



2022

SIGNIFICANT CASES

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CLASS ACTION



COUNSEL: Robert C. Jarosh and Richard A. Mincer

FIRM: Hirst Applegate, LLP

HEADQUARTERS: Cheyenne, WY

CLASS ACTION, NEGLIGENCE, FRAUD, CONSPIRACY

Former Board of Directors Not Liable in \$100MM Class Action Related to Sale of Telephone Cooperative

The plaintiffs brought a 100+ page complaint, alleging a dozen causes of action, against the former directors of a telephone cooperative that provided telecommunications services to households and businesses in mostly rural parts of Wyoming. In the complaint, the plaintiffs alleged that former directors wrongfully sold the telephone cooperative to a private entity, even though the cooperative members received sometimes life-changing amounts of money from the sales proceeds. The complaint included allegations of negligence, breaches of fiduciary duty, violations of securities laws, fraud, and conspiracy. Regarding the latter, the complaint alleged that the former directors conspired with company officers, lawyers, and the purchaser to sell the telephone cooperative for tens of millions of dollars less than it was worth. After extensive briefing, the trial court certified the case as a class action, with more than 700 former members of the cooperative joining the class. The class sought more than \$100 million in damages.

After more than six years of intense litigation, the trial court granted summary judgment on behalf of the former directors. In an extensive ruling, the trial court held that the class waived any claims against the former directors by voting to approve the sale, and by failing to avail themselves of opportunities to challenge the sale prior to the vote. The trial court also found that the class failed to bring the claim as a derivative action, could not overcome the former directors' defenses related to the business judgment rule, and failed to provide adequate evidence related to the allegations

COUNSEL: Robert C. Jarosh and Richard A. Mincer

FIRM: Hirst Applegate, LLP

HEADQUARTERS: Cheyenne, WY

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of fraud and conspiracy. Rather, the trial court found the record demonstrated that throughout the sales process, the former directors' actions were attributable to numerous rational purposes, overwhelmingly supporting the application of the business judgment rule. ■

RESULT: Summary Judgment for Former Directors.



COMMERCIAL LITIGATION



COUNSEL: P. Ryan Beckett and La'Toyia J. Slay

FIRM: Butler Snow LLP

HEADQUARTERS: Ridgeland, MS

COMMERCIAL LITIGATION

Stolen Funds, Claims a Duty Owed by Bank

In a business dispute involving the alleged theft of funds from a business bank account of the plaintiffs, over \$500,000 in stolen funds were used to pay down certain consumer debts, including certain debts to defendant. Defendant and the other bank defendants each brought separate motions to dismiss based on the lack of any duty owed by a bank to a non-customer under the Uniform Commercial Code. The plaintiffs moved for leave to amend and were given an opportunity to file an Amended Complaint. Defendants again each moved to dismiss on the same grounds. The court granted the motions to dismiss and dismissed the plaintiffs' claims with prejudice. After threatening to appeal in order to try and extract a settlement, the plaintiffs allowed their time to appeal to run and the case is concluded. ■

RESULT: Motions to dismiss granted.

EMPLOYMENT / DISCRIMINATION / DISABILITY / WORK COMP



COUNSEL: Melissa Y. York

FIRM: Harman, Claytor, Corrigan & Wellman, P.C.

HEADQUARTERS: Richmond, VA

EMPLOYMENT DISCRIMINATION

Summary Judgment for School Board for Claims of Title VII Race Discrimination and Retaliation

School bus driver received a negative performance evaluation and was not recommended to receive a contract for the following school year. Employee filed suit against the School Board, claiming race discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended. The School Board moved for summary judgment, which was granted. The Court found that there was no evidence the employee was meeting the School Board's legitimate expectations, and the employee was not treated differently than any similarly-situated employees outside of her protected class. The Court also found no evidence of pretext and that timing alone was insufficient to create a jury question on the retaliation claim. ■

RESULT: Summary Judgment for Defendant.



COUNSEL: Neil Brunetz

FIRM: Drew Eckl & Farnham, LLP

HEADQUARTERS: Atlanta, GA

OSHA LITIGATION

Company Received Serious OSHA Citations That May Have Jeopardized Their Existing and Future Contracts

Company had two employees suffer arc flash related burns, one severely but both hospitalized, while working on live front electrical equipment. OSHA investigation resulted in 4 serious citations related to the incident, and fines resulted. After early negotiations failed, we proceeded to litigate with OSHA, and, after conducting discovery and scheduling the deposition of the OSHA inspectors, OSHA agreed to reduce the severity of the citations. ■

RESULT: OSHA Citations Contested and Reduced.



COUNSEL: Shelby M. McMillan

FIRM: Reminger Co., L.P.A.

HEADQUARTERS: Cleveland, OH

WORKERS' COMPENSATION

Third-Party Car Accident, Injured Employee, Who Pays?

The injured worker was driving back to his place of employment after running errands on his lunch hour when he was hit head-on by another car. The claim was allowed for the conditions of Fractured Sternum, Contusion of Left Knee, Abrasion of Right Hand, and Complex Tear of the Left Medial Meniscus. Defense counsel gathered the necessary evidence, including police reports, relevant medical, and the third parties' insurance information. Defense counsel requested a complete claim reimbursement for the entire claim based on a narrow provision in the Ohio Workers' Compensation Act that provides: "If an employer can establish that a claim from their employee is the result of a not-at-fault motor vehicle accident involving a third party, the BWC may exclude the cost of the claim from the employer's experience." This provision requires that either the third party at-fault driver have active insurance coverage, or there must be an active uninsured/underinsured motorist coverage to apply for the claim cost exemption. The employer must have had active coverage on the date of the injury and must be current on all payments due to the BWC. ■

COUNSEL: Alice Spitz and Julie E. Molod

FIRM: Molod Spitz & DeSantis, P.C.

HEADQUARTERS: New York, NY

PLUMBING SUBCONTRACTOR LIABILITY IN LABOR LAW CASE

Plaintiff Injured at Construction Site

Plaintiff claimed that he was injured while working at a construction site. As he was pouring a concrete floor, he tripped and fell over a protruding permanent drainpipe that was covered with a bucket to prevent concrete from entering it. Defense represented the plumbing subcontractor.

The lower court denied defense summary judgment motion. On appeal, the Court reversed the decision and granted motion for summary judgment. Defense proved that the allegedly dangerous condition was open and obvious and also that the plumbing subcontractor lacked the authority to supervise and control the plaintiff's work. The case was dismissed as against the plumbing contractor. ■

RESULT: Labor Law Case Dismissed.



COUNSEL: Patrick Kasson; Kent Hushion

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

GOVERNMENT/PUBLIC ENTITY/ LIABILITY

Summary Judgment Victory in a Federal 1983 Claim Based Upon Free Speech

The mayor was stealing money from the city. A secretary reported him, and he fired her because she reported him. He then went to jail. He also fired her husband, who is a police officer, allegedly to retaliate as well. Defense obtained summary judgment in both claims, in part because the secretary reporting the mayor was part of her job duties and thus not protected First Amendment speech. The court found there was a legitimate basis to fire the police officer based upon how he handled a missing minor case.

Defense entertained settlement discussions to settle both claims near six figures, never accepted. Motion for Summary Judgment granted. ■

RESULT: Victory on a Motion for Summary Judgment.

COUNSEL: David R. Adams

FIRM: Hurwitz Fine, P.C.

HEADQUARTERS: Buffalo, NY

CONSTRUCTION SITE INJURY

Plaintiff Demands \$6MM In Construction Accident

The case involved an accident at a construction site with allegations of negligence and violations of New York Labor Law § 241(6) and § 200. The plaintiff was injured attempting to stop a rough terrain forklift, which was rolling into an open street. Plaintiff alleged he sustained injury to both his lumbar spine and his right knee, requiring six surgeries and the implantation of a spinal cord stimulator. The demand of the plaintiff never dropped below the \$6MM in available coverage.

