
- **Corporate Governance**
- **Insurance**
- **Real Estate**
- **Construction Design**
- **Cyber Liability**
- **EPL Claims**
- **Miscellaneous Professional Liability**

"Some cases have evaluated whether medical malpractice limitations statutes apply to optometric cases."

PLDF AND DIVERSITY

Professional Liability Defense Federation supports diversity in our member recruitment efforts, in our committee and association leadership positions, and in the choices of counsel, expert witnesses and mediators involved in professional liability claims.

OPTOMETRIC MALPRACTICE, CONT'D

Conclusion

Health care malpractice claim professionals and counsel will fit right in to the adjustment or defense of optometric professional negligence claims. Expert witness recruitment, affidavit of merit scrutiny, limitations defense enforcement, and causation defense development preparations all carry over to these claims. Learn the diseases and science and you are good to go.

Endnotes

1. Ophthalmoscope is used to evaluate the back of the eye to determine if the retina, macula and fovea are normal.

2. Glaucoma is related to optic nerve damage often caused by elevated pressure within the eye. A floater is a small piece of eye protein that is loose within the main chamber of the eye.

3. Retinal detachment occurs when a tear develops in the back of the eye that can fill with fluid and cause the retina to pull away from the back of the eye.

4. LASIK stands for Laser-Assisted in Situ Keratomieusis.

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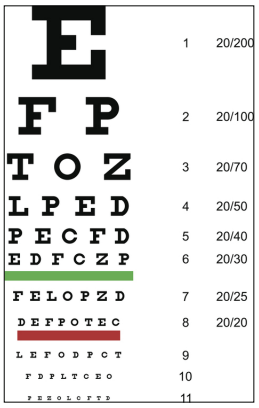

TIPS FOR WORKING WITH EXPERTS, CONT'D

My co-author, Mr. Fisher, has spent the past 41 years engaged in the claim resolution process and/or in providing insurance to other professionals—in other words, inhabiting the looking glass we lawyers sometimes overlook at our peril.

Here are our collective thoughts about the rules on experts that aren't in the procedure books.

1.Earlier is better. Standard-of-care issues in a case should be framed as early as possible. This may often be accomplished in as little as ninety days from the opening of the file. The issues can be defined, and the needs for expert testimony can be assessed, as can the kind of expert(s) who should be engaged. In a given case these might include a standard-of-care expert, as well was tax, reconstruction, environmental, human resources, and other experts. All it takes is some informed forethought. It costs little, sometimes nothing, to get an early "curbside" consultation.

2. How much information is enough? The tricky part is having *enough* information about the case to allow a consultant to assist in suggesting investigation or discovery that the case needs, based on standard industry practices, without waiting for the results of formal discovery. By that time the proverbial horse is out of the barn. Do industry organizations have online resources about the subjects at issue? What are the applicable governmental or self-regulatory authorities? Who are the reliable "heavy hitters" among experts in the specific area?

A lawyer sees a new complaint that has been filed in court and starts thinking, "Affirmative defenses." An industry consultant sees the same complaint and starts thinking, "Where are the records that will prove or disprove the allegations or the claimed damages?" In this context, the "looking glass" is a telescope—the lawyer and the expert look through different ends of the tube.

What the lawyer provides to the consultant or expert is equally important. While we all want the perfect case and the strongest expert opinion, life doesn't deal us a royal flush every time, if ever. Honesty is still the best policy, and an honest opinion that recognizes the shortcomings in the case as well as its strengths will be more credible to a judge or jury. (Those shortcomings, if recognized up front, can often be diminished in importance through counter-arguments on lack of causation and damages.)

Experts, whether formally retained or just providing initial observations, should be provided with evidence for the downside of a case as well as the upside. This prevents "unwanted surprises" and is often a catalyst for a creative solution

3. Whose case is this? When the time to retain an expert or consultant is nigh, it's also time to clarify two closely-related issues: (a) Who is retaining the expert? (b) Who is paying the expert? Many experts' standard fee agreements recite that they are being hired by the law firms. That is a half truth. Just as a general contractor may hire a soils subcontractor, the subcontractor's work is being performed for the benefit of the developer or owner. In the legal milieu, it's the client's case, not the lawyer's.

