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DELAWARE

CONSTRUCTION

Daubert Motion to Exclude Expert Testimony Granted

In this action, the Third Party Plaintiff, a General Contractor who had been sued by a group of residential homeowners for water damage, alleged that Rawle & Henderson LLP's client, a subcontractor, failed to notice and report a defect in the weatherproofing elements of a deck prior to laying the cast stone coping over the top. This defect was outside the subcontractor's scope of work, but the General Contractor argued that the subcontractor was contractually obligated to report defects even outside the subcontractor's scope.



**Laura Bower
Braunsberg**

To advance that argument, the General Contractor hired a construction expert with over 50 years of industry experience in construction to opine as to the subcontractor's alleged fault for the water damage. The General Contractor's construction expert offered, in his report, his opinion that the contract imposed on the subcontractor a duty to inspect for defects in the construction, even defects outside the subcontractor's scope of work. The General Contractor further opined that failure to inspect and report triggered the indemnification provisions of the contract.

Rawle & Henderson LLP filed a *Daubert* motion to exclude the expert report as offering an impermissible legal conclusion under Delaware's Rule of Evidence 704 (which is identical to the federal rule). We argued that an expert cannot offer the fact finder contract interpretation, as that was the exclusive province of the court and the finder of fact.

In opposition, the General Contractor responded that the construction expert was providing industry context for the clauses in the contract, which is permissible under Delaware law.

The Court ruled in favor of Rawle & Henderson LLP's client and excluded testimony related to most of the report. The Court reiterated the importance of Evidence Rule 704, which precludes experts from offering testimony as to legal standards, duties or ramifications. The Court noted that any statement by the expert as to what duties were imposed by the contract was an impermissible legal opinion rather than industry contract.

The Court then proceeded to outline the portions of the expert report that she found objectionable. In particular, she noted that when the expert quoted from the contract, that action "underscores the fact that he's offering a legal opinion and legal interpretation of the contracts." The Court ruled that she would permit into evidence the

portion of the report opining that if the subcontractor had taken certain steps, the damages would not have occurred, but ordered that the expert stop short of saying those steps were contractually required of the subcontractor.

This ruling was significant because the Court seldom excludes reports from experts with impressive qualifications. This is because rule 702 and the *Daubert* standard allow experts generous leeway to opine on the subject of their expertise. The Delaware Courts will, however, enforce rule 704, which prohibits parties from using experts to advance their legal arguments rather than their factual claims. The Court is the authority as to the law and will preclude expert testimony that invades the Court's province.

Laura Bower Braunsberg is an associate in our **Wilmington, Delaware** office. She concentrates her practice on commercial litigation, property damage, personal injury, commercial motor vehicle matters, and casualty and premises liability.

She earned her J.D., *cum laude*, from the University of Virginia School of Law in 2010. While attending law school, Laura served as an Editor for the *Virginia Law Review* and as President of the National Trial Advocacy Team. She earned her B.A., *magna cum laude*, in Philosophy, Japanese, and East Asian Studies from Macalester College in 2006.

Laura serves on the American Mock Trial Association Board of Directors and is the Head Coach for the University of Delaware Mock Trial team. She represents victims of domestic violence through Delaware Volunteer Legal Services and children in foster care through the Office of the Child Advocate. She is the BARBRI Evidence lecturer for the Delaware Bar Exam.

Laura is admitted to practice in Delaware, as well as the U.S. District Court for the District of Delaware and the U.S. Court of Appeals for the Third Circuit.

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Rawle's Reports is a monthly client newsletter of Rawle & Henderson LLP with recent case law updates. If you would like hard copies of past issues, or would like to request PDF copies from us, please email info@rawle.com. Past issues are also available and downloadable from our website, www.rawle.com.

DELAWARE OFFICE

Rawle & Henderson LLP has offices in Philadelphia, Pittsburgh, Harrisburg, Delaware, New Jersey, West Virginia, New York City, and Long Island. Our **Delaware Office** is located at 300 Delaware Avenue, Suite 1120, Wilmington, Delaware 19801—easily accessible from I-95 North or South. Meet our Delaware Office attorneys:



JOELLE FLORAX is Of Counsel to the Firm in our Delaware office. She concentrates her practice in the area of environmental, mass and toxic torts. Joelle is admitted to practice in Delaware as well as the U.S. District Court for the District of Delaware. Joelle received her Juris Doctor from the Widener University School of Law, *cum laude*, in 1996 and her B.A. in Radio, Television and Film with a minor in Criminal Justice from Temple University in 1992.

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MICHAEL J. LOGULLO is Of Counsel to the Firm. He concentrates his practice in the areas of medical professional liability, professional liability, casualty and premises liability, property damage, subrogation, construction accidents, and product liability claims. He is admitted to practice in Delaware, as well as the U.S. District Court for the District of Delaware, the U.S. Court of Appeals for the Third Circuit, and the U.S. Supreme Court. Michael earned his J.D. in 1998 from the Widener University School of Law and his B.S. in Business Administration in 1994 from the University of Delaware.

