



2014

SIGNIFICANT CASES

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DEFENSE COUNSEL: **Phil Abernethy, Ryan Beckett, Mark Garriga,
LeAnn Nealey, Lem Montgomery**
FIRM: **Butler Snow LLP**
HEADQUARTERS: **Ridgeland, MS**

CIVIL – ELECTION CONTEST – UNITED STATES SENATE

The Mississippi Republican Party held its primary runoff election for the office of United States Senate on June 24, 2014 between candidates Thad Cochran and Chris McDaniel. The losing candidate, Chris McDaniel, initiated a “Complaint of Election Contest” on August 4, 2014, before the Republican Party State Executive Committee, seeking to challenge the results of the runoff pursuant to Mississippi Code § 23-15-923. After the Executive Committee declined to entertain the contest, McDaniel petitioned the Circuit Court of Jones County to hear his challenge.

Defense counsel represented Thad Cochran and filed with the Circuit Court a motion to dismiss on the ground that McDaniel’s challenge was untimely. As argued by counsel in its motion, Mississippi’s Supreme Court has held that a challenge to a district or state-wide election must be initiated within twenty (20) days of the election. McDaniel filed forty-one (41) days after the election. The Circuit Court agreed with Cochran’s position and granted the motion to dismiss.

McDaniel appealed the Circuit Court’s decision to Mississippi’s Supreme Court. Following the parties’ briefing and oral argument, the Court upheld the ruling of the Circuit Court. The Court relied on the legislative history of the election contest statutes at issue as well as Mississippi precedent interpreting the same. The Court concluded that while the statute relied upon by McDaniel to file his election contest did not on its face provide a 20-day deadline, the Court’s interpretation of the relevant election statutes in *Kellum v. Johnson*, 115 So. 2d 147 (1959), rendered the 20-day deadline a part of the statute. The Court concluded as follows: “In 1959, the Court, in *Kellum*, through canons of statutory construction, determined that a candidate has twenty days following the primary to file an election contest for an office covering multiple counties. The statutes considered in 1959 have been reenacted without material change. Thus, under the doctrine of *stare decisis*, we find that McDaniel failed to file his election contest timely, and the trial judge did not err by dismissing the case.” ♦

CIVIL RIGHTS

The Plaintiff alleged that he was the victim of mistaken identity by the police for another person with a similar name. After the mistake was discovered, the Plaintiff alleged he was wrongly held in custody and then was beaten when he refused to enter a jail cell. The surveillance video of the incident was taped over by the Defendants and was unavailable to refute or confirm the Plaintiff's version of the incident. Plaintiff eventually pleaded guilty to several charges arising from the incident, including Careless and Imprudent Driving and four counts of Property Damage, for damage to four police officers' uniform shirts caused by the Plaintiff bleeding on them. The plaintiff alleged the Property Damage charges to which he pleaded guilty were based on fabricated testimony and his substantive due process rights were violated when the probable cause affidavits were falsely signed.

The police officer Defendants alleged the Plaintiff was intoxicated and belligerent when he was arrested and refused to cooperate in the booking process. When Plaintiff was ordered to enter a cell, he refused and struck one officer in the face with his fist, breaking his nose.

The Plaintiff alleged that he lost approximately five thousand dollars in legal fees and additional damages for lost wages and for his humiliation, emotional distress and the violation of his rights. The Defendant officers rejected six figure settlement demands from Plaintiff. After a two day trial, the court entered judgment in favor of the Defendants, finding that the Plaintiff's admitted testimony barred his substantive due process claims and that the de minimus injuries alleged by Plaintiff as the result of his "beating" by the police did not violate the 4th Amendment's prohibition against unreasonable seizures. Plaintiff's appeal of these rulings remains pending. ♦

MALICIOUS PROSECUTION – ABUSE OF PROCESS – CONSPIRACY – IMMUNITY

After a fire occurred at a residence owned by the Plaintiff's fiancé, authorities investigated the fire and subsequently charged Plaintiff and his fiancé with arson and related crimes. During the course of the investigation, the police and prosecutors demanded that the insurer of the property turn over its own investigative materials in accordance with Pennsylvania's Arson Reporting Immunity Act (ARIA).

The insurance company complied with its ARIA obligations. The insurance company's investigative materials contained a report completed by cause and origin investigators, who had determined that the fire was intentionally set, despite the fact that no traces of combustible liquids were recovered at the scene of the fire. Additionally, the insurance company's investigative materials included a report authored by an electrical engineer retained by the insurance company, which ruled out any electrical cause of the fire. Joseph Selep represented the electrical engineer and his employer in this suit.

During the course of the criminal investigation against Plaintiff, Plaintiff retained an expert who determined that a hair dryer found at the property had been plugged in at the time of the fire. However, the report of the electrical engineer retained by the insurance company indicated that the hair dryer had not been plugged in. The Plaintiff's expert's report stated that the engineer had erred in ruling out an electrical cause for the fire because the hair dryer could have been an electrical source of the fire. After examining the hair dryer, the engineer wrote a second report, agreeing that the hair dryer was plugged in at the time of the fire, but maintaining that an electrical cause could be ruled out.

The police, prosecutors, and officials determined that there was probable cause to bring arson charges against Plaintiff, and, pursuant to a judge's order, arrest warrants were issued; however, in the middle of Plaintiff's criminal trial, the prosecutors decided to drop the charges against Plaintiff.

Plaintiff then sued the insurance company, the companies of the cause and origin investigators, the company of the electrical engineer, and the electrical engineer himself for claims of malicious prosecution, abuse of process, and conspiracy. Plaintiff's case proceeded to trial. At trial, Plaintiff

pointed to inconsistencies between the evidence found at the scene of the fire and the investigators' reports, arguing that these inconsistencies showed that the investigators had acted with reckless disregard in ruling out the electrical cause of the fire and in determining that the fire was intentionally set. Plaintiff also contended that the police had relied on the investigators' and the engineer's reports to establish probable cause to arrest Plaintiff. Plaintiff's counsel maintained that the defendants entered into a grand conspiracy that the fire was intentionally set to frame him for arson. Plaintiff sought approximately \$90,000 for court costs and attorney's fees relating to his criminal litigation, as well as unspecified amounts of noneconomic damages for the emotional distress he endured while being incarcerated and having to experience a criminal trial.

The defense maintained that the evidence showed that the insurance company, the investigators, and the electrical engineer were protected from suit by the Arson Reporting Immunity Act because there was no evidence they acted with malice in conducting their investigation. Defendants contended that the weight of the evidence indicated that their conclusion that the fire was not electrical, and that it was intentionally set, was well supported by the evidence from the scene of the fire and the events surrounding the fire. Defendants also argued that the police and officials independently determined that there was probable cause to arrest Plaintiff for arson and that there was no evidence of a conspiracy.

The jury found that the defense maintained that the evidence showed that the insurance company, the investigators, and the electrical engineer did not act with actual malice in investigating the fire and then providing the information related to their investigation to the authorities, in accordance with the Arson Reporting Immunity Act. The jury's trial deliberations lasted approximately fifteen minutes. ♦

DEFENSE COUNSEL: **John Harrington and Beth Catenza**
FIRM: **Sulloway & Hollis, P.L.L.C.**
HEADQUARTERS: **Concord, NH**

PUTATIVE CLASS ACTION FOR ALLEGED OVERBILLING

The patient claimed that the defendant hospital failed to give him statutorily-required notice of his right to a discount as an uninsured patient, and improperly charged and collected the full undiscounted amount. He sought certification of a class of all similarly-situated persons.

