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## Walter F. Kawalec III

Shareholder

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Walt focuses the majority of his practice on post-trial appellate advocacy with particular emphasis in the areas of public entity liability and civil rights, insurance coverage/bad faith litigation and professional liability. He has handled several hundred appeals to date, many of which have been in representation of physicians and attorneys, in appeals connected with malpractice litigation.

In his capacity as an appellate attorney, Walt has developed extensive experience briefing and arguing cases before the Third Circuit Court of Appeals, the Supreme Courts of Pennsylvania and New Jersey, Pennsylvania's intermediate appellate courts, the Superior Court and Commonwealth Court, and New Jersey's intermediate court, the Appellate Division. As well, Walt has experience, thus far, up to the petition stage before the United States Supreme Court.

In addition to Walt's involvement in the appellate courts, he has also briefed and argued cases and motions before the Pennsylvania Board of Finance and Revenue, the Pennsylvania Courts of Common Pleas, and the New Jersey Superior Court Law Division.

Walt is a graduate of Glassboro State College and the University of Pittsburgh School of Law, where he earned his *juris doctor, cum laude*, in 1998. He was the recipient of the Dean's Scholarship for three years, first year moot court competition award for "Best Brief," and served as an officer in Phi Alpha Delta legal fraternity.

In 1999 Walt joined Marshall Dennehey as a member of the Appellate Group. Since that time, he has developed an proficiency in all aspects of appellate law, from legal research, brief writing and other written advocacy to oral argument, and appellate-level motion practice.

Walt's published opinions in New Jersey, Pennsylvania and the Third Circuit Court of

### Practices

- Appellate Advocacy & Post-Trial Practice
- Public Entity & Civil Rights Litigation
- Insurance Services – Coverage & Bad Faith Litigation

Appeals have established and clarified important legal principles on subjects ranging from insurance coverage and remittitur, to informed consent claims in medical malpractice actions, and contributory negligence in accountant malpractice cases.

From 2002 to 2011, Walt also worked as the editor of *Defense Digest*—Marshall Dennehey's quarterly newsletter that updates our clients on important legal cases and issues of the day.

## Education

- University of Pittsburgh School of Law (J.D., *cum laude*, 1998)
- Rowan University (B.A., 1991)

## Admissions

- Pennsylvania, 1998
- U.S. Court of Appeals 3rd Circuit, 1999
- New Jersey, 2002
- U.S. Supreme Court, 2002
- U.S. District Court Eastern District of Pennsylvania, 2002
- U.S. District Court District of New Jersey, 2002
- U.S. Court of Appeals 4th Circuit, 2017

## Published Works

- "Reconsidering Reconsideration," *Defense Digest*, Vol. 27, No. 5, December 2021
- "*Walters v. YMCA*, Putting Some Limitations on *Stelluti v. Casapenn*," *Defense Digest*, Vol. 20, No. 4, December 2014
- "De Facto Appeals Eliminate Federal Jurisdiction," *Defense Digest*, Vol. 10, No. 4, 2004
- "Pennsylvania Superior Court Rejects Request To Void Stacked Coverage," *Defense Digest*, Vol. 10, No. 3, 2004
- "'Advertising Injury' in the Third Circuit: A Frog Switch and a Green Machine," *Defense Digest*, Vol. 9, No. 1, 2003
- "An Injury Is Not An 'Injury' If The Pain Is Non-Compensable," *Defense Digest*, Vol. 8, No. 2, 2002
- "Superior Court, S.I.R.'s and the Direct Action Statute: Contracts Rule, Penna. Bar Ass'n, Civil Litigation Newsletter," orig. published in the *Defense Digest*, 2002
- "Pennsylvania Appellate News," *Defense Digest*, Vol. 7, No. 1, 2001
- "Appellate Courts Refine Pennsylvania Settlement Law," *Defense Digest*, Vol. 6, No.1, 2000
- "Pennsylvania Appellate News," *Defense Digest*, Vol. 5, No. 4, 1999

## Significant Representative Matters

- Obtained summary judgment on behalf of an obstetrician in a medical malpractice action. The plaintiff alleged that our client did not obtain the requisite informed consent from our client to undergo a trial of labor after having two prior cesarean section deliveries ("TOLAC x2"). The court found that the plaintiff's lack of informed consent claim was without foundation as she had an awareness of the risks of TOLAC x2. Rather, the court found that her claim was premised on the assertion that the

physician performing the TOLAC x2 failed to convert the TOLAC to a C-section quickly enough when complications arose. The court held that as matter of law our client had no obligation to discuss the risk that the doctor in the delivery room may wait too long to pivot to a C-section, which was the actual cause of the plaintiff's alleged harm.

