

Our Spring edition of Your Best Defense offers an exciting look at some areas of law that have not been the focus of past newsletters.

Jaime Fabert, one of the newest additions to our professional staff, has taken a fresh look at the Supreme Court's 1987 opinion in Marshall v. Michael Baker Jr., Inc., in which our office successfully defended a design professional in a lawsuit arising out of a construction project. The limitations on a design professional's liability generated by that case to this day have important and lasting effects, and Jaime addresses the continuing impact of that pivotal decision.

The legislature's recent efforts to insulate a large cross section of professionals from frivolous malpractice litigation is addressed by James Creenan. Jim, who in the Winter edition of Your Best Defense examined the new Fair Share Act and its likely resounding impact on tort reform in Pennsylvania, in this edition analyzes the new professional liability statute and the requirements of expert



review and the issuance of a certificate of merit before a suit can move forward.

Paul Mannix has authored an article addressing the recent clarification of the economic loss doctrine provided by the Pennsylvania Superior Court. Much of the discussion of this doctrine has come from the federal courts in Pennsylvania, but a state appellate court has now provided some long-awaited explication.

Finally, I am pleased to offer another contribution to Your Best Defense, this time looking carefully at a recent Superior Court opinion where, for the first time, an appellate court addresses the issue of whether an easement holder can assert immunity as an owner under the Recreational Use of Land and Water Act.

*Once again, it is hoped that the foregoing articles are found useful and interesting. If you know of anyone that might benefit from Your Best Defense, and who is not now on our mailing list, please let me know at [dforsythe@waymanlaw.com](mailto:dforsythe@waymanlaw.com).*

## RECREATIONAL USE OF LAND AND WATER ACT

By: Dale K. Forsythe

A recent decision by the Pennsylvania Superior Court has helped clarify the extent of applicability of the Recreational Use of Land and Water Act (RULWA) relative to a holder of an easement over a section of unimproved land.

In a case of first impression on this issue, the Superior Court issued an opinion February 24, 2003 (revised February 25, 2003) in the case of Benjamin Stanton, et.ux. v. Lackawanna Energy, Ltd, et.al, 2003 Pa.Super 71. Minor plaintiff was injured when riding a motorbike on land owned by defendant Lackawanna. Defendant Pennsylvania Power and Light Co.(PPLC) had in 1982 purchased an easement over a section of the land involved for the erection and maintenance of power lines. A steel swing-arm gate had been erected by PPLC at an access road for service of this easement, and

minor plaintiff was injured when he collided with this gate. PPLC sought entry of summary judgment based upon statutory immunity under the RULWA, and the issue eventually certified for appeal was whether an easement holder would be considered an "owner of land" as defined by the Act, so as to be afforded immunity (pp. 1-4).

The Court looked at the definition of "owner" under the Act as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises" and quickly eliminated an easement holder as a possessor of a fee interest, a tenant or lessee. Thus, to be afforded immunity under the Act, the easement holder must be seen as "an occupant or person in control of the premises." (p. 11). See 68 P.S. Section 477-2. In recognizing that the mere transfer of an easement does not establish control, since an easement itself does not impart a possessory interest, the key issue for the court was the amount of control that the easement conveyed: sufficient control may exist, noted the court, so as to give rise to liability under Restatement Second of Torts section 328E as a possessor of the property. That being the case, easement holders would logically be motivated to curtail access to land under their control, which goes against the purpose of the RULWA to encourage owners to make land available. (pp. 12-13).