Plaintiff's counsel apparently viewed this as a test case that could provide a platform for suing other hospitals on the same theory. He threatened to create adverse publicity for the defendant, as he had successfully done in prior cases against other defendants, and to advertise for additional plaintiffs if the initial representative should be ruled inadequate as a class representative. The defense sought to convince plaintiff's counsel that any such efforts would not induce the hospital to make a settlement offer. Ultimately, summary judgment was granted against the named plaintiff, and the class claims were dismissed for lack of an adequate representative, without any publicity or the appearance of any substitute plaintiffs. ♦



CONSUMER FRAUD CLASS ACTION

Plaintiff purchased defendant's used car service contract on the used car she purchased. It was alleged that plaintiff was not told that an identical service contract was available directly from the defendant and other dealerships for a lower pre-printed price than the marked-up price sold to plaintiff. The only difference between the two contracts was how each was titled.

It was claimed that this was a deceptive act and that class certification was warranted.

The Court denied plaintiff's motion for class certification finding that plaintiff had not sufficiently demonstrated that defendant engaged in a deceptive act by allowing used car dealers in New York the choice of selling defendant's service contract for a fixed price or at a price set by the dealership for each individual contract sold. The court found that plaintiff had not shown defendant was obligated to inform her that identical contracts were available elsewhere at a lower fixed price. Defendant had opposed the motion on the basis that the contracts as sold were legal; that dealers only sold one or the other, not both; that each dealer's decision to sell one or the other was based on its own assessment of which price structure would be preferred by its customers; that plaintiff received the contract terms and price she bargained for; that she did not pay an excessive price; and that neither the dealer nor defendant was obligated to advise plaintiff that she could do better at a competitor.

The Court denied the motion for class certification. The Court allowed plaintiff to pursue discovery on her individual claim. Settlement was reached before active discovery commenced. ♦

CONSTRUCTION SITE ACCIDENT INVOLVING CATASTROPHIC INJURIES

Plaintiff, a construction supervisor for a general contractor, was crushed by a bulldozer operated by grading subcontractor. He sustained serious injuries, requiring twenty seven surgeries and incurring medical bills totaling more than \$900,000. He sued the subcontractor seeking \$100,000,000 in compensatory damages.

Defense filed a Motion to Dismiss asserting that the plaintiff was barred from seeking recovery against it, a statutory co-employee, pursuant to the exclusivity provision of the Virginia Workers' Compensation Act.

Plaintiff, a NC resident employed by a NC company, received NC workers' compensation benefits. He argued that the Full faith and Credit Clause required the VA court to recognize his "vested" right to pursue a tort action against a statutory co-employee under NC law.

The US District Court in VA granted the defendant's motion and dismissed the lawsuit with prejudice for lack of subject matter jurisdiction. Applying VA choice-of-law rules, the Court found that VA law applies and the plaintiff's lawsuit was barred by the Act because his injury occurred in VA and was caused by a statutory co-employee.

This matter is currently on appeal before the United States Court of Appeals for the Fourth Circuit. ♦

COUNSEL: **Steven E. Springer and Mark D. Gerth**

FIRM: **Kightlinger & Gray, LLP**

HEADQUARTERS: **Indianapolis, IN**

DEFAMATION AND THE COMMUNICATIONS DECENCY ACT (FCDA)

Plaintiff was executive director of the local Junior Achievement. In that capacity, he was involved in a cooperative effort with several other non-profit organizations to fund and construct a building to be used for educational purposes. Statements were made questioning finances and what happened to the money. Local media reported on the scandal and readers publically commented. One anonymous source posted on a newspaper's electronic bulletin board commented that the Plaintiff was a crook and should go to jail. Plaintiff and his wife sued numerous individuals and business entities alleging that various comments were defamatory and had cost him his reputation and job prospects.

Numerous motions for summary judgment were filed, several of which have been granted and remain in the appellate process.

After extensive discovery, the trial court ultimately granted the corporate defendant's motion for summary judgment addressing the application of the FCDA to a state cause of action involving a corporate defendant and then finding the owner of the server was not liable for posts that electronically traversed the server. This was upheld by the state Court of Appeals and the state's Supreme Court declined further review. ♦

DEFENSE COUNSEL: **Robert C. Jarosh**
FIRM: **Hirst Applegate, LLP**
HEADQUARTERS: **Cheyenne, WY**
CO-COUNSEL: **Thomas B. Kelley, Katherine M. Bolger and Mara J. Gassman of Levine Sullivan Koch & Schulz LLP**

DEFAMATION

Wyoming Corporate Services (WCS) brought suit against CNBC, LLC and Reuters America, LLC for recovery of “at least \$10,000,000 in damages” that WCS alleged resulted from the publication by Reuters, and the republication by CNBC, of an article concerning WCS’s line of business – creating and incorporating businesses. WCS alleged that the defendants maliciously published an article that contained multiple false statements about WCS, with an intent to portray WCS as in the business of aiding and abetting illegal activities, offering illegal business solutions, and generally engaged in illegal activity.

The federal district court in Wyoming granted CNBC’s and Reuter’s summary judgment motion, finding that the article published by the defendants did not constitute defamation or defamation by implication, and that the “defamatory sting” that WCS attempted to attach to the articles did not exist. The Court concluded that “the First Amendment does not allow litigants, like WCS, to seize upon minor inaccuracies in a publication to sue a publisher for defamation.” ♦



INSURANCE COVERAGE

Plaintiff alleged that Defendant, his employer, discriminated and retaliated against him because of his disability-blindness-and his advocacy on behalf of disabled employees. Defendant is a not-for-profit organization that provides employment opportunities to blind individuals. Plaintiff alleged that after he sustained a work-related injury and was on medical leave, Defendant refused to provide him with accommodations necessary for him to return to work. Plaintiff alleged that Defendant ultimately terminated him because of his advocacy on behalf of blind employees and because he refused to lie about a workers' compensation claim filed by another employee with a disability. He further alleged that Defendant refused to promote him due to his disability and failed to accommodate his disability, and generally failed to treat blind employees equal to sighted employees. Plaintiff sought a permanent injunction enjoining the Defendant from discriminating and retaliating against Plaintiff, damages for lost wages, lost earning capacity, mental anguish and emotional distress, and attorney fees. Defendant denied all of Plaintiff's allegations.

The Court entered summary judgment in favor of Defendant on the discrimination claims. After a two-day trial, the Court entered judgment in favor of Defendant on the remaining retaliation claims. ♦

INSURANCE COVERAGE

Defendant/insurer denied a Plaintiff/lawyer's request for a defense of more than \$450,000 and indemnification (where requested damages exceeded \$200,000) of a legal malpractice case because the lawyer did not report it to the insurance company during the proper policy period. Rather, she reported it two years after she was first sued, and did not report the lawsuit on the policy application renewals during the pendency of the litigation. The lawyer was represented by one of the top Plaintiff's firms in Florida and claimed that she was entitled to coverage because (1) she reported the claim to her broker (who allegedly told her that the claim would not be covered), and (2) the claim for fiduciary duty in the initial complaint was not a claim for legal malpractice. The Court rejected these bases since a broker under Florida law is an insured's agent, not for the insurance company, and because the initial complaint did state an action challenging her services as an attorney as defined by the policy. Plaintiff did not appeal this ruling. ♦