After a three-week unified trial, the jury found that there was not an unreasonable violation to any of the charged six regulations under the New York State Industrial Code, that the work site was not unreasonably unsafe, and that neither the general contractor or masonry contractor acted negligently. ■

RESULT: Complete Defense Verdict for Contractors in a Three-Week Unified Jury Trial.

INSURANCE / COVERAGE



COUNSEL: John Davis, Mike Williams and Nick Cenac

FIRM: Brown Sims, PC

HEADQUARTERS: Houston, TX

PRIMARY INSURER'S DUTY TO SETTLE WITHIN PRIMARY LIMITS

Jury Finds Primary Insurer Liable for Excess Judgment

In 2007, excessive rainfall caused flooding at a marina in Texas. Prior to this event, the marina engaged an insurance broker to procure a \$15 million blanket coverage policy for the marina. After the flood, the marina discovered that the coverage it requested was not the coverage obtained, and litigation ensued. Among other claims asserted by the marina, the insurance broker was sued for failing to procure the requested coverage prior to the flood loss.

The insurance broker had errors and omissions (E&O) coverage; however, the primary E&O insurer declined to accept four settlement demands within its eroding \$5 million limit of coverage. Specifically, the primary insurer refused to accept offers to settle claims against the broker for \$2 million in May 2009; for \$2.2 million in September 2009; for \$3.6 million in July 2010; and for \$3.6 million in November 2010. The umbrella carrier was not notified of the claim until March 2010. After the marina's failed attempts to settle with the primary insurer, it raised its demand to \$15 million and then \$25 million.

The underlying case was tried against the insurance broker and a verdict of over \$13 million was returned against the broker. After exhausting all appeals, the primary insurer paid the final judgment amounts in excess of the remaining primary limits—save \$379,885.78 paid by the excess umbrella insurer, which was the amount in excess of the appeal bond secured by the primary insurer.

COUNSEL: John Davis, Mike Williams and Nick Cenac

FIRM: Brown Sims, PC

HEADQUARTERS: Houston, TX

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Subsequently, the primary insurer sued the umbrella insurer to recover of the amounts in excess of its primary policy limit (\$7.7 million, plus pre-judgment interest and attorneys' fees). The umbrella insurer countered that the primary insurer negligently failed settle within its primary limit when presented with the opportunity to do so, and that the umbrella insurer was entitled to assert an equitable subrogation Stowers claim against the primary insurer by virtue of its \$379,885.78 payment on behalf of the mutually insured broker.

Following a week-long trial, the jury found that the primary insurer was negligent in declining to settle within its policy limits as a reasonable and prudent insurer would have on each of the four above-referenced occasions. ■

RESULT: Verdict for Umbrella Insurer in Reverse-Stowers Trial.



LEGAL MALPRACTICE



COUNSEL: Julie S. Palmer

FIRM: Harman, Claytor, Corrigan & Wellman, P.C.

HEADQUARTERS: Richmond, VA

LEGAL MALPRACTICE CASE

\$3,000,000 Legal Malpractice Case with Multi-Day Trial

Plaintiff sued his divorce attorney for alleged breaches of the standard of care with respect to spousal support. In the underlying divorce action, Plaintiff's wife filed a complaint for an at-fault divorce on grounds of adultery. Wife's complaint asked the court to incorporate the terms of a separation agreement she and Husband had agreed to some years before in a prior separation, which included that the husband pay alimony.

Approximately eight months after the divorce litigation began, Husband's attorney (the defendant in the malpractice case) filed a complaint for no-fault divorce on behalf of Husband, based upon the parties having by then lived apart for more than one year. Husband's attorney included in Husband's complaint a request for spousal support as a matter of course, even though Husband was the primary breadwinner, and his wife did not work outside of the home. The two complaints for divorce were later consolidated.

At the divorce trial, the circuit court denied Wife's request for a divorce on grounds of adultery and granted Husband's request for a no-fault divorce. The circuit court also overruled Wife's request to incorporate the provisions of the prior separation agreement but ordered Husband to pay Wife spousal support in a different amount.

In the legal malpractice action, Husband argued that Defendant-Attorney breached the standard of care by including a request for spousal support in Husband's complaint for divorce. Under Virginia law, a complaint for divorce must contain a specific request for spousal support. Husband and his expert witness argued that Wife's original complaint for divorce did not specifically request spousal support because all it did was ask to incorporate the prior

COUNSEL: Julie S. Palmer

FIRM: Harman, Claytor, Corrigan & Wellman, P.C.

HEADQUARTERS: Richmond, VA

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separation agreement. Husband and his expert witness argued that it was only Defendant-Attorney's inclusion of the request for spousal support in Husband's complaint for divorce which gave the circuit court jurisdiction to order Husband to pay spousal support. But for this error, Husband and his expert witness argued that Husband would not have had to pay any spousal support. Husband claimed \$3,000,000 in damages.

After a three-day trial involving expert testimony and significant argument and briefing on highly technical legal issues, the circuit court ruled in favor of the Defendant-Attorney on all issues and entered final judgment in the attorney's favor. ■

RESULT: Judgment for Defendant.

COUNSEL: Andrew J. Dorman, Holly Marie Wilson

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

LEGAL MALPRACTICE

Successful Defense of Multimillion Dollar Legal Malpractice Claim

Appellate court affirmed trial court's dismissal of legal malpractice claim against law firm, and individually named attorneys, where Plaintiff challenged the handling of a multi-million-dollar division of property between feuding business owners. ■

RESULT: Appeal Affirmed.



MEDICAL



COUNSEL: Kristin Shigemura and Jarrett Dempsey

FIRM: Cades Schutte, LLP

HEADQUARTERS: Honolulu, HI

MEDICAL MALPRACTICE

Estranged Sons' Wrongful Death Lawsuit Stymied by Collateral Attack

Two adult sons filed medical negligence and wrongful death claims over the death of their father, who was a resident of a Defendant long term care facility. The sons alleged that because the father had Stage IV pressure ulcers at the time of death, the long-term care facility was negligent and caused the father's death. The sons were estranged from the father. One son last spoke with his father 3 years before his death, and the other son had never met his father or been acknowledged as his biological son. One of the sons sought and received appointment as the personal representative for the estate without a will in order to pursue the estate's medical negligence claims.

During discovery, Defendant deposed a nephew, who was the only family member known to have visited the father at the facility. The nephew testified that the father had executed a will and told him he left everything to the nephew, who was like a son to him. The nephew also testified that the son who had been appointed as the personal representative was told about the existence of the will, but the son did not tell the nephew that he had filed a lawsuit on behalf of the estate of the father. The nephew disputed the sons' claim and stated that his uncle would not have wanted to sue the facility where he had lived the last several years of his life.

The nephew thereafter produced a copy of a will in which the father had disowned the two sons, nominated the nephew as the personal representative of the estate, and named the nephew as the sole beneficiary.

The probate court held an evidentiary hearing on the validity of the will and found by clear and convincing evidence that the will

COUNSEL: Kristin Shigemura and Jarrett Dempsey

FIRM: Cades Schutte, LLP

HEADQUARTERS: Honolulu, HI

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was valid and unrevoked, the nephew had been nominated as the personal representative, and the nephew was the sole beneficiary of the estate. The probate court then removed the son as the personal representative and appointed the nephew as the new personal representative.

Defendant then filed a motion to dismiss the estate claims on the grounds that the estate claims were not being pursued by the real party in interest, and moved for summary judgment on the sons' wrongful death claims on the grounds that they suffered no damages as a result of the father's death because they were estranged and had not lost any parental consortium with the decedent. The nephew declined to intervene and pursue the estate's medical negligence claims, and the sons failed to respond to the motion for summary judgment, resulting in dismissal of all claims. ■

RESULT: Summary Judgment Granted on All Claims.



