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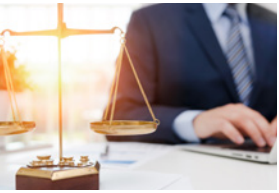
# 2020 | SIGNIFICANT CASES

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# 2020 | SIGNIFICANT CASES

# SIGNIFICANT CASES BY FIRM

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# CLASS ACTION

**COUNSEL:** Ryan Beckett, Bob Frey, Luther Munford, Haley Gregory and La'Toyia Slay

**FIRM:** Butler Snow LLP

**HEADQUARTERS:** Ridgeland, MS

# RICO CLASS ACTION AND FRAUD

## RICO laws asserted against tech company by jail inmates

Defendant, a technology company, that specializes in communications and educational products for the corrections industry, in a suit brought by two inmates and five family members purporting to assert a RICO class action and fraud case. Plaintiffs alleged that the company charged rates and fees that were in excess of those allowed under the filed tariffs with the Public Service Commission. The technology company denies these claims and Plaintiffs have been unable to demonstrate a single of instance of an improperly charged rate or fee. The case was dismissed three times in response to Rule 12(b)(6) motions, the third time with prejudice. The case was then appealed to the United States Court of Appeals for the Fifth Circuit and, in June of 2020, the Fifth Circuit affirmed the dismissal in an unpublished opinion, resulting in a total victory for the defense. ◆

**RESULT:** Defense Verdict.

**COUNSEL:** Michael F. Perley, Amber E. Storr
**FIRM:** Hurwitz & Fine, P.C.
**HEADQUARTERS:** Buffalo, NY

# PUTATIVE CLASS ACTION

## Plaintiff "played fast and loose with the facts" Court not amused

A Delaware limited liability company and one of its series filed a putative class action suit against an insurance company in an attempt to collect funds allegedly owed to a Medicare Advantage Organization ("MAO") under the Medicare Secondary Payer Act ("MSPA"). The MSPA requires a no-fault insurer, as a "primary payer" to reimburse Medicare or an MAO, as a secondary payer, for conditional medical payments made by the Medicare program that should have been covered under the insurer's no-fault coverage. The Plaintiffs alleged, generally, that they were assignees of the MAO and that the Defendant no-fault insurer repeatedly failed to provide payment or reimburse conditional payments made by the MAO for treatment of its insureds' automobile accident injuries. The assignments described claims in a certain date range but also exempted unspecified retained claims. The insurer moved to dismiss for lack of standing on two grounds; first that the purported assignments did not properly identify any exemplar and second, that the Plaintiff did not demonstrate that the insureds triggered their right to no-fault benefits in the first instance. Noting inconsistencies in the complaint, the case was dismissed without prejudice, finding that the Plaintiffs failed to plead injury in fact where the pleadings did not establish that the exemplar representative claim was included in the assignments. In its decision, the Court went on to cite numerous similar class actions dismissed across the country in which plaintiffs "played fast and loose with facts, corporate entities, and adverse judicial rulings" and warned Plaintiffs not to commit fraud upon the Court

**COUNSEL:** Michael F. Perley, Amber E. Storr
**FIRM:** Hurwitz & Fine, P.C.
**HEADQUARTERS:** Buffalo, NY

# [CONTINUED]

should they attempt to file this case again. Plaintiff's application for reconsideration was denied. ◆

**RESULT:** Case Dismissed for Lack of Standing.

**COUNSEL:** Raymond L. Robin and Elizabeth A. Izquierdo
**FIRM:** Keller Landsberg PA
**HEADQUARTERS:** Fort Lauderdale, FL

# CLASS ACTION SOUGHT ON FLORIDA CONSUMER COLLECTION PRACTICES ACT

## Homeowner sues law firm trying to collect fees due

Defense represented a large, prominent, national collection and foreclosure law firm ("Foreclosure Law Firm") with its principal office in Florida. The Foreclosure Law Firm was retained by a national bank to foreclose a residential mortgage. After the Foreclosure Law Firm filed the foreclosure action on behalf of the bank, the homeowner's attorney requested a reinstatement letter. The Foreclosure Law Firm prepared and sent the homeowner's attorney a reinstatement letter setting forth the balance that the homeowner would need to pay to reinstate the loan. The reinstatement letter also listed the breakdown of the expenses comprising the balance. One of those expenses was for attorney's fees incurred by the bank in a prior unsuccessful foreclosure action. The homeowner filed a Counterclaim against the Foreclosure Law Firm for breach of the *Florida Consumer Collection Practices Act, Section 559.55, et seq*., Florida Statutes, which not only prohibits any attempt to collect an unauthorized debt but also provides for the award of statutory damages and attorneys' fees for anyone who is the victim of any such attempt. The homeowner sought to maintain a class action suit seeking statutory damages for the substantial number of borrowers to whom similar letters had been sent during the statute of limitations period. Before the class could be certified, the defense filed a Motion for Final Summary Judgment on behalf of the Foreclosure Law Firm arguing that the homeowner had no claim because the charge for prior attorney's fees was authorized by the language of the mortgage signed by the homeowner. The Court agreed and granted Final Summary Judgment. Because the putative

**COUNSEL:** Raymond L. Robin and Elizabeth A. Izquierdo
**FIRM:** Keller Landsberg PA
**HEADQUARTERS:** Fort Lauderdale, FL

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class counter-plaintiff, the homeowner, had no individual claim, no class action could be maintained, and the Court entered Final Judgment in favor of the Foreclosure Law Firm. The homeowner's appeal is pending. ◆

**RESULT:** Final Judgment for Counter-Defendant.

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# COMMERCIAL LITIGATION

**COUNSEL:** Jeffrey E. Havran
**FIRM:** Margolis Edelstein
**HEADQUARTERS:** Scranton, PA

# COMMERCIAL LITIGATION

## Plaintiff demands $1MM alleging improper debt collection and retaliation

After obtaining a commercial loan, the Plaintiffs subsequently defaulted, sold the property at issue, and attempted to seek a release of the debts/mortgages thereon. The Plaintiffs sued multiple Defendants including our client, which was alleged to have acted as a facilitator of the loan and maintained an interest in same, alleging violations of the *Fair Debt Collection Practices Act, the Pennsylvania Unfair Trade Practices and Consumer Protection Law*, violation of the Fair Credit Reporting Act along with breach of contract for alleged deceptive and fraudulent practices with regard to the purchase and finance of commercial real estate. Plaintiffs further asserted that the debt was then improperly transferred, that any collection attempts were improper and that the Defendants had engaged in retaliatory conduct by reporting the loan deficiency to credit bureaus as retribution for plaintiff initiating litigation. Damages alleged by Plaintiffs exceeded $1,000,000. After exhaustive litigation and extensive discovery including depositions and the production of expert reports, summary judgment was granted in favor of our client and the case was dismissed. ◆

**RESULT:** Summary Judgment granted to Defense.

**COUNSEL:** Paul Caleo, Katrina Durek and Mark Heisey
**FIRM:** Burnham Brown
**HEADQUARTERS:** Oakland, CA

# FRAUD LAWSUIT AGAINST NATIONAL RETAILER

## Plaintiff fails in her attempt to make a collateral attack on Georgia judgment by filing new lawsuit in California

This lawsuit arose out of an attempt by Plaintiff to use the California court system to make a collateral attack on a Georgia judgment from a lawsuit she brought against the defendant, a national retailer, that was finally upheld on appeal. Plaintiff's First Amended Complaint in the California lawsuit alleged that she filed a complaint against the Defendant for quantum meruit and unjust enrichment in Georgia in 2014 claiming that she provided the idea to the Defendant that ultimately became the "Nordstrom Rack App." Plaintiff alleged that Defendant owed her millions of dollars in damages based on the revenue and profits generated by its customers using the App which was originally her idea. Plaintiff alleged in the California lawsuit that the summary judgment Defendant obtained in the Georgia lawsuit in 2015 was obtained or procured by extrinsic fraud and that this fraud was never the subject of the underlying suit. Plaintiff asked the California court to allow her to litigate the "fraud" on its merits in an attempt to off-set the judgment obtained in the Georgia lawsuit.

After the Plaintiff filed two unsuccessful dispositive motions herself, the motion for summary judgment filed by the Defense on the "Full Faith and Credit" clause of the US Constitution in Art. IV, Section 1 to argue the collateral estoppel effect of the Georgia state judgment on the Plaintiff's California lawsuit.

