SIGNIFICANT CASES 2018

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COMMERCIAL LITIGATION

COUNSEL: E. Barney Robinson III
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, Mississippi

COMMON LAW CORPORATE OPPRESSION

Court compels arbitration

A minority shareholder brought common law corporate oppression claims in court against two other minority shareholders. Plaintiff alleged a civil conspiracy between the two other shareholders, in order to combine their holdings into a majority of shares. The parties' shareholders' agreement contained arbitration provisions but had a judicial carveout for provisional remedies. Defendants moved to compel arbitration and argued that the shareholders' agreement's invocation of the American Arbitration Association rules incorporated by reference those rules' delegation clause, assigning arbitrability disputes to the arbitrators, not a court. The Plaintiff argued that the contract's Delaware choice of law clause excluded application of the Federal Arbitration Act and meant that arbitrability decisions were for the court's resolution, not the arbitrators. He further argued that his common law claims were outside the reach of the contract's arbitration provisions. The Mississippi Supreme Court ruled that Delaware courts' interpretation of these issues under the FAA did control and that the arbitrability analysis under that law was for the court, not the arbitrator. On the merits, however; the Court held that the Plaintiff's claims did fall within the scope of the parties' contract and unanimously affirmed the trial court order compelling arbitration. ◆

RESULT: Court held that the Plaintiff's claims did fall within the scope of the parties' contract and unanimously affirmed the trial court order compelling arbitration.

COUNSEL: Buck Lewis
FIRM: Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
HEADQUARTERS: Memphis, TN

COMMERCIAL LITIGATION INVOLVING DISTRIBUTION CONTRACT

Plaintiff was China distributor of hips, knees, extremities, and biologics for Tennessee based medical device company. Company assigned some but not all product lines to third party and deleted the remaining products from contract. The District Court and Sixth Circuit rejected claims that this was a de facto termination, rejected claims of bad faith, enforced limitations on damages provision, and enjoined Chinese distributor from attempting to proceed on identical claims in China in violation of forum selection clause. ◆

RESULT: Eight figure claim for breach of contract and tortious interference. Summary judgment granted, affirmed by U.S. Court of Appeals for Sixth Circuit.

COUNSEL: David Elmaleh
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, Canada

MISFEASANCE IN PUBLIC OFFICE / RENEWABLE ENERGY LITIGATION

Commercial Litigation to be joined with personal injury action?

The Plaintiff corporation sued Firm's client for $9MM for misfeasance in public office. The shareholder of the Plaintiff corporation commenced separate proceedings against his former lawyer for professional negligence as a result of an alleged improvident settlement in a personal injury action. The plaintiff corporation and plaintiff shareholder sought to join the two cases. Defense successfully argued that the cases were unique, and the alleged economic loss of the corporation is distinct from the alleged economic loss of the individual plaintiff. Furthermore, it would be overly-cumbersome and inefficient to try two relatively distinct cases together and it would be a waste of judicial resources. ◆

RESULT: Held that shareholder in a commercial dispute, and a shareholder in a solicitor's negligence claim, should not be tried together.

DEFENSE COUNSEL: Michael D. Hutchens and Elizabeth S. Poeschl
FIRM: Meagher & Geer, P.L.L.P.
HEADQUARTERS: Minneapolis, Minnesota

COMMERCIAL REAL ESTATE INVESTORS/DEVELOPERS SUED ARCHITECT WHEN HISTORIC DEVELOPMENT PROJECT FAILS TO MOVE FORWARD

Investors sue their architect when a $90MM historic development fails

This case involved the development of three historic buildings in the Minneapolis Warehouse District. The investors initially, and mistakenly, thought that the property could be developed for approximately $50-$60MM. Eventually it was determined that the cost was going to be significantly higher and/or the project had to be reduced in scope. The investors then blamed the architect for failing to take into account historic guideline parking restrictions. However, the architect made it clear from the outset that parking was going to be a significant challenge. The architect also maintained that the investors simply underestimated the tremendous cost to develop a complex site in an area that was governed by historic preservation guidelines. The jury sided with the architect and not only gave the architect a defense verdict, but also awarded the architect its unpaid fees. ◆

RESULT: Defense verdict in favor of the architects after jury trial.

DEFENSE COUNSEL: S. Karen Bamberger
FIRM: Betts Patterson & Mines, P.S.
HEADQUARTERS: Seattle, Washington

COMMERCIAL LITIGATION REGARDING MARIJUANA

Seven figure demand made for "mass plant death" of marijuana

Plaintiff, owner of an indoor grow operation, claimed that defendant caused "mass plant death" of its marijuana plants when it painted an outdoor water tank, located over 800 feet away. There was evidence of paint overspray on vehicles parked outside of the facility. Plaintiff's theory was that the presence of volatile organic compounds ("VOCs") contained in the paint caused the plant death. However, plaintiff's "experts" failed to document any of the testing performed and claimed that no testing could be performed for the presence of VOCs. There were no test results of any kind maintained and no samples of any kind retained. Defendant moved for summary judgment based on the inability of plaintiff to prove causation based on Frye and ER 703. The court granted summary judgment moments after plaintiff walked out of mediation. After appeal was filed, it was withdrawn. ◆

RESULT: Summary Judgment Granted.

DEFENSE COUNSEL: Kelton G. Busby
FIRM: The Cavanagh Law Firm, PA
HEADQUARTERS: Phoenix, Arizona

BREACH OF WARRANTY AND FRAUD ACTION AGAINST RV MANUFACTURER AND DEALERSHIP

RV manufacturer and dealership prevail at trial against breach of warranty, fraud and punitive damages claims

Plaintiffs sued defendant RV manufacturer and defendant dealership for fraud, unfair practices, breach of warranty, breach of contract, negligent repair and punitive damages. Plaintiffs alleged that the dealership pulled a "bait and switch" during the sales transaction and that it failed to disclose certain alleged defects in the motor home. Plaintiffs also alleged that defendants breached various warranties and sales contracts, that they negligently repaired the motor home and that their conduct warranted punitive damages. Plaintiffs demanded more than five times the purchase price of the motor home to settle the claim. Defendants denied all liability and wrongdoing and vigorously defended the allegations at trial. The presentation of trial evidence included live testimony by 18 witnesses, including retained experts, in-house technicians and engineers, and the introduction of hundreds of pages of documents. The jury returned a verdict in favor of both Defendants on all causes of action, entitling Defendants to recover costs from Plaintiffs. ◆

RESULT: Defense verdict before a 12-person jury; costs awarded to defendants.

COUNSEL: Aidan Smith, Herbert Burgunder III
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Baltimore, MD

RESTRICTIVE PROPERTY COVENANTS

Plaintiff sues to rid property of restrictive covenants

Plaintiff claimed that language in deeds extinguished restrictive covenants on their property. The trial court entered judgment in favor of Roland Park Roads and Maintenance. Plaintiff appealed the trial court's ruling and the Court of Special Appeals affirmed the trial court. ◆

RESULT: Defense wins, appeal court affirms.

COUNSEL: Brian P. Voke, Adam A. Larson
FIRM: Campbell Conroy & O'Neil, P.C.
HEADQUARTERS: Boston, MA

BREACH OF CONTRACT

Plaintiff sues for $30 million breach of contract claim and voids $4 million guarantee

The plaintiff sues on a breach of contract claim for $30MM arising out of contract and a $4MM guarantee to operate a fiber optic network. The plaintiff alleged that network lost $30MM as a result of defendant's failure to properly market the network. The plaintiff further alleged that after defendant's subsidiary filed for bankruptcy, defendant was liable on a $4MM guarantee. After more than 5 months of arbitration involving witnesses from all over the world defendant achieved a complete defense verdict! ◆

RESULT: Defense verdict on $30MM breach of contract claim and $4 million guarantee.

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CIVIL RIGHTS

COUNSEL: David Elmaleh
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, Canada

DEFAMATION (LIBEL AND SLANDER)

Defamation and Strategic Lawsuits against Public Participation

Plaintiff, a lawyer and politician, sued for defamation arising from a press release where defendant stated the Plaintiff used social media to advocate on behalf of terrorists.

Defense successfully brought a motion to dismiss on the basis that the lawsuit was a strategic lawsuit against public participation ("SLAPP"). The Court ruled that the expression was on a matter of public interest and was made without malice. The Court found that the expressions were "fair comment" and protected speech. This high-profile case is currently under appeal. The appeal is scheduled to be heard in February 2019. ◆

RESULT: Successful motion to dismiss libel action.

DEFENSE COUNSEL: Bruce Salzburg and Kara Ellsbury
FIRM: Hirst Applegate, LLP
HEADQUARTERS: Cheyenne, Wyoming

CONSTITUTIONAL

University successfully defends challenge to regulation prohibiting firearms on campus

Plaintiff, a delegate attending the Wyoming Republican Convention at the University of Wyoming's conference center was requested to relinquish his firearm as required by the University's regulations. He refused to do so and refused to leave the premises when requested. He was then cited for trespass and subsequently brought a declaratory judgment action challenging the University regulation as violating the Second Amendment to the United States Constitution, the Wyoming Constitution's parallel provision, and the Wyoming Firearms Freedom Act. Both parties sought summary judgment. The court granted summary judgment in favor of the University, holding that the regulation was not unconstitutional and that it did not violate the Act, including for the reason that the Act allowed firearms regulations by the "State of Wyoming," which encompassed the University. ◆

RESULT: Summary judgment for Defendant.

COUNSEL: Peter J. Dunne and Robert Plunkert
FIRM: Pitzer Snodgrass PC
HEADQUARTERS: St. Louis, MO

CIVIL RIGHTS EXCESSIVE FORCE

Mistaken Identity Arrestee Sues Officers For $1MM

Plaintiff was an innocent motorist who was mistaken by the defendant police officers for a suspect who had led the officers on a high-speed pursuit on a busy interstate highway. Following a minor collision with the pursued vehicle, the plaintiff exited his vehicle and was ordered by the defendant officers to get on the ground. Plaintiff claimed the officers ground his face into the concrete highway and he suffered severe facial lacerations as well as other soft tissue injuries when he was arrested. When the officers' mistake was discovered, the plaintiff was released. The Plaintiff then sued in Federal court under Section 1983 for civil rights violations for excessive force under the 4th Amendment and for the unconstitutional police pursuit in violation of the 14th Amendment. The court granted summary judgment for defendants on the 14th Amendment claim, and the jury found for the defendants on the 4th Amendment claim. ◆

RESULT: Jury Verdict for Defendants.

COUNSEL: David Corrigan, Jeremy Capps and Doug Pittman
FIRM: Harman Claytor Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

CIVIL RIGHTS

Agency head sued for $60MM for systemic mismanagement of state-run hospitals

Plaintiff's decedent, who was arrested for stealing snacks from a convenience store, died in jail while he was awaiting a transfer to a state-run mental health hospital for competency restoration services. After the death garnered significant local and national media attention, Plaintiff brought 42 U.S.C. § 1983 claims against numerous defendants, including individual capacity claims against the head of the agency that runs the state's mental health hospitals. Plaintiff alleged that the agency head had systemically mismanaged the state's mental health system by allowing detainees in need of competency restoration services to languish on waitlists while empty beds were available in state-run hospitals. After an Eastern District of Virginia district court judge denied the agency head's Motion to Dismiss, the Fourth Circuit overruled the Court's decision and dismissed the federal claims against the agency head on qualified immunity grounds, ruling that that the Plaintiff's allegations of "empty beds and waiting lists" did not constitute a clearly-established Constitutional violation. ◆

RESULT: Dismissed on qualified immunity grounds.

COUNSEL: John W. Zotter
FIRM: Zimmer Kunz, PLLC
HEADQUARTERS: Pittsburgh, PA

CIVIL RIGHTS

Defendant Dismissed in Lawsuit Seeking $2.8MM in Damages

This lawsuit arose out of the delay in the construction of an upscale residential development in Pennsylvania that Plaintiff claimed resulted in lost profits of $2,8MM. In making a Section 1983 substantive-due-process claim, Plaintiff claimed that the Defendant, Sewage Authority, impaired Plaintiff's constitutional rights to develop its property by obstructing access to municipal sewer lines in a variety of ways. In addition, Plaintiff claimed that the Sewage Authority violated its constitutional rights by requiring Plaintiff to build a pumping station (on a property Plaintiff did not own) before it would take over Plaintiff's sewer lines in the development. Defendant sought dismissal from the lawsuit arguing that there is no constitutional right to sewage service. The Court granted Defendant's Motion for Summary Judgment holding that the Plaintiff did not establish a prima facie case under Section 1983. ◆

RESULT: Summary Judgment Granted.