INSURANCE COVERAGE DISPUTE

Insured sought indemnity under an excess policy for sums Insured had agreed to pay to settle two class actions. The class actions alleged Insured had engaged in a pattern and practice of including an allegedly worthless and over-priced anti-theft product into consumers' motor vehicle sales contracts without sufficient disclosures. In order to recover, a class member need not have financed or leased a vehicle. Rather, the class action settlement provided that any class member consumer who purchased a vehicle – and the product – from Insured was entitled to recovery. The insurance policy provided coverage for an alleged negligent act or error or omission occurring during the policy period and resulting from a civil violation of any federal, state or local statute that regulates specific disclosures required to complete (1) consumer financing agreements and (2) consumer leasing agreements. The defense argued, and the court held, that the class action claims did not allege violation of a statute regulating specific disclosures in financing or leasing agreements. The court found the class action claims sought damages for deceptive conduct irrespective of whether a financing or leasing agreement was in place. In addition, the court held that the class actions did not seek damages due to a negligent act or error or omission. Rather, the class actions sought damages for intentional conduct by Insured. ♦



INSURANCE COVERAGE – POLLUTION EXCLUSION

Court held that the absolute pollution exclusion was unambiguous and barred coverage for the pastor's death and bodily injuries to the pastor's wife caused by carbon monoxide released by a boiler in the rectory basement. In addition, the court determined that the district court did not abuse its discretion in excluding expert testimony regarding whether carbon monoxide is a "pollutant," because the interpretation of an insurance policy is a question of law, on which expert testimony has no bearing. The court also concluded that the insurer was not estopped from relying on the pollution exclusion. The insured church entered into a consent judgment with the claimants (the pastor's estate and wife), which included a covenant not to execute the judgment against the insured church and an assignment of all rights to recover under the insurance policies. The claimants argued that the insurer should be estopped from relying on the pollution exclusion because it did not reserve rights to deny coverage under the pollution exclusion until a claim was made, twenty-one months after the occurrence. The Court disagreed, explaining that estoppel requires that an insured be prejudiced. By entering into the consent agreement with the claimants, there was no possible prejudice to the insured because there was no liability exposure. ♦

COVERAGE ON WATER CLAIM FOR INTERIOR PERSONAL PROPERTY DAMAGE UNDER “ALL RISK” POLICY

Tenant Insured brought suit against its insurer, QBE, for recovery of insurance proceeds on a claim for interior water damage to personal property and against the Landlord for negligence in the maintenance of the leased premises. The insurer’s disclaimers cited various policy exclusions that applied. Plaintiff alleged consequential damages of almost \$3,000,000 as a result of the QBE’s denial of coverage.

On motion and cross-motion for summary judgment, defense established that the exclusions in its policy applied and were subject to no other reasonable interpretation. The policy did not cover losses due to cracks in the sealant around penetrations in the roof caused by ordinary wear and tear, which did not constitute a fortuitous loss. The policy also barred damages caused by faulty maintenance. Plaintiff did not submit evidence that the building sustained damage from a covered cause of loss to its roof, walls, or exterior through which the rain entered. Purported issues of fact concerning others causes of the water penetration, besides a clogged drain, did not create a possibility of coverage because they tended to show only damages resulting from the nature and inherent qualities of the property, which are not covered. QBE showed that its disclaimers were proper. Motion for Summary Judgment granted. ♦

DEFENSE COUNSEL: **Michael Gorelick and Thomas Maeglin**

FIRM: **Abrams, Gorelick, Friedman & Jacobson, LLP**

HEADQUARTERS: **New York, NY**

SUMMARY JUDGMENT ABSOLVING CARRIER OF LIABILITY CONTRIBUTION ON PRIMARY POLICY

Liberty Surplus (“LSI”) brought suit against QBE for recovery of \$1,150,000 of the \$2,150,000 it paid to settle an underlying Labor Law case brought against QBE’s insured (a general contractor) and LSI’s insured (the subcontractor/employer of the plaintiff).

In the underlying action, QBE tendered the defense of its insured, Marson Contracting, to LSI as an additional insured in LSI’s policy issued to MRC II, plaintiff’s employer. LSI accepted the tender and, at insistence of QBE’s counsel, retained separate counsel to defend Marson and the premises owner (1510 Second Avenue), on the one hand and MRC II, on the other. QBE’s insured, Marson, was granted summary judgment dismissing the complaint against it. Subsequently, LSI entered into a settlement of the underlying action in which it paid \$2,150,000 (\$1 million constituting the limits of its CGL policy and \$1,150,000 under its umbrella/excess policy. MRC’s Workers Compensation carrier contributed an additional \$350,000 to the overall settlement.

After the settlement, LSI brought an action against the owners’ insurer (Burlington Insurance Company) and QBE (Marson’s insurer) seeking a declaration that the QBE primary policy should apply before the LSI excess/umbrella policy and that QBE is obligated to reimburse LSI for the \$1,150,000 paid under the LSI umbrella/excess policy to settle the underlying action.

The Supreme Court, New York County, granted QBE’s motion dismissing LSI’s claim for reimbursement of settlement paid under its umbrella/excess policy, finding that the grant of summary judgment to QBE’s named insured, Marson, in the underlying action was dispositive that QBE’s insured had no liability and, thus, QBE had no obligation to reimburse LSI for the settlement. ♦

COVERAGE COUNSEL: **Dan D. Kohane, Elizabeth A. Fitzpatrick,
Steve E. Peiper and Diane F. Bosse**
FIRM: **Hurwitz & Fine. P.C.**
HEADQUARTERS: **Buffalo, NY**

COVERAGE: INSURER BREACHED ITS DUTY TO DEFEND AND LOST ITS RIGHT TO RELY ON LIABILITY POLICY EXCLUSIONS

The NY Court of Appeals issued one of the most significant and dangerous rulings for the insurance industry by unanimously holding that because an insurer breached its duty to defend it lost its right to rely upon liability policy exclusions. This decision, overruling years of well-established contrary precedent, was a devastating blow to insurers.

After an application to reargue was granted, several state and national insurance associations engaged defense coverage counsel to represent a significant portion of the insurance industry's interest and the firm secured amicus status on their behalf. Amicus brief successfully argued for reversal of the high court's unanimous decision seeking reinstatement and reaffirmation of pro-insurance company precedent which permitted an insurer to rely upon policy defenses, even if it wrongly refused to defend an insured.

The NY Court of Appeals reversed itself, re-embracing previous precedent, in line with the amicus brief submitted by the firm. ♦

COUNSEL: **D. David Keller, Raymond L. Robin and Stephanie M. Michel**

FIRM: **Keller Landsberg PA**

HEADQUARTERS: **Fort Lauderdale, FL**

LEGAL MALPRACTICE CASE BY INVESTOR FEEDER FUNDS INVOLVED IN BILLION DOLLAR PONZI SCHEME

Eight individual investor feeder funds claim to have engaged an out of state law firm to provide legal opinions as to the tax consequences and applicability of the foreign state's law regarding a FL investment in purported structured settlements. The firm provided the opinions to investors and lenders, and the feeder funds invested over \$600 Million in what turned out to be a massive Ponzi Scheme, generating over \$1 Billion in revenue invested in or loaned to facilitate purchases of non-existent fabricated employment law and whistleblower cases. The primary person running the Ponzi Scheme pleaded guilty and was sentenced to 50 years in federal prison. The CFO/COO individual running the feeder investment funds has pleaded guilty to conspiracy and wire fraud charges, and is awaiting sentencing.

After the Complaint was filed in 2011, a Trustee was appointed for two of the eight plaintiffs when creditors initiated involuntary Chapter 7 bankruptcy proceedings. Although suit had been filed, no service was effected by any of the Plaintiffs for nearly a year, and the Court ordered a Case Management Conference. Plaintiffs' counsel attended without noticing the defendant law firm, and improperly obtained an ex parte stay order. Plaintiffs then waited another year and a half before finally serving the Defendant some two and a half years after filing suit, on a claim originally filed just before the two year statute of limitations expired.