COUNSEL: Jeff Croasdell, Shannon Sherrell

FIRM: Rodey Law

HEADQUARTERS: Albuquerque, NM

MEDICAL MALPRACTICE

\$50M Demand to the Jury

Plaintiff, decedent's representative, claimed that defendant GI doctor was negligent in the performance of a colonoscopy, which allegedly led to the patient's death. The plaintiff asked the jury to return a verdict in the amount of \$12 million for medical malpractice and wrongful death and \$40 million in punitive damages.

The defense successfully argued that the GI doctor met the standard of care, and that there was insufficient evidence to support a finding of causation. After a 10-day trial, the jury returned a defense verdict in favor of the GI doctor. ■

RESULT: Defense Verdict.



COUNSEL: John W. Zotter

FIRM: Zimmer Kunz, PLLC

HEADQUARTERS: Pittsburgh, PA

DENTAL MALPRACTICE

Plaintiff Fails to Prove Malpractice or Lack of Informed Consent

A defense verdict was secured for a dentist who was alleged to have committed malpractice and failed to obtain the informed consent of his patient. The lawsuit arose out of an extended course of dental treatment that was planned to include placement of multiple implants and an implant-supported fixed prosthesis. During the extended treatment, two implants failed, and the dentist determined that another implant should not be placed without the support of a bone graft. Also, before the defendant dentist could complete the treatment, he moved out of state and was not able to complete the planned treatment. The plaintiff sought treatment from different dental professionals who provided a course of treatment that resulted in the plaintiff having a less desirable removable denture. The plaintiff claimed that it was the defendant dentist's fault that he is now left with a removable denture. In response, the defendant dentist convincingly testified that neither his treatment, nor his moving out of state, caused the Plaintiff to now have a removable denture. The defendant's testimony was strongly supported by testimony from a highly qualified dental expert witness. A defense verdict was rendered in favor of the defendant finding that no malpractice was committed, and that the plaintiff gave informed consent to the treatment. ■

RESULT: Defense Verdict.

COUNSEL: Elizabeth M. Midgley, Elizabeth G. Adymy,
and Todd C. Bushway

FIRM: Hurwitz Fine, P.C.

HEADQUARTERS: Buffalo, NY

MEDICAL MALPRACTICE/ NURSING HOME NEGLIGENCE

Plaintiffs Want to Reach Back on Elimination of Immunity Statute

In an important and precedential decision, the court held that the statute repealing New York's Emergency or Disaster Treatment Protection Act (EDTPA), which granted healthcare providers, including individual workers as well as facilities and their executives and administrators, immunity from civil and criminal liability for any injury or death alleged to have been sustained during the Covid-19 pandemic, is to be given prospective, rather than retroactive, effect.

Defendants successfully argued that the text of the repeal statute itself, and the legal principles governing statutory interpretation, could only lead to the conclusion that the repeal took effect starting on the date the repeal statute was enacted, and did not negate retroactively the previous time period that immunity was in place. This decision is a major victory for health care providers and brought clarity to an issue impacting hundreds, if not thousands, of pending or potential claims across New York State. ■

RESULT: Repeal of COVID-19 Immunity Statute Not to be Applied Retroactively.

COUNSEL: Michael P. Murphy, Alexandria Esposito

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

MEDICAL MALPRACTICE

\$2.8 Million Demand when Patient Dies due to Massive Bleeding

Plaintiff, decedent's representative, claimed that defendant radiologist was negligent and failed to order preoperative blood work in a patient with a known bleeding disorder. Shortly after the interventional radiologist performed the kyphoplasty procedure, the patient experienced massive bleeding and death. The plaintiff asked the jury to return a verdict in the amount of \$2.8 million for medical malpractice and wrongful death.

The defense successfully argued that the preoperative bloodwork (an INR test which measures the time for the blood to clot) was merely a guideline used as a tool for preadmission testing, not a rule or substitute for clinician judgement to set forth the standard of care. The jury returned a defense verdict in favor of the radiologist. ■

RESULT: Defense Verdict.

MOTOR VEHICLE / TRANSPORTATION



COUNSEL: David R. Hudson

FIRM: Reminger Co., L.P.A.

HEADQUARTERS: Cleveland, OH

FAAA PREEMPTION OF CLAIMS IN TRUCKING ACCIDENT

Plaintiff Files Claims Against Shippers and Freight Brokers in Trucking Accident

Plaintiff sustained personal injuries as a result of a trucking accident. In her claims, she asserted a variety of state law claims (including negligence, vicarious liability, and loss of consortium) against multiple parties, including the truck driver, the employer and owner of the truck, the owner of the trailer, the shipper of the goods carried on the truck, and the freight/shipping broker. The freight broker and shipper moved for dismissal on the basis that the claims asserted were preempted under the 1994 Federal Aviation Administration Authorization Act ("FAAAA"). Plaintiff argued the claims were not preempted by the FAAAA and, even if they were, the claims fell within the bounds of the "safety exception" such that the claims were "saved" and preemption did not apply. Along those lines, the Plaintiff argued the preemption provisions of the FAAAA do not apply to state common law negligence claims. They also argued their claims were not sufficiently "related to a price, route, or service" as is required by the preemption provision.

The court summarily rejected the Plaintiff's position, holding that the preemption provisions of the FAAAA apply to state common law claims. The court went on to hold that the "safety exception" did not apply to save the Plaintiff's claims from preemption. In so holding, the court recognized the plain meaning of "safety and regulatory authority of a State" does not support the inclusion of private tort claims. Likewise, if the safety exception preserved all claims related to motor vehicles, as the Plaintiff advocated, all preempted claims would then be "saved" by the exception. Importantly, the court

COUNSEL: David R. Hudson

FIRM: Reminger Co., L.P.A.

HEADQUARTERS: Cleveland, OH

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recognized that the FAAAA's preemption provision protects precisely parties such as shippers and brokers, who did not have direct involvement in the accident at issue.

The liability that attaches to commercial freight brokers is a contentious topic in trucking and commercial transportation law. Injured parties often attempt to assert state law negligence claims against freight brokers to "deepen the pot" of available insurance funds in claims involving severe injuries/death. Notably, this decision contradicts the 2020 decision from the 9th Circuit Court of Appeals in the case of *Miller v. C.H. Robinson Worldwide, Inc.* In *Miller*, the court reached a different conclusion, holding that the common law tort claims brought under state law against a broker fall within the preemption provisions of the FAAAA, but determined the safety exception applied such that the claims were "saved" and could proceed. In 2022, the U.S. Supreme Court denied review of the FAAAA's preemption provisions and its safety exception in regards to *Miller* on grounds that there was no Circuit Split warranting further review. This decision from Judge Knepp in Ohio was published after the Supreme Court denied review of the *Miller* case. If affirmed by the Sixth Circuit, Lee could provide the Circuit split needed for the Supreme Court of the United States to review the issue. ■

COUNSEL: David R. Hudson

FIRM: Reminger Co., L.P.A.

HEADQUARTERS: Cleveland, OH

FAAA PREEMPTION OF CLAIM AGAINST FREIGHT BROKER

Plaintiff Sues Freight Broker, Preemption Upheld

In a second decision in less than three months, the Judge ruled that a Plaintiff's claims for negligent selection and/or vicarious liability asserted against Freight Broker are preempted by the 1994 Federal Aviation Administration Authorization Act ("FAAAA") and not saved by the "safety exception."

This is a significant victory for Freight Brokers at the end of 2022, who saw other Federal District Courts and Circuit Courts issue less favorable decisions on the topic of FAAAA preemption in recent years. Importantly, this decision not only dismissed claims against the Freight Broker, but also dismissed similar claims of negligence and vicarious liability to "upstream" defendants, such as subsidiaries, sister companies, and shareholders of the Broker. Judge held that "the FAAAA's preemption provision protects precisely the parties such as the shipper and broker, who did not have direct involvement in the accident that injured Plaintiffs." ■

RESULT: Motion to Dismiss Granted on Claims Against Freight Broker.