Relying on Evidence Code section 452(d), the motion included a detailed Request for Judicial Notice of the content and legal effect of the 10 critical documents and court Orders in the Georgia lawsuit,

**COUNSEL:** Paul Caleo, Katrina Durek and Mark Heisey
**FIRM:** Burnham Brown
**HEADQUARTERS:** Oakland, CA

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and argued that the Plaintiff raised these identical issues of "fraud" in the Georgia lawsuit and they were necessarily decided against her in a full and final judgment. The California Court agreed and granted the Motion for Summary Judgment, concluding that the collateral estoppel effect of the Georgia judgment and post-judgment orders provided Defendant with a complete defense to Plaintiff's sole cause of action for extrinsic fraud. Judgment was entered against the Plaintiff with costs and is now final. ◆

**RESULT:** Judgment with Costs Against Plaintiff.

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# CIVIL RIGHTS

**COUNSEL:** David P. Corrigan, Melissa Y. York
**FIRM:** Harman, Claytor, Corrigan & Wellman, P.C.
**HEADQUARTERS:** Richmond, VA

# 1ST AMENDMENT FREE SPEECH

## Declaration of an Unlawful Assembly and Dispersal of the Unite the Right Rally Does Not Violate the 1st Amendment

Plaintiffs, organizers of the August 12, 2017 Unite the Right Rally in Charlottesville, VA, sued the City, the former Chief of Police, and others, alleging violation of their 1st Amendment right to free speech. Specifically, they argued that the Defendants effectuated a "heckler's veto" by using anticipated violence and chaos between protestors and counter-protestors to declare an unlawful assembly. Police did declare an unlawful assembly after mutual combat broke out at the Unite the Right Rally between protestors and counter-protestors, and all individuals were directed to disperse. The United States District Court for the Western District of Virginia, Charlottesville Division, dismissed the case on the defendants' motions to dismiss pursuant to Rule 12(b)(6). In so doing, the Court held that there was no constitutional violation, because the police did not owe a duty to the plaintiffs to protect them from the acts of private parties or to prevent public hostility. The Court subsequently denied a Rule 59(e) and Rule 60 Motion to Alter or Amend Judgment. ◆

**RESULT:** Case Dismissed.

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# CONSTRUCTION

**COUNSEL:** V. Christopher Potenza, Esq.
**FIRM:** Hurwitz & Fine, P.C.
**HEADQUARTERS:** Buffalo, NY

# CONSTRUCTION INJURY "FALLING WORKER" STATUTE

## Injured worker sues for $1MM under "falling worker" statute

The jury found for the Defendant in a trial involving a fall during a roof replacement at a mixed-use property that contained a residence, two professional offices, and an income apartment. In New York, a contractor or owner who fails to furnish proper safety devices to prevent a fall from a height is absolutely liable for accidents or injuries which occur. The statute contains an exemption for liability for owners of one and two-family dwellings who contract for but do not direct or control the work. On a prior motion, the Court ruled it a question of fact as to whether the homeowner's exemption to the law applied given the mixed commercial and residential use of the property. The jury determined that the site and purpose of the work primarily benefited the residential aspects of the property over the commercial use and thus the homeowner Defendant was not liable for plaintiff's injuries. ◆

**RESULT:** Defense Verdict.

**COUNSEL:** Paul Caleo and Greg McCormick
**FIRM:** Burnham Brown
**HEADQUARTERS:** Oakland, CA

# CONSTRUCTION ACCIDENT, INJURIES, PRIVETTE DOCTRINE ON GENERAL CONTRACTOR LIABILITY

## Construction laborer suffers severe injuries in fall, sues for $4.8 million

Defendant was hired by the owners of a commercial property as the general contractor for a project that involved renovation and improvement work on the administrative offices of the building, as well as to the refrigeration and food processing portion of the building. The general contractor performed the improvements and renovation work on the administrative portions of the building and hired a subcontractor to perform the work on the refrigeration system and refrigeration portion of the building. Plaintiff was employed by the subcontractor as a laborer. Plaintiff was standing in the attic of the refrigeration portion of the building when the ceiling panel he was standing on gave-way and he fell 19 feet onto the concrete floor below. Plaintiff suffered multiple serious and permanent injuries including severe emotional distress that resulted in panic attacks. Plaintiff claimed that he would never be able to return to work as a laborer or construction worker. Plaintiff's wife made a loss of consortium claim. Plaintiffs claimed total recoverable damages of up to $4.8 million.

The winning motion argued that the circumstances of the plaintiff's accident fell squarely within the Privette doctrine. The motion argued that the general contractor, as the hirer of subcontractor, had no right of control as to the mode of how subcontractor would do the work it contracted for. Further, Defendant specified in its

**COUNSEL:** Paul Caleo and Greg McCormick
**FIRM:** Burnham Brown
**HEADQUARTERS:** Oakland, CA

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contract that the subcontractor would be solely responsible to take all safety precautions to protect its own workers, including the plaintiff. "Absent an obligation, there can be no liability in tort."

Notwithstanding the extensive discovery conducted by counsel for the plaintiff seeking to defeat the motion, the Court ruled that the Defendant meet its burden of proof and provided the factual foundation for the Privette presumption to apply. The court also ruled that the plaintiffs had not met their burden of establishing that any of the exceptions to the Privette doctrine applied and consequently granted the motion for summary judgment on behalf of the Defendant. ◆

**RESULT:** Motion for Summary Judgment granted.

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# EMPLOYMENT / DISCRIMINATION / DISABILITY / WORK COMP

**COUNSEL:** Kristin Shigemura and Mallory Martin
**FIRM:** Cades Schutte, LLP
**HEADQUARTERS:** Honolulu, HI

# SEXUAL HARASSMENT AND RETALIATION, FIRST CIRCUIT COURT, STATE OF HAWAII

## Sexting harassment lawsuit, Plaintiff sanctioned for failure to provide discovery

A private, religious-based K-12 school, was sued by a former female employee who had complained that supervisor had taken photographs of her, made inappropriate sexual jokes, texted sexually charged messages, and sent a photo of his erect penis. The female employee provided screen shots of the photo and partial text messages between her and the male employee in which the male made numerous sexual comments about her body. The supervisor, who was married, claimed the relationship was consensual but he was terminated for failing to abide by the school code of conduct and morality. The woman claimed that the fired supervisor continued to harass her, that she was subject to retaliation by the school, and she eventually failed to return to work claiming constructive discharge. In discovery, school sought access to all electronic devices, cell phone and text records, and social media accounts. The Plaintiff refused to provide discovery and claimed that devices were no longer available. Partial records subpoenaed from cell phone carriers showed 156 texts between the two former employees' phone numbers over a 10-day period. Court compelled discovery and granted $15k in sanctions. Plaintiff agreed to dismiss case in exchange for release of sanctions. ◆

**RESULT: Case dismissed in exchange for release of sanctions award against Plaintiff.**

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# INSURANCE / COVERAGE

**COUNSEL:** Jeffrey S. Tindal
**FIRM:** Betts, Patterson & Mines, P.S.
**HEADQUARTERS:** Seattle, WA

# INSURANCE COVERAGE, LIMITS ON REPAIR PAYMENTS

## Insured uses "left over" money on unrelated tasks

Insured sued insurer for failure to pay for cost of repair of certain items. The total damages claimed, including attorney fees, was over $200K. After agreeing to a scope of repairs, including the replacement of a large rafter beam, the insurer, via his public adjuster, unilaterally deviated from the repair scope by only repairing the rafter beam. The insured then used the "left over" money allocated for the beam replacement on unrelated items, including a substantially upgraded kitchen and the refurbishing of an undamaged outdoor sign. Relying on policy language limiting coverage to the amount actually spend that was necessary to repair or replace the lost or damaged property, the insurer denied coverage. The court adopted the analysis of the insurer and granted summary judgment in its favor. The Court of Appeals affirmed the trial court. The insured's petition for review with the Supreme Court was denied. ◆

**RESULT:** Appellate Court affirms granting of summary judgment.

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

# INSURANCE COVERAGE DENIAL

## Bad foundation, $450K in damages, not covered by insurance

Defense won a reversal in a coverage case successfully arguing that the Court abused its discretion when it applied the federal law instead of Alabama law to determine whether issue preclusion applied. The trial judge was not only the presiding judge for the Northern District of Alabama but had also been counsel's insurance law professor in law school.

In the underlying case, the Plaintiffs filed sued against the general contractor for defective construction of the foundation to their large home that resulted in over $450K in damages. The general contractor filed a third-party action against subcontractor. The subcontractor's insurer filed a declaratory judgment, and the Court held that the resulting damages precluded the insurance company's policy period, and thus, they were not covered. The Plaintiffs obtained an assignment from the general contractor and took a judgement against the subcontractor, both individually and as the general contractor's assignee. The Plaintiffs then sought to collect the judgment under Alabama's direct-action statute.

