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News

Veilleux Re-Elected as NHD's Managing Attorney

At the firm's recent Membership meeting, John Veilleux was unanimously reelected by Members of the firm for his third term as the firm's Managing Attorney. John was first elected to this position in late 2020 when Managing Attorney Steve Hessert retired. John formally took the reins as Managing Attorney in January 2021 after serving as the Chair of NHD's Litigation Group for a number of years. John continues to maintain a full and active caseload involving all types of liability defense litigation in addition to his management role.

Johnson & Veilleux Prevail in Law Court

Sam Johnson and John Veilleux recently scored an appellate win in *Fama, et al v. Bob's, LLC, et al*, 2024 ME 73, — A.3d —, which overruled the Superior Court's denial of summary judgment. The Law Court concluded that the Plaintiff's liquor liability claim against a restaurant was barred by the named and retained requirement of Maine's Liquor Liability Act. The Court concluded that the Plaintiff's prior settlement of a worker's compensation claim involving her late husband's co-employee resulted in immunity to that co-employee, which in turn barred the liquor liability claim against the restaurant.

In *Fama*, an action was brough by a spouse personally, and in her capacity as the executor of the estate of her late husband, against a restaurant and her late husband's coworker for liquor liability, wrongful death, wrongful death conscious pain and suffering, loss of consortium, and battery. The allegations stemmed from an altercation that occurred after dinner while her late husband and his coworkers were staying in Maine on assignment for their employer.

The spouse had previously submitted a claim for worker's compensation benefits for her late husband's injuries and death, which claim was accepted, paid, and memorialized in a settlement agreement. Following that settlement the spouse filed claims against the restaurant her late husband had dinner at with his co-workers prior to the altercation, and the co-worker involved in the altercation with her late husband after dinner.

At the trial court level, the co-employee defendant moved for summary judgment arguing that given the worker's compensation settlement he was immune from suit pursuant to Maine's Worker's Compensation Act. The restaurant also moved for summary judgment arguing that in light of the immunity afforded to the co-employee defendant, the liquor liability claim failed as a matter of law. Both motions were denied and an interlocutory appeal was filed by the co-employee and restaurant.

On appeal, the Law Court addressed the interlocutory nature of the appeal. The Court concluded that it would reach the merits of the appeal because both the Death Knell and Judicial Economy exceptions to the final judgment rule applied to the facts of this case. Addressing the merits, the Law Court concluded that the receipt and retention of worker's compensation benefits by the decedent's spouse afforded immunity to the co-employee defendant pursuant to Maine's Worker's Compensation Statutes. Further, because the co-employee defendant was immune from suit, the Law Court held that the decedent's spouse was unable to maintain a liquor liability claim against the restaurant.

To maintain a liquor liability claim, in addition to naming the establishment serving alcohol, the Plaintiff must also name and retain the patron who was allegedly overserved. To be named and retained within the meaning of the Act, the overserved patron must have an actual and real financial stake in the outcome of the litigation. Here, because the allegedly overserved patron was a co-employee that was immune from suit, that co-employee defendant did not have an actual stake in the outcome of the litigation and therefore could not be named and retained in the lawsuit as required by Maine's Liquor Liability Act. As a result, the court concluded it was an error of law to deny the motions for summary judgment and the matter was remanded to the trial court for entry of judgment in favor of the co-employee defendant and restaurant defendant.

For more information, please contact Sam Johnson.

The Intra-Family Eviction

Evictions are a sad but necessary reality in our society. Intra-family evictions, however, present unique issues that sharpen both the tragedy and necessity of that grim reality. Against a backdrop of allegations of elder exploitation, Aaron Baltes recently obtained a judgment of possession for an elderly landlord in an eviction case against his adult son for non-payment of rent. In *Oleston v. Oleston*, the District Court judge ruled that the tenant had failed to pay rent as agreed by the parties, that the landlord had provided sufficient notice under the tenancy-at-will statute, and the landlord was entitled to possession of the premises.

Motion to Modify Denied

In the arena of family law, the venerable notion of the "finality of judgments" buckles under the common sense need for family orders involving children to evolve as the children age and develop. Hence, a parent can modify a family order involving a minor child, but only if they can prove there has been a substantial change in circumstances and the requested modification is in the best interests of the child. In *Wing v. Wing*, Aaron Baltes successfully defended against a post-divorce motion to modify. After the moving party presented her case, Aaron's motion for judgment as

a matter of law was granted on the grounds that there was insufficient evidence to prove a substantial change in circumstances. Aaron's timely procedural move obviated the need for his client to testify, streamlining the proceeding and reducing expenses for the client.

Pattershall Secures Dismissal for Lack of Personal Jurisdiction

Brad Pattershall recently secured the dismissal for his client Tommy Woodward, Inc. d/b/a Columbia Diesel Castings ("Columbia Diesel"), a Mississippi corporation, when the United States District Court determined it lacked personal jurisdiction over Columbia Diesel.

The case was initiated by a local company called Three Girls Fishing, LLC ("Three Girls"), that owned a commercial fishing boat based in Maine. Three Girls purchased a re-conditioned diesel engine for its fishing boat from a Louisiana corporation called Pan-American Power Corp. ("Pan Am") and had the engine installed in the boat in Maine. Before Pan Am shipped the engine to Maine for installation, it asked Columbia Diesel, which has one shop in Columbia, Mississippi, to perform specification work on the engine's crankshaft. Columbia Diesel performed the work within a week and shipped the crankshaft back to Pan Am in Louisiana, about one hour away. Columbia Diesel had no knowledge of the crankshaft's or engine's ultimate destination.

After the engine failed while the fishing vessel was at sea, Three Girls sued Pan Am in federal court in Maine. Pan Am then brought in Columbia Diesel and three other parties as third-party defendants. Pan Am sought contribution from Columbia Diesel, and the other third-party defendants similarly filed crossclaims seeking contribution.

Columbia Diesel filed a motion to dismiss Pan Am's third-party complaint and the various crossclaims of the other third-party defendants pursuant to F.R. Civ. P. 12(b)(2), asserting that the court lacked personal jurisdiction over Columbia Diesel. Judge Torresen granted the motion on August 12, 2024 in a well-reasoned, 20-page decision in the matter of Three Girls Fishing, LLC v. Pan American Power Corp. et al., Docket No. 2:23-cv-00175-NT. The judge held that Columbia Diesel had insufficient ties to Maine to justify exercising general or specific jurisdiction over Columbia Diesel, holding essentially that Columbia Diesel's only contact with Maine was the random and fortuitous installation of the engine, and the crankshaft it worked on, in a boat in Maine. USCOURTS-med-2_23-cv-00175-0.pdf (govinfo.gov)

Sam Johnson Wins 19-Minute Defense Verdict

Reports of "Nuclear Verdicts" have been greatly exaggerated by the media. In *Weeks v. True*, Sam Johnson recently obtained a defense verdict in Penobscot County Superior Court after the jury deliberated for a total of 19 minutes.

The case involved an auto accident in which liability was not contested, but the causal connection between the claimed damages and auto accident were in dispute.

A $10,000.00 offer of judgment was submitted in advance of trial, which was rejected. The Plaintiff's final demand was $100,000. Following a one-day trial, the jury found that none of the damages alleged by Plaintiff were related to the auto accident. All 9 jurors concurred in the verdict.

The Three-Parent Problem

Netflix has a show called "The Three-Body Problem." Aaron Baltes recently prevailed in a case that could be called "The Three-Parent Problem." In 2015, the Maine Parentage Act modernized the statutes governing parentage, providing for several different methods for establishing legal parentage beyond a genetic link to the child. The Act proved critical in establishing parental rights for Aaron's client in *Rose v. Rose*, where two married females recruited a male friend to be a sperm donor for one of them in the "old-fashioned" way and used a sperm donor agreement they found on the Internet. Because they did not use IVF or another form of assisted reproduction, however, the agreement was not enforceable and the sperm donor advanced a parental rights claim that was consolidated with the females' divorce. After protracted litigation and a contested hearing, Aaron's client was granted allocated parental rights and primary residence despite having no genetic link to the children. As they say, "love is thicker than blood."

Hadiaris & Lavoie Successfully Defend Maine Surgeon in Jury Trial

NHD trial attorneys JD Hadiaris and Mark Lavoie recently secured a defense verdict for a Maine surgeon in a medical malpractice jury trial at the York County Superior Court.

At trial, the Plaintiff claimed that the surgeon failed to obtain valid informed consent for a cervical lymph node excisional biopsy, which had been recommended in conjunction with a thyroid wedge biopsy to test for possible malignancy. The Plaintiff alleged that an injury to the recurrent laryngeal nerve occurred during the lymph node excisional biopsy

The Plaintiff and his expert alleged that the surgeon was required to offer the Plaintiff the option of a wedge biopsy *only*, without the lymph node excisional biopsy — despite the fact there was concern for possible malignancy due to, *inter alia*, abnormal appearance of the lymph nodes on ultrasound, lymphadenopathy, and prior needle biopsy testing that failed to rule out cancer. Furthermore, after the needle biopsies were taken, the surgeon spoke

with pathology, and lymph node excision was recommended to perform further testing.

At trial, the defense team presented a nationally recognized expert in endocrine surgery who testified that the lymph node excisional biopsy was a necessary part of the procedure and was *required* by standard of care. The expert also testified that the standard of care did not require the surgeon to offer unreasonable treatment options – such as a wedge biopsy only, without the lymph node excisional biopsy – to the patient. On the issue of causation, the expert explained that it was completely speculative to suggest that the nerve injury – a known risk of the procedure, and not evidence of negligence on the part of the defendant surgeon – occurred during the lymph node excisional biopsy portion of the operation, as opposed to the wedge biopsy or during intubation.

In closing, the defense argued that the Plaintiff failed to establish any of the necessary elements of his claim for lack of informed consent under Maine law. The jury began deliberations on the afternoon of May 6, 2024, and returned a defense verdict on the same day.

Following trial, the Plaintiff moved for a new trial, arguing that the Court committed legal error in its jury instructions. The defense team at NHD opposed the Plaintiff's Motion for New Trial, and the Court denied the Plaintiff's Motion in summary fashion on July 3, 2024.

JD Hadiaris and Mark Lavoie are partners in Norman Hanson DeTroy's medical malpractice and professional liability department. They regularly defend providers and hospitals in medical malpractice claims in Maine and New Hampshire.

Goldman Preserves Deane's Trial Court Win

David Goldman

David Goldman scored another appellate victory in *Vargas v. Riverbend Management.* In its decision, the Law Court affirmed the defense verdict secured by Devin Deane in the Superior Court.

Devin Deane

In *Vargas*, the Law Court took the opportunity to clarify the circumstances under which an employer can be held vicariously liable for the discriminatory actions of its employees.

In *Vargas*, the plaintiffs were customers who had a negative interaction with a McDonald's drive-thru employee when that employee served them the iced coffee that they had ordered but then refused to provide them with an extra cup of ice they requested at the service window unless they went to the back of the drive-thru line and ordered it there.

After the first employee walked away from the window, a different employee gave the plaintiffs their extra cup of ice and, upon the plaintiffs' request, told them the name of the employee who they interacted with earlier.

The plaintiffs drove away from the service window and stopped in the parking lot to talk with each other when they noticed the employee who had refused them the ice delivering food to a different customer in the parking lot. The plaintiffs opened their window and made a comment letting the employee know that they knew his name, at which point the employee responded with a racially insulting expletive.

When the Plaintiffs complained of the incident to McDonald's, the franchise owner had his manager investigate the incident to determine if a negative interaction had happened, fired the employee as soon as he confirmed as much, and reached out repeatedly to the Plaintiffs to apologize and try to make them feel comfortable returning to his McDonald's. The Plaintiffs, nevertheless, sued the McDonald's franchise asserting the existence of vicarious liability for the franchise owner for the employee's public accommodations discrimination under the Maine Human Rights Act ("MHRA").

Following a bench trial, the judge ruled that vicarious liability against the franchise owner was inappropriate and granted judgment in its favor. On appeal, the Plaintiffs argued that the MHRA's broad language rendering discrimination in access to public accommodations unlawfully implied that employers should be held liable for any employee's discriminatory act committed while at work and subject to the employer's control regardless of any other facts. The Law Court disagreed. In so doing, the Court spoke to at least two issues that will be of importance to practitioners to understand moving forward.

The first was the Law Court's confirmation that the MHRA "incorporates principles of vicarious liability" and does not, as the plaintiffs would have had it, essentially impose strict liability on employers for their employees' actions while at work. The Court then went on to address a disagreement between the parties over whether Maine courts look to the Restatement (Second) of Torts or Restatement (Third) of Torts for guidance on vicarious liability determinations.

Although the Law Court acknowledged that the two Restatement standards are similar, it recognized that "the two Restatements are not identical." In particular, the Restatement (Third) standard "diminishes the significance of whether the employee's conduct at issue occurs during working hours and at the workplace" while also adopting "a somewhat more concrete test" for scope of employment questions than the Restatement (Second) of Torts. Ultimately, the Court clarified that from this point forward Maine courts should rely upon the Restatement (Third) of Torts standard for vicarious liability determinations under the MHRA, though the Restatement (Second) of Torts retains instructive in other circumstances, most notably in cases arising of the a "context of vicarious-liability claims

based on an employer's or agent's negligence or other unintentional acts."

The second key takeaway from the Vargas decision was the Court's discussion of the many ways in which the McDonald's franchise owner had done right. In particular, the Court found notable that, in advance of this incident, the franchise owner had long had a "zero tolerance" policy towards discriminatory behavior by employees, had instituted employee training on this policy, and that there was no prior behavior from the employee in question or any other employee that would have made the possibility of a discriminatory act of the kind that occurred foreseeable. The Court also found relevant that, the franchise owner quickly took action in response to the Plaintiffs' complaint, including promptly firing the employee in question and doing what he could to reach out to the Plaintiffs and apologize for what had occurred.

Vargas could prove to be a highly consequential opinion. It clarifies when a business can be held liable for its employees' discriminatory behavior and, in the manner it does so, properly incentivizes employers to ensure that they are taking all appropriate steps to ensure that discriminatory behavior by those employees is not a reasonably foreseeable occurrence, while making clear that, if an employer takes such steps, it won't necessarily be held liable for an isolated incident of discriminatory behavior by an employee solely because that behavior occurs while the employee is on the job.

NHD Sponsors Bench-Bar Hockey Game

For the past 12 years, Norman, Hanson & DeTroy has sponsored the Maine Bench-Bar Hockey Game to promote civility and collegiality among the legal community. The irony of a hockey game promoting civility and collegiality is not lost on us. Tom Marjerison and John Veilleux started the game, and Sam Johnson has ably taken over management of the contest. In addition to Tom Marjerison, John Veilleux, and Sam Johnson, Devin Deane and JD Hadiaris suited up for the game.

Hoffman Graduates from Maine's Daniel Hanley Health Leadership Development Course

On May 15, 2024, Attorney Kelly M. Hoffman graduated from Maine's Daniel Hanley Health Leadership Development course. As part of the 17th graduating class, Kelly and a diverse mix of experienced leaders from a wide range of healthcare settings and professions completed the almost year–long course, which focused on collaborative leadership skills imperative to effective and pragmatic health care delivery. Kelly was voted by her cohort to serve as the Class speaker at graduation and received a standing ovation for her speech on reflections from the class

experience. https://www.hanleyleadership.org/leadership-courses/health-leadership-development/

Cummings Named to Finance Authority of Maine Board

Governor Janet Mills recently nominated Dan Cummings to the Board of Directors of the Finance Authority of Maine (FAME). The Joint Committee on Innovation, Development, Economic Advancement and Business and the Maine Senate both unanimously approved his nomination.

Dan has nearly 35 years of experience in the lending industry representing credit unions throughout the state and serves as General Counsel to the Maine Credit Union League.

Article by Pattershall & Brogan on Employment Discrimination

An article written by Brad Pattershall and Jonathan Brogan was recently published in *Maine Town & City*, a periodic publication of the Maine Municipal Association (MMA). The article addresses how to mitigate claims of employment discrimination by implementing best practices.

NHD frequently represents MMA insureds both before the Maine Human Rights Commission and in court on discrimination claims. The article can be accessed here: Download (memun.org)

Brogan Named to National Academy of Distinguished Neutrals

Norman Hanson & DeTroy, LLC is pleased to announce that Jonathan W. Brogan has been inducted into the National Academy of Distinguished Neutrals (NADN)

Jonathan W. Brogan is a partner and chair of the firm's litigation group. He is an experienced trial lawyer, having tried more than 250 trials to verdict on a range of issues. He is a Fellow of the American College of Trial Lawyers, considered by most the highest honor a trial lawyer can receive from his peers. Jonathan is also a highly skilled mediator having mediated numerous civil disputes to successful resolution for plaintiffs and defendants.

The National Academy of Distinguished Neutrals is a professional association whose membership consists of ADR

professionals distinguished by their hands-on experience in the field of civil and commercial conflict resolution. Membership is by invitation only and all Academy members have been thoroughly reviewed and found to meet stringent practice criteria. Members are amongst the most in-demand neutrals in their respective states, as selected by their peers and approved by local litigators.

“We’re delighted to recognize Jonathan W. Brogan to the Academy’s Maine Chapter in recognition of Excellence in his mediation practice,” commented Darren Lee, Executive Director of NADN.

David Very Successfully Obtained the Dismissal of a Claim of Punitive Damages

David Very successfully obtained the dismissal of a claim of punitive damages against a major trucking client in a significant pedestrian/truck accident pursuant to a motion for judgment on the pleadings shortly after the complaint was filed. There has been a recent trend of Plaintiff attorneys including counts for punitive damages to be used as leverage against companies and arguing that it to early to dismiss the count on the pleadings as discovery may uncover evidence of implied malice. In a decision issued in December of 2023, the Superior Court Justice rejected the Plaintiff’s argument that discovery may uncover evidence to support the punitive damages claim, stating, “The court is reticent to allow Plaintiff to engage in a fishing expedition.” This decision will support motions in future cases to defeat this tactic.

Hadiaris & Lavoie Secure Defense Verdict

J.D. Hadiaris and Mark Lavoie secured a defense verdict following a medical malpractice jury trial at the Penobscot Judicial Center in Bangor, Maine.

J.D. and Mark’s client, an orthopedic surgeon, was accused of breaching the standard of care in obtaining informed consent for shoulder surgery, and causing damages, including shoulder dysfunction and the need for the Plaintiff to undergo further surgery. The jury rejected the Plaintiff’s theory, and after six days of trial, found that the surgeon acted appropriately in his care and treatment of the Plaintiff.

J.D. and Mark had also argued that the Plaintiff could not establish the second necessary element of her malpractice claim, i.e., that harm was caused by the alleged negligence of the surgeon. However, in light of the jury’s ‘no negligence’ finding, it was not necessary for the jury to address the second necessary element of the Plaintiff’s malpractice claim.

JD Hadiaris and Mark Lavoie are Partners in Norman Hanson & DeTroy's Medical Malpractice Litigation Group. They regularly represent health care providers and practitioners in the defense of malpractice claims in Maine and New Hampshire courts, and before medical malpractice prelitigation screening panels.

NHD Wins Major Contract Case

Mark Lavoie recently secured a defense verdict in a seven-figure contract case involving a Maine hospital system.

The Plaintiff, a vendor providing Medicare and Medicaid billing services, claimed that a third-party association had negotiated a contract for a "success fee" (essentially a contingent fee arrangement), so it would receive a percentage of any additional federal reimbursements it secured for the Hospital. In the past, the Plaintiff had been paid a flat fee for its services, and the difference between that fee and the "success fee" was a staggering amount.

Mark and the hospital defended the case by presenting evidence that the association did not have authority to negotiate on its behalf, a hotly contested issue, and that the Plaintiff did not satisfy conditions precedent for collecting its fee. Following a lengthy jury trial and after brief deliberations, the jury returned a unanimous verdict that there was no enforceable contract for a "success fee."

Abby Liberman Joins NHD

Norman, Hanson & DeTroy is proud to announce that Abby Liberman has joined the firm's litigation group. Abby is a proud McAuley High School graduate. She attended Acadia University in Wolfville, Nova Scotia where she graduated with an Honors degree in History. She spent her summers during college working as a horse wrangler in Colorado for a hunting outfitter.

Abby is a 2023 *cum laude* graduate of the University of Maine School of Law. While attending law school, Abby interned at the United States Attorney's Office and participated in Moot Court competitions.

Kelsey Kenny Joins NHD

Norman, Hanson & DeTroy, LLC is pleased to welcome Kelsey Kenny to the firm. Kelsey is a 2023 *cum laude* graduate of the University of Maine School of Law where she earned a certificate in Information Privacy Law with distinction. She is also a 2018 graduate of the University of Massachusetts–Amherst.

While in law school, Kelsey was a managing editor of the Maine Law Review and co-founded the Student Journal of Information Privacy Law. She is published in both journals and participated in multiple moot court competitions. Kelsey was summer associate at Norman, Hanson & DeTroy and served as a judicial extern to Magistrate Judge Karen Frink Wolf in the Federal District Court for the District of Maine.

Erika Roberge Joins NHD

Norman, Hanson & DeTroy, LLC is pleased to welcome Erika Roberge to the firm. Erika is a 2023 *cum laude* graduate of the University of Maine School of Law and a 2016 *summa cum laude* graduate of Husson University. She will primarily focus her practice on workers' compensation matters. Erika has a background in workers' compensation after having worked as an adjuster for MEMIC both before and during law school.

While attending the University of Maine School of Law, Erika completed externships at the Androscoggin County District Attorney's Office and the United States Attorney's Office. She also served as a student attorney for the Youth Justice Clinic at Maine Law. Erika graduated from Maine Law cum laude and with a distinction for Pro Bono Service. A lifelong Mainer, Erika lives in Sebago with her husband and two hound dogs.

NHD honored to be included among the top "Highly Recommended" law firms in Maine

Norman Hanson & DeTroy is honored to be included among the top of the "Highly Recommended" law firms in the State of Maine in the 2024 edition of *Benchmark Litigation's* "The Guide to America's Leading Litigation Firms and Attorneys." In addition, the following attorneys received individual recognition from *Benchmark Litigation*:

Local Litigation Stars

- Mark G. Lavoie – 2024
- Jonathan W. Brogan – 2024

Future Stars

- Thomas S. Marjerison – 2024

Deane & Lavoie Win Directed Verdict in Medical Malpractice Case

Devin Deane and Mark Lavoie successfully defended a local hospital and surgeon against a claim of medical malpractice resulting in significant injuries. The case involved complicated issues of pathology and infectious diseases and was vigorously defended in the two-week jury trial in York County Superior Court. The surgeon and the hospital were confident in their care for the patient, which was supported by internationally recognized experts who testified in support of their care at trial. At the close of the plaintiff's case-in-chief, the defense moved for judgment as a matter of law arguing that plaintiff's counsel had not presented enough evidence to prove plaintiff's case—even without the surgeon and hospital putting on their full defense. The Court agreed and entered judgment in the surgeon's and hospital's favor.