The Court considered a Motion to Dismiss based on the long delay in service, holding three separate hearings and entertaining extensive briefing and submissions of transcripts and other evidence, and including a separate evidentiary proceeding to consider issues of prejudice. The case was dismissed immediately following the lengthy evidentiary hearing. ♦

LEGAL MALPRACTICE CASE

Plaintiff Creative Compounds, LLC (“Creative”), a company involved in the dietary supplement industry, claimed to have invented a leak-proof shaker cup to mix and transport supplement drinks consumed by athletes and work-out enthusiasts. Creative asked the law firm, for a fee estimate to finalize and file a utility patent application that Creative drafted. On September 4, 2007, Creative agreed to the firms’ fee proposal and retained the law firm to file the patent application. At that time, Creative had already been selling the shaker cup for some time but did not advise the law firm. The lawyers worked on the patent application and filed it with the U.S. Patent and Trademark Office (“USPTO”) on October 30, 2007. After the patent application ran into difficulties with the USPTO on the ground of patentability, Creative produced an invoice dated October 10, 2006, which it claimed evidenced to the first sale of 10,000 units of the shaker cup to an online retailer. Creative then sued the firm claiming that it had missed the one-year bar date by not filing it by October 10, 2007. Under then-existing patent law, an invention could not be patented if at the time the application was filed it had been on sale in the United States for more than one year. The case, initially filed in Missouri, was eventually transferred to the United States District Court for the Southern District of Florida. Creative sought to recover all lost royalties based on amount of all sales of all similar shaker cups sold in the United States through 2027. Creative proffered an expert who opined that the Shaker Cup was patentable.

Discovery requests to Creative yielded few documents because Creative claimed to have lost them due to computer failure. Attempts to obtain information from the online retailer who apparently purchased the 10,000 units on October 10, 2006, were thwarted for similar reasons. However, Creative did produce shipping documents that showed that the 10,000 units were ordered by Creative from its Chinese manufacturer and shipped to Creative before September 4, 2006, more than one year before Creative retained the law firm. Compelling then-recent case law out of the Federal Circuit Court held that for purposes of the patent bar date, the “first sale” date is the date on which the inventor orders the invention from its manufacturer for resale in the United States and not when the inventor first sells the invention in the United States. The shipping documents

Creative provided showed that Creative purchased the 10,000 units from its manufacturer more than one year before it even retained the law firm. Accordingly, as a matter of law, the bar date had expired before the law firm was retained and it could not have done anything to timely file the patent application. Within days after the law firm filed its Motion for Summary Judgment based on the Federal Circuit Court authority, the case settled for a nominal amount. ♦

LEGAL MALPRACTICE

Plaintiff sued real estate attorney for breach of fiduciary duty for alleged conflict of interest after client served as commissioner in judicial sale of plaintiff's property. Property at issue included several coastal lots with multi-million dollar valuation and plaintiff alleged in excess of \$2,000,000.00 in damages.

Plaintiff and her ex-boyfriend cohabitated and acquired several properties together. When the relationship dissolved in bitter dispute, boyfriend petitioned the court for judicial sale of property. One day after defendant was appointed to conduct judicial sale, defendant prepared legal opinion on behalf of one of plaintiff's tenants about whom plaintiff had filed complaint before real estate commission. Tenant subsequently became hostile toward plaintiff, and plaintiff and tenant became involved in separate litigation including criminal charges and civil no-contact orders. Plaintiff alleged defendant's representation of tenant before real estate commission constituted a conflict of interest, and that defendant conspired with tenant against her, allowing plaintiff's boyfriend to purchase 100% interest in the property through a greatly reduced judicial auction which defendant conducted.

Plaintiff repeatedly rejected offers to pre-suit mediation. Plaintiff alleged defendant's conduct caused her to incur tens of thousands in litigation costs through underlying judicial sale proceedings which lasted more than two years. Trial court dismissed pursuant to Rule 12(b)(6) because defendant had judicial immunity.

Court of Appeals scheduled to hear without oral arguments December 3, 2014. ♦

NEGLIGENT MISREPRESENTATION, BREACH OF FIDUCIARY DUTY AND INDEMNIFICATION

In response to a mortgage foreclosure action filed by the Seller of a commercial property, the Buyer and borrower filed a counterclaim against the Seller and a third party complaint against the Seller's Attorney/Closing Agent alleging that they were on notice of and failed to disclose existing code violations on the commercial property. The Buyer purchased a vacated restaurant, which was in the midst of interior demolition work, intending to convert the property into a place of worship. The code violations related to interior demolition work performed without proper permitting. The Buyer claimed that it learned of the code violations after the closing and that the existence of the code violations caused approximately \$800,000 in additional expenses, and delayed the ability to convert and renovate the commercial property.

The Law Firm filed a Verified Motion to Strike Third Party Complaint as a Sham, based on at least six emails from the Law Firm to the Buyer's Principal before closing expressly informing the Buyer of municipal code violation issues, and agreeing to assist the Buyer in resolving these issues, which the Buyer rejected. In addition, the Law Firm argued that the Buyer accepted the commercial property in an "as is" condition after expiration of a thirty day due diligence period.

Following several lengthy evidentiary hearings, the Court granted the Law Firm's Motion to Strike the Third Party Complaint as a Sham, held that the third party complaint was based on inherently false facts which were clearly known at the time the pleading was filed, struck the Third Party Complaint as a sham pleading and entered Final Judgment in favor of the Law Firm. ♦

MEDICAL MALPRACTICE

Post-operative monitoring after open heart surgery was not negligent despite neurological delays and disabilities after surgery. ♦

No physician negligence in connection with Lumbar transforaminal epidural steroid injection that allegedly led to paraplegia. ♦

Chiropractor adjustments were not negligent despite allegation of carotid artery dissection and stroke. ♦



MEDICAL MALPRACTICE

The plaintiff had a rare congenital hernia of her diaphragm which the surgeon repaired using mesh to cover the defect. In securing the mesh to the diaphragm, the surgeon used a tacking device which perforated a vessel on the surface of the heart, causing a cardiac tamponade and requiring sternotomy for repair. Plaintiff alleged that the manufacturer warned against use of the tacking device to secure mesh to the diaphragm due to its proximity to the heart, and offered the product insert as evidence in the case. Plaintiff's expert testified that the use of the tacking device in this manner was a clear violation of the standard of care. The surgeon and the defense expert both testified that the mesh must be affixed to the diaphragm and that the tacking device was properly utilized for this purpose. Further, the defense argued that the cause of the perforation of the vessel was a change in position of the heart in relation to the diaphragm after the repair surgery, as well as plaintiff coughing post operatively.

After a week-long trial, the jury returned a verdict in favor of the defendant. ♦



MEDICAL MALPRACTICE

The Plaintiff claimed that the Defendant doctor failed to perform a proper evaluation and work-up and failed to perform a cervical epidural steroid injection due to neck pain in a proper manner leading to a bleed in the spinal canal. After undergoing a cervical epidural steroid injection by the Defendant doctor, which was alleged to have not been necessary, the Plaintiff became a paraplegic due to the bleed and subsequent compression of the spinal canal, having no use of his lower extremities and was forced to live the remainder of his life in a wheelchair. Due to the alleged negligence of the Defendant, the Plaintiff claimed horrific injuries including the inability to use his legs, pain and spasm in his lower extremities and the daily need for suppositories and digital stimulation in order to have bowel movements. Because of this Plaintiff lost his independence, could not leave his house and needed daily care from visiting nurses for the nerve pain and bowel and bladder care.