The Court held that the Plaintiffs were not barred by the doctrine of issue preclusion from pursuing their claim against the insurer as the general contractor's assignee. The case proceeded to a trial, resulting in a verdict for the Plaintiffs. On appeal, though, defense successfully argued that Alabama's "expansive definition of privity" applied and that the Court abused her discretion when she applied the more restrictive standard. ◆

**RESULT:** Judgment vacated and case remanded with new instructions.

**COUNSEL:** Daniel A. Webb (trial attorney) with Laken N. Davis (trial preparation)
**FIRM:** Beahm & Green
**HEADQUARTERS:** New Orleans, LA

# FIRST PARTY PROPERTY COVERAGE AND BAD FAITH

## Full Defense Verdict in First Party Property Coverage and Bad Faith Case

The Plaintiff policy holder sought property coverage following an alleged wind and weather event. The damage was to the roof of a commercial building. The Defendant insurer retained an expert engineer to inspect the damage immediately. The engineer opined that defective construction, improper materials, and weight overload caused the roof damage – not the alleged weather event. Following the insurer's denial of coverage, the policy holder filed suit seeking coverage and also seeking bad faith penalties – for a total amount of more than $875K. The policy holder's expert concluded that wind caused the property damage; however, the Judge pointed out that the expert never explained how he arrived at that conclusion. The case went to a two-day trial, following which, the Court issued his findings fully dismissing all claims, at the policy holder's cost, with the Court finding the defense expert to be more credible and fact-based than the policy holder's expert. ◆

**RESULT:** Defense Verdict.

**COUNSEL:** Gary Snodgrass; Phillip Bryant
**FIRM:** Pitzer Snodgrass, P.C.
**HEADQUARTERS:** St. Louis, MO

# INSURANCE BROKER LIABILITY

## Plaintiff Surrenders Rather Than Argue Against Insurance Broker

The premises leased by the Plaintiff restaurant owner was damaged by fire at no fault of either the tenant or landlord. The restaurant owner contended that the Lease for the premises required her to insure the landlord against damage to the building. The Plaintiff further asserted that the insurance broker was negligent because he did not secure a policy that insured the landlord against fire damage.

In the broker's Motion to Dismiss, it was pointed out that, contrary to the Plaintiff's conclusory assertion, the Lease did not require the tenant to insure her landlord against fire damage to the building. In fact, the Lease required the landlord to insure the building and the tenant to insure the tenant's improvements and personal property. The insurance policy that was procured satisfied the requirements of the Lease. Additionally, the tenant could not be liable to the landlord for the fire damage because a provision of the Lease waived rights of subrogation between the landlord and tenant.

On the eve of the hearing, rather than argue against the agent's Motion to Dismiss, the tenant voluntarily dismissed the agent. ◆

**RESULT:** Voluntarily Dismissed.

**COUNSEL:** Andrew M. Lusskin
**FIRM:** Braff, Harris, Sukoneck & Maloof
**HEADQUARTERS:** Livingston, NJ

# DECLARATORY JUDGMENT ON DUTY TO DEFEND

## Insurers fight over who has Duty to Defend

The underlying suit involves a slip and fall on ice at an apartment complex. There is a dispute between the Plaintiff insurer of the owners/operators of the complex and Defendant's insured, a snow removal contractor, as to the scope of the contract and indemnity. There was also an Additional Insured provision in the contract resulting in a separate DJ which the firm defended. The Plaintiff carrier for the complex asserted that under the terms of the contract and policy, the Duty to Defend is triggered immediately even if liability is not decided and there may ultimately not be a Duty to Indemnify, thus the Defendant insurer has the Duty. The law in NJ is somewhat unsettled on the specific issue and the interplay between indemnity and coverage pursuant to a particular contract. Plaintiff carrier filed a Motion for SJ seeking a Declaration that Defendant carrier had a Duty to Defend at this point regardless of the outcome of the underlying case. In denying Plaintiff carrier's Motion, the Judge adopted many of defense arguments as to why such a finding would be premature and a determination as to the Duty to Defend can await the outcome of factual issues in the underlying case. As this was between two carriers, thereby not leaving a party unrepresented, depending on out the outcome, the Duty to Defend can be converted to a Duty to Reimburse. The Judge wrote an opinion containing a full analysis of the law and cases in the State regarding these issues. ◆

**RESULT:** Defendant carrier duty to defend not triggered.

**COUNSEL:** Clay Wilkerson; Michael Williams
**FIRM:** Brown Sims, P.C.
**HEADQUARTERS:** Houston, TX

# AGGREGATE LIMITS – MULTIPLE DEATHS

## Primary carrier pays more than its claimed aggregate limit in settlement

Premises owner was sued for wrongful death in three lawsuits arising from three murders that occurred on different dates at its property. Primary insurer defended the cases for over a year and through two global mediations on the basis that its policy had a $1 million per occurrence limit and an aggregate limit of $2 million. After an impasse was reached at third global mediation, primary insurer accepted a "policy limit" settlement demand of $2 million from one wrongful death claimant and notified the insured and excess insurers that it had exhausted its policy limits and would no longer defend the remaining cases. Excess insurer client argued that primary insurance had either misrepresented its limits by misrepresenting the effect of an endorsement that modified them, or, alternatively, had voluntarily paid $1 million by paying $2 million to settle one, single occurrence case, thus leaving $1 million left on its aggregate limit. After a mediation of the coverage issues and subsequent negotiations, the remaining two lawsuits were resolved with primary insurer's additional contribution of nearly $1.5 million in excess of its claimed $2 million aggregate limit. ◆

**RESULT: Primary insurer pays over claimed aggregate limit.**

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# LEGAL MALPRACTICE

**COUNSEL:** Dena B. Sacharow
**FIRM:** Keller Landsberg PA
**HEADQUARTERS:** Fort Lauderdale, FL

# LEGAL MALPRACTICE CASE AND WRONGFUL DEATH

## Representatives sue law firm following suicide

The Personal Representative of an Estate filed a Wrongful Death and Survival Claim against the Decedent's former lawyers and law firm ("Defendants") alleging that the failure to timely file a claim for stacking underinsured motorist coverage caused the Decedent to commit suicide three and a half years after the Defendants were discharged. The Decedent was rendered permanently and totally disabled following a motor vehicle accident in January 2008 which occurred during the course and scope of his employment. The employer's UM carrier promptly tendered the full UM policy limit identified on the Declarations Page of the policy. Decedent retained the Defendants in June 2012 to file a bar grievance against the Decedent's former lawyer and to assist with collection efforts on a workers' compensation judgment. When inquiry was made regarding stacking UM coverage, the UM carrier asserted that the policy did not provide UM stacking coverage because the named insured was a corporation. The Decedent discharged the Defendants on October 1, 2015 and retained new counsel. In January 2016 (eight years after the accident), subsequent counsel asserted a new demand for stacking UM coverage, which was rejected on the basis that the statute of limitations for any stacking claim had expired. The subsequent lawyers then sued the UM carrier, but the case was dismissed on August 25, 2017 on the basis that the claims were time-barred. The Decedent committed suicide on March 10, 2019. On August 23, 2019 (almost four years after discharging the Defendants), the Decedent's Estate filed a cause of action for damages "for legal malpractice resulting in wrongful death." Defendants moved to dismiss all claims with prejudice, in

**COUNSEL:** Dena B. Sacharow
**FIRM:** Keller Landsberg PA
**HEADQUARTERS:** Fort Lauderdale, FL

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part on the basis that: (1) the Wrongful Death and Survival Claims failed as a matter of law because Defendants did not owe a duty to the Decedent to prevent his suicide; (2) the statute of limitations had expired on any purported legal malpractice claims; and (3) the underlying claim for UM stacking benefits failed as a matter of law based on the language of the policy. The Court granted the Motion to Dismiss with Prejudice on all grounds. Plaintiff's appeal is pending. ◆

**RESULT:** Dismissal with Prejudice.

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# MEDICAL

**COUNSEL:** Brenda M. Saiz and Jeffrey M. Croasdell
**FIRM:** Rodey Law
**HEADQUARTERS:** Albuquerque, NM

# MEDICAL MALPRACTICE – SPOLIATION

## Mistrial for failure to produce documents in med mal case

A woman who was hearing impaired and who had recently had a kidney transplant returned to the hospital with complaints of pain near the surgical site. She was diagnosed with a hernia that required immediate surgery. She was hospitalized for six days following the surgery, and on the day that she was to be discharged she collapsed and died. The cause of death was a pulmonary embolism.

A significant portion of the evidence centered around text messages that the patient had been sending to family and friends. The decedent's sister had kept the text messages that she thought were important. She deleted the rest. After the defense raised this with the judge and was granted a spoliation instruction, seven days into a 10-day trial, Plaintiff produced some of the missing text messages. The judge granted a mistrial based on the late production of evidence. The parties will re-try the case in 2021.