- Successfully defended a grant of summary judgment in the New Jersey Appellate Division that resulted in a published opinion. Our clients were the owner and manager of an apartment complex for seniors. The plaintiff resident had returned from walking her dog and alleged she received injuries entering the elevator. She had allowed the dog to enter first, when the doors began to close. She alleged injuries occurring when the right door struck her arm, and when she used her left arm and left side of her body to slow the doors from closing while she leapt into the elevator.
- She sued our clients and the company hired to maintain the elevator, but was unable to establish any proof of negligence. The trial judge dismissed the case, declining to apply the doctrine of *res ipsa loquitur*, in part, because the plaintiff could not establish the third element of the doctrine: that the injury did not result from the plaintiff's own voluntary act or neglect. On appeal, the plaintiff argued that the Appellate Division should eliminate this third element. The Appellate Division, in a published opinion, concluded that the third element is a well-established law in New Jersey and only the New Jersey Supreme Court could eliminate it, and that court has shown no inclination to do so. Because the plaintiff could not demonstrate the third prong, *res ipsa* was not applicable and the failure of the plaintiff to establish negligence resulted in summary judgment in the defendants' favor.
- Successfully argued to the New Jersey Supreme Court that the grant of a new trial by the Appellate Division in medical malpractice action was erroneous, as the plaintiff failed to object to the matter at trial and could not establish plain error.
- Successfully argued to the US District Court and Third Circuit Court of Appeals that a municipalities decision close a property to the public during the removal of a significant amount of buried military ordinance did not constitute a constitutional violation or takings.
- Successfully argued that the represented municipality enacted a valid regulatory ordinance and not an improper licensing ordinance notwithstanding the use of the term "license" in the ordinance.
- Successfully briefed arbitration argument and achieved a defense result in multi-million dollar binding arbitration in construction defect case.
- Successfully persuaded the Appellate Division to reinstate multi-million dollar complaint dismissed in the Law Division.
- Successfully argued for the reversal of a dismissal of the insurance carrier's fraud complaint, which clarified the operation of the entire controversy doctrine in New Jersey.
- Successfully argued that a minor deviation on the form for rejecting the stacked limits for UIM coverage was not enough to vitiate the policy-holder's rejection of stacked coverage.
- Successfully argued that a trial court committed reversible error when, after the Appellate Division found the verdict to be excessive and remanded the case for *remittitur*, remitted the verdict by one cent.
- Successfully argued that parties who were found guilty of criminal tax evasion were estopped from denying their contributory negligence in a civil suit against their accountant, stemming from the preparation of those income tax returns.
- Successfully argued that the term "advertising injury" in policy was limited to claims arising out of the misappropriation of advertising ideas or style of doing business.
- Successfully argued that a plaintiff who was successful against a carrier's policyholder

has no claim against the carrier for the amount of the self-insured retention of the policyholder.