Business Today Names NHD Attorneys as "Top 10 Most Influential"

Business *Today* named Mark Lavoie, Chris Taintor, Jonathan Brogan and JD Hadiaris to the "*Top 10 Most Influential Maine Medical Malpractice & Insurance Defense Lawyers 2023*."

- Mark Lavoie was noted as: "Excelling in medical malpractice litigation, including critical work pertaining to the opioid crisis."
- Chris Taintor was described as: "An expert in medical malpractice, with a particular excellence in appellate and regulatory work."
- Jonathan Brogan was recommended as: "An experienced trial lawyer, adept in medical malpractice and personal injury defense cases."
- JD Hadiaris was noted as: "Garnering a reputation for medical malpractice defense, representing care providers, hospitals, and physicians."

Well-deserved congratulations to all. Click here for the full article.

Co-Owners' Partition Rights Upheld

Dan Cummings successfully represented the plaintiffs in a case seeking partition of real estate located in Kennebunkport valued at $1.5 million after the four owners could not come to an agreement on how the property would be used. After a trial, the Business Court agreed with the plaintiffs and ordered partition of the property by listing it on the market and apportioning the net proceeds.

Successful Law Court Appeal That Clarifies Foreclosure Actions

Dan Cummings represented the Maine Credit Union League as amicus curiae in the case of *KeyBank National Association v. Elizabeth E. Keniston et al.*, 2023 ME 38, in which the appellant successfully obtained vacation of the trial court's dismissal of its foreclosure action based on the debtor's estate being a necessary party. The appellant's position, supported by the League, was that foreclosure is an *in rem* action and that extinguishment of the ability to enforce the promissory note secured by the mortgage as personal liability of the maker of the note does not also extinguish a mortgagee's right to realize on its collateral by foreclosure of the mortgage.

Brad Pattershall Prevails in Credit Contract Case

After more than a year of litigation, Brad Pattershall prevailed in a bench trial on behalf of his client, a real estate company based in Rangeley, Maine ("Client"). Client recently constructed a new office building in Rangeley with materials provided by a local lumber supply company ("Plaintiff"). Considering the surge in lumber prices during the COVID-19 pandemic, Client questioned the invoices it received from Plaintiff because they were at odds with the terms of the original quoted prices. Plaintiff ultimately placed a mechanic's lien on Client's property for approximately $125,000.

Ultimately, Client paid to discharge the lien on its property, but Plaintiff claimed it was owed interest and attorney's fees for having carried the costs on account. The trial took place in Farmington, with the focus being whether there was a meeting of the minds concerning the credit terms pursuant to which Client bought the building materials. The Superior Court (Lipez, J.) held (1) that there was no such meeting of the minds and (2) that interest and attorney's fees must be supported by a contract and cannot be awarded on an equitable basis. Judgment was entered for Client, avoiding a six-figure liability for interest and Plaintiff's attorney's fees. Having paid the value of the mechanic's lien in full, Client fully satisfied all debt owed to Plaintiff.

The Court found Plaintiff had billed the materials to the account of a different corporation, albeit one to which the

owner of Client also had a connection. This was based on an incorrect assumption on the part of Plaintiff and not based on an agreement between Plaintiff and Client. The billed third-party corporation had a separate project going in the Rangeley area, had used its account for that project, and had specific terms of credit for its account. However, the third-party corporation was in no way involved in the construction of Client's real estate office building. The terms of credit on the account between Plaintiff and the third-party corporation could not be applied as between Plaintiff and Client. As between Plaintiff and Client there was no contract at all.

Chambers & Partners Names NHD Top Firm

Chambers and Partners released their 2023 Rankings, and Norman, Hanson & DeTroy was listed as the top firm (Band 1) for *Litigation: Medical Malpractice & Insurance Defense*. Four Maine firms were listed in Band 2. We are proud of our reputation in the legal and business community, and look forward to providing unparalleled service to our clients in the future.

Chambers & Partners' Attorney Recognitions

Chambers & Partners USA 2023 has recognized Norman, Hanson & DeTory as a Top Firm in the categories of Litigation: General Commercial and Medical Mapractice & Insurance Defense. Additionally, the following NH&D attorneys have received the "Ranked Lawyer" distinction in the publication:

- Mark G. Lavoie – Maine Litigation: Medical Malpractice & Insurance Defense
- James D. Poliquin – Maine Litigation: General Commercial
- Jonathan W. Brogan – Maine Litigation: Medical Malpractice & Insurance Defense
- Christopher C. Taintor – Maine Litigation: Medical Malpractice & Insurance Defense
- Russell B. Pierce – Maine Litigation: General Commercial
- Emily A. Bloch – Maine Litigation: Medical Malpractice & Insurance Defense
- Joshua D. Hadiaris – Maine Litigation: Medical Mapractice & Insurance Defense.

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NHD Attorneys Recognized by Super Lawyers

Norman, Hanson & DeTroy is proud to announce that the 2023 edition of New England Super Lawyers and the 2023 New England Rising Stars has recognized several of our attorneys for inclusion in the publications. We congratulate each of these attorneys for this accomplishment.

Maine Super Lawyers Top 5

- Mark G. Lavoie

Super Lawyers

- Jonathan W. Brogan: Personal Injury – General: Defense
- Mark G. Lavoie: Personal Injury – Med Mal: Defense
- Thomas S. Marjerison: Personal Injury – General: Defense
- Russell B. Pierce: Civil Litigation: Defense
- James D. Poliquin: Insurance Coverage
- John R. Veilleux: Personal Injury – General: Defense

Super Lawyers Rising Stars

- Grant J. Henderson: Workers' Compensation
- Samuel G. Johnson: Civil Litigation: Defense

Deane Secures Defense Verdict

Devin Deane successfully defended a local McDonald's franchisee against a claim of race-based public accommodations discrimination in a multi-day trial in Cumberland County Superior Court. Devin successfully proved that the offending employee's actions were based on personal motivations outside the scope of his employment for which the employer could not be held responsible under the Maine Human Rights Act and Maine common law.

The defense verdict was a vindication for the small business owner who celebrates having one of the most diverse work forces in Maine and did everything in his power to ensure a positive, nondiscriminatory environment at his store, including immediately terminating the offending employee's employment when he was made aware of the incident.

For information regarding the subsequent appeal affirming the trial court's decision, please click here.

Marjerison Wins Acquittal

Following a closely watched trial and after ten hours of jury deliberations, Tom Marjerison secured an acquittal for his client, Faysal Kalayaf Manahe, on federal criminal charges alleging a Sherman Act violation for wage-fixing and no-poach hiring agreements. This prosecution arose out of the Department of Justice's initiative focusing on criminal prosecutions of alleged wage-fixing and no-poach agreements. This jury verdict has national implications as additional anti-trust cases alleging similar conduct are set for trial across the country.

In addition to its national legal significance, the trial was closely watched by Maine's immigrant community, which packed the courtroom for each day of trial. In an interview with Reuters, Tom Marjerison noted that "It is difficult to understand why the DOJ felt the need to bring the weight of a federal government down on Iraqi immigrants who were doing the best they could in running a health care business in Portland during a global pandemic."

Jon Goodman, Bruce Merrill and Neale Duffett represented the three other defendants who were also found not guilty in a clean win for the defense. Additional media coverage of this case can be found at:

Reuters

Law360

Portland Press Herald

Bangor Daily News

Tom Marjerison represents clients in civil and criminal matters in state and federal courts. In 2020, Tom was inducted as a Fellow of the American College of Trial Lawyers. Mark Lavoie, Jonathan Brogan, and the late Peter DeTroy were previous inductees from the firm.

Tom's cases have ranged from the acquittal of a physician charged in federal court with multiple counts of unlawful distribution of controlled substances in *United States v. Hoffman* to the Maine Law Court's adoption of the implied co-insured doctrine in *North River Insurance Co. v. Snyder*. He has also successfully obtained defense verdicts in a number of high-value and high-profile trials.

Deane & Lavoie Garner Defense Verdict for Neurosurgeon

Devin Deane and Mark Lavoie successfully tried a complex medical malpractice case to a defense verdict after two-week jury trial in Cumberland County Superior Court. Devin and Mark represented an outstanding neurosurgeon against a claim of malpractice resulting in paralysis. The trial was hard-fought and well-presented by both sides, but the neurosurgeon's case was supported by multiple leading experts in the field who testified at trial. The jury rejected the plaintiff's $8,000,000 demand in closing argument and returned a defense verdict in the neurosurgeon's favor. The defense verdict was a vindication for the surgeon, who stood by their care throughout the lengthy litigation and delays caused by Covid's impacts on our civil justice system.

Deeded Water Access Rights Defended

Dan Cummings successfully defended a case in which the plaintiffs sought a declaratory judgment that the defendants did not have easement rights to access Crescent Lake in Raymond from their residence across the street. The plaintiffs argued that only those property owners who had express easements to the lake in their deeds from the developer enjoyed lake access, while the defendants asserted that their deed make reference to the subdivision plan that depicted streets and ways, including a way down to the water. After a two-day trial, the Superior Court agreed with Dan's clients that they had obtained easement rights over the depicted way that allowed them access to the lake.

Law Court Declines to Expand Liability for Negligence, Negligent Infliction of Emotional Distress

In a recent decision with potentially far-reaching implications, the Maine Supreme Judicial Court accepted the argument made by Attorneys Matthew T. Mehalic and Trevor D. Savage and held that: (1) a plaintiff's allegation of post-traumatic stress disorder ("PTSD") did not constitute a "physical injury" for purposes of establishing a claim for general negligence; and (2) in the absence of special circumstances, a defendant does not owe a plaintiff any duty of care to avoid causing her emotional harm

The case, *Boivin v. Somatex, Inc.*, arose from in incident that occurred in Rumford, Maine, in August 2014. Defendant Somatex, Inc., was hired by NewPage Paper Company—Ms. Boivin's employer—to repair one of NewPage's overhead cranes, and Ms. Boivin's supervisor requested that she work with Somatex employees while

they repaired the crane. To determine why the crane was not operating correctly, one of the Somatex employees climbed onto the crane to ride it while it was running. The Somatex employees instructed Ms. Boivin to operate the crane while the Somatex employee was on it, and after initially refusing to do so, Ms. Boivin agreed.

While Ms. Boivin moved the crane, the Somatex employee unexpectedly stood up and was crushed between an overhead truss beam and the moving crane. The Somatex employee was knocked out of the crane and fell approximately thirty feet to the floor, where he landed in front of Ms. Boivin. The Somatex employee died as a result of his injuries, and Ms. Boivin alleged that she suffered PTSD and related mental, emotional, and behavioral disorders as a result of the incident.

Ms. Boivin sued Somatex, arguing that Somatex—as NewPage's subcontractor—owed her a duty of care not to endanger NewPage employees and to ensure that its employees safely performed the crane repair. The Superior Court entered summary judgment in Somatex's favor, holding that: (1) although Ms. Boivin's expert opined that her PTSD was a "physical disorder," she failed to establish any *physical injury* as a result of witnessing the Somatex employee's fall; and (2) the working relationship between Ms. Boivin and Somatex did not create a duty on behalf of Somatex to protect Ms. Boivin from emotional injury.

The Maine Supreme Judicial Court affirmed the judgment on appeal, concluding that the duty of care applicable to claims for general negligence is the duty to "avoid causing *physical harm* to others," and that Ms. Boivin failed to submit any evidence that "physical manifestations of an emotional injury meet the legal definition of a 'physical injury.'" With respect to Ms. Boivin's claim for NIED, the Court observed that the duty to act reasonably to avoid harm to others applied only in "very limited circumstances": specifically, in so-called "bystander" cases where the plaintiff had a "close relationship" with the victim; and where a "special relationship" existed between the allegedly negligent actor and the person emotionally harmed. As the Court concluded, Ms. Boivin did not have a "close relationship" with the deceased Somatex employee, and nor did Somatex—a company contracted by her employer—have a "special relationship" with her. Accordingly, Somatex did not owe any duty of care to avoid causing her emotional harm, and Somatex was entitled judgment as a matter of law.

For more information regarding the decision in *Boivin v. Somatex, Inc.* or its ramifications, please contact Matthew T. Mehalic or Trevor D. Savage at mmehalic@nhdlaw.com or tsavage@nhdlaw.com, respectively.

Matt Mehalic

Trevor Savage

Chambers and Partners Recognition for NHD

Chambers and Partners recently ranked Norman, Hanson & DeTroy in Band 1 of law firms in the State of Maine. Chambers and Partners is an independent research company operating across 200 jurisdictions delivering detailed rankings and insight into the world's leading lawyers.

Mark Lavoie was featured in Band 1 of all Litigation attorneys in the State of Maine, and Emily Bloch, Jonathan Brogan, and Chris Taintor were listed in Band 2. J.D. Hadiaris was noted as an "Up-and-Coming" Litigation lawyer. Jim Poliquin and Russell Pierce were ranked for General Commercial Litigation.

Reviewers commented that NHD had a "well-established team highly regarded for its work in complex personal injury and medical malpractice cases. Also known for its experience in shareholder disputes and commercial real estate litigation."

Veilleux Notches Win

John Veilleux scored a defense victory in a one-ton truck vs. pedestrian paraplegia claim arising out of a November 2018 accident in Portland. Plaintiff stepped from a place of safety on St. John Street at night in misty conditions outside of a crosswalk directly into the path of Defendant's commercial pickup truck from the Defendant's right side. Plaintiff eventually had spinal surgery and was left without the use of his legs after surgery. Incurred medical bills were more than $1 million, and Plaintiff had a significant life care plan exceeding $3 million.

John was retained early on to spearhead the investigation and retain necessary experts to evaluate the significant liability questions. The Crash Lab and Rick McAlister were hired to be the lead reconstruction expert. Given the nighttime visibility ("conspicuity") questions, Rick recommended that we retain Jeff Muttart, Ph.D of Crash Safety Research Center, LLC to assist with those aspects of the case. Plaintiff retained reconstruction and "human factors" experts as well.

The case went to suit at the beginning of the COVID pandemic with the demand being nearly 3 times the available coverage limits ($6 million in coverage). After extensive discovery, including the depositions of all retained liability experts, and given the lack of civil jury trials due to COVID, the parties agreed to binding arbitration.

The case was tried to the arbitrator via Zoom over the course of two days with ten expert witnesses testifying "live" in the late fall of 2021. Key among those experts testifying were Rick McAlister and Jeff Muttart. After taking the matter under advisement, the arbitrator found that the Defendant was not liable for the Plaintiff's injuries.

Another Land Use Victory for David Goldman

David Goldman chalked up another appellate win in *Zappia v. Town of Old Orchard Beach*. The Law Court's decision in *Zappia* promises to significantly shape the way in which local municipal land use officials are required to interpret zoning ordinances that restrict the way in which property owners make use of their own private property

This decision arose out of the Ms. Zappia's application for a building permit to construct a greenhouse in her front yard to grow food year round for her family's consumption. The applicable Town zoning ordinance restricted the placement of such a building in a lot's "required front yard." Ms. Zappia took the position that, since she planned to construct the greenhouse outside the Town required fifty foot setback area (i.e. the only portion of her front yard "required" by the Town's zoning ordinance) there should be no issue of her compliance with the ordinance. The Town's code enforcement officer and zoning board of appeals, as well as the Superior Court on appeal of the local zoning officials' decisions, disagreed, interpreting the phrase "required front yard" as being synonymous with "front yard." Ms. Zappia, therefore, was denied permission to build a greenhouse anywhere within her property's front yard.

On appeal, the Law Court ruled that the Zappias' interpretation of the zoning ordinance was consistent with a number of important canons of construction that municipal zoning officials are tasked with applying in interpreting zoning ordinances.

These include the requirement to give meaning, wherever possible, to each word used in the ordinance, which the Town's interpretation failed to do when it ignored the presence of the word "required" in the phrase "required front yard."

Additionally, and most importantly, these canons of construction also include the requirement that, if the meaning of a term is ambiguous such that it could reasonably be interpreted in two different ways, it must be construed strictly against an interpretation that would stop landowners from making use of their private property as they see fit. Given that many local zoning provisions are worded in ways that create ambiguities regarding their meaning, the impact of the Law Court's choice to emphasize this canon of construction should reverberate widely for many years.

For more information regarding the decision in *Zappia v. Town of Old Orchard Beach* and other land use issues, please contact David Goldman at (207) 553-4609 or DGoldman@nhdlaw.com.

John Veilleux Recognized as 2022 Lawyer of the Year in Personal Injury Law

Norman, Hanson & DeTroy is proud to announce that *Best Lawyers* recognized John Veilleux as its 2022 *Lawyer of the Year* in the practice area of personal injury law – defense. John was also highlighted in the 28th Edition of *The Best Lawyers in America* for his high caliber work in the practice area of insurance law.

Kelly Hoffman Settles Landmark Case for Colby Coaches

Norman, Hanson & DeTroy is proud to announce Kelly Hoffman's settlement of a landmark Title VII and Title IX Discrimination case brought by 5 of the 7 female head coaches at Colby College. Federal and Maine equal pay laws mandate that employers may not discriminate between employees on the basis of their gender by paying wages to any employee at a lesser rate for jobs that have comparable skill, effort, and responsibility. We were honored to represent collectively the majority of Colby's female head coaches. The Coaches and the Colby College community have settled their disputes and are pleased that the matter has been resolved constructively and amicably.

Please click below for up-to-date media coverage of this historic settlement.

- NewsCenter Maine
- CentralMaine.com
- Bangor Daily News
- Portland Press-Herald

Kelly Hoffman has a national sports practice, assisting coaches, professional athletes, college athletes, and other members of athletic departments with a range of matters from seeking equal pay for equal work to defending individuals in Title IX or other investigations. Whether it is a high-profile news event or navigating complaints made parents or student-athletes, Kelly ensures that her clients are well-advised in handling these challenging and emotional processes.

Kelly served as a goalkeeper for both the Johns Hopkins field hockey and lacrosse teams, and was honored as an All-American in field hockey. After university, Kelly served as a member of the USA Field Hockey National Outdoor Team. In 2018, she was named by the U.S. Women's Masters Olympic Field Hockey Committee to its traveling team, and represented Team USA during the International Hockey Federation (FIH) Masters World Cup in Terrassa, Spain.

Kelly may be contacted at KHoffman@nhdlaw.com or 207.553.4683.

David Very Wins Award of Attorney Fees to Insurer before Law Court

In a decision issued today in *Fortney & Weygandt, Inc. v. Lewiston DMEP, et al.*, 2022 ME 5, the Maine Law Court upheld the award of over $300,000 in attorney fees to Travelers Insurance Company for successfully defending counter-claims against its insured in an action initiated by its insured under Maine's prompt payment statute.

David Very was retained by Travelers to defend a contractor from several counter-claims alleging defective work in response to the contractor filing an action seeking payment from the owner pursuant to Maine's prompt payment statute. The statute provides that the prevailing party in any proceeding to recover payment within the scope of the Prompt Payment Act must be awarded attorney fees.

After several years of litigation, the contractor won the prompt payment action and all of the counter-claims were defeated at trial before Maine's Business Court. Attorney Very filed an application for all of its fees arguing that the defense of the counterclaims was "intertwined" with the prompt pay action, and thus awardable. Attorney Very further argued that the fact that an insurer, rather than the contractor, paid the fees should not exclude the award because to do so would give the owner a windfall and defeat the purpose of the prompt payment statute, which is to deter owners from failing to timely pay contractors. The Business Court agreed and awarded over $300,000 in fees to the Travelers and the owner appealed.

On appeal, the Law Court agreed that the contractual payment claims and counterclaims were based on a common core of facts so interwoven that separation of fee and non-fee work was not possible. Thus, the Law Court disagreed with the owners' argument that fees paid by Travelers should not have been awarded because counsel was specifically retained to defend the counterclaims, not prosecute the payment claims, as those claims were intertwined. The Court also rejected the owners' argument that Travelers, as an insurer, would not be entitled to fees under the statute, as excluding those fees would violate the purpose of the prompt payment statute. Thus, the Law Court upheld the award of over $300,000 to the Travelers, plus fees associated with the appeal.

Please click here for the Law Court's full decision in *Fortney & Weygandt, Inc. v. Lewiston DMEP, et al.*, 2022 ME 5.

For more information about this case, or for questions on construction related matters, please contact David P. Very at dvery@nhdlaw.com.

Phone: (207) 774-7000

Experienced. Efficient. Effective.

Lindsey Sands Confirmed as Adminstrative Law Judge

We are pleased and proud to announce that our colleague and friend, Attorney Lindsey Sands, was unanimously appointed to serve as an Administrative Law Judge by the Workers' Compensation Board for the State of Maine.

Lindsey spent her entire private practice career here at Norman, Hanson & DeTroy, and leaves a lasting legacy of hard work, great client relationships, and outstanding results. Although we are very sad to see her go, we know she will be a great addition to the Bench.

Judge Sands will be presiding in formal hearings from the Workers' Compensation Board's Lewiston Regional Office once her transition from our offices has been completed. The State of Maine is fortunate to have the skills and talents Judge Sands will bring to the Bench. She will be greatly missed.

Isobel Golden Returns to NHD

Norman, Hanson & DeTroy is pleased to announce that Isobel Golden, a former Summer Associate, has returned to the firm as an Attorney. Isobel will be practicing with the firm's professional services practice group, focusing on medical malpractice and professional liability defense.

During her tenure at the University of Maine School of Law, Isobel served as an Articles Editor for the *Maine Law Review*, interned with the Lewiston District Court, and was a summer associate at our firm. After graduating from the Maine Law in 2020, she worked as a judicial law clerk with the Maine Superior Court.

Isobel grew up in Waldoboro, Maine and graduated from Bates College in 2011. Prior to law school, she worked for a number of years as a legislative aide for the Maine State Legislature and served for a term on the Lewiston City Council. She now lives in Lewiston with her husband, Jared, and their daughter.

Landgon Thaxter Joins the Firm

Norman, Hanson & DeTroy is pleased to announce that Langdon Thaxter has joined the firm as an associate attorney in our Commercial Group.

Langdon is a Maine native who grew up in Portland. He attended Bard College in New York State, where he majored in philosophy with a focus on the philosophy of language. After getting his undergraduate degree, Langdon worked for a non-profit in Lewiston where he helped high school students navigate the college application process.

Langdon attended the University Of Maine School Of Law where he graduated *magna cum laude*. During law school he interned at the Federal Defenders Office for the District of Maine and worked at the Cumberland Legal Aid clinic as student attorney where he represented juveniles. Langdon also helped asylum seekers through Maine Law's Immigration Clinic and he traveled to the U.S.-Mexico border as part of Jones Day's Laredo Project where he worked with Jones Day attorneys representing asylum seekers at the border. During the end of his law school career, Langdon was selected to serve as a judicial intern with the Hon. Kermit V. Lipez on the United States Court of Appeals for the First Circuit.