COUNSEL: Robert C. Jarosh and Kara L. Ellsbury

FIRM: Hirst Applegate, LLP

HEADQUARTERS: Cheyenne, WY

TRANSPORTATION LAW, PREMISES LIABILITY, GENERAL NEGLIGENCE

Mineral Plant Not Liable in \$1M+ Motorcycle Accident and Wrongful Death Case

The plaintiffs were wrongful death claimants who alleged that their decedent, a helmetless passenger on a motorcycle, was killed when the motorcycle her husband was driving encountered a mineral called bentonite on the highway near the defendant's plant. Bentonite becomes slippery when it is wet, and it was raining or had recently rained. The plaintiffs alleged that when the motorcycle encountered the accumulation of bentonite on the highway, the motorcycle lost control, and both the driver and decedent were thrown off of it. The passenger succumbed to head injuries. Among other things, the plaintiffs alleged that the mineral was spilled on the highway by the defendant during hauling or other processing operations at the nearby plant. Plaintiffs were seeking in excess of \$1,000,000 in damages.

On summary judgment, trial court held that the defendant engaged with an independent contractor for hauling operations, and therefore owed the plaintiffs no duty with respect to hauling operations. Instead, hauling operations were exclusively under the control of the independent contractor. The court additionally found that the defendant did not owe any post-hauling duty to remove the bentonite from the highway if the independent contractor spilled or tracked it onto the highway and did not owe any duty to warn motorists of the danger of bentonite accumulations on the highway.

■

RESULT: Summary Judgment Granted.



COUNSEL: Erin E. Berry and Richard A. Mincer

FIRM: Hirst Applegate, LLP

HEADQUARTERS: Cheyenne, WY

TRANSPORTATION LAW, VICARIOUS LIABILITY, ASSAULT

Truck Driver Assaults Another Truck Driver – Trucking Company Not Liable

The plaintiff was a commercial truck driver. The plaintiff was waiting in line to refuel at a gas station when the defendant's driver allegedly cut ahead of the plaintiff in line to refuel his tractor trailer. The plaintiff, upset because he believed the defendant's driver cut ahead, approached the defendant's driver's tractor trailer. After a heated argument over who was in line first for fuel, the defendant's driver exited his tractor trailer and beat the plaintiff unconscious. The defendant's driver was arrested and later pleaded guilty to misdemeanor assault.

Subsequently, the plaintiff asserted claims of vicarious liability, negligent hiring, negligent supervision, negligent retention, and punitive damages against the trucking company defendant. The plaintiff argued the defendant's driver was fueling his truck prior to the altercation and was thus within the scope of his employment with the defendant at the time of the assault. The defendant moved for summary judgment in the district court, arguing it could not be held liable for its driver's actions because he was not acting within the course and scope of his employment when he assaulted the plaintiff. The court agreed with the defense and affirmed the district court's grant of summary judgment. The Court held that the driver's relevant conduct—assaulting another truck driver—was “wholly unconnected to the separate act of refueling and was not the conduct of the kind he was employed to perform.” The Court additionally held the defendant could not be liable for plaintiff's direct negligent claims as the defendant driver's criminal history,

COUNSEL: Erin E. Berry and Richard A. Mincer

FIRM: Hirst Applegate, LLP

HEADQUARTERS: Cheyenne, WY

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which included misdemeanors for shooting a neighbor's dog with a BB gun and disorderly conduct for becoming belligerent with a police officer, had no relationship to the job of transporting freight.

■
RESULT: Summary Judgment Affirmed in Favor of Trucking Company.



COUNSEL: Matthew B. Reilly

FIRM: Erickson & Sederstrom, P.C., L.L.O.

HEADQUARTERS: Omaha, NE

MOTOR VEHICLE ACCIDENT INVOLVING SCHOOL VAN AND UNBELTED PASSENGERS

School Not Liable for Passenger's Failure to Wear an Available Seatbelt

Defense represented a school district in a claim by a high school student who was injured as a passenger in an automobile collision involving a school van during a summer activity. There was no dispute that the school van driver was not at fault for the accident, as another driver crossed the centerline on the highway and was impossible to avoid. The passenger—himself, a licensed driver aware of the rules of the road—sued the school, claiming that the van driver failed to ensure that the passenger secured his own seatbelt. Plaintiffs refused to consider any settlement offers below policy limits. After almost ten years of litigation—including a two-week trial, two directed verdicts in favor of the school district, and two different appeals—ruled in favor of the school district, holding that Nebraska statutes do not provide a passenger with a negligence claim against a driver when the sole basis of the claim is a failure to ensure the usage of a seatbelt. ■

RESULT: Defense Verdict Upheld on Appeal.

COUNSEL: Anastasia McCarthy and Brian Webb

FIRM: Hurwitz Fine, P.C.

HEADQUARTERS: Buffalo, NY

SCHOOL BUS ACCIDENT, NONECONOMIC DAMAGES

Plaintiff Wishes to Recover Noneconomic Damages

Plaintiff brought a tort claim for personal injuries sustained in a school bus accident. Under New York Law, plaintiffs are only permitted to recover noneconomic damages in such cases if their alleged injuries qualify as “Serious Injuries” as defined by Article 51 of New York’s Insurance Law. The defense motion for summary judgment on the grounds that plaintiff’s injuries did not so qualify was denied by the trial court and an appeal was taken.

In reversing the trial court’s decision, the court held that plaintiff lacked any persuasive objective proof that her alleged injuries limited her to the degree required by the law. Specifically, the court agreed with defense arguments that (i) the medical records did not support plaintiff’s testimony that she suffered a concussion in the accident, must less a disabling one, and (ii) even though plaintiff had evidence of causally related disc herniations in her cervical spine, the evidence in the case, both in medical records and plaintiff’s own testimony, failed to demonstrate that said injury significantly limited her. As a result, the Appellate Division ordered that plaintiff’s claim for noneconomic damages be dismissed in full and, since there was no claim for economic damages, the decision resulted in the complete dismissal of plaintiff’s claim. ■

RESULT: Court Reverses Trial Court and Grants Dismissal to Defendants.

COUNSEL: Michael Kennedy and Garrett Harper

FIRM: McCague Borlack LLP

HEADQUARTERS: Toronto, Ontario

TRANSPORTATION LAW, PERSONAL INJURY LITIGATION

Plaintiff Loses, Ordered to Pay \$156K

The Plaintiff alleged that he sustained personal injuries (soft-tissue injuries, chronic pain, and associated psychological injuries) due to a motor vehicle accident in winter driving conditions. The Defendant disputed that the Plaintiff sustained any injury because of the accident, as the Plaintiff was on disability leave immediately prior to the accident. The action ultimately proceeded to a 14-day jury trial in Ontario. At the close of evidence, the Defendant successfully argued that questions regarding future care and past or future income loss ought not to be put to the jury due to insufficient evidence (as there were no income loss or future care experts presented at trial). The only damages question permitted to be put to the jury was that of causation and the value of the Plaintiff's pain and suffering, if any. Following the trial, the jury rendered its verdict and found that Plaintiff failed to establish causation. Consequently, the Plaintiff's case was dismissed. The Defendant also succeeded on a motion in Ontario known as a "threshold" motion, upon which the Plaintiff must prove his injuries were serious and permanent so as to recover any damages for pain and suffering. In rendering the decision on the threshold motion, the Court ruled that Plaintiff did not present as a credible witness and that the experts testifying on behalf of the Defendant were preferred to those testifying on behalf of the Plaintiff. The Court ultimately awarded the Defendant's costs in the amount of \$156K owing to the complete success of her defense.