Lawyers should be clear that when they "hire" an expert they are doing so on behalf of the client, and are acting as agents to effect that hiring. Experts may want to have the law firm "on the hook" for their bills, but the proper paying party is the client, or perhaps the client's liability insurer. Establishing in writing from the outset who the expert is really working for, and who is really responsible to pay the bills, can

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***PLDQ*'s Spring 2017 Issue**

We encourage member submission of articles pertinent to professional liability claims administration, defense trial advocacy, or professional liability substantive law. The manuscript deadline for the next issue is:

May 1, 2017.

TIPS FOR WORKING WITH EXPERTS, CONT'D

avoid a lot of divisive communications down the road.

4. Free parking. It costs little or nothing to "park" an expert, meaning an initial retention as a consultant that makes the expert unavailable to opposing parties. The expert's work can be put on hiatus after the "curbside" opinion, and reactivated when later needed.

The "curbside" opinion will often be in the form of questions that outline information that needs to be obtained from a variety of sources, including discovery. Once obtained, the conclusions drawn from the information may moot the need to litigate or may require that gearing up for trial.

A few extra insights can make a world of difference in a case, with fewer surprises and regrets as to what "might have been done."

5. The good, the bad, and the ugly. Lawyers are advocates, and as such try to paint the best picture of the facts for their clients. It's a good strategy in front of a jury or arbitrator, but not with an expert. The *non-confidential* information about the case that the other side is going to learn anyway should not be kept from an expert. Otherwise, a strongly favorable expert opinion can tumble like a house of cards on cross-examination. It can ruin your whole day, not to mention the case.

Sometimes, your expert can do you an immense favor (if hired early) by identifying a truly hopeless case—one that should be settled before the other side realizes just how good their case is. But he or she can only do that with an accurate knowledge of the facts.

A caveat: the attorney's opinions about the case and confidential communications with the client should not be given to an expert, or they may become discoverable. There are ways to get damaging information to an expert without breaching the attorney-client or work-product privileges.

6. The Scouts' Motto. Be prepared for the unexpected, and be flexible. We develop our own narrative of a case early in its life span. How often we reach snap judgments—the case is a "dead bang loser," a "bunch of B.S.," or a "cake walk." We become committed to those perceptions in our early reports to clients. Changing our evaluations can be like a loaded oil tanker trying to make a 90-degree turn.

Major shifts in case evaluations are preferable before most of the budgeted defense fees and costs have been incurred, for obvious reasons. A consultant's timely input can aid defense counsel and the liability insurer in avoiding a change in the case's evaluation based on factors outside counsel's legal training and expertise, long before the courthouse steps are in sight.

Every case is really three different cases: the one that walks in the door and about we form our initial impressions, the one we learn about through discovery, and the one that the judge, jury, or arbitrator hears at trial. It is, after all, completely new to those who decide its outcome. An early consultation helps assure that the first case's trajectory is straight and true, and may need only minor mid-course corrections.

We've all heard the lesson since childhood: a stitch in

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Frederick J. Fisher started his career in professional liability claims adjusting that included auditing, risk management services, and TPA work. He then founded ELM Insurance Brokers and served as CEO for 20 years. Frederick ates **Fisher Consulting Group** in **El Segundo, California**, and can be reached at fjfisher@fishercg.com.

> "Major shifts in case evaluation are preferable before most of the budgeted defense fees and costs have been incurred, for obvious reasons."

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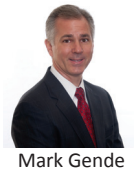
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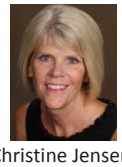
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MEDICAL COMMITTEE CHAIR STEPHEN B. SAMBOL

time saves nine.

Stephen B. Sambol is with Mateer Harbert in Orlando, Florida. Stephen defends medical malpractice and other professional liability claims, and he also advises clients in commercial litigation, cyber liability, and insurance coverage matters. Not surprisingly, being from central Florida, Stephen also has expertise in equine law.

Stephen attended the University of Pittsburgh School of Law, as well as Stetson College of Law, and is licensed to practice in the state and federal courts in Florida. He is also a Florida certified civil mediator, and he has received Florida Supreme Court training as an arbitrator. He is a member of the American Health Law Association, the Trial Law Institute, the Diversity Law Institute, a Fellow in the Litigation Counsel of America, and he has received the "AV" rating from Martindale-Hubbell. He is active in the Business Law and Health Law Sections of the Florida State Bar.