The Plaintiff had asserted that the doctor failed to do a proper workup of the Plaintiff's history and pre-existing medical condition which was significant for liver disease including cirrhosis, an enlarged spleen, a long-standing history of low platelet count, anemia and a history of bleeding, all which should have informed the Defendant physician that plaintiff was not a proper candidate for a cervical epidural steroid injection due to his alleged "increased risk of bleeding." Due to the alleged negligence of the Defendant physician, plaintiff contended that he was wheelchair bound and needed 24 hour attendant care wherein he was unable to care for himself and needed to be catheterized along with bowel care. A Life Care Plan was submitted by the Plaintiff in excess of \$5,000,000.00 which included 24 hour attendant care in addition to experts who opined as to the breach of the standard of care by the Defendant.

Defense counsel was able to obtain a decision in favor of the Defendant doctor even though it was found that a proper work-up had not been done by the Defendant by arguing that even though a proper work-up may not have been done by the Defendant, that the plaintiff was still a proper candidate for a cervical epidural steroid injection and that the standard of care was met in administering same. ♦

MEDICAL MALPRACTICE; NEGLIGENT HIRING AND RETENTION; FAILURE TO WARN

David Kwiatkowski, a traveling radiological technologist, was arrested after infecting over thirty patients at a prominent NH hospital with Hepatitis-C. Upwards of 50 patients had been infected in states across the country due to Mr. Kwiatkowski's drug diversion in which he returned needles filled with saline to hospital stores tainted with his infected blood after stealing and self-injecting medications such as fentanyl. First the patients, and then the NH hospital, in a significant action for contribution, sued staffing agencies, a credentialing organization, and other prior employers of Mr. Kwiatkowski on the theory that they should have stopped him from continuing as a traveler when they allegedly became aware of the drug-diverting conduct.

Maxim Healthcare Services, a prominent staffing company, was dismissed as a defendant because of a lack of duty to prevent Mr. Kwiatkowski's subsequent criminal acts despite alleged knowledge that Mr. Kwiatkowski had diverted drugs while in Maxim's employ.

Maxim was the only defendant in the high-stakes NH Hepatitis-C litigation to have been dismissed from any of the cases pending. ♦



DEFENSE COUNSEL: **Mary G. Pryor**

FIRM: **The Cavanagh Law Firm, P.A.**

HEADQUARTERS: **Phoenix, AZ**

MEDICAL MALPRACTICE

Plaintiff had his appendix removed laparoscopically by defendant surgeon without incident. Six months later, he was hospitalized for several days due to vague abdominal complaints; CT scans showed mesenteric inflammation but not appendicitis, and he was successfully treated with antibiotics. Another four months later, the Plaintiff presented with recurrent abdominal symptoms and apparent appendicitis on CT scan. Exploratory surgery revealed recurrent appendicitis; the appendix was removed, antibiotics were given, and the patient eventually recovered without further abdominal problems.

Plaintiff's expert testified that the surgeon fell below standard in not completely removing the appendix. The defendant surgeon and his experts testified that the surgeon followed all standard procedures to identify the complete appendix and remove it at its base, which Plaintiff's expert acknowledged, and that the appendix removed at the surgery was a duplicate appendix, which although rare is reported in the literature. There were numerous signs supporting that this was a duplicate appendix, including that the first appendix was removed from the "antececal" area (on the front of the colon); the second appendix was removed from the "retrocecal" area (on the back of the colon); there were no signs of prior surgical intervention on the second appendix that was removed; and various other indicators on the pathology slide. The surgeon and his experts also testified that regardless of whether this was an incompletely removed "stump" appendix or a duplicate appendix, the surgeon complied with the standard of care by following what plaintiff's expert agreed were appropriate procedures in identifying and isolating the base of the appendix and because "stump appendicitis" is recognized in the literature as a possibility.

Plaintiff withdrew his claim for lost wages due to inability to support the claim, but tried to recover it under general pain and suffering and "loss of quality of life" damages. Plaintiff's counsel suggested the jury use a "formula" for calculating damages that would have resulted in a verdict in the \$600,000 to \$1 million range. The defendant surgeon never gave consent to settle. After a two-week trial and after approximately two hours of deliberations, the jury returned a unanimous verdict in favor of the defense, finding that the surgeon complied with the standard of care. ♦

MEDICAL MALPRACTICE

The Plaintiff suffered from chronic headaches due in part to an elongated bone at the base of the skull (also known as Eagle Syndrome). The patient initially underwent surgery on the right side by the co-defendant ENT surgeon to remove the elongated bone without incident. During subsequent surgery on the left side, however, the ENT surgeon encountered inadvertent arterial bleeding. The defendant vascular surgeon answered a call for emergency assistance, and clipped a small branch of the external carotid artery without incident.

The plaintiff alleged that the ENT surgeon and/or the vascular surgeon caused a dissection of the internal carotid artery and injuries to various cranial nerves, leaving him with difficulty swallowing, voice problems, and other alleged deficits. The ENT surgeon, the vascular surgeon, and their experts testified that the Defendant surgeons complied with the standard of care; the plaintiff's injuries were recognized risks of the underlying procedure and the efforts to control the bleeding, to which the plaintiff consented; the plaintiff was predisposed to carotid dissection from his underlying Eagle Syndrome; the carotid artery dissection was due to a combination of trauma to the carotid artery from the underlying Eagle Syndrome, normal retraction and/or other standard surgical maneuvers during the procedure and during the efforts to control the bleeding; the carotid artery dissection in turn caused the cranial nerve injuries, due to local compression and/or by cutting off the blood supply to the affected nerves; and the plaintiff had largely recovered from the injuries.

Plaintiff presented special damages of nearly \$2 million. The ENT surgeon settled after six days of trial. Rather than attempt to finish only 2-3 more days of trial, the plaintiff dismissed all claims against the vascular surgeon with prejudice. ♦

MEDICAL NEGLIGENCE

Plaintiff had a history of retinal detachment in his left eye which ultimately resulted in cataract surgery. The defendant's partner performed the cataract surgery, following which the plaintiff was informed of the potential risks of endophthalmitis or infection in the eye. On post-operative day one, after hours, the plaintiff contacted the answering service of the ophthalmology practice and reached the defendant. The defendant offered to see the patient and elicited a history of some vision changes in the left eye. There were no complaints of pain, discharge, redness or any other sequelae related to infection. The plaintiff developed pain during the course of the evening following the conversation, but never contacted the practice until the following morning. The patient was then sent to the Massachusetts Eye and Ear Infirmary for evaluation. The Massachusetts Eye and Ear Infirmary did not tap and inject the eye for some six hours. The defendant ophthalmologist's care was supported by the nation's leading endophthalmitis expert from the Bascom Palmer Eye Institute in Miami. In addition, the care and treatment provided was supported by another board-certified ophthalmologist practicing in Boston.

Jury returned a defense verdict in 20 minutes. ♦



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

MEDICAL NEGLIGENCE

Plaintiffs alleged that obstetrician failed to diagnose and treat infection in a postpartum patient. Patient presented to the hospital with signs of infection one week after an uneventful vaginal delivery. Plaintiffs claimed that the obstetrician should have performed a hysterectomy to remove the source of infection within hours after the patient's arrival and before identification of the nature of the infection. The patient progressed to toxic shock, organ failure and death approximately 18 hours after she arrived at the hospital. At autopsy, the infection was identified as *Clostridium sordellii* which the medical literature indicates is uniformly fatal in postpartum patients. A motion to exclude the opinions of Plaintiffs' experts on the basis that their opinions lacked scientific evidence was granted and the Court thereafter granted summary judgment in favor of the obstetrician. ♦



DEFENSE COUNSEL: **Natalie Magdeburger and Kim Longford**

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

HEADQUARTERS: **Baltimore, MD**

MEDICAL NEGLIGENCE

Plaintiffs alleged that radiologist failed to diagnose a basilar artery aneurysm when performing a CT scan to rule out subdural hematoma. CT scan was read as normal. Several days later, Plaintiff had change in condition. After seeking assistance from several emergency departments and his primary doctor, he was ultimately admitted. A CTA revealed large basilar artery aneurysm. Repair was attempted and Plaintiff was discharged to home where he ultimately expired when the aneurysm ruptured. Plaintiffs sought pain and suffering damages for the decedent, damages for wrongful death for the decedent's mother and lost future financial support.