This decision is significant, as it presents one of the first civil jury decisions in Ontario post-pandemic. The jury's verdict was unique in that the jury found that the Plaintiff failed to establish causation.

COUNSEL: Michael Kennedy and Garrett Harper

FIRM: McCague Borlack LLP

HEADQUARTERS: Toronto, Ontario

[CONTINUED]

Given the nature of the Plaintiff's complaints, the jury was clearly influenced by the extensive cross-examinations undertaken by the Defendant's counsel. The decision (and corresponding costs decision) is currently under appeal by the Plaintiff. However, successful appeals of jury decisions in Ontario are exceedingly rare.

■

RESULT: Jury Dismisses the Plaintiff's Action After 14-day trial.



COUNSEL: Arthur D. Spratlin, Jr., Caroline C. Loveless
and Nicole A. Broussard

FIRM: Butler Snow LLP

HEADQUARTERS: Ridgeland, MS

PERSONAL INJURY

Summary Judgment for the Defense in a Tractor-Trailer vs. Pedestrian Accident

Plaintiff suffered extensive injuries when he stepped out in front of defendant's oncoming tractor-trailer. Dash-cam video from the tractor showed the plaintiff walking with his back to traffic on the shoulder and then suddenly darting out in front of the tractor-trailer. Plaintiff argued various theories of our driver's negligence including failing to completely change lanes, failing to sound his horn, and otherwise failing to slow down for the pedestrian on the shoulder. Defendant argued that the pedestrian showed no threat, did not appear to be intoxicated, and was clearly walking in a deliberate path forward along the shoulder in a rural area where there were no obvious reasons for him to be crossing the Interstate. After allowing plaintiffs to take the truck driver's deposition, defendant filed a motion for summary judgment. After oral argument, the judge ruled from the bench and awarded summary judgment in defendant's favor. ■

PERSONAL INJURY



COUNSEL: Jeffrey E. Havran

FIRM: Margolis Edelstein

HEADQUARTERS: Scranton, PA

PREMISES/HOMEOWNER'S LIABILITY, DOG BITE

Dog's Vicious Tendencies, Face Bite Causes Deformities

Plaintiff alleged the Defendants' dog had a prior history of biting and a history of vicious propensities known to the Defendants. The Plaintiff contended although the Defendants were aware of the dog's "vicious and dangerous propensities," they neglected to remove the dog from the home or barricade the dog before the plaintiff was invited inside the property.

During discovery and depositions, various favorable admissions were obtained regarding the dog and the lack of culpability of the Defendants/dog owner which supported the filing of a Motion for Summary Judgment. The Court proceeded to grant summary judgment in favor of the Defendants/dog owners finding that Plaintiff had failed to establish sufficient facts and/or evidence to substantiate her claim. The Court found it significant that Plaintiff had admitted that there was nothing about the dog's demeanor or behavior that concerned her on the day in question, she had not been warned or given any indication that the dog was vicious or dangerous and concluded that the dog had bitten her because she had startled it. In granting summary judgment, the Court determined that Plaintiff had failed to meet her burden of proof entitling the Defendants/dog owners to judgment as a matter of law. ■

RESULT: Summary Judgment Granted.

COUNSEL: Dennis Monaco

FIRM: Molod Spitz & DeSantis, P.C.

HEADQUARTERS: New York, NY

SLIP AND FALL

Defense Demands Tenant Indemnify Pursuant to Lease

Defendant owns a highly trafficked property situated at the base of a subway station and near a busy bus stop. Plaintiff alleged serious personal injuries with spinal surgeries following a trip and fall accident on the sidewalk outside of the premises. Under NYC law, the landowner is generally responsible for sidewalk maintenance by virtue of City Code, whether they occupy the premises or not, but proper language in a lease can pass that risk off to a tenant. Throughout the litigation, the defense repeatedly demanded that the tenant accept its responsibility for the incident pursuant to the indemnification and insurance procurement provision in the lease. The tenant repeatedly refused.

Based on the evidence presented to the jury, it was obvious that liability rested with the tenant pursuant to lease and based on the parties' performance in maintaining and repairing the sidewalk where plaintiff fell. After several days of testimony and motion practice, the tenant ultimately settled the case for \$1.5MM without contribution from the defendant. ■

RESULT: Claim Paid Entirely by Tenant After Trial.

COUNSEL: Robert A. Von Hagen

FIRM: Molod Spitz & DeSantis, P.C.

HEADQUARTERS: New York, NY

SUMMARY JUDGMENT AND APPELLATE WIN FOR HOUSING COMPLEX

Plaintiff Alleged Head Trauma and Neck Injuries After a Window Collapsed

The plaintiff claimed head trauma and neck injuries after the upper sash of a window within her housing complex fell on her in a common stairwell. After the completion of discovery, Defense moved for summary judgment demonstrating that the stairwell was inspected routinely and had never been problematic. During depositions, defense elicited damning testimony from the plaintiff where she admitted that she had never noticed any hazards with the window and it functioned normally on all prior occasions she used it, including on the morning of her accident.

After the court granted summary judgment to the landowner and its management company, plaintiff appealed. Defense successfully defended the decision where plaintiff persisted in its argument that the landowner should have conducted better inspections and noticed whatever latent defect caused the collapse. The Court found that argument unappealing and affirmed the dismissal. ■

RESULT: Dismissal.

COUNSEL: Robert A. Von Hagen & Paul Civitanes

FIRM: Molod Spitz & DeSantis, P.C.

HEADQUARTERS: New York, NY

HOME INSPECTOR LIABILITY FOR ENVIRONMENTAL TORT

Plaintiff Alleged Serious Injuries Due to Asbestos

A homeowner purchased a property after it was inspected by defendant's home inspection company, a duly licensed and credentialed inspector. The inspection was performed pursuant to a contract that contained the limited scope of the inspector's duties as well as a liquidated damages limitation in the amount of the contract to \$500.00. The plaintiff closed on the home with no call backs or complaints following the inspection. After closing, the plaintiff alleged she started experiencing breathing problems and vacated the premises. She ultimately sued the seller of the property and the home inspector claiming they failed to disclose or wrongly identified vermiculite insulation containing asbestos. She sought unspecified damages for the remediation, the fraudulent sale of the home, and personal injuries.

Defense immediately arranged for another inspection of the home by an outside expert. Within days of suit being filed, a motion to dismiss and enforce the liquidated damages clause was filed. The Court dismissed nearly all of plaintiff's claims but one, and in addressing that claim, held that the liquidated damages provision of the contract was enforceable.

By having the claims of gross negligence, fraud, and breach of contract dismissed, the client's reputation and business were vindicated, and the case was resolved early. ■

RESULT: All But One Claim Dismissed and Liquidated Damages of \$500 Paid.

COUNSEL: Richard Boyette, Gina Von Oehsen Cleary, and Georgia Malik

FIRM: Cranfill Sumner LLP

HEADQUARTERS: Raleigh, NC

ASBESTOS/MESOTHELIOMA

Truck Mechanic Sues Several over his Mesothelioma

Plaintiff, a career truck mechanic, claimed that his alleged exposure to asbestos while working with various automotive products caused his mesothelioma. The firm's defendant was one of the alleged product sellers. The defense moved for summary judgment as to their defendant. The Court held that the plaintiffs failed to create a genuine issue of material fact as to whether the plaintiff's alleged mesothelioma was caused by his exposure to various defendants' products.