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DELIA A. CLARK is Of Counsel to the Firm with offices in Wilmington, Delaware, Marlton, New Jersey, and Philadelphia, Pennsylvania. She focuses her practice on the defense of trucking companies and their insurers, casualty and premises liability, medical professional liability, and workers' compensation matters. Delia is admitted to practice in Delaware, New Jersey, Pennsylvania and the District of Columbia, as well as the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania, the District of Columbia and the District of New Jersey, and the U. S. Court of Appeals for the Third Circuit. Delia graduated from the Widener University School of Law in 1988 and received her undergraduate degree from Ohio State University in 1984.

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STEPHANIE M. SMITH is an associate in our Delaware office. She concentrates her practice on toxic tort litigation, commercial litigation, and employment law. Stephanie is admitted to practice in Delaware, Illinois, and Missouri, as well as the U.S. District Court for the District of Delaware. She received her J.D. from the University of Kansas School of Law in 2007. She earned an M.B.A. in Business Administration and Management from the University of Delaware - Lerner College of Business and Economics in 2010. Stephanie earned a B.A. in Humanities and Western Civilization in 2003 from the University of Kansas.

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LAURA BOWER BRAUNSBURG is an associate. She concentrates her practice on commercial litigation, property damage, personal injury, commercial motor vehicle matters, and casualty and premises liability. Laura is admitted to practice in Delaware, as well as the U.S. District Court for the District of Delaware and the U.S. Court of Appeals for the Third Circuit. She earned her J.D., *cum laude*, from the University of Virginia School of Law in 2010. She earned her B.A., *magna cum laude*, in Philosophy, Japanese, and East Asian Studies from Macalester College in 2006.

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WIDENER LAW

Gary N. Stewart, a partner in Rawle & Henderson LLP's **Harrisburg** office, has been invited as an instructor for Widener Law School's Intensive Trial Advocacy Program (ITAP) in May 2019. The course will be held on the Harrisburg campus of Widener Law. Gary will instruct and assist third-year students and graduates on civil trial techniques, including openings and closings. This will be the 11th year that Mr. Stewart has been invited to participate in this program.



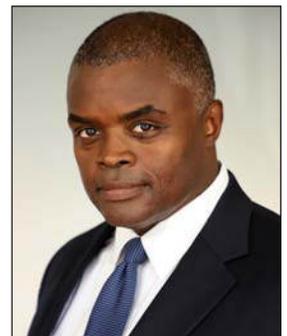
Gary N. Stewart

Gary focuses his practice on the defense of the trucking industry, specifically commercial motor vehicles and the companies that insure them, and is privileged to represent most of the motor carriers and their drivers seen on our highways. He is admitted to practice in the State and Federal Courts of Pennsylvania, New Jersey, Massachusetts, Vermont and Rhode Island, and has been admitted pro hac vice in other jurisdictions throughout the Mid-Atlantic region. Gary and his team of experienced attorneys and paralegals are routinely retained immediately following accidents involving motor carriers to perform "immediate responses," to preserve evidence and to assist in the handling of the case from the day it occurred through trial. He graduated *magna cum laude* from the Harrisburg campus of Widener University School of Law. Gary received his undergraduate degree from the U.S. Merchant Marine Academy at Kings Point, New York, where he was honored as an Intercollegiate All-American in Sailing, winning the Intercollegiate National Championship in 1979. Before becoming a lawyer, he served in the U.S. Merchant Marine and obtained U.S. Coast Guard professional licenses as Master of Oceans, Steam or Motor Vessels up to 1600 gross tons as well as Chief Officer, unlimited tonnage, all oceans. Gary served as the law clerk for the Honorable Rochelle Friedman, Commonwealth Court of Pennsylvania in Harrisburg, and has been selected by his peers as a Transportation/Maritime **Pennsylvania Super Lawyer** in 2007, 2009–2012 and 2016–2019 by *Super Lawyers*, a program of Thomson Reuters. He is a member of the Firm's Executive Committee.

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ABA TIPS

Nigel A. Greene, a partner in Rawle & Henderson LLP's **Philadelphia** office, has been appointed **Vice-Chair** of the **ABA Tort Trial and Insurance Practice Section (TIPS) Commercial Transportation Litigation General Committee** for the 2019–2020 fiscal year. His appointment is in recognition of his professional abilities and reputation among 24,000 TIPS members. This will be the sixth one-year term that Nigel has served in this position.



Nigel A. Greene

Nigel focuses his practice on the defense of commercial motor vehicle companies, municipalities, commercial general liability, and premises liability matters. In addition, he serves as an arbitrator in Philadelphia County. He is admitted to practice in the state courts of Pennsylvania, the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania and the U.S. Courts of Appeals for the Third Circuit. He received his J.D. from Georgetown University Law Center in 1994 and his B.A. from the Virginia Polytechnic and State University in 1989. He is a member of the American Bar Association and the Trucking Industry Defense Association.

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