The jury found in favor of the radiologist on standard of care and damages. ♦

NEGLIGENCE (SLIP AND FALL)

Plaintiff allegedly slipped and fell in a grocery store, as a result of a leaking fresh flower cooler that had leaked and been repaired at least 4 times prior to the date of the incident. Plaintiff claimed that she suffered from RSD/Complex Regional Pain Syndrome as a consequence of her fall, and that she would never be able to work again as dental surgical assistant. There was a question as to whether there was a caution cone in the area, and if so, was it conspicuous. Also, the issue of whether Plaintiff suffered from RSD was hotly contested. Plaintiff was able to put before the jury approximately \$1.6 million in past and future lost wages and medical expenses. Plaintiff's demand was as high as \$1.7 million and never came below \$1 million. Plaintiff declined Defendant's \$400,000 offer, as well as Defendant's \$200,000/\$500,000 high/low offer. Among others, the case dealt with the complicated issues surrounding the causation, diagnosis and treatment of RSD/Complex Regional Pain Syndrome.

After a six (6) day trial, the jury unanimously found that the Defendant was not negligent. ♦



SLIP AND FALL IN HOTEL BATHTUB

Plaintiff slipped and fell in her hotel room bathtub while showering. She alleged that the hotel's failed to use non-skid tubs and should have placed non-slip bath mats in the tubs. Plaintiff claimed lumbar and cervical disc injury and myofascial pain syndrome and had expert opinions that calculated over \$1 million the present value of her economic damages. She sued the international hotel chain that branded the hotel and demanded \$1.3 million in settlement.

In granting summary judgment, the court stated, "slipperiness" resulting from customary soap and water usage in a shower does not constitute a dangerous condition from which liability flows. ♦

PREMISES LIABILITY

Plaintiff was an elderly woman attending a credit union meeting at a local community college who tripped and fell while leaving the building upon conclusion of the meeting late into the evening after nightfall. Specifically, the plaintiff fell while walking out the building's exterior doorway. Plaintiff contended her fall was a result of the college's negligence as the exterior light over the doorway was not operating at the time and because a doorstop had been negligently placed at the far end of the door where it posed a trip hazard. Plaintiff's injuries were serious including several fractures in her arms and legs. Plaintiff was unable to care for herself over an extended recuperation period and was forced to live with family members for assistance. The college denied liability for plaintiff's injuries and rejected plaintiff's settlement demands on several instances in favor of proceeding to trial.

At trial, the Plaintiff presented eye witness testimony that the exterior light over the doorway had not been operating at the time she left the building as well as testimony relative to hazards created by the subject doorstop. The college presented testimony that lighting from other sources was sufficient to meet its duty and that plaintiff's injuries were a result of her own negligence without contribution from the college. Upon conclusion of trial, the Court entered its verdict in favor of the college finding no liability for plaintiff's injuries, awarding no damages, and dismissing the plaintiff's lawsuit with costs assessed against the plaintiff. ♦

COMMERCIAL EVICTION, SUBJECT MATTER JURISDICTION

A Biloxi casino filed a Complaint for Specific Performance in Chancery Court against its primary landlord (one among a coalition of landowners who leased property to the casino) and the landowner coalition, seeking enforcement of an amendment to a commercial ground lease that the primary landlord refused to acknowledge. The landlord, on its own behalf and on behalf of the landowner coalition, answered and filed a counterclaim seeking eviction of the casino and payment of several million dollars in alleged back rent. Many months passed, during which time the parties engaged in written discovery. Then, the landowner coalition, under the control of the primary landlord, filed an unlawful entry and detainer action against the casino in Mississippi County Court seeking the exact same relief that it sought in its counterclaim against the casino in Chancery Court. An unlawful entry and detainer action is a statutory, summary eviction procedure that permits a landlord, on very short notice, to regain possession of property from a tenant who has failed to pay rent. The procedure also permits the landlord to join in the eviction proceeding its claim for back rent. In this case, the landowner coalition sought eviction of an operating casino and payment of several million dollars in damages on seven days' notice. The defense immediately filed a motion to dismiss on behalf of the casino, arguing that jurisdiction over the landlord's claims had already attached in Chancery Court and, thus, the priority of jurisdiction rule precluded the landlord's County Court action, despite the fact that the unlawful entry and detainer statute granted exclusive jurisdiction over such proceedings to the County Court.

The County Court issued a written decision concluding that in light of the pending Chancery Court action, where jurisdiction had attached over the controversy, the priority of jurisdiction rule applied and the County Court lacked subject matter jurisdiction. The County Court's judgment of dismissal was affirmed on appeal. ♦

FAIR HOUSING ACT AND STATE ANTI-DISCRIMINATION STATUTES

Disabled residents of a group housing facility sought to prevent the sale of the building to a private developer after its federally subsidized mortgage expired. The building had been operated by a non-profit organization for more than fifty years, which had sustained millions of dollars of losses in maintaining the aging facility. Despite several years of effort, the non-profit was unable to identify a sustainable solution and sold the facility.

Plaintiffs sued the non-profit, contending the sale would result in eviction of the majority of residents, who were persons with disabilities unable to afford market-rate rent. They cited to several decisions enjoining government defendants from adopting redevelopment plans which disproportionately impacted a protected class, and argued for extension of this treatment to private actors. The Defendant argued that discrimination cases against private landlords were limited to intentional discrimination only, and that extension of the disparate impact doctrine would discourage voluntary participation in federal housing assistance programs. The judge held that there was no legal basis for enjoining a private owner from selling its property and dismissed the case on Defendant's motion for summary judgment. ♦



PRODUCTS LIABILITY/TRAUMATIC BRAIN INJURY

Plaintiff, a project manager for a construction firm hired to oversee a renovation project, was injured when a 60-pound wooden blind fell from a window during a routine inspection and hit her in the head. She alleged that she sustained a traumatic brain injury and post-concussion syndrome, and she was no longer able to work. The plaintiff claimed economic losses exceeding \$1,645,000.

The plaintiff filed suit against a number of entities, including the general contractor, subcontractors, blind manufacturer and suppliers, and sought more than \$10,000,000 in compensatory damages. Prior to trial, she dismissed, settled, or arbitrated with all of the defendants except for the manufacturer of the blinds.

There was no dispute that the blind fell because it was not properly installed by the contractor. Although the manufacturer had no role with the project or the installation of the blinds, the plaintiff argued that the blinds were negligently designed, and a safer, alternate design was feasible at no additional cost to the defendant, and that the defendant failed to properly warn about the dangers of the design and risk of improper installation. Only the claims of implied warranty and strict liability survived the defendant's motion for a directed verdict.

After a three-day trial, the jury returned in verdict in favor on the defendant on all remaining counts. ♦

PHARMACEUTICAL/PRODUCT LIABILITY

The plaintiff claimed that Actos caused him to develop bladder cancer and that Takeda Pharmaceuticals failed to warn that Actos causes bladder cancer. In addition, the plaintiff claimed that Takeda intentionally concealed information regarding the risk of bladder cancer from the FDA and other regulatory agencies and intentionally destroyed documents regarding the design and development of Actos. The plaintiff claimed that Takeda was motivated not to warn of the risk of bladder cancer and to conceal the information establishing that risk because of the billions of dollars earned in the sale of Actos. Takeda presented substantial evidence that the FDA, and all regulatory agencies, were fully informed of all information regarding Actos and that the Actos label was updated in accordance with FDA regulations. Further, Takeda presented epidemiological evidence that Actos does not cause bladder cancer.