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CONSTRUCTION

COUNSEL: Stephen Barbier
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, ON, Canada

CONSTRUCTION

Limitation Period for Late Invoices

The client did not final invoice his developer client for $1,100,000 until more than two years after the work was done based on promises that he would be paid and because he was still working for them on another project and thought it was 'money in the bank'. The developer then terminated him from the second project and refused to pay the invoices on the first project despite the work being completed to their satisfaction and the properties being sold. Firm started an action for payment and the defendants responded with a summary judgment motion on a limitation period argument. The judge dismissed their motion entirely on the basis that defense had claimed within two years of the time within which the Firm's client could have reasonably invoiced and the defendant would have responded. This is a significant win for the client as the developer has no other defense to the claim and will lead to prompt settlement. ◆

RESULT: Successful in defeating summary judgment.

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EMPLOYMENT / DISCRIMINATION / DISABILITY

COUNSEL: Tim Threadgill
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, Mississippi

LABOR AND EMPLOYMENT LITIGATION

Summary Judgement upheld in Employment Discrimination Case

Defendant hired a new Electric Department Superintendent, who was in his early 40's. After the new Electric Department Superintendent took over, the Plaintiff received several disciplinary actions, and the Defendant terminated the Plaintiff's employment– just over 6 months after the new Electric Department Superintendent took over. The Plaintiff had a hip replacement surgery prior to coming to work for the defendant, and claimed he had "physical defects which preclude [him] from performing certain types of work," including "no heavy lifting." While the defendant had accommodated him for two decades, after the new Superintendent took over, the plaintiff had to perform some outdoor tasks. The plaintiff accurately claimed that the defendant had sent him to a doctor for a physical since they believed he was slurring his speech and having trouble concentrating. The plaintiff claimed that the defendant also added responsibilities to his job that his disability (hip replacement) prevented him from performing. The plaintiff sued, claiming age discrimination and disability discrimination. Defense filed a motion for summary judgment, which the District Court granted. The plaintiff appealed the summary judgment on the disability discrimination claim (abandoning his age discrimination claim) to the Fifth Circuit Court of Appeals. After briefing, the Fifth Circuit affirmed the summary judgment in favor of the defendant. ◆

RESULT: Fifth Circuit affirmed the summary judgment in favor of the defendant.

COUNSEL: Barry Jacobs
FIRM: Abrams Gorelick Friedman and Jacobson, LLP
HEADQUARTERS: New York, New York

CIVIL RIGHTS, ALLEGED VIOLATION OF 42 USC 1981 AND 1982, ET SEQ.

Action against NYC Fire Department Chief Diversity and Inclusion Officer Dismissed

This was a civil rights action brought in the US District Court for the Eastern District of New York by a NYC fireman against the City of New York and its former Chief Diversity and Inclusion Officer (CDIO) pursuant to 42 USC 1981 and 1983, et seq. alleging First Amendment retaliation, racial discrimination, and interference with his right to contact. Abrams Gorelick, represented the CDIO.

While the Court found that the plaintiff's comments at a meeting in which he participated with FDNY officials were constitutionally protected, his claims for First Amendment retaliation were dismissed because plaintiff failed to allege an adverse employment action. In fact, the Court noted that it was the CDIO who may have suffered an adverse action as a result of the dispute as she was subsequently removed from position as CDIO. The Court further found that plaintiff's causes of action sounding in "race Discrimination" failed because plaintiff failed to show that the City of New York had a policy or custom that caused the deprivation of his constitutional rights or that the CDIO's actions or claims were motivated by race.

Consequently, plaintiff's complaint was dismissed. ◆

RESULT: Pre-answer Motion to Dismiss granted by US District Court Judge.

COUNSEL: Buck Copeland
FIRM: Cranfill Sumner & Hartzog, LLP
HEADQUARTERS: Raleigh, NC

WORKERS' COMPENSATION OCCUPATIONAL DISEASE

Expert Evidence in Occupational Disease Claims

Defense was successful in having an employee's Petition for Discretionary Review denied by the Supreme Court of North Carolina. That means that the decision of the Court of Appeals of North Carolina will be binding. Defense was successful at the Court of Appeals in having the employee's workers' compensation claim denied in its entirety. The Court of Appeals held that in an occupational disease claim, an employee must put on expert witness opinion evidence on the issue of greater risk. In this particular case, the employee did not put forward such expert opinion evidence and therefore failed to prove that he had suffered a compensable occupational disease under the North Carolina Workers' Compensation Act. ◆

RESULT: Supreme Court of North Carolina denies employee's Petition for Discretionary Review.

COUNSEL: Leslie Stellman, Adam Konstas
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Baltimore, MD

NATIONAL LABOR RELATIONS BOARD HEARING

Vulgar language not protected labor activity

In the case, which was a "protected and concerted activities" case, the judge found that the termination of the employee who used vulgar language when criticizing the general manager during a staff meeting did not result in protected activity as to violate the Act. ◆

RESULT: NLRB Administrative law judge ruled in favor of the defense.

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

DISABILITY DISCRIMINATION, RETALIATION AND CONSTRUCTIVE DISCHARGE

Teacher sues claiming discrimination/retaliation

Court grants summary judgment in favor of defendant employer in disability discrimination, retaliation and constructive discharge action brought by teacher against school system. ◆

RESULT: Defense win, Summary Judgment granted.

COUNSEL: Martin A. Smith, Desneiges Mitchell and Marla Rosenblatt-Worth

FIRM: McCague Borlack LLP

HEADQUARTERS: Ottawa, Canada

WRONGFUL DISMISSAL AND SEVEN OTHER TORTS

Employer defends battery of torts

Plaintiff sued past employer for alleged wrongful dismissal and seven other torts including: inducing breach of contract, injurious falsehood, intentional infliction of mental distress, defamation, false imprisonment, malicious prosecution, and civil conspiracy. Plaintiff was fired for installing spyware and stealing co-worker's personal information. Following 16 days of hearings the Court found for the defence and dismissed all claims, finding that the plaintiff's "conspiracy theory" had no basis in the facts presented and refuted at trial. Just cause for termination was also found. ◆

RESULT: Claims dismissed at trial.

COUNSEL: Andrew Tice & Lindsay Vaught
FIRM: Ahlers & Cooney, PC
HEADQUARTERS: Des Moines, IA

EMPLOYMENT LITIGATION

Employee Claims Discrimination & Violation of Drug Testing and Wage Payment Laws

Plaintiff claimed he was unjustly terminated from employment when company requested drug-testing that showed no evidence of drugs. The plead claims included allegations of disability discrimination, violation of drug-testing laws, and violation of wage payment laws. Following a trial, the jury returned a verdict completely and wholly rejecting plaintiff's disability discrimination and drug-testing claims. In considering the wage payment claim for time plaintiff was suspended before termination, the jury found plaintiff was entitled to payment for a couple day's wages totaling $336 but found the employer's failure to pay these wages was not purposeful. The Court entered judgment upon the jury's verdict. The case is on appeal to the Iowa Supreme Court. ◆

RESULT: Favorable Trial Verdict (awarded $336 on non-purposeful wage claim; rejecting $450K claim).

COUNSEL: Manny Sanchez and Heather D. Erickson
FIRM: Sanchez Daniels & Hoffman LLP
HEADQUARTERS: Chicago, IL

RETALIATORY DISCHARGE AND WHISTLEBLOWER CASE

IL Whistleblower Act Violation/Retaliatory Discharge/ Tortious Interference Claims rejected by jury

Defense won a complete defense victory for the Cook County Health and Hospital System (CCHHS) in a retaliatory discharge and whistleblower case. The plaintiff, former employee, alleged he was discharged from his position in retaliation for complaints he made against CCHHS regarding patient care, shortage of security personnel and complaints about safety on the hospital campus, and working conditions. Plaintiff further claimed that due to those complaints and his subsequent dismissal, he was denied employment with additional health care systems in the area. During the case, defense presented evidence that plaintiff had accepted a contract to work full-time for another hospital more than six months prior to his termination and was discharged for job abandonment. Before the trial, the defense offered $250K to settle. It was rejected in lieu of a request for $6MM. At trial, plaintiff asked for damages in excess of $9MM for lost wages, emotional distress and damage to his reputation as a result of termination.

The jury returned a full defense verdict in favor of CCHHS. ◆

RESULT: Full defense verdict.

COUNSEL: Laurie McLeRoy
FIRM: von Briesen & Roper, s.c.
HEADQUARTERS: Milwaukee, WI

EMPLOYMENT LITIGATION/ MUNICIPAL LIABILITY

Correctional Officer Claims Sexual Harassment, Discrimination & Retaliation

Plaintiff claimed she was harassed and discriminated against on the basis of her sex alleging she was disciplined more harshly than fellow male correctional officers. After Plaintiff complained about the disparate treatment, she alleged further discipline was in retaliation for her complaints. The federal district court dismissed the harassment and post-termination discrimination claims on summary judgment. Following trial, the jury returned a verdict rejecting the pre-termination discrimination and retaliation claims, finding the municipality articulated a valid basis for its action based upon its employee handbook and progressive discipline that was unrelated to plaintiff's gender. The Court entered judgment upon the jury's verdict. ◆

RESULT: Partial Summary Judgment Granted/Defense Verdict on Remaining Claims.

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

EMPLOYEE, GONE FOR 18 YEARS, RETURNS, ASKS FOR DEFERRED COMPENSATION. GETS NOTHING.

Employee sues packing company 18 years after he left company claiming entitlement to deferred compensation simply by turning age 65.

Plaintiff was a former employee of packing company who sued former employer for deferred compensation 18 years after leaving the employer. Plaintiff claimed his deferred compensation agreement entitled him to receive deferred compensation simply by turning age 65, even though he had not worked the required ten years consecutively for the employer after signing the agreement and had also worked for a competitor after leaving the employer.

Employer packing company said working 10 consecutive years at the company was a pre-requisite to receiving deferred compensation and that the agreement gave the employer the right to resolve disputes over the amount of and entitlement to deferred compensation.

Erickson | Sederstrom and co-counsel from another firm tried the case to a jury. Plaintiff demanded $120K and attorney's fees. The jury returned a verdict in favor of the employer, awarding the plaintiff nothing. The case is now on appeal to the Nebraska Court of Appeals. ◆

RESULT: Defense verdict in favor of employer, $0 to employee.

DEFENSE COUNSEL: Marc A. Campsen, Robert W. Hesselbacher, Jr. and Laura L. Rubenstein

FIRM: Wright, Constable & Skeen, LLP

HEADQUARTERS: Baltimore, MD

TITLE VII EMPLOYMENT DISCRIMINATION

COO of multi-million-dollar government contractor unsuccessfully claims reverse discrimination

The COO of a government contractor asserted a reverse discrimination claim in Virginia Federal Court against his employer alleging he was terminated based on his race in violation of Title VII after only 19 months on the job. Plaintiff sought back pay, front pay, punitive damages and attorneys' fees. Discovery revealed that Plaintiff was only one of dozens of employees, including management level, that were laid-off in a relatively short period of time as a part of a sales and operational reorganization resulting from the expiration of the employer's largest contract and the corresponding significant revenue decline. Additionally, discovery revealed that Plaintiff hired a lower-paid subordinate and delegated a large swath of his responsibilities to the subordinate, rendering Plaintiff's COO position superfluous but forcing the employer to essentially pay two salaries for the same job.

The court granted the employer's summary judgment motion under the three-pronged burden shifting McDonnel Douglas test. Initially, the court found the plaintiff satisfied his minimal burden of establishing a prima face case of discrimination. The court, however, next found the employer easily satisfied its burden of providing legitimate, non-discriminatory reasons for terminating plaintiff, e.g., loss of major contract, loss of revenue, improper delegation of job responsibilities. Finally, the court found that the plaintiff failed to establish the employer's non-discriminatory reasons for termination were merely a pretext for discrimination. ◆

RESULT: Motion for Summary Judgment Granted.