This was the first trial in Santa Fe, NM since the Covid-19 restrictions were lifted. ◆

**RESULT:** Mistrial granted.

**COUNSEL:** John F. Costa, Esq.
**FIRM:** Ryan Ryan Deluca LLP
**HEADQUARTERS:** Bridgeport, CT

# MED-MAL, STATUTE OF LIMITATIONS/REPOSE

## Ophthalmology group prevails against claim of one-eye blindness

The defendant provided eye care to the plaintiff through December 2014. Plaintiff filed suit in November 2018 arguing that the failure of the defendant ophthalmology group to provide plaintiff with a complete copy of the chart when requested in 2016 and 2017, constituted separate and distinct acts of professional negligence which tolled the two-year statute of limitations and three-year statute of repose. The Court found that merely providing routine eye examinations did not mean that defendant was providing a continuous course of treatment following the last appointment in 2014. The statute of limitations applied. The Court further found that failing to provide complete records was insufficient to support a claim of medical malpractice. ◆

**RESULT: Summary judgment granted: statute of limitations applied.**

**COUNSEL:** Kristin Shigemura, Randy Vitousek, and Jarrett Dempsey
**FIRM:** Cades Schutte LLP
**HEADQUARTERS:** Honolulu, HI

# MEDICAL MALPRACTICE

## Hernia mesh fails, patient sues surgeon and center

Medical malpractice action against ambulatory surgery center and surgeon alleging negligent hernia repair, mesh failure, and breach of duty of informed consent. Plaintiff claimed permanent injuries and disability. Plaintiff claimed that he had only met pre-operatively with the physician assistant who did not discuss risks and benefits of surgery, and surgeon had never advised patient of potential complications of use of mesh for hernia repair. Plaintiff claimed that surgery center had independent duty to ensure informed consent was obtained and pointed to fact that informed consent was documented on the surgery center's form and was signed by a surgical nurse. Court held that surgery center had no duty to obtain an informed consent and granted summary judgment to surgery center. ◆

**RESULT:** Summary Judgment granted.

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# MOTOR VEHICLE / TRANSPORTATION

**COUNSEL:** Nathan Lennon, Rick Weil, Kevin Foley
**FIRM:** Reminger Co., LPA
**HEADQUARTERS:** Cleveland, OH

# TRUCKING ACCIDENT

## Federal Jury Returns Unanimous Defense Verdict in Pedestrian Versus Semi Collision where plaintiff requested $29MM in closing

Plaintiff, a livestock worker who was working on the clock, cut across traffic on a busy rural highway near Columbus, Ohio in an old pickup with the tailgate down and a load in the bed. Some items fell out. Plaintiff stopped his vehicle once he got across traffic, got out, and ran full speed on foot back to the road to retrieve the items. The defendant semi driver, and an independent witness following him, testified that Plaintiff crossed over the fog line of the road and ran into the side of the then-passing tractor-trailer driven by the defendant. Plaintiff claimed that he stopped outside the fog line and that the semi swerved into him. After the accident, Plaintiff was in hospital and rehab for months. He was declared permanently disabled by workers' compensation and lost the practical functional use of both of his arms, although he retained his mental faculties, the ability to walk, and the ability to do most activities of daily living with some improvising. Plaintiff brought suit against the driver and the driver's employer. Plaintiff's total specials presented at trial were over $1MM. At closing argument, Plaintiff's counsel requested $29MM. The defendant driver and his employer requested a defense verdict. After about 6 hours of deliberation, the jury returned a unanimous defense verdict, finding Plaintiff 60% at fault, which is a "take nothing" verdict in Ohio. ◆

**RESULT:** Defense Verdict.

**COUNSEL:** Paul Caleo and Lynn Rivera
**FIRM:** Burnham Brown
**HEADQUARTERS:** Oakland, CA

# COMMERCIAL AUTO VICARIOUS LIABILITY

## Plaintiff seriously injured, sues truck driver's employer

Plaintiff filed a negligence action against Defendant and his employee for serious injuries and damages arising out of a collision between Plaintiff's vehicle and a truck driven by Defendant employee. Plaintiff alleged that Defendant was liable for Plaintiff's serious orthopedic injuries under theories of (a) vicarious liability as the employer, and (b) a permissive use theory given the accident occurred in a company vehicle.

Defense argued there was no evidence of liability because employee took the vehicle without permission and was not working at the time of the accident. Plaintiff opposed the motion and argued employer was liable because it gave employee implied permission to use the vehicle. It also argued that employer was negligent for failing to safeguard the vehicle keys or implement written policies and procedures regarding vehicle use. Plaintiff also argued that employer was liable under the special circumstances' doctrine.

The Court granted the motion for summary judgment, ruling that there was no triable issue of material fact on vicarious liability and permissive use. It also ruled that the special circumstances' doctrine did not apply to the case facts. ◆

**RESULT:** Motion for Summary Judgment granted.

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# MUNICIPAL LIABILITY

**COUNSEL:** Alice Spitz; Marcy Sonneborn
**FIRM:** Molod Spitz & DeSantis, P.C.
**HEADQUARTERS:** New York, NY

# SCHOOL NOT LIABLE IN SECURITY GUARD FALL

## Guard falls down stairs, sues school for $3MM

Plaintiff, security guard for the school, was standing on an entry staircase talking with another guard. Video of the accident confirmed that she turned around, missed a step, and fell down the stairs. Plaintiff claimed that the stairs were slippery, that the handrail was wobbly and that there was a design defect based on the location of the stairs and the security desk. The Plaintiff sustained a left ankle fracture and had a Cervical fusion to C 5-6. The defense claimed that the video was dispositive, that there was nothing wrong with the stairs, the school had just been built and opened several months prior to the accident and was in pristine condition. Plaintiff had previously demanded $3MM to settle. The offer was $3000.

Summary Judgement denial from the lower court was unanimously reversed when the Appellate Court held that the Defendant established prima facie that Plaintiff's fall on a staircase in their building was not caused by negligence on their part; that the staircase handrail was stable and did not contribute to her fall; that the design defect claim raised in opposition to summary judgment was not properly pled; and that the Plaintiff's expert's report was speculative, conclusory and had no probative value. Case dismissed. ◆

**RESULT:** Case Dismissed.

**COUNSEL:** David P. Corrigan, M. Scott Fisher, Jr.
**FIRM:** Harman, Claytor, Corrigan & Wellman
**HEADQUARTERS:** Richmond, VA

# OFFICER'S USE OF FORCE IN FIRING SHOTS AT ACCELERATING VEHICLE

## $10MM demand by plaintiffs after being shot by police

A suspected gang member found in a stolen vehicle was shot and killed by a police officer after the suspect accelerated the vehicle toward the officer. Two backseat passengers of the stolen vehicle were shot and permanently injured after the vehicle crashed near a gas pump. There was no bodycam footage, but forensic evidence and surveillance video from the gas station, corroborated the officer's contentions that he fired first on the driver as the vehicle sped toward him and fired again on the backseat passengers after the vehicle crashed and only after the passengers opened the rear door of the vehicle and moved toward the officer. Three guns were found in the stolen vehicle after the incident. The surviving Plaintiffs contended that the guns did not belong to anyone in the vehicle. Forensic evidence did not conclusively connect any of the guns to the passengers. Plaintiffs filed suit for $10MM. Summary judgment was granted. The Court credited the officer's version of events in light of the uncontested video and forensic evidence, finding that the question was one of the officer's reasonable perception - not one of verified certainty. ◆

**RESULT:** Case Dismissed.

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# PERSONAL INJURY

**COUNSEL:** David M. Pick
**FIRM:** Brownlee LLP
**HEADQUARTERS:** Calgary, Alberta, Canada

# PERSONAL INJURY ACTION ARISING FROM A SINGLE VEHICLE ROLLOVER

## Trial suspended as Plaintiff accepts settlement, originally asked for $1.1MM

On a personal injury matter arising from a single vehicle rollover, defense was successful in negotiating a favourable settlement at day 4 of a 15-day trial. The Plaintiff was injured in 2008. While liability was admitted, contributory defenses of failing to wear a seatbelt and being the willing passenger of a drunk driver were involved. The Plaintiff suffered a comminuted fracture of the humerus resulting in surgical repair, along with whiplash and a mild TBI. After 7 months he returned to work as a mechanic and worked for another 4 years. About 2.5 years after the accident, he began to develop symptoms of fibromyalgia and chronic fatigue syndrome. This gradually worsened such that he had to quit his job in 2012 and has not returned to work since. Causation of these conditions and the life-altering disability were the main issues at trial. Two mediations were unsuccessful with the plaintiff's last demand being $1.1MM and the defense final offer, two months prior to trial, was $280K plus costs. Final settlement was reached during trial for $230K plus costs as of the date of the defense final offer. ◆

**RESULT:** **Plaintiff settles for less than the defense pre-trial offer at day 4 of a 15-day trial.**

**COUNSEL:** John Davis, Michael Williams
**FIRM:** Brown Sims, P.C.
**HEADQUARTERS:** Houston, TX

# OFFSHORE INJURY CLAIM

## Injured offshore rig worker injured, sues for $13MM

Plaintiff was employed by a subcontractor to build scaffolding as part of a construction project to expand an oil and gas platform located offshore. He was allegedly injured when a gust of wind caught the scaffold board he was carrying. Suit was filed asserting *Jones Act* and general maritime law and thus was removed to federal court. Plaintiff alleged injury by the negligence of the platform owner and general contractor for not shutting down work due to weather conditions. The case was mediated before trial with plaintiff making a global demand of $13MM. The defendants moved for summary judgment asserting they were not liable for the acts of an independent contractor and owed no duty as they did not control the details of the subcontractor's work. The Court granted summary judgment six days before trial dismissing all claims with prejudice. ◆