After a six-week trial the jury returned a full defense verdict on all counts in favor of Takeda. The jury found that the Actos label was adequate and that Actos did not cause bladder cancer. ♦



AUTOMOTIVE/ PRODUCT LIABILITY

The plaintiff lost control of his 2006 Honda Odyssey on a wet and slippery country road. The vehicle travelled off road, struck a guard rail, slid sideways and tipped over on to the driver's side. The 2006 Honda Odyssey was equipped with a rollover activated side curtain airbag system that did not deploy in the accident. The plaintiff alleged that side curtain airbag should have deployed during the roll over portion of the accident and that his injuries would have been prevented if the air bag deployed. The plaintiff also claimed that Honda's warnings and marketing materials failed to disclose that the side curtain air bag system may not deploy in some rollover accidents.

Honda's experts explained that the side curtain airbag is designed not to deploy in some low energy rollover accidents. In a certain low energy rollover accidents, the deploying airbag can cause or enhance injuries to vehicle occupants. Honda presented extensive evidence of the design and development history of the side curtain airbag system in support of the reasons why the airbag should not have deployed in the plaintiff's rollover accident. Honda was among the very first to introduce side curtain airbag technology and was an industry leader in rollover safety.

After three weeks of trial, the jury returned a unanimous defense verdict for Honda after deliberating for just over two hours. ♦



COUNSEL: **Michael Hutchens and Elizabeth Poeschl**
FIRM: **Meagher & Geer, P.L.L.P.**
HEADQUARTERS: **Minneapolis, MN**

PROFESSIONAL NEGLIGENCE

Case involved complex electrical engineering design services for second largest retailer at its national data center. Damages were alleged to exceed \$7 million. After the general contractor settled with codefendants, leaving the engineers as the only remaining parties, the defense team argued and the jury found that a large majority of the fault lay with the general contractor and the electrical subcontractor, resulting in a judgment against the engineering company significantly lower than the pretrial demand. ♦

DEFENSE COUNSEL: **Michael D. Hutchens**

FIRM: **Meagher & Geer, P.L.L.P.**

HEADQUARTERS: **Minneapolis, MN**

PROFESSIONAL ENGINEERING NEGLIGENCE ALLEGATION IN CONNECTION WITH THE DESIGN OF A HIGHWAY RESULTING IN QUADRIPLEGIA INJURY

Plaintiff was 57 year old gentleman who was on his regular route home when he lost control of his vehicle and struck a concrete barrier that he claimed was too close to the highway. The defendant engineer had redesigned the highway several years earlier leaving in place a concrete retaining wall that had been present for over 30 years. Plaintiff alleged that the concrete structure constituted a dangerous hazard within the “clear zone” and that, therefore, it should have been removed or guarded.

The case was tried to a jury two years ago resulting in a defense verdict for the engineering client. The judge substituted his own judgment for the jury verdict and ordered a new trial based allegations of jury misconduct. After an interlocutory appeal was denied the case was set for a second jury trial. Eventually, the first trial judge agreed to have himself removed whereupon the case proceeded with a new judge and a new jury. Damages were stipulated at \$10 million which was consistent with the damage portion of the verdict that the first jury found.

The second jury to hear the evidence in this interesting case also decided that the engineer was completely free from fault and that the accident was 100% the fault of the plaintiff driver. ♦

PROPERTY DAMAGE - ALLEGED NEGLIGENCE OF A SPRINKLER CONTRACTOR

A sprinkler contractor was sued over the extent of the damages caused to an apartment complex. It was alleged the defendant failed to follow or advise the apartment complex owner of a National Fire Protection Association Safety Warning to drain all sprinkler anti-freeze systems. The Plaintiffs were alleging that the anti-freeze in the sprinkler pipes exacerbated the fire causing it to spread from a garage into two buildings of the Complex. The Plaintiffs failed to establish ownership of the Complex at trial and also failed to differentiate between the original fire damages and the alleged exacerbated fire damages.

The Defense contended that the water supply for the sprinkler system had been shut off prior to the fire and that anti-freeze had no role to play regarding the spread of the fire. The defense also contended that the obligation to advise the owner rested with the owner's general maintenance contractor who had sub-contracted the sprinkler work to the defendant. Finally, the defense alleged code violations on the Owner for storing combustible liquids in the garage without having them in an appropriate flammable liquids storage cabinet and for deciding not to add sprinklers to the balconies on the buildings, which ended up being the direct path by which the fire exiting the garage on the ground floor extended up into the building's attic and roof structure. Five liability experts and three damage experts were involved in the 2.5 week trial.

Plaintiffs sought \$2.5 million and their last demand before trial was \$1.5MM, later reduced to \$500K during trial. Defendant's offer of \$150K was withdrawn during trial.

The Jury found that the Defendant was not negligent. ♦

DEFENSE COUNSEL: **James R. Sutterfield and Candace R. LeBlanc**
FIRM: **Sutterfield & Webb, L.L.C.**
HEADQUARTERS: **New Orleans, LA**

DESIGN DEFECT INVOLVING A SHOPPING CENTER

The plaintiff fell while descending from a sidewalk to the parking lot of a shopping center, claiming her fall was caused by a design defect in the steps and violations of the Life Safety Code and applicable building codes. Plaintiff claimed to have sustained a myriad of injuries, the most significant being injury to her hip and knee, and aggravation of a recently-repaired shoulder. Plaintiff was treated by 14 healthcare providers and underwent two surgeries. After a seven-day trial, the jury, while finding that the step at issue was defective at the time of the accident, agreed with the defense that the patron's inattentiveness to her surroundings, rather than the defective condition, caused the plaintiff's fall and resulting injuries. The plaintiff's Motion for Judgment Notwithstanding the Verdict was denied, and the Trial Court awarded defendants in excess of \$20,000 in costs. ♦

DEFENSE COUNSEL: **Joan Cerniglia-Lowensen and Kimberly Longford**
FIRM: **Pessin Katz Law, P.A.**
HEADQUARTERS: **Baltimore, MD**

ADMINISTRATIVE ACTION AGAINST A PHYSICIAN'S LICENSE

The Complainant alleged that the primary care physician who was conducting a preoperative physical examination touched her in an inappropriate manner and made sexual comments. A three day hearing was held before an administrative law judge who issued findings of facts, conclusions of law and a recommended disposition which was adopted by the Maryland Board of Physicians. The administrative law judge found the Complainant lacked credibility and found in favor of the physician. ♦

DEFENSE COUNSEL: **John Davis, Michael Williams, Mark Clemer and Colby Lewis**

FIRM: **Brown Sims, P.C.**

HEADQUARTERS: **Houston, TX**

PERSONAL INJURY – BRAIN DAMAGE ALLEGED BY FOUR WORKERS

Plaintiffs were marine electricians working on a drilling rig undergoing repairs in a shipyard located in Brownsville, Texas. The carbon dioxide fire suppression system in the rig's engine room was being serviced by a contractor when the entire system accidentally discharged. Although the engine room was to have been cleared, plaintiffs were running cable from scaffolding at the top of the engine room. Plaintiffs were overcome by the lack of oxygen and lost consciousness. Eyewitness testimony described one of the plaintiffs as "foaming at the mouth and flopping around like a fish out of water." All plaintiffs alleged permanent brain impairment from the discharge. Brown Sims was asked to take over the defense of the drilling company, shipyard and fire system contractor two months before trial with only minimal discovery depositions having occurred. A three-month continuance of the trial setting was obtained.