DEFENSE COUNSEL: Khale J. Lenhart; Robert C. Jarosh
FIRM: Hirst Applegate, LLP
HEADQUARTERS: Cheyenne, WY

EMPLOYMENT

Employee claims retaliatory firing after complaints of discrimination

A retirement home was sued for retaliatory termination after an employee claimed she was fired for complaining of discrimination. The retirement home denied this, claiming that the employee was terminated for insubordination, and also arguing that the employee's EEOC complaint did not allege that she was terminated in retaliation for prior complaints of discrimination. The district court found that the employee failed to allege retaliation in the EEOC complaint, so the Court therefore lacked jurisdiction. The Court also found that, even if jurisdiction existed, the retirement home was entitled to summary judgment.

On appeal, the Tenth Circuit found that the employee's EEOC complaint did not contain allegations of retaliation and the retirement home's response to the EEOC complaint was not sufficient to expand the scope of the inquiry beyond what was contained in the employee's EEOC complaint. The district court was therefore correct in finding that it lacked jurisdiction. ◆

RESULT: Case dismissed; dismissal affirmed on appeal.

DEFENSE COUNSEL: Bruce Salzburg and Kara Ellsbury
FIRM: Hirst Applegate, LLP
HEADQUARTERS: Cheyenne, WY

EMPLOYMENT/CIVIL RIGHTS

University professor sues for breach of contract and violation of civil rights

Plaintiff, a University Professor, was removed from her administrative appointment as Director of the Division of Social Work. She sued, alternatively claiming breach of express and implied employment contracts, as well as denial of procedural due process, and retaliation for exercise of her First Amendment rights. The District Court found that plaintiff's administrative appointment was at-will, such that she could be removed for any reason, or no reason at all, and therefore, her contract claims failed. The Federal procedural due process claim failed for lack of a protected property interest in the at-will position, and the First Amendment retaliation claim failed for lack of speech on a matter of public concern. Summary judgment for the University and its employees granted. ◆

RESULT: Summary judgment for Defendants.

DEFENSE COUNSEL: Rob Jarosh
FIRM: Hirst Applegate, LLP
HEADQUARTERS: Cheyenne, WY

EMPLOYMENT

Nursing home administrator sues for termination in violation of public policy

Plaintiff, a former nursing home administrator, resigned under what he alleged was the threat of termination related to a report of elder abuse. Although he was admittedly an at-will employee, Plaintiff alleged that his constructive discharge fit within the narrow exception to the at-will employment doctrine related to terminations in violation of public policy. Specifically, he alleged that he was protected from discharge relating to his filing of a mandatory report with the State, and that his discharge was an effort to cover up alleged fraud. The District Court first granted a motion to dismiss the regional supervisor, finding that Wyoming law does not recognize the tort cause of action of wrongful termination in violation of public policy against a supervisor. The District Court subsequently granted summary judgment to the employer, finding that Plaintiff failed to present any admissible evidence of an improper retaliatory motive for Plaintiff's alleged termination, and that even if he had, the employer presented a non-discriminatory motive for the termination, which Plaintiff could not rebut. ◆

RESULT: Summary judgment for Defendants.

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ENVIRONMENTAL

COUNSEL: Haley Gregory and Brian Kimball
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, Mississippi

ENVIRONMENTAL/INSURANCE LITIGATION

Fifth Circuit reverses district court ruling

Defendant was sued in a gasoline leak at a gas station. Around that same time, the Defendant's insurance company, filed a declaratory judgment action in federal court, arguing that the Total Pollution Exclusion barred the Defendant's claims. In that declaratory judgment action, the insurance sought a determination that it had no obligation to defend and indemnify the Defendants related to the claims asserted in the state court action. The Defendants had purchased an insurance policy for the gas station from the insurance company, and after the Defendants sold the gas station, an adjacent property owner discovered a sheen on his pond, which he believed was caused by a gasoline leak from an above-ground storage tank at the gas station. In response to the Defendants' notice of claim letter, the insurance company sent a letter notifying the Defendants that their insurance policy would defend them, but if they were ordered to take part in the environmental clean-up, the policy would not cover those costs. The insurance company hired counsel for the Defendants, defended the claims from the adjacent property owners, and settled those claims. The insurance company appointed counsel also defended the Defendants in an action by the MDEQ against the Defendants and the subsequent purchasers of the gas station. The MDEQ entered an order finding the Defendants jointly and severally liable with the subsequent purchasers. The appointed counsel did not appeal that order. In the declaratory judgment action, the district court ruled in favor of the insurance company on summary judgment, and the Defendants appealed that decision to the Fifth Circuit Court of Appeals. The Fifth Circuit reversed in favor of the Defendants, ruled that the insurance

COUNSEL: Haley Gregory and Brian Kimball
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, Mississippi

[CONTINUED]

company was estopped from denying coverage, and remanded to the district court. After the district court set the case for trial on damages only against the insurance company, defense negotiated a favorable settlement in favor of the Defendants. ◆

RESULT: Summary Judgement granted in clients' favor by the Fifth Circuit, reversing the district court.

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INSURANCE / COVERAGE

COUNSEL: Peggy Sharon and Sharon Shefer, adv.
FIRM: Levitan, Sharon & Co. Law Firm
HEADQUARTERS: Tel Aviv, Israel

INSURANCE: FRAUDULENT INSURANCE CLAIM ALLEGING ROBBERY OF DIAMONDS

Plaintiff filed a fraudulent Insurance Claim For $10MM

Plaintiff alleged that he was robbed in his Hong Kong office and diamonds worth $10MM were stolen, hence filed a Claim under the policy. Insurers declined the Claim, following which the Plaintiff submitted a Claim to Court.

In the trial, Insurers were able to prove that Plaintiff issued duplicated GIA certificates to the diamonds allegedly robbed, and in fact the diamonds remained in Plaintiff's possession after the robbery or were sold by him beforehand. By doing so, Plaintiff intended to receive Insurance Benefits and keep/sell the diamonds alleged to be robbed.

After 7 years of trial, the Court determined that Insurers succeeded in proving all the elements of Fraud: that Plaintiff provided false facts in his claim, and he was aware of the falsity of such facts and did so with the intent of unlawfully extracting funds from the Defendants. The Court also determined that the description provided by the Plaintiff regarding his entering into his office was false and hence the Claim was dismissed. ◆

RESULT: The Court declined the Claim in full.

COUNSEL: Michael Kennedy
FIRM: McCague Borlack LLP
HEADQUARTERS: Kitchener, Canada

ACCIDENT BENEFITS

Financial dependency in priority dispute accident benefits case

Client commenced arbitration to transfer an injured person's accident benefits claim to another insurer. After an in-person hearing with lay and expert evidence followed by written arguments, defense was successful in convincing an arbitrator that the injured person was financially independent. This involved a complex calculation of expenses and financial resources. ◆

RESULT: Successful transfer of accident benefits claim to opposing insurer.

DEFENSE COUNSEL: Mark Mills
FIRM: Betts, Patterson & Mines, P.S.
HEADQUARTERS: Seattle, WA

INSURANCE COVERAGE AND BAD FAITH

Exclusion Upheld to Actually Exclude Coverage

A condominium homeowners association sued a contractor for defective replacement of roofs on two condominium buildings. The contractor's CGL policy excluded liability arising from any work or operations in connection with any condominium; an exception to the exclusion returned coverage for repair or remodel work done on individual condominium units under a contract with the individual unit's owner. Firm's client denied any duty to defend or indemnify the contractor.

The contractor sued for wrongful denial of both defense and indemnity and for bad faith or extra-contractual damages, alleging the exception to the exclusion rendered the condominium exclusion ambiguous.

The trial court upheld the condominium exclusion and granted summary judgment to the Firm's client. The Ninth Circuit Court of Appeals affirmed. ◆

RESULT: Motion for Summary Judgment Granted and Affirmed.

COUNSEL: Heidi L. Vogt and Jason R. Fathallah
FIRM: von Briesen & Roper, s.c.
HEADQUARTERS: Milwaukee, Wisconsin

INSURANCE COVERAGE LITIGATION

$68MM Judgment Reversed

Plaintiff alleged that numerous insurers breached their duty to defend Plaintiff against environmental contamination claims. Nearly every insurer settled. In 2012, the circuit court, relying on general concepts instead of specific policy language, ruled in favor of Plaintiff and against Defendants on summary judgment. The circuit court entered judgment against Defendants in the amount of $68MM. Defendants appealed, contending that their policies included a contingent and limited defense provision that applied only under limited circumstances that were not applicable. Plaintiff continued focusing on generalized concepts rather than the relevant policy language. Following Wisconsin Supreme Court precedent, the court of appeals found the "duty to defend analysis must be driven by policy language — not generalizable concepts about the role of excess insurance." The court concluded that Defendants owed no duty to defend Plaintiff and ordered judgment to be entered in Defendants' favor. The Wisconsin Supreme Court denied Plaintiff's petition for review. ◆

RESULT: Court of appeals reversed order granting summary judgment; Wisconsin Supreme Court denied review.

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

FIRST PARTY COVERAGE

Insurer sued for $400K following tidal surge, what is a basement??

Plaintiff insured owns a beachside hotel and was issued a Standard Flood Insurance Policy, pursuant to the National Flood Insurance Program, by defendant. Following a surge of tidal water that impacted the lower level of the hotel, the insured submitted a proof of loss in support of its insurance claim. The proof of loss demanded a payment $98K. Defense issued payment for that amount but also issued a partial denial for damages sustained on the lower level of the hotel because a determination was made that the lower level constituted a "basement" under the policy and was subject to the restricted coverage provided for basements in the policy. The insured appealed the partial denial unsuccessfully and then eventually filed a civil action seeking approximately $400K. At the time the civil action was filed, no supplemental proof of loss had been submitted to demand the $400K amount. The insured moved for summary judgment on the arguments that the lower level was not a basement and that a supplemental proof of loss was not required because the adjuster had engaged in conduct that waived the requirement. Defense filed a cross-motion for summary judgment arguing that the lower level was a basement and that the requirement for a supplemental proof of loss was not subject to waiver. The trial court determined that defendant is merely a "fiscal agent" for FEMA, not a "general agent", and, as such, cannot waive the proof of loss requirement, which is a condition precedent to suit. The basement issue was thus deemed moot. ◆

RESULT: Defense vedict.

COUNSEL: Brian A. Homza
FIRM: Cook, Yancey, King & Galloway
HEADQUARTERS: Shreveport, Louisiana

RESTAURANT FIRE; $1.6MM IN BUILDING COVERAGE; $950K IN LOSS OF BUSINESS INCOME; AND $500K IN BAD FAITH

Plaintiff sues for $1.6MM, $950K Business Insurance, & $500K Bad Faith

Local restaurant owner, brought suit for damages arising out of a fire loss, including $1.6MM in damages from total destruction plus an additional $950K in loss of business income, and $500,000 for bad faith. While evidence indicated the fire was intentionally set, the owner of the restaurant satisfactorily proved he was not in the restaurant at the time the fire was set. It was discovered the manager of the restaurant was in the restaurant within three to ten minutes of the fire being discovered at 10:00 p.m. When deposed, the manager pled the 5th Amendment.

As to coverage Part A (Dwelling), coverage was excluded due to the dishonest or criminal act of the insured's employee to whom the insured entrusted the property. As to the Employee Dishonesty Endorsement, the dishonest acts of an employee are covered only as to business personal property and only if the insured satisfies its burden of proof in showing the dishonest employee intended to cause a loss to the insured and to obtain a financial gain for the employee. Since the manager pled the 5th Amendment, the insured could not satisfy the insured's burden of proof. Summary judgment was granted to defendants as to all claims. ◆

RESULT: Defense win, Summary Judgment Granted Dismissing All Claims.