Accordingly, in keeping with the statutory purposes of the RULWA, the court held that "occupant or person in control" under the Act was co-extensive with the definition of "possessor" under the Restatement. (p. 14). In effect, then, an easement holder would be rendered immune as a matter of law from claims of possessor liability for injuries sustained on the land - the evidence needed to

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### **MARSHALL V. MICHAEL BAKER JR., INC., REVISITED: A DESIGN PROFESSIONAL LIABILITY FOR CONTRACTORS' UNSAFE CONSTRUCTION PRACTICES**



*Jaime N. Fabert, Esquire*

In January 1990, Wayman Irvin & McAuley successfully represented Michael Baker Jr., Inc., an engineering firm accused of negligence resulting in a catastrophic injury. An opinion issued by the Supreme Court of Pennsylvania in Marshall v. Michael Baker Jr., Inc., affirmed the 1987 Order of the Commonwealth Court of Pennsylvania that Michael Baker Jr., Inc. had no duty “to actively inspect job site safety procedures through its contractual obligation to merely obtain...periodic reports...regarding implementation of the contractor’s safety program.” (See Marshall v. Michael Baker, Jr., Inc., 568 A.2d 931 (Pa. 1990)). In this case, Baker was retained by the Port Authority of Allegheny County (PAT) to design the PAT East Busway. Plaintiff Marshall was employed by Mosites Construction Company, the general contractor of the construction project. Marshall sued both PAT and Baker when he fell from a severed beam at the site and suffered a leg injury when, after he reached the ground, another beam fell upon his leg. Marshall’s claim against Baker was premised on a theory of negligence arising from Baker’s negligent supervision of the general contractor. Marshall failed in his attempt to show that Baker owed him a duty and as a result, was not successful on his negligence claim.

The Court found that while Baker had a specific duty to review contractors’ practices and procedures under the original contract, the original contract was modified effectively by supplemental agreement. However, the Court found the relevant provision in the PAT-Baker supplemental agreement to be ambiguous and looked to extrinsic evidence to determine the parties’ intent. The Court utilized PAT’s contract with Mosites, the general contractor in this case, as extrinsic evidence.

Based upon its review of both the PAT-Baker contract and the PAT-Mosites contract, the Court held that the PAT-Baker supplemental agreement imposed only a passive duty on Baker to assure that the final product complied with design drawings and specifications. The Supreme Court reasoned that to hold Baker to an active duty to ensure safety compliance would be inconsistent with PAT’s contract with Mosites, under which Mosites had a duty to supervise and direct the work, being “solely responsible for all construction means.” *Id.* at 936. Baker was not under any duty arising out of the PAT-Mosites contract because Baker was not a party to that contract.

As such, while the PAT-Mosites contract permitted Baker to take action against safety hazards, nothing in the amended PAT-Baker contract required Baker to do so. Thus, the Court affirmed the Order holding Baker not liable on a theory of negligence in its safety supervision because Baker had no duty to monitor the safety procedures of Mosites under the PAT-Baker contract. Further, under the PAT-Mosites contract, PAT delegated that duty specifically and directly to Mosites.

This issue was addressed again in 1994 by the Superior Court in Frampton v. Dauphin Distrib. Serv. Co., 648 A.2d 326 (Pa.Super. 1994). In this case, the Court ruled that, in the absence of a contractual duty specifically imposed upon the architectural firm, or a course of conduct in which the firm engaged, the firm had no duty to take affirmative action to protect workers from jobsite hazards. Under the express terms of the contract, the architect did not have control over construction and safety measures, but had a responsibility only for preparation of drawings and foundation design. Thus, the Court upheld the lower court’s grant of summary judgment to the appellee architectural firm.

In 1999, the Common Pleas Court of Lackawanna County addressed the issue of design professional liability in Boyanoski v. Gould, Inc., 46 Pa. D. & C. 4th 164 (Lack. 1999). In this case, the Court denied the motion for summary judgment of Synergist, a subcontractor retained to develop a safety plan. The Court distinguished Marshall on the grounds that, in this case, the safety plan imposed direct obligations on the subcontractor to correct hazardous conditions and provide safety training and protective equipment. Further, the subcontractor exhibited a course of conduct, such as inspecting the jobsite weekly and reporting any potential violations to the appropriate individuals, that assumed a duty to guarantee work safety. Based upon the specific contractual terms and the subcontractor’s course of conduct, the Court refused to grant Synergist’s motion for summary judgment.