After law school, Langdon was chosen to serve as a law clerk to the Chief Justice of the Maine Supreme Judicial Court by former Chief Justice Leigh Saufley. He clerked for the Court for one year before joining Norman Hanson & DeTroy where he is excited to be starting his legal career. Langdon lives in Portland with his dog Hector, and he enjoys hiking with his dog and skiing in the winter months.

Joe Mavodones Joins NHD

Norman, Hanson & DeTroy is proud to announce that Joe Mavodones has joined the firm's Professional Liability Group focusing on professional malpractice defense, general liability defense, and commercial litigation.

Before joining Norman, Hanson & DeTroy, Joe worked as a judicial law clerk for Justice Thomas E. Humphrey at the Maine Supreme Judicial Court and, most recently, for Magistrate Judge John C. Nivison at the U.S. District Court for the District of Maine.

Joe graduated from the University of Maine School of Law, where he served as Articles Editor on the Maine Law Review. During law school, he interned with the Maine District Court in Portland and with Justice Donald G. Alexander at the Maine Supreme Judicial Court. Prior to attending law school, Joe worked for a ferry company that services the islands off the coast of Portland, during which time he obtained his 100-ton captain's license.

Joe and his wife, Emily, live in Cape Elizabeth with their three kids and enjoy exploring the coast of Maine.

Matthew Mehalic admitted to the US District Court for the District of Massachusetts

Matthew Mehalic was admitted to the United States District Court for the District of Massachusetts on Tuesday, October 19, 2021. Matthew focuses his practice on insurance coverage and defense matters, but also handles general litigation matters, including, but not limited to, construction litigation, product liability, and personal injury. Matthew is willing to assist all of Norman, Hanson & DeTroy's clients with matters pending in Massachusetts state and federal courts.

Bob Bower Named Best Lawyers' 2022 Lawyer of the Year in Workers' Compensation

Norman, Hanson & DeTroy is proud to announce that *Best Lawyers* recognized Bob Bower as its 2022 *Lawyer of the Year* in the practice area of workers' compensation law. Bob has also been highlighted in the 28th Edition of *The Best Lawyers in America* for his high caliber work in the practice area of labor law.

Wuesthoff Elected as Member of the Firm

Norman, Hanson & DeTroy, LLC is pleased to announce the election of Noah Wuesthoff as a Member of the firm.

Noah is a 1991 graduate of McGill University and graduated from the University of Maine School of Law in 1994. Noah worked at a local law firm before joining Norman, Hanson & DeTroy.

Noah is a vital part of the firm's Healthcare and Professional Practice Defense Group where his practice focuses on identifying, vetting, and recruiting highly qualified medical expert witnesses and drafting science-backed trial briefs and motions for medical malpractice trial preparation.

Noah's longstanding relationships with nationally prominent medical experts and researchers enhances the firm's practice and provides clients with a competitive advantage in medical malpractice litigation. Noah is admitted to

practice law in the Maine state and federal courts.

In his time away from work, Noah enjoys the Maine woods and spending time with his two children, who both attend the University of Virginia.

Grant Henderson Elected as a Member of the Firm

Norman, Hanson & DeTroy, LLC is pleased to announce the election of Grant Henderson as a Member of the firm.

Grant is a 2007 graduate of Boston University and graduated *cum laude* from Temple University Beasley School of Law in 2013. While at Temple Law, Grant was a Staff Editor of the Temple Law Review.

Following graduation, Grant joined a boutique Philadelphia law firm specializing in insurance defense and affirmative civil RICO actions. He later transitioned to a large law firm in New Jersey, where he practiced workers' compensation defense and commercial litigation for three years. After years of visiting his wife's family in Maine, Grant could no longer resist the urge and moved to Portland in the spring of 2017.

Since joining Norman, Hanson & DeTroy, Grant has concentrated his practice on defending clients in workers' compensation matters, and government relations issues. He has been recognized by *Super Lawyers* a a "Rising Star" since 2018 and was named a *Best Lawyers*' "Ones to Watch" in 2021.

Grant lives in Falmouth with his wife and their young son, and enjoys outdoor activities with his family.

John Bonneau Awarded Maine State Bar Association Life Member Award

Norman, Hanson & DeTroy is pleased to announce that John V. Bonneau was recognized last month by the Maine State Bar Association and presented with the Life Member Award. The Maine State Bar Association's Life Member Award expresses its appreciation to Attorney Bonneau whose 50 years of faithful and meritorious service to the Bar have contributed substantially to the honor and dignity of the legal profession.

John is a Lewiston native who attended Bowdoin College and Villanova Law School. Immediately after law school John

developed his corporate and business law and estate planning skills with a large and well regarded law firm in Philadelphia. John returned to practice in his hometown in Lewiston in 1976 and practiced there until his retirement in 2019. John's intelligence, keen personal instincts and curiosity were emblems of the professional service he provided to his clients. Norman, Hanson & DeTroy is proud of John and pleased by this recognition from the Maine State Bar Association.

David Goldman Wins Major Land Use Case

The Law Court upended practitioners' expectations regarding how local municipal land use officials are expected to act in the face of a property rights dispute between neighbors in its decision in *Tomasino v. Town of Casco* that a recent Maine Bar Journal article referred to as "arguably the most significant land use decision of 2020."

This decision arose out of the Tomasinos' application for a permit to cut down trees whose trunks straddled both sides of the boundary line separating an area encumbered by the Tomasinos' easement rights that burdened our client's land while the remainder of land was unencumbered by any easement rights. Although the Tomasinos' deed gave them easement rights, it failed in any way to specify the scope of those rights.

Prior to the *Tomasino* decision, most lawyers' understanding was that local code enforcement officers should not weigh their assessment of applicants' property rights into their decision on whether to grant a permit. However, the Law Court adopted David Goldman's argument that the Tomasinos were required to seek clarity from a Superior Court judge as to whether they held a property right to cut our client's trees before seeking a land use permit to do so.

Although the full impact of the new land use application regime established by the *Tomasino* decision will not be known for some time, it has already forced many practitioners to rethink what they believed they knew about the standards applicable to land use permit applications. Going forward, parties involved in land use permit disputes that implicate questions regarding a party's property rights would be wise to closely study the Law Court's reasoning in *Tomasino* as that decision represents a potential sea change in how disputes of this kind are to be resolved.

For more information regarding the decision in *Tomasino v. Town of Casco* and other land use issues, please contact David Goldman at (207) 553-4609 or DGoldman@nhdlaw.com.

> *David Goldman has a wide ranging litigation practice, representing clients involved in a broad variety of complex civil litigation, including real estate and business disputes, as well as administrative appeals of municipal and state agency decisions. David also has a particular focus on appellate practice, with significant experience representing clients before the Maine Supreme Judicial Court and before Federal Courts of Appeal.*

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Stay Up-To-Date with Emerging Legal Issues

The coronavirus pandemic may have changed how we do business, but it is has not reduced the need for up-to-date information on legal trends and decisions issued by the state and federal courts. To provide clients with fast and concise information on a variety of legal topics, Norman, Hanson & DeTroy is rolling out *Maine Law Reports* for our clients.

To subscribe to *Maine Law Report*, please click here. You will be directed to the subscription page, and you can select Law Reports on the following subjects:

- Medical and Professional Liability Law
- General Liability and Insurance Law
- Commercial Law
- Workers Compensation Law
- Legislative Developments.

You will also receive analyses of a variety of legal issues in each of these subjects. Thank you.

John McGough Joins NHD as a Non-Attorney Labor & Employment Consultant

Norman Hanson & DeTroy LLC is pleased to announce that John G. McGough has joined the firm as the newest member of the Labor & Employment Law Practice Group as a non-attorney Labor & Employment Consultant. McGough served approximately 25 years in a variety of senior federal, state, and local public sector positions with responsibility for all aspects of management/human resources & labor relations. McGough's consulting practice is focused on all aspects of human resource policy-making and audits, employment investigations and workplace conflict resolution. McGough represents management in public sector collective bargaining, provides comprehensive recruitment & hiring services and is available to employers seeking an interim manager or human resource leader for their organization.

Prior to joining the firm, McGough served as New England Regional Director for the U.S. Department of Health & Human Services with responsibility for the six New England states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, as well as the Region's 10 federally recognized Tribes. As the primary New England representative for former DHHS Secretary Alex M. Azar II, McGough led the Secretary's whole-of-

government response to COVID-19 through collaboration with Governors, State Heath Officers, and locally elected officials. Secretary Azar additionally tasked McGough for a year to concurrently serve as Regional Director for the Southeast (AL, FL, GA, KY, MS, NC, SC, & TN), a total of 14 states.

Prior to his appointment with DHHS, McGough served for 7 years as Chief of Staff to former Maine Governor Paul R. LePage. Before serving the Governor, McGough held local government leadership positions including Director of Human Resources for the City of South Portland and Assistant City Administrator/Human Resources Officer for the City of Waterville. McGough is also a former Chief of Staff for the House Minority Leader in the Maine House of Representatives. He earned a Bachelor's and Master's Degree in Public Administration from the University of Maine system and resides in Brunswick.

Bystander Liability Clarified by Maine Supreme Court

BY: Jonathan W. Brogan, Esq.

Recently the Maine Supreme Court made a significant decision regarding bystander claims of negligent infliction of emotional distress. *Coward v. Gagne and Sons Concrete Blocks, Inc.,* 2020 ME 112 (9/17/2020).

The longstanding test in Maine was decided in a case called *Culbert v. Sampson Supermarket* which stated that there would be bystander liability if the bystander was (1) present at the scene of the accident, (2) suffered serious mental distress as a result of seeing the accident and the ensuing danger of the victim, and (3) was closely related to the victim. That has been the test in the Maine courts since 1982. Since that time, there has been a gradual change in the law, in other states, regarding these three factors.

In Coward v. Gagne and Sons Concrete, our Supreme Court was presented with a horrific case. Thomas Coward and his wife, Lisa Coward, brought a claim against Gagne and Sons Concrete after their son was killed in a crush injury by steel re-bar being delivered to their place of business. Thomas Coward did not see the accident but heard the accident occur, arrived "seconds later" and witnessed his son die. Though the Superior Court granted Gagne and Sons' motion for summary judgment, the Supreme Court overturned that summary judgment and remanded Mr. Coward's claim for negligent infliction of emotional distress and Mrs. Coward's claim for loss of consortium to the Superior Court for further action. The underlying wrongful death was tried and a more than $2,000,000 verdict was entered for the Estate of Phil Gagne, the decedent.

Throughout the years, we have always used the *Culbert* test in determining whether a bystander had a claim. The issue in the Gagne and Sons case was contemporaneous perception. It was decided that being within a 100 feet of the accident, hearing the crashing re-bar and the victim's screams and arriving within seconds to witness the aftermath met the plaintiffs' burden.

The issue of what contemporaneous perception means, in Maine, has been somewhat nebulous. The Court has now said that it does not mean that the bystander is required to directly witness and immediately be aware that an injury causing event is taking place.

The Court concluded that perception of an accident can arise from any of a person's senses, not just sight. The bystander's observation of the victim's injuries must occur in the immediate aftermath of the injury producing event, but they cannot be called to the scene or otherwise not be present at the scene, and the bystander must have perceived the injuries or death of the victim as an immediate result of their perception of the injury producing event. No specific time was established by the Court for this perception of injury however the Court did state that a "brief amount of time" is enough. In other words, learning through indirect means of an accident and then going to the scene would not be enough, but hearing or seeing the event and then immediately perceiving the damage is enough.

The Court's lengthy decision (26 pages) does not extensively change the law as it has been interpreted in the Superior Court for many years. However, this Supreme Court case finally ends the belief that bystander liability is limited to actually seeing the event and perceiving it contemporaneously as opposed to perceiving the event and, within a reasonable amount of time, understanding what has happened.

If you have any questions about this decision or its ramifications, please do not hesitate to contact any of us here at Norman Hanson & DeTroy to discuss it.

New Attorney Announcement – Nicole Sawyer and Christine Johnson

This past year Norman Hanson & DeTroy welcomed two new attorneys to the firm.

Nicole Sawyer

Nicole is a Maine native who has historically served the people of Maine before joining Norman, Hanson & DeTroy. She attended the University of Maine at Farmington before ultimately graduating from the University of Maine at Augusta. She was inspired to go to law school while working at the Department of Health & Human Services. During her time at the University of Maine School of Law, she was a judicial intern for the Lewiston District Court and with Judge Kermit V. Lipez of the United States First Circuit Court of Appeals. While at Maine Law, she was also selected for the Charles A. Harvey, Jr. Trial Practice Immersion Fellowship, in which she shadowed and assisted many of Portland's top litigation attorneys over the course of an eleven-week rotation.

Nicole was chosen to serve as the student research assistant for the Maine Advisory Committee on Rules of Evidence from 2017-2018, and honed her legal research skills to provide the Committee with guidance for evaluating and proposing changes to the Maine Rules of Evidence. During that same term, Nicole was selected to be Research Editor

for the *Maine Law Review*. In her final year of law school, she counseled and represented clients in the Cumberland Legal Aid Clinic. After graduating *magna cum laude* in 2018, she served as a law clerk for four justices of the Maine Superior Court. Nicole lives in Freeport with her husband and their two dogs. In her free time she enjoys walks in the woods, a good game of cribbage, and finding treasures at estate sales.

Christine Johnson

Christine Johnson is a lifelong resident of York County. She attended the University of Vermont, the University of Southern Maine, and Maine School of Law. Before attending law school, she was a case manager at Sweetser and worked with at-risk youth in an immersive adventure therapy program. While in law school, Christine was a student attorney at the Cumberland Legal Aid Clinic, volunteered for the Abused Women's Advocacy Project, and completed an externship at Pine Tree Legal Assistance.

Christine's legal career began at a small bankruptcy firm in Kennebunk, and developed into consumer advocacy work. For several years, she was an active member of MASH (Maine Attorneys Saving Homes), a volunteer advocate for Maine's Volunteer Lawyer's Project, and a mediator for the Maine Judicial Branch. From there, she represented local and national lending institutions in a variety of matters. She has a solid background in real estate, with an emphasis on foreclosure litigation and creditor rights. She also has experience in probate and debt collection. She has presented and participated in numerous panels related to Maine's Foreclosure Diversion Program and Consumer Financial Protection Bureau rules. Christine lives in Buxton with her husband and two daughters. She enjoys spending time with her family and many outdoor activities, including running, hiking, and gardening.

Kudos

Mark Lavoie represented the Maine Chapter of the American College of Trial Lawyers at its annual meeting, held in La Qunita, California and scored third place with his group in the organization's golf tournament.

Robert Cummins was recently nominated by Governor Mills and approved by the State Legislature to serve as a commissioner on the Maine Commission on Indigent Legal Services.

Katlyn Davidson, Lindsey Sands and Elizabeth Brogan presented at the 26th annual Maine Workers' Comp Summit held at the Samoset Resort in Rockport. Katlyn and Lindsey presented at the Summit's opening plenary session, "Keys to Compliance and Successful Outcomes," which provided an overview of Maine's workers' compensation system and provided instruction on key elements oF claims handling and litigation practices. Elizabeth presented at two plenary sessions regarding legislative updates to the Maine Workers' Compensation Act and the legal year in review, discussing Law Court and Appellate Division decisions of note over the past year.

Elizabeth Brogan served on a working group convened by the Workers' Compensation Board pursuant to

the workers' compensation omnibus bill, LD 756, enacted in 2019. The results of the group's work, on issues related to work search, vocational rehabilitation and protections for injured workers whose employers have wrongfully not secured workers' compensation coverage, were reported to the Joint Standing Committee on Labor and Housing at the end of January.

Kathyrn Longley-Leahy has been appointed to a second three-year term as an Advisor to 10th, 11th and 12th grade girls at Edward Little High participating in the Olympia Snowe Women's Leadership Institute program as "Olympia's Leaders. The Institute is designed to elevate the confidence and aspirations of high school girls by helping them build the leadership, collaboration and problem-solving skills needed to become successful in their lives, families, careers and communities. The Institute has state-wide support by leading organizations and over 360 professional women volunteer as mentors and classroom advisors to more than 500 high school girls across the State of Maine.

David Very was awarded the Defense Research Institute's State Leadership Award at the DRI Annual Meeting. DRI is the largest international membership of defenses attorneys with over 22,000 members.

Elizabeth Brogan was a featured presenter regarding new developments in workers' compensation law and the legislative process at the annual meeting of the Maine Health Care Association Workers' Compensation Fund.

Health Law Update

By Christopher C. Taintor, Esq.

"The Sooner the Better"
Is Not Enough to Prove Causation

The Maine Supreme Judicial Court, sitting as the Law Court, recently decided *Holmes v. Eastern Maine Medical Center,* 2019 ME 84, 208 A.3d 792. In *Holmes*, the Court affirmed judgments in favor of three defendants: Eastern Maine Medical Center (EMMC), a surgeon employed by the hospital, and a radiologist employed by a separate entity. The Superior Court entered summary judgment in favor of the radiologist, who was represented by Mark Lavoie and J.D. Hadiaris of NH&D. Because the other defendants' motions for summary judgment had been denied, the case went to trial before a jury, which returned verdicts in their favor. The Law Court decision, which focused on the claim against the radiologist, is significant because of what the Court had to say about a malpractice plaintiff's need to prove that a causal connection actually exists between a defendant's alleged negligence and specific, identifiable harm suffered by the patient.

Michael Holmes underwent colon surgery at EMMC on August 14, 2012. On August 20th, he returned to the EMMC emergency department complaining of abdominal pain. The covering surgeon promptly ordered a CT scan. The scan was first read that evening by a "nighthawk" radiologist, and then read again the following morning (the 21st)

by the defendant-radiologist. Neither radiologist interpreted the scan as showing evidence of an anastomotic leak — that is, a condition in which bowel contents leak into the abdomen at the junction of the two parts of the bowel that were surgically reconnected after the earlier surgery. The patient was thought to have an ileus, a condition in which the intestinal track "slows down," and so he was monitored with the expectation that he would recover bowel function

Over the course of the day on August 21st, however, Mr. Holmes' condition got worse. The severity of his condition was recognized that evening — about 14 hours after the defendant-radiologist's reading of the CT scan — and exploratory surgery was performed. In the course of that second surgery an anastomotic leak was detected and repaired. The leak had allowed bowel contents to enter Mr. Holmes' abdomen, causing a severe systemic infection. He remained in the hospital, gravely ill, for several weeks, suffered a stroke while hospitalized, and was left with serious deficits.

The plaintiff presented an expert who testified at deposition that the defendant-radiologist, reading the CT scan at 8:00 a.m. on August 21st, had negligently failed to diagnose an anastomotic leak. The key issue at the summary judgment stage was whether, assuming the leak was present and diagnosable at that time, its consequences had already become unavoidable. The radiologist pointed to testimony by the Plaintiffs' own experts, who said that the most serious sequelae of the leak — the systemic infection and the stroke — could have been avoided only if the leak had been detected and repaired on the evening of August 20th, roughly 10 hours before the defendant-radiologist read the CT scan. The Plaintiffs, on the other hand, pointed to testimony from one of their experts, who said that Mr. Holmes could have avoided *some* harm even if diagnosis and intervention had occurred on the morning of the 21st. His opinions, however, were vague at best. The expert testified that it is generally better to treat infections earlier than later, because every minute that passes with an untreated infection causes the patient to suffer "physiologic hits." His testimony, as characterized by the Plaintiffs, was that surgery performed earlier "would have had some benefit in terms of improving the potential for a better outcome" — essentially, "the sooner the better."

The Superior Court judge ruled, and the Law Court agreed, that this testimony was insufficient to get the plaintiffs' case to a jury. Notably, the Law Court cited cases from other jurisdictions which have held that it is not enough for an expert to say that "time is of the essence," or that "every hour counts." Rather, there must be evidence sufficient to enable a jury to find that a defendant's negligence more likely than not caused some specific, identifiable injury. Because no expert could say that intervention on the morning of August 21st probably would have averted any particular injury to Mr. Holmes, the judgment was affirmed.

Reasoned Medical Decisions Do Not Amount to "Disability Discrimination"

In *Cutting v. Down E. Orthopedic Assocs., P.A.,* 2019 WL 1960329 (D. Me. 2019), the United States District Court for the District of Maine addressed a question that has not received much attention: when a physician's decision whether to treat a patient is influenced by the existence of a disability, can that decision ever be characterized as "disability discrimination" under the Americans with Disabilities Act (ADA) and the Maine Human Rights Act (MHRA)? In the *Cutting* case, which NH&D defended, the District Court explained the limited circumstances under which

liability can be imposed on treating physicians for disability discrimination, and entered summary judgment against the plaintiff because the evidence was insufficient to bring her claim within the reach of the ADA or the MHRA.

The plaintiff in the *Cutting* case suffered from Tourette's syndrome, which caused her to have repeated involuntary body movements, including repetitive shoulder flexion of the right arm in an outward motion, which her medical records described as resembling a "punching motion." The frequency and severity of plaintiff's tics depended on factors which included her stress level, and whether she was comfortable in her surroundings. In 2013, she was referred to an orthopedic surgeon for long-standing, persistent right shoulder pain. The surgeon examined the shoulder and diagnosed the plaintiff as suffering from acromioclavicular arthritis with possible rotator cuff tendonitis and impingement, and recommended surgery.

While waiting to decide whether to proceed with surgery, the plaintiff saw other providers. One doctor told her that he questioned whether she would be able to limit the motion of her right arm enough to heal post-surgically. Eventually, however, the plaintiff did decide to undergo surgery. The surgeon performed an open distal clavicle excision – the removal of part of the distal clavicle and arthroscopy. During the arthroscopic portion of the procedure, he identified both a partial thickness rotator cuff tear and a full thickness rotator cuff tear. He debrided and smoothed the rough edges around the tears, but chose not to attempt a rotator cuff repair because he believed the plaintiff would re-tear the tendon following surgery when she experienced movements caused by her Tourette's syndrome.

The plaintiff later sued, contending she was afforded services "on the basis of disability" that were "not equal to that afforded to other individuals," in violation of the ADA and MHRA. Although she alleged various subsidiary acts of discrimination, the essence of the lawsuit was her dissatisfaction with the surgeon's decision not to repair her rotator cuff tear when he discovered it during surgery, because he believed her tics would disrupt the repair. In essence, she claimed that her rights were violated because she was denied the benefit of a procedure the surgeon would have performed on a person who did not have her disabling condition.

The Court rejected that claim, reasoning that it was one of "medical malpractice, not discrimination," and that "[s]pecific medical decisions, which must account for a patient's conditions and traits to meet the professional standard of care, generally do not constitute unequal service delivery 'on the basis of disability' within the meaning of the ADA." The Court went on to explain:

> Ultimately, medical care decisions can only be challenged "by showing the decision to be devoid of any reasonable medical support."
>
> [T]he point of considering a medical decision's reasonableness in this context is to determine whether the decision was unreasonable *in a way that reveals it to be discriminatory.* In other words, a plaintiff's showing of medical unreasonableness must be framed within some larger theory of disability discrimination. For example, a plaintiff may argue that her physician's decision was so unreasonable – in the sense of being arbitrary and capricious – as to imply that it was pretext for some discriminatory motive, such as animus, fear, or "apathetic attitudes."