COUNSEL: Patricia McHugh Lambert
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Baltimore, MD

FIRST PARTY COVERAGE

Proof of loss not signed and sworn

The plaintiffs, who were insured under a policy issued by defendant. Sued alleging defendant improperly denied their second proof of loss in support of their insurance claim and were entitled to $248,750. The central issue was whether the plaintiffs' proof of loss, which was prepared by a public adjuster on a non-standard form, complied with the insurance policy, which required the proof of loss to be signed and sworn. The plaintiffs argued that their proof of loss was sufficient because it was titled "Sworn Proof of Loss" and the policy did not define "sworn." However, the proof of loss was not notarized, did not contain a declaration under the penalty of perjury, and was undated. The Court granted summary judgment in favor of the defendant because defendant's policies must be strictly construed, and the proof of loss did not comply with the ordinary requirements of a sworn document. Therefore, the proof of loss could not be considered in support of plaintiffs' claim, and the defendant was entitled to judgment as a matter of law. ◆

RESULT: Defense verdict.

COUNSEL: Andrew J. Gallogly
FIRM: Margolis Edelstein
HEADQUARTERS: Philadelphia, PA

INSURANCE COVERAGE/ LIABILITY

No Duty to Defend or Indemnify Under Homeowners Policy for Barroom Assault

Firm successfully litigated declaratory judgment action on behalf of homeowner's insurer on appeal to Third Circuit, securing ruling reaffirming Pennsylvania's strict "four corners" rule in determining the duty to defend, in addition to several other fundamental principles of insurance law. Despite the fact that the personal injury suit alleged that the insured was guilty of an "unjustified" and "unprovoked" assault upon the plaintiff, foreclosing any possible issue of self-defense based upon the allegations of the complaint, and despite holding that the incident was not a covered "occurrence" within the insuring agreement to the policy, the lower court held that there was a potential issue of "self-defense" which created an ambiguity relating to the insurer's duty to defend in light of a self-defense exception to the policy's intentional injury exclusion. The Court of Appeals reversed, holding that once the district court determined that there was no covered "occurrence" within the scope of the policy, its inquiry should have ended, and it should not have gone on to consider the policy exclusions. The appeals court also recognized the rule that exceptions to policy exclusions cannot create or expand insurance coverage beyond that provided through the initial grant of coverage. Finally, the Third Circuit ruled that the district court erred in looking beyond the complaint allegations to consider a self-defense claim, holding that allegations of an unprovoked and unjustified assault do not support a claim of self-defense. ◆

RESULT: Reversed in favor of client on appeal – 'four corners' of policy control coverage.

COUNSEL: David Keller, Dena Sacharow, Maria Vernace
FIRM: Keller Landsberg PA
HEADQUARTERS: Fort Lauderdale, FL

COVERAGE BATTLE BETWEEN EXCESS PROFESSIONAL LIABILITY INSURERS

Epic 10-year battle of insurers in $5MM excess case

After a jury trial lasting over two weeks in Miami-Dade Circuit Court in a decade-long dispute taken over from prior counsel, the defense team secured a favorable jury verdict against an excess professional liability insurer that was seeking to avoid and shift responsibility to a previous excess insurer for its share of a $10MM settlement of a professional liability claim against a major law firm. The Plaintiff insurer employed a prominent, highly regarded jury consultant, to assist before and during jury selection, and presented expert testimony from a nationally recognized authority on excess and surplus lines insurance coverage matters. The defense team and its client prevailed without use of a jury consultant and without reliance on expert testimony. ◆

RESULT: Defense win.

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LEGAL MALPRACTICE

DEFENSE COUNSEL: Michael E. Brown & Richard Mullineaux
FIRM: Kightlinger & Gray LLP
HEADQUARTERS: Indianapolis, IN

CLAIM FOR LOSS OF $3 MILLION DOLLARS+ DUE TO LEGAL MALPRACTICE

Lawyers accused of failing to properly advise seller of 10 liquor stores when the transaction hit the skids

The owner of 10 liquor stores entered into a sales agreement with a competitor to transfer all property and licenses for $3.75MM. When the deal began to unwind his lawyers assisted him in a settlement of the agreement resulting in the transfer of one location for $300K. A year later, when only a few of the remaining stores had been sold, a new attorney for the seller accused the lawyers of failing to represent the seller adequately to enforce the original agreement. Because the accused lawyers were very concerned about adverse publicity, the seller was convinced to pursue a quicker result through the use of a private judge in a confidential proceeding. The case was presented to that judge over a full week with the testimony of three experts and substantial evidence from the seller's own files that showed the transaction was not likely to be successful. The result was a judgment for the lawyers without public disclosure of the claims against them. ◆

RESULT: Defense verdict before a private judge.

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

LEGAL MALPRACTICE

Plaintiff sues lawyer for damages in excess of $2MM

After the co-personal representative named in a will failed to qualify as personal representative under Florida Statutes, he sued the lawyer who drafted the codicil to the will, alleging legal malpractice in failing to advise the potential personal representative and decedent of the qualification requirements for serving as personal representative. Plaintiff alleged damages in excess of $2MM, based on the Estate's value at almost $200 million. The Court granted Defendant's Motion to Dismiss with Prejudice because the plaintiff was not a third-party beneficiary of the attorney-client relationship between the lawyer and the decedent, and thus could not state a claim for legal malpractice. Two days after Oral Argument before the Fourth District Court of Appeal, the Appellate Court affirmed the ruling in a per curiam decision. ◆

RESULT: Dismissal with prejudice upheld on appeal.

COUNSEL: David Keller, Raymond Robin, Jose Riguera
FIRM: Keller Landsberg PA
HEADQUARTERS: Fort Lauderdale, FL

ALLEGED LEGAL MALPRACTICE IN CORPORATE ACQUISITION

Plaintiffs' case rebutted

After six days of a scheduled two-week trial on claims of legal malpractice in connection with investors' purchase of a financially distressed corporation and alleged negligence in due diligence and advice regarding the transaction, the defense successfully negotiated a confidential nominal settlement substantially lower than any pre-trial demands. The settlement at trial followed effective cross-examination of Plaintiffs' best witnesses and presentation of critical testimony from two key out-of-town defense witnesses taken out of turn during Plaintiffs' case-in-chief. Settlement was for approximately 3% of initial pre-trial demand. ◆

RESULT: Settlement for 3% of initial pre-trial demand.

COUNSEL: David Keller
FIRM: Keller Landsberg PA
HEADQUARTERS: Fort Lauderdale, FL

ALLEGED LEGAL MALPRACTICE IN LITIGATION

Defendant Lawyer wins malpractice case

After taking over the representation of a highly regarded commercial lawyer and his law firm less than a month before trial, Defense won a Directed Verdict following several days of jury trial, after successfully cross-examining the Plaintiff and his extremely well qualified and high-profile expert witness, and cross-examination of the defendant lawyer called to testify by Plaintiff's counsel. Defense established without dispute the absence of any factual basis for a claim of professional negligence relating to a technical legal research issue and preservation of error for appellate review. Claims for attorneys' fees and costs against the Plaintiff are pending. ◆

RESULT: Directed Verdict for the defense.

MEDICAL

DEFENSE COUNSEL: Jeffrey M. Croasdell and Shannon Sherrell
FIRM: Rodey Law
HEADQUARTERS: Albuquerque, NM

PARAPLEGIA ALLEGEDLY RESULTING FROM DROP BY AMBULANCE PERSONNEL

Woman sues for $150MM in paralysis case after transfer from gurney

Plaintiff had requested a transport from her home to the hospital because of back pain about a month after spinal fusion surgery in which 14 vertebrae were fused. At the hospital, she was being moved from the ambulance gurney to a wheelchair when her legs gave out and she went to her knees. She claimed that she was paralyzed as a result of the fall. Plaintiffs requested in excess of $150MM at trial because of lost wages as a police dispatcher, pain and suffering, the nature and extent of the injury, and punitive damages. The defense proved that the paralysis was a result of a progressive condition that was common to an extensive fusion surgery. The jury returned with a defense verdict. ◆

RESULT: Defense verdict after jury trial.

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

NURSING HOME NEGLIGENCE

Plaintiff alleges fraud, sues for millions in punitive damages for treatment of ulcer

Plaintiff was a middle-aged female with underlying multiple sclerosis which limited her mobility upon admission to Fairport Baptist Home for rehabilitation following shoulder surgery. A pressure ulcer on her coccyx was noticed shortly after admission, was treated, and healed. Plaintiff alleged negligence and fraud, seeking punitive damages for alleged intentional and fraudulent documentation and manipulation of plaintiff's treatment records. The trial lasted three weeks, with plaintiff employing focus groups, a high-priced jury consultant, and a nationally recognized wound-care expert. Plaintiff's trial strategy was textbook "Reptile Theory" and sought hundreds of thousands of dollars in compensatory damages, and millions in punitive damages to "send a message to the community." The defense presented the front-line caregivers to defend their record keeping and treatment of plaintiff. The jury completely rejected plaintiff's fraud and punitive damages claim and awarded a modest five-figure compensatory damages verdict that was less than half the last settlement offer and likely insufficient to even cover plaintiff's trial expenses. ◆

RESULT: Jury rejects fraud and punitive damages claim and awards modest damages.

COUNSEL: James R. Olson, Stephanie Zinna
FIRM: Olson, Cannon, Gormley, Angulo & Stoberski
HEADQUARTERS: Las Vegas, NV

HOSPICE CARE NEGLIGENCE

Summary Judgment granted as to punitive damages and elder abuse

A hospice care company was caring for an elderly patient in a resident facility when she rolled out of bed and sustained bilateral tibia fractures. Plaintiff brought suit and alleged negligence, punitive damages and elder abuse. The punitive damages and elder abuse claims were based upon the fall itself and under the theory that following the fall, the caretakers picked Plaintiff up and placed her back into bed without obtaining a nurse assessment. The Court granted summary judgment as to the punitive damages and elder abuse claims, reasoning that the caretakers did not act with a culpable state of mind that exceeded recklessness or gross negligence, but merely acted in an emergency situation. The Court further found that the caretaker's actions did not intend to abuse or neglect Plaintiff, and their actions were not distasteful or malicious so as to warrant punitive damages. The case proceeded to trial under the negligence theory alone and settled during trial. ◆

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

MEDICAL MALPRACTICE

Gynecologist sued in ectopic pregnancy case

Defense obtained a defense verdict in a trial in favor of a gynecologist and her professional practice. Plaintiff alleged that the physician should have removed the Plaintiff's left fallopian tube during laparoscopic surgery to remove an ectopic pregnancy from the right fallopian tube and that the failure to do so caused the Plaintiff to undergo surgery for an ectopic pregnancy developed years later in the left fallopian tube. The jury found no breach of the standard of care by the physician. ◆

RESULT: Defense verdict.

COUNSEL: Natalie Magdeburger, Chantelle Custodio
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Baltimore, MD

MEDICAL MALPRACTICE

Physicians sued in plastic surgery case

Plaintiff suffered a fat embolus as a result of a fat transplant plastic surgery procedure. The diagnosis was alleged to have been untimely made, but defense was able to show that the complication was a completely unheard-of scenario never reported in the medical literature. After more than two full days of deliberation, the jury agreed and returned a defense verdict for defendant. There was a hung jury as to the other defendant: the plastic surgeon. ◆

RESULT: Defense verdict.

COUNSEL: Joan Cerniglia-Lowensen
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

Plaintiff sues nursing home for $500K based on death from urinary tract infection

Case involved allegations that the health care providers at Stella Maris failed to identify and treat a urinary tract infection resulting in sepsis and death. After a five-day jury trial, a defense verdict was returned indicating no deviation in accepted standards of care by the facility and its employees. ◆

RESULT: Defense verdict.

COUNSEL: Joan Cerniglia-Lowensen, Brian Cathell
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

$1MM sought for urgent care facility's alleged failure to diagnose and treat

RESULT: Defense represented an urgent care facility receiving a defense verdict in a "failure to diagnose and treat" unstable angina which allegedly resulted in myocardial infarction and death.

COUNSEL: Martin A. Smith, Desneiges Mitchell
FIRM: McCague Borlack LLP
HEADQUARTERS: Ottawa, ON, Canada

CHIROPRACTIC NEGLIGENCE AND BATTERY

Experts evidence exonerates chiropractor

Plaintiff with long history of chronic back pain in lower spine. Regular chiropractor placed note on file stating to do no cervical spine adjustments. Plaintiff attended clinic for urgent appointment and was treated by defendant chiropractor. Although notation was not seen, defendant performed thoracic spine adjustment, not cervical. Patient returned home in "extreme pain". She sued defendant for negligence and battery, her daughters advanced claims under the Family Law Act. Defendant chiropractor had a duty of care to the plaintiff, however, defendant's evidence that no cervical spine adjustment was done was preferred. Causation was also not proven. Expert opinion led by defendant persuasive to court. Action dismissed in its entirety. ◆

RESULT: Action dismissed at trial.