Stephen has authored articles on the subjects of cyber liability, computer consultant malpractice, anti-kickback and self-referral laws affecting health care professionals, dual agency in equine sales, communications-based lawsuits, and Florida constitutional amendments affecting physicians. Stephen has also served as Vice Chair of Professional Liability Defense Federation's Cyber Liability Committee.

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Glen R. Olson is with Long & Levit, LLP in San Francisco. He has defended attorneys, accountant, insurance agents, escrow agents, real estate brokers, and directors and officers. Glen also has an extensive background in insurance litigation, with a particular emphasis on professional liability/ errors and omissions coverage. Between 1997 and 2005 he was an officer of a national insurer, leading first its extra-contractual claims unit, and then its lawyers and accountants professional liability claims departments.

Glen has jury and bench trial experience, and was named a 2012, 2013 and 2014 Northern California Super Lawyer®. He is Co-Chair of the State Bar of California Committee on Professional Liability Insurance, and was previously Chair of the American Bar Association Torts, Trials and Insurance Practice Section Professionals, Officers and Directors Liability Committee.

Glen speaks at events sponsored by the ABA, State Bar of California, and Bar Association of San Francisco. He is a Registered Professional Liability Underwriter (RPLU), an Associate in Risk Management (ARM), and has spoken at PLUS, DRI, and IADC conferences. Glen is licensed to practice in the state and federal courts in California. He is a graduate of the University of California, Hastings College of Law (J.D. cum laude). Glen may be reached at golson@longlevit.com.

Please note the accompanying biographies of four of Professional Liability Defense Federation Committee leaders. This will be a regular feature in the *PLDQ.*

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Stuart T. O'Neal, III, is with Burns White in it Philadelphia (Conshohocken) office. Stuart defends medical malpractice, data breach and privacy, employment, and officers and directors claims in the state and federal courts in Pennsylvania. He also litigates commercial and contract claims. Stuart is Co-Chair of Burns White's Cybersecurity and Professional Liability Groups, and was named the firm's first Chief Privacy Officer in 2014.

Stuart also serves as a Judge Pro Tem in Philadelphia County and as a mediator in Montgomery County. A graduate of Villanova University School of Law, Stuart has also been named a Pennsylvania Super Lawyer®. He is a past president of Professional Liability Defense Federation. Stuart can be reached at soneal@burnswhite.com.

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Christopher speaks on professional liability issues before the New Jersey State Bar Association, other bar associations, and the New Jersey Society of Certified Public Accountants. He is licensed to practice before the state and federal courts of New Jersey and New York. He is a graduate of the Seton Hall University School of Law (J.D.), and has been selected for inclusion in New Jersey Super Lawyers® from 2005 through 2016. Christopher may be reached at ccarey@grahamcurtin.com.

PROFESSIONAL LIABILITY DEFENSE QUARTERLY
is published by:
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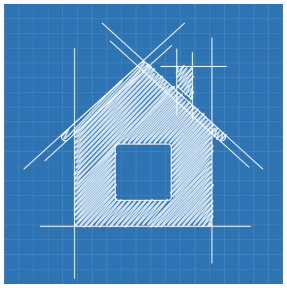
2017 ARCHITECT/ENGINEER CASELAW UPDATE, BY THOMAS D. JENSEN, EDITOR

The new year has started out with growing activity in the construction design professional liability space. Please note the following developments.

Client hired engineering firm to provide design and permitting services for a new beachfront development. Michael Kiefer was a project manager on the team. He coordinated the team but did not manage the licensed engineers' work. Kiefer had passed the state "fundamentals of engineering" test and was therefore certified as an engineer intern. Following project delays suit was brought against the firm and all team members for professional negligence. Evidence showed that Kiefer was not a licensed engineer and could not sign and seal plans. Trial court ruled on a Rule 12 motion that Kiefer was not a design professional. The ruling was affirmed in *Sunset Beach Investments LLC v. Kimley-Horn & Associates Inc*., 2017 WL 33678 (Fla. App. Jan. 4, 2017). Recognizing that a licensed engineer could be subject to a professional negligence claim, here Kiefer was not a licensed engineer. The legislature classified him as an engineering intern. Rejecting analogies to surveyors and insurance adjusters, the court noted that they are licensed. Client was unable to cite any authority supporting professional liability claims against unlicensed persons. Licensing rules show what the legislature expects in determining who should work in the profession. An intern does not meet the threshold and therefore the PL claim could not lie against Kiefer.