**RESULT: Case Dismissed with prejudice six days before trial.**

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# PRODUCT LIABILITY

**COUNSEL:** Bobby Miller, Will Thomas and Kat Carrington
**FIRM:** Butler Snow LLP
**HEADQUARTERS:** Ridgeland, MS

# PRODUCT LIABILITY, APPEAL

## $14MM in motorcycle accident that Plaintiff blamed on brakes

Plaintiff, an architect, was driving his motorcycle to work. As the Plaintiff was attempting to get onto the interstate-highway he lost control, went across a slightly raised concrete gore, across another lane of traffic, and crashed into a 20-foot ravine. The crash left him permanently paralyzed. Later, the motorcycle manufacturer did a product recall on the front brake master cylinder that was on the man's motorcycle. The Plaintiff then filed a lawsuit claiming the recall condition was present on his motorcycle and caused his crash. After lengthy, expert-heavy discovery and substantial pre-trial briefing, the case proceeded to a jury trial. After a 5-week trial, the Plaintiff asked the jury to award $14MM in damages. Instead, the jury found that the motorcycle was not defective and ruled in favor of the manufacturer. One of the keys to success was a favorable ruling on a motion to exclude all evidence of the product recall under Rule 407 as a subsequent remedial measure. This is a significant victory for the manufacturer, as they tried two similar lawsuits earlier that resulted in plaintiff's verdicts. In 2020 the 5th Circuit unanimously affirmed the judgment on the jury verdict, and subsequently, denied the plaintiffs' petition for panel rehearing and rehearing en banc. ◆

**RESULT:** United States Court of Appeals for the Fifth Circuit unanimously affirmed verdict.

**COUNSEL:** Jeffrey M. Croasdell
**FIRM:** Rodey Law
**HEADQUARTERS:** Albuquerque, NM

# ASBESTOS TRIAL

## Plasterer sues 23 defendants in asbestos case

Plaintiff was a 78-year-old former plasterer who brought an asbestos claim against 23 defendants. After a two-week trial, a jury returned a defense verdict. The case was prosecuted by national counsel skilled in asbestos cases and trials. This was the last trial in New Mexico before a five-month shut down as a result of the Covid-19 restrictions. ◆

**RESULT:** Defense verdict.

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# PROFESSIONAL LIABILITY

**COUNSEL:** Richard J. Gilloon
**FIRM:** Erickson | Sederstrom
**HEADQUARTERS:** Omaha, NE

# ARCHITECT/ENGINEER PROFESSIONAL LIABILITY

## Developer sues architect/engineer for close to a $1MM in lost profits

Defendant, architect/engineering firm, provided services to Plaintiff developer to build an assisted living facility. Facility was built and opened but behind schedule. Plaintiff sued Defendant claiming $924,500 in lost profits due to a three-month delay due to alleged failures in design and construction.

The contract contained a clause by which both parties agreed to waive consequential damages (i.e.: lost profits.) Plaintiff claimed the clause was unenforceable in NE.

Defense successfully moved for partial summary judgment in removing the claim for lost profits of $924,500 with the trial court finding that the contract clause WAS enforceable. Plaintiff dropped the case shortly after motion was granted with no payment from Defendant. ◆

**RESULT:** Case dismissed.

**COUNSEL:** Andrea Schillaci, Katherine L. Wood
**FIRM:** Hurwitz & Fine, P.C.
**HEADQUARTERS:** Buffalo, NY

# PROFESSIONAL LIABILITY SUIT AGAINST LANDSCAPE ARCHITECT, STATUTE OF LIMITATIONS

## Appellate Court Unanimously Finds Landscape Architectural Design Negligence Claim Untimely

The Town of West Seneca, New York contracted with a company to design and build a nature and arts center and surrounding park. The general contractor then subcontracted with a landscape design firm to provide professional design services. The design professionals did not have a written contract directly with the Town. Fifteen years after the project was completed, the nature and art center began to settle, the walls cracked, studs rotted, and foundation degraded. The Town alleged that it was entitled to an expanded statute of limitations as it had not contracted with the subcontractors. The Court granted a pre-Answer Motion to Dismiss, which was unanimously affirmed on appeal. The Appellate Court rejected the Town's claim that its cause of action accrued upon discovery of the damage rather than on completion of the project. The Court further stated that the relationship between the Town and subcontractor landscape architect was one of functional privity and the Town was an intended third-party beneficiary of the contract between the general and subcontractors. Case dismissed. ◆

**RESULT:** Case Dismissed.

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# PROPERTY

**COUNSEL:** Jeffrey E. Havran
**FIRM:** Margolis Edelstein
**HEADQUARTERS:** Scranton, PA

# PREMISES LIABILITY

## Dog viciously attacks child, sues landlord

The Plaintiff, a minor, and his parents were visiting a tenant at property owned and rented to the tenant by defendant property owner/landlord. While at the property, it was alleged that the tenant's dog, which had a history of biting, got loose, attacked the Plaintiff, dragged him under a porch inflicting extensive bite marks on his face and torso.

The tenant did not have any liability insurance and suit was brought only against the property owner/landlord alleging they were aware that the dog had "vicious and dangerous propensities," that defendant should have taken steps to have the dog removed from the property, and seeking significant damages for the injuries sustained.

During the depositions of the Plaintiffs, numerous favorable admissions were obtained regarding the dog and the lack of culpability of defendant property owner/landlord, which supported a filing of a Motion for Summary Judgment. The court granted Summary Judgment in favor of defendant finding that Plaintiff had failed to show or adduce any actual knowledge on the part of the property owner of a dangerous animal on the property. In granting our Summary Judgment Motion, the court determined that although it was undisputed that the property owner owned the property where the accident occurred, there was no actual knowledge of any dangerous or vicious propensities as to the dog in question. ◆

**RESULT:** Summary Judgment granted in Favor of Defendant in Dog Bite Litigation.

**COUNSEL:** Nabeel Peermohamed
**FIRM:** Brownlee LLP
**HEADQUARTERS:** Calgary, Alberta, Canada

# SLIP AND FALL

## Alberta Court of Appeal Confirms Test for Summary Judgment

The Plaintiff was walking immediately behind the school custodian applying sand to the sidewalk and still managed to slip and fall. The custodian arrived at the school at 6:30 a.m. He checked the condition of the sidewalk and concluded it was not slippery. The sidewalk then became slippery a couple of hours later when it started to snow. The school's vice principal told the school custodian to spread sand on the sidewalk. At 8:45 a.m., while the custodian was sanding the sidewalk, and while the plaintiff was walking directly behind the custodian, the Plaintiff still slipped and fell on the sidewalk. The Court held nothing more could have reasonably been done by the school and the matter has been dismissed. On appeal, the Alberta Court of Appeal dismissed the plaintiff's slip and fall case. ◆

**RESULT:** Case Dismissed.

**COUNSEL:** Alice Spitz; Murad (Mordy) Sardar
**FIRM:** Molod Spitz & DeSantis, P.C.
**HEADQUARTERS:** New York, NY

# PREMISES LIABILITY, POLICE OFFICER INJURED

## Appellate Court Unanimously Finds Storage Facility Not Liable to Police Officer

A Police Officer was injured while attempting to handcuff a tenant who refused to leave his storage unit at closing time. The Plaintiff claimed that the storage facility was negligent in failing to evict the tenant based on his alleged psychological impairments. Plaintiff also alleged a violation of the New York City Administrative Code claiming that backup officers were prevented from accessing the basement to assist, as the doors leading to and from the basement were allegedly wrongfully locked.

Summary Judgement denial from the lower court was unanimously reversed when the Appellate Court held that the defense established that the storage facility had no duty to evict the tenant prior to the incident. There was no admissible evidence demonstrating that the tenant had a history of violence, and the Court affirmed that a landlord cannot be held responsible for assessing and determining the dangerous propensities of mentally ill tenants or for exercising control over them. The Court also found that the doors did not violate any applicable code. No Duty and No Question of fact! ◆

**RESULT:** Case Dismissed.

**COUNSEL:** Alice Spitz; Mary B. Dolan Roche
**FIRM:** Molod Spitz & DeSantis, P.C.
**HEADQUARTERS:** New York, NY

# SLIP-AND-FALL

## Plaintiff blames store for slip following snowstorm

Upon entering the Defendant's store, the Plaintiff passed through approximately seven feet of non-slip floor covering and about 17 feet of carpeting. Nevertheless, Plaintiff slipped when she stepped off the carpet and fractured her left hip. Because a significant amount of snow had accumulated outside the store's entrance from a snowstorm that struck New York City the day before, a yellow caution sign was placed at the edge of the carpeting. Video surveillance of the entrance showed 28 individuals passing through the entrance without falling in the 20 minutes prior to Plaintiff's fall. The Plaintiff admitted that she observed the caution sign upon entering the store. The defense claimed that the video was dispositive in demonstrating that the Defendant lacked notice of the condition and that the condition was likely created either moments before the Plaintiff's fall or by the Plaintiff herself. Plaintiff claimed the defendant had notice because the video captured an individual briefly sliding on the tile floor before Plaintiff's fall.

The Court held that Plaintiff failed to provide evidence demonstrating that the Defendant breached a duty of care by either creating or having legally sufficient notice of the alleged dangerous condition. The court deemed the Plaintiff's claim regarding notice as purely speculative. Additionally, the Court acknowledged that the Defendant had no duty to continuously monitor the floors following the storm. The Court awarded Summary Judgment to the defendant. ◆

**RESULT:** Court awarded Summary Judgment to the defendant.

**COUNSEL:** Deedee Gasch, Stephen Bell
**FIRM:** Cranfill Sumner LLP
**HEADQUARTERS:** Raleigh, NC

# DRAM SHOP, ALCOHOL NEGLIGENCE, AND PREMISES LIABILITY CASE

## Man beaten by alleged intoxicated assailant at festival, sues hotel

An annual festival showcasing local breweries and restaurants was held at a hotel. Plaintiffs were a husband and wife who attended the event. They alleged that as the festival was closing down, an intoxicated patron assaulted Plaintiff husband resulting in permanent brain injury.

Plaintiffs alleged that Defendants were liable for the assault because the purchase of tickets to the event created a special relationship between the parties, because Defendants were negligent in failing to provide security for the event, because Defendants caused and allowed the assailant to be over-served, and because Defendants failed to place limits on alcohol consumption and created an "all you can drink" atmosphere that made the assault reasonably foreseeable. Plaintiffs sought an award of actual and punitive damages.

Defense successfully argued that Plaintiffs failed to allege facts sufficient to assert a duty owed or breach of any duty by the hotel where the festival was held or its management company. Defense also moved for dismissal on the grounds that Plaintiffs failed to allege sufficient facts that the dismissed entities were the appropriate licensees or permittees for purposes of dram shop liability, or that the Defendants knew, or should have known, the assailant was intoxicated at the time of service. Finally, defense succeeded in convincing the Court that any action or inaction of the hotel or its management company could not legally constitute

**COUNSEL:** Deedee Gasch, Stephen Bell
**FIRM:** Cranfill Sumner LLP
**HEADQUARTERS:** Raleigh, NC

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the proximate cause of Plaintiffs' injuries, as Plaintiffs alleged the assault was so immediate that security guards or other protective measures would not have prevented it. ◆

**RESULT:** Hotel and Its Management Company Dismissed.

**COUNSEL:** Paul Grote
**FIRM:** Drew Eckl & Farnham, LLP
**HEADQUARTERS:** Atlanta, GA

# SLIP AND FALL ON MOPPED FLOOR

## Mopped wet floor causes customer to slip

Plaintiff, restaurant customer, claimed she fractured her pelvis and sustained significant medical bills and impairment after a slip and fall due to mop water left on restaurant floor. In deposition, Plaintiff denied seeing any employee mopping in the restaurant or seeing any caution wet floor signs. Video of the incident showed an employee mop near the area of Plaintiff's fall, and that Plaintiff walked near a caution wet floor sign seconds before the fall, although the sign was not directly in the path traveled by Plaintiff. The defense argued that the video was dispositive as it showed plaintiff walk by a "caution wet floor" sign such that knowledge of the claimed hazard had to be imputed to plaintiff. Plaintiff contended that the restaurant failed to follow mopping and warning sign placement procedures. The court held that the "caution wet floor" sign shown on the video imputed knowledge of the claimed hazard despite Plaintiff's testimony she did not see the sign. The Court granted summary judgment. ◆

**RESULT:** The Court granted summary judgment.

**COUNSEL:** Paul Caleo and Mark Heisey
**FIRM:** Burnham Brown
**HEADQUARTERS:** Oakland, CA

# LANDLORD-TENANT, HABITABILITY, TOXIC MOLD EXPOSURE

## Plaintiff claims she was poisoned by mold, sues landlord for $4.885MM

Plaintiff, a tenant in a studio apartment owned by the defendants alleged she was poisoned by toxic mold as a result of a roof leak and claimed she was injured and damaged for the rest of her life, and further argued that her compromised immune system made her more susceptible to illness.

The defendants did not dispute that there was a roof leak caused by a rainstorm. They immediately responded to fix the roof leak and remediate and clean the studio apartment and argued that evidence-based medicine confirmed that plaintiff was not injured by the presence of mold in the studio apartment. The defense was able to seriously discredit the Plaintiff's medical experts before the jury.

Plaintiff's demand for most of the lawsuit was $2.5MM. The defendants served a statutory offer for $100K. After starting trial, the parties were sent to a further all-day mandatory settlement conference where the plaintiff lowered her demand to $650K and the defendants offered $235K.

In closing arguments, plaintiff's counsel asked the jury to award a total of $4,885,042 in total damages. After deliberating for a day and a half, the jury returned a verdict awarding damages to plaintiff totaling $93,290 made up of $79,290 in past economic damages; $5000 in future economic damages; and $9000 in past general damages and zero for future general damages. Further, the jury found that the plaintiff was 15% at fault for her own injuries

**COUNSEL:** Paul Caleo and Mark Heisey
**FIRM:** Burnham Brown
**HEADQUARTERS:** Oakland, CA

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and damages and that defendants were not liable for Intentional Infliction of Emotional Distress or Concealment nor for punitive damages.

The defendants filed a cost bill in excess of $100K and are waiting for the court to issue its final rulings on the several post-trial motions to determine if they will be the prevailing parties in this lawsuit. The trial judge has already denied the Plaintiff's Motion for a New Trial.

> *COVID NOTE: This jury trial was stopped In March with only two to three days to go, when California Governor Newsom handed down the shelter-in-place directive in response to the then burgeoning COVID-19 pandemic. Both parties requested the trial judge not to order a mistrial but rather put the trial in hiatus until a later date when the court could consider completing it with guidelines that would ensure the safety and well-being of court staff, the litigants and the jurors. Both parties are indebted to the judge in allowing the jury trial to re-commence and be completed in June under circumstances that involved all persons wearing face masks, maintaining safe distances, and with counsel conducting witness examination and closing arguments surrounded by clear plexiglass.* ◆

**RESULT:** Jury verdict less than statutory offer of $100K.

**COUNSEL:** Andrew M. Lusskin
**FIRM:** Braff, Harris, Sukoneck & Maloof
**HEADQUARTERS:** Livingston, NJ

# PREMISES LIABILITY AGAINST DEFENDANT PROPERTY OWNER AND THIRD-PARTY DEFENDANT CHURCH

## Woman injured at Church event

Plaintiff, a parishioner of Defendant Church, was injured during a Fellowship event held at the farm of Church Council Members who hosted the event and were directly named by plaintiff as defendants. Plaintiff was stepping off of a wagon when she fell allegedly suffering significant head and other injuries. Plaintiff sued only the property owners who then filed a Third-Party Complaint against Defendant Church. Summary Judgment Motions were filed by the Church and the property owners. The primary focus of both Motions was Charitable Immunity including a Choice of Law issue between PA and NJ law. PA essentially abrogated Charitable Immunity and, if applicable, Charitable Immunity would not serve as a defense. NJ law on the other hand, applied Charitable Immunity. The Judge ruled PA applied and therefore Charitable Immunity did not apply. However, accepting the Defense alternate argument that there was no liability against the Church, granted Summary Judgment for the Church but denied as to the property owners. The Court agreed that although this was a Church sponsored Fellowship event, and the Church did assist with setting up and running the event, the property owner was essentially in charge and responsible for safety. The Church did not have a duty in this regard. ◆

**RESULT:** Summary Judgment for the Church.

**COUNSEL:** Brian W. Johnson
**FIRM:** Drew Eckl & Farnham, LLP
**HEADQUARTERS:** Atlanta, GA

# CASE DISMISSED ON INTERLOCUTORY APPEAL

## She slips, she's injured, she sues

Plaintiff claimed significant injuries, including traumatic brain injury, and seven figure damages, after she slipped and fell while stepping up from a parking lot area onto a curb in the car cleaning area of an apartment complex where she resided. Plaintiff attempted to use a car vacuum that was surrounded by embedded rocks in a landscaped area and she claimed she had never traversed the area before the date of incident. Plaintiff sued premises owner and management company for alleging she slipped on a foreign substance, or, that the static condition rocks in the landscaped area were hazardous.

The trial court denied the defendant's summary judgment motion and defendant appealed. The Court of Appeals reversed because evidence introduced by defense controverted Plaintiff's speculation as to evidence of a hazard. The Plaintiff initially testified that she did not know what caused her to fall and later speculated that the landscape rocks were slippery and smooth.

The Court of Appeals found that the Trial Court improperly concluded that a jury could infer from other evidence that the rocks were slippery from a nearby car wash facility. Defense persuaded the Appellate Court to find that Plaintiff's claims of liability were based on conjecture and speculation. Defense further succeeded in convincing the GA Supreme Court to deny certiorari review; hence the decision of the Court of Appeals to dismiss Plaintiff's case with prejudice stood as the final judgment: defense prevailed. ◆

**RESULT: Court of Appeals reverses trial court and dismisses case based on speculation.**

**COUNSEL:** Maria Delpizzo Sanders
**FIRM:** von Briesen & Roper, s.c.
**HEADQUARTERS:** Milwaukee, WI

# FIRE CAUSE AND ORIGIN

## Mini-fridge blamed for massive fire: $6MM plus in damage

The original claim alleged the insured's mini-refrigerator was responsible for starting the fire on the third floor of a large logging facility. The pre-suit damage claim estimate exceeded $5MM and then later rose to over $6MM. The original expert retained by the insured essentially went along with the plaintiff's experts in their determination of cause and origin of the fire being related solely to the mini-refrigerator on the third floor. During the initial investigation after suit was filed, defense counsel determined that there were discrepancies in the fire report, employee statements, the first responders' impressions when attending the fire, and the initial investigations of the building. Fortunately, well after the initial pre-suit investigations had been completed, the building itself had not undergone renovation and the scene was essentially pristine as it was immediately post-fire. Defense counsel immediately retained several experts including a cause and origin expert, and electrical engineering expert, to re-evaluate the investigation materials and then pressed for re-inspections of the accident site. After multiple visits, it was determined that the cause and origin of the fire was not on the third floor as originally conceded, but actually came from a lower floor.

There were enough fire indicators and residual markers to convince plaintiff's experts the initial conclusions were erroneous and could not have come from the mini-fridge manufactured by the Defendant. Plaintiff's counsel was ultimately forced into a voluntary dismissal to avoid sanctions and the case was voluntarily dismissed against the Defendant manufacturer and its U.S. insurer. ◆

**RESULT:** Voluntary dismissal.

**COUNSEL:** Patrick J. Ewing
**FIRM:** Drew Eckl & Farnham, LLP
**HEADQUARTERS:** Atlanta, GA

# TENANT OBLIGATIONS TO LANDLORD

## Court awarded damages, interest, and attorneys' fees to apartment company after video trial

The Tenant caused damage to multiple units of an apartment complex due to hoarding of rubbish, poor housekeeping, accumulation of pet waste, unreported water overflows, and creation of conditions for vermin. After the Tenant abandoned the premises and refused the apartment company's demand for payment for the cost of repairs, the apartment company was forced to bring suit. After a trial conducted by video during the pandemic, the Court awarded the apartment company all of its requested relief and entered judgment against the Tenant that included the cost of repair to the premises, interest from the date of the demand for payment, and attorneys' fees. ◆

**RESULT:** Landlord prevails.

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# WRONGFUL DEATH

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

# WRONGFUL DEATH, DRAM SHOP

## Court rules Plaintiff failed to state claim against utility company and declined to extend existing dram shop law

The Estate of the 23-year-old Decedent brought an action against, among others, an utility company that owns a hydroelectric lake after the Decedent was allegedly struck and killed by a drunk driver in the middle of the night The Estate alleged that in the hours before the collision, the drunk driver consumed alcohol at numerous private residences around the lake, at a local restaurant, and on an undeveloped island on the lake owned by the electric utility. The Estate alleged the utility company was negligent in failing to prevent the consumption of alcohol by minors on its undeveloped island. The Estate alleged that alcohol consumption by minors on this island was well known to the utility company. The trial court granted the utility's Motion to Dismiss in Lieu of Answer, finding that the Estate failed to state a cause of action for which relief could be granted as the Estate's theory of liability is not recognized in SC. The court ruled that because the electric utility does not possess a license to sell or distribute alcohol, the statutory-based dram shop law of SC did not create a duty. Case dismissed. ◆

**RESULT:** Case Dismissed.

**COUNSEL:** Jon A. Nichols and Danielle M. Smith
**FIRM:** Harman, Claytor, Corrigan & Wellman
**HEADQUARTERS:** Richmond, VA

# WRONGFUL DEATH

## Tree falls on mobile home killing son, estate sues for $10MM

The administrator of the estate of a deceased minor filed a wrongful death claim seeking $10MM arising out of an incident where a tree fell onto a mobile home, killing the minor. Defendant mobile home park owner removed the case to federal court based upon diversity.

Plaintiff purchased a mobile home and entered into a lease with a mobile home park owner to use a lot. She moved into the mobile home and resided there with her son. Seven months later, a windstorm with gusts reaching 60 mph caused a tree on the lot to fall through the roof of the mobile home, killing her son while he was sleeping in his bunk bed. Plaintiff alleged that the tree had been decaying, that she notified the mobile home park of the condition, that she requested removal of the tree, and that she was told by the mobile home park that they would get to it. The mobile home park disputed these claims, stating that they were not notified of the condition of the tree at any point, and that, even if it had been, maintenance of trees on the lot were the exclusive responsibility of the tenant under the lease.

Following oral argument, the court held that the wrongful death claim failed because the Plaintiff could not allege a common law or statutory duty upon which relief could be granted. The parties' relationship was premised upon a contract that ceded many responsibilities to the lot tenant, including responsibility for the trees. The court also held that the Manufactured Home Lot Rental Act (MHLRA) did not provide a basis for a statutory duty on Defendant's part because responsibility for the trees was expressly excepted in the written agreement. Therefore, the court dismissed the action with prejudice.

**COUNSEL:** Jon A. Nichols and Danielle M. Smith
**FIRM:** Harman, Claytor, Corrigan & Wellman
**HEADQUARTERS:** Richmond, VA

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Plaintiff initially demanded $1MM to settle the claim prior to argument on the motion. After noting an appeal to the 4th Circuit Court of Appeals, the Plaintiff accepted $30,000.00 to settle the wrongful death claim and the appeal was withdrawn. ◆

**RESULT:** Court dismissed the action with prejudice.

**COUNSEL:** Natalie Magdeburger, Elliott Petty
**FIRM:** Pessin Katz Law, P.A.
**HEADQUARTERS:** Baltimore, MD

# MEDICAL NEGLIGENCE WRONGFUL DEATH

## Plaintiffs decedent claims MD severed the ileal conduit later causing death

Plaintiffs alleged that surgeon failed to timely recognize and treat subsequent bowel perforation following surgery to repair spontaneous bowel perforation. Plaintiffs' decedent presented to hospital emergently with bowel perforation. She had previously had bladder cancer and had an ileal conduit for passing urine. After refusing to authorize surgery for 24 hours, Plaintiffs' decedent underwent successful repair of bowel perforation. Plaintiffs' decedent was septic post-surgery and developed kidney failure but had begun to show signs of recovery clinically. Post-surgery, drains initially drained serosanguineous fluid but on day 6 surgeon believed the drains were putting out urine. Sampling confirmed creatinine and CT showed ileal conduit was disrupted at site of pre-existing hernia. Patient transferred to another institution for repair of ileal -conduit and on day 7 post-surgery began draining bilious content. CT scan revealed additional perforation at or near the site of the 1st repair. Second repair was conducted but seven days later the second repair broke down. Plaintiffs contended that the initial surgeon had severed the ileal conduit at time of first repair and had injured the bowel causing the second perforation. The defense established that the ileal conduit was likely disrupted from the pre-existing hernia and that Plaintiffs' decedent had failed to heal due to underlying co-morbidities causing all repairs to break down. The jury returned a defense verdict in favor of the surgeon. ◆

**RESULT:** Defense Verdict.

**COUNSEL:** Kara L. Ellsbury and Robert C. Jarosh
**FIRM:** Hirst Applegate, LLP
**HEADQUARTERS:** Cheyenne, WY

# TRUCKING COMPANY WINS ON APPEAL IN INDEPENDENT CONTRACTOR CASE INVOLVING WRONGFUL DEATH

## Wheel explodes killing repair man, estate loses, now appeals

Plaintiffs' decedent owned a towing and repair business in WY. The Defendant trucking company's driver was travelling on Interstate 90 when one of the wheels on the truck began to wobble. Defendant hired decedent to repair the wobbling wheel. While attempting to remove the wobbling outer wheel, the rim assembly came apart, striking and killing him. The decedent's estate sued defendant for wrongful death. Much later, the decedent's wife and brother, who worked with the decedent and were present when he died, sued defendant and others for negligent infliction of emotional distress (NIED).

Defendant filed a motion for summary judgment in the wrongful death case asserting Plaintiff's decedent was an independent contractor over whom defendant did not exercise control; therefore, Defendant did not owe the decedent any duty. The court agreed and granted summary judgment in favor of defendant in the wrongful death case. The court then took judicial notice of its decision in the NIED case and dismissed the claims against defendant in that case.