## Representative Cases

- *T.L. v. Goldberg*, N.J., A-11-18 (N.J. 2019)
- *Cona v. Tp. of Wash.*, 456 N.J. Super. 197, 201 (N.J. App. Div. 2018)
- *Estate of Brust v. ACF Industries, LLC*, 443 N.J. Super. 103 (N.J. App. Div. 2015)
- *Bermudez v. Kessler Institute for Rehabilitation*, 439 N.J. Super. 45 (N.J. App. Div. 2015)
- *Nat'l Amusements, Inc. v. Borough of Palmyra*, 716 F.3d 57 (3d Cir. 2013)
- *Manahawkin Convalescent v. O'Neill*, 217 N.J. 99 (N.J. 2014)
- *EEOC v. Geo Group, Inc.*, 616 F.3d 265 (3rd Cir. 2010)
- *Biber Partnership, P.C. v. Diamond Hill Joint Venture, LLC*, 404 N.J. Super. 96 (App. Div. 2008)
- *Allstate New Jersey Ins. Co. v. Cherry Hill Pain & Rehab. Institute*, 389 N.J. Super. 130 (App.Div 2006)
- *Marran v. Marran*, 376 F.3d 143 (3d Cir. 2004)
- *Vosk v. Encompass Ins. Co.*, 851 A.2d 162 (Pa. Super. 2004)
- *Columbia Med. Group, Inc. v. Herring & Roll, P.C.*, 829 A.2d 1184 (Pa. Super. 2003)
- *Tomaino v. Burman*, 364 N.J. Super. 224 (App. Div. 2003)
- *Green Machine v. Zurich-American Ins. Co.*, 313 F.3d 837 (3d Cir. 2002)
- *Hohns v. Gain*, 806 A.2d 16 (Pa. Super. 2002)
- *Kleban v. National Union Fire Insurance Co.*, 771 A.2d 39 (Pa. Super. 2001)
- *Miller v. Sacred Heart Hospital*, 753 A.2d 829 (Pa. Super. 2000)

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## Results

### **Successfully Overturned \$1.8 Million Judgment on Appeal in New Jersey**

We successfully overturned a \$1.8 million judgment on appeal in a case that involved the *Laidlow* exclusion in a workers' compensation/employers liability policy. The decedent succumbed to heat exhaustion while at work, and the plaintiff alleged the death was due to working conditions the employer knew were substantially certain to lead to injury. Our client, the insurer, offered to defend the employer, but only to the extent of obtaining dismissal of the workers' compensation claim, which was filed in the wrong forum. The insured rejected the offer, and suit for the injury and coverage claims commenced. At summary judgment, the trial court refused to apply the policy's clear and prominent *Laidlow* exclusion barring all coverage for claims in the Superior Court whether alleged as negligent or intentional. The trial court entered judgment in the amount of the arbitration award and awarded defense costs for the *Laidlow* suit, costs of the declaratory judgment action and interest. The matter went up on appeal. After briefing, but before argument, the New Jersey Supreme Court released the *Rodriguez* decision, which validated our client's position on application of the *Laidlow* exclusion and went even further to hold that the employer's liability carrier has no obligation to provide a defense for the common law negligence claims filed in the Superior Court. The trial court refused

to apply the principles enunciated by the appellate division in the *Rodriguez* decision and refused to apply the reasoning of a second unpublished appellate court decision directly on point. The trial court simply ignored the cases, reasoning they were unpublished. Prior to oral argument in our matter, the *Rodriguez* decision was published, and the plaintiffs abandoned the case, settling for nuisance value.

### **Favorable Decision Obtained from the Court of Appeals for the Third Circuit**

We received a favorable decision from the Court of Appeals for the Third Circuit in a First Amendment case. The circuit court affirmed the District of New Jersey's denial of a preliminary injunction in which the plaintiff claimed that federal and local officials violated her First Amendment rights through censorship and retaliation after she posted comments on Facebook. In a published decision, the Third Circuit agreed with our arguments that the plaintiff lacked standing since she could not demonstrate a substantial risk of future harm specific to our client, the former chief of police of North Hanover, NJ, as well as the other co-defendants.

### **Successful Representation of National Home Improvement Corporation's Tool & Truck Rental Division**

Marshall Dennehey's trial and appellate attorneys were successful in their representation of a national home improvement retail corporation's tool and truck rental division. Handling the case at both the trial and appellate levels, the defense was successful in convincing the New Jersey appellate court to affirm the trial court's decision on July 23, 2024. At the trial level, the judge granted our motion for a directed verdict and dismissed the case. The plaintiff had rented a flatbed truck in 2018 to move a cabinet he had just purchased. He alleged that a store employee gave him a set of ramps to use in the truck, but while doing so, they moved and he fell, sustaining serious and permanent injury to his back. The plaintiff alleged he later returned to the store and was told that he had been given the wrong ramps. The panel said that the record included no actual evidence that the ramp did not fit the truck beyond the employee's saying it was the wrong ramp, or that the ramp slipped because it was incompatible with the truck. Even in his testimony, the panel said the plaintiff did not actually identify any physical cause for the ramp to move. "The dearth of evidence establishing the manner and cause of the slip or slide of the ramp rendered it impossible for the jury to make a reasoned determination as to whether defendant's purported negligence proximately caused plaintiff's fall and injuries," the panel said. The court, therefore, affirmed the case on appeal.