A recent Pennsylvania decision analyzed the need for expert opinion testimony in engineering professional negligence claims, and the role of affidavits of merit in those claims. Engineering firm prepared a subdivision plan that would allow a city to acquire a parcel needed for the construction of a water tower. In exchange the city would provide sewer and water to four lots on the seller's remaining property. A 50-foot right of way was planned for the parcel, and an easement was recorded. When the water line was thereafter installed, sellers claimed it was placed in a location outside the right of way. Suit followed against the engineering firm. Summary judgment was argued and granted for the engineering firm when the sellers failed to obtain expert witness support. In *Plaza v. Herbert Rowland and Grubic, Inc.*, 2017 WL 519827 (Pa. Super Jan. 30, 2017 the court upheld dismissal of the professional liability claim. The common knowledge exception could not apply to the question whether the piping was installed at the right depth in the correct location. The court also ruled plaintiffs' trespass claim was barred on grounds plaintiffs consent to the water line placement under the unbuilt portion of the road right of way.

A New Hampshire school was supposed to cost $4.7 million; final cost exceeded $9 million. School district sued the architect who gave the $4.7 million estimate for malpractice. Based on the estimate the district had voters approve the construction, and it rejected other proposed fixes for the building deterioration. Construction delays, design modifications, and damage from exposure to the elements pre-enclosure followed. Architect resigned and the successor completed the project. In *Unity School District v. Vaughn Assocs. Inc.,* 2017 WL 280695 (D.N.H. Jan. 20, 2017) architect sought summary judgment, contending school district could not prove damages caused by architect's malfeasance. Architect said the district paid what it had to pay to complete the project, and approved all design changes that increased costs. But the court countered that architect repeatedly assured the district about costs, and cause district not to make other plans and lower costs. Here architect failed to monitor and manage changes to keep costs to its estimate, he proposed plans that failed best practice guidance, he failed to interact suitably with state authorities regarding the project, and caused delays. Further district showed cognizable damages claims consisting of the architect's fees, the cost to bring the plans into regulatory compliance, and other evidence showed the project should have been completed for $8.1 million.



In *Toscano v. Weiss*, 2017 WL 416987 (N.Y. Sup. Ct. Jan. 20, 2017) defendant retained plaintiff to provide architectural services for the erection of an apartment building. Plaintiff sued for unpaid fees. Defendant counterclaimed for malpractice, but did not seek arbitration as required by the engagement agreement. Defendant claimed plaintiff failed to submit documents to city authorities in time to obtain certain tax abatements. At summary judgment plaintiff submitted his own affidavit demonstrating compliance with the standard of care. In affirming summary judgment the court ruled that whether delays in regulatory submissions constituted architectural malpractice did not fall within the common knowledge exception to the expert support requirement. "Plaintiff's submission of his own affidavit was sufficient to make out a prima facie case that he had not committed malpractice."

Suit was brought (apparently subrogation) following a fire against a general contractor for failure to install a lightning protection system (LPS) throughout the tanks of an oil facility in New Mexico. Dispute arose as to whether NFPA Standard 780 (relating to the design of lightning protection systems was admissible. Defendant contended the standard was irrelevant because per the economic loss rule, negligence-based evidence is inadmissible. In *Atlantic Specialty Ins. Co. v. Deans, Inc*., No. Civ. 13-945 (D.N.M. Jan. 18, 2017) the court ruled that defendant had a duty to design and install a code-compliant LPS. Therefore the economic loss rule did not bar the claim and NFPA 780 was declared ad-

> "The new year has started out with growing activity in the construction design professional space."

2017 ARCHITECT/ENGINEER CASELAW UPDATE, CONT'D

missible as it is "the guiding standard of care for design and installation of an LPS."