DEFENSE COUNSEL: Christopher Tompkins
FIRM: Betts, Patterson & Mines, P.S.
HEADQUARTERS: Seattle, WA

PRODUCT LIABILITY CLAIM FOR SURGICAL STAPLER

Allegations of Malfunction, Malfunction

Plaintiff suffered an anastomotic leak following a colectomy and sued both her surgeon and the manufacturer of the surgical stapler. Claims against the manufacturer included both product defect and invasion of privacy due to the presence of a sales representative during the surgery. Plaintiff disclosed an expert who opined that the stapler had malfunctioned and mis-fired during the surgery. The court granted summary judgment on the product claim, holding there was no admissible evidence of defect because an alleged statement by the surgeon was hearsay and the expert did not meet Daubert standards. The court later granted summary judgment on the invasion of privacy claim on the basis that plaintiff had no evidence that the sales representative knew her presence was not consented. ◆

RESULT: Motion for Summary Judgment Granted.

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MOTOR VEHICLE / TRANSPORTATION

COUNSEL: Jay Gunsher
FIRM: Abrams Gorelick Friedman & Jacobson, LLP
HEADQUARTERS: New York, NY

MOTOR VEHICLE ACCIDENT

Appellate Court Unanimously Affirms Summary Judgment on Serious Injury Threshold

New York's Appellate Division, First Department, unanimously affirmed summary judgment dismissing an action brought in notoriously plaintiff-friendly Bronx County. First, defense counsel argued, and the Appellate Division agreed, that the plaintiff's appeal was untimely, finding that the short delay in filing the Notice of Appeal was not supported by plaintiff's excuse for the delay. However, the court also noted that "[H]ad the appeal not been dismissed as untimely, we would affirm the order at issue." In affirming the trial court's order granting summary judgment and dismissal of plaintiff's complaint on the "serious injury" threshold, the Appellate Division held that plaintiff had failed to submit medical evidence to raise a triable issue of fact as to whether he sustained any serious injury causally related to the subject accident. ◆

COUNSEL: Matthew Reilly and Thomas Culhane
FIRM: Erickson | Sederstrom, PC, LLO
HEADQUARTERS: Omaha, NE

MOTOR VEHICLE NEGLIGENCE/POLITICAL SUBDIVISION LIABILITY

School District prevails in traumatic brain injury case, up to $20MM in damages

Plaintiffs, parents of 17-year-old basketball player, claimed that their son was injured in a school van that was involved in an accident on the way home from a summer basketball camp. The accident occurred when another driver crossed the center line on a highway and collided head-on with the van. Investigations revealed that no actions or conduct on the part of the driver of the school van caused or contributed to the action; the accident was indisputably caused by the other driver. Plaintiffs claimed that the School District had an obligation to ensure that the player was wearing his seatbelt inside the van and that his nonuse of a seatbelt caused him to suffer a brain injury. Among the School District's defenses were that Nebraska law does not recognize a cause of action for failure to ensure seatbelt use, that the driver of the school van was not an agent of the school, and that the other driver was an efficient intervening cause of the collision.

Plaintiffs sued the other driver and the School District, demanding up to $20MM in damages. The final pretrial demand specifically to the School District was for $1.7MM. After Plaintiffs put on their evidence over the course of six days in a trial against both the other driver and the School District, the Court granted a directed verdict in favor of the School District on all claims, finding that the other driver's conduct was the efficient intervening cause of the accident and that any preceding negligence alleged on the part of the driver

COUNSEL: Matthew Reilly and Thomas Culhane
FIRM: Erickson | Sederstrom, PC, LLO
HEADQUARTERS: Omaha, NE

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of the school van could not be a proximate cause of Plaintiffs' claimed damages. ◆

RESULT: Directed verdict in favor of the defense.

DEFENSE COUNSEL: Jerald L. Rauterkus; Nicholas F. Sullivan
FIRM: Erickson | Sederstrom
HEADQUARTERS: Omaha, NE

COMMERCIAL LITIGATION REGARDING SALE OF TRACTOR TRAILERS

Plaintiff sues for more than $10MM on sale of trucks

This case involved a commercial trucking transaction between two large national trucking companies. The transaction involved the sale of 332 used tractor units under two separate purchase agreements. Plaintiff claimed a breach of the purchase agreements and sought damages in excess of $10MM. Defendants took the position that the liquidated damage provision in each purchase agreement capped the damages available to plaintiff at approximately $166,000. After extensive discovery, the chief judge of the federal district court in Nebraska granted summary judgment to the defendants on the damage issues. ◆

RESULT: Defense win, liquidated damage provision upheld, Motion for Summary Judgment granted.

COUNSEL: Robert M. Kaplan
FIRM: Margolis Edelstein
HEADQUARTERS: Philadelphia, PA

MOTOR VEHICLE NEGLIGENCE

Pedestrian Plaintiff Struck by Auto Found 75% At Fault

Plaintiff pedestrian suffered significant orthopedic and neurologic injuries after being struck by the defendant while attempting to cross a State Highway. The jury found that the plaintiff was 75% at fault for the accident and the trial court entered a judgment of no cause for action. On appeal, the plaintiff argued that the court issued inappropriate instructions to the jury concerning the traffic laws governing pedestrian crossings and should have taken judicial notice concerning the asserted legality of the attempted crossing. The plaintiff claimed that he was entitled to a new trial because of these claimed errors.

In a published opinion the Appellate Division disagreed and affirmed the judgment in the defendant's favor finding that the court's jury instructions were proper as were several challenged evidentiary rulings. ◆

RESULT: Defense verdict rendered by jury affirmed on appeal.

COUNSEL: Gerald A. Connor
FIRM: Margolis Edelstein
HEADQUARTERS: Philadelphia, PA

USE OF CELL PHONE WHILE DRIVING NOT CAUSE FOR PUNITIVE DAMAGES

Summary Judgment Dismissing Punitive Damages in Trucking Accident

Firm's client, a tractor-trailer operator, was allegedly distracted by use of his cell phone immediately prior to being involved in a serious multi-vehicle accident on Interstate 81 in Luzerne County and was confronted with a count for punitive damages contending his conduct was "outrageous or recklessly indifferent." After extensive discovery narrowed the issue, a Motion for Partial Summary Judgment contending the Plaintiff failed to meet her burden of demonstrating our operator's conduct as presented – including the alleged use of his cell phone – warranted a punitive damage claim to be considered by the Jury. The Trial Court agreed, dismissing the Plaintiff's punitive damages claim which ultimately led to a successful resolution of the matter on behalf of the client. ◆

RESULT: Summary Judgment Precludes Testimony Re Use of Cell Phone.

COUNSEL: John W. Zotter
FIRM: Zimmer Kunz, PLLC
HEADQUARTERS: Pittsburgh, PA

MOTOR VEHICLE

Jury Trial Defense Verdict in $1MM Demand Case

The lawsuit arose out of an accident wherein the Plaintiff, a pedestrian, was struck by the front of the Defendant's vehicle. Plaintiff sustained multiple orthopedic fractures that required initial treatment at a Level 1 Trauma Center followed by a lengthy inpatient stay. The lawsuit included a claim for punitive damages. Pre-trial settlement demand was $1MM. No settlement offer was made in the case. At trial, Plaintiff contended that he was struck while crossing the street in a cross-walk. The Defendant asserted that the Plaintiff was not in a cross-walk and entered the roadway in a manner that gave rise to a "sudden emergency" for the Defendant. Accident reconstruction experts retained by the parties gave different opinions as to the amount of time that the Defendant had to avoid the collision. Following deliberation, the jury returned a unanimous verdict in favor of the Defendant finding that the Defendant was not negligent. ◆

RESULT: Defense Verdict.

COUNSEL: Brian A. Homza
FIRM: Cook, Yancey, King & Galloway
HEADQUARTERS: Shreveport, LA

18-WHEELER REAR-END ACCIDENT

Mild Traumatic Brain Injury: Lumbar Fusion & SI Joint Fusion, Plaintiffs Demand $8MM and Life Care $4.3MM

Plaintiff sued for personal injuries arising out of a rear-end tractor tanker collision. Plaintiff claimed loss of consciousness and residual effects from a mild traumatic brain injury. Plaintiff underwent surgery of an SI joint and a second surgery for lumbar fusion at L4-5. Plaintiff had undergone an L5-S1 surgery in 2002, long before this 2016 motor vehicle accident. After the L4-5 surgery, plaintiff was complaining of chronic pain and was referred by the Orthopedic Spine Specialists to pain management, where epidural steroid injections and then radiofrequency ablations were prescribed for the remainder of her life at a cost of $4.3MM dollars. The last offer from plaintiff was $2MM. The defense plan included pharmacy records to show long term opioid use, obtaining out of state medical reflecting continued complaints of pain after the 2002 surgery and the retention of an automobile accident reconstruction expert with biomechanical background to show the force of impact was not sufficient to render an injury to either the SI joint or the L4-5 nerve. Plaintiff was shown to have misrepresented her medical history to several of the doctors. Defendants made an Offer of Judgment before trial for $400K. The jury rendered a verdict giving plaintiff $375K total. ◆

RESULT: Jury Verdict – Defense Win.

COUNSEL: Hillel David
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, Ontario

MVA JURY VERDICT

Trial judge's obligation to make threshold determination

The plaintiff was involved in a minor-impact MVA, for which the defendants admitted liability. The only issue at trial was damages, and it was a trial by jury. After a lengthy trial, the jury essentially found that the injuries sustained by the plaintiff were minimal in nature, despite the fact that he had had surgery on both shoulders after the accident. In effect, the jury decided that those real and serious problems were not causally connected to the accident.

The plaintiff appealed. The major issue on the appeal was the question whether the trial judge was entitled to refuse to make a determination on the issue of whether the plaintiff's injuries resulting from the accident satisfied the statutory threshold. The statute provided that the trial judge "shall" make that determination. The trial judge declined to do so for two reasons: First, the issue was moot in light of the jury verdict, and second, a determination that the threshold had been met would be in direct conflict with the jury verdict.

There were other trial-level decisions in which there had been a similar refusal by the trial judge to make a threshold determination. On appeal, the Ontario Divisional Court held that a trial judge has no discretion in the matter – the threshold determination is mandatory, regardless of the jury verdict – but that a new trial would not be ordered in this case because there had been no substantial wrong or miscarriage of justice. In such situations, s. 134(6) of the Ontario Courts of Justice Act provided that no new trial be ordered. ◆

RESULT: Verdict upheld despite error by trial judge.

COUNSEL: Gregory G. Guice and Brian D. Sullivan
FIRM: Reminger Co., L.P.A.
HEADQUARTERS: Cleveland, OH

TRUCKING LIABILITY

Reversal of $5,900,000 default judgment

Plaintiff obtained a $5.9MM judgment against a truck driver who caused significant injuries while driving in the course and scope of his employment with a motor carrier. After the truck driver and motor carrier were sued, the motor carrier filed an answer on its behalf admitting that its driver was in the course and scope of employment and that the driver was negligent in causing the accident. The motor carrier, however, refused to file an answer on behalf of the truck driver because it had been unsuccessful at communicating with the truck driver after he was terminated following the accident. Because an answer was not filed on behalf of the truck driver, plaintiff moved for a default. The trial court conducted a hearing and entered judgment against the truck driver in the amount of $5.9.

After the default judgment was entered, defense was retained to represent the truck driver. Defense moved to vacate the default judgment on the basis that service upon the truck driver was defective because it was served at an address where the truck driver used to live. The trial court, however, concluded that the truck driver's testimony regarding his residence was not credible and refused to vacate the default judgment.