These cases are still important to design professionals. First, the duty of the design professional arises only from the design professional’s individual contract with the client, or an established course of conduct. Without establishing that a duty is owed, the client or a third party cannot recover against the design professional on a theory of negligence. Second, the original contract between the design professional and the client may be modified effectively to eliminate specific duties that were the responsibility of the design professional under the original contract. This is particularly important in issues concerning site safety responsibility of the design professional. The contract should make it clear that the design professional has not undertaken site safety responsibilities. Third, when a term or phrase in a contract is ambiguous, Courts may read several contracts or provisions of contracts together to derive the parties’ intent and by extension, the responsibility of the design professional in a given situation. The holding of the Pennsylvania Supreme Court in Marshall in 1990 continues to protect design professionals today.

*If you would like more information about this area of the law, please contact Wayman, Irvin & McAuley, LLC or Jaime N. Fabert at [jfabert@waymanlaw.com](mailto:jfabert@waymanlaw.com).*

*Jaime N. Fabert, Esquire, is the newest member of the Wayman, Irvin & McAuley, LLC Design Professional Litigation Practice Group. She emphasizes environmental litigation. ■*

### UPDATING THE ECONOMIC LOSS DOCTRINE



Paul Mannix

In the recent case of Pflumm Pav. & Exc. v. Foundation Serv. Co., 2003 Pa.Super. 41 (Feb. 3, 2003), the Superior Court clarified the scope of the economic loss doctrine, explicitly finding that the doctrine bars claims for negligent misrepresentation where the plaintiff is seeking pure monetary damages.

Originating from product liability cases, the economic loss doctrine was created by the courts for the purpose of limiting potentially limitless liability and mass tort litigation against manufacturers of goods. East River Steamship Co. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). While the Supreme Court of Pennsylvania has not directly addressed the economic loss doctrine, the Pennsylvania Superior Court has acknowledged that, under the economic loss doctrine, certain claims for purely monetary damages are barred. Initially, the economic loss doctrine was utilized by the Superior Court in the context of product liability suits. REM Coal Co., Inc. v. Clark Equipment Co., 386 Pa.Super. 401, 563 A.2d 128 (1989); N.Y. State Elec. & Gas v. Westinghouse, 387 Pa.Super. 537, 564 A.2d 919 (1989). Eventually, the Court expanded the reach of the economic loss doctrine and applied it to claims against design professionals in the scope of construction projects. Linde Ent. v. Hazelton City Authority, 602 A.2d (1992).

After the decision in Linde, the Pennsylvania appellate courts have rarely expounded upon the economic loss doctrine. As a result, it has fallen upon the federal courts within Pennsylvania to rule upon the viability and applicability of the doctrine. Many of the federal court decisions have restricted the reach of the economic loss doctrine. Duquesne Light Co. v. Westinghouse, 66 F.3d 604, 620 (3rd Cir. 1995); Borough of Lansdowne v. Severson Env. Serv., 2000 WL 1886578 (E.D. Pa. 2000); Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F.Supp.2d 519 (W.D. Pa. 2000).

In Borough of Lansdowne, the United States District Court for the Eastern District of Pennsylvania held that the economic loss doctrine does not preclude a claim for negligent misrepresentation, where the defendant could be held liable under the Restatement (Second) of Torts section 552. Section 552 provides, in pertinent part:

(1) *One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.*

(2) *Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered*

*(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and*

*(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.*

Relying on this language, the Eastern District Court in Lansdowne ruled that a negligent misrepresentation claim against the defendant engineers could be pursued for pure economic losses, as long as the requirements of Section 552 were met. However, with its ruling in Pflumm, the Superior Court has reinforced the vitality of the economic loss doctrine under Pennsylvania law and has placed in a questionable light the Lansdowne decision and other federal court decisions limiting the scope of the economic loss doctrine.