Cutting v. Down E. Orthopedic Assocs., P.A., at *7 (quoting *Lesley v. Hee Man Chie*, 250 F.3d 47, 55 (1st Cir. 2001)).

Cutting is consistent with a handful of federal decisions which tell us that where medical treatment decisions are concerned, the scope of liability for disability discrimination is quite narrow. There can be liability where the discrimination is obvious and objectively groundless – for example, in the seminal case of *Bragdon v. Abbott*, 524 U.S. 624 (1998), where a dentist simply refused to treat an HIV-positive patient because of unfounded fears about the transmissibility of the virus. As one federal appellate court has said, however, "[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory.'" *United States v. Univ. Hosp., State Univ. of New York at Stony Brook*, 729 F.2d 144, 157 (2d Cir. 1984).

"Conscience Rule," Enacted by DHS, Is On Hold Pending Appeal

Over the past several decades, Congress and state legislatures have enacted statutes which give employees, both generally and in the health care field specifically, the right to act in ways that are consistent with their religious beliefs. The broadest protection, in the sense that it cuts across all sectors of the economy, is found in Title VII of the Civil Rights Act of 1964. Title VII gives employees the right to accommodations in the workplace when *bona fide* religious practices or beliefs conflict with job requirements, so long as those accommodations do not impose an "undue hardship" on employers.

The most common examples of conflict between work and religious observance involve attendance and dress. Where attendance is concerned, the Supreme Court has said that an employer is not required "to bear more than a de minimis cost" in order to accommodate an employee's religious scheduling preference. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977). Under that standard, employers are not required to bear additional costs to give days off based on religion, when they do not bear additional costs to give other employees the days off they prefer, since that "would involve unequal treatment of employees on the basis of their religion."

Other, less typical examples of conflict between work and religion, which have also produced Title VII litigation, include:

- A male employee who had a religious objection to working in an area where there were nude pictures of women hanging on the wall, *Lambert v. Condor Mfg., Inc.*, 768 F. Supp. 600 (E.D. Mich. 1991);
- A Roman Catholic surgical aide who refused to clean instruments which were used to perform abortions, *Tramm v. Porter Memorial Hospital,* 1989 U.S. Dist. LEXIS 16391 (N.D. Ind. Dec. 22, 1989);
- An atheist telemarketing employee who objected to interacting on the phone with religious organizations, *McIntyre-Handy v. West Telemarketing Corp.*, 97 F. Supp. 2d 718, 736 (E.D. Va.

2000); and

- A Roman Catholic police officer who objected to being assigned to guard an abortion clinic, *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998).

It is in the field of health care, however, that the conflicts have become most pointed. In 1973, shortly after the Supreme Court decided *Roe v. Wade*, Congress passed the "Church Amendment," which prohibits public officials from requiring any person to perform a sterilization procedure or abortion if doing so would be contrary to his or her religious beliefs. Within a decade after *Roe*, at least forty states, including Maine, had enacted statutes allowing health care providers the right to choose not to provide sterilization procedures and abortions. Since then, "conscience protection" has expanded, so that many laws now relieve health-care providers of not only the need to perform procedures they object to, but also the obligation to provide counseling or referral services to patients.

In 2019, the United States Department of Health and Human Services (HHS) adopted a rule which, if implemented, would supersede all the conscience protections that currently exist under various federal laws. In support of the rule, HHS asserted that the rule was necessary because there has been confusion about existing conscience protections, and because there has been a "significant increase" in the number of complaints the Department's Office of Civil Rights (OCR) has received about violations of existing laws.

The HHS rule broadly prohibits any "health care entity" – including any hospital, pharmacy, medical laboratory, and "other health care provider or health care facility" – from taking adverse action against an employee for refusing to perform or "assist in the performance" of health care activities on account of "religious, moral, ethical or other reasons." The Rule defines the term "assist in the performance" as "tak[ing] an action" with a "specific, reasonable, and articulable connection" to furthering a particular procedure, program or service. Assisting may include "counseling, referral, training, or otherwise making arrangements" for the procedure, program or service at issue. In litigation, HHS has acknowledged that the rule, as drafted, "would authorize individuals at some remove from the operating theater or medical procedure at issue to withhold their services." It "would apply, for example, to a hospital or clinic receptionist responsible for scheduling appointments, and to an elevator operator or ambulance driver responsible for taking a patient to an appointment or procedure." "It would also, for the first time, . . . permit abstention from activities ancillary to a medical procedure, including ones that occur on days other than that of the procedure."

Under the Rule, a health care entity's attempts to accommodate an employee's religious or moral objections does not constitute discrimination if the employer offers an "effective accommodation" and the employee "voluntarily accepts" that accommodation. Conversely, if the employee does not consent to the accommodation offered by the employer, the employer must carry out the procedure using "alternate staff or methods" that do not require additional action by the employee, and may not take action which constitutes an "adverse action" against the employee or excludes her from her "field of practice."

In a lengthy decision handed down on November 6, 2019, a federal judge in the Southern District of New York prohibited HHS from implementing the rule. *State of New York v. United States Dept. of Health and Human Services,*

2019 WL 5781789 (S.D.N.Y. Nov. 6, 2019). Two weeks later, a federal judge in the Eastern District of Washington largely adopted the New York decision. *Washington v. Azar*, 2019 WL 6219541 (E.D. Wash. Nov. 21, 2019). The decisions rest on several grounds. Although many of the grounds for the decisions are matters of technical administrative law, they also include, more notably, the Courts' view that the Conscience Rule conflicts with Title VII of the Civil Rights Act, and with the Emergency Medical Treatment and Active Labor Act (EMTALA).

With respect to Title VII, the judge in the New York case noted that the Conscience Rule "defines 'discrimination' so as not to contain the defense that the accommodation sought by the employee would present an 'undue hardship' to the employer." That is, the Rule would not "protect an employer who, on account of hardship, refuses to accommodate the employee." By way of example, the Court explained that under the Conscience Rule, if a hospital which receives federal funds offered an employee a transfer from a unit which performs functions the employee objects to (for example, obstetrics), to a unit which does not (such as neonatal care), the transfer would constitute "discrimination" under the Conscience Rule unless the employee agreed to the transfer. In that situation, a health care facility which receives federal funds "could face liability to HHS – including a loss of funding – under the Rule," even though the transfer would be perfectly reasonable under Title VII. Because HHS does not have the power to make rules which abrogate rights granted by Congress, this conflict with Title VII was fatal to the Conscience Rule.

The Court also observed that the Conscience Rule would conflict with EMTALA. Under EMTALA, hospitals that receive federal funds and have emergency departments must provide emergency care to any patient suffering from an emergency medical condition, regardless of the patient's ability to pay. EMTALA does not include an exception for religious or moral refusals to provide emergency care. However, the Conscience Rule's definition of "discrimination" could expose a provider (such as a hospital, clinic or ambulance service) to liability for failing to accommodate an employee's conscience objection in emergency-care situations. The Court therefore reasoned that the Rule is invalid on the additional ground that it would "create, via regulation, a conscience exception to EMTALA's statutory mandate."

In summary, as matters currently stand the Conscience Rule is unenforceable. That is in part because it deprives health care employers of rights they have under Title VII, and in part because compliance with the Rule would put hospitals at risk of violating EMTALA. Both district court decisions are now on appeal, one to the Second Circuit and one to the Ninth Circuit Court of Appeals. Decisions will likely come down within the next several months. In light of the current social and political climate, though, it is reasonable to expect that the issue is destined for decision by the Supreme Court.

NHD Represents "Friends of the Court" in Supreme Court Super PAC Challenge

Russ Pierce and Chris Taintor have recently entered an appearance in the United States Supreme Court, on behalf of a group of law professors and researchers, who are Amici Curiae ("Friends of the Court") supporting a group of Congressional Petitioners asking the Supreme Court to review a seminal decision of the D.C. Circuit involving campaign finance reform. The D.C. Circuit's 2010 decision in *SpeechNow* gave rise to Super PACs and "independent expenditure organizations." Our Amici clients conducted empirical research on the central questions arising from *SpeechNow*, and are presenting a summary of their research in their Brief for Amici Curiae.

Judicial and Legislative Developments in Maine Employment Law

BY: Devin W. Deane, Esq.

The last several months have seen a great deal of activity in the field of employment law. In a series of decisions, the Maine Supreme Judicial Court and the United States District Court for the District of Maine have more clearly defined the limits on liability under the Maine Whistleblowers Protection Act (MWPA). Meanwhile, the Maine Legislature has enacted several laws which grant Maine workers new rights in the areas of leave, pay, and protection from discrimination.

Judicial Decisions

Pushard v. Riverview

On January 30, 2020, the Maine Supreme Judicial Court decided the case of *Roland Pushard v. Riverview Psychiatric Center*, 2020 ME 23. In *Pushard*, the Court clarified that an employee does not necessarily qualify as a whistleblower simply because he or she complained about a dangerous condition in the workplace. Rather, one must actually reveal a condition that is not generally known to the employer.

Roland Pushard was the Director of Nursing at Riverview. He complained to the hospital director, Jay Harper, about his concern with the inadequacy of the institution's staffing practices. He told Harper that he believed Riverview patients were put at risk because the hospital was staffed by under-qualified caregivers. After Pushard was terminated, he brought suit alleging that he was fired in violation of the MWPA, which prohibits retaliation against an employee who, "acting in good faith, . . . reports to the employer . . . , orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual." 26 M.R.S. § 833(1)(B). The Law Court had previously ruled, in *Cormier v. Genesis Healthcare LLC*, 2015 ME 161, 129 A.3d 944, that a healthcare worker could be protected under the MWPA for reporting staffing-related safety concerns. The Court said, however, that Pushard was not protected under the Act because "he was

not exposing a concealed or unknown safety issue. Instead, he was simply giving his opinion concerning his supervisor's attempts to address well-known problems related to staffing." The Law Court explained:

Pushard's conduct does not meet that standard because he was simply engaged in a policy dispute with his employer about how best to handle Riverview's staffing issues. That Riverview was understaffed was known to the public, the Legislature, and Riverview employees. Even if the specific staffing decisions about which Pushard complained were not widely known, it is uncontroverted that Pushard "did not believe that he was making Harper or anyone else aware of anything they were not already aware of." For this reason, Pushard was not *reporting*; he was complaining.

The implications of the *Pushard* case are hard to gauge. It seems unlikely that the Maine Legislature meant to deny job protection to those who complain about unsafe conditions or illegal practices whenever those things are already known to some members of management. On the other hand, in situations like the one in *Pushard*, where a problem truly is public knowledge, the protection of the MWPA arguably should not extend to every employee who echoes what others have said. The Law Court seems to have understood that the facts of the *Pushard* case were fairly unusual, and therefore tried to limit the reach of its holding. The Court expressly observed that it had "no occasion here to articulate a comprehensive standard for what qualifies as a protected report." In particular, the Court "decline[d] to adopt an 'initial reporter' rule for WPA cases, as urged by Riverview." Therefore, it remains to be seen how momentous the decision will be. At the very least, however, we can be sure that in cases to come, there will be litigation over the question of when pre-existing awareness of an unsafe condition or an illegal practice makes an employee a "complainer," who can be disciplined for commenting on those conditions and practices, rather than a statutorily-protected "reporter."

Apon v. ABF Freight Systems, Inc.

In two separate decisions rendered over the course of several months in the same case, the United States District Court for the District of Maine established additional limits on liability under the Whistleblowers Protection Act.

The Plaintiff in the Apon case was an Operations Supervisor for ABF Freight System, Inc., a national trucking company. When the federal government enacted rules to implement "hours of service" and meal break requirements in the Federal Motor Carrier Safety Act – measures to make sure that drivers didn't become overworked and overtired while driving – ABF took steps to ensure compliance. The company required all management personnel to sign a document entitled "Leadership Responsibility Hours of Service and Meal Break Compliance Form." The "Leadership Form" stated that "[c]ompliance must be achieved through oversight, enforcement, and leadership of the Branch Managers and Linehaul Managers." Because the Leadership Form did not mention Apon's job title (Operations Supervisor), he refused to sign it, and he was fired for his refusal. He then sued, alleging violations of both the "reporting" and "refusal" protections of the Whistleblower Protection Act. Apon claimed that his firing was motivated in part by the fact that he had reported to a supervisor his reasonable, good faith belief that his signature on the form would violate state or federal transportation laws, rules, or regulations. He also claimed that the firing was motivated in part by his refusal to commit an illegal act.

ABF, represented by NH&D, first moved to dismiss the "refusal" claim on the ground that Apon had not identified any

particular law he would have violated if he had signed the Leadership Form. There is well-settled authority that employees are protected from retaliation if they *report* what they genuinely and in good faith believe to be violations of the law, even if they are wrong – that is, even if the employer is not actually violating the law. ABF argued, however, that in order to be protected under the MWPA for refusing to carry out a directive, an employee must allege, and ultimately prove, that the directive was actually illegal. The District Court agreed and granted the motion, reasoning that "Section D of the MWPA . . . does not protect an employee who has refused to carry out a directive to engage in an activity that he *genuinely believes would be* a violation of a law or rule. Rather, it protects employees who, acting in good faith, refuse to carry out a directive or engage in an activity that "*would be* a violation of a law or rule."

After the dismissal of the "refusal" claim, the parties conducted discovery on the "reporting" claim, and at the close of discovery ABF moved for summary judgment. ABF argued that the "reporting" claim also failed because, even if Apon was telling the truth when he said he believed it would be illegal for him to sign the Leadership Form, he had not conveyed that belief to anyone at ABF. The District Court agreed on this score as well. According to the Court, it was not enough that Apon objected to the form, telling his supervisor that he "had an issue with the form" and that he needed someone to explain why he, as an Operations Supervisor, was required to sign it. The Court reasoned that "for an employee's conduct to fall within the protection of the MWPA, the purpose of which is to deter retaliation against employees who report what they reasonably believe to be illegal acts, *the employee must communicate that he or she thinks the reported act is illegal*. Put another way, 'it is a basic prerequisite to a whistleblower protection claim that the plaintiff has actually blown the proverbial whistle.'"

Legislative Developments

In the fall of 2019 the Maine legislature enacted several new laws and amendments to existing laws that affect employment law in Maine. Many of the laws, which took effect in the fall and by now have been widely publicized, are intended to curb unfair or discriminatory employment and pay practices. Others are intended to provide Maine workers opportunities for paid time off for inevitable life events.

Earned Employee Leave

The Maine Legislature enacted LD 369, "An Act Authorizing Earned Employee Leave," which is intended to ensure that Maine workers have adequate opportunities to take time off without losing pay to take care of inevitable life events. The law is the first of its kind in the United States. It requires an employer – except an employer in a seasonal industry – that employs more than 10 employees for more than 120 days in any calendar year to provide each employee earned paid leave based on the employee's base pay. The law specifies that an employee is entitled to earn one hour of paid leave for every 40 hours worked, up to 40 hours in one year of employment, with accrual of leave beginning at the start of employment. The employee is required to work for 120 days before an employer is required to permit use of the paid time off. The law requires reasonable notice prior to use of the paid time off. The Department of Labor is required to prepare rules for the implementation of this law. The rulemaking process is underway and the law will take effect January 1, 2021. The Department of Labor has the exclusive authority to enforce the new law and remedy violations thereof.

Pay Equality

The Legislature also enacted LD 278, "An Act Regarding Pay Equality." The law prohibits an employer from inquiring about a prospective employee's compensation history until after an offer of employment that includes all terms of compensation has been negotiated and made to the prospective employee. As stated in the Act's legislative findings and intent, it is intended to address wage inequality that is perpetuated when an employer bases its compensation decision on the pay history of a prospective employee. The rationale is that a prospective employee will continue to experience wage inequality if her pay is based on the unequal pay she received in the past. The Act further provides that an employer's inquiry into a prospective employee's compensation history is evidence of unlawful employment discrimination under the Maine Human Rights Act and Maine Equal Pay Act, for which the employee may recover compensatory damages. An employer may be fined not less than $100 and not more than $500 for each violation of the Act.

Pregnant Workers

Through enactment of LD 666, "An Act to Protected Pregnant Workers," the Legislature required employers to provide reasonable accommodations for employees' pregnancy-related conditions, unless providing the accommodations would impose an undue hardship on the employer. The Act specifies that reasonable accommodations may include, but are not limited to, providing more frequent or longer breaks; temporary modification in work schedules, seating, or equipment; temporary relief from lifting requirements; temporary transfer to less strenuous or hazardous work; and provisions for lactation.

Gender Identity

LD 1701, "An Act to Clarify Various Provisions of the Maine Human Rights Act," was also enacted into law. The Act adds gender identity as a protected class under the Maine Human Rights Act and prohibits "[d]iscrimination in employment . . . on the basis of sexual orientation or gender identity." The Act defines gender identity as "the gender identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual's assigned sex at birth." Religious organizations that do not receive public funds are exempted from compliance with the law.

Noncompete Agreements

Another law enacted by the legislature, LD 733, "An Act To Promote Keeping Workers in Maine," limits the scope and enforceability of non-compete agreements. The Act states that "[n]oncompete agreements are contrary to public policy" and are enforceable only to the extent that they are reasonable and no broader than necessary to protect:

1. The employer's trade secrets (as defined by statute);
2. The employer's confidential information that does not qualify as a trade secret; or
3. The employer's goodwill.

26 M.R.S. § 599-A. The Act outright prohibits noncompete agreements for an employee earning wages at or below

400% of the federal poverty line. 400% of the current federal poverty line is $49,960. According to the U.S. Census Bureau, per capita income and median household income in Maine were $29,886 and $53,024 in 2017, respectively. Thus, noncompete agreements are now prohibited for a significant majority of Maine employees. An employer may be fined not less than $5,000 for violating this prohibition. The Department of Labor is responsible for enforcement of the prohibition; the Act does not create a private right of action for the affected employee.

"Wage Theft"

Finally, the Legislature enacted LD 1524 "An Act to Prevent Wage Theft and Promote Employer Accountability." The law creates additional remedies for so-called "wage theft" by an employer, which is defined as a violation of state laws regarding minimum wage, overtime, and timely and full payment of wages, among others. The additional remedies include injunctive relief through the courts and cease operations orders from the Commission of Labor. The remedies are in addition to existing penalties and, with respect to injunctive relief, the Act provides that an employer must pay costs and attorneys' fees to the prevailing party (either an employee or the Department of Labor). The Act is intended to curb abusive wage payment practices, which affects the employee involved, but also affects the State's payroll tax base, and creates an unfair advantage as compared to competitors who play by the rules.

Employers should review their personnel policies, including policies regarding compensation, paid leave, reasonable accommodations, and noncompete agreements, to ensure their consistency with the newly enacted laws. Employment counsel at Norman, Hanson & DeTroy are available to provide further and specific guidance with these and other employment matters.

NHD COVID-19 Safety Considerations

In light of the COVID-19 outbreak, Norman, Hanson & DeTroy, LLC, has adjusted its policies so that its services and response capabilities for clients remain unaffected, while doing our best to prevent risk of spreading the coronavirus in our workplace and our community.

Because of safety considerations relating to COVID-19, we are closing reception to all walk-in traffic. Every effort will be made to conduct meetings and conferences via telephone or other electronic forms of communication. If the circumstances require an in-person meeting, it will need to be scheduled through your attorney, and we will ask any visitor to respect social spacing recommendations from the CDC.

We are following state and federal CDC Guidelines, and are:

- limiting our business travel plans and in person meetings in favor of conference calls or video conferencing where possible;

- assuring that our lawyers are technologically enabled to work remotely in case of a need for confinement or spread prevention. The quality of work and communications will not be affected adversely;
- instructing that if meetings need to be held in person, every effort will be made to avoid close contact;
- updating our practices to be consistent with current CDC guidelines on prevention and risk management.

Norman, Hanson & DeTroy is committed to continuing to provide our clients with experienced, effective and efficient legal services in a timely manner, consistent with the official recommendations for dealing with the coronavirus outbreak.

Thank you for your understanding as we work through this health crisis together.

Marjerison Named as ACTL Fellow

On March 7, 2020, Tom Marjerison was inducted as a Fellow of the American College of Trial Lawyers. Mark Lavoie, Jonathan Brogan, and the late Peter DeTroy are previous inductees from the firm.

Tom represents clients in civil and criminal matters in state and federal courts. Tom's cases have ranged from the acquittal of a physician charged in federal court with multiple counts of unlawful distribution of controlled substances in United States v. Hoffman to the Maine Law Court's adoption of the implied co-insured doctrine in North River Insurance Co. v. Snyder along with numerous defense verdicts in high-value and high-profile trials.

The American College of Trial Lawyers is comprised of the best of the trial bar from the United States and Canada and is widely considered to be the premier professional trial organization in North America. Founded in 1950, the College is an invitation only fellowship. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. Learn more at www.actl.com.

Several NHD attorneys recognized in the 2019 edition of New England Super Lawyers and New England Rising Stars

Norman, Hanson & DeTroy is proud to announce that the 2019 edition of New England Super Lawyers and the 2019 New England Rising Stars has recognized several of our attorneys for inclusion in the publications. We congratulate each of these attorneys for this accomplishment.

Top 100 2019 New England Super Lawyers
Mark G. Lavoie – 2019

Super Lawyers
Jonathan W. Brogan – 2019 – Personal Injury – General: Defense
Stephen Hessert – 2019 – Workers' Compensation
Kelly M. Hoffman – 2019 – General Litigation
John H. King, Jr – 2019 – Workers' Compensation
Mark G. Lavoie – 2019 – Personal Injury – Med Mal: Defense
Thomas S. Marjerison – 2019 – Personal Injury – General: Defense
James D. Poliquin – 2019 – Insurance Coverage
John R. Veilleux – 2019 – Personal Injury – General: Defense

Super Lawyers Rising Stars
Christopher L. Brooks – 2019 – Creditor Debtor Rights
Devin W. Deane – 2019 – Civil Litigation: Defense
Joshua D. Hadiaris – 2019 – General Litigation
Grant J. Henderson – 2019 – Workers' Compensation
Matthew Mehalic – 2019 – Insurance Coverage
Darya I. Zappia – 2019 – Business/Corporate

NHD honored to be included among the top "Highly Recommended" law firms in the State of Maine

Norman Hanson & DeTroy is honored to be included among the top of the "Highly Recommended" law firms in the State of Maine in the 2020 edition of *Benchmark Litigation's* "The Guide to America's Leading Litigation Firms and Attorneys" In addition, the following attorneys received individual recognition from *Benchmark Litigation*:

Local Litigation Stars

Jonathan W. Brogan – 2020

Mark G. Lavoie – 2020

Future Stars

Thomas S. Marjerison – 2020

Joshua D. Hadiaris – 2020

Benchmark 40 & Under Hot List!