On appeal, the Ohio Eighth District Court of Appeals concluded that the trial court abused its discretion in refusing to grant the truck driver relief from judgment. The appellate court found that the evidence submitted to the trial court demonstrated that the truck driver did not live at the address where the complaint was served because he had recently moved, and plaintiff failed to come forward with sufficient evidence rebutting the presumption of improper

COUNSEL: Gregory G. Guice and Brian D. Sullivan
FIRM: Reminger Co., L.P.A.
HEADQUARTERS: Cleveland, OH

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service. As such, the trial court reversed the default judgment and remanded the matter to the trial court for further proceedings. ◆

RESULT: Default judgment reversed and remanded.

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

MOTOR VEHICLE ACCIDENT

Jury rejects Plaintiff's $5MM demand in Cervical Fusion Case

Defense recently obtained a favorable jury verdict in a case where summary judgment on liability was previously granted in a rear end collision against the Golden Touch franchisee. In this damages-only trial, Plaintiff claimed injuries to her cervical spine, including a cervical fusion, with corpectomy, rotator cuff tear to the right shoulder with arthroscopic surgery, and meniscus tear to the right knee with arthroscopic surgery.

The defense focused on the lack of "serious injury," challenging the causation between the accident and the neck surgery. There was a one-year gap in plaintiff's medical treatment from 2015 to 2016. Through a biomechanical/biomedical engineer, MSD challenged that the mechanism of accident was not sufficient to cause the alleged injuries.

During summation, trial counsel for the plaintiff requested $5MM for pain and suffering, medical costs, and future pain and suffering. The Jury awarded a total of $65K, ($10K for past pain and suffering, $40K for future pain and suffering, and $15K for medical treatment for the next 14.8 years, or the life expectancy of the 71-year-old plaintiff). The post-trial motion for additur was denied. ◆

RESULT: $65K Jury Verdict.

COUNSEL: Theresa Hartley
FIRM: McCague Borlack, LLP
HEADQUARTERS: Toronto, Canada

CARRIER NEGLIGENCE

Rare Non-Suit Success

Plaintiffs sued transportation company as a result of alleged damage to its granite after being retained to ship it between two nearby locations. Plaintiffs' only claim was in negligence and based on the theory that the Defendant's erratic driving caused the damage. After calling their case, Plaintiffs did not put forth any evidence to support their theory of liability. Defendant moved for non-suit after Plaintiffs' case closed. Trial Judge agreed that the Plaintiffs did not meet their onus of proof. Action dismissed. ◆

RESULT: Non-Suit Granted Following Trial.

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MUNICIPAL LIABILITY

COUNSEL: E. Barney Robinson III
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, Mississippi

AGENCY DEFERENCE, SEPARATION OF POWERS

Mississippi Supreme Court unanimously affirms state agency decision

On June 6, 2018, Mississippi adopted now-Justice Gorsuch's view and abrogated a long line of cases applying Mississippi's version of the Chevron Doctrine. During the appeal, the Mississippi Supreme Court held "that the Court bears the ultimate responsibility to interpret statutes." It further found that affording agency deference to statutory interpretation violated Mississippi constitutional provisions on separation of powers between the executive, legislative and judicial branches. Id. at 407-08. While ultimately unanimously affirming the state agency decision in the case, the court did so based on a de novo review of the statutes at issue, employing standard cardinals of statutory construction and affording no agency deference. ◆

RESULT: The Mississippi Supreme Court held "that the Court bears the ultimate responsibility to interpret statutes.

COUNSEL: Patrick Flanagan and Alesha Brown
FIRM: Cranfill, Sumner & Hartzog
HEADQUARTERS: Raleigh, NC

MALICIOUS PROSECUTION AND 4TH AMENDMENT DUE PROCESS

Police officer sued for malicious prosecution

Plaintiff was arrested for breaking and entering and larceny and spent approximately one year in jail before being acquitted at trial. Plaintiff then filed a malicious prosecution and due process lawsuit against the Detective in charge of the investigation which led to his arrest. The Federal District Court found as a matter of law that probable cause existed to arrest the plaintiff and dismissed the lawsuit against the Detective. ◆

RESULT: Summary Judgment granted for Detective.

COUNSEL: Charles "Chuck" Deluca, John W. Cannavino Jr., and Thomas S. Lambert

FIRM: Ryan Ryan Deluca LLP

HEADQUARTERS: Stamford, CT

INADEQUATE SCHOOL SECURITY IN SANDY HOOK SHOOTING

Town of Newton and Board of Education sued following the Sandy Hook shooting

Court granted the Motion for Summary Judgment briefed and argued by defense counsel on behalf of the Town of Newton and its Board of Education when the estates of two of the victims of Lanza's attack brought a lawsuit against the Town and its Board for allegedly failing to prevent the attack by the shooter and for having inadequate security.

Court agreed with the defense, finding that, "[i]n the present case, faculty and staff had to make split-second decisions in the face of an armed gunman and subjecting their decisions to scrutiny, aided by hindsight, would no less serve the public interest than subjecting a police officer's discretionary decisions to second guessing." "Emergencies, by their very nature, are sudden and often rapidly evolving events, and a response can never be 100 percent scripted and directed," she wrote. "In an emergency situation, whereby those deemed to react in a discretionary manner are themselves under attack, no reasonable jury could find that anything would have been apparent to these individuals, under such explosive and rapidly evolving circumstances, as a matter of law." The case is currently on appeal. ◆

RESULT: Summary judgment granted.

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

ESTABLISHMENT CLAUSE AND FREE SPEECH CLAUSE

Court affirms constitutionality of curriculum/instruction on Islam in High School World History Course

RESULT: Summary judgment was granted in favor defendant public school administrators with regard to First Amendment Establishment Clause, Free Speech Clause, and retaliation claims brought by a student and her father.

COUNSEL: Hillel David
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, ON, Canada

SLIP-AND-FALL ON A SIDEWALK – MUNICIPAL LIABILITY

Claim arising from fall on sidewalk allegedly in disrepair

The plaintiff slipped and fell on a sidewalk in Toronto. There had been a large storm, with significant snowfall, a week before the incident. The City had plowed and otherwise maintained its sidewalks during the intervening time period, but the plaintiff alleged the sidewalk where the incident occurred was icy due to melt-freeze cycles during that time period. Unlike roadways, there were no legislative minimum maintenance standards for sidewalks. Responses to icy conditions were handled on a case-by-case basis through group decisions of City personnel. Also, unlike claims arising from non-repair of roadways, claims for injury caused by snow or ice on a sidewalk required proof of gross negligence on the part of the municipality.

The trial judge found that the sidewalk had not been in a dangerous condition on the day of the incident. He found that the plaintiff had failed to establish a prima facie case requiring explanation from the City. Even if the plaintiff had been successful in doing so, the trial judge held that the City's general policy was reasonable and that the City's response to the conditions in the period leading up to the incident had also been reasonable. He therefore concluded that the City had not been grossly negligent. The trial decision was affirmed on appeal. Included for consideration on the appeal were the issues of the standard of review on an appeal and what constitutes gross negligence. ◆

RESULT: Dismissal of action affirmed on appeal.

COUNSEL: Timothy J. Finnerty and Jason M. Janoski
FIRM: Wallace Saunders, Chrtrd.
HEADQUARTERS: Overland Park, Kansas

NEGLIGENCE

Sheriff's Deputy Wins on Public Duty Doctrine

Plaintiff unknowingly picked up a fleeing felon who had shot a cop as a hitchhiker. Defendant was a Sheriff's Deputy who responded to find the felon after a report the felon had gotten into a red pickup truck (Plaintiff's). The Deputy saw the truck and followed slowly while awaiting backup. The truck stopped, the felon got out, and the Deputy approached, identifying himself and saying "show me your hands." The felon opened fire on the Deputy, who fell to the ground and returned fire. While Plaintiff was still sitting in his truck, a bullet struck him in the neck during this exchange causing injury. The Court found that the "public duty doctrine" applied and that the Deputy owed a duty to the public at large – not to the individual Plaintiff. Without a duty, there is no cause of action for negligence. The Court also found that the Deputy was performing a "discretionary function" and was immune from liability pursuant to the Kansas Tort Claims Act. It granted summary judgment for the Deputy and the County. Plaintiff's counsel sought to avoid a federal venue for the lawsuit and instead pursued a common-law excessive-force case. Plaintiff sought $318K in damages. ◆

RESULT: Summary Judgment Granted for Defendants.

COUNSEL: Anthony Ellrod, Karen Liao and Trisha Newman
FIRM: Manning & Kass, Ellrod, Ramirez, Trester, LLP
HEADQUARTERS: Los Angeles, California

NEGLIGENCE – VOLUNTEER AT NO-KILL ANIMAL SHELTER MAULED BY DOG

Court of Appeal Affirms Summary Judgment in Dog Mauling Case

Plaintiff was a volunteer at a no-kill animal shelter. She was asked to walk a pit bull, but when she approached the dog with a leash she was attacked. She sustained severe injuries requiring 11 days of hospitalization and four surgeries. She continues to have significant limitations and disfigurement. Plaintiff claimed that the dog was misclassified, and that defendant provided insufficient training and equipment. Defendant brought a motion for summary judgment based upon the volunteer release plaintiff signed and under the primary assumption of risk doctrine. The trial court granted the motion, and the Court of Appeal affirmed. ◆

RESULT: Summary Judgment in Favor of Animal Shelter Upheld on Appeal.

COUNSEL: Patrick Flanagan and Carl Newman
FIRM: Cranfill, Sumner & Hartzog
HEADQUARTERS: Raleigh, NC

USE OF EXCESSIVE FORCE AND WRONGFUL DEATH

Sheriff's Deputies

Plaintiff's decedent was shot by two Sheriff's Deputies who were responding to a call of a disturbance in rural North Carolina mountains. The officers fired five shots, one struck and killed the decedent, while the other bullets struck the porch and the house where the decedent's two teenage daughters were standing. Plaintiffs filed wrongful death and excessive force claims on behalf of the estate, and assault and negligent infliction of emotional distress claims on behalf of the two daughters. A Federal jury found that the Deputies' conduct was reasonable under the circumstances and the case was dismissed. ◆

RESULT: Jury verdict for Defendant Law Enforcement Officers.

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PERSONAL INJURY

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

ALLEGED BURN INJURY

Burn Injury Case in building grandfathered on insulation code

Defense won summary judgment in an odd case involving the plaintiff's alleged burn injuries. Defendant owned and operated a non-profit homeless shelter. Plaintiff suffered a seizure while seated on the toilet within his assigned apartment. The seizure caused him to fall to the floor and involuntarily lock his feet around an exposed portion of his apartment's steam heat riser. His feet remained locked around the pipe for a prolonged period of time and melted away the contacting skin.

Defense argued that this was an unforeseeable medical emergency, not any negligence on the part of the client or its staff. NY's 1968 Building Code requiring landowners to insulate such pipes did not apply because the building was constructed in 1906. Thus, the building was "grandfathered" under the older Building Code, which did not mandate pipe insulation. Plaintiff argued that the pipe should have been insulated, but the Court agreed that the unforeseeable seizure was the operative event that severed any causal relationship between the injuries and any possible negligence by the defendant. The case was dismissed. ◆

RESULT: Summary Judgment Granted.

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PRODUCT LIABILITY

COUNSEL: Martin A. Smith & Alex Robineau
FIRM: McCague Borlack LLP
HEADQUARTERS: Ottawa, Canada

DUTY TO WARN AND REASONABLE FORESEEABILITY

Duty to warn in $1MM case

Plaintiff hired defendant to repair neon signage. A fire originating from a neon sign which the defendant had not worked on caused property damage. An expert determined improper installation was the cause. Plaintiff sued for $1,050,000.00 in damages. Defendant's summary judgment motion refused, leave to appeal refused, action dismissed at trial. The Court found for the defense and dismissed the claim, finding that the electrician did not have a positive duty to warn of a third party's mistakes. Experience or expertise alone does not give rise to a duty to warn of specific risks caused by a third party, making the loss unforeseeable. ◆

RESULT: Action dismissed at trial.

COUNSEL: Barry Jacobs
FIRM: Abrams Gorelick Friedman and Jacobson, LLP
HEADQUARTERS: New York, New York

CLASS ACTION SUIT ALLEGING DISTRIBUTION OF TAINTED DRUG

Defense and Indemnification of Insured pharmacy

In a case in which the firm represented the insured, defense prevailed for the manufacturer and distributor of an allegedly tainted drug – Valsartan – to assume the defense and indemnity of its client. The client, a pharmacy, had filled several prescriptions of the subject medication for plaintiff, but always prior to the recall of the drug. Plaintiff, who apparently had not suffered any physical injury as a result of the drug, claimed that the pharmacy knew or should have known that the drug was tainted despite the absence of a recall.