### **Summary Judgment Secured in a Complex Medical Malpractice Case**

We obtained summary judgment on behalf of an obstetrician in a medical malpractice action. The plaintiff alleged that our client did not obtain the requisite informed consent from the plaintiff to undergo a trial of labor after having two prior cesarean section deliveries (TOLAC x2). The court found that the plaintiff's lack of informed consent claim was without foundation as she had an awareness of the risks of TOLAC x2. Rather, the court found that her claim was premised on the assertion that the physician performing the TOLAC x2 failed to convert the TOLAC to a C-section quickly enough when

complications arose. The court held that our client had no obligation to discuss the risk that the doctor in the delivery room may wait too long to pivot to a C-section, which was the actual cause of the plaintiff's alleged harm.

### **Summary Judgment Secured in a Racial and Sex-Based Discrimination**

#### **Employment Case**

We obtained summary judgment in an employment litigation case involving claims of racial and sex-based discrimination. The plaintiff alleged that she experienced a hostile work environment based solely on her race. We were able to prove that there was no evidence to substantiate these claims.

### **Defense Obtains a Published New Jersey Appellate Division Decision Affirming that Perception of Having COVID-19 Does Not Constitute Perceived Disability Under NJLAD**

The New Jersey Appellate Division affirmed the dismissal our defense team obtained in a New Jersey Law Against Discrimination (NJLAD) perceived disability claim, alleging COVID-19 to be a disability under this statute. This employment discrimination claim involved a matter of first impression in New Jersey and established that COVID-19 infection, without more, does not constitute a disability under the NJLAD.

A former employee filed suit, asserting perceived disability discrimination under the NJLAD. The plaintiff alleged he was wrongfully terminated based upon his employer's perception that he had COVID-19. We filed a motion to dismiss in lieu of an answer, asserting the complaint did not set forth a cause of action as COVID-19 is not a recognized disability under the NJLAD. The court granted our motion and agreed that COVID-19 is not a disability under the NJLAD and, therefore, could not be the predicate for a perceived discrimination case. The Appellate Division affirmed this decision, finding the plaintiff's COVID-19-perceived disability claim failed to plead a viable cause of action under the NJLAD.

### **Appellate Court Pivots; Motion to Dismiss Granted**

We obtained a published decision in the New Jersey Appellate Division reversing the denial of a motion to dismiss because of a lack of duty. The plaintiff's ex-husband drove through the gate at a large, high-rise apartment complex, waited for plaintiff to arrive, and then shot her in the face. Our client was the former management company which ceased its management obligations 17 days before the shooting, when a successor management company took over. The plaintiff argued that our client was negligent based on procedures for securing the lot it put in place when it managed the property. We sought summary judgment, arguing a lack of duty due to the expiration of a management contract. The Law Division judge denied that motion, asserting there were genuine issues of fact and that the jury had to decide whether a duty existed. We persuaded the Appellate Division to grant interlocutory appeal, and then we successfully argued for a reversal. First, the Appellate Division agreed with us that the trial judge erred by holding that the existence of a duty was a jury question and not a question for the court to decide as a matter of law. Second, the Appellate Division held that, since our client no longer

had any rights or responsibilities over the security of the premises when the shooting happened, and because there was no indication that the successor management company or the owner of the property could not have changed the procedures which our client had put in place, the former management company owed no duty to the plaintiff and that summary judgment was therefore appropriate.