Plaintiffs in the two cases appealed to the 10th Circuit. The 10th Circuit affirmed the decisions, holding that defendant did not exercise control over the decedent's work. More specifically, defendant did not instruct the decedent how to do his work. The decedent, and he alone, decided whether to deflate the tire,

**COUNSEL:** Kara L. Ellsbury and Robert C. Jarosh
**FIRM:** Hirst Applegate, LLP
**HEADQUARTERS:** Cheyenne, WY

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whether to stand directly in front of it, what tools to use, and the method and manner in which to disassemble the rim assembly. ◆

**RESULT: Order affirming summary judgment in favor of trucking company.**

# ADDITIONAL IMPORTANT CASES

**COUNSEL:** Erin E. Berry, Billie LM Addleman
**FIRM:** Hirst Applegate, LLP
**HEADQUARTERS:** Cheyenne, WY

# LANDLORD WINS COVID FED CASE

## Delinquent tenants try to use CDC COVID order as cover on paying rent

In August 2020, a landlord filed a forcible entry and detainer proceeding as a result of its tenants' failure to pay rent for 15 months. After a hearing on the matter, the court ordered the tenants to vacate the property in two weeks and entered judgment in favor of the landlord for rent owed. The same day the court entered its order, the Center for Disease Control and Prevention issued its *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 ("CDC Order")*. The CDC Order prohibits any action by a landlord to evict a covered individual based on non-payment of rent. To be a covered individual, the tenant must provide a declaration signed under oath to his or her landlord. The tenant must certify, among other things, he or she is using best efforts to make timely partial payments that are as close to the full payment as his or her circumstances may permit, taking into account other nondiscretionary expenses.

The landlord received a declaration from the tenants and sought to challenge the validity of the declaration. Initially, the Court was hesitant to allow the landlord to challenge the validity of the declaration. After successfully convincing the Court that the landlord has a constitutional right to challenge the validity and veracity of the tenants' declaration and certifications, the Court permitted an evidentiary hearing on the matter. At the evidentiary hearing, the landlord introduced evidence that the tenants made approximately $6000.00 per month, spent money on discretionary expenses such as Netflix, Hulu, and eating out, and had not attempted to make any partial rental payments to the landlord.

**COUNSEL:** Erin E. Berry, Billie LM Addleman
**FIRM:** Hirst Applegate, LLP
**HEADQUARTERS:** Cheyenne, WY

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The court determined, based on this evidence, that the tenants' declaration was invalid, and the tenants were therefore not covered individuals to the CDC Order. The Court ordered the tenants to vacate the property within one week and entered judgment for all unpaid rent. ◆

**RESULT: Court ordered the tenants to vacate and pay all unpaid rent.**

**COUNSEL:** Susan Hofer, Mica Worthy
**FIRM:** Cranfill Sumner LLP
**HEADQUARTERS:** Raleigh, NC

# AVIATION CARRIER; INTERNATIONAL TRAVEL CLAIM

## Plaintiff sues airline for refusal to board aircraft

Defense obtained dismissal with prejudice for an air carrier client in an action involving the application of the *Montreal Convention*. Plaintiff alleged damages resulting from an alleged refusal to board an aircraft from an international flight. Defense filed a Motion to Dismiss based on the exclusive remedies and statute of limitations of the Montreal Convention, with which the Court agreed, and thus granted the dismissal with prejudice. ◆

**RESULT:** Case Dismissed.

**COUNSEL:** Luisa E. Taddeo and Shawna M. Lydon
**FIRM:** Betts, Patterson & Mines, P.S.
**HEADQUARTERS:** Seattle, WA

# HOA DISPUTE REGARDING BOARD'S REJECTION OF PROPOSED BYLAW

## WA Supreme Court denies homeowners' petition

Petitioners represented several homeowners living in an equestrian-friendly community with access to several miles of equestrian trails. In the covenant of the land, the developer of the community set aside certain tracts of development, "for the benefit of, and to be used by ..." the residents of the HOA community. At the request of the developer, one of the early residents of the community, who built a stable and riding area for his family's use, expanded his property to board horses for both residents and non-residents. The developer never placed any restriction on the non-resident's use of the boarding area of the property or use of the equestrian trails. The subsequent sellers continued to operate the boarding facility, with the resident and non-resident boarders using the equestrian trails. Over a decade later, some residents sought to change the community's bylaws to prohibit non-resident boarders from using the equestrian trails. The notice to amend the bylaws did not specify the actual amendment proposed at the meeting. Over 65% of the votes were obtained by proxy in reliance on a defective and incomplete notice. The HOA board later rejected this bylaw amendment as void in several respects.

Petitioners filed suit seeking the enforcement of the bylaws through claims for declaratory and injunctive relief. Both sides filed summary judgment motions. The trial court granted the HOA's motion, denied the Petitioners' motion, and dismissed the case with prejudice based on four separate issues, all of which the trial court determined contained no genuine issue of material fact.

**COUNSEL:** Luisa E. Taddeo and Shawna M. Lydon
**FIRM:** Betts, Patterson & Mines, P.S.
**HEADQUARTERS:** Seattle, WA

# [CONTINUED]

Petitioners appealed to the Court of Appeals and oral arguments were heard. In January of 2020, the Court of Appeals issued its Unpublished opinion affirming the trial court's dismissal on one of the four issues. The Court of Appeals did not consider the three other arguments presented on appeal since any one of those issues would have warranted affirmation of the trial court's dismissal of the Petitioners' claims. Petitioners then sought review from the Washington Supreme Court. After briefing, the Supreme Court denied the petition for review, affirming the dismissal of all of Petitioners' claims. ◆

**RESULT: Petition for Review Terminated affirming grant of summary judgment in favor of HOA.**

**COUNSEL:** Russ Racine
**FIRM:** Cranfill Sumner LLP
**HEADQUARTERS:** Raleigh, NC

# ARBITRATION; FAIR CREDIT REPORT ACT, BACKGROUND SEARCHES ON PROSPECTIVE EMPLOYEES

## Claimant says software company must verify data given on prospective employees

A company providing background searches to businesses for employment purposes, asserted claims against Respondent, a software company selling access to its proprietary software. Respondent's software provides customers with direct access to court records across the nation for criminal background searches on prospective employees. Claimant sued Respondent claiming the Fair Credit Reporting Act required Respondent to independently verify the accuracy of the information Claimant accessed and obtained through the use of Respondent's software. After presentation of the evidence, the Arbitrator held that the Claimant breached its contract with Respondent, Respondent had no duty under the FRCA to verify the accuracy of the data provided through its software platform, and Claimant was liable for Respondent's attorney's fees in defending the action. ◆

**RESULT:** Claimant's claims denied; Attorney's fees awarded to Respondent.

**COUNSEL:** Art Spratlin, Kat Carrington
**FIRM:** Butler Snow LLP
**HEADQUARTERS:** Ridgeland, MS

# BREACH OF CONTRACT, NOTICE OF TRIAL

## Mississippi Supreme Court unanimously reverses $800K bench verdict

Plaintiffs alleged Defendants overcharged for lumber brokering services in violation of an oral contract. After years of the case becoming stale and Defendants' original attorney withdrawing to become a federal judge, Plaintiffs unilaterally converted the case from a jury trial to a bench trial, set the case for trial without properly notifying Defendants, and obtained an $800K verdict. Defendants retained Butler Snow LLP after Plaintiffs attempted to execute on the judgment in another state several months after trial. The trial judge refused to set aside the judgment, and Defendants appealed. A unanimous Mississippi Supreme Court reversed, finding the circuit clerk failed in his mandatory responsibility to notify all parties of the forthcoming trial, thus depriving Defendants of their opportunity to appear and defend themselves. ◆

**RESULT:** Reverse and Remand.

**COUNSEL:** Jack Crawford, Charles Griffin, Ryan Beckett and La'Toyia Slay
**FIRM:** Butler Snow LLP
**HEADQUARTERS:** Ridgeland, MS

# WHITE COLLAR CRIME

## Mississippi Supreme Court affirms dismissal

Parens patriae case brought by the Mississippi Attorney General against ten foreign manufacturers, under the Mississippi Consumer Protection Act and the Mississippi Antitrust Act alleging that the foreign manufacturers conspired to fix the market for automotive wire harness systems. Completed on April 30, 2020, the Mississippi Supreme Court affirmed the dismissal of all defendants. ◆

**RESULT:** Defense Verdict.

**COUNSEL:** G. Randall Moody, Jeffrey Leasendale
**FIRM:** Drew Eckl & Farnham, LLP
**HEADQUARTERS:** Atlanta, GA

# CLAIM FOR ATTORNEY FEES IN AN ADMITTED LIABILITY CASE

## Plaintiff claims defendant has NO right to defend a $2MM case

Plaintiff was driving his tractor through a rail yard to pick up a trailer when defendant's truck struck plaintiff's vehicle from the rear. Plaintiff sought award of attorney fees and expenses of litigation contending that fault of defendant was clear so no basis for defense existed. Defendant did challenge the extent of plaintiff's injuries and damages, which plaintiff claimed to be over $2MM. The federal judge over the case granted summary judgment to defendant on the plaintiff's attorneys fees claims. Agreeing with defendant's argument, the court held that the defendant's refusal to settle the case did not constitute stubborn litigiousness since a bona fide controversy existed, even if the controversy was about the extent of damages and not legal liability. ◆

**RESULT:** Summary judgment granted.