The Court found that certain defendants met the initial responsibility to inform the Court of the basis of the motion by identifying those portions of the pleadings, depositions, and answers to interrogatories, showing the absence of a genuine issue of material fact. The burden was then shifted to plaintiff to set forth a specific showing that there was a genuine issue for trial. The Court agreed with some of the defendants that the plaintiff failed to present a forecast of evidence showing actual exposure to the alleged offending products. Consistent with this standard, the Court also found that the plaintiff had to show more than a casual or minimum contact with the alleged offending products and had to present evidence of exposure to the specific products on a regular basis over some extended period of time in proximity to where the plaintiff actually worked. The case was dismissed as to some of the defendants as the plaintiff failed to satisfy the "frequency, regularity and proximity" test set forth in *Lorhmann v. Pittsburgh Corning Corp.*, 782 F. 2d 1156, 1162-63 (4th Cir. 1986). ■

RESULT: Case dismissed as to firm's defendant.



COUNSEL: Matthew B. Reilly

FIRM: Erickson & Sederstrom, P.C., L.L.O.

HEADQUARTERS: Omaha, NE

TRIP AND FALL IN A PUBLIC PARK

Political Subdivision Immune in Fall in Public Park

Defense represented a sanitary improvement district against a claim by two parents that their son was injured when he stepped into a hole on the grounds of the playground within the district's boundaries. Defense asserted immunity on behalf of the district against the significant damage claims in reliance upon statutes that provide that a political subdivision cannot be sued for claims arising out of "recreational activities." The lower court ruled in favor of the district on the asserted grounds and dismissed the parents' claims against the district. ■

RESULT: Summary Judgment Granted.



COUNSEL: J. Carter Fairley and Scott M. Strauss

FIRM: Barber Law Firm, PLLC

HEADQUARTERS: Little Rock, AR

PREMISES LIABILITY - SWIMMING POOL ACCIDENT WITH QUADRIPLÉGIA

Quadriplegic Demands \$25MM in Pool Accident

Plaintiff, an invited guest of a tenant, went swimming after hours at an apartment complex. The group entered the unlocked pool area despite tenant knowing it closed at 10pm. Wearing only his undershorts, Plaintiff ran and dove into the shallow end illuminated by only a single underwater pool light and surrounding buildings. The apartment complex was between security personnel and did not have the gates locked after hours as normal.

Plaintiff alleged the owners of the apartment complex were negligent for failing to have the pool locked as normal as well as having insufficient warnings, deck markings, and lighting around to the pool to alert swimmers of the shallow depth on the opposite end from the pool light.

It was contended by Plaintiff that since he was an invited guest of the tenant that he was conferred invitee status on the premises, requiring the Defendant apartment complex owner to use ordinary care to maintain the premises in a reasonably safe condition. However, Plaintiff was nothing more than a social guest of tenant and was only conferred licensee status on the premises that only requires a premises owner to not injure a licensee by willful or wanton conduct after his presence is known or should've been known. Despite the apartment owner being aware that tenants might gain entry to the pool area after hours, the lease agreement governing the tenant's right to the property clearly prohibited the tenant and her guests from accessing the pool area after hours.

COUNSEL: J. Carter Fairley and Scott M. Strauss

FIRM: Barber Law Firm, PLLC

HEADQUARTERS: Little Rock, AR

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Competing experts offered opinions supporting each party's position, including multiple experts engaged by Plaintiff to testify that the subject pool did not meet industry standards for apartment complexes with respect to safety as well as pool markings and lighting.

Plaintiff presented a life care plan for \$15MM as well as over \$2MM in past medical expenses for treatment of his multi-level cervical fractures and resulting quadriplegia. A policy limits demand was made for insurance limits of over \$25MM. A motion for summary judgment was filed and granted on the issue of Plaintiff's status as a licensee at the apartment complex. There was no allegation and no proof of any willful or wanton conduct by the apartment complex owner to injure Plaintiff. ■

RESULT: Summary Judgment Granted in Favor of Apartment Complex Owner.



PRODUCT LIABILITY



COUNSEL: John W. Zotter

FIRM: Zimmer Kunz, PLLC

HEADQUARTERS: Pittsburgh, PA

PRODUCT LIABILITY

Outdoor Tube Slide, Fractured Ankle 11-Year-Old Girl

It was alleged that the 11-year-old plaintiff was injured as she exited a five story, one hundred twenty-foot-long, outdoor tube slide at a camp and crashed into a hard-plastic mesh net at the end of the landing platform. The Minor-Plaintiff sustained an open bi-malleolar fracture of the left ankle. The Minor-Plaintiff was initially treated at a local hospital but was then transferred to the Cleveland Clinic where she underwent open reduction internal fixation of the ankle fracture. Suit was filed against the camp. Thereafter, the camp joined the manufacturer of the tube slide as an Additional Defendant. In its Complaint to Join, the camp essentially alleged that if the camp is liable for injuries resulting from the use of the slide, then the manufacturer of the slide is ultimately responsible. On behalf of the slide manufacturer, it was argued that the Minor-Plaintiff's injuries were caused by the landing platform for the slide that was built and installed by the camp and not the slide itself. Also, it was argued that the camp should not have allowed the slide to be used during the winter when the slide was wet and the landing platform was covered with ice because these conditions allowed the plaintiff to travel too fast. On behalf of the slide manufacturer, a Motion for Summary Judgment was filed, as the camp failed to produce any evidence that the slide itself was defectively designed or manufactured, and, in particular, failed to produce an opinion from an expert that the slide itself caused the incident giving rise to the lawsuit.

COUNSEL: John W. Zotter

FIRM: Zimmer Kunz, PLLC

HEADQUARTERS: Pittsburgh, PA

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Following oral argument, the Motion for Summary Judgment was granted, and the slide manufacturer was dismissed from the lawsuit. ■

RESULT: Summary Judgment Granted to Slide Manufacturer.



COUNSEL: Stephen P. Yoshida

FIRM: MB Law Group, LLP

HEADQUARTERS: Portland, OR

MEDICAL DEVICE PRODUCT LIABILITY

Plaintiff AND Defendant Go After Manufacturer in Mouth Burn Case

The plaintiff dental patient suffered mouth burns when a dental handpiece device purportedly malfunctioned and overheated during a routine dental procedure. The plaintiff put the dentist on notice of the claim, and then later sued the dentist. The defendant dentist then claimed the incident and resulting injuries were caused by an alleged defect with the dental handpiece. The plaintiff responded to this “empty chair” defense by adding the manufacturer of the dental handpiece to the lawsuit, claiming a dangerous design or manufacturing defect was to blame for the incident.

Upon being added to the lawsuit, the defendant dental device manufacturer immediately requested information regarding the usage and maintenance history on the subject product, along with an opportunity to inspect the product. However, the defendant dentist had either put the product back into service (without tracking it or segregating it from the rest of its inventory), or simply lost the product. Thus, the manufacturer defendant moved for summary judgment arguing that (1) plaintiff and the dental practice could not prove defect or causation without producing the product, or alternatively, (2) dismissal was appropriate as a sanction for spoliation. Plaintiff and the defendant dentist argued that product defect and causation could be inferred from the incident, and they pointed to alleged consumer complaints showing a supposed widespread issue with the same class of product. The trial judge was not persuaded. In granting summary judgment, the judge not only dismissed all claims against the manufacturer defendant, but

COUNSEL: Stephen P. Yoshida

FIRM: MB Law Group, LLP

HEADQUARTERS: Portland, OR

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explicitly stated that the dentist could not blame the product at trial (thus, effectively depriving the dentist of any liability defense at trial). ■

RESULT: Summary Judgment Granted.



COUNSEL: Stephen P. Yoshida

FIRM: MB Law Group, LLP

HEADQUARTERS: Portland, OR

VEHICLE PRODUCT LIABILITY

Plaintiff Sues for \$10MM in “Unintended Acceleration” Lawsuit

Plaintiffs, the owner/driver and passenger of a vehicle, sued the vehicle’s distributor and manufacturer for strict products liability, breach of warranty, unfair trade practices violations, and fraud following a vehicle accident in the parking lot of a marijuana dispensary. Plaintiffs claimed the vehicle suffered from a design defect that caused it to suddenly accelerate without driver input. Plaintiffs further claimed to have suffered various physical and emotional injuries resulting from the accident. Following the accident, plaintiffs’ insurer declared the vehicle a total loss, and the insurer subsequently sold the vehicle to an auto auction, which then sold the vehicle to a third party who drove the vehicle for an additional 40,000 miles, post-crash, without incident.