Joshua D. Hadiaris – 2019

Norman Hanson & DeTroy Attorneys Receive Honors from Best Lawyers

Norman, Hanson & DeTroy is proud to announce that fourteen of its attorneys have been named to the 2020 edition of The Best Lawyers in America, the oldest and most respected peer review publication in the legal provision. First published in 1983, Best Lawyers is based on an exhaustive annual peer-review survey comprising of nearly 4 million confidential evaluations by some of the top attorneys in the country. The Best Lawyers list appears regularly in Corporate Counsel Magazine, and is published in collaboration with U. S. News & World Report. The following attorneys were honored by Best Lawyers for their work and expertise in the listed practice areas:

John W. Geismar – 2020
Tax Law

Robert W. Bower, Jr – 2020
Labor Law
Worker's Compensation Law – Employers

Jonathan W. Brogan – 2020
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Paul F. Driscoll – 2020
Litigation – Real Estate
Real Estate Law

Stephen Hessert – 2020
Worker's Compensation Law – Employers

Kelly M. Hoffman – 2020
Litigation – Labor and Employment
Professional Malpractice Law – Defendants

John H. King, Jr – 2020
Worker's Compensation Law – Employers

Mark G. Lavoie – 2020
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Thomas S. Marjerison – 2020
Personal Injury Litigation – Defendants

Russell B. Pierce, Jr. – 2020
Appellate Practice
Commercial Litigation
Ethics and Professional Responsibility Law
Product Liability Litigation – Defendants
Professional Malpractice Law – Defendants

James D. Poliquin – 2020
Appellate Practice
Bet-the-Company Litigation
Commercial Litigation
Insurance Law
Personal Injury Litigation – Defendants

Daniel P. Riley – 2020
Administrative/Regulatory Law
Government Relations Practice

Roderick R. Rovzar – 2020
Corporate Law
Real Estate Law

John R. Veilleux – 2020
Insurance Law
Personal Injury Litigation – Defendants

In addition, six attorneys have been designated by Best Lawyers as the “Lawyer of the Year” for 2020 for the greater Portland area. We congratulate them for having achieved this impressive recognition.

James D. Poliquin – 2020 Appellate Practice

Kelly M. Hoffman – 2020 Professional Malpractice Law – Defendants

Mark G. Lavoie – 2020 Medical Malpractice law – Defendants

Paul F. Driscoll – 2020 Litigation – Real Estate

Robert W. Bower, Jr. – 2020 Workers’ Compensation Law – Employers

Russell B. Pierce, Jr. – 2020 Product Liability Litigation – Defendants

NH&D Recognized by Chambers & Partners

Chambers & Partners USA 2019 has recognized NH&D as a Top Firm in the category Litigation: General Commercial. Additionally the following NH&D attorneys have received the “Ranked Lawyer” distinction in the publication:

Emily A. Bloch – Maine Litigation: Medical Malpractice & Insurance

Jonathan W. Brogan – Maine Litigation: Medical Malpractice & Insurance

Mark G. Lavoie – Maine Litigation: Medical Malpractice & Insurance

Russell B. Pierce – Maine Litigation: General Commercial

James D. Poliquin – Maine Litigation: General Commercial

Christopher C. Taintor – Maine Litigation: Medical Malpractice & Insurance

Immunity for Physicians Who Criticize Their Peers

By Christopher C. Taintor, Esq.

Section 2511 of the Maine Health Security Act grants immunity from suit to physicians (and some others) "for making any report or other information available to any . . . professional competence committee . . . committee pursuant to law." A "professional competence committee" is any committee which has "responsibility effectively to review the professional services rendered in [a healthcare] facility for the purpose of insuring quality of medical care of patients therein." The term can include a credentialing, peer review, quality assurance, or medical executive committee, as long as its purpose is at least in part to "maintain or improve . . . quality of care," "reduce morbidity and mortality," or "establish and enforce appropriate standards of professional qualification, competence, conduct or performance."

In *Strong v. Brakeley*, which was decided in 2016, the Maine Supreme Judicial Court ruled that for physicians, the immunity afforded by Section 2511 is absolute – that is, even if a doctor who is asked to comment on the competence or character of a peer maliciously lies in response to that inquiry, he cannot be held liable for damages. The Court reasoned that the immunity provision is intended to encourage the candid reporting which is essential to promoting quality in the healthcare profession, and that allowing liability upon proof of bad faith would discourage doctors from exposing incompetent or unprofessional colleagues.

In *Argerow v. Weisberg*, the Law Court took the immunity analysis one step further. In that case Argerow, a nurse practitioner, resigned from her position with Dr. Weisberg and accepted a job at Mercy Hospital. In a lawsuit against both Weisberg and Mercy, Argerow alleged that Weisberg, who had an incentive to retaliate against her because she had testified against him in a workers compensation hearing, then contacted Mercy and accused her of incompetence, which led the hospital to withdraw its job offer. The Superior Court dismissed the complaint, citing Section 2511 of the MHSA. Argerow appealed and the Law Court affirmed the dismissal.

For a majority of the Law Court, the case was a simple application of the rule it had established in *Strong v. Brakeley*. However, two justices dissented, arguing that the Court had gone too far. Most notably, the dissenters said that it was error for the Superior Court, and a majority of the Law Court, to treat any and all information presented to a hospital as falling within the scope of Section 2511. In their view, Argerow should have been allowed to conduct some limited discovery focused on the immunity defense before the Superior Court ruled on the motion. They argued that "[t]he Court's decision expand[ing] the scope of immunity to include *any* information supplied to any representative of a hospital by a physician" was wrong, because the statute was "intended to apply to information supplied by a *qualified* reporter to an *appropriate* authority during a *legitimate* peer review process." According to the dissenters, context is critical in deciding questions of immunity, and from the complaint alone the Court could not know "to whom Weisberg placed his call or report, . . . or whether that person could be properly deemed an appropriate 'board, authority, or committee' pursuant to Section 2511."

Argerow illustrates the difficult policy choices confronted by a court called upon to interpret and apply an immunity statute like Section 2511. There is no doubt that important public policies are served by encouraging doctors and representative of health care organizations to be candid about the shortcomings of their peers. Patients can be

harmed if doctors and hospitals are afraid to divulge that information to organizations that are prepared to hire their former employees, because they might be sued for defamation or on some other theory. On the other hand, as the law has now developed, healthcare professionals like Argerow have no recourse for even the most savage, career-crippling falsehoods, shared behind closed doors and with malicious purpose, regardless of the existence of any formal credentialing, peer review, or quality assurance process.

WC Appellate Division Decision issued on June 7, 2019 – Termination Due to Cause from Post-Injury Employment

Termination Due to Cause from Post-Injury Employment

A recently issued Appellate Division case provides some clarity to the murky question as to what effect, if any, does termination due to cause have on the analysis of an injured worker's post-injury earning capacity.

In O'Leary v. Northern Maine Medical Center, the employee sustained a 2011 back injury. For a period following the injury, she was able to return to her regular job but her employment subsequently ended based on her termination for cause. After her termination, she found employment with a new employer earning less. She filed a Petition for Review seeking to establish entitlement to ongoing partial benefits given the reduced earnings. In the underlying decree, the ALJ made the factual finding that the work injury continued to result in the need for restrictions. However, he held that the work injury had not resulted in reduced earning capacity. In doing so, the ALJ held that while the earnings for the new employer did constitute prima facie evidence of her post-injury ability to earn, it was also appropriate to include the earnings from the job she lost in his analysis given that the termination was due to her own fault. Since she was earning consistent with her pre-injury average weekly wage prior to her termination, the ALJ concluded that the employee failed to demonstrate that the reduced earnings were caused by the injury. As such, her Petition for Review was denied.

On appeal, the Appellate Division affirmed. Although this would appear to be the perfect opportunity for the Appellate Division to address the ambiguity present in 39-A M.R.S. §214(1)(D) and (E), they chose not to do so. Rather, they simply confirmed that analysis of the ALJ contained no legal error and the post-injury/pre-termination earnings constituted competent evidence of earning capacity.

Please feel free to contact Lindsey M. Sands, Esq. at lsands@nhdlaw.com with any questions.

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WC Appellate Division Decision issued on May 14, 2019 – Social Security Retirement Benefits and 14-Day Violation

Social Security Retirement Benefits and 14-Day Violation

The Appellate Division recently issued a notable decision in a case titled Butler v. City of Portland. This decision addresses two issues: (1) the applicability of the Social Security retirement benefit authorized under the coordination of benefits provision in §221; and (2) whether a 14 day violation exists in the absence of an affirmative request for lost time benefits.

The first argument was that the City of Portland was not entitled to take the statutory offset for Social Security retirement benefits being paid because the City had never contributed to the Social Security system on the employee's behalf. Based on the plain language of the statute, the Administrative Law Judge had rejected this argument and allowed the City to take the offset. The Appellate Division affirmed this finding and expressly noted that while the legislature could have implemented a provision limiting the offset to the contributing employer, it chose not to do so.

The employee had also argued that a 14 day violation occurred when the City's insurer had failed to either increase his partial benefits to total or file a Notice of Controversy within 14 days of having actual knowledge that he was taken out of work in part due to his restrictions. The employee had been working part time in an accommodated position due to his work injury while receiving partial benefits based on his reduced wages. He ultimately left work when the City told him that they could no longer accommodate the restrictions. He took a disability retirement package and continued to receive partial benefits. The administrative law judge found that he did not seek an increase in incapacity benefits when he went out of work, neither did anyone on his behalf. Per these facts, the administrative law judge rejected the argument of a Rule 1.1 violation. On appeal, the employee did not dispute the factual findings but argued that the City's actual knowledge of his out of work status was sufficient to trigger Rule 1.1. The Appellate Division disagreed and affirmed the underlying decision. In doing so, they noted that Mr. Butler continued to have earning capacity and in fact found part-time work thereafter. "As a matter of law, he was not automatically entitled to benefits on account of the circumstances that ended his employment. To invoke the penalty provision in Me. WCB Rule, ch. 1, § 1, he had to make an affirmative claim for benefits." Of note, a footnote suggests a potentially different answer may have been reached if the employer had "knowledge 'from the circumstances of the injury' that is responsible to pay benefits. This could occur when an ALJ finds as fact an actual loss of earning capacity implied by the circumstances of the injury."

We continue to recommend that Notice of Controversies be filed anytime when there is knowledge that an employee loses time as a result of an injury; regardless of whether a verbal assertion of a claim is made. With that said, this case will clearly be helpful in defending allegations of a 14 day violations premised on what the employer knew or should have known.

Please feel free to contact Lindsey M. Sands, Esq. at lsands@nhdlaw.com with any questions.

The First Circuit Significantly Expands the Scope and Reach of the Maine Human Rights Act

By Devin W. Deane, Esq.

In a recent decision, *Roy v. Correct Care Solutions, LLC*, 914 F.3d 52 (1st Cir. 2019), the United States Court of Appeals for the First Circuit significantly expanded the scope and reach of employer and non-employer liability under the Maine Human Rights Act ("MHRA"). Addressing "unresolved questions of Maine Law," the First Circuit held:

- Non-employers may be liable for employment-related discrimination under § 4633 of the MHRA;
- Employers may be liable for a hostile work environment created by non-employees as long as the employer knew of the harassment and failed to take reasonable steps to address it; and
- Employers may be liable for retaliation where its adverse action was caused by a third party's action or demand, which the employer knew was motivated by a retaliatory or discriminatory animus.

The case arises out of the Maine State Prison in Warren, Maine. The plaintiff, Tara Roy, worked at the Maine State Prison as a nurse, employed by defendant Correct Care Solutions, LLC—a government contractor that contracted with the Maine Department of Corrections ("MDOC") to provide health care services at the prison.

As alleged by the plaintiff, while working at the prison, several MDOC corrections officers made derogatory comments about the plaintiff and women in general; referred to her using sexual epithets; and spread rumors that she had slept with multiple corrections officers. After she complained about the conduct to her employer, Correct Care Solutions, corrections officers began ignoring her requests for assistance and frequently left her alone with inmates in violation of prison protocols. The plaintiff reported the protocol violations to her employer, which she claimed were retaliatory and put her at risk of harm. Correct Care Solutions notified the MDOC of the complaints. After investigating at least one of the incidents, the MDOC concluded that the plaintiff had exaggerated the circumstances of the alleged protocol violations. The MDOC revoked the plaintiff's security clearance, which was a requirement of plaintiff's position at Correct Care Solutions. Citing the revocation of her security clearance, Correct Care Solutions terminated the plaintiff's employment.

The plaintiff sued the MDOC and Correct Care Solutions alleging, among other things, that she was subjected to a hostile work environment created by the MDOC correction officers; that her employer, Correct Care Solutions, knew of the officers' harassment and failed to take reasonable steps to address it; and that her termination and the revocation of her security clearance were in retaliation for her complaints about the hostile work environment created by the MDOC corrections officers.

The United States District Court for the District of Maine entered summary judgment in the defendants' favor. With respect to the claims against the MDOC, the District Court held that non-employers, like the MDOC in this instance, cannot be liable under the MHRA. With respect to the claims against Correct Care Solutions, the District Court held that the plaintiff did not generate a dispute of fact regarding the existence of a hostile work environment and that the plaintiff's complaints regarding the corrections officers' conduct were not protected activity—and therefore could not be the basis of a retaliation claim—because Correct Care Solutions was without the ability and authority to correct the officers' behavior.

On appeal, the First Circuit reversed summary judgment for each defendant finding error with each of the bases of the District Court's opinion.

Non-employer liability under the MHRA

Relying on the Law Court's decision in *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, 58 A.3d 1083, the District Court concluded that the MHRA allows employment discrimination actions against employers only, and never against non-employer entities like the MDOC. The First Circuit disagreed, holding, based on the text and history of § 4633 of the MHRA, the MHRA allows retaliation claims against any "person," including non-employers. The First Circuit distinguished *Fuhrmann*, where the issue before the Law Court was individual supervisor liability for a claim under § 4572, the MHRA provision that prohibits unlawful employment discrimination an "employer." In contrast, § 4633 prohibits discrimination by any "person," which, according to the First Circuit, targets actions by third parties, like the MDOC—not the employer, its employees, or agents. The First Circuit declined to extend *Fuhrmann*'s holding to bar suits against non-employer third parties under § 4633.

Employer liability for a hostile work environment created by non-employees

The District Court did not address the issue of whether Correct Care Solutions could be liable for the alleged hostile work environment created by the non-employee, third-party corrections officers. The District Court entered summary judgment for Correct Care Solutions on the basis that the plaintiff did not establish a genuine dispute of fact as to whether the corrections officers' conduct constituted a hostile work environment. The First Circuit disagreed, concluding that the plaintiff had produced enough evidence to generate a dispute of fact as to the existence of a hostile work environment. The First Circuit then addressed Correct Care Solutions' potential liability for the alleged hostile work environment created by the non-employee, third-party corrections officers. Citing a number of federal cases interpreting similar claims under Title VII, the First Circuit held that "an employer can be liable under the MHRA for a hostile work environment created by non-employees as long as the employer knew of the harassment and failed to take reasonable steps to address it."

Employer liability for adverse action caused by a third party's discriminatory animus

In entering summary judgment for Correct Care Solutions on the plaintiff's retaliation claim, the District Court ruled that the plaintiff's complaints were not protected activity because, in its view, Correct Care Solutions lacked the ability and authority to correct the complained-of violations by the corrections officers. Because it concluded that the plaintiff's complaints were not protected activity, the District Court did not address the plaintiff's argument that

Correct Care Solutions terminated her because of her complaints. The First Circuit reversed, concluding that the plaintiff's complaints were protected activity under the MHRA and that factual disputes existed as to whether the plaintiff was terminated in retaliation for her complaints. Rejecting Correct Care Solutions' argument that its reason for firing the plaintiff— the MDOC's revocation of her security clearance—was neutral, the First Circuit held that "a jury could conclude that MDOC's retaliatory animus caused the revocation of the security clearance and, in turn, caused [the plaintiff's] termination." The First Circuit held that an employer may be liable for retaliation under the MHRA where a third party's retaliatory or discriminatory actions or demands caused the employer's adverse action and "the employer knew that [retaliatory or discriminatory] animus motivated the third party's actions or demands and simply accepted those actions or demands."

The First Circuit's opinion is non-binding but likely persuasive authority to Maine courts

Because it was interpreting and applying a state statute, and not reviewing the statute with respect to its constitutionality, the First Circuit's opinion is not binding on Maine state courts' interpretation and application of the MHRA. However, the First Circuit's opinion is likely to be persuasive authority unless and until the Law Court addresses the issues specifically.

Breach of Home Construction Contracts Act Does Not Entitle Homeowner To Substantial Damages or Recovery of All Attorney's Fees Incurred in Prosecuting Claim

By Matthew T. Mehalic, Esq., CPCU

In *John Sweet II v. Carl E. Breivogel et al.*, 2019 ME 18 (Jan. 29, 2019), the Law Court looked at the connection between the Home Construction Contracts Act (HCCA) and the Unfair Trade Practice Act (UTPA). The case arose out of the home construction of a timber frame home by Sweet for the Breivogels on Mount Desert Island. The parties had exchanged communications prior to the commencement of construction. The Breivogels were shown several examples of Sweet's construction. Sweet gave the Breivogels estimates for construction of similar homes he showed them. The Breivogels inquired about whether Sweet could build them a saltbox style timber frame home for $275,000. The Breivogels contended that they believed they had requested a fully completed home, ready for occupancy. Sweet contended that he understood that the Breivogels only wanted an enclosed, weather tight timber frame home – including only a frame, walls, roof, insulation, doors, windows, chimney, and exterior shingles.

The Breivogels authorized Sweet to begin construction, but there was no contract. The Breivogels asked Sweet when they would formalize the project terms and Sweet responded that he had never signed a written contract in over thirty years. They did agree that the Breivogels would be billed biweekly and pay for all materials and labor at a rate of $32/hour. Throughout the construction, Sweet sent the Breivogels emails containing photographs of the

progress and biweekly invoices.

Upon completion of the work that Sweet had believed the Breivogels had originally requested, it was understood by both parties that Sweet would continue to construct a fully completed home ready, for occupancy. "At this point, the Breivogels determined, without informing Sweet, that they would have Sweet continue to work on the project, but would initiate legal action against him after they obtained a certificate of occupancy. They intended to seek damages for payments made in excess of $275,000." *Id* at ¶ 9. Despite this, the Breivogels paid Sweet a total of $601,195.75 through the end of construction. Sweet invoiced the Breivogels a total of $602,250.98, but the Breivogels refused to pay any additional amounts. Sweet then placed a lien on the home for $51,953.94 for unpaid labor and plumbing work and filed an action against the Breivogels. The Breivogels filed counterclaims for negligence, breach of contract, fraud, negligent misrepresentation, breach of the implied warranty of workmanship, and violation of the Unfair Trade Practices Act.

The Superior Court determined that Sweet was entitled to the money he had received under a theory of quantum meruit for the work he performed in constructing the home, but also held that he overcharged the Breivogels by $640.77. On the Breivogels' counterclaims, the Superior Court held that they failed to establish that Sweet was negligent, that he breached any contractual obligation to perform in a workmanlike manner, that he breached an implied warranty, or that Sweet committed fraud or negligent misrepresentation. The Superior Court did determine that Sweet violated the Home Construction Contract Act by failing to provide a written contract, which also resulted in a finding of violation of the Unfair Trade Practices Act. The Superior Court awarded costs to the Breivogels in the amount of $3,832.43 and attorneys' fees of $30,000, as allowed under the Unfair Trade Practices Act. The Breivogels appealed the Superior Court judgment arguing that the Superior Court erred in (1) concluding that they failed to establish their counterclaims for fraud, negligent misrepresentation, and breach of contract; (2) "calculating the damages recoverable under the Unfair Trade Practices Act arising out of the violation of the Home Construction Contract Act; and (3) awarding insufficient attorneys' fees." *Id.* at ¶ 13.

The Law Court held that the Superior Court did not err in its determinations in regards to the counterclaims for fraud, negligent misrepresentation, and breach of contract.

In regards to the calculation of damages recoverable under the Unfair Trade Practices Act, the Court found that the trial court was correct in awarding only the amount overcharged by Sweet – $640.77.

> In this case, while it is clear that the parties did not sign a contract or share an exact understanding of the scope and terms of construction, the court's application of quantum meruit was appropriate. The parties engaged in months of discussions and planning before the project began and remained in fairly constant communication throughout every phase of construction. . . The Breivogels permitted Sweet to continue the project beyond the [weather tight] phase – the point at which the Breivogels realized that Sweet had a different understanding of the scope and cost of construction – and allowed him to continue working until their home was fit for occupancy.

Id. at ¶ 18. Furthermore, the Court determined that the amounts charged by Sweet to the Breivogels was appropriate for the product received.

In regards to the Breivogels recovery under the Unfair Trade Practices Act, the Court also found that the trial court was correct in the awarded damages. "To recover under the [Unfair Trade Practices Act], a party must demonstrate a loss of money or property as a result of a UTPA violation." *Id.* at 21. In performing this analysis, the court looks to whether the homeowner has suffered a financial or tangible loss, whether the materials claimed to be furnished were in fact furnished, and whether the price charged was fair and reasonable. The Court determined that the Breivogels failed to establish that they did not receive value for their payments. There also was no loss sustained because of Sweets' failure to provide a contract.

Finally, in regards to the award of attorneys' fees, the Court determined that the Superior Court award was appropriate. "An award of attorney fees pursuant to the [Unfair Trade Practices Act] is recoverable only to the extent that it is earned pursuing a UTPA claim." *Id.* at ¶ 24. The Breivogels argued that they were entitled to recover all of their attorneys' fees because all of the claims were inextricably entwined with, and arose from the UTPA violations. The Law Court rejected this argument and held that the Superior Court properly exercised its discretion where the Breivogels failed to distinguish between the fees incurred associated with the UTPA violation and those associated with the counterclaims.

This decision reemphasizes that violation of the Home Construction Contract Act does not necessarily result in an imposition of damages, but the attorneys' fees and costs awarded may be substantial – especially when considering that the contractor violating the Home Construction Contract Act will have costs and fees of his or her own.

Decision to Discharge Patient Appropriate and Medical Malpractice Prelitigation Screening Panel Not Equivalent to Trial

By Matthew T. Mehalic, Esq., CPCU

In *Randy N. Oliver, II et al. v. Eastern Maine Medical Center*, 2018 ME 123 (August 21, 2018), the Law Court addressed whether EMMC was negligent when it discharged an individual despite contrary instructions given by the individual's limited guardians to the hospital. The Superior Court entered judgment in favor of EMMC and the Law Court affirmed holding that EMMC was not negligent.

The case arose out of the hospitalization of an individual, Randy Oliver. Randy was found severely intoxicated at his home and was taken to EMMC by his daughter and his ex-wife. The conditions of Randy's home were unsanitary, there was no running water, and there were a number of fire hazards. Randy was admitted with diagnoses of liver-related brain damage, possible alcohol withdrawal, deterioration of functional status, and a neglected state. He also had burns on his hands. The day after his admission, a psychiatrist conducted an evaluation of Randy, at which Randy expressed that he did not understand why he was at the hospital. The evaluation concluded that Randy's alcohol addiction was potentially lethal, that he suffered from significant cognitive impairment, and that a guardian might need to be appointed. About a week later another evaluation was performed by a neuropsychologist that

concluded that Randy lacked the capacity to manage simple or complex finances independently or make informed decision about his health.

Randy's son and daughter filed a petition with the Probate Court to be appointed Randy's co-guardians. After a hearing Randy's son and daughter were appointed as co-guardians. However, the appointment was limited in that the guardians were authorized to "act only as necessitated by [Randy's] actual mental and adaptive limitations or other conditions warranting this procedure." *Id.* at ¶ 9.

Over the course of Randy's two month hospitalization his condition improved and he expressed that he wanted to leave the hospital. Another neuropsychological evaluation was performed. The evaluation indicated that Randy was alert, friendly, pleasant, and very cooperative. Randy was noted as "strikingly different" from the earlier evaluation. It was concluded that Randy had the capacity to "manage simple or complex finances independently" and "make better informed decisions regarding his health." *Id.* at ¶ 10. Randy had also indicated that he planned to quit drinking.

Based on the evaluation, EMMC concluded that Randy "no longer needed acute medical care and that the hospital was possibly holding him there against his will." *Id.* at ¶ 11. Randy's son and daughter, his limited guardians, disagreed with the evaluation findings and disapproved of Randy's discharge from the hospital. EMMC offered to have another evaluation performed by another practitioner, but the guardians informed EMMC that they did not want another evaluation. EMMC ultimately discharged Randy based on the Probate Court's order providing limited guardianship to Randy's son and daughter only where Randy was unable of making decisions and Randy's request to be discharged. When Randy was discharged a plan was generated that included a referral to Randy's primary care provider, a pain clinic, community case management, and a recommendation to participate in substance abuse treatment. Randy's son and daughter were informed by EMMC of Randy's discharge on the date of discharge.

Randy's son and daughter visited Randy twice over the course of the night and when they left him the last time he was intoxicated. Randy died later that night as the result of a fire.

Randy's son and daughter, individually and as personal representatives of the estate filed a complaint in the Superior Court against EMMC based on negligence for breach of the standard of care. Judgment was entered in favor of EMMC. An appeal was filed by Randy's son and daughter.

The issues raised on appeal were whether the Superior Court erred in: (1) "concluding that the Probate Court's guardianship order did not preclude EMMC from discharging Randy, given the contrary instructions they had given in their capacity as Randy's court-appointed guardians"; (2) "concluding that Randy had regained capacity to make the decision to be discharged"; and (3) "concluding that EMMC's discharge plan was reasonable." *Id.* at ¶ 26.

With regard to the first issue, the Law Court held that the Superior Court was correct in concluding that the Probate Court guardianship order did not preclude EMMC from discharging Randy. The guardianship order was a limited guardianship order, pursuant to 18-A M.R.S. § 5-105. This section allows appointment of a guardian with fewer than all of the legal powers and duties of a guardian. In addressing healthcare decisions, per the Probate Code, the limited guardian is to make decisions in accordance with the ward's individual instructions when the ward has

capacity. *See* 18-A M.R.S. § 5-312(a)(3). Furthermore, the healthcare provider, per the Uniform Healthcare Decisions Act contained within the Probate Code, is to presume capacity and when capacity is lacking if the individual regains capacity the healthcare provider is to communicate the determination to the patient and any other person authorized to make decisions on behalf of the patient. Because of the determination by the healthcare provider that Randy had regained capacity and because of the limited scope of the Probate Court guardianship order, EMMC was not precluded from discharging Randy.

In regards to the second issue, the Court concluded that EMMC met the standard of care involved in concluding that Randy regained capacity. Having the same neuropsychologist evaluate Randy upon the initial admission and almost two months later in order to compare the condition of Randy met the standard of care. Also, the other EMMC providers that had interacted with Randy during his hospitalization also concluded that he had regained capacity. The medical records supported Randy's improvement and regaining of capacity. The expert witnesses called by EMMC to testify also supported that the EMMC met the standard of care for evaluating whether Randy had regained capacity to make the decision to be discharged.

Finally, with regards to the third issue, the Court concluded that the discharge plan was safe and reasonable. Appointments were scheduled for Randy to a pain clinic and his primary care physician. Information was provided for case management services. EMMC also gave strong recommendations that Randy stop drinking, attend group meetings, and EMMC even offered substance abuse counseling. Randy's acknowledgment that he needed to stop drinking was evidence that the discharge plan was appropriate. Therefore, the discharge plan was held to be safe and reasonable and not negligent. Judgment in EMMC's favor was affirmed.

Another issue involved in the appeal, was whether the Superior Court had erred when it refused to award EMMC its expert costs incurred during the medical malpractice prelitigation screening panel process. Title 14 M.R.S. § 1502-C allows the courts within their discretion to award reasonable expert witness fees and expenses as allowed under 16 M.R.S. § 251. Section 251 provides in pertinent part, "The court in its discretion may allow at the trial of any cause, civil or criminal, in the Supreme Judicial Court, the Superior Court or the District Court, a reasonable sum for each day's attendance of any expert witness or witnesses at the trial." Due to the confinement of section 251 to "trial" in a court, the Law Court held that the prelitigation screening panel proceeding was not a "trial" that permitted the courts to award expert witness fees and expenses incurred in the panel proceeding.

No Liability Coverage Under Homeowner's Policy for Premeditated Assault

By Matthew T. Mehalic, Esq., CPCU

In *Vermont Mutual Insurance Company v. Jonathan Ben-Ami, et al.*, 2018 ME 125 (August 21, 2018), the Law Court addressed whether the expected or intended injury exclusion applied where an individual carried through a

premeditated attack on another. James Poliquin, Esq. of Norman, Hanson & DeTroy, LLC represented Vermont Mutual on this claim and successfully argued that the exclusion applied.

The case arose out of Joshua Francoeur's attack on a fellow high-school student, Jonathan Ben-Ami. The two individuals had a verbal altercation at a football game several days before the attack. Francoeur was encouraged by his friends to plan an attack on Ben-Ami. During the school day, Francoeur went to Ben-Ami's classroom. The door to the classroom was locked, but Francoeur was able to convince the teacher to open the door. Francoeur went up behind Ben-Ami who was wearing headphones and punched him repeatedly in the face resulting in injuries and a broken jaw.

Francoeur's father had a homeowner's policy with Vermont Mutual. The policy included an exclusion for expected or intended injury which provided in pertinent part that coverage was excluded for "bodily injury . . . which is expected or intended by the insured." *Id.* at ¶ 12. Ben-Ami filed a complaint against Francoeur and Vermont Mutual provided a defense under a reservation of rights based on the expected or intended injury exclusion and on other grounds not addressed by the Law Court on appeal. Eventually, Ben-Ami and Francoeur agreed to a stipulated judgment with a covenant not to execute against the personal assets of Francoeur. Ben-Ami proceeded solely against any liability coverage that was provided under the Vermont Mutual policy. Vermont Mutual filed a declaratory judgment action on the basis of the application of the exclusion, among other reasons, and Ben-Ami filed a reach-and-apply action against Vermont Mutual. The two matters were consolidated.

The Superior Court denied Vermont Mutual's motion for summary judgment and held a bench trial on the applicability of the expected or intended injury exclusion and ruled in favor of Ben-Ami. The Superior Court did not conclude that Francoeur "subjectively intended to inflict the level of damage that ultimately was inflicted upon Mr. Ben-Ami in the form of his broken jaw." *Id.* at 6. Furthermore, the Superior Court determined that, "Mr. Francoeur's testimony that he did not consider the consequences of his action or consider the likelihood that his punching of Mr. Ben-Ami would produce a serious injury [was] credible." *Id.* Vermont Mutual appealed the Superior Court's decision.

The Law Court framed the dispositive issue as "whether the evidence compelled the court to find that Francoeur either "intended or expected" bodily injury to Ben-Ami, which would trigger the exclusion." *Id.* at ¶ 14. The Court determined that the evidence did compel such a finding.

Crucial to the Courts determination were the following facts:

> Francoeur and Ben-Ami had had a hostile verbal encounter several days earlier; Francoeur then developed a plan to attack Ben-Ami; in execution of that plan, Francoeur left his classroom and proceeded to another classroom where Ben-Ami was present; Francoeur induced the teacher to unlock the door in order to allow him into the classroom; Francoeur approached Ben-Ami from behind so that Ben-Ami, who had headphones on, was "likely unaware" of the imminent attack; Francoeur punched Ben-Ami about the face with a closed fist "multiple times"; and, as the direct result of the assault, Ben-Ami sustained serious injuries, including a broken jaw.

Id. at ¶ 15. The Court could not rectify these facts with the Superior Court's findings that Francoeur did not consider

the consequences of his action or did not subjectively intend the extent of damage he could, and did, cause. "Given the premediated nature of the assault, the ambush tactic that Francoeur used, and the location and magnitude of the resulting injuries, the evidence compelled the court to find, at the very least, that Francoeur must have subjectively foreseen as practically certain (i.e., expected) that his deliberately violent conduct would result in bodily injury to Ben-Ami." *Id.* at 17.

Despite the Court's decision in favor of Vermont Mutual, the Court refused to categorically hold that an assault, as that at issue in the matter, always fell within the expected or intended exclusion without consideration of the subjective intent or expectation of harm of the perpetrator, as was requested by Vermont Mutual.

In a concurring opinion, Justices Mead, Alexander and Jabar, three of seven Justices on the panel, agreed with the Court's entry of judgment in favor of Vermont Mutual, but wished that the Court had gone further, as requested by Vermont Mutual. "I would go further and conclude that this factual scenario – the intentional striking of an unsuspecting person in the face with a closed fist – leads to a conclusion that as a matter of law the physical injuries resulting from the attack were intended and expected." *Id.* at ¶ 25. The concurring Justices wished to do away with an examination of the subjective intent of the perpetrator under these circumstances when determining if the expected or intentional injury exclusion applied.

Marjerison Secures Defense Verdict in Traumatic Brain Injury Case

On February 28, 2019, Tom Marjerison secured a defense verdict in *Bradford v. Fowler* following a four-day jury trial in Waldo County Superior Court. The case arose out of a truck accident in which it was alleged that the Defendant crossed the fog line and struck Plaintiff's vehicle who was waiting to pull onto the roadway.

As a result of the significant impact, Plaintiff suffered a traumatic brain injury and was transported by Life Flight from the accident scene. Unfortunately, the responding police officers did not photograph the scene, and there was a significant dispute where the impact occurred in the roadway.

The Defendant called Rick McAlister of The Crash Lab who opined that the impact occurred in the travel lane. The Plaintiff called Dale Syphers as an expert witness who offered the opinion that the Defendant crossed the fog line and struck Plaintiff's vehicle who was waiting to pull onto the roadway. After 1/2 day of deliberations, the jury returned an 8-1 defense verdict.

Over his 23-year career at Norman, Hanson & DeTroy, Tom Marjerison has tried a large number of high-profile and high-value civil cases.

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Medicare Set-Asides: Are You Paying Too Much?

By: Stephen Hessert

Background

Medicare came into being in 1935 as part of the original Social Security Act enacted by Congress. It was described as "a federally funded health insurance program for the elderly and the disabled." Over the years, its cost became problematic and in the late 1970s, a General Accounting Office study suggested that forty-one billion dollars of Medicare benefits were being used to subsidize other insurance programs such as workers' compensation and liability insurance. Consequently, in 1980, Congress passed the Medicare Secondary Payor Act which required beneficiaries to exhaust all other health insurance options before Medicare would pay benefits. Those other options include insurance for workers' compensation, liability, auto etc. The Act provided that Medicare would make "conditional payments" and provide benefits if the other carriers initially denied liability, but it is required that Medicare be repaid if other benefits are found to be applicable.

In the workers' compensation arena, a Medicare set-aside arrangement (MSA) is necessary to account for the future medical component of the primary payor's responsibility. MSAs are the tool used to account for the future medical expense associated with injuries, in order to avoid shifting responsibility for future medical from the primary payor to the Medicare system. This article will briefly touch on two separate issues. The first will be to describe the appeal process for dealing with contested conditional payments. The second will deal with the question of whether too much is being set-aside in providing for Medicare's future interests.

Conditional Payments

Conditional payments are made by Medicare based upon diagnosis codes. The Centers for Medicare and Medicaid Services (CMS) will attribute certain diagnosis codes to an injury. In workers' compensation, it will depend upon the diagnosis of the injury, but will also include any payments for any diagnoses that are made voluntarily and without prejudice. These potentially unrelated codes/conditions become part of the liability for the work injury in Medicare's point of view.

Once liability for a primary payor is "demonstrated" by either an acceptance of liability or by settlement of the claim, conditional payments must be addressed. The parties should request that the case be put into the "final conditional payment process" which notifies the CMS Benefit Coordination and Recovery Center that the case is within 120 days of settlement. A request may be made for a final conditional payment amount within three business days of settlement via the Medicare Secondary Recovery portal. Once you have that amount, the question becomes whether it is an accurate description of the medical costs of the consequences of the actual injury, or whether it includes other treatment for which there should be no liability, either in a liability case or in the workers' compensation arena.

Appeal Process

The law is now clear that workers' compensation administrative bodies and state courts lack subject matter jurisdiction over Medicare Secondary Payor (MSP) reimbursement disputes that have not been fully exhausted through the mandatory Medicare appeal process. Any challenge to MSP's entitlement "arises under the Medicare Act" and the appellant, or the Medicare enrollee, must first proceed with an administrative appeal prior to any judicial review. *See, e.g., 42 U.S.C. §405(g-h) §1395w-22g5; 42 C.F.R. §422.560-422.612.* That appeals process has five steps:

1. The parties must appeal the conditional payment demand letter within thirty days.

2. The appealing party will receive an independent outside entity review (qualified independent contractor) that contracts with CMS to do this work.

3. If the result from the independent qualified contract review is unfavorable, an Administrative Law Judge hearing may be requested.

4. If the Administrative Law Judge hearing produces an adverse result, the party may appeal to a Medicare Appeal Council, if the ruling is adverse to the appellant and exceeds a threshold amount ($1,000).

5. Finally, if the ruling is still adverse, an appeal may be made for federal judicial review, to the Federal District Court in the appropriate jurisdiction. From there, an appeal can be taken to the Circuit Court of Appeals and possibly to the United States Supreme Court.

The important point is that absent a timely utilization of this appeal process, there is no possibility of attacking the issue of whether a conditional payment was, in fact, for the workers' compensation injury or automobile accident in question in any state proceeding, or whether other defenses such as the statute of limitations are available. Any factual issues will be resolved either through the initial administrative steps of the appeal process, or before the Administrative Law Judge.

Are You Paying Too Much?

Accounting for Medicare's interests for future medical expense for an injury is a well-developed process in workers' compensation. CMS has established work review thresholds of $25,000 for a current Medicare beneficiary, or $250,000 and the potential that the Medicare beneficiary is likely to become enrolled in Medicare within thirty months, for workers' compensation cases. If those thresholds are met, CMS will review a future MSA proposal and will provide an opinion that the parties can rely upon in settling their case. This conventional practice of submitting an MSA proposal to CMS for review and approval, which is entirely voluntary, predictably inflates costs and over burdens claim payors. In 2017 alone, some 26,000 claims had an average of about $93,000 each set aside as funds to reimburse Medicare for future medical treatment. Care Bridge International, a vendor that does work on MSAs recently did a study focusing on the actual spending on behalf of an injured worker for the first five years post MSA report approval. Their finding was that in the fifth year post settlement, the pace of medication spending was 64% of the forecast and 55% for all other medical care. In another study, they analyzed a huge database of eight million

non-settled workers' compensation claims noting the medical spending for up to eleven years after injury.

Why the inflated numbers?

1. Medicare requires that medications be priced unrealistically high at RED BOOK average wholesale price. Most claims payors pay for drugs with pharmacy benefit managers and arrange for prices that are up to 35% lower.

2. Medicare unrealistically requires that medications be budgeted unaltered for the projected life of the worker. There is no scientific assurance that this will be the case.

3. Medicare requires that treatment the worker is receiving or has planned, as of the time of settlement, will continue but, in reality, treatment evolves as patients adapt.

MSA vendors are learning this and using it to their advantage. There are several vendors who now will produce an MSA proposal and recommend that it not be submitted to CMS regardless of whether it falls within the work-review threshold. Those vendors offer to stand behind their proposal and take over and pay if CMS rejects their analytics and if, in fact, payment exceeds the amount proposed. It is my understanding that they are developing or utilizing an insurance product for this purpose. Moreover, in some states, MSAs that are structured are being negotiated with consideration given to making the beneficiary the insurance carrier or the self-insured employer, rather than the claimant's estate. These products are new to the market, but should be considered as potential cost savings can be significant.

NHD Recognized by Chambers & Partners

Chambers & Partners USA 2018 has recognized NHD as a Top Firm in the category Litigation: General Commercial. Additionally the following NHD attorneys have received the "Ranked Lawyer" distinction in the publication:

Emily A. Bloch – Maine Litigation: Medical Malpractice & Insurance

Jonathan W. Brogan – Maine Litigation: Medical Malpractice & Insurance

Mark G. Lavoie – Maine Litigation: Medical Malpractice & Insurance

Russell B. Pierce – Maine Litigation: General Commercial

James D. Poliquin – Maine Litigation: Medical Malpractice & Insurance

Christopher C. Taintor – Maine Litigation: Medical Malpractice & Insurance

WC Appellate Division Decision issued on June 14, 2018 – Average Weekly Wage

Average Weekly Wage

The employee was employed by the same employer for 52 weeks prior to a December 17, 2014 injury, but for approximately 13 of those weeks she was out of work for non-occupational reasons and received STD benefits which were substantially lower than her customary weekly earnings. The ALJ determined the average weekly wage by excluding the weeks on which the employee was out of work on medical leave and averaging the remainder. The employer appealed to the Appellate Division.

In *Thibeault v. Twin Rivers Paper Company, LLC*, Me. W.C.B. No. 18-20 (App. Div. 2018) the Division ruled that the STD benefits were not analogous to vacation pay and should not be included in the wage calculation. The Division found that during the period in which the employee had been taken out of work by her physician she received no wages, earnings, or salary. The Division found that including the weeks of STD benefits would artificially deflate the average weekly wage and would not fairly compensate the employee for the loss of earning capacity.

Accordingly, the Division found that the ALJ had properly excluded from consideration the weeks in which the employee did not work and had correctly calculated the average weekly wage.

WC Appellate Division Decision issued on May 14, 2018 – Statute of Limitations

Statute of Limitations

Ten years ago the Law Court ruled in *Wilson v. Bath Iron Works*, 2008 ME 47, 942 A.2d 1237 that the two-year statute of limitations does not begin to run until the employer files a First Report of Injury, regardless of how much time may have passed since the injury occurred. In the years following the employer community invested considerable effort to amend Section 306(1) to reverse the *Wilson* decision, as the effect of that case was to delay the commencement of the statute of limitations until such time as an employer had an obligation to file a First Report. Ultimately, the legislature amended Section 306(1) effective August 30, 2012. The Law Court has never had an opportunity to interpret the language of the amended statute, but in a recent decision the Appellate Division

addressed the matter “head on” and ruled how the amended statute is to be applied.

In *Bickmore v. Johnson Outdoors*, Me. W.C.B. No. 18-18 (App. Div. 2018) the employee sustained two separate injuries eight years apart while working for the same employer but when different insurers were on the risk. The insurer at the time of the second injury filed a Petition for Award seeking to establish the compensability of the first injury and a corresponding obligation on the part of the first insurer to contribute to benefits owed to the employee. The first insurer had paid medical expenses but was never required to file a First Report. More than six years from the date of the last payment had elapsed before the duty to file a First Report arose.

The Division tackled the complex legislative history behind the 2012 amendment to Section 306(1), and it is not necessary to recite the sequence of events in this brief article. Ultimately, the adopted amendment lacked clarity and was susceptible of different interpretations. Indeed, the Division found that it was not clear exactly what the Legislature had intended and that the Legislature had never specifically stated that it was acting to modify *Wilson.* Because the meaning of the statute was found to be ambiguous, the Division analyzed the legislative history and concluded that the Legislature had actually intended to limit the scope of *Wilson*. Specifically, the Division held as follows:

> …we conclude that the appropriate interpretation of Section 306(1) as amended is: except as otherwise provided in section 306, a claim is barred two years after the date of injury or, if within that two year period the employee’s employer is obligated to file a First Report under Section 303 and fails to do so, two years from the date the employer files the First Report.

Thus, the Division held that if an employer is not required to file a First Report within the two year period immediately following the injury, the statute of limitations bars a claim after that point.

The Division then addressed whether the amended version of Section 206(1) could be applied retroactively. The Court found no express or implied legislative intent that the amendment should be given retroactive effect. However, the panel concluded that this finding was not determinative, and that retroactive application must be determined by the timing of two events. Specifically, if the date that an employer becomes obligated to file a First Report of Injury and the date that the employer actually files a First Report of Injury occur after the effective date of the 2012 amendment, the amended version of Section 306(1) will therefore apply to determine whether or not a claim is barred by the statute of limitations. Accordingly, because of the passage of time the first insurer in *Bickmore* had no obligation to file a First Report for the initial injury until long after the amendment took effect, all claims with respect to the initial injury were barred by the statute of limitations.

This is an extremely important decision and resolves a number of questions that have remained unanswered since the 2012 attempt to modify or reverse the scope of *Wilson*. Carriers and self-insureds can now determine with greater accuracy whether or not the statute of limitations on a particular claim has expired.

WC Appellate Division Decision issued on May 10, 2018 – Waiver of Issues

Waiver of Issues

The employee filed a Petition for Award resulting from a December 8, 2015 injury to her neck and left hand. She also filed a Petition for Reinstatement. She had not worked for the employer since the date of injury, and a dispute arose as to whether the employer had offered her suitable employment which had then been rejected without good and reasonable cause. Also in dispute was the issue of whether or not the employee had properly preserved her claim for reinstatement.

In *Ornberg v. Pineland Farms Potato Company, Inc.*, Me. W.C.B. No. 18-17 (App. Div. 2018), the Petition for Award was granted and the employee was given the protection of the Act. However, the claim for incapacity benefits was denied on the grounds that the employee had rejected a bona fide offer of employment within her restrictions without good and reasonable cause. There was conflicting evidence on this issue; the employer's evidence showed that an offer had been made while the employee argued that no such offer had been extended. The ALJ, as the fact finder, accepted the testimony from the employer's witnesses, and the Appellate Division affirmed, finding that an ALJ has full authority to select between the testimony of conflicting witnesses.

On the Petition for Reinstatement, the employee evidently had made only a vague and limited reference to the issue during litigation, without actually requesting reinstatement. No mention of the issue was made in the employee's written position paper or in a post-hearing Motion for Findings of Fact. Following in the footsteps of *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46 (App. Div. 2017) and *Waters v. S.D. Warren Company*, Me. W.C.B. No. 14-26 (App. Div. 2014), the panel found that the ALJ committed no error in finding that the claim for reinstatement had been abandoned. The key conclusion is that all issues raised by the parties, whether in the nature of claims for benefits or defenses to such claims, must be explicitly raised and maintained both during litigation and in the post-litigation stage in closing memos and Motions for Findings. A party that barely mentions an issue at all and fails to back up their positions with developed argumentation will be found to have waived the issue.

Damages for Medical Expenses: Review of the Judicial Split on Admission of Medical Services Billed vs. Paid

By Jessica S. Smith, Esq.

There has been a longstanding discussion in the Maine legal community surrounding the recoverability and, therefore, the admissibility, of medical expenses billed by a provider versus those that are actually paid by the patient, her insurer, or the government. The argument stems from the fact that third-party payers such as Medicare

and private insurers pay less than the expenses reflected in medical bills, either by contract or law. Plaintiffs argue to exclude evidence of the lesser amount actually paid, while defendants argue for its admission. In the right case, the difference can add up to hundreds of thousands of dollars in medical expenses that the jury gets to see and award as damages.

The Law Court has yet to decide whether the amount billed or the lesser amount paid is admissible as evidence of the reasonable value of the medical services rendered to the patient. The Superior Court has addressed the issue, but little consensus has been reached, leading to a split amongst the Justices. This article addresses the debate, the legal doctrines involved, and the various approaches taken by the Superior Court Justices.

The Debate

The courts and parties often look to the *Maine Jury Instruction Manual* for guidance on what is recoverable. Prior to 2004, the *Manual's* jury instruction stated, "The reasonable value, *not exceeding actual cost to the plaintiff*, of examination and care by doctors and other medical personnel…" *Eastman v. Eastern Maine Medical Center*, 2003 WL 26559786 (Me.Super.), 2. This jury instruction appeared to decide the question in favor of the defense, at the time, by making the amount actually paid, and not the higher amount billed, recoverable. However, in approximately 2004, the *Manual* was amended and now states, "Medical expenses includes the reasonable value of medical services…shown by the evidence to have been reasonably required and actually used in treatment…" Alexander, *Maine Jury Instructions Manual* §7-108 (2017 ed). This version of the instruction removed the limit on recovery and left open the question of how one proves and recovers the reasonable value of medical services rendered to the plaintiff. Whether reasonable value is proven best by the amount medical providers billed for their services or the reduced amount paid by the patient or third parties and accepted by the providers remains the debate.

The Collateral Source Rule

The Collateral Source Rule commonly is cited in this debate about admissible and recoverable medical expenses. As the argument goes, if medical bills were paid by someone other than the plaintiff or were a gift to the plaintiff, the Rule prohibits the admission of evidence of the payment so that the jury does not limit the award of damages. *Hoitt v. Hall,* 661 A.2d 669, 673 (Me. 1995). This is based on the reasoning that the intent of awarding damages is to make the Plaintiff whole for her injury, and any benefit to the plaintiff from a third party should not also benefit the defendant. In addition, in many instances, third-party payers of medical expenses are entitled to reimbursement from damage awards, thereby preventing a windfall double recovery by the plaintiff.

On the other hand, the argument against recovering the amount billed for medical services, when a lesser amount was accepted by the provider, is that the Collateral Source Rule is not implicated. When a provider accepts a negotiated rate or a regulated rate from a third-party payer, the plaintiff is never liable for the higher amount originally billed. The lesser amount paid is in full satisfaction of the amount due for the medical services provided. Since the plaintiff never incurs liability to pay the higher amount billed, the plaintiff does not suffer any loss related to the difference in payment and the Rule is never implicated. The Supreme Court of California best summarized this reasoning:

Having never incurred the full bill, plaintiff could not recover it in damages for economic loss. For this reason alone, the collateral source rule would be inapplicable… The rule does not speak to losses or liabilities the plaintiff did not incur and would not otherwise be entitled to recover. Certainly, the collateral source rule should not extend so far as to permit recovery for sums neither the plaintiff nor any collateral source will ever be obligated to pay…

Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal.2011), reh'g denied (Nov. 2, 2011).

Since the amount paid is admissible, it can be considered by the jury as *evidence* of the reasonable value of the medical services provided to the plaintiff. The jury never knows the identity of the payer, the amount billed, or that there was a difference between the amounts billed and paid, so the rationale for the Collateral Source Rule does not apply. The jury is only aware of the amount the provider was willing to accept as payment in full for its medical services. The jury ultimately weighs that evidence and determines what the reasonable value of the medical service is and awards damages.

The Maine Health Security Act

When it comes to medical malpractice claims, the Legislature has considered the windfall a plaintiff may receive when the amount of medical expenses actually paid is not admitted in evidence and used by the jury to award damages. The Maine Health Security Act provides for an adjustment of the plaintiff's recovery if a third-party collateral source exercises its right to subrogation in order to recoup the cost of the medical expenses it has paid within thirty days of receiving notice of the plaintiff's verdict. 24 M.R.S.A. § 2906(2). If a third-party payer seeks to recover the money it paid for medical bills on the plaintiff's behalf, then the court will not reduce the plaintiff's damage recovery. However, if the third-party payer does not seek to recover from the plaintiff's damages award, then the court will reduce the damages awarded by the amount that has been paid or that is payable by a collateral source. 24 M.R.S.A. § 2906(2).

The Act does not expressly address the admissibility of medical expenses billed or paid during trial. The statute only enables a judge to reduce damages for medical expenses awarded by a jury.

The Split in the Superior Court

There have been a handful of orders from the Superior Court Justices deciding the admissibility of medical expenses, typically in the context of motions *in limine*. There are three, sometimes conflicting, outcomes the Justices have reached: (1) to admit only the actual amount paid and accepted by the provider; (2) to admit only the amount billed by the provider; (3) and lastly, to admit both, the amount billed and the amount actually paid and accepted by the provider.

Admitting Evidence only of the Amount Paid is the Best Result

Damages awarded for the expense of medical services are "compensatory" damages. The purpose is to put the plaintiff in the position she would have been if she never were injured. *Wendward Corp. v. Group Designs, Inc.*, 428 A.2d 57, 61-62, (Me. 1981). "While the measure of damages should avoid a windfall to either party, it should

compensate the Plaintiff as precisely as possible for the loss without recourse to speculation and conjecture." *Cote Corp. v. Thom's Transport Co., Inc.,* 2000 WL 762076, * 3 (D. Me) (citing *Wendward Corp. v. Group Designs, Inc.*, 428 A.2d 57, 61-62, (Me. 1981). By awarding money for an expense the plaintiff (or a third party source) never incurred or paid, it would leave the plaintiff better off than if the accident had never happened. Damages for medical services should precisely compensate the plaintiff for medical services costs.

The best evidence of the reasonable value of the medical services rendered is the amount the providers accept in final payment. The amount billed is typically an unusually inflated value because providers are looking to recoup funds lost from defaulting patients or compensate for lesser government or insurance payments. Therefore, the amount billed is not reliable evidence of the reasonable value of a provider's medical services.

Courts outside of Maine have decided that the amount paid and accepted by the provider is proper evidence of the reasonable value of the medical expenses recoverable by a plaintiff. Most notable in *Hanif v. Housing Authority of Yolo County*, reasonable value was found to be a "term of limitation, not of aggrandizement" noting that compensatory damages should compensate the plaintiff for actual injuries sustained and no more. 200 Cal.App3d 635, 641 (Cal.Ct.App. 1988).

Conclusion

When and how the Law Court will rule on this issue is unpredictable. Until then, the outcome in Superior Court will depend on which Justice is sitting on the bench.

Rental Car Insurance: Are You Paying for Coverage You Already Have?

By Samuel G. Johnson, Esq.

Introduction:

It's not every day an attorney tells you to decline insurance coverage for a potential loss. Well brace yourselves, because that is exactly what I am going to do in this article.

Whether your car is in the shop for repairs or you are taking a long vacation far away from home, chances are you have rented a car and will do so again. Given your experience renting cars, you are familiar with the exchange that will likely take place each time you step up to the counter to rent a car. You are given the rental contract, but before you sign on the dotted line the salesperson is pushing hard for you to elect certain additional coverages for your vehicle, such as a Collision Damage Waiver. They invoke fear by explaining the expenses you could incur in the event of an accident if you decline the Collision Damage Waiver and you damage the rental vehicle. Fear not, they

tell you, because for an additional cost of anywhere from $10.00 to $30.00 a day—depending on your location and the rental company—you will not have to worry about incurring these potential expenses.

So should you purchase the Collision Damage Waiver for your rented vehicle? In that moment not having previously considered the question, and given the compelling sales pitch from the agent behind the counter, you may not feel confident in your answer. On the one hand, you are a responsible driver and don't want to pay what could be upwards of $30.00 a day extra for the Collision Damage Waiver. On the other hand, accidents happen, that's why they are called accidents, right? Even an extra $30.00 a day is far less than what you would have to pay if you somehow damaged the rented vehicle. So what do you do?

Decline the Collision Damage Waiver! Chances are you already have coverage for this type of situation, and despite the compelling sales pitch from the agent behind the counter, you do not need to purchase the Collision Damage Waiver. It is important to note at the outset that the answer to this questions is not one size fits all. There are several considerations you should undertake before making your decision. This article, however, should equip you with the tools needed to confidently answer this question when the time comes.

What is a Collision Damage Waiver?

So what is a Collision Damage Waiver? Despite what you may think, it is not insurance. It sounds like you are paying for coverage on the vehicle, but a Collision Damage Waiver, or a Loss-Damage Waiver, is actually what the name implies, it is a waiver. What this means is for the additional fee the rental company waives its right to pursue you in the event there is damage to the rented vehicle or it is stolen. Sounds like a good deal right? Although such a waiver may sound like all-encompassing protection, be aware of the fine print.

Most Collision Damage Waivers contain limitations and exceptions. For example, the damage or loss will likely not be covered if the vehicle is driven by someone who was not listed as an authorized driver, the driver has consumed any alcohol—whether or not he or she is over the legal limit—or the car is driven in a careless or reckless manner. While these don't sound like limitations that would be difficult to avoid, consider the following hypotheticals:

The Single Glass of Wine Hypothetical: It's another cold winter in Maine, so you and your spouse decide that it would be nice to take a trip somewhere warm, so you book a week-long vacation in Florida. After your flight lands, you step up the counter to rent a car. After a compelling sales pitch from the agent, you decide to purchase the Collision Damage Waiver from the rental company, sign on the dotted line, and rush out to check in to your hotel. After you get settled in you and your spouse head out for a nice dinner. At dinner you have of a glass of wine. After dinner, while leaving the parking lot, you back up into a light pole and damage the bumper and frame of your rental car. Although you are not over the legal limit, because you had a glass of wine at dinner you are likely on the hook for the damage despite purchasing the Collision Damage Waiver.

The Designated Driver Hypothetical: Consider the same hypothetical with a slight twist. Before leaving dinner you remember that you will not be covered for any damage caused to the rental vehicle because you have consumed alcohol. Even though you are not over the legal limit, you have your spouse who has not consumed any alcohol drive. While leaving the parking lot they back up into a light pole and damage the bumper and frame. Again,

despite your spouse being a licensed driver, you are likely on the hook for the damage despite purchasing the Collision Damage Waiver because you did not list your spouse as an authorized driver.

Even if you determine that these situations are avoidable and you would like the Collision Damage Waiver, don't check that box just yet. You may already be covered, and that coverage would likely protect you in the two hypotheticals discussed above. To determine if you already have coverage you will want to consult your personal auto policy.

Where to look:

All motorists in Maine are required to carry, at a minimum, liability and uninsured motorist coverage. Typically, there are four potential coverages available in a personal auto policy.

- Mandatory Liability Coverage insures the owner of an automobile for damages he or she becomes legally liable for due to bodily injury or property damage caused by an accident of the insured vehicle.
- Medical Payments Coverage covers medical expenses incurred because of bodily injury that is sustained by an insured and caused by a motor vehicle accident.
- Mandatory Uninsured Motorist Coverage covers the insured for compensatory damages for bodily injury that the insured is legally entitled to recover from the owner or driver of an uninsured motor vehicle. In Maine, this coverage must match the motorists liability limits.
- Physical Damage Coverage covers damage or loss to the covered vehicle itself. Typically, there are two types of Physical Damage Coverage that an insured can elect to carry, Collision Coverage and Comprehensive Coverage. Collision Coverage covers loss stemming from the upset of the covered vehicle or its impact with another vehicle or object. Comprehensive coverage is often defined as other than collision coverage, meaning damage to the vehicle stemming from something other than upset or impact with another vehicle or object.

So are you already covered?

Chances are, depending on your personal auto policy, you are already covered for damage to the rented vehicle. In ascertaining whether you can decline a Collision Damage Waiver when renting a vehicle due to existing coverage, you will need to look to the Physical Damage Coverage section of your personal auto policy. It is important to note that this type of coverage is not required, so the first thing you need to determine is if you carry this type of coverage. If you do, great, you may be one step closer to confidently declining the Collision Damage Waiver. What should you be looking for if you do carry this coverage? Here are a few excerpts from different personal auto policies:

Example 1: The standard ISO Policy includes an endorsement with language pertaining to rented vehicles, and provides coverage for "direct and accidental loss to any "*non-owned auto* which is a private passenger auto, pick up or van, or trailer, rented to you or any *family member* for a term of 45 continuous days or less, by any person or organization, including franchises, in the business of providing private passenger autos, pickups, vans or trailers to the public." This coverage applies to direct and accidental loss to a rented vehicle and equipment, minus the

applicable deductible, caused by *collision* or *other than collision* so long as that coverage has been elected by the insured.

Regarding loss of use expenses, the endorsement provides that the insurer "will pay, without application of a deductible, for verifiable loss of use expenses that are for a continuous period of up to 30 days and for which [the insured] becomes legally responsible in the event of loss to a rented vehicle." If the loss is caused by other than theft, the coverage is limited to the period of time reasonably required to repair or replace the rented vehicle.

If you elected this coverage, and you verify that your present circumstances fall within definitions outlined in the policy, a Collision Damage Waiver is unnecessary.

Example 2: Other policy language from a major auto insurer states that if you carry Collision Coverage, the insurer "will pay for sudden, direct, and accidental loss to a *covered auto* . . . or a *non-owned auto*, and its *custom parts or equipment* resulting from a collision." The policy defines a *non-owned auto* as "an *auto* that is not owned by or furnished or available for the regular use of *you* or a *relative* while in the custody of or being operated by *you* or a *relative* with the permission of the owner of the *auto* or the person in lawful possession of the *auto*," and defines collision as "the upset of a vehicle or its impact with another vehicle or object."

If you have Comprehensive Coverage, the insurer will cover loss to a *non-owned auto* that is not caused by collision. The policy then lists the types of damage that qualify as not caused by collision. If you elected to carry Comprehensive Coverage under this policy, the insurer will also pay for loss of use damages that you are legally liable to pay if a *non-owned auto* is stolen up to a combined maximum of $900.00 not exceeding $30.00 per day.

Again, if you have elected this coverage a Collision Damage Waiver is likely duplicative of the coverage you already have, and have already paid for.

Example 3: The last example, from a national auto insurer, states that if the insured elects to carry Collision Coverage the insurer "will pay for *collision loss* to the *owned auto* or *non-owned auto* for the amount of each *loss* less the applicable deductible." The policy defines *collision loss* as "loss that is caused by upset of the covered auto or its collision with another object, including an attached vehicle." *Non-owned auto* is defined by the policy as "an automobile or *trailer* that is not owned by or furnished for the regular use of either *you* or a *relative*, other than a *temporary substitute auto*. An auto that is rented or leased for more than 30 days will be considered as furnished for regular use." If the insured elects to carry Comprehensive Coverage, the insurer will pay "for each *loss*, less the applicable deductible, that is caused by other than *collision* to the *owned auto* or *non-owned auto*." The policy then lists losses that qualify as other than collision.

This policy, too, will provide coverage for damage to a rented vehicle, less the applicable deductible, so long as the vehicle is not rented for more than 30 days and the damage falls within the definition of a collision or other than collision. No Collision Damage Waiver is needed.

Deciding whether your policy provides coverage necessarily requires determining first if you have elected to carry Physical Damage Coverage. This information will be contained in your policy's Declarations Page. Then you must

determine whether the rental vehicle qualifies as a covered auto under the definitions provided by your policy. This will require cross-referencing the specific coverages with the definitions provided by your policy. Lastly, you should check if any limitations or exclusions apply to the Physical Damage Coverage.

After reviewing your personal auto policy if you are still unsure whether you are covered for damage to a rented vehicle, you can always call your insurance agency to ask about coverage for rented vehicles under your policy.

Additional Considerations:

As mentioned previously, the answer to whether you can decline a Collision Damage Waiver is not one size fits all. There are additional considerations you should make. For example, if you do not have a personal auto policy, the Collision Damage Waiver or some other form of coverage is advisable.

Depending on your policy, what appears to be a covered loss may nevertheless be excluded. For example, if you are using the rented vehicle to conduct business many policies seek to exclude coverage for the loss. Even with coverage, you will likely have to pay a deductible in the event damage is caused, that amount, depending on the length of your rental, may far exceed the price of the Collision Damage Waiver.

Another consideration is your location. Many personal auto policies do not provide coverage if you are renting a vehicle outside of the United States or Canada. Additionally, some policies provide coverage for loss of use while others may limit the amount covered or exclude it entirely. This means that a rental agency could potentially come after you for the loss of use of the vehicle while it is out of commission even though your policy covers the actual damage to it.

Conclusion:

With this information you now know where to look to determine for yourself whether you are already covered for potential damage to a rented vehicle. You have reviewed your personal auto policy or spoken with your insurance agent and can feel confident when you step up to the counter and are met with the fear-inducing sales pitch from the rental company. If you have elected to carry Physical Damage Coverage, you are likely already covered, and you can confidently decline the Collision Damage Waiver and spend your $30.00 a day on something you will enjoy, rather than coverage you already have.

Jonathan W. Brogan Admitted to the American College of Trial Lawyers

Jonathan W. Brogan, a member of the law firm of Norman, Hanson & DeTroy, LLC, has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America.

Brogan, who concentrates his practice in litigation, was recently inducted into the College during the association's 2018 annual meeting. Fellowship in the College is extended by invitation only — and only after careful investigation — to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

The College was founded in 1950 and is composed of the best of the trial bar from the United States and Canada. Lawyers must have a minimum of 15 years of trial experience before they can be considered for Fellowship. Membership is limited to no more than 1 percent of the practitioners in any state or province.

Brogan has more than 30 years of experience representing businesses and individuals in complex civil litigation matters. He has received numerous honors for his legal work, including recognition by Martindale-Hubbell, New England Super Lawyers, Best Lawyers in America and Chambers USA. Best Lawyers named Mr. Brogan "Lawyer of the Year" for medical malpractice — defense (2017) and personal injury — defense (2015, 2018).

Active professionally, he is a member of the Maine State Bar Association, Cumberland County Bar Association and is a fellow of International Society of Barristers and Litigation Counsel of America and a member of International Association of Defense Counsel.

WC Appellate Division Decision issued on February 16, 2018 – Res Judicata and Multiple Injury Claims

Two years ago the Appellate Division held in *Eck v. Verso Paper*, Me. W.C.B. No. 16-20 (App. Div. 2016) that the Board may determine that an employee has sustained more than one gradual injury to the same portion of the body. This decision sparked concern among employers that multiple claims could be made in an attempt to obtain a finding of compensability of any injury occurring at some point over a broad spectrum of time. In a recent decision the Appellate Division relied upon the established doctrine of res judicata to preclude redundant litigation in search of a compensable event.

In *Bridgeman v. S.D. Warren*, Me. W.C.B. No. 18-08 (App. Div. 2018) the employee filed a Petition for Award in 2001 alleging a gradual mental stress injury occurring on August 6, 1999. The evidence included testimony of severe harassment in December 1994 that produced an emotional breakdown, and a Section 312 examination also referred to the December 1994 events. In a 2002 decree the Board determined that the claimed injury had occurred, but that timely notice was not given. Accordingly, the Petition for Award was denied.

Years later the employee filed another Petition for Award in 2011 alleging a gradual stress injury but asserting December 1, 1994 as the actual date of injury. The same essential evidence of occupational stress was offered in the second proceeding as had been presented in the first. The presiding ALJ found that the employee had sustained an injury on December 1, 1994 and awarded ongoing benefits for total incapacity. The employer appealed to the

Appellate Division, arguing that the claim was barred by res judicata.

The Appellate Division agreed and vacated the decision of the ALJ.

Whenever there has been a final decision in a litigated claim, res judicata prevents the re-litigation of the same essential claim in a subsequent proceeding. The Division held that, notwithstanding the assertion of a new date of injury, "the matters presented for decision in the second action were actually litigated in the first". The Division found that the employee "has essentially repackaged a claim that the board rejected in 2002", and that the claim in the second case was based upon the same operative facts that had been raised in the prior litigation. Therefore, because the claim resulting in the 2002 decree was based upon the identical circumstances alleged in the second proceeding, the allegation that the employee had sustained a different injury on an alternative date was barred by res judicata. Any other result, according to the Division, would both compromise judicial economy and undermine the stability of final judgments, and would require the employer "to mount multiple defenses over time against a single claim".

Kelly Hoffman Has Been Selected as a Representative of Team USA in the 2018 FIH Masters World Cup

It is important to recognize the accomplishments of our attorneys both in and out of the courtroom. When we learned Kelly Hoffman was named to the U.S. Women's Masters Field Hockey training squad, we recognized this achievement in the "Kudos" section of our Summer 2017 newsletter. We are elated to announce that after five months of practicing with the country's elite field hockey players, Kelly was selected to travel to Terrassa, Spain in July as a representative of Team USA playing in the 2018 FIH Masters World Cup. The biennial tournament will host more than 140 national teams expected to compete in five age brackets. Kelly's position on the Over-40 team is as a goalkeeper.

Since discovering field hockey during her Junior year of high school, the game has become a passion of Kelly's. She was the goalkeeper for both the Johns Hopkins University field hockey and lacrosse teams. As a Senior captain of the university's field hockey team, she was named All-American in part for record making career saves (452). Kelly has continued to play on various leagues since college and even coached girls field hockey for a few seasons at the local private Portland school, Waynflete. She continues working with young athletes as a referee for middle and high school games in southern Maine and a coach for the indoor club MAINE STYX.

This honor to represent the United States on an international playing field is also a huge comeback for Kelly who was diagnosed with Stage 3C breast cancer in 2012. Now in full remission, Kelly told News Center Maine during an interview last fall, "Training again and getting out there and playing has been so good for my mind and my soul. It's brought me back full force into a sport that I do truly believe has gotten me to where I am today."

She is looking forward to the World Cup where her wife, their twin daughters, and family will cheer her on.

WC Law Court Recognizes Credit for Social Security Retirement Benefits Paid in the Past

It has been recognized in several Law Court decisions that, generally speaking, there is no right to recover an overpayment of workers' compensation benefits by taking an offset or by claiming reimbursement. However, in a significant new decision, the Court has held that an employer is entitled to a credit for the value of Social Security retirement benefits paid in the past at the same time in which an injured worker also received workers' compensation incapacity benefits.

In *Urrutia v. Interstate Brands International*, 2018 ME 24 the employer voluntarily initiated payment of benefits for total incapacity at a point when, unknown to the employer, the employee was already receiving Social Security retirement benefits. He continued to receive workers' compensation benefits unreduced by the Section 221 offset until the employer eventually learned of the Social Security entitlement. At that point the employer reduced its ongoing payments pursuant to Section 221, but by that time the employee had received over $24,000.00 in workers' compensation benefits to which he was not entitled pursuant to Section 221. The employer sought a credit for the amount of the overpayment, and the ALJ granted the request. However, on appeal the Appellate Division reversed and essentially held that the employer was not entitled to a retroactive credit for benefits overpaid, notwithstanding the language of Section 221 indicating that benefits must be reduced when Social Security retirement payments are received. The employer then appealed to the Law Court.

In a 5-2 decision, the Court analyzed the language of Section 221 in detail and found that it "unambiguously entitles an employer to a credit based on an employee's past receipt of Social Security retirement benefits". The Court cited the statutory injunction that incapacity benefits "must be reduced" to reflect the receipt of Social Security retirement income and that the credit is triggered when an injured worker is receiving "or has received" Social Security retirement payments. The majority ruled that a refusal to recognize a credit would allow the employee to retain a double recovery of benefits in violation of the express intent of Section 221. Therefore, the Court vacated the decision of the Appellate Division and ruled that "Interstate is entitled to a credit [in excess of $24,000.00] for incapacity benefit overpayments made to Urrutia during the same period when he received Social Security retirement benefits".

The Court remanded the matter to the ALJ to determine "the specific terms of the credit and resulting payment holiday" to which the employer was entitled.

Steve Moriarty represented the employer on appeal.

WC Appellate Division Decision issued on January 17, 2018 – Multiple Gradual Injuries to Same Area

It had been determined by the Board that the employee sustained a gradual occupational injury to his right elbow on October 29, 2000. Several years later the employee filed a Petition for Award alleging a second gradual injury to the same portion of the body occurring on May 8, 2009. There was conflicting medical evidence as to whether or not a second injury had been sustained, and the ALJ found that the employee did not sustain his burden of proof.

In *White v. S.D. Warren Company*, Me. W.C.B. No. 18-02 (App. Div. 2018) the Appellate Division rejected the employee's appeal and found that the ALJ committed no error in weighing the contrasting medical opinions in finding that the employee had not established a new gradual injury to the same portion of the body. The existence of contrary medical opinion did not compel the hearing officer to find in the employee's favor, and the ALJ's decision fell within the range of her "sound discretion" and was not arbitrary or capricious.

WC Appellate Division Decision issued on January 16, 2018 – Record of Mediation

When parties reach agreement at mediation and the issues agreed to are reflected in the record, the record is fully binding upon the parties and has the effect of a final Board determination. However, when no agreements are reached and the mediation is considered unresolved, the record itself has no res judicata effect.

In *Karimova v. Nordyx*, Me. W.C.B. No. 18-01 (App. Div. 2018), the Board granted a Petition for Award alleging a September 11, 2006 personal injury which had not been identified or included within a prior record of mediation. The employer claimed that the injured worker was prevented by res judicata from raising the claim on the grounds that it could have been asserted at mediation. The Appellate Division disagreed and ruled that the doctrine of res judicata applies only when a final judgment is rendered, but that unsuccessful or unresolved mediations which result in records that merely list the issues in dispute cannot be given res judicata effect. Accordingly, the Division ruled that the employee was not prevented from pursuing her claim for the September 11, 2006 injury simply because it had not been raised at a previous mediation.

David Herzer will chair the Maine Professional Ethics Commission again for 2018

The Professional Ethics Commission is comprised of eight attorneys who meet monthly to volunteer their time and expertise to render formal and informal written advisory opinions to the Court, Board, Grievance Commission, Bar Counsel, and members of the Maine bar involving the interpretation and application of the Maine Rules of Professional Conduct applicable to lawyers. Dave has been an active member of the Commission since 2010 and was the Chair for 2017.

WC Appellate Division Decision issued on December 29, 2017 – Challenge to Section 201(3) Rejected

In its final decision of 2017 an *en banc* panel of the Appellate Division consisting of seven ALJs unanimously denied an appeal brought by an employee in a case in which a claim of a gradual mental injury had been denied. In *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46 (App. Div. 2017), the claimant had a pre-existing emotional condition resulting from an occupational event which was barred by the statute of limitations, but asserted a new gradual emotional injury related to interpersonal events at work. The ALJ denied the gradual stress injury claim on the grounds that the employee failed to meet the demanding burden of proof under Section 201(3).

Following the close of the evidence in the underlying litigation, the employee argued for the first time in her position paper that applying Section 201(3) would violate the equal protection clauses of both the United States and Maine Constitutions, and would also violate the Americans with Disabilities Act. The argument was made in a brief portion of an otherwise lengthy position paper and was asserted without substantial legal analysis and supporting authority. In denying the Petition for Award the ALJ did not comment upon the issues which were raised for the first time following the close of the evidence.

The employee filed a Motion for Findings of Fact, but in her proposed findings she did not raise either the constitutional or the ADA issues. Similarly, when the employee appealed to the Appellate Division she did not cite these arguments as among the issues to be addressed on appeal. Ultimately the employee argued before the Appellate Division that the ALJ committed reversible error in failing to address or act upon the alleged constitutional issues in the application of Section 201(3).

In denying the employee's appeal the Appellate Division observed that long-established legal procedure prevents a party from raising issues for the first time on appeal, even though they may arguably be of constitutional significance. In effect, the Division ruled that the employee had waived her arguments by failing to raise them in a timely fashion and by doing so only in a brief and insubstantial manner without focused and developed legal argumentation.

> Therefore, we conclude that Ms. Henderson forfeited consideration of her equal protection and ADA arguments both by raising them belatedly, doing so in a perfunctory manner, as well as by failing to seek additional findings or conclusions regarding them.

Accordingly, the Division did not address the merits (or lack thereof) of the employee's constitutional objections to Section 201(3).

The Division also rejected the employee's argument that the burden of proof by clear and convincing evidence required by Section 201(3) should not be applied when a pre-existing condition is present. The Division found that Section 201(3) applies equally to new stress injuries as well as to those which may be an aggravation or exacerbation of a prior condition. Therefore, apart from any arguable constitutional issues, the Appellate Division upheld the clear and convincing evidence standard mandated by Section 201(3) for all types of gradual emotional injuries.

Steve Moriarty represented the employer in litigation before the Board and on appeal.

Law Court Decision issued on December 12, 2017 – Employment Status

In its second workers' compensation opinion of the year, the Law Court has addressed determination of employment status in a unique factual context. In *Huff v. Regional Transportation Program*, 2017 ME 229 (December 12, 2017), the petitioner volunteered as a driver for a non-profit agency which provided transportation services to disabled and low-income clients. At the onset of the relationship the claimant signed a Memorandum of Understanding which expressly specified that volunteer drivers were not considered to be employees and that no employee-employer relationship was deemed to exist between the parties. The petitioner received no income from Regional Transportation Program but was paid mileage reimbursement for the use of his personal vehicle at the rate of $.41 per mile. According to the petitioner he was able to retain approximately one-half of the mileage reimbursement as income after paying for gas and vehicle maintenance services.

The petitioner was severely injured in an August 2012 motor vehicle accident and filed a Petition for Award. By agreement of the parties the issue of employment status was tried separately, and the ALJ found that the petitioner was not an employee within the meaning of the Act. The Appellate Division affirmed and the Law Court granted Mr. Huff's Petition for Appellate Review. On appeal the Court recognized that payment of income in exchange for services rendered is necessary to the existence of an employment relationship, and framed the controlling issue as follows:

> Whether a mileage reimbursement to a "volunteer" can constitute remuneration when it is significant enough to exceed the volunteer's immediate expenditures.

The petitioner argued that the rate of mileage reimbursement was sufficiently high to constitute the payment of income necessary to establish an employment relationship.

The Court rejected the petitioner's argument and agreed with the Appellate Division that there was no payment of income even though the petitioner was able to operate his vehicle at a cost less than the mileage reimbursement rate. The Court ruled that the statutory definition of "employee" clearly requires that a worker must receive remuneration in return for services in order to be entitled to compensation benefits under the Act, but that the mileage reimbursement does not qualify as income. Therefore, because the petitioner was not an "employee" within the scope of the Act, the Court affirmed the denial of the Petition for Award.

NHD Ranked in the 2018 Edition of U.S. News – Best Lawyers

Norman, Hanson & DeTroy is honored to be ranked in the 2018 edition of U.S. News – Best Lawyers. The Firm has been recognized for the following practice areas:

Metropolitan Tier 1
Portland-ME

Appellate Practice
Commercial Litigation
Insurance Law
Labor Law – Union
Litigation – Real Estate
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants
Professional Malpractice Law – Defendants

Real Estate Law
Workers' Compensation Law – Employers

Metropolitan Tier 2
Augusta-ME

Tax Law

Portland-ME

Administrative / Regulatory Law

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WC Appellate Division Decision issued on November 13, 2017 – Scope of Bailey Decision

In *Bailey v. City of Lewiston*, 2017 ME 160, 168 A.3d 762, the Law Court ruled that after a PI determination has been made by the Board, an employer cannot seek to lower the assessment in a subsequent proceeding based upon a change in medical condition. However, in its opinion the Court in the broadest possible language ruled that once the level of PI has been determined by the Board the issue can never be relitigated by the parties. Thus, the Court held that the doctrine of res judicata prevents an employee from seeking to increase a prior PI determination and prevents an employer from seeking to decrease the assessed level.

Occasionally in written opinions appellate courts make comments which, strictly speaking, are not necessary to support the decision in the particular case under appeal. An extraneous comment by an appellate court is referred to by the latin phrase *obiter dictum* (plural: *dicta*), and the term describes an assertion or statement by a court which is essentially superfluous. Statements which are *dicta* are generally not considered to be binding or to have precedential effect. After the Court issued its decision in *Bailey*, there was uncertainty within the legal community as to whether the ruling would apply to employee attempts to increase PI, for the reason that the case only involved an attempt to decrease PI.

The issue has now been put the rest by the Appellate Division. In *Somers v. S.D. Warren Company*, Me. W.C.B. No. 17-38 (App. Div. 2017), a Board decree had established the level of PI resulting from the injury at 7%. As the durational limit approached, the employer filed a Petition for Review seeking to terminate benefits, and the employee responded by arguing that there had been a subsequent worsening of the medical condition justifying an increase in the rating. The case was litigated before the *Bailey* opinion issued. The ALJ found that there was no comparative evidence of a change and granted the employer's Petition for Review, allowing the termination of benefits. The employee appealed.

The case was briefed and argued before the Appellate Division before the *Bailey* decision was released and the Division then requested the parties to submit additional briefs. At this stage the employee argued that the language of *Bailey* preventing an attempt to increase PI was *obiter dictum*. The Division affirmed the ALJ and rejected the employee's contention. As the Division ruled:

> The issue in *Bailey*, as framed by the Court, was whether the Workers' Compensation Act allows the board to revise a previously established impairment rating. It answered that question in the negative without distinguishing between upward and downward revisions. Therefore, pursuant to *Bailey*, the ALJ did not err when declining to revise the 7% impairment rating assigned to Ms. Somers' knee in the 2008 decree.

Any doubt about the scope of the *Bailey* decision has now been resolved, and the attempt to limit *Bailey* solely to petitions seeking to decrease the PI level has been rejected.

WC Appellate Division Decision issued on November 3, 2017 – Challenging PI Determination

Shortly after the Law Court's landmark decision in *Bailey v. City of Lewiston*, 2017 ME 160 (July 20, 2017), the Appellate Division has had an opportunity to apply the holding of that decision in a claim involving an attempt to revise a prior PI determination. The *Bailey* decision is extremely significant, as the Court held that there may not be a redetermination of PI once a percentage has been established by Board decree.

In *Puiia v. Newpage Corp.*, Me. W.C.B. No. 17-36 (App. Div. 2017), the employee sustained separate respiratory injuries in 2001 and 2004 and also a gradual orthopedic injury to several portions of the body in 2005. In a 2008 decree the employee was awarded ongoing benefits for partial incapacity based upon the two respiratory injuries.

The employee then filed Petitions to Determine the Extent of Permanent Impairment for the three injuries, and the parties entered into a Consent Decree establishing 19% PI due to the combined effects of all dates of injury. The Consent Decree did not recite individual impairment assessments pertinent to each date of injury.

The recent litigation began when the employer filed Petitions to Determine the Extent of Permanent Impairment with respect to the two respiratory injuries, requesting the Board to assign a PI assessment to the injuries individually. The presiding ALJ denied the petitions on the grounds that the res judicata effect of the 2010 Consent Decree prevented the Board from further intervening to assign specific percentages on a per-injury basis. The ALJ also found that the medical evidence was insufficient to assign individual PI ratings.

Although litigation in the case began long before the *Bailey* decision was issued, the outcome was heavily influenced by that opinion.

The Appellate Division affirmed the decision of the ALJ, and specifically relied upon the *Bailey* decision. The Division found that the 2010 Consent Decree was a valid and final adjudication of the PI issue, and that *Bailey* prevented the employer from seeking individual assessments post-decree. The panel found that res judicata precluded the employer from re-opening the issue after there had been a valid and final Board determination. As a result, the

employer could not obtain an allocation of the percentage of impairment attributable to each of the injuries individually.

WC Appellate Division Decision issued on October 30, 2017 – Work Search and Changed Circumstances

It has long been recognized that when the amount of entitlement to benefits for incapacity has been established by Board decree, that determination may later be revised based upon evidence of a change of economic circumstances. A recent decision of the Appellate Division addressed the issue of whether work search evidence, without more, can be sufficient to permit an ALJ to increase the level of entitlement.

In *Pelletier v. Pelletier, Inc.*, Me. W.C.B. No. 17-34 (App. Div. 2017), the employee sustained an undisputed shoulder injury on January 16, 2012, and was initially awarded ongoing benefits for partial incapacity based upon an imputed earning capacity. Later, the employee filed a Petition for Review seeking an increase in benefits to 100% partial based upon extensive work search evidence. The ALJ ruled that such evidence was inadequate to overcome the res judicata effect to be given to the prior Decree, and ruled that work search evidence alone cannot be sufficient to establish a change of circumstances justifying an increase in the level of benefits.

On appeal the Appellate Division vacated the decision of the ALJ and remanded the matter for further findings. In particular, the Division found that prior case law did not support the proposition that work search evidence alone was insufficient to establish changed circumstances. As the Division held:

> Prohibiting an injured employee who is receiving partial incapacity benefits…from seeking an increase in benefits after engaging in an extensive work search would thwart the purpose of the Act to encourage employees to look for post-injury employment.

Noting that the extent of incapacity is dynamic and subject to change, the employee was entitled to an adjudication of his current disability based upon the results of having searched for work. The Division instructed the ALJ on remand to determine whether the work search evidence offered constituted a significant change in circumstances, thereby justifying an increase in the level of entitlement.

The *Pelletier* decision is significant as it gives an injured worker a second opportunity to establish entitlement to 100% partial based only upon additional and more thorough work search activities even though there has been no other medical or economic change of circumstances.

WC Appellate Division Decision issued on October 11, 2017 – Average Weekly Wage and Employment Status

Incapacity benefits are based upon the pre-injury average weekly wage, which in most cases is the average of the employee's earnings received during the 52-week period preceding the injury. In the vast majority of cases earnings received during this period are simply averaged together and the resulting figure is deemed to reflect what the employee's earning capacity would have been if the work-related injury had never occurred. In some instances there may have been changes in the nature or type of an injured worker's employment during this one year period. However, in a recent decision the Appellate Division ruled that not every change in pre-injury employment status will preclude the use of the standard averaging method.

In *Winslow v. Aroostook Medical Center*, Me. W.C.B. No. 17-33 (App. Div. 2017), the employee had worked full-time as a registered nurse for the employer for many years prior to an undisputed right shoulder injury occurring on August 18, 2014. At some point in the spring and summer of 2014 the employee took a maternity leave, and when she returned from leave in July 2014 she chose to work on a part-time basis. However, there were no changes in her duties or responsibilities as a registered nurse. Thus, she was working on a part-time basis when injured.

In calculating the pre-injury AWW, the ALJ averaged all sums earned during the 52-week period preceding the injury, and awarded benefits for partial at varying rates until the employee ultimately returned to full-time status in March 2016. The employer argued that shortly before the injury the employee had established a new earning capacity when she switched to part-time status, and that earnings of comparable part-time employees should have been considered in arriving at the wage. On appeal the employer relied upon the Law Court's decision in *Fowler v. First National Stores, Inc*., 416 A.2d 1258 (Me. 1980), in which the employee had been promoted from a part-time clerk to a full-time produce manager one week before she was injured, and in which the Court held that because the employee acquired a new occupation no consideration should have been given to her earnings when working as a part-time clerk.

The Appellate Division rejected the argument and found that the claimant did not acquire a new occupation with different responsibilities when she returned to work from maternity leave. On the contrary, there had merely been a reduction in hours without a corresponding change of duties or assignments. The Division affirmed the ALJ's finding that averaging all earnings during the one year period preceding the injury was a fair and reasonable means of calculating the employee's future earning capacity, and that the ALJ committed no error in considering all earnings.

In summary, the *Winslow* decision holds that, where there has been consistent employment with the same employer for 52 weeks or more, there must be more than a simple switch from full-time to part-time status prior to an injury before an ALJ may resort to earnings of comparable employees to determine the average weekly wage.

WC Appellate Division Decision issued on October 11, 2017 – Rejection of Offer of Reasonable Employment

Section 214(1)(A) provides employers with a strong mechanism for controlling costs in compensation claims. Specifically, if an employer extends an offer of reasonable employment to an injured employee who is out of work due to an injury, and if the employee refuses that offer without good cause, the employee "is no longer entitled to any wage loss benefits under this Act during the period of refusal". In essence, an employee who rejects a reasonable reinstatement offer forfeits entitlement to incapacity benefits for as long as the refusal continues.

The length of the period of refusal is highly fact-specific to the circumstances surrounding a particular claim, and in a recent decision the Appellate Division took a very conservative position in assessing when a period of refusal may have ended. In *Johnson v. Maine Department of Transportation*, Me. W.C.B. No. 17-32 (App. Div. 2017), the employee had sustained an undisputed back injury in 2010 and had been accommodated for several years until his condition progressed to the point that he was no longer able to continue within current restrictions. As a result, he was placed out of work. However, in short order the State identified a clerical position consistent with the restrictions and extended a reinstatement offer. The employee rejected the offer on the grounds that he felt the position was beyond his ability to perform.

Shortly after the rejection the State filled the position in order to meet its employment needs. A few weeks later the employee obtained a report from his physician supporting his decision not to accept the offer. The employee then found a full-time job on his own but earned substantially less than he would have if the State's offer had been accepted, and filed a Petition for Review seeking ongoing benefits for partial to reflect the differential.

The ALJ found that the State had made a bona fide offer of reasonable employment which had been rejected without good and reasonable cause. The ALJ was not persuaded by the opinion of the physician to the effect that the position was beyond the employee's capacity to perform. The ALJ further found that the period of refusal was not ended by either the retraction of the job offer or by the employee's having obtained a position with a new employer. Accordingly, the Petition for Review was denied and no ongoing benefits were awarded.

On appeal the Appellate Division accepted all of the factual findings made by the ALJ and agreed that the State had met its burden of proof in showing that the employee had refused a genuine offer of reasonable employment. With regard to the duration of the refusal, the Division found that the filling of the offered position did not establish that the State was no longer willing or able to accommodate the employee. In addition, the Division found that obtaining new employment with a different employer did not end the period of refusal, and that such a result would be contrary to legislative intent by allowing an individual to "avoid forfeiture by obtaining underemployment at a substantially reduced wage". The employee's appeal was denied, and the decision of the ALJ was affirmed.

In summary, an ALJ may properly reject the opinion of a physician on the suitability of an offered position. Similarly, developments such as filling a position with another individual and an employee's obtaining new employment elsewhere do not mark the end of the period of forfeiture following rejection of an offer of reasonable employment. When the period of unjustified refusal has not ended, an employee is not entitled to receive ongoing benefits for any

degree of incapacity.

Steve Moriarty represented the State in litigation before the Board and on appeal.

Tom Marjerison Wins Defense Verdict

On September 14, 2017, following a week-long trial in Knox County Superior Court, Tom Marjerison obtained a defense verdict in *Howard v. Viking, Inc.* This case arose out of automobile/motorcycle accident. Plaintiff was operating his motorcycle southbound on Route 1 when Co-Defendant Andrew O'Brien pulled out of the Defendant's parking lot and caused a collision. O'Brien settled the claim against him for $50,000 and Defendant claimed apportionment of liability under 14 M.R.S. § 163.

Plaintiff claimed the layout of the Defendant's parking lot and the contour of the land made the parking lot exit unreasonable dangerous due to a stone retaining wall that blocked the line of sight. Defendant made an Offer of Judgment of $200,000 prior to trial. Plaintiff's total medical bills were $234,310, Plaintiff sought $1,224,220 in loss of earning capacity, and also claimed significant permanent impairment. The jury returned a 7-2 defense verdict after one day of deliberation.

Tom Marjerison is a Partner in the firm's litigation group and regularly tries civil and criminal cases in state and federal court.

Norman Hanson & DeTroy Attorneys Receive Honors from Best Lawyers

Norman, Hanson & DeTroy is proud to announce that sixteen of its attorneys have been named to the 2018 edition of *The Best Lawyers in America*, the oldest and most respected peer review publication in the legal provision.

First published in 1983, *Best Lawyers* is based on an exhaustive annual peer-review survey comprising of nearly 4 million confidential evaluations by some of the top attorneys in the country. The *Best Lawyers* list appears regularly in Corporate Counsel Magazine, and is published in collaboration with *U. S. News & World Report*. The following attorneys were honored by Best Lawyers for their work and expertise in the listed practice areas:

Robert W. Bower, Jr. – 2018
Labor Law – Union
Worker's Compensation Law – Employers

Jonathan W. Brogan – 2018
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Paul F. Driscoll – 2018
Litigation – Real Estate
Real Estate Law

John W. Geismar – 2018
Tax Law

David L. Herzer, Jr. – 2018
Insurance Law
Personal Injury Litigation – Defendants
Professional Malpractice Law – Defendants

Stephen Hessert – 2018
Worker's Compensation Law – Employers

Kelly M. Hoffman – 2018
Litigation – Labor and Employment
Professional Malpractice Law – