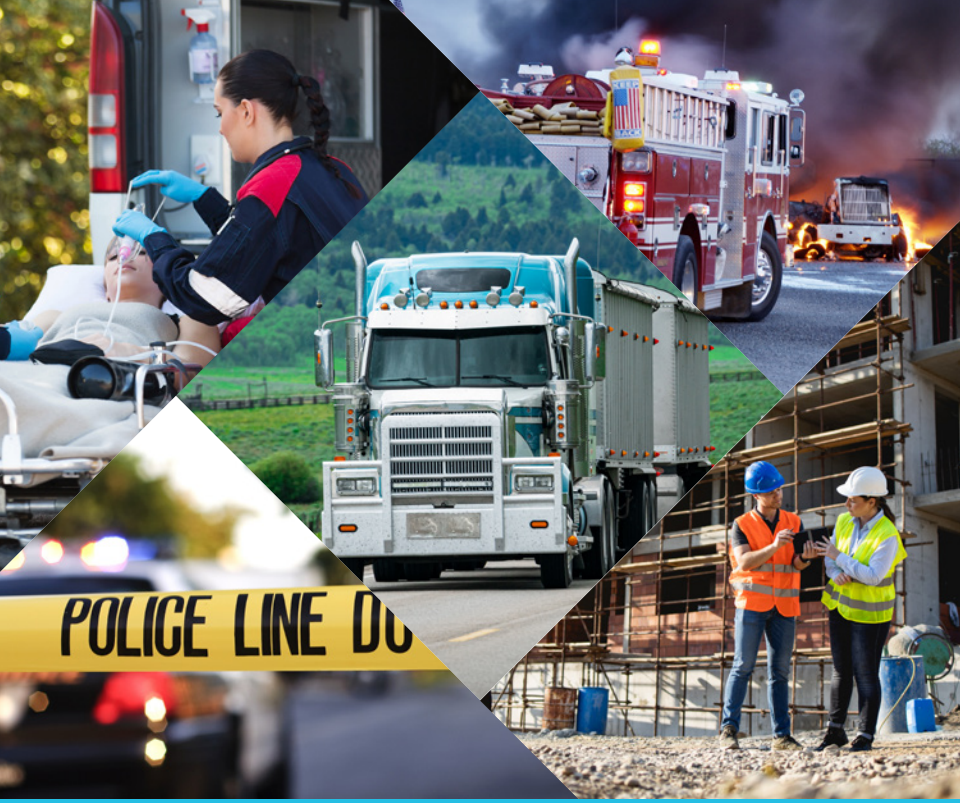

SIGNIFICANT CASES 2019

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CLASS ACTION

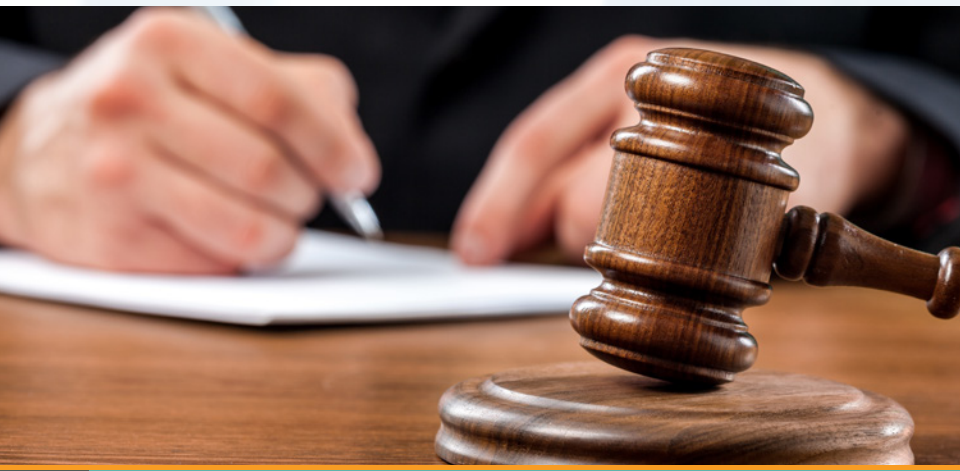
DEFENSE COUNSEL: Benoît G. Bourgon, Ann-Julie Auclair
FIRM: Robinson Sheppard Shapiro LLP (RSS)
HEADQUARTERS: Montréal, QC

$3M CLASS ACTION DISMISSED

There is a difference between speculation and evidence

The defendant city had been involved in a long and costly legal battle with four citizens over their demand for changes in a servitude (a restriction in the use of real property). The plaintiff in the class action, also a citizen, alleged that the city was conducting a vendetta against the four applicants, said vendetta that was not in the interest of citizens and that the city was not acting according to the Cities and Towns Act. The plaintiff's failure to demonstrate an apparent right in the remedy that he sought constituted failure to meet an essential condition for a class action. Appeal dismissed summarily. ◆

RESULT: Class action dismissed in favor of RSS client.



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COMMERCIAL LITIGATION

COUNSEL: Josh Wiener, Kat Carrington
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONSHIP, DEFAMATION, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Court lacks subject matter jurisdiction under First Amendment

The plaintiff was the former executive director of a religious state convention that works in conjunction with another board within a particular religious denomination. The plaintiff was terminated from his employment and sued the religious board, alleging it caused the termination and has otherwise wronged the plaintiff. The religious board initially moved to dismiss under the ministerial exception of the First Amendment, but it was denied in light of the plaintiff not being the religious board's direct employee. The religious board subsequently moved for partial summary judgment, which resulted in the district court issuing a show cause order asking the parties to brief whether the Court has subject matter jurisdiction. In its submission, the religious board demonstrated that the ecclesiastical abstention doctrine precludes the Court from hearing any of the claims because it would require the Court to impermissibly interfere with the internal affairs of a religious organization. Agreeing with the religious board's position, the district court dismissed all of the plaintiff's claims with prejudice. The matter is currently on appeal to the Fifth Circuit. ◆

RESULT: Dismissal of all claims pursuant to Fed. R. Civ. P. 12(b)(1).

DEFENSE COUNSEL: Raymond L. Robin and Karene Tygenhof
FIRM: Keller Landsberg PA
HEADQUARTERS: Fort Lauderdale, FL

ACTION ON A PROMISSORY NOTE

Recovery on Promissory Note Reduced by Millions

A real estate developer borrowed $1.5 Million from his business partner and signed a promissory note requiring monthly interest-only payments at 10% interest. Defendant made payments for the first few months and then stopped. The two partners were involved in a number of real estate projects together over the years. Their joint deals ended poorly primarily because of the 2008 recession, and the Plaintiff sued on the note. Defendant raised a number of offset defenses related to the parties' prior business dealings. The Jury agreed with the offsets and Defendant's expert accounting analysis, which allocated the offsets against principal as they were incurred, and awarded Plaintiff just slightly more than $1.4 Million, substantially less than the principal balance on the loan in default for over 10 years. The Final Judgment was for less than one-half of the total amount due based on the face of the Note. ◆

RESULT: Jury Verdict and Final Judgment for Plaintiff.

DEFENSE COUNSEL: Aidan Smith
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

LAWSUIT REGARDING COMMERCIAL LEASE

Commercial Lease Suit Backfired Against Plaintiff

Judgment was entered against the plaintiff on a counterclaim and the original complaint was dismissed. Plaintiff appealed the Circuit Court's ruling, which was affirmed by the Court of Special Appeals. ◆

RESULT: Judgment was entered against the plaintiff on a counterclaim, original complaint was dismissed.

DEFENSE COUNSEL: Benoît G. Bourgon, David Paradis
FIRM: Robinson Sheppard Shapiro LLP (RSS)
HEADQUARTERS: Montréal, QC

CLAIM FOR A $1.14M FINDER'S FEE

The burden of proof regarding an agreement is... well... a real burden

Successfully defending a fast food chain against a claim for a finder's fee. The plaintiff did make numerous communications with the interested parties in the sale of the restaurants as well as with the parties who did close the deal, but he failed to adduce evidence that an agreement on a commission was effective. Affirmed by the Court of Appeal. ◆

RESULT: Claim dismissed in favor of RSS client.

DEFENSE COUNSEL: Aidan Smith
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

REAL PROPERTY DISPUTE

Charitable Entity's Interest in Property Saves the Day

Plaintiff obtained a decree foreclosing Defendant's right of redemption with respect to real property that was valued at $4.9 million. A charitable entity with an interest in the property was granted the right to intervene in the action and the decree foreclosing the right of redemption was stricken based upon its interest in the property. ◆

RESULT: Decree foreclosing right of redemption to property worth $4.9 million stricken.

DEFENSE COUNSEL: Brian Voke and Ashley McCormack
FIRM: Campbell, Conroy & O'Neil, PC
HEADQUARTERS: Boston, MA

NEGLIGENCE AND BREACH OF WARRANTY ACTION

Serious Internal Injuries Lobster Roll Case

Defense recently obtained Summary Judgment in a Negligence and Breach of Warranty case. The plaintiff alleged that he sustained serious internal injuries when he ingested a lobster shell fragment within a lobster roll sold at a McDonald's restaurant, and brought claims against the franchisee, and all possible distributors and suppliers of the lobster meat. The court entered summary judgment on the grounds that, *inter alia*, the plaintiff had no reasonable expectation of proving causation because more than one supplier provided lobster meat to the subject McDonald's during July 2015, and the plaintiff consumed multiple lobster rolls in that same time frame. The Court dismissed the request by the plaintiff to apply the "alternative liability" theory. ◆

RESULT: Summary Judgment Granted.

DEFENSE COUNSEL: Michael J. Farrell
FIRM: MB Law Group
HEADQUARTERS: Portland, OR

TRADE SECRET MISAPPROPRIATION AGAINST SOFTWARE DEVELOPER

No Misappropriation or Interference Despite Software Developer's Plans to Develop Competing System and Pursue Clients

Plaintiff, a national university student loan servicing company, filed suit in the U.S. District Court of Oregon against a software development company and the individual software developer that had developed plaintiff's loan servicing platform. Plaintiff alleged misappropriation of plaintiff's trade secrets and intentional interference with plaintiff's clients. Although plaintiff had been working with both the software development company and the individual developer for twenty years, the parties' initial contract and all extensions had expired, and it was unclear who owned certain components of the platform. Shortly before the lawsuit, plaintiff was acquired by a multinational conglomerate which decided to play hardball and claimed ownership of the entire system. The individual developer left the software development company and, several months later, sent an email to plaintiff entitled "Some Much Needed Competition," setting out his plan to develop a competing system using newer, modern technologies (i.e. Linux-based system utilizing cloud storage, micro-sharding, and newer programming languages). He also expressed his intent to pursue plaintiff's biggest clients but was kind enough to ask if plaintiff had any objections. Two weeks later, the developer was served with the federal complaint and a motion for a temporary restraining order and preliminary injunction.

DEFENSE COUNSEL: Michael J. Farrell
FIRM: MB Law Group
HEADQUARTERS: Portland, OR

[CONTINUED]

Plaintiff alleged that the developer and his former employer intentionally misappropriated plaintiff's proprietary software and plaintiff's highly confidential list of university clients and contact persons that plaintiff had spent decades developing. Plaintiff sought permanent injunctive relief regarding the developer's proposed new system, damages of not less than $1,000,000, punitive damages, plus fees and costs. The case was aggressively prosecuted by a large Washington D.C. law firm (which reportedly incurred over fees of over $1,000,000) and went to a two-week jury trial less than one year after being filed. Michael Farrell tried the case for the individual developer.

Upon plaintiff's motion for terminating sanctions, the U.S. District Court judge found that, during discovery, the individual developer had intentionally destroyed documents that he had taken with him when left his employment. The judge did not, however, issue the terminating sanction of striking the developer's answer as requested, but instead issued an adverse inference jury instruction under which the jury could presume that the documents destroyed by the developer were unfavorable to him. Nevertheless, the jury returned a unanimous defense verdict for the developer and his former employer. ◆

RESULT: Defense Verdict.

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CIVIL RIGHTS

DEFENSE COUNSEL: Andrew Scott, Lisa Settles
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

EDUCATION CASE INVOLVING VIOLATION OF CONSTITUTION AND STATUTORY RIGHTS

No Statutory or Constitutional Violations Found for Including Islam in History Class Curriculum

On October 15, 2019 the Supreme Court denied certiorari in a case in which a student and her parents, represented by the Thomas More Law Center, filed suit against the county school board, the Principal of the high school and the Assistant Principal, asserting claims for violation of the Establishment Clause and Free Speech Clause of the First Amendment of the United States Constitution, violation of Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, and Article 36 of the Maryland Declaration of Rights. In short, Plaintiffs alleged that the board's World History curriculum endorsed Islam, that the Defendants forced the student to profess faith in Islam (it did not), and that the Defendants retaliated against the student's father for his online speech opposing the aforementioned offenses by issuing him a "no trespass" letter banning him from the school grounds after he made what could reasonably be viewed as threatening remarks. The Board and individual defendants prevailed in the United States District Court and again at the Fourth Circuit. The Plaintiffs then petitioned for certiorari at the Supreme Court, and the Court directed the filing of an opposition brief, which ultimately prevailed. ◆

RESULT: Denied Certiorari.

DEFENSE COUNSEL: Rochelle Eisenberg, David Burkhouse and Adam Konstas

FIRM: Pessin Katz Law, P.A., P.A.

HEADQUARTERS: Towson, MD

CLAIM UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

Public School Didn't Fail

On October 7, 2019 the U.S. Supreme Court denied certiorari in a case where the parents of a special education student attending public school asserted a claim under the Individuals with Disabilities Education Act alleging a failure to provide a free appropriate public education as required by the Act. The parents requested public funding of a private educational placement which would cost approximately $60,000 per year. In addition, the parents sought to recover their legal fees which exceed $500,000.00. The school board prevailed at the administrative hearing in this matter, on petition for judicial review in U.S. District Court, and on appeal to the Fourth Circuit Court of Appeals. The parents then petitioned the Supreme Court to hear the matter, and the Court directed the filing of an opposition brief – which ultimately carried the day. ◆

RESULT: Denied Certiorari.

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CONSTRUCTION

DEFENSE COUNSEL: Mica Nguyen Worthy
FIRM: Cranfill Sumner & Hartzog LLP
HEADQUARTERS: Raleigh, NC

CONSTRUCTION DEFECT, TRESPASS AND NUISANCE CLAIM

Plaintiffs' complaints of damages not enough to prove liability

Plaintiffs owned property next to a commercial development project constructed by the general contractor Defendant. Plaintiffs focused on alleged damages and complaints of trespass and nuisance but failed to prove how the general contractor's work proximately caused the alleged damages. Plaintiffs' experts also failed to take into consideration another large construction project taking place at the same time across the street, which may have been the cause of the alleged damages. At the summary judgment hearing, the Court agreed that Plaintiffs had not raised a genuine issue of material fact and granted Defendant's summary judgment, which is on appeal at this time. ◆

RESULT: Summary Judgment for Defendant.

DEFENSE COUNSEL: Kile T. Turner
FIRM: Norman, Wood, Kendrick & Turner
HEADQUARTERS: Birmingham, AL

DEFECTIVE CONSTRUCTION OF A RETAINING WALL

Wall Properly Constructed

The firm's client was an out-of-state construction company that specialized in retaining walls. The homeowners alleged that the retaining wall built by the client failed within three months of being built and put the entire house at risk. The lawsuit was filed in the county where the homeowner/plaintiff lived. At trial, the plaintiff presented an engineering expert who criticized various aspects of the design of the wall. An additional expert opined that significant grading work was required to fix the slope- which should have been done by Mr. Turner's client. Inconsistencies in some of the engineering drawings were blamed for the slope being more steep than what was stated in the contract, which resulted in the failure.

Mr. Turner countered with his own expert, and leader in the construction of MSE walls, who explained why the wall was properly constructed. One of the keys to winning the case was the consistency of the defense witnesses who were able to take a complicated geotechnical engineering problem and make a clear presentation to the jury.

RESULT: Even though the case had been in litigation for six years, but it took the jury less than 60 minutes to return a complete verdict for the defense. The insurance carrier for the construction company awarded Mr. Turner its "golden gavel award" for this courtroom victory. ◆

RESULT: Defense Verdict.

COUNSEL: John Ong and VA Wooten
FIRM: Cranfill Sumner & Hartzog LLP
HEADQUARTERS: Raleigh, NC

CONSTRUCTION

No viable claims for contribution of a Supplier/ Subcontractor

In a case with claimed damages over 10 million dollars arising out of alleged truss failures in an apartment complex, subcontractor/ supplier achieved a summary judgment on claims asserted based on the fact that there could be no viable claim for contribution were the sole plaintiff's claim was breach of contract against the general contractor. The resulting third-party claims asserted by the general contractor and its other subcontractors against our client for contribution could not stand as contribution actions cannot be premised on a breach of contract claim. ◆

RESULT: Motion for Summary Judgment Granted.

COUNSEL: Mike McWilliams, Kyle Miller, Kat Carrington
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

NEGLIGENT MAINTENANCE

Fifth Circuit Affirms Summary Judgment in favor of Defendants

The Defendants were a U.S. distributor of construction hoists and a former rental company that would rent the construction hoists distributed to it. During 2013 and 2014, the rental company rented a construction hoist for use at the Kemper County Power Plant in Kemper County, Mississippi. Plaintiff was an elevator operator at the Kemper Plant and allegedly operated the construction hoist. Plaintiff claimed that while operating the hoist, the rear door suddenly and without warning free fell directly onto her head, causing her injury.

Plaintiff filed suit in the United States District Court for the Southern District of Mississippi, Northern Division, claiming negligent maintenance of the hoist. After extensive discovery, Defendants moved for summary judgment. One day before the pretrial conference and 2 ½ weeks before trial, the court granted Defendants' motion and dismissed the case with prejudice. The plaintiff appealed. In an 11-page opinion, the Fifth Circuit affirmed. ◆

RESULT: Summary judgment affirmed.

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EMPLOYMENT / DISCRIMINATION / DISABILITY / WORK COMP

DEFENSE COUNSEL: Lisa Y. Settles and Adam E. Konstas
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

RACE DISCRIMINATION

Summary Judgement Confirmed in Race Discrimination Case

A three-judge panel of the U.S. Fourth Circuit Court of Appeals issued an unpublished per curiam opinion affirming summary judgment granted by the U.S. District Court of Maryland in favor of a local board of education employer and school superintendent in a race discrimination action brought by a terminated African American male transportation supervisor. ◆

RESULT: Summary Judgment.

DEFENSE COUNSEL: Lisa Y. Settles and Adam E. Konstas
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

RACE, SEX AND GENDER DISCRIMINATION

No Race, Sex or Gender Discrimination in Administrator's Reassignment

The U.S. District Court of Maryland granted summary judgment in favor of a local board of education employer in a race, sex, and gender discrimination action brought by an African American female school administrator who claimed the employer's discriminatory failure-to-promote her and its discriminatory reassignment of her following reorganization of the school system's central office upon appointment of an interim superintendent. ◆

RESULT: Summary Judgment.

DEFENSE COUNSEL: Bonnie M. Boryca and Mark M. Schorr
FIRM: Erickson | Sederstrom, P.C.
HEADQUARTERS: Omaha, NE

UNPAID WAGE CLAIMS BY GROUP OF FORMER EMPLOYEES

Unpaid wage claims rejected because employees paid as agreed

Multiple former employees filed suit against former employer alleging unpaid wages under state wage payment and collection act, seeking upwards of six figures each in back pay and attorney's fees. Employer defended by showing that the employment agreements provided that employees were to be paid salaries and had received all salaries and benefits they were owed. Despite appearing to masquerade as an FLSA claim for overtime wages, much of which was for wages not recoverable on statute of limitations grounds, the court held that even under the wage payment act the claims could not proceed to trial. The undisputed evidence showed the employees had agreed and accepted to be paid salaries. And, there were no genuine disputes of fact that they had received all compensation promised to them for the work performed. ◆

RESULT: Summary judgment for defense.

DEFENSE COUNSEL: Robert Kelso; Megan Van Pelt
FIRM: Kightlinger and Gray
HEADQUARTERS: Indianapolis, IN

EMPLOYMENT DISCRIMINATION

Termination of 3 memory care unit nurses by Nursing Home

The Title VII Federal Court discrimination lawsuits of 3 former employees of a nursing home were dismissed on summary judgment. The Federal Court found, in all 3 cases, that the conduct of the Plaintiffs, which included abandonment of their job duties (evidenced on video), provided the Defendant nursing home with sufficient "legitimate, non-discriminatory reason" for the terminations of the 3 nurses. ◆

RESULT: Three Motion for Summary Judgments Granted for Defendant Nursing Home.

COUNSEL: Robin Taylor and Timothy Lindsay
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

WRONGFUL TERMINATION CASE

Jury returns defense verdict in under two hours

Medical supply salesperson claims he is owed millions and alleges he was terminated because of his age, 53 years old. The case arose from the termination of a medical supply salesperson who had been employed with the medical supply company's sales force for 14 years. Plaintiff was terminated after customers complained about his substandard service and after he consistently failed to meet sales goals despite coaching, counseling, discipline and being placed on a performance improvement plan. Plaintiff filed this suit, alleging the medical supply company discriminated against him because of his age. After a 4-day trial, jury returned defense verdict in under 2 hours. ◆

RESULT: Defense Verdict.

DEFENSE COUNSEL: Andrew Tice, Ahlers & Cooney, P.C.
FIRM: Ahlers & Cooney, P.C.
HEADQUARTERS: Des Moines, Iowa

COLLECTIVE BARGAINING CONTRACT ENFORCEMENT ACTION

State of Iowa Board of Regents Wins on No Contract

Plaintiff, Service Employees International Union, sued the State of Iowa Board of Regents claiming the parties had reached a collective bargaining agreement only days before a change in the law. The State of Iowa Board of Regents argued there was no enforceable agreement resulting in the lack of any contract. The State of Iowa Board of Regents successfully obtained summary judgment from the Iowa District Court calling for dismissal of the Union's lawsuit. The Union appealed and the Iowa Supreme Court accepted the case for review. Following briefing and argument, the Supreme Court affirmed summary judgment and dismissal of the Union's lawsuit finding in favor of the State of Iowa Board of Regents accepting the argument no valid binding contractual agreement had been reached between the parties. ◆

RESULT: Summary Judgment & Supreme Court Affirmation.

DEFENSE COUNSEL: Jeremy D. Capps, Melissa Y. York
FIRM: Harman Claytor Corrigan & Wellman, PC
HEADQUARTERS: Richmond, VA

EMPLOYMENT DISCRIMINATION – RACE AND AGE

School Board did not discriminate on the basis of race or age when terminating teacher

Plaintiff was an elementary school teacher that had been employed with the school division for 32 years at the time she was terminated for poor performance after repeated counseling, negative evaluations, and a performance improvement plan. Plaintiff alleged that her school principal discriminated against her on the basis of race (she was one of two African American teachers at the school) and age when the principal did not recommend the tenured teacher for continuing employment. The District Court held on summary judgment that there was no evidence of race or age discrimination, and that there was no evidence to support a Cat's Paw theory of liability against the School Board after the School Board reviewed the grievance record before voting unanimously to terminate employment. ◆

RESULT: Defense Motion for Summary Judgment granted.

COUNSEL: Ann E. Evanko and Katherine L. Wood
FIRM: Hurwitz & Fine, P.C.
HEADQUARTERS: Buffalo, NY

EMPLOYMENT LAW

ADA and Age Discrimination claims dismissed against municipal defendant

Plaintiff, a 20+ year lawyer with the Office of Legal Affairs, had filed a Complaint against his employer, a municipality, and the Director of the Office of Legal Affairs, individually and in her professional capacity, alleging among other things, violations of 42 U.S.C. section 1983, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act, and New York State Human Rights Law. Plaintiff alleged that the defendants, his boss and employer, humiliated and embarrassed him in front of his co-workers because of his age and alleged mental health disability, and otherwise discriminated against him by trying to force him out of his job. The Complaint sought compensatory damages, costs, and attorney's fees.

The U.S. Second Circuit Court of Appeals affirmed the decision of the U.S. District Court, Western District of New York, which granted Defendants' motion to dismiss due to Plaintiff's failure to timely serve Defendants with process. Plaintiff, represented by counsel, relied on state law which allows 120 days after filing the complaint to serve it on the defendants, rather than federal law which is only 90 days. Plaintiff served Defendants fifteen (15) days after the 90-day service period expired. Due to the extremely short statute of limitations imposed on employment discrimination claims, the statute of limitations expired shortly after Plaintiff served Defendants with process, and thus if the Complaint were dismissed, Plaintiff would be time barred from refiling his claims—which is a loss of a substantial right. Despite this, the Western District Court engaged in an extensive analysis and found that negligence of counsel/law office failure, without an independent good cause

COUNSEL: Ann E. Evanko and Katherine L. Wood
FIRM: Hurwitz & Fine, P.C.
HEADQUARTERS: Buffalo, NY

[CONTINUED]

reason, is insufficient to persuade the Court to allow Plaintiff an extension of time to serve his Complaint. Since the delay in service could have been avoided and was entirely within the Plaintiff's control, the Court further refused to permit a discretionary extension of time to serve. The Second Circuit upheld the Western District's dismissal of the Complaint finding no abuse of discretion at the trial level. ◆

RESULT: Second Circuit affirmed the granting of county defendants' motion to dismiss.

DEFENSE COUNSEL: Paul Caleo and Katrina Durek
FIRM: Burnham Brown
HEADQUARTERS: Oakland, CA

PREMISES LIABILITY; NEGLIGENCE; CHEMICAL EXPOSURE INJURIES TO EMPLOYEE; APPLICATION OF EXCEPTIONS TO WORKERS COMPENSATION EXCLUSIVITY RULES

Employee plaintiff seeking additional damages ruled no exception to Workers Comp exclusivity

Plaintiff age 24, a barista at Starbucks, went to the Starbucks he worked at in Mountain View, on his day off. He went to the bathroom and observed a sewage overflow and reported it to the store supervisor, who asked him to clock in and assist with stopping the sewage. Plaintiff and other employees threw towels down onto the sewage water to try and stop it spreading into the front of the store. Plumbers were called to fix the sewage issue and cleaned the store with bleach they had brought with them. Plaintiff claimed he and the other employees were then asked to complete the usual store closing procedures. Plaintiff claimed he cleaned the floors with the standard floor cleaning solution, under the direction of the store management.

Plaintiff claimed the combination of the bleach used by the plumbers and the store's floor cleaning solution reacted and caused him to be exposed to toxic chemicals and a toxic gas was created. Plaintiff claimed he was injured and took a leave of absence to recover, but that he was terminated from his employment while on the leave during the month he was undergoing medical treatment

DEFENSE COUNSEL: Paul Caleo and Katrina Durek
FIRM: Burnham Brown
HEADQUARTERS: Oakland, CA

[CONTINUED]

for his alleged injuries. Plaintiff made a workers' compensation claim as a result of the incident and received workers' compensation benefits including medical treatment. Plaintiff then sued Starbucks and the store manager.

Plaintiff's counsel alleged claims of exceptions to workers compensation exclusivity including fraudulent concealment pursuant to Labor Code section 3602(b)(2); premises liability under the dual capacity doctrine; and retaliation pursuant to section Labor Code section 1102.5.

Defendants' counsel contended that Plaintiff's lawsuit was barred by the workers' compensation rule of exclusivity. Defense counsel contended Plaintiff voluntarily resigned from employment and could not prove that he was discharged. Through motions in limine, defendants excluded from evidence plaintiff's expert's opinions as to the dangerousness of the cleaning chemicals used by the plaintiff. Defendants excluded plaintiff's industrial hygiene expert's opinion that Plaintiff was working in a "toxic chlorine gas" as a result of the reaction between the floor cleaning chemical being used by Plaintiff, and bleach used by a plumber. Defendants relied on the case of Sargon Enterprises, Inc. v. University of Southern Cal. (2012) 55 Cal. 4th 747 to exclude this expert's testimony as inadmissible because it was based on speculation and conjecture.

At the close of plaintiff's case after seven days of trial, defendants moved for nonsuit pursuant to C.C.P. 581c. The defendants argued that there was insufficient evidence that would permit or allow the jury to find some of the necessary elements for each of the plaintiff's three causes of action. Defense counsel contended there was no direct evidence regarding several of the necessary elements, and additionally there was no indirect evidence from which a permissible inference could be drawn.

DEFENSE COUNSEL: Paul Caleo and Katrina Durek
FIRM: Burnham Brown
HEADQUARTERS: Oakland, CA

[CONTINUED]

Plaintiff claimed chemical burn injuries including lung damage and irritation to chemicals. Plaintiff played college soccer and claimed he was denied an opportunity to pursue athletic scholarships at certain universities as a result of his decreased lung capacity and inability to perform at the same level as before the incident. He sought recovery for his past and future pain and suffering, past and future medicals and future lost earnings.

Plaintiff also sought punitive damages for the defendants' alleged conduct.

Defense counsel also contended Burger suffered no injury as a result of his exposure to sewage water or the bleach used by the plumbers and there was no chemical reaction between the bleach and the store floor cleaner and that Plaintiff had no damages because of this alleged exposure.

Defendants Motion for Summary Judgment had been denied prior to trial. Plaintiff's demand was $750K. Defendants served a CCP 998 statutory offer of $7.5K. Defendants filed a cost bill in excess of $100K based on the successful statutory offer. Plaintiff appealed the Judgment entered against him. Defendants obtained a Judgment against Plaintiff for $43K. Plaintiff agreed to waive his appeal rights in exchange for Defendants not seeking to execute against the Judgment. ◆

RESULT: Defendants Motion for Non-Suit granted after 8 days of jury trial and cost bill in excess of $100K filed.

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INSURANCE / COVERAGE

DEFENSE COUNSEL: S. Brent Wakefield, Carter Fairley and Adam Franks
FIRM: Barber Law Firm PLLC
HEADQUARTERS: Little Rock, AR

NEGLIGENCE ACTION AGAINST NONPROFIT MENTAL HEALTH SERVICES PROVIDER AND ITS INSURER (RISK RETENTION GROUP)

Parent shot three times by foster child – no liability

Plaintiff, a foster parent, sued his employer, a mental health services provider (and its insurer), after defendant placed a 17-year-old foster child in plaintiff's home who later shot the plaintiff three times with plaintiff's own weapon. After the five years of litigation and a policy limits demand of $10,000,000, the circuit court first granted summary judgment to the insurance company based on the statute of limitations, then six months later granted summary judgment in favor of the insured mental health services provider on the basis of both charitable immunity and acquired sovereign immunity (in administering a foster care program pursuant to a contract with the state of Arkansas). Plaintiff has appealed the ruling as to the insurance company, but not as to the mental health services provider. ◆

RESULT: Summary Judgment Xs 3.

DEFENSE COUNSEL: Nick Krnjevic, Benoît G. Bourgon
FIRM: Robinson Sheppard Shapiro LLP (RSS)
HEADQUARTERS: Montréal, QC

WELLINGTON APPLICATION

Stretching coverage by... 27 years?

Defending the distributor of natural gas following an explosion caused by the faulty installation of piping connectors. Application to compel the insurer, our client, to defend the insured.

The Wellington application was dismissed since the policy that was in force when the connection was installed, in 1987–88 was no longer in force in 2014 when the damage occurred.

Reference to come. ◆

RESULT: Application dismissed in favor of RSS client.

DEFENSE COUNSEL: W. Benjamin Woody
FIRM: Harman Claytor Corrigan Wellman
HEADQUARTERS: Richmond, VA

UNDERINSURED MOTORIST INSURANCE COVERAGE

UIM for one, liability for all

A commercial auto policy's liability provision symbol (1) references all autos, while its UIM provision symbol (2) refers to the autos identified in the schedule of covered autos. When an employee driving an unscheduled auto is critically injured while on the job, he claimed UIM under the commercial policy. The U.S. District Court for the Eastern District of VA recognized that the distinction between the symbols on the declarations page was meaningful, and the employee was not entitled to UIM benefits under the policy. ◆

RESULT: Summary judgment for UIM carrier.

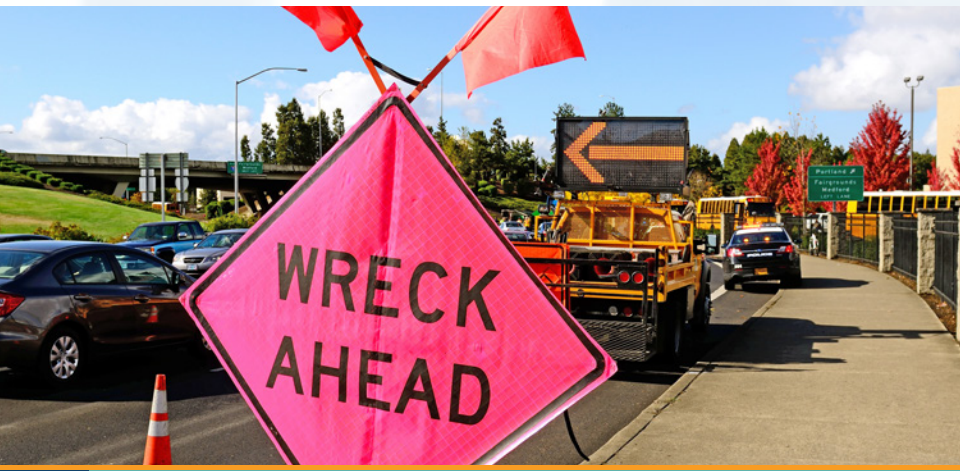
COUNSEL: Josh Wiener, Kat Carrington
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

UNINSURED MOTORIST

Damages successfully limited to nominal figure in damages-only case

Plaintiffs were the insureds of defendant insurance company. One of the plaintiffs was involved in a motor vehicle accident that resulted in physical injuries and sought uninsured motorist coverage from the insurance company. The insurance company admitted liability, and the case proceeded to a federal court jury trial on damages only. Plaintiffs asked the jury for $4 million, and the defense team successfully limited the award to a nominal $37,000. Plaintiffs have appealed the award. ◆

RESULT: Nominal damages in damages-only federal jury trial.



DEFENSE COUNSEL: Dan Syhre and Michelle Kierce
FIRM: Betts, Patterson & Mines, P.S.
HEADQUARTERS: Seattle, WA

INSURANCE COVERAGE DECLARATORY JUDGMENT ACTION

Ignorance of the law is neither an excuse nor an "occurrence"

Insured towing company sought defense and indemnity coverage for an underlying lawsuit brought by the State of Washington alleging that the insured unlawfully sold vehicles belonging to active duty servicemembers to satisfy storage liens after the vehicles were impounded. The insurer commenced a declaratory judgment action to resolve the question of coverage. The insurer argued that the sale of a vehicle to satisfy a storage lien is an intentional act and the alleged injury to the vehicles and/or their active duty owners was not covered because it was not caused by accidental conduct constituting an "occurrence." The insured argued that while selling the vehicles may have been intentional, the resulting harm was "accidental" because the insured did not know about the applicable law and, thus, did not realize the sale of vehicles owned by active duty servicemembers was wrongful. The Western District of Washington, Judge Leighton, rejected the company's mistake of law defense and ruled that because it acted intentionally in selling impounded vehicles at auction, where doing so foreseeably deprives the owner of possession, there was no accident or "occurrence" to trigger coverage. The insurer's motion for summary judgment was granted as to the duty to defend and to indemnify. No appeal was taken. ◆

RESULT: Motion for Summary Judgment Granted.

DEFENSE COUNSEL: Kile T. Turner
FIRM: Norman, Wood, Kendrick & Turner
HEADQUARTERS: Birmingham, AL

CONSTRUCTION – INSURANCE COVERAGE

No Coverage for Defective Work

In this case, an insurance carrier had initially provided a defense to its insured, a construction company, when a lawsuit was filed against it alleging defective construction. It was later determined that no coverage existed for the claims, and the defense was withdrawn. The underlying claim was arbitrated and resulted in a judgment against the insured for faulty construction. The insured then sought reimbursement for defense costs and indemnity of the adverse judgment from the carrier.

After the trial court entered judgment requiring the carrier to pay both the arbitration and reimburse the entire cost of the litigation, Mr. Turner was hired to handle the coverage appeal. At the heart of the case was whether the arbitration award included any damages that were the result of an "occurrence." In AL, the defective work itself is not considered an "occurrence", but any resulting damages trigger coverage. The arbitration award was vaguely written, which created the "occurrence" issue.

RESULT: The AL Supreme Court reversed the trial court and remanded the case for the trial court to enter judgment in favor of Mr. Turner's client. Interestingly, the Appellate Court relied on one of Mr. Turner's prior successful appeals, Town & Country Ford v. Amerisure Insurance Company, 111 So.3d 699 (Ala. 2011) to support its decision in favor of his client in this case. ◆

RESULT: Reversal of adverse verdict and judgment rendered in favor of client.

DEFENSE COUNSEL: Mark Carlton, Robert Friedman
FIRM: Harman, Claytor, Corrigan & Wellman
HEADQUARTERS: Richmond, VA

INSURANCE COVERAGE

No Coverage Under CGL Policy for Garage-Related Injury

A truck driver sued an insured that operated a truck stop, which included a hotel, garage, restaurant and gas station. The truck driver brought his truck to the garage in order to have a tire repaired. The insured's employee removed the tire from the truck, placed the tire in a safety cage, and began inflating the tire. The truck driver was standing in the garage repair area while the tire being inflated and was injured when the tire exploded. The truck driver sued the truck stop for bodily injuries based upon theories of negligent inflation of the tire and premises liability. The truck stop's CGL insurer denied coverage for the truck driver's bodily injury lawsuit against the insured. The Supreme Court of VA upheld the CGL insurer's denial of coverage based upon the standard auto exclusion in the CGL policy. The Court ruled that: 1) the auto exclusion was clear/unambiguous in excluding coverage arising from the "maintenance of any auto;" 2) the term "maintenance" in the standard auto exclusion is unambiguous and refers to vehicle repair/servicing activities; and 3) the auto exclusion applied to bar coverage for the premises liability claim because the claim "arose from" vehicle maintenance activities. ◆

RESULT: Summary Judgment for Insured Reversed and Judgment Entered for Insurer.

DEFENSE COUNSEL: John Claytor, Mark Carlton, Robert Friedman
FIRM: Harman, Claytor, Corrigan & Wellman
HEADQUARTERS: Richmond, VA

INSURANCE COVERAGE

Insurer entitled to reimbursement of settlement after second insurer wrongfully claimed excess priority position

Two insurers—Insurer A and Insurer B--were involved in an initial coverage dispute regarding the priority of liability coverages for a mutual insured in connection with an underlying wrongful death action. In the initial coverage action, Insurer B took the position that Insurer A was primary as to the first $3 million layer of coverage. After Insurer B prevailed before the trial court in the coverage action, and with trial in the wrongful death action looming, Insurer A settled the underlying wrongful death action within the $3 million layer. At the time of the settlement, Insurer A's appeal in the coverage action was pending. After the settlement, the Supreme Court of VA reversed the trial court and held that Insurer B was, in fact, primary.

Following the Supreme Court of VA's first ruling, Insurer A filed an equitable contribution action against Insurer B seeking reimbursement for the underlying settlement. Insurer B moved to dismiss the reimbursement action on two grounds: (1) It did not consent to the underlying wrongful death settlement, such that its policy's consent-to-settlement clause was breached; and (2) Insurer A's settlement amounted to a "voluntary payment" for which it was not entitled to reimbursement. The trial court agreed with Insurer B and granted Insurer B's motion to dismiss Insurer A's contribution action.

Upon appeal back to the Supreme Court of VA, Insurer A argued that the trial court erred because Insurer B had waived its consent-to-settlement clause by wrongfully disavowing its primary coverage obligations. Insurer A further argued that it did not act as a

DEFENSE COUNSEL: John Claytor, Mark Carlton, Robert Friedman
FIRM: Harman, Claytor, Corrigan & Wellman
HEADQUARTERS: Richmond, VA

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volunteer in light of the initial trial court's unfavorable ruling, and that the volunteer doctrine—an equitable doctrine-- was otherwise inapplicable because its application under the circumstances would be inequitable. The Supreme Court of VA ruled in favor of Insurer A, holding that Insurer B had waived its consent-to-settlement clause and that the volunteer doctrine did not bar reimbursement. ◆

RESULT: Supreme Court of VA held that settling insurer was entitled to equitable contribution.

DEFENSE COUNSEL: Patricia McHugh Lambert and Kambon Williams
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

FIRST PARTY COVERAGE DISPUTE RE: NATIONAL FLOOD INSURANCE PROGRAM POLICY

Insurer "Fiscal Agent" not "General Agent" to FEMA

The insured owns a beachside hotel in Oregon and was issued a Standard Flood Insurance Policy, pursuant to the National Flood Insurance Program, by a large insurance company. Following a surge of tidal water that impacted the lower level of the hotel, the insured submitted a proof of loss in support of its insurance claim. The proof of loss demanded a payment of approximately ninety-eight thousand dollars. The insurer issued payment for that amount but also issued a partial denial for damages sustained on the lower level of the hotel because a determination was made that the lower level constituted a "basement" under the policy and was subject to the restricted coverage provided for basements in the policy. The insured appealed the partial denial unsuccessfully and then eventually filed a civil action in the U.S. District Court for the District of Oregon seeking approximately four-hundred thousand dollars. At the time the civil action was filed, no supplemental proof of loss had been submitted to demand the four-hundred thousand amount. The insured moved for summary judgment on the arguments that the lower level was not a basement and that a supplemental proof of loss was not required because the adjuster had engaged in conduct that waived the requirement. The insurer filed a cross-motion for summary judgment arguing that the lower level was a basement and that the requirement for a supplemental proof of loss was not subject to waiver. Ruling for insurer, the trial court determined that the insurer is merely a "fiscal agent" for FEMA, not a "general agent", and, as such, cannot waive the proof of loss requirement, which is a

DEFENSE COUNSEL: Patricia McHugh Lambert and Kambon Williams
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

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condition precedent to suit. The basement issue was thus deemed moot.

On appeal, the Ninth Circuit affirmed the lower court's ruling, rejecting insured's argument that the proof of loss requirement should be set aside due to the alleged misstatements of the adjuster regarding the processing of the claim because "[n]one of the statements attributable to the insurer constitute 'affirmative misconduct going beyond mere negligence'" and courts may not impose estoppel against the government absent affirmative misconduct. ◆

RESULT: Ruling for Insurer.

DEFENSE COUNSEL: Marcel-Olivier Nadeau
FIRM: Robinson Sheppard Shapiro LLP (RSS)
HEADQUARTERS: Saguenay, QC

NO COVERAGE FOR AN INSURED WHO ACTED IN BAD FAITH

Liar-liar, house on fire — and no compensation

The plaintiff's house was destroyed by fire; he claimed a $131,000 compensation from his insurer. However, evidence revealed that contrary to his declaration to the broker, he had not paid $47,500 for the house, but $7,500. He also omitted to declare that the house had been vacant for a number of years, that he had been filed for bankruptcy two years earlier, and that he had made several insurance claims in the past. The Court dismissed the claim, declaring that the insurance was null ab initio. Case dismissed. ◆

RESULT: Claim dismissed in favor of RSS client, the insurer.

DEFENSE COUNSEL: Franklin Beahm & Christopher Otten
FIRM: Beahm & Green
HEADQUARTERS: New Orleans, LA

CGL CLAIM AGAINST HOSPITAL ARISING OUT OF HURRICANE KATRINA

No evidence of injuries = no award for damages

Plaintiffs filed suit against a New Orleans hospital centering on the post-Katrina environment. The plaintiffs, family members of the decedent patient, claimed that the conditions in the hospital caused or exacerbated the decedent patient's preexisting health issues and caused or contributed to her death approximately one month after Hurricane Katrina. The plaintiffs sought damages in the amount of $800,000. The case was tried to the judge, who took the matter under advisement and entered a defense judgment in favor of the hospital with written reasons in January 2019, finding the hospital complied with all appropriate rules and regulations, finding no evidence of injuries to the decedent, and finding plaintiffs' experts not credible. Plaintiffs did not appeal. ◆

RESULT: Defense Judgment.

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LEGAL MALPRACTICE

DEFENSE COUNSEL: Dena B. Sacharow and Karene Tygenhof
FIRM: Keller Landsberg PA
HEADQUARTERS: Fort Lauderdale, FL

ABUSE OF PROCESS / CONSPIRACY CLAIMS AGAINST OPPOSING LAWYERS

Abuse of Process and Conspiracy Claims Dismissed Against Lawyers

Attorneys represented a Wife in a dissolution action. Following the divorce, an issue arose regarding the Husband's obligation to pay alimony. After the Wife, through counsel, sought to enforce the alimony, contentious litigation ensued but was ultimately resolved via mediation. After the mediation, the Husband filed suit against his now ex-Wife, her counsel and her accountant for malicious prosecution and conspiracy regarding the actions taken to enforce the unpaid alimony. After serving a Motion for Sanctions, the Husband amended the action to pursue claims for abuse of process and conspiracy. The Court ultimately dismissed the lawsuit with prejudice finding that all matters were resolved in the mediation, a lawyer cannot conspire with their client unless there is a personal stake in the illegal conduct separate from advancing the interests of the client, plaintiff could not plead or prevail on an abuse of process claim and the litigation privilege provided the lawyers immunity for abuse of process. The case is currently on appeal. ◆

RESULT: Final Dismissal with Prejudice.

DEFENSE COUNSEL: D. David Keller and Jose R. Riguera
FIRM: Keller Landsberg PA
HEADQUARTERS: Fort Lauderdale, FL

PROFESSIONAL LIABILITY / LEGAL MALPRACTICE

Fraud on the Court Revealed – Fees and Costs Recovered

Attorney closed sale on a foreclosed property with an inadvertently erroneous legal description. The buyer sued the bank for breach of contract although it relied on an erroneous title commitment. Assuming defense of the bank under an indemnity agreement with its lawyer, defense counsel exposed the case at trial as a fraud on the court because the buyer and his closing lawyer concealed their pre-closing knowledge of the erroneous legal description. The bank prevailed on the claim for breach of contract and on its counterclaim for reformation and recovered reimbursement of all attorneys' fees and costs, plus additional damages. ◆

RESULT: Final Judgment for Defendant.

DEFENSE COUNSEL: D. David Keller and Raymond L. Robin
FIRM: Keller Landsberg PA
HEADQUARTERS: Fort Lauderdale, FL

PROFESSIONAL LIABILITY/ LEGAL MALPRACTICE

Trial Court Cannot Review Decisions of Appellate Court

Clients sued a prominent attorney and his law firm for legal malpractice after the clients lost an appeal handled by the attorney. The final judgment against the clients, which was the subject of the appeal, was grounded on two separate and independent legal theories. The appellate court issued a per curiam affirmance ("PCA") without opinion upholding the final judgment against the clients. One of the legal theories upon which the final judgment was based was the subject of an unrelated appeal in the Florida Supreme Court pending at the time the intermediate appellate court issued its decision. After the intermediate appellate court issued the PCA, the Supreme Court changed the law as it existed at the time of the PCA. Plaintiffs claimed that the Defendant attorney was negligent by not advising the clients to seek to have the appellate court revisit the issue. Defendants filed a motion for summary judgment arguing that the Supreme Court's decision had no effect because the PCA was based on two separate and independent grounds and no subsequent court or jury could decide that the remaining basis alone was insufficient to support the PCA. The Court granted the motion and entered final judgment for the Defendants. Claims for fees and costs are pending. ◆

RESULT: Final Summary Judgment for Defendant.

MEDICAL

COUNSEL: Davis Frye and Clay Gunn
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

NURSING HOME NEGLIGENCE ACTION

Arbitrator finds in favor of nursing home

The claimant alleged that a nursing home resident developed pressure ulcers attributable to multiple breaches in the nursing standard by the staff at a long-term care facility. According to the claimant, the nursing staff failed to turn and reposition the resident, failed to treat the resident's skin breakdown timely, and failed to implement appropriate measures to reduce the resident's identified risk for skin breakdown. The claimant alleged that the nursing home's negligence resulted in pressure ulcer to the resident's sacrum, heels, elbows, feet, legs, and hands. After three days of testimony at the arbitration, the arbitrator ruled in favor of the nursing home, finding that the evidence did not establish any breach in the standard of care by the nursing staff at the long-term care facility. ◆

RESULT: Arbitration award of no liability in favor of Nursing Home Defendant.

COUNSEL: Michael Badowski & Anthony Gabriel
FIRM: Margolis Edelstein
HEADQUARTERS: Philadelphia, PA

OPIOID AND BENZODIAZEPINE PRESCRIPTION DRUG DEATH CASE

MD's prescription found to be within standards of acceptable pain management

In a death case, Plaintiff daughter alleged that our primary care physician client negligently treated her 40-year-old father's chronic pain and severe anxiety with excessive and prolonged opioid and benzodiazepine prescriptions causing addiction and her father's ultimate death from hypothermia. Having not been heard from for three days, the man was discovered in a frigid mobile home with minimal vital signs from which he could not be resuscitated despite the copious administration of Narcan. Plaintiff's two well-established and credentialed expert witnesses opined that the root cause of the man's death was respiratory depression brought on by his opioid pain and anti-anxiety benzo medications. During the course of the week-long trial in Dauphin County the Defense called numerous fact witnesses and two expert witnesses in establishing that our client's prescription practices over a seven-year period were within standards of acceptable pain management care applicable at the time. It was further persuasively postulated that the event precipitating the man's hypothermic demise was his likely 'binge' use of crystal meth (a non-narcotic illicit stimulant drug) followed by a 'crash' phase resulting in overwhelming somnolence; explaining his frozen exposure. (In pre-trial discovery, it was learned that a hollow pen was found on the man's person which ME's Harrisburg trial defense team of Michael Badowski and Anthony Gabriel secured independent lab analysis revealing the interior presence of methamphetamine.) Following two hours of

COUNSEL: Michael Badowski & Anthony Gabriel
FIRM: Margolis Edelstein
HEADQUARTERS: Philadelphia, PA

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deliberations, the jury returned a verdict of no negligence. Pre-trial, the defense was confronted with and successfully thwarted a plethora of motions to exclude evidence along with repeated attempts on the part of Plaintiff to assert claims of punitive damages. Plaintiff would not budge from her $5 million settlement demand. ◆

DEFENSE COUNSEL: Catherine Steiner and Gregory Kirby
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

Jury Found "No Breach" Despite Finger Pointing by Settled Defendant

The Plaintiff alleged that the Defendant failed to order a test in a timely manner and that failure resulted in the patient's death. The Plaintiff settled against the hospital and other agents of the hospital. One of those agents changed their testimony and affirmatively testified that the Defendant/client had failed to order the test and that she thought he would have ordered the test. The Plaintiff's counsel asked for $8 Million Dollars in her closing argument. Despite this change in testimony and overt finger pointing by a settled Defendant, the PK Law represented Defendant prevailed and the jury found "NO BREACH". ◆

RESULT: Defense Verdict.

DEFENSE COUNSEL: Catherine Steiner
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

No Causation Found After Botched Vasectomy

The Plaintiff alleged medical negligence against the Defendant doctor and Defendant practice with respect to a post-vasectomy semen analysis on June 10, 2015 following a vasectomy performed on the Plaintiff on February 4, 2015. The Plaintiff alleged that the doctor's medical assistant failed to appropriately focus the microscope during the analysis and therefore failed to properly observe motile sperm. On July 29, 2015, the doctor's office received a telephone call from the Plaintiff suggesting that his significant other may be pregnant, and a semen sample reviewed that day showed the presence of motile sperm. Plaintiff's significant other subsequently gave birth to a healthy baby boy on April 11, 2016. The jury found a breach of the standard of care on the part of the practice but found no causation resulting in a verdict in favor of the Defendants. ◆

RESULT: Defense Verdict (Breach of Standard of Care by group but no causation).

DEFENSE COUNSEL: Catherine Steiner and Megan Anderson
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

No Breach Despite Allegations of Two "Failed" Spine Surgeries

The Plaintiff alleged that the Defendant failed to appropriately secure spinal hardware during the performance of a posterior spinal fusion surgery. Plaintiff asserted that this alleged failure caused Plaintiff to require a second surgery performed through an anterior approach. Plaintiff alleged that the Defendant was "sloppy" and failed to remove adequate disk material during the anterior approach procedure, and that the failure caused new pain for Plaintiff post-operatively causing Plaintiff to require a third surgery. Through the use of a detailed radiologic imaging review the defense was able to dispel Plaintiff's theories of negligence at each turn thus resulting in a "NO BREACH" jury verdict in favor of the PK Law represented Defendant. ◆

RESULT: Defense Verdict.

DEFENSE COUNSEL: Mairi Pat Maguire
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

No Double Dipping in Litigation

In its 7-0 decision, the Court of Appeals applied the "one satisfaction rule" to prevent the Plaintiff from seeking compensation for the hospital's alleged negligence after reaching a settlement with an insurance company that covered the injuries from the crash and the alleged malpractice.

"Under the one satisfaction rule, once the plaintiff has obtained a full satisfaction, he or she is prevented from pursuing another who may be liable for the same damages," Judge Clayton Greene Jr. wrote for the high court. "If the satisfaction only compensated the plaintiff for the injuries he or she initially sustained from the automobile accident, the plaintiff's claim for injuries that resulted from the subsequent malpractice is not barred. If, however, the satisfaction compensated the plaintiff for all of the injuries he or she sustained from the automobile accident and the malpractice, the plaintiff's medical malpractice claim is barred by the one satisfaction rule." ◆

RESULT: Defense Verdict.

DEFENSE COUNSEL: Catherine Steiner and Gregory Kirby
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

Lost Earnings Not Properly Compensable for Loss of Consortium Plaintiff

Summary judgment was obtained on Plaintiffs' claim for $400,000 in lost earnings. The loss of consortium husband Plaintiff sought lost earnings as part of contingent compensation for the sale of a business because he claimed he had to take care of his wife. He said he lost time from work and was entitled to that as compensation. Defendants argued that lost earnings was not properly compensable to an uninjured loss of consortium plaintiff under Maryland law or public policy concerns. The judge agreed with the defense and granted the client summary judgment which wiped out the claimed $400,000 in potential damages before trial. ◆

RESULT: Summary Judgment.

DEFENSE COUNSEL: Catherine Steiner and Kim Longford
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE, LISFRANC INJURY

Plaintiff's expert stricken, summary judgment for defense

Plaintiff sustained a Lisfranc injury and alleged that she was told she could bear weight as tolerated, allegedly causing the injury to displace. Plaintiff relied on one expert in support of her case. We challenged the expert pursuant to Maryland's Twenty Percent Rule and successfully argued that Plaintiff had failed to meet her burden of showing that her expert did not spend more than 20% of his professional time on activities related to testifying in personal injury matters. Plaintiff's expert was stricken, and summary judgment was entered in favor of the defense as Plaintiff had no expert testimony in support of her claims. ◆

RESULT: Summary Judgment.

COUNSEL: Davis Frye and Clay Gunn
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

NURSING HOME NEGLIGENCE ACTION

Arbitrator dismisses nursing home negligence action

The claimant alleged that a nursing home resident developed multiple, large abscesses on her back and buttocks due to negligent nursing care provided at a long-term care facility. Specifically, the claimant alleged that the staff at the nursing home failed to timely diagnose and treat the resident's back and buttock abscesses, failed to provide appropriate staff to care for the resident, failed to turn and reposition the resident properly to avoid the development of skin breakdown, and failed to assess the resident for significant changes in her condition. Initially filed in state court, the defense successfully removed the case to federal court and compelled the claimant to assert his claims in arbitration. After significant discovery, the Respondent obtained summary judgment in the arbitration proceeding based on the claimant's failure to support his claims with appropriate expert testimony. ◆

RESULT: Summary judgment at arbitration.

DEFENSE COUNSEL: Natalie Magdeburger and Kim Longford
FIRM: Pessin Katz Law, P.A., P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

Radiologist sued for reporting area of increased tracer uptake on PET imaging which Plaintiffs alleged was metastatic disease and then dismissed by Plaintiffs

Plaintiffs alleged that the standard of care required reporting an area of increased uptake at the right clavicle on PET imaging as a new finding that likely represented metastatic disease. Our client, the defendant radiologist who interpreted the PET scan, reported the area of increased uptake at issue and recommended a bone scan to further evaluate the lesion for diagnostic purposes. The radiologist's report was transmitted to the patient's referring oncologist. Plaintiffs alleged that the referring oncologist, also a defendant, failed to communicate the results to the patient and failed to request any follow-up testing, such as a bone scan or a biopsy. The patient was diagnosed with metastatic adenocarcinoma in the right clavicle about two years later. At the close of discovery, Plaintiffs voluntarily dismissed our client radiologist and the case continued against the oncologist co-defendant. ◆

RESULT: Voluntary Dismissal.

DEFENSE COUNSEL: Kim Longford
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

Radiologist sued and dismissed for interpreting ultrasound as equivocal and recommending further evaluation and then dismissed by Plaintiff

Plaintiff complained of right upper quadrant pain and had an abdominal ultrasound performed which was interpreted by our client as showing cholelithiasis without wall thickening or pericholecystic edema. However, it was also noted that the findings were equivocal and further evaluation with other studies was recommended. No further evaluation was pursued by the patient's surgeon and the patient elected to undergo laparoscopic cholecystectomy. During the surgery, it was discovered that the patient's gallbladder had been previously removed. Plaintiff did not disclose to her providers that she had a prior laparoscopic cholecystectomy. Plaintiff alleged that she underwent unnecessary surgery due to our client's interpretation of her ultrasound. After engaging in discovery, Plaintiff voluntarily dismissed our client. ◆

RESULT: Voluntary Dismissal.

COUNSEL: Patrick B. Curran, Esq.
FIRM: Hurwitz & Fine, P.C.
HEADQUARTERS: Buffalo, NY

NURSING HOME NEGLIGENCE

Defense verdict on wrongful death claim of nursing home resident

This case primarily relates to an event in which a resident died while being fed by an aide in the defendant nursing home. Plaintiff alleged that the defendant grossly deviated from the resident's care plan by failing to supervise the resident and investigate the incident, failed to establish proper aspiration precautions which directly resulted in a fatal choking incident, and failed to provide the decedent with a proper diet in accordance with the care plan to prevent aspiration. Plaintiff further claimed that the defendant was negligent in failing to prevent the development and worsening of pressure ulcers and violated "resident's rights" statutes pursuant to New York State Public Health Law §2801 and Federal Law.

The defense established that plaintiff's death was caused by a heart attack, not aspiration, and the jury determined that the alleged negligence of the facility was not a cause of the decedent's injuries. ◆

RESULT: Jury rejects claim that negligence of nursing home caused choking death.

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MOTOR VEHICLE / TRANSPORTATION

DEFENSE COUNSEL: John G. H. Davis, Michael Williams, Elizabeth Sandoval

FIRM: Brown Sims, PC

HEADQUARTERS: Houston, TX

NEGLIGENCE CASE AGAINST DRIVER AND TRUCKING COMPANY

Trucking defendants exonerated: defense theory of sudden emergency. Plaintiffs punished for bloated medical bills.

The lawsuit arose from a multi-vehicle accident. Plaintiffs were traveling in the right lane of a highway that was under construction. There was an abandoned mattress blocking traffic in the right lane. Co-defendant (who settled pre-trial) was traveling behind plaintiffs and changed lanes to avoid Plaintiffs and the other stopped traffic. Co-defendant then stopped in the left lane directly in front of the oncoming tractor-trailer without leaving enough room for the truck driver to stop. The tractor-trailer driver attempted to move into the right lane, but Plaintiffs' vehicle was stopped in that lane. The driver "threaded the needle" and tried to go in-between both cars to avoid a direct impact on either. The truck driver struck the right rear of co-defendant's vehicle and the left rear of Plaintiffs' car. Plaintiffs sued the driver and the trucking company alleging the driver was negligent in the operation of a vehicle, including speeding and failing to keep a proper lookout. Plaintiffs settled with the other defendants before trial. Plaintiffs' counsel argued that the truck driver was originally in the right lane behind them and co-defendant and that when co-defendant changed lanes, the truck driver was travelling too fast to stop. The truck driver argued that he was in the left lane the entire time and co-defendant cut him off and stopped abruptly in his lane.

DEFENSE COUNSEL: John G. H. Davis, Michael Williams, Elizabeth Sandoval

FIRM: Brown Sims, PC

HEADQUARTERS: Houston, TX

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Plaintiff driver underwent extensive medical treatment including a laminectomy and lumbar fusion resulting in over $450,000.00 in medical bills. He further claimed almost $500,000.00 in future medical expenses. Plaintiff passenger did not undergo surgery and had approximately $70,000.00 in past medical expenses. Plaintiffs requested $3.5 million from the jury.

Defense counsel was able to point out multiple instances of inconsistencies with the medical care including double and triple billing for the same procedure on the same day, as well as treatment for a prior accident attributed to the accident at issue. Additionally, the defense accident reconstruction expert was able to establish that the truck driver was in the left lane and attempted to swerve into the right contrary to Plaintiffs' allegations.

After less than two hours, the jury found negligence and comparative responsibility of 75% on the driver who dropped the mattress in the road and 25% percent on co-defendant. The jury did not find the truck driver negligent and did not reach the damages questions. ◆

RESULT: Complete defense verdict after a 9-day trial.

DEFENSE COUNSEL: Michael Kenney; Steve Malitz
FIRM: Ryan Ryan Deluca, LLP
HEADQUARTERS: Stamford, CT

NEGLIGENCE/RECKLESSNESS CASE AGAINST TRUCKING COMPANY

Motion Practice – Don't Overlook It!

Plaintiff sued a trucking company and its driver after he drifted onto the shoulder of an interstate highway at 2:30 a.m. and drove under the rear of the defendants' tractor trailer at high speed. The plaintiff miraculously survived, but sustained catastrophic injuries requiring dozens of surgical procedures. He had nearly $1.6MM in medical bills and significant wage and earning capacity damages, to go along with a massive "non-economic damages" claim and loss of parental consortium claims brought by his two minor children. The defendant driver had stopped on the shoulder to sleep after finding a nearby rest area full, in had parked in an area designated "emergency parking only". The plaintiff sued under negligence and recklessness theories, and claimed he was in the shoulder because he had hit black ice. After removing the case to federal court, the defendants filed a motion to dismiss the recklessness counts for failure to state a claim, and this motion was granted. After targeting depositions and expert discovery at the plaintiff's comparative negligence (he was intoxicated at the time of the accident and told police at the scene that he must have fallen asleep at the wheel), the defendants moved for summary judgment on the remaining negligence claims. In addition to gathering ample expert and lay witness testimony refuting the plaintiff's claims, a key argument was that a plaintiff cannot create a genuine issue of material fact to withstand summary judgment through only his own self-serving deposition testimony, when such testimony is contradicted by all other admissible evidence. The District Court agreed with the defendants and entered summary judgment in their favor. ◆

DEFENSE COUNSEL: Michael Kenney; Steve Malitz
FIRM: Ryan Ryan Deluca, LLP
HEADQUARTERS: Stamford, CT

[CONTINUED]

RESULT: Defense MTD on recklessness counts and MSJ on negligence counts granted.

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MUNICIPAL LIABILITY

DEFENSE COUNSEL: Jeremy D. Capps, Melissa York, and George A. Somerville

FIRM: Harman Claytor Corrigan & Wellman, PC

HEADQUARTERS: Richmond, VA

TORT/NEGLIGENCE – MUNICIPAL LIABILITY

Municipal sovereign immunity is alive and well in VA

The plaintiff was the administrator of the estate of an individual who died in a house fire, allegedly because the nearest hydrant "was effectively inoperable" because it "was not receiving an adequate or sufficient sustained flow of water." Lawsuit sought $10,000,000 in damages. Plaintiff argued that his claim was based on negligence in the performance of a proprietary function, municipal water supply, but the Supreme Court held that the City's provision and maintenance of fire hydrants is an immune governmental function. It also noted, citing prior cases, that "to the extent that this governmental function coincides with the City's proprietary functions in Massenburg's surviving allegations, 'the governmental function is the overriding factor' and the doctrine of sovereign immunity will shield the locality from liability." It therefore affirmed a final judgment based on an order sustaining a demurrer to plaintiff's amended complaint.

RESULT: Defense judgment on demurrer, VA Supreme Court affirmed on appeal.

DEFENSE COUNSEL: Jean-François Lamoureux, Justin Beeby
FIRM: Robinson Sheppard Shapiro LLP (RSS)
HEADQUARTERS: Montréal, QC

CLAIM FOR DAMAGES BY UNSUCCESSFUL BIDDER

You can't pierce your own corporate veil

A municipality had issued an RFP for lawn mowing and landscaping services, stating that a bidder had to demonstrate at least three years of experience. The appellant corporation had been incorporated less than three years before the RFP, hence failed to meet that condition. However, the sole shareholder of the company personally had over six years' experience and argued that this would qualify his company. The court considered that the company alone was to be considered as the bidder. Affirmed by the Court of Appeal. ◆

RESULT: Claim dismissed in favor of RSS client.

DEFENSE COUNSEL: Edmund O'Meally, Andrew Scott and Kambon Williams

FIRM: Pessin Katz Law, P.A.

HEADQUARTERS: Towson, MD

SCHOOL SEXUAL MISCONDUCT CASE

"Actual Notice" Required in School Sexual Misconduct Case

On December 20, 2019, the Circuit Court granted summary judgment in favor of the Defendant Board of Education (the "Board") in twelve consolidated cases arising out of the sexual misconduct of a former school system employee and volunteer. Of particular note, in ruling on the plaintiffs' claims under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. ("Title IX"), the court concluded that the Fourth Circuit Court of Appeals' decision in Baynard v. Malone, 268 F.3d 228 (4th Cir. 2001), cert. denied, 535 U.S. 954 (2002), remains good law within the Fourth Circuit despite it being rejected in other federal appellate circuits, and, applying the standard set forth in Baynard, which requires "actual notice" of the abuse in question as opposed to actual notice of a substantial risk of abuse, the court concluded that the Board did not act with deliberate indifference once an "appropriate person" possessed actual notice of the former employee's/volunteer's abuse. The court also granted summary judgment in the Board's favor on the plaintiffs' intentional tort claims, state constitutional claims, and negligent hiring claims. As such, only several negligence-based claims against the Board survive, which the Board contends are subject to a damages' cap pursuant to the Board's entitlement to sovereign immunity.

RESULT: Summary Judgment Granted.

DEFENSE COUNSEL: Catherine S. Nietzel
FIRM: Ryan Ryan Deluca LLP
HEADQUARTERS: Stamford, CT

SCHOOL BOARD DISMISSED FROM CLAIMS OF NEGLIGENT SUPERVISION OF TEACHER GUILTY OF SEXUAL ASSAULT OF STUDENT

School Board not Liable for Teacher's Predatory Behavior

A female high school English teacher and fitness instructor performed a sex act on a 17-year-old boy at school, after having repeated inappropriate communications with the 17-year-old's football teammate, a 15-year-old, during the six months prior to the sex act. A third boy became an intermediary between the teacher and the two other boys when the teacher wouldn't stop trying to communicate with them, mainly through direct messaging on Instagram. The 17-year-old reported the sex act to administrators and police and the schoolteacher was dismissed, arrested and pled guilty. The three boys charged the School Board with negligent supervision, claiming that the District should have known that the teacher posed a threat to students because she began to dress more suggestively both at school and during football workouts, where she led core-conditioning drills. The students also claimed that the teacher used her role as a teacher and yearbook coordinator to call the students out of class repeatedly, which should have alerted school personnel to potential improper behavior. Finally, the plaintiffs also claimed that the teacher's husband, also an English teacher at the high school, knew or should have known about his wife's proclivities because their marriage was failing, and he observed that she appeared to enjoy the attention of boys at the school. A state court judge dismissed all claims,

DEFENSE COUNSEL: Catherine S. Nietzel
FIRM: Ryan Ryan Deluca LLP
HEADQUARTERS: Stamford, CT

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finding that none of the exceptions to general rules of immunity for governmental employees applied, notwithstanding that the plaintiffs were school children. The court found that the conduct that the plaintiffs claimed should have alerted administrators was not the sort of behavior that would make it apparent to a reasonably prudent school administrator that there was a sufficient risk of imminent harm to a student if no actions were taken to address the behavior. The plaintiffs have taken an appeal from the ruling. ◆

RESULT: Summary judgment granted for school board despite teacher's predatory behavior.

THE HARMONIE GROUP®

PERSONAL INJURY

DEFENSE COUNSEL: Kile T. Turner
FIRM: Norman, Wood, Kendrick & Turner
HEADQUARTERS: Birmingham, AL

BODILY INJURY – MOTORCYCLE ACCIDENT

Client's Truck Did Not Cause Accident

The firm represented a landscaping company that was working at an apartment complex in the college town of Auburn, AL. Because the parking lot was full, the truck parked parallel to the apartment building which took up a lane of travel. The plaintiff was an Auburn University student who had left his apartment to go study at the library. Because it can be difficult to find a parking space, he took his motorcycle instead of driving. As he was headed north out of the apartment complex another resident was heading west and started making a left turn into the plaintiff's path just past the client's truck. As a result, the plaintiff was struck by the oncoming car resulting in serious injuries, including a broken leg that required multiple surgeries. In addition, he was forced to quit school for nearly a year while he recuperated from his injuries. The plaintiff blamed the truck for blocking his view and forcing him into the opposite lane of travel in order to go around the truck and criticized the client for not using cones or finding a safer place to park the truck.

In defense of the landscaping company, Mr. Turner relied on the trial pad program to emphasize important photographs that showed the area where the accident occurred. During cross examination, he was able to quickly impeach the plaintiff in several areas of his testimony by utilizing the programs word search. With multiple parties and voluminous documents crammed into a small courtroom, use of trial technology allowed Mr. Turner to efficiently defend his client.

RESULT: The jury returned a complete defense verdict for Mr. Turner's client. ◆

RESULT: Complete Defense Verdict on all Counts.

DEFENSE COUNSEL: Leslie Becknell
FIRM: Drew Eckl & Farnham
HEADQUARTERS: Atlanta, GA

GENERAL LIABILITY, PERSONAL INJURY

$0 in damages awarded in shoplifting case for retailer

Plaintiffs alleged that that they were falsely accused by a Loss Prevention Manager of shoplifting, arrested, and handcuffed, while shopping at a world-wide retailer in Augusta, Georgia. The plaintiffs claimed False Arrest, False Imprisonment, Malicious Prosecution, Intentional Infliction of Emotional Distress, and Negligence as they sought damages for therapy for PTSD, lost wages, expenses related to the defense against the criminal charges, attorneys' fees, and punitive damages. After evaluation the evidence, the jury found in favor of one plaintiff, however awarded her $0 in damages and allocated 98% of the fault to that Plaintiff and the jury sided with the Defendants on all other claims. ◆

RESULT: Favorable Jury Verdict with $0 in damages.

DEFENSE COUNSEL: Vasudev Addanki and Michelle Kierce
FIRM: Betts, Patterson & Mines, P.S.
HEADQUARTERS: Seattle, WA

PERSONAL INJURY – TRAUMATIC BRAIN INJURY

Credibility is Everything

Plaintiff (38-year-old female) was injured in a series of three car accidents over a six month period, the last of which was moderately severe. We represented the driver involved in the second accident, which was a minor "tap" at a stop light. Plaintiff claimed she suffered a mild traumatic brain injury with severe, permanent cognitive effects as a result of the combination of all three accidents, as well as permanent back and shoulder pain. At the time of the accident, Plaintiff was working as a paralegal with aspirations to restart law school. Two years after the accident, Plaintiff started law school and also became gainfully employed as a paralegal at a large multinational tech corporation. At trial, Plaintiff claimed that her pain limited her ability to do any meaningful activity and that her cognitive difficulties, including her memory, recall, attention, and processing, were so severe that she had to take an indefinite leave of absence from law school and was even at risk of losing her job, which justified asking the jury for approximately $975,000 in damages. The case was tried against all three defendants, plus Plaintiff's UIM carrier as an intervenor. The jury awarded Plaintiff a total of $67,000 (including $1,000 to each of her minor children involved in the first and third accidents) because they were able to observe her during the trial and during her testimony, in which she exhibited little to no pain behaviors and near-perfect, but very selective, recall of details and information. Further, the team of defense experts all testified that Plaintiff exhibited tell-tale signs of malingering and secondary gain. Of the total award, the jury allocated $60,000 to the third accident, $5,000 to the first accident for diminished value of her vehicle, and $0 in damages to the

DEFENSE COUNSEL: Vasudev Addanki and Michelle Kierce
FIRM: Betts, Patterson & Mines, P.S.
HEADQUARTERS: Seattle, WA

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second accident (our client) because the jury did not find that the accidents had caused any cumulative damage. In interviewing the jury after the verdict, the jurors indicated that they carefully observed Plaintiff throughout the trial, and all felt she was neither impaired nor credible. ◆

RESULT: Defense Verdict for Insured Client.

THE HARMONIE GROUP®

PRODUCT LIABILITY

DEFENSE COUNSEL: Steven J. Pugh
FIRM: Richardson, Plowden & Robinson, P.A.
HEADQUARTERS: Columbia, SC

PRODUCT LIABILITY – MESOTHELIOMA

No Causation, No Liability

The plaintiff was the family of a deceased paper mill worker who suffered from mesothelioma, which the family blamed on exposure to asbestos from numerous products, including the defendant's boiler. The plaintiff sought more than $20 million in actual damages, plus an award of punitive damages. All other defendants settled with the plaintiff prior to trial.

At trial, the defense team vehemently opposed plaintiff's causation evidence and arguments. After the 2-week trial, the jury returned a complete defense verdict in less than 90 minutes. ◆

RESULT: Defense Verdict.

COUNSEL: Art Spratlin, Keenan Carter and Kate Van Namen
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

MOTOR HOME BREACH OF WARRANTY CASE

Federal Judge returns only nominal damages to Plaintiffs

Plaintiffs alleged over twenty manufacturing defects in their 2016, 37-foot diesel motor home and filed suit under various breach of warranty theories, while seeking attorney fees under the Magnuson-Moss Federal Warranty Act. Plaintiffs sought rescission of the contract or repurchase of the vehicle, demanding that the manufacturer buy back their motor coach for over $200,000. Plaintiffs also asserted claims for violation of consumer protection laws, negligence, and bailment, alleging that the vehicle had been damaged in transit while in the possession of the manufacturer. After 4 days of trial in Federal Court, the District Judge ruled that the manufacturer did not have to buy back the coach, and only had to pay damages for two minor "warranty" items totaling $1,270. On the bailment claim (spider cracking in the headlight area), the court found that the coach was damaged while in transit upon delivery to the Plaintiffs in Wisconsin, awarding $6,000 (3,000 for repairs, and 3,000 loss in value), for a total damage award of $7,270. After the trial, Plaintiffs sought their attorney fees under Mag-Moss in the amount of $77,000, and after extensive briefing, the Court awarded only $2,307.66 in attorney fees. The total damage award, including atty fees, was $9,577.66. ◆

RESULT: Nominal damage award to Plaintiffs.

DEFENSE COUNSEL: Stephen P. Yoshida
FIRM: MB Law Group
HEADQUARTERS: Portland, OR

PRODUCT LIABILITY AND DECEPTIVE TRADE PRACTICES CLAIM AGAINST TRAILER MANUFACTURER/DEALERSHIP

No Mold Injury, No Conspiracy, No Recovery

Plaintiff sued the manufacturer and the retail dealership of a new travel trailer alleging that the trailer was defective due to alleged water intrusion and toxic mold growth. She also alleged the dealership failed to disclose, and actively concealed, both the existence of mold as well as various other alleged pre-sale defects. Steve Yoshida tried the case for the dealership, with the assistance of Tom Purcell. The trial took several interesting twists and turns, as plaintiff changed her theory in response to rulings by the court. Plaintiff claimed, among other things, that mold in the trailer had caused her to suffer a litany of health problems, including asthma, seizure-like episodes, and cognitive decline. However, the judge ruled early on plaintiff could not pursue any mold-related personal injuries because her mold "expert" did not have the requisite medical expertise. In addition, the defendants introduced evidence that plaintiff had been suffering from many of her alleged injury symptoms for years prior to her supposed mold exposure. Plaintiff continued to push the mold narrative, even after her personal injury claims were dismissed. However, her focus turned to the sale and inspection practices of the dealership. Plaintiff accused the dealership of various unlawful business practices and coverups. During an extremely animated closing argument, plaintiff's attorney declared that the dealership's personnel should be jailed and be forced to pay $100,000,000 for their conduct. The jury was not

DEFENSE COUNSEL: Stephen P. Yoshida
FIRM: MB Law Group
HEADQUARTERS: Portland, OR

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convinced. In the end, the jury agreed with defendants that there was no cover up, no undisclosed defects, and no misconduct by the dealer or the manufacturer. The trial lasted five days and the jury returned its 10-2 defense verdict in less than two hours. ◆

RESULT: Defense Verdict.

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PROPERTY

DEFENSE COUNSEL: Michael J. Farrell and Stephen P. Yoshida
FIRM: MB Law Group
HEADQUARTERS: Portland, OR

WRONGFUL FORECLOSURE, EVICTION AND EJECTMENT

Court of Appeals AWOPs Claim Preclusion Argument Arising from Multiple Lawsuits

The case involved "wrongful foreclosure" and statutory deceptive trade practices claims against a national banking institution. The borrower defaulted on his mortgage loan for a vacation property on Mt. Hood, Oregon. The property was foreclosed by a foreclosure law firm, which then brought an eviction action against the defendant. The foreclosing lender lost at the eviction trial due to several missteps including, most significantly, relying on outdated statutory forms during the foreclosure. The foreclosure law firm recorded a number of corrective deeds to cure the foreclosure defects and then filed a new ejectment action, instead of a second eviction action. Unfortunately, all of the corrective documents had defects as well, prompting the borrower to assert counterclaims for wrongful foreclosure and violations of Oregon's Unlawful Trade Practices Act. The bank then asked MB Law Group to take over. After curing all of the foreclosure firm's errors, MB Law Group obtained summary judgment on all claims, including an award of over $30,000 for attorney's fees defeating the Unlawful Trade Practices Act counterclaims.

The borrower appealed arguing, among other things, that the eviction claim was barred by res judicata because the bank already lost at trial on the eviction claim. Michael J. Farrell and Stephen P. Yoshida were on the briefs for the bank and Michael J. Farrell argued the appeal to the Oregon Court of Appeals on behalf of the bank. The court of appeals issued an order affirming the case without opinion ("AWOP"). Notably, the same borrower/attorneys

DEFENSE COUNSEL: Michael J. Farrell and Stephen P. Yoshida
FIRM: MB Law Group
HEADQUARTERS: Portland, OR

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recently prevailed on a similar appeal involving a separate property and different national banking institution. ◆

RESULT: Summary Judgment Affirmed on Appeal.

DEFENSE COUNSEL: Michael J. Farrell and Stephen P. Yoshida
FIRM: MB Law Group
HEADQUARTERS: Portland, OR

JUDICIAL FORECLOSURE AND DEFENSE OF TWENTY-ONE AFFIRMATIVE DEFENSES AND SIX COUNTERCLAIMS

Bank Overcomes Twenty-One Affirmative Defenses and Six Counterclaims

The defendant stopped paying her mortgage (including taxes and insurance) in 2011. She then rented the house out and moved to Pennsylvania and has since received over $100,000 in rental income. After a foreclosure firm filed for judicial foreclosure, defendant raised twenty-one affirmative defenses and six counterclaims relating to fraud in entering the loan, trespass, violations of numerous federal and state loan servicing laws, and other contract, statutory, and tort claims. The bank asked MB Law Group to take over the defense of those claims. After the borrower and her attorney refused to discuss any sort of reasonable settlement, the bank moved for summary judgment. Michael J. Farrell argued the case for the bank. The court granted all of the bank's motions for summary judgment and denied all of the defendants' motions. The case is currently on appeal. ◆

RESULT: Summary Judgment.

COUNSEL: Paul Cassisa, Jr. and Paul Rosenblatt
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

EASEMENT DISPUTE

Husband and wife claimed an express easement was created in favor of dominant estate in a 1972 Warranty Deed. They sought to enforce that easement when they purchased the dominant estate more than 40 years later. Current owner of the servient estate denied that easement ran across their land and threatened the current owners of the dominant estate with trespass. Relying on the testimony of a witness who was familiar with the property in the 1970s and a surveyor, the claimants proved that an easement was created and that they were entitled to a use that easement. ◆

RESULT: Chancellor found easement existed.

DEFENSE COUNSEL: Salvatore J. DeSantis; Robert Von Hagen
FIRM: Molod Spitz & DeSantis, P.C.
HEADQUARTERS: New York, NY

LACK OF SUPERVISION/ NEGLIGENTLY MAINTAINED CLASSROOM

A Daycare is Not an Insurer of a Child's Safety

Plaintiff tripped and fell on a carpet within the defendant's early childhood daycare center / school. Plaintiff, 23 months old, was one of two children within the classroom at the time of the incident with one adult supervisor thus the defense proved that student to teacher ratios were adequate and within code. Infant plaintiff walked toward an area within the classroom, delineated with an area rug that was cordoned by several "cubby" shelves, and fell forward over the edge of the carpet into one of the shelves. He sustained a laceration on his forehead that required six stitches. The demand was $650,000. The Bronx County trial court denied summary judgment, but was reversed on appeal, dismissing the case based on adequate supervision and lack of notice of a defective condition. ◆

RESULT: Appellate Court dismissed case.

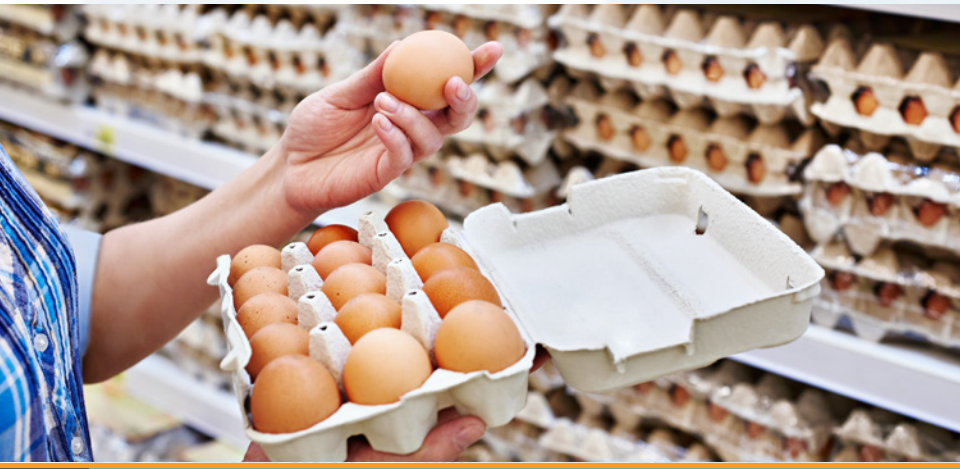
DEFENSE COUNSEL: Nabeel Peermohamed
FIRM: Brownlee LLP
HEADQUARTERS: Calgary, AB

OCCUPIERS' LIABILITY

Don't put all your eggs in one basket

Plaintiff sued grocery store for trip and fall over egg display pallet in cooler room. The plaintiff alleged that after she entered the cooler room, selected her eggs for purchase, and began walking towards the exit, she tripped and fell on an empty pallet that was protruding into the walkway causing significant injuries. The Trial Judge dismissed the case because the plaintiff was not credible, pictures revealed the pallet had product, the pallet was bright red and yellow creating a stark color contrast with the dull grey floor, and the pallet created a walkway for the only entrance/exit into the cooler room rather than protrude into it. ◆

RESULT: Defense Judgment.



DEFENSE COUNSEL: G. Randall Moody and Brian W. Johnson
FIRM: Drew, Eckl & Farnham, LLP
HEADQUARTERS: Atlanta, GA

PREMISES LIABILITY / SLIP AND FALL WITH SPINE SURGERY RECOMMENDATION

Superior Knowledge Cannot Be Inferred with The Unnoticeable

Plaintiff sued a nationwide convenience store operator in a case involving a slip in fall on an alleged puddle of a "slick, oily substance" on the sidewalk in front of a convenience store entrance. Plaintiff claimed injuries including: an acute partial left rotator cuff tear with surgical repair and recommendations for a C5/6-C6/7 cervical discectomy.

Georgia trial courts typically reject efforts to obtain summary judgment in foreign substance premises liability cases. However, at deposition we were able to get the plaintiff to admit that despite her efforts to look where she was walking at the time of the incident, the alleged foreign substance was "unnoticeable." In light of plaintiff's admission that the alleged substance was "unnoticeable" prior to the fall, we argued that the plaintiff failed to establish that defendant's employees could have easily seen and removed the alleged substance. The court agreed with our arguments and found that plaintiff failed to prove superior knowledge and that constructive knowledge could not be inferred in light of plaintiff's testimony. ◆

RESULT: Motion for Summary Judgment Granted.

DEFENSE COUNSEL: Salvatore J. DeSantis
FIRM: Molod Spitz & DeSantis, P.C.
HEADQUARTERS: New York, NY

NEGLIGENT MAINTENANCE OF A LIFT AGAINST PREMISES OWNER

Trial Court Erred in Denying Summary Judgement to defense in Death Case

A lift was installed for handicapped residents to travel from the mezzanine/lobby level to the street level, approved by a New York City Department of Buildings' Elevator Inspector.

At the time of the accident, the plaintiff's decedent was operating a scooter. It was alleged that the lift malfunctioned, dropping suddenly and the door "flying open" prior to safely descending to the ground, causing the plaintiff to fall out.

In reversing the trial court, the Appellate Court held that the defense was able to show its entitlement to judgment as a matter of law through submission of evidence demonstrating that they did not have notice of any malfunction of the door, including service records which showed there was no issue relating to the door opening prematurely. ◆

RESULT: Appellate Court dismissed the case.

DEFENSE COUNSEL: Charlie Green & Christopher Otten
FIRM: Beahm & Green
HEADQUARTERS: New Orleans, LA

PREMISES LIABILITY CLAIM AGAINST GROCERY STORE

No need to call defense witnesses if plaintiff fails to prove case

Plaintiff filed a premises liability lawsuit against a local grocery store alleging injuries resulting from a slip and fall accident in the store. The case was tried to the judge. The plaintiff testified as to the mechanics of her fall and as to her subsequent medical treatment generally. However, plaintiff's counsel elicited no testimony establishing the store had notice of the alleged condition on the floor (a "quarter-sized drop of water"). Specifically, defendants introduced maintenance and inspection logs detailing the store's clean up and visual inspection occurring just 20 minutes before the fall. Additionally, the surveillance video which was admitted and played at trial demonstrated multiple customers walking through the subject area without incident. At the close of plaintiff's case, defense counsel moved for involuntary dismissal, arguing the plaintiff failed to meet her burden of establishing notice or a causal link between the claimed injuries and the fall. The court granted the motion, dismissing plaintiff's claims with prejudice and at plaintiff's cost. ◆

RESULT: Motion for involuntary dismissal/directed verdict granted.

DEFENSE COUNSEL: Andrew Tice
FIRM: Ahlers & Cooney, P.C.
HEADQUARTERS: Des Moines, IA

NEGLIGENCE ACTION AGAINST VEHICLE & IMPLEMENT REPAIR FACILITY

Jury Discards Patron's Negligence Claim

Plaintiff, a customer of a vehicle & implement repair facility, was injured as he approached the repair facility in order to retrieve products purchased from the facility. Plaintiff claimed serious injuries to his arm resulting in a complex three-part fracture and substantial monetary damages. The injury was allegedly the result of slipping upon ice that was upon the property in near proximity to a drainage gutter from the facility's roof. The parties were unable to reach any amicable agreement. The claim proceeded through litigation and to a jury trial with the repair facility, amongst other things, disputing any liability for plaintiff's claimed injuries. Following a trial in which witnesses were called including individuals upon the property at the time of plaintiff's alleged injury, responding police officials, and expert medical providers, the jury returned a verdict finding no liability on the part of the repair facility and wholly discarding plaintiff's claim. There were no further post-trial motions or appeals upon agreement amongst the parties that the repair facility would not seek to recover costs associated with the successful trial presentation. ◆

RESULT: Defense Verdict.

DEFENSE COUNSEL: Jennifer Welch
FIRM: Cranfill Sumner & Hartzog LLP
HEADQUARTERS: Raleigh, NC

POA SPECIAL AND ANNUAL ASSESSMENTS

Assessments of Property Owners' Association found to be valid and enforceable

A property owner sued the Property Owners' Association, and others, for allegedly misappropriating funds received from homeowner's dues by failing to hold required annual meetings of POA members and boards of directors to formulate and approve lot owners' assessments. Plaintiff further objected to the imposition of a special assessment and refused to pay homeowners' dues and the special assessment, resulting in a lien on his property. The POA argued that as a property owner, Plaintiff was a member of the POA and therefore required to pay dues and assessments, and that Plaintiff had not properly challenged Defendant's authority to charge the annual and special assessments. On cross motions for summary judgment, the Court found in favor of the POA. ◆

RESULT: Motion for Summary Judgment Granted.

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WRONGFUL DEATH

DEFENSE COUNSEL: Robert V. Kish
FIRM: Reminger Co., LPA
HEADQUARTERS: Cleveland, OH

MEDICAL MALPRACTICE / WRONGFUL DEATH

Standard of care includes individualizing care

Defense obtained a defense verdict in a trial in favor of an anesthesiologist, nurse anesthetist and their hospital employer. Plaintiff alleged they were negligent in placing a double lumen endotracheal tube while the patient was in the right lateral position that caused the tube to be misplaced, resulting in hypoxia, pulseless electrical activity and death of a 61-year-old wife and mother of two. The defense was the patient's position was reasonable because the providers individualized the care of their patient, and furthermore, that the tube was placed in the correct location. In closing, Plaintiff's Counsel asked for $5M. The jury found no breach of the standard of care by the Defendants. ◆

RESULT: Defense Verdict.

DEFENSE COUNSEL: Lynne Jones Blain & Elizabeth O. Papoulakos
FIRM: Harman Claytor Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

PLACENTAL ABRUPTION – WRONGFUL DEATH CLAIM AGAINST PHYSICIANS, COMMUNITY CLINIC AND HOSPITAL

Failure to designate patient with prior placental abruption as "high risk" did not constitute negligence

Plaintiff sued her obstetrical health care providers subsequent to an acute placental abruption that resulted in the death of her 36-week-old fetus.

Plaintiff's Maternal Fetal Medicine specialist testified that the physicians and certified nurse midwife were negligent when they failed to designate the patient as "high risk" due to her previous placental abruption. Plaintiff also claimed that the providers were negligent for failing to document plaintiff's complaints of abdominal pain and failure to send her to the hospital, in light of her complaints, in the days leading up to the abruption.

The critical issue with regard to the designation of "high risk" became whether or not such a designation would have made a difference in the type of care received and would that change in care have saved the life of the baby.

With regards to the issue of communication, the clinic documented the plaintiff's prior placental abruption—with an urgent cesarean section—during her previous pregnancy. All the providers testified that they knew about the prior placental abruption during their treatment of the plaintiff. Although Plaintiff testified that she

DEFENSE COUNSEL: Lynne Jones Blain & Elizabeth O. Papoulakos
FIRM: Harman Claytor Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

[CONTINUED]

complained of 10/10 pain during her clinic appointment on the day before the abruption occurred, the certified nurse midwife testified that the plaintiff's appointment was routine, and the plaintiff did not voice any complaints during the examination.

The jury returned a unanimous defense verdict. ◆

RESULT: Defense Verdict.

ADDITIONAL IMPORTANT CASES

DEFENSE COUNSEL: Mica Nguyen Worthy
FIRM: Cranfill Sumner & Hartzog LLP
HEADQUARTERS: Raleigh, NC

ADMINISTRATIVE LAW – USTR TARIFF EXCLUSIONS GRANTED IN 2019

Significant refund obtained for the tariffs on Chinese goods

The tariffs on the import of Chinese goods significantly impacted a local company, who had temporarily obtained commitments from customers to pay an additional 25% on the final products to account for the tariffs. We argued to the US Trade Representative (USTR) Office through the exclusion process that the subject products were only available from China, they had no relation to the "Made in China 2025" initiative, the tariffs would result in severe economic harm to the client and US customers, and US Customs and Border Protection would not find it inherently difficult to administer. The USTR was in agreement on all products submitted and granted the tariff exclusion requests. ◆

RESULT: USTR tariff exclusions granted.

DEFENSE COUNSEL: Justin Beeby
FIRM: Robinson Sheppard Shapiro LLP (RSS)
HEADQUARTERS: Montréal, QC

CLAIM FOR DAMAGES FROM FINANCIAL INSTITUTION THAT DID NOT RUSH INTO DUBIOUS TRANSACTION

Don't expect prompt action with suspicious power of attorney

The plaintiff seeks damages from a financial institution that had failed to transfer hastily $100,000 from her mother's account to her own account. The power of attorney she produced had been signed by her elderly mother shortly before and was similar to another power of attorney drafted several years earlier, and that the mother had cancelled because the daughter was stealing the money. The court ruled that the institution had acted in a prudent and reasonable manner, and that the damages claimed (loss of a deposit on an item to be purchased, etc.) were without grounds. Case dismissed. ◆

RESULT: Claim dismissed in favor of RSS client.

DEFENSE COUNSEL: Élisabeth Laroche
FIRM: Robinson Sheppard Shapiro LLP (RSS)
HEADQUARTERS: Montréal, QC

CLAIM FOR DAMAGES BY UNSUCCESSFUL BIDDER

There is some leeway in the analysis of an RFP

Defending a home-care center for handicapped residents against a claim based on alleged violations in a request for proposals for nursing services. The alleged violations of the process — having expressly invited certain potential providers to bid, having allowed some bidders to conduct an unscheduled visit of the premises, having disclosed the rates of the party presently providing the services, having solicited employees of that party to continue working at the center albeit under a new winning bidder — were not material. Similarly, the plaintiff failed in its attempts to demonstrate bad faith on the part of the evaluation committee. Affirmed by the Court of Appeal. ◆

RESULT: Claim dismissed in favor of RSS client.

DEFENSE COUNSEL: Kevin Bress and Barry Bach
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

TRUST LITIGATION

Siblings Attempt an End-Around to Reform Trust

Plaintiff, Trustee of parents' revocable trusts, sought Circuit Court assumption of jurisdiction of the trusts claiming that its proposed reformation of trust terms would yield income tax advantages. Defendant, a sibling of the Plaintiff and beneficiary of the trust, learned of the action after the court had already granted the relief requested. Reformation of the trust terms would have serves to deny Defendant his one-quarter proportionate share of the trust and he succeeded in having the order struck. Subsequently, upon a hearing on the motion, the judge not only dismissed the action but advised Plaintiff from the bench that even if the suit proceeded judgment would have been entered for the Defendant. ◆

RESULT: Dismissal of Petition for Court to Assume Jurisdiction over Trust.