Plaintiffs demanded \$34 million at mediation. The case was expert witness intensive. Plaintiffs had 14 paid expert witnesses in fields such as neurology, MRI studies, speech pathology, hyperbaric medicine, life care planning and critical care medicine. A total of 55 witnesses testified at trial. Local television and newspapers covered the case in the weeks leading up to the trial and during the trial. A gag order was entered preventing counsel from speaking to the media about the case. Defendants argued that the plaintiffs were exposed to carbon dioxide, lost consciousness but did not suffer any permanent deficits. Contributory negligence was not submitted to the jury. Defendants asked the jury to award a reasonable amount for plaintiffs' trauma in going through the event, past lost wages and no damages for future impairment or medical expenses.

After a four-week trial, plaintiffs asked the jury for \$40 million in damages. Plaintiffs' last pre-closing demand was \$18 million. Defendants offered \$1.5 million prior to closing. The jury deliberated for 1.5 days and returned a verdict of \$1.3 million which was then reduced by the 5% of the negligence of plaintiffs' employer and further burdened by a workers' compensation lien. Plaintiffs were awarded damages for past pain and suffering and lost wages, but the jury found no future impairment to plaintiffs. ♦

INTENTIONAL MISREPRESENTATION AND VIOLATION OF WISCONSIN TELECOMMUNICATIONS SERVICES LAWS

Plaintiff was a prior customer of an internet service provider who was hoping to transfer his subscription when he moved to a new home. The plaintiff alleged that an employee of the ISP informed him service was available at the property he was considering purchasing. Based on that representation, he purchased the home. Plaintiff later found out that service was actually unavailable to him at his new address.

The Defense contended that the plaintiff was not a subscriber as defined by WI law as he had no subscription for the new address at which he requested service. The plaintiff had not entered into a contract with the ISP at the time of the alleged misrepresentation and drafted a motion to dismiss advancing that argument.

The Court granted the motion to dismiss in favor of Defendant on all claims, finding that the law protecting subscribers from misrepresentations of the terms of a subscription applied only to current subscribers, not potential customers. ♦



DEFENSE COUNSEL: **Charles A. Deluca**

FIRM: **Ryan Ryan Deluca LLP**

HEADQUARTERS: **Stamford, CT**

ASSAULT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The plaintiff ex-wife claimed that the defendant assaulted her and inflicted emotional distress on ten separate occasions spanning an 11-year timeframe. The assaults allegedly occurred in Russia, France, and the U.S. The case was premised upon a recent Connecticut Supreme Court case which allowed for the continuing course of conduct doctrine to apply in cases of intentional infliction of emotional distress so long as the most recent incident occurred within the three-year statute of limitations. In this case, the plaintiff alleged assaults in France and Greenwich, all occurring within the three years prior to bringing the lawsuit. The other seven alleged assaults stretched back to 2001 and occurred in Moscow and Miami. The case presented questions of Russian, French, and American law and also illustrated the difficulty of obtaining discovery in Russia.

After a four-week trial, the jury found that the defendant did not assault the plaintiff nor inflict emotional distress and found unanimously in the defendant's favor. ♦

DEFENSE COUNSEL: **Mandy M. Good, Eva La, Thomas A. Nicholas**

FIRM: **Hirst Applegate, LLP**

HEADQUARTERS: **Cheyenne, WY**

RESOLUTION OF NON-CLASS ACTION LAWSUIT INVOLVING MORE THAN 190 PLAINTIFFS

Defense represented five clients sued by more than 190 individual plaintiffs. The Complaint did not allege a class action (and the case did not qualify as one). Instead, plaintiffs made individual claims of fraud, intentional and fraudulent misrepresentation, fraudulent concealment, breach of contract, violation of the Wyoming Consumer Protection Act, negligent misrepresentation, fraud in the inducement, breach of the implied covenant of good faith and fair dealing, unjust enrichment, civil conspiracy, and tort claims. The various claims spanned over a decade of time and required massive discovery occurring over a period of more than five years. This case presented unique issues involving client competency, case handling procedures, and discovery. It included hundreds of potential witnesses across the United States and abroad and a decade of electronic documentation from a very active business. More than three hundred thousand documents were pulled for review as potential exhibits. The case also required the use of experts in highly specialized fields. The defense team included 15 attorneys and 5 legal assistants over the course of several years. The case was resolved to the satisfaction of the defendants and costs were controlled through careful briefing and tailored discovery techniques. ♦

MOTOR VEHICLE/TRUCKING LIABILITY

Plaintiff claimed her vehicle was struck in the rear by a tractor-trailer while traveling in the middle lane of the Long Island Expressway. The injuries alleged included recommended right rotator cuff surgery, lumbar herniations, cervical herniations, eighty-six (86) epidural injections to the cervical and lumbar spine, and a projected \$3,000,000 in future medical care.

The defendant, an employee of a trucking company, claimed that while he was traveling in the middle lane of the Long Island Expressway, the plaintiff came from the left and cut him off so closely that despite applying his brakes, he was unable to avoid striking the rear of the plaintiff's vehicle. The jury found that the defendant was not negligent but acted reasonably in the face of the plaintiff's sudden lane change. Motions for summary judgment had previously been denied.

The jury deliberated for 48 minutes before returning with a defense verdict. ♦



MOTOR VEHICLE/TRUCKING LIABILITY

Plaintiff was the driver of a school bus, traveling on a four lane highway. Mr. Livingood represented the driver of a work van also traveling on the highway in the same direction. The work van experienced engine problems, and plaintiff alleged that the operator of the van should have attempted to leave the roadway sooner, as the van operator admitted that he was in the process of calling his wife on the cell phone when struck in the rear by plaintiff's bus. Plaintiff's bus was then struck by a tractor trailer.

Plaintiff asserted a workers compensation lien over \$300,000. She underwent a cervical laminectomy followed by successive spinal cord stimulator implants that now cause her to shake uncontrollably 24 hours a day. She asserted over \$750,000 in future wage loss and over \$1,750,000 in future medical expenses.

Plaintiff's accident reconstruction expert admitted on cross examination that plaintiff violated the assured clear distance ahead rule in striking the work van. The jury found plaintiff 59% at fault, the work van operator 29% at fault and the tractor trailer operator 12%, thereby precluding recovery under Pennsylvania's comparative negligence rule. Plaintiff's demand just prior to trial was \$2,100,000. ♦

WC: EMPLOYEE SUES CLAIMING TUBERCULOSIS AS AN OCCUPATIONAL DISEASE

A workers comp (WC) claim was filed against a food manufacturing company by an employee who had tuberculosis and was claiming that the employer was responsible for this as an occupational disease. The attorney for the employee claimed there was an “outbreak” of tuberculosis at one of the company’s processing plants. At the time of the hearing, the plant had been closed down and the defense had to track down several witnesses, one out of state, and obtain their testimony. Defense retained the Chief of Infectious Disease Department at one of the local university’s School of Medicine as an expert witness to review and provide expert opinion testimony on issues concerning the plaintiff tuberculosis claim. The defense then searched through a warehouse for documents showing that the employee attended tuberculosis meetings with the Health Department. After all of the evidence was presented, the defense filed a Brief with the Industrial Commission arguing the employee was not entitled to WC benefits. If the employee prevailed the monetary exposure was significant.

The Deputy Commissioner issued a written decision concluding that the employee did not have a compensable WC claim and that the company was not responsible for paying any WC benefits to the employee. The employee appealed to the Full Commission and the Full Commission granted the motion to dismiss the appeal. ♦

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