The defendants argued that plaintiffs had no proof to support the existence of any product defect or causation. In particular, defendants asserted that the vehicle accident was most likely caused by driver pedal confusion, but regardless, the condition of the vehicle at the time of the crash could not be inferred or recreated due to post-crash sale, repairs, and usage. Defendants also argued that plaintiffs could not prove the vast majority of their \$10MM damages claim, which included alleged damages that were inconsistent with medical records and taped interviews. Defendants aggressively pursued discovery and obtained discovery sanctions against plaintiffs. Defendants also obtained summary judgment based, in part, on plaintiffs’ discovery violations, as well as also based on plaintiffs’ inability to offer any admissible proof to support their claims of product defect or causation. ■

RESULT: Summary Judgment Granted.



COUNSEL: Chad R. Hutchinson, Kari L. Sutherland and Adam D. Porter

FIRM: Butler Snow LLP

HEADQUARTERS: Ridgeland, MS

MEDICAL DEVICE

Gastric Weight Loss Balloon-Induced Coma

Plaintiff received a gastric weight loss balloon and experienced extensive medical complications, including sepsis, before she was medically induced into coma for 5 months. She brought suit against the manufacturer of the balloon and alleged ten different causes of action. Following several dispositive motions based on preemption, Plaintiff proceeded to trial on two claims: manufacturing defect and breach of express warranty. At the close of the plaintiff's case, the defendant moved for directed verdict on both claims. The Court granted the defendant's motion as to the breach of express warranty claim but allowed the manufacturing defect claim to go to the jury. The jury of nine women deliberated for less than an hour and returned a unanimous and complete defense verdict. ■

RESULT: Defense verdict.

PROFESSIONAL LIABILITY



COUNSEL: Bonnie M. Boryca, Thomas J. Culhane

FIRM: Erickson & Sederstrom, P.C., L.L.O.

HEADQUARTERS: Omaha, NE

LLC DISSOLUTION

Business Partner Accusing of Withdrawing From LLC

A bifurcated jury trial was held on the issue of whether one of four business partners in a real estate development LLC had withdrawn as a member of the LLC. If it had, then any liability and value of its percentage ownership of the LLC was capped as of the date of withdrawal. All business partners testified, as well as non-party witnesses. The jury returned a unanimous verdict in favor of the business partner accused of withdrawing, finding that there was no withdrawal or dissociation. ■

RESULT: Jury Verdict and Court Ruling That Partner Had Not Withdrawn From LLC.

COUNSEL: John W. Zotter

FIRM: Zimmer Kunz, PLLC

HEADQUARTERS: Pittsburgh, PA

STORMWATER RUNOFF

Stormwater Runoff, Mosquitos, Stagnant Water

It was alleged that a window manufacturing plant in an industrial park caused excessive stormwater to flow from its property onto a neighboring property. Among other damages, it was alleged that the stormwater runoff would cause an accumulation of stagnant water that facilitated an excessive mosquito infestation. Plaintiff alleged that the window manufacturer violated the Pennsylvania Stormwater Management Act and created a nuisance. The window manufacturer denied liability and asserted that the plaintiff failed to produce any evidence that the manufacturer altered the natural flow of water from its property or unreasonably increased the quantity of stormwater flowing from its property. On behalf of the window manufacturer, a Motion for Summary Judgment was filed because the plaintiff had failed to produce any evidence of violation of the law. In addition, it was argued that the plaintiff's own expert acknowledged that the window manufacturer's property existed prior to any stormwater permitting requirements being enacted. Following oral argument, the Motion for Summary Judgment was granted, and the window manufacturer was dismissed from the lawsuit. ■

RESULT: Summary Judgment Granted.

PROPERTY



COUNSEL: Matthew B. Reilly

FIRM: Erickson & Sederstrom, P.C., L.L.O.

HEADQUARTERS: Omaha, NE

GAS EXPLOSION, INSURANCE SUBROGATION ACTION

Gas Explosion in Historic Downtown Building

Counsel represented a subrogation carrier with a \$2.6MM claim arising out of a fire in Omaha's downtown Old Market area. The fire occurred when an underground gas line was struck in the course of a contractor performing directional boring work. The one remaining defendant at trial was the gas utility operator, Metropolitan Utilities District (MUD). MUD denied all liability and claimed that it properly marked its buried gas line. After a 2-week trial, the court ruled in favor of the subrogated carrier and found that MUD was 50% at fault (the remaining 50% was assigned to a settled party.) ■

RESULT: Subrogation Win \$2.6MM.



COUNSEL: George W. Hatch, III, and Alexander S. Whitlock

FIRM: Guilday Law, P.A.

HEADQUARTERS: Tallahassee, FL

COMMERCIAL PROPERTY, DUTY TO REPAIR, HURRICANE MICHAEL

Plaintiff Fails to Make Repairs After Hurricane

Policyholder Refuses to Comply with Repair Obligation, Files Suit Seeking to Circumvent Insurance Policy Requirements.

The Plaintiff policyholder, a religious institution, sought coverage under its Replacement Cost commercial insurance policy from its insurer for Hurricane Michael related damage to its property. For a claim seeking Replacement Cost coverage, payments are not owed until repairs are made and payments are limited to the actual cost of repairs. The policy provided the Plaintiff with the alternative to elect instead to have its claim valued and settled on an Actual Cash Value basis. Plaintiff did not make this election.

Throughout the life of the claim, the Plaintiff only requested Replacement Cost coverage, including retaining a general contractor to provide the insurer with a Replacement Cost estimate. The insurer advanced approximately \$100,000.00 to the Plaintiff to facilitate repairs even though the insurer was not required to do so under the insurance policy.

Eighteen months after the loss, the Plaintiff still refused to perform repairs. Instead, the Plaintiff retained a “building consultant” who produced a Replacement Cost estimate that was nearly 3 times the amount of the general contractor’s estimate. Despite having not made repairs, or incurring any repair costs, the Plaintiff demanded that the insurer pay the full Replacement Cost amount estimated by the Plaintiff’s building consultant. Consistent with the policy’s requirements, the insurer refused to tender additional payment until repairs were made. The Plaintiff then filed suit.

COUNSEL: George W. Hatch, III, and Alexander S. Whitlock

FIRM: Guilday Law, P.A.

HEADQUARTERS: Tallahassee, FL

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After removal to federal court, the Plaintiff, to avoid summary judgment, alleged that it had either elected to make an Actual Cash Value claim or, alternatively, that the insurer had waived, or was estopped from asserting, the insurance policy's requirement that the Plaintiff must elect to make an Actual Cash Value claim. Notwithstanding that Plaintiff had denied making an Actual Cash Value claim during litigation and that waiver and estoppel cannot be used to expand or alter coverage provisions of an insurance policy, the Court found that a disputed issue of fact existed, denied summary judgment, and the matter proceeded to trial.

At trial, the Court permitted the Plaintiff to present arguments that it had made an Actual Cash Value claim and claims related waiver and estoppel. The insurer was able to present evidence to the jury that at all times the Plaintiff had only sought Replacement Cost coverage, denied making an Actual Cash Value claim, had not made repairs, had not incurred any repair costs, and that waiver and estoppel were inapplicable. After less than an hour of deliberation, the jury returned a verdict in favor of the insurer. ■

RESULT: Defense verdict for the insurer, judgment of no liability entered.

WRONGFUL DEATH



COUNSEL: Julie S. Palmer

FIRM: Harman, Claytor, Corrigan & Wellman, P.C.