**Confirmation for obtaining the grant of summary judgement in a premises liability case.**

Our defense team successfully obtained an affirmance of the grant of summary judgment in a premises liability case. The plaintiff asserted he tripped and fell in our client's supermarket and that the fall exacerbated his epilepsy. The discovery period ended without the plaintiff producing an expert opinion that causally connected the medical complaints to the fall. The plaintiff claimed that his treatment for cancer caused his inability to be timely examined and to obtain an expert opinion. After the trial court denied the plaintiff's motion to extend discovery, we moved for summary judgment on the grounds the plaintiff was required to provide an expert opinion linking his fall to his allegedly worsened epilepsy. The plaintiff filed a cross-motion for additional time. At the hearing on the motions, the judge expressed a willingness to consider further extension if the plaintiff had presented some indication that the report would be produced. But in the absence of such an indication, the judge found that fairness to the defense required that summary judgment be granted. On reconsideration, the plaintiff presented a "preliminary summary" from his doctor, which relied on the plaintiff's wife's statements to link the epilepsy to the plaintiff's fall. The trial court denied reconsideration. On appeal to the Appellate Division, the court found no error in the decision of the Law Division judge. The court found that the plaintiff failed to show exceptional circumstances to justify a further extension of discovery and discounted the "preliminary summary" submitted on reconsideration as an improper attempt to expand the record and re-argue the motion.

**New Jersey Appellate Division affirms dismissal of plaintiff's gender discrimination and workers' comp retaliation claims.**

Our defense team was successful before the New Jersey Appellate Division. The plaintiff is a former employee of a non-profit agency that provides services to disabled individuals. She filed suit against her former employer and its manager, alleging gender discrimination and retaliation for filing a workers' compensation claim. As discovery progressed, thousands of pages of discovery were exchanged, which demonstrated that legitimate, long-standing performance deficiencies were the actual basis for her termination. The defendants filed for summary judgment prior to the end of the discovery period, and the Law Division granted the motion, finding no reason not to grant the immediate dismissal, especially as the plaintiff failed to even respond to the statement of material facts. On appeal to the Appellate Division, the court affirmed the dismissal, rejecting the plaintiff's arguments that the motion judge engaged in a subjective analysis of the facts and thereby made factual findings on disputed issues, and that the motion judge erred by granting the motion before discovery was complete. The court found that the plaintiff failed to demonstrate, with any degree of particularity, that further discovery would supply the missing elements to her cause of action. The court further found that the plaintiff failed to demonstrate a prima facie case of gender discrimination or workers'

compensation retaliation given the un rebutted facts provided by the defendants.

**Successful defense of discrimination case before the New Jersey Appellate Division.**

The plaintiff filed suit against her employer, a governmental agency, alleging she was subject to discrimination under the New Jersey Law Against Discrimination (NJLAD) based upon her disability and that she was subject to retaliation for filing a previous discrimination suit. She further asserted aiding-and-abetting claims against fellow employees. The case was dismissed via summary judgment, and the plaintiff appealed. The Appellate Division accepted our argument that the failure to move the plaintiff to a position she desired did not constitute an adverse employment action or failure to accommodate as she suffered no adverse effect on her salary or benefits, and did not materially alter her working conditions. Further, the court addressed concerns the plaintiff's physician had expressed when she sought the accommodation, even though she was not transferred to a position in which she preferred to work, and agreed the claims were properly rejected by the trial Judge.

**Marshall Dennehey Appellate Attorneys Reverse Coverage Decision in New Jersey**

We successfully persuaded the New Jersey Appellate Division to reverse a coverage determination. The original determination had found that the plaintiff was entitled to \$500,000 in coverage under her then-boyfriend's insurance policy, rather than being limited to the \$100,000 in her own policy. The Law Division rejected our arguments that the policy did not deem the plaintiff a "covered person" because she was the named insured in her own policy, and rejected the argument that the step-down provision applied. On appeal, the Appellate Division did not agree with us that the Law Division erred in its determination that the plaintiff was a "covered person," but it did agree that the step-down provision applied to limit the plaintiff's recovery to that of her own policy. Cross petitions for review were filed with the New Jersey Supreme Court, which declined to alter the Appellate Division's decision, resulting in significant savings on the claim for our client.