Counsel for the drug manufacturer and distributor will be defending the pharmacy in the lawsuit, which has been transferred to the District Court of New Jersey, where it be joined in the MDL pending there. ◆

RESULT: Drug manufacturer and distributor has assumed the defense of insured pharmacy.

COUNSEL: Michael Kennedy & David Elmaleh
FIRM: McCague Borlack LLP
HEADQUARTERS: Kitchener, Canada

PRODUCT LIABILITY

Limitation Periods in Product Liability Cases

Plaintiff sued for damages resulting from an allegedly defective hydraulic lubricant. More than two years after the claim, the plaintiff attempted to increase the claim for damages. Defense successfully opposed the amendment in the underlying action on the basis that each portion of damages should have its own limitation period (meaning the amendments were out of time). Given the value of the damages that were excluded, the plaintiff appealed. The Court of Appeal heard arguments and determined that only one limitation period should apply for all damages, regardless of when they were discovered. ◆

RESULT: Only one limitation period exists for all resultant damages in a product liability case.

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PROFESSIONAL LIABILITY

COUNSEL: Eric Turkienicz
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, Canada

MORTGAGE LITIGATION

Plaintiff seeking execution before judgment!

Plaintiff mortgagee sued guarantor of mortgage for balance owing after default. Plaintiff used existence of the litigation to scare real estate lawyer into holding in escrow proceeds of sale of a related property which were payable to guarantor. Plaintiff argued that those funds were needed to satisfy their ultimate judgment against the guarantor and so they should remain in escrow pending resolution of the litigation. Following failed summary judgment motion by Plaintiff, Plaintiff brought motion under Rule 45.02 to preserve the money as a specific fund earmarked to the litigation. Court disagreed and found that despite the properties and parties being peripherally related to the litigation, the pleadings did not reference the matters giving rise to the sale of the property and that there was therefore no connection between the funds and the present litigation. Motion dismissed and funds ordered released to the guarantor from escrow. ◆

RESULT: Motion dismissed and funds released to defendant.

COUNSEL: Katherine Delage, Nicholas J. Krnjevic and Ann-Julie Auclair
FIRM: Robinson Sheppard Shapiro LLP
HEADQUARTERS: Montreal, Canada

PROFESSIONAL LIABILITY

Shareholders, in $55MM case, do not possess a right of action separate from the corporation

On December 7, 2018 — the Supreme Court of Canada released its decision in Brunette v. Legault Joly Thiffault, s.e.n.c.r.l., 2018 SCC 55, a professional liability case with stakes of $55 million. It dismissed the claim at the preliminary stage against a tax law firm, restating two legal principles: 1. a party needs to demonstrate a sufficient interest to file legal proceedings, 2. Shareholders do not possess a right of action allowing them to claim damages from professionals having rendered services to the company in which they hold shares. ◆

RESULT: Dismissal of action at a preliminary stage.

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PROPERTY

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

SLIP AND FALL WITH TRAUMATIC BRAIN INJURY

Slip and Fall at Starbucks with Traumatic Brain Injury

A customer at Starbucks picked up his coffee at the counter and it spilled on the counter and onto the floor. Moments later, the plaintiff slipped on the coffee and fell. The barista working behind the counter saw that some of the coffee had dripped onto the floor and called to the shift supervisor to take care of the spill, as the barista himself could not access it from behind the bar. By the time the shift supervisor got to the spill, the Plaintiff had already fallen. Plaintiff went to the emergency room and complained that she fell and struck the back of her head and had pain in her right elbow and hip. Plaintiff alleged that she sustained a traumatic brain injury, loss of balance, and tinnitus from the fall. Plaintiff alleged that Starbucks was negligent in that it failed to adequately protect and warn her from the coffee spill. Plaintiff asked the jury to award her $650,800 in damages. Starbucks offered a pre-trial statutory offer of $45,001. After a nine-day jury trial, the jury returned a complete defense verdict after deliberating for three hours. The jury found that Starbucks was not negligent (9/3) and not negligent in the use and maintenance of its property (9/3). As the prevailing party, Starbucks filed a cost bill of just under $100,000. ◆

RESULT: Defense verdict.

COUNSEL: Eric Turkienicz
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, Canada

OCCUPIERS LIABILITY

Plaintiff has duty to investigate the identities of potential defendants

Plaintiff sued property manager, maintenance company, and owner for a slip and fall at a mall. Plaintiff was advised of existence of contract between property manager and security company to conduct inspections after litigation commenced and limitation period expired. Plaintiff brought motion to add security company as defendant and argued discoverability. Court found that because Plaintiff knew that security guards were on site, she and her counsel had duty to investigate their identity within the normal limitation period. Court further found that discovery of contract between parties was a red herring and not the trigger for discovery of the claim since the plaintiff could not base her claim in contract. While courts often rubber stamp these motions, the Judge dismissed the motion in this instance, creating precedent for other parties in similar situations. ◆

RESULT: Motion to add Defendant dismissed.

COUNSEL: Jim Tomlinson and Garett Harper
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, Canada

NEGLIGENCE – OCCUPIERS' LIABILITY AND WAIVERS

Ontario Court of Appeal upholds validity of waivers

In this case, the Ontario Court of Appeal heard two cases together that involved injured skiers bringing lawsuits against ski resorts after having signed agreements waiving the facilities' liability in the event that the skiers sustained damages. The lower courts found that the liability waivers were voided by the provisions of the Consumer Protection Act (CPA).

Firm was retained by one of the interveners on appeal. The Ontario Court of Appeal came to the conclusion that the right of an occupier to limit its liability under the Occupiers' Liability Act (OLA) trumps the provisions of the CPA. While the plaintiffs argued that the relevant portions of the OLA and CPA could be read harmoniously, the Court of Appeal found that there was an irreconcilable conflict between the two statutes. The Court determined that the OLA was intended to be an exhaustive scheme in relation to the liability of occupiers and held that the specific provisions of the OLA superseded the more general provisions of the CPA. Accordingly, the Court concluded that the CPA cannot be used to nullify an otherwise valid waiver of liability. Leave is now being sought by the plaintiffs to appeal to the Supreme Court of Canada. ◆

RESULT: Court of Appeal reversed previous findings that waivers of liability are voided by the provisions of the Consumer Protection Act.

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

PREMISES LIABILITY

Landowner sued for $1MM after Plaintiff Injured in industrial accident

Plaintiff suffered various orthopedic injuries including multiple fractures of his left clavicle, left shoulder, left wrist, ribs and a C4-5 chip fracture after being injured while excavating land as part of a Penndot road widening project. Plaintiff required multiple surgeries and a lengthy hospital and inpatient rehabilitation stay because of his injuries. Plaintiff, through their expert, alleged that Defendant failed to conduct or require proper safety measures, identify potential hazards on site and failed to address safety hazards and ensure safety management leading to Plaintiff's accident.

Damages were sought for lost and future wages, medical bills and pain and suffering in excess of $1MM.

After four years of litigation consisting of extensive discovery including the production of adverse expert reports and the denial of an initial motion for summary judgment, the Court granted summary judgment for the property owner just prior to trial. ◆

RESULT: Summary Judgment granted in Favor of Defendant.

COUNSEL: Anthony Ellrod, Karen Liao and Trisha Newman
FIRM: Manning & Kass, Ellrod, Ramirez, Trester, LLP
HEADQUARTERS: Los Angeles, California

NEGLIGENCE AND PREMISES LIABILITY – FALL FROM ROCK CLIMBING WALL

Summary Judgment on Release and Primary Assumption of Risk Affirmed

Plaintiff sustained a broken back after falling at defendant's rock-climbing facility. Her injuries were severe, requiring several surgeries including internal fixation. Plaintiff claimed that contrary to the facility's policies she received no instruction before climbing and claimed that the padding at the facility was less than industry standard. Defendant's motion for summary judgment based upon the release plaintiff signed as well as the primary assumption of risk doctrine was granted by the trial court and affirmed by the Court of Appeal. ◆

RESULT: Trial Court Dismissal Negligence and Premises Claims Upheld on Appeal.

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

PREMISES LIABILITY

Greedy Plaintiff lets $1MM offer slip out of her hands

Plaintiff sued the adjoining landowner and sought in excess of $5MM for failure to repair the sidewalk in a timely manner. Plaintiff underwent lumbar laminectomy and fusion. She also has arthroscopic surgery to her shoulder. Plaintiff's economist projected $2,377,766.00 in special damages. Defense spinal surgeon and biomechanical expert refuted causal connection. Verdict for the defense. ◆

RESULT: Jury found in favor of defense in "plaintiff oriented" Bronx County.

COUNSEL: Robert M. Browning, H. Miles Klaff & Casey Armstrong
FIRM: Brown Sims, P.C.
HEADQUARTERS: Houston, TX

PREMISES DEFECT

No Duty to Warn Where Plaintiff Perceived Danger

Plaintiff attended a wedding at Defendant country club and fell when stepping from the club's front landing onto the sloped driveway. The Plaintiff testified that she perceived the step but failed to appreciate the height of the curb at the specific point where she stepped down. An expert opined that the sloped driveway and level landing was consistent with ordinary construction practices. Plaintiff sought $500K in damages. Plaintiff's claims were dismissed on Defendant's summary judgment motion. The Plaintiff appealed, and the Court of Appeals upheld the trial court's summary judgment finding that the club did not have a duty to warn of the danger or otherwise make the landing safe. ◆

RESULT: Defense win, Summary Judgment Upheld on Appeal.

DEFENSE COUNSEL: Rodney R. Parker and Adam M. Pace
FIRM: Snow Christensen & Martineau
HEADQUARTERS: Salt Lake City, UT

PREMISES LIABILITY – NEGLIGENCE

Plaintiff wasn't watching where she was going and tripped over a flat

The plaintiff broke her shoulder when she tripped over a flat-bed stocking cart in the seasonal area of the store during the morning after Christmas sale. Plaintiff's trial strategy was to use "Reptile Theory" tactics to demonize the store by attacking its safety culture. The defense maintained that the cart was open and obvious, and that plaintiff was at fault for her own injuries because she wasn't watching where she was going. The trial court granted defense motions in limine to exclude general safety evidence and keep the case focused on the plaintiff's accident. The trial lasted five days. After deliberating for seven hours, the jury sent a note asking: "If the allocation of fault is 50%/50% (both parties have equal fault) do we need to continue to answer questions [about damages]?" The jury returned with a defense verdict a few minutes later. ◆

RESULT: Defense verdict after jury trial.

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WRONGFUL DEATH

COUNSEL: Herschel E. Richard, Jr.; David J. Hemken

FIRM: Cook, Yancey, King & Galloway

DEATH CASE INVOLVING THE EMPLOYEE OF A CONTRACTOR WORKING IN A PAPER MILL WHO FELL TO HIS DEATH

Deceased survived by minor child and three major children; plaintiffs ask for $5.3MM

Deceased fell to his death and his survivors alleged the grating on which he was working gave way, resulting in his fall. The defendant filed a motion for summary judgment based on the contention that the deceased was the statutory employee of the defendant and the exclusive remedy in the case was worker's compensation. After extensive discovery and briefing, the court granted defendant's motion and dismissed the case with prejudice. ◆

RESULT: Defense win, Summary Judgment Granted.