HEADQUARTERS: Richmond, VA

WRONGFUL DEATH

Supreme Court of Virginia Upholds Grant of Sovereign Immunity and Dismissal of \$24 Million Case Against Jail Physician

Plaintiff filed suit against the City, City employees who operated a minimum-security municipal jail, and a physician employed by the City to provide medical care to inmates at the jail, after the decedent collapsed in his jail cell and ultimately died. Plaintiff contended that the decedent had a number of pre-existing health conditions that were not properly treated during his six-month incarceration at the jail, and that the jail physician had not properly monitored these conditions following a brief hospitalization of the inmate within weeks of his arrival at the jail.

The trial court granted the physician's plea of sovereign immunity and dismissed Plaintiff's claims of ordinary negligence, finding after an evidentiary hearing, argument, and supplemental briefing that (1) the operation of the municipal jail was a government function; (2) the City had a significant interest and involvement in the function performed by the physician; (3) the City exercised control and discretion over the physician; and (4) the allegedly negligent treatment provided by the physician involved the exercise of judgment and discretion.

Plaintiff's Complaint also asserted a claim of gross negligence, which was not barred by sovereign immunity. The trial court granted the physician's motion to dismiss the claims of gross negligence, finding that the facts asserted by the Plaintiff in the Complaint did not, even if ultimately proven, support a finding of gross negligence as that term is defined under Virginia law. Accordingly, the court dismissed the case in its entirety, with prejudice.

COUNSEL: Julie S. Palmer

FIRM: Harman, Claytor, Corrigan & Wellman, P.C.

HEADQUARTERS: Richmond, VA

[CONTINUED]

Plaintiff appealed both rulings to the Supreme Court of Virginia. At the time of the appeal, only discretionary appellate review of civil cases was available under Virginia law. The Supreme Court of Virginia granted a writ to consider the case. After briefing and oral argument, the Supreme Court of Virginia affirmed the trial court's rulings, holding that the physician was entitled to derivative sovereign immunity and that the Complaint failed to set forth a prima facie case of gross negligence as a matter of law. ■

RESULT: Case Dismissed and Affirmed on Appeal.



COUNSEL: Salvatore J. DeSantis and Julie E. Molod

FIRM: Molod Spitz & DeSantis, P.C.

HEADQUARTERS: New York, NY

WRONGFUL DEATH

Wrongful Death, Electrocuting

Defense obtained summary judgment prior to any depositions or medical examinations in favor of an electrical contractor in a wrongful death action. The deceased was electrocuted while working on a residential renovation project, lost consciousness, and fell from a height as a result. Defendant was the electrical contractor. Defense proved that they had only pulled a permit to work on the premises and had not actually conducted work. Through affidavits, detailed analysis of the relevant Building Codes, and documentary evidence, defense proved a lack of duty under New York's draconian Labor Law as well as common law negligence.

Crucially, the Court also held that defense had shown that there was no need for further discovery. In addition to proving a lack of liability, defense motion cut off all available lines of inquiry that might justify keeping the contractor in the case. The case is still being litigated, with no appeal having been taken from the decision dismissing the case against the defendant. ■

RESULT: Summary Judgement Granted to Electrical Contractor Prior to Discovery.

ADDITIONAL IMPORTANT CASES



COUNSEL: Patrick Kasson; Tom Spyker

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

JUDICIAL CULPABILITY, GOVERNMENT/PUBLIC ENTITY LIABILITY

Judge Orders Spectator to Drug Test, Orders 10 Days In Jail Upon Refusal, Sues For \$1mm

This is an interesting decision. We are representing a municipal court judge who engaged in some out-of-bounds conduct.

A drug dealer was in court, and his girlfriend came to show her support. The judge ordered the girlfriend, even though she was a mere spectator in his courtroom, to go get a drug test. When she refused, he ordered that she spend 10 days in jail. The judge ultimately lost his license and his position on the bench.

Plaintiff demanded \$1MM in damages. A Motion for Judgment on the Pleadings was granted based upon judicial immunity. ■

RESULT: Motion for Judgment on The Pleadings Granted.

COUNSEL: Patrick Kasson; Mrinali Sethi

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

GOVERNMENT/PUBLIC ENTITY/ LIABILITY

1983 Claim Against Condominium Association Dismissed for Lack of State Action

Plaintiff was a condominium owner who hung a thin blue line flag outside his condominium, in violation of a policy that only allowed for federal, state, and college football flags. The condominium owner and the supposed owner of the flag filed a 1983 action claiming the condominium association's actions were state action because they would have the right to enforce it in court, through a state statute. There is actually some support for this, as Thurgood Marshall won an interesting decision pre-Civil Rights Act dealing with racist restrictive covenants on deeds. It technically has not been overruled. But rather, courts continue to sidestep it.

The Judge agreed that the Condominium Association was not a "state actor." So, the 1983 Claim – which requires state action – was dismissed, and a preliminary injunction motion was denied. ■

RESULT: Victory on Motion For Summary Judgment.

COUNSEL: Holly Marie Wilson, Katie L. Zorc

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

ADMINISTRATIVE LAW, LICENSURE CHALLENGE

Residential Youth Facility Fends Off Attack by State and Keeps Its License

Residential Youth Facility appeared in an administrative trial before the Ohio Department of Mental Health and Addiction Services (ODMHAS) which sought to revoke Facility's license. Instead of having its license revoked, as threatened by the State, the Facility received a recommendation for its renewal, with a notable chastisement of the State, and compliments for the service it provides to the community. ■

RESULT: Successfully Defended.



COUNSEL: Holly Marie Wilson, Brianna Prislipsky

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

FEDERAL FAIR HOUSING ACT, CONDOMINIUM LAW DISPUTE

Owners Claim Disability Discrimination and Condominium Mismanagement

Plaintiffs, two disabled condominium owners, challenged condominium association, individual board members and employees, alleging multiple breaches of Ohio condominium law and federal discrimination. Case was bifurcated and proceeded in both federal and state trial and appellate courts. Defendants were successful in defending Plaintiffs' claims on all counts. ■

RESULT: All Counts Dismissed.



COUNSEL: Holly Marie Wilson, Brian D. Sullivan, Brianna Prislipsky

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

CONTRACTUAL DISPUTE BETWEEN PUBLIC SCHOOL DISTRICTS

Tax Revenue Sharing Agreement Upheld by Supreme Court of Ohio

After a trial court denied a plaintiff school district's claims to enforce a tax revenue sharing agreement, the school district was successful in reversing the decision in the appellate court. Disappointed defendants appealed to the Supreme Court of Ohio, which accepted the jurisdictional appeal. Ultimately, plaintiff school district was successful in affirming the appellate court's decision, and the case was remanded back to the trial court for further proceedings. ■

RESULT: Court Enforces Contractual Agreement to Share Tax Revenue Between School Districts.

COUNSEL: Sean T. Needham

FIRM: Reminger Co., LPA

HEADQUARTERS: Cleveland, OH

FINANCIAL SERVICES LIABILITY

Customer Claims Seven Figures Against Broker/Dealer Concerning Investments

In the dispute, customer sought more than seven-figures in damage related to the purchase of several alternative investments in a FINRA (Financial Industry Regulatory Authority) arbitration against defendants: an independent broker-dealer client, and its registered representative. The customers claimed, amongst other things, that their accounts were overconcentrated, subject to unsuitable investment recommendations, and lacked supervision as to the five Real Estate Investment Trusts at issue. The three-member FINRA Panel issued a decision agreeing with defense arguments that the case was ineligible for arbitration as it was filed more than six years after the transactions at issue.

After a full telephonic hearing, the Panel issued its award dismissing all claims, holding that “any and all claims for relief... including any request for punitive damage, treble damages and attorneys’ fees, are denied.” ■

RESULT: Rare Dismissal of All Claims in FINRA Arbitration in Favor of Broker-Dealer Client.