In Pflumm, an excavation contractor entered into a contract with a municipality to build a public library. Certain data regarding the subsurface conditions was contained in the contract documents and this data was provided by several companies which performed geotechnical testing and engineering services on the project. However, the contract specifically stated that the contractor “assumes all risks in excavating for this Project and shall not be entitled to rely on any subsurface information obtained for the architect or indirectly for the owner.” During construction, Pflumm encountered a large quantity of unforeseen rock and incurred great expense to remove the rock. As a result, Pflumm brought a claim against the engineering firms which provided information regarding the subsurface conditions on the project, claiming that the information was insufficient and/or incorrect. Pflumm brought suit for negligence, negligent misrepresentation and fraudulent misrepresentation.

Prior to trial, the engineering firms filed a motion for summary judgment arguing that Pflumm’s negligence and negligent misrepresentation claims were barred by the economic loss doctrine. The trial court agreed and dismissed the claims against the engineering firms. On appeal, the Superior Court upheld the decision. In accordance with the reasoning of the Lansdowne case, Pflumm contended that Section 552 of the Second Restatement of Torts permits a negligent misrepresentation claim for pure economic losses. After considering the actual language of Section 552 and relevant caselaw, the Superior Court noted that, “although negligence actions pursuant to Section 552 may lie where there is loss that is not solely economic . . . , the economic loss doctrine precludes recovery in negligence actions for injuries which are solely economic.” Furthermore, the Court determined Section 552 to be especially inapplicable to the present claim of negligent misrepresentation, as the contract specifically stated that the contractor was not entitled to rely on the engineer’s information regarding the subsurface conditions. Based on these factors, the Court ruled that Pflumm’s claim for negligent misrepresentation was precluded by the economic loss doctrine.

In its opinion, the Court suggested that there may be certain circumstances where Section 552 of the Restatement (Second) of Torts would apply and allow a plaintiff to pursue a negligent misrepresentation claim for purely economic damages. However, the Court’s decision demonstrates that Section 552 will be narrowly construed and, in most cases, claims for negligent misrepresentation will be valid only where the plaintiff suffered more than economic losses. ■

### **NEW RULE REFORMS PROFESSIONAL LIABILITY CLAIMS**



*James Creenan, Esq.*

On January 27, 2003, the Pennsylvania Supreme Court adopted a new series of rules governing claims against certain licensed professionals. The new rules require a plaintiff to file a “certificate of merit” verifying that another licensed professional has confirmed that the civil action presents a meritorious claim for breach of a professional standard of care.

#### **Who’s Affected?**

The new rules apply to most but not all licensed professionals. The rules apply to claims against:

medical doctors, nurses, dentists, chiropractors, pharmacists, physical therapists, psychologists, veterinarians, accountants, architects, engineers, land surveyors, attorneys.

#### **Who’s Not?**

Although Rule 1042.1 applies broadly to most licensed professionals, certain groups of licensed professional will not receive any relief from the reform. Most notably, real estate agents and life insurance agents are not included within the scope of the rule. Additionally, construction managers fall outside this new rule. The bottom line is that only those professions specifically listed in the rule can invoke the rule’s benefits.

#### **How Does This Help Professionals?**

The Rule appears to confront non-meritorious claims against professionals. Although many of the better plaintiff’s lawyers consult qualified experts prior to commencing a lawsuit, there are many instances where early consultation with a qualified expert does not take place and would have prevented a weak claim from being brought in the first place. In many cases, the dire weaknesses of dubious claims are not confirmed until after the parties have completed the pleadings and discovery stage of litigation, as expert reports are not generally required until the Pretrial Statement is filed.

Therefore, the new rule attempts to place the burden on plaintiff’s lawyers to assure that the claim has merit before commencing an action against a professional. Combined with new Rule of Civil Procedure 1023.1 governing groundless actions and assertions, the new Rule will provide another tool to combat frivolous litigation.

#### **What Must Be Filed?**

A certificate of merit must be filed with the complaint or filed within 60 days after the Complaint is filed. The plaintiff’s attorney must certify to the Court that another licensed professional has “supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work . . . fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm.” The professional supplying the written statement must be an expert in the field.

In the addition to the written statement requirement, the COM can state that the claim against a particular defendant is based on that professional’s vicarious liability for another licensed professional/defendant (and a COM has been filed against that professional).

Finally, the COM can simply state that expert testimony will not be necessary to establish the professional’s negligence.

#### **Who Must File a COM?**

In multi-defendant cases, the plaintiff must submit a COM for each professional/defendant in the case.

If a defendant files counter-claim against a professional (typically in a breach of contract/failure to pay for services case), then the defendant must file a COM against the plaintiff/professional.

A defendant that joins a professional as an additional defendant is not required to file a COM unless joinder is based on different set of negligent acts.

#### **When Must the COM be filed?**

The Certificate of Merit should be filed with the Complaint but no later than 60 days after the Complaint is filed.

The trial court may extend the deadline for filing upon good cause shown for a period not to exceed 60 days; however, there is no limit to the number of extensions that may be obtained by motion. Extensions will likely be granted if counsel was obtained only shortly before the expiration of the statute of limitations or if medical records required for a complete review have not been obtained. In all instances, the moving party must show due diligence.

The most important thing to remember is that that extension must be obtained prior to the expiration of the allowable time.

#### **What Response to the COM?**

The new rule extends the time to file a responsive pleading to 20 days after the Certificate of Merit is filed.

If the plaintiff fails to attach or file a “Certificate of Merit” (or filed a non-complying COM) within the allowed time, then the defendant/professional can file preliminary objections requesting dismissal of the Complaint. Another basis for attack is the lack of a qualified expert’s certification.

The Prothonotary can also enter judgment of non pros if the plaintiff fails to file certification within the required time and allowable extensions.

#### **Is Discovery Allowed?**

A plaintiff may not seek general discovery against a professional unless the COM has been filed. Only requests for production of documents and requests for inspection may be served before the COM has been filed. Of course, the trial court may grant leave for specific discovery needed to obtain information to support the written statement and COM. The rules do not affect the professional’s ability to seek a protective order from discovery not needed for the plaintiff to obtain the certification.

#### **Who Testifies?**

The expert testifying at trial does not need to be the same professional that supplied the written statement supporting the certificate of merit. Therefore, it is conceivable that a potential expert otherwise reluctant to testify in marginal cases might be willing to provide a written statement.

#### **What Sanctions Are Available?**

In addition to the newly enacted sanctions available under Rule 1023.4 for improper certification, professionals should be encouraged that the written statement must be produced by the plaintiff at the conclusion of the proceedings against that professional, whether by voluntary dismissal, order of court, or



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**Wayman Watch**

- **James Creenan** presented “ *New Rules for Professional Liability Claims*” at the *Pittsburgh Claims Association Insurance Seminar*, and **Dale Forsythe** once again presented the “*General Liability Update*” and moderated.
- **Michael Magulick** recently represented the Firm at the *Federation of Defense and Corporate Counsel Winter Meeting in Mission Hills, CA*.
- *Congratulations to **Paul Mannix** and his wife on the birth of their daughter, Deirdre Marie Mannix*

*Water Act, continued from page 1*

establish liability as a possessor would also establish its defense as an “occupant or person in control” under the RULWA. (p. 15).

The Supreme Court has not addressed this issue, obviously, however for now it appears that easement holders will be able to use the Stanton case to support summary judgment entitlement in possessor liability cases under the RULWA. ■

*New Rule Reform, continued from page 3*

verdict. Therefore, the professional can further compare the written statement and obtain sanctions after the lawsuit is concluded if the action or the COM were brought without proper factual or legal bases. Sanctions can be imposed on the party, the lawyer or the law firm.

**Conclusion**

The new rule represents a significant reform to cases where a professional’s judgement is seemingly always challenged after a bad outcome. Before the aggrieved plaintiff can commence an action, counsel must now affirm that the case has merit after consultation with a qualified professional that has provided a written statement. The Rule goes even further to afford professional’s relief in the event a plaintiff fails to adhere to the letter and spirit of these mandates. Overall, the new rule should be expected to reduce the instances of truly frivolous litigation. ■