**Successful defense of grant of summary judgment in the New Jersey Appellate Division results in published opinion**

Walter Klekotka (Mount Laurel, NJ) and Walter Kawalec (Mount Laurel, NJ) were successful in defending a grant of summary judgment in the New Jersey Appellate Division that resulted in a published opinion. Our clients were the owner and manager of an apartment complex for seniors. The plaintiff/resident had returned from walking her dog and alleged she received injuries entering the elevator. She had allowed the dog to enter first when the doors began to close. She alleged injuries occurred when the right door struck her arm and when she used her left arm and the left side of her body to slow the doors from closing while she leapt into the elevator.

She sued our clients and the company hired to maintain the elevator, but she was unable to establish any proof of negligence. The trial judge dismissed the case, declining to apply the doctrine of *res ipsa loquitur*, in part, because the plaintiff could not establish the third element of the doctrine: that the injury did not result from the plaintiff's own voluntary

act or neglect. On appeal, the plaintiff argued that the Appellate Division should eliminate this third element. The Appellate Division, in a published opinion, concluded that the third element is a well-established law in New Jersey and only the New Jersey Supreme Court could eliminate it, and that court has shown no inclination to do so. Because the plaintiff could not demonstrate the third prong, *res ipsa* was not applicable, and the failure of the plaintiff to establish negligence resulted in summary judgment in the defendants' favor.

#### **Dismissal of Complaint Under New Jersey's Charitable Immunity Act**

Marshall Dennehey was successful in the New Jersey Appellate Division, which affirmed the dismissal of the plaintiff's complaint under New Jersey's Charitable Immunity Act. The defendant operated a shelter for battered women, their dependent children and the homeless. The plaintiff and her child were residents at the shelter and beneficiaries of its charitable goals when the plaintiff slipped and fell on ice on the shelter's property. She argued that she was not a beneficiary of the charity because she did administrative tasks and volunteered in the charity's thrift store. However, the trial court and Appellate Division rejected those arguments, holding that the plaintiff's presence on the defendant's property was due to her being a resident beneficiary of the charity, not as a result of any volunteer work she may have performed for the defendant. Thus, because her volunteer activities were incidental to her residency at the shelter, the Charitable Immunity Act applied and the dismissal of the complaint was affirmed.

#### **Plaintiff's complaint dismissed for lack of personal jurisdiction.**

In this medical malpractice action, the defendant, a New York doctor with no connection to New Jersey, was sued in New Jersey by a former patient who was a New Jersey resident. The court first found that the defendant did not waive consideration of the issue by waiting until after a dispute concerning the sufficiency of the affidavit of merit was resolved. The court then found that the evidence presented by the plaintiff was simply insufficient to establish either general or specific jurisdiction. The fact that the doctor had no connection to New Jersey and that the treatment occurred in New York were key to the decision, as the advertising activity by the New York hospital where the doctor is on staff, which the plaintiff relied upon, was insufficient to establish jurisdiction over the physician, especially as those activities had nothing to do with the plaintiff's decision to treat with the defendant. In a published decision, the New Jersey Appellate Division affirmed the dismissal of the plaintiff's complaint for lack of personal jurisdiction.

#### **Order for new medical malpractice trial reversed.**

We obtained a unanimous decision in the New Jersey Supreme Court reversing an order for a new trial. In this medical malpractice action, the defendant was a physician who allegedly committed malpractice when he prescribed a drug to a patient. According to the plaintiff's experts, she was not an appropriate candidate for the drug. The matter was tried by another law firm before a jury, which reached a defense verdict. However, on appeal to the Appellate Division, the court reversed and remanded for a new trial on the grounds that the defendant's change of testimony at trial, from what it had been in his deposition, prejudiced the plaintiff. The matter was then transferred to Marshall Dennehey for further appeal in the New Jersey Supreme Court. The Supreme Court unanimously agreed with the defense's argument that the precedent which the Appellate

Division had relied upon in ordering the new trial was distinguishable. Further, the fact that plaintiff's counsel failed to object to the changed testimony at trial was likely strategic and, therefore, did not prejudice the plaintiff sufficiently to compel the reversal. The court reversed and reinstated the jury verdict.

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## Thought Leadership

December 1, 2021

**Reconsidering Reconsideration**