COUNSEL: Herschel E. Richard, Jr.; David J. Hemken

FIRM: Cook, Yancey, King & Galloway

THREE OILFIELD WORKERS WERE SERIOUSLY INJURED DURING THE FRACKING OF A WELL

Injured oilfield workers claim $3MM in damages

A contractor's employee was the borrowed servant of the owner/operator of a gas well. Plaintiffs were employees of subcontractor responsible for a frac of a gas well in the Haynesville Shale. During the frac, the lines were over pressured, and the plaintiffs were injured as a result. It was alleged that the completion engineer, a purported independent contractor, was responsible for the over pressurization. The granting of a partial summary judgment concluded that the completion engineer was the borrowed servant of the owner/operator. This resulted in a resolution of the case wherein the completion engineer and his employer paid nothing. ◆

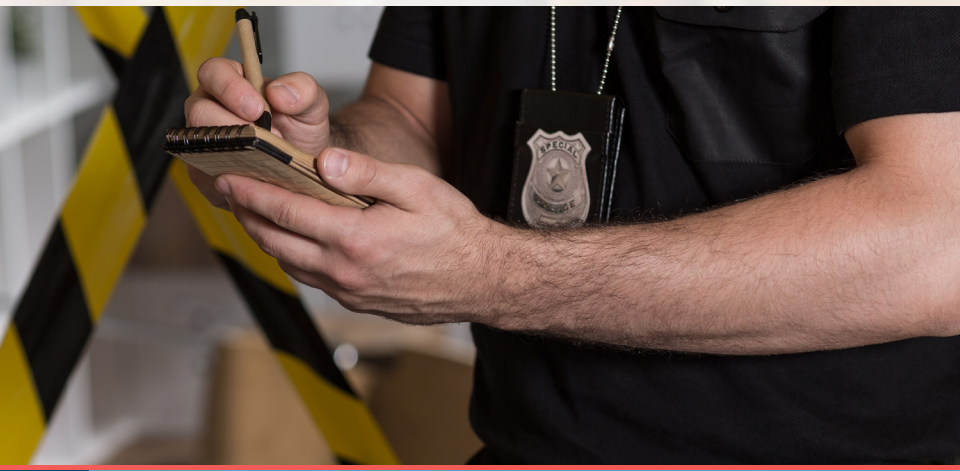
RESULT: Defense win, motion for Partial Summary Judgment Granted.

COUNSEL: Felicia Galati
FIRM: Olson, Cannon, Gormley, Angulo & Stoberski
HEADQUARTERS: Las Vegas, NV

WRONGFUL DEATH

Summary Judgment on Stand your Ground Law

Defense successfully obtained summary judgment in a wrongful death case of a minor based on NRS 200.120, Nevada's stand your ground law. The decedent broke into the client's home and was shot and killed. The decision was confirmed upon dismissal of the appeal. ◆



COUNSEL: John A. Merrick, William J. G. Barnes, George A. Somerville, and Stanley P. Wellman

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

HEADQUARTERS: Richmond, VA

WRONGFUL DEATH – NEGLIGENCE – DUTY

Assumption of Duty Rule in $5M Wrongful Death murder case

The administrator of a taxi driver who was murdered by a passenger sued the dispatcher and his employer alleging that they had undertaken a duty to warn their driver of an unsafe condition and negligently breached that duty. The trial court sustained the defendants' demurrer (motion to dismiss) and the Supreme Court of Virginia affirmed that dismissal by a 4-3 decision. The majority reasoned that, generally, "there is no duty to warn or protect against acts of criminal assault by third parties [because], under ordinary circumstances, acts of assaultive criminal behavior by third persons cannot reasonably be foreseen." The Court further held that a duty to protect another person from a third-party criminal assault is limited to "special relationships", such as common carrier/passenger, and to express undertakings. An implied undertaking, as alleged in this case, is not sufficient. ◆

RESULT: Trial Court dismisses and Lawsuit Upheld on Appeal.

DEFENSE COUNSEL: Michael D. Hutchens and John E. Radmer
FIRM: Meagher & Geer, P.L.L.P.
HEADQUARTERS: Minneapolis, MN

DOUBLE WRONGFUL DEATH AND BRAIN INJURY CLAIM FROM CARBON MONOXIDE POISONING

HVAC provider sued for death of husband and wife and brain injury of an adult relative

A husband and wife were killed, and their sister was brain damaged after a carbon monoxide incident in Jamestown, North Dakota. The survivors sued claiming that the HVAC company failed to detect a defect in their residential furnace. A stipulation was reached on damages. The case went forward on the liability issue alone. The jury found that the defendant's negligence was not a cause of the deaths and injury. The defense maintained that the carbon monoxide poisoning was caused by the homeowner's negligent attempt to repair his furnace. The jury deliberated for less than two hours. ◆

RESULT: Defense verdict after jury trial.

ADDITIONAL IMPORTANT CASES

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

AUDIO RECORDING OF PROBATION OFFICER

State sues to revoke probation

State alleged defendant had violated probation by performing audio recording of probation officer. Violation of probation was dismissed at the hearing due to technical arguments regarding the Maryland Wiretap statute. ◆

RESULT: Defense win, case dismissed.

COUNSEL: Mica Nguyen Worthy
FIRM: Cranfill Sumner & Hartzog LLP

AVIATION BUSINESS DISPUTE

Obtained favorable resolution for the client

The Client, a general aviation pilot, contracted for the right to purchase a Jet with certain specifications and equipment. However, shortly before production of the aircraft, the manufacturer sought to increase the total contract price and indicated the specified equipment was not available as previously indicated without bundling other items, for which the Client did not contract. The case required analysis of the potential for arbitration compared to the potential for litigation and the analysis of terms of the proposed aircraft purchase agreement. The Jet manufacturer demanded the Client's agreement to the new terms on a short deadline, but Firm was able to work quickly and diligently to persuade the Jet manufacturer to come to a suitable resolution that involved a buy-back of the Jet position at a commercial rate beneficial to the Client. ◆

RESULT: Confidential Pre-Suit Settlement .

COUNSEL: Eric Turkienicz
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, Canada

CIVIL CONTEMPT

Civil Contempt of a fraudster: Unusual service and examining his mother

Judgment previously obtained against individual masquerading as a lawyer for $1.4MM. Debtor failed to provide accounting of where funds went or attend judgment debtor examination. Motion brought for civil contempt of court. Fraudster was personally served with prior case materials but "disappeared" before he could be served with contempt motion materials personally. Creditor plaintiff satisfied the court that the contemnor was aware of the proceedings by serving his criminal lawyer with the materials. Court further granted creditor permission to examine the fraudster's mother regarding his personal assets as her own assets and business dealings were intertwined with his. Finding of contempt made. ◆

RESULT: Finding of contempt and permission granted to examine non-party relative.

DEFENSE COUNSEL: Jennifer M. Herrmann
FIRM: Kightlinger & Gray, LLP
HEADQUARTERS: Indianapolis, Indiana

CLAIM FOR BREACH OF CONTRACT ALLEGEDLY RESULTING IN OVER $1.3 MILLION IN DAMAGES

Property management company accused of breaching contract and abandoning property

The owner of an apartment complex entered into a property management agreement with a property management company. The relationship between the owner and the property management company began to deteriorate shortly after the agreement was finalized. As a result, four and a half months after the agreement was finalized, the property management company gave a 30-day notice of its intent to terminate the agreement pursuant to the terms of the agreement. The day after said notice was given, the owner forced employees of the property management company off of the property. The owner filed suit against the property management company and the President/CEO of same, alleging a breach of contract claim, professional negligence claim, fraud claim, and offense against property claim. The Court granted a Motion for Partial Summary Judgment and entered judgment in favor of the property management company and the President/CEO on all claims except the breach of contract claim against the property management company. The remaining claim was presented to a superior court judge over two days, with the testimony of five lay witnesses, testimony of three purported expert witnesses and substantial evidence from the owner's files and property management company's files. The result was a judgment for the property management company, with the Court specifically

DEFENSE COUNSEL: Jennifer M. Herrmann
FIRM: Kightlinger & Gray, LLP
HEADQUARTERS: Indianapolis, Indiana

[CONTINUED]

finding that the property management company did not breach the contract and the owner did not suffer damage as a result of any alleged breach. ◆

RESULT: Defense verdict before a superior court judge.

COUNSEL: David Elmaleh
FIRM: McCague Borlack LLP
HEADQUARTERS: Toronto, Canada

CLASS ACTION – RENEWABLE ENERGY LITIGATION

$19.5MM Class Action, Renewable Energy and Fraud

A class of Plaintiffs sued various companies alleging fraud and deceptive business practices related to the largest Feed-in-Tariff Renewable Energy Program in Canada. The companies allegedly lured plaintiffs to invest tens of thousands of dollars in solar panel installations only to keep the money and not build the projects. The class of Plaintiffs sought Leave of the Court to add Firm's client, the administrator and regulator of the renewable energy program in Ontario, Canada. Firm succeeded in persuading the Court that Leave should be Denied on the basis that the two-year limitation period expired – the class knew, or ought to have known, that the administrator / regulator did not warn the class of the deceptive practices of the third-party companies yet made a tactical decision not to sue it at the outset. As a result, a $19.5MM class action proceeding did not proceed forward against client. ◆

RESULT: A Regulator of Renewable Energy Programs is Not Liable in $19.5MM Class Action due to Expiry of Limitation Period.

COUNSEL: David Keller, Raymond Robin, Elizabeth Izquierdo
FIRM: Keller Landsberg PA
HEADQUARTERS: Fort Lauderdale, FL

CONSPIRACY – USURPATION OF CORPORATE OPPORTUNITY, MISREPRESENTATION, AIDING AND ABETTING, CIVIL THEFT, CLAIMS FOR PUNITIVE DAMAGES

Attorney sued on multiple claims including punitive damages

Defense assumed representation from original counsel in a challenging case, after several years of litigation, and a number of adverse rulings, including Orders Granting Leave to pursue punitive damage claims against the defendant lawyer and a major law firm. The defense team prevailed after a two-week jury trial on claims for Conspiracy – Usurpation of Corporate Opportunity, Negligent Misrepresentation, Aiding and Abetting Fraud/Theft of Corporate Opportunity, Civil Theft and Breach of Contract/Escrow Agreement. The defense team obtained a Directed Verdict on the claims for Civil Theft and for Punitive Damages against the firm, and ultimately a complete defense verdict on all remaining claims. The Court recently granted Defendants' Motion for recovery of substantial attorneys' fees and costs, with the amounts to be determined. ◆

RESULT: Defense win – attorneys' fees and costs awarded.

DEFENSE COUNSEL: Steve Goldstein
FIRM: Betts, Patterson & Mines, P.S.
HEADQUARTERS: Seattle, WA

DEFAMATION CLAIM AGAINST CHURCH AND SCHOOL

Truth – Still the best defense

Plaintiff sued a church and school for defamation because of a teacher's statement to sixth grade students that the plaintiff had threatened to punch the teacher's father, who was pastor of the church and administrator of the school. The defense asserted that the statement was true, and/or the teacher had a reasonable belief it was true. After an emotionally charged bench trial because of technical defenses, Firm believed a judge would understand better than a jury, the Court ruled in favor of the defense, finding both the statement was true and the teacher had a reasonable belief it was true. ◆

RESULT: Defense Judgment.

COUNSEL: Melody Jolly; Deedee R. Gasch
FIRM: Cranfill Sumner & Hartzog LLP
HEADQUARTERS: Raleigh, NC

DRAM SHOP ALCOHOL LIABILITY

Compensatory and Punitive Damages Sought Against Bar

Defense obtained a jury verdict in favor of the defense after the jury deliberated for only 22 minutes. Plaintiffs alleged that a local Fraternal Organization overserved alcohol to a member who was allegedly a "regular" at the on-site bar to the point of intoxication. The member allegedly left the premises and was involved in a motor vehicle accident. The Plaintiffs, the family in the vehicle struck by the drunk driver, claimed the Fraternal Organization was responsible for significant, permanent neck and back injuries they sustained in the automobile accident caused by over service of alcohol. They also sought an award of punitive damages. The drunk driver resolved his claim before trial as did another establishment that allegedly served alcohol to the drunk driver. The Defendants contended that there was no evidence that the member was at the establishment on the day in question, nor any evidence that he was served any alcohol by the organization, much less that he was overserved. Defense successfully excluded evidence of the breathalyzer results and significantly limited the testimony of Plaintiffs' toxicologist. After evaluating the evidence, the testimony from several witnesses including Plaintiff's expert toxicologist and treating physicians and closing arguments in which Plaintiff's counsel asked for a verdict in excess of $170K in compensatory damages alone, the jury found no negligence and returned a verdict in favor of Defendants. ◆

RESULT: Fraternal Organization Obtains Defense Verdict in Dram Shop Liquor Liability Case.

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