In *Hill City High School District No. A v. Dick Anderson Constr., Inc.*, 2017 WL 491783 (Mont. Feb. 7, 2017) a school roof collapsed and had presented ongoing leakage problems since construction was completed. Suit was brought against the contractor and architect more than ten years after final construction. Montana has a ten year statute of repose affecting improvements to real property. Court ruled that the statute began to run when the school was in full use. As that was more than ten years after suit was brought the court majority affirmed summary judgment for the architect. It also ruled that the repose statute cannot be tolled.

When the Swormville Fire Department needed a new fire hall it hired architects for the design. An issue arose as to whether a certain wall needed to be a fire wall in compliance with the state building code. Trial court granted summary judgment to the fire department based upon its expert's opinion affidavit against the architects. That was reversed in Swormville *Fire Co. v. K2M Architects P.C.* 2017 WL 458544 (N.Y. Sup. Ct. Feb. 3, 2017). The expert disclosure was conclusory and involved mere speculation because it failed to reference code provisions supporting the opinion, and because the defense expert countered plaintiff's expert's opinion.

In 2000 a lender obtained a Phase I environmental assessment to support the owner's loan application. (The site had earlier been a gas station.) No contamination was found. In 2006 owner sold the parcel to her corporation. Plaintiff sold the parcel in 2010 and oil contamination was found during pre-closing investigations. Plaintiff sued the environmental engineers for malpractice in not discovering the contamination in 2000. In *Mao v. Piers Environmental Services, Inc.*, 2017 WL 511853 (Cal. App. Feb. 8, 2017) the court affirmed dismissal of the claim. Court held defendant owed not duty to plaintiff because it was engaged by the lender in 2000, not plaintiff. Further, plaintiff could not prove damages because she sold the parcel to her corporation after the 2000 assessment and no longer owned the land when the contamination was found.

In a coverage case a project engineer sued its CGL carrier for defense and indemnity after methane gas ignited on a construction site causing personal injuries. Claimants alleged defendant was negligence in providing engineering services. In *Orchard Hiltz & McCliment Inc. v. Phoenix Ins. Co.*, 2017 WL 244787 (6th Jan. 20, 2017) the court affirmed a ruling coverage was precluded by operation of the professional services exclusion. This was so even though some of the underlying facts involved tasks "that do not, in and of themselves, involve a specialized skill" when they are reasonably related to [the] overall provision of professional services."

PRESIDENT'S MESSAGE

I am truly honored to serve as this year's PLDF president. The PLDF Board of Directors is looking forward to an exciting year. The Board met on January 19th and 20th and worked on both long range and short term planning issues for the coming year. Considerable energy will focus on enhancing the benefits of committee membership. It is through the work of our committees that we the PLDF can accomplish its mission of enhancing the stature and effectiveness of professional liability defense professionals through education, training, and the exchange of information. The challenges of working in professional liability defense continue to mount. The PLDF keeps us current in identifying and dealing with those challenges through its seminars and publications dealing with those challenges.

The organization will continue to thrive and grow if we all participate. Both our industry and lawyer members can provide timely, innovative information on topics of interest to us all. The PLDF website provides a gold mine of information. I encourage everyone to take advantage of what the website offers. And if you are so inclined, contribute to our PLDF Quarterly! Articles on both lawyerly and practical topics are welcome.

I would strongly encourage everyone to get involved. Join committees that interest you. If you are interested in being considered for committee leadership, please contact the PLDF office for information on applying.

Planning is underway for the 2017 Annual Meeting. This year's meeting will be held in Chicago at the Westin Chicago River North, September 27th through the 29th. A call for program ideas is in your inbox. If you have an idea, submit it! And make plans now to attend.

I would also encourage everyone to sponsor at least one new member this year. Industry members, talk the organization up to your defense counsel. Lawyer members, encourage your clients, partners and associates to join. I don't believe there is any other organization that provides the value that the PLDF does for those of us in this line of work.

Please feel free to contact me directly with any questions or concerns, and I'll see you in Chicago in September.

Timothy J. Gephart, C.P.C.U. is President of PLDF and Vice President—Claims at **Minnesota Lawyers Mutual Insurance Company**. MLM writes LPL insurance in 15 states. Tim may be reached at **tjg@mlmins.com**.

PLDF Amicus Program

Please let us know of appeals in your jurisdictions implicating important professional liability issues that might have national significance.

"I don't believe there is any other organization that provides the value that the PLDF does for those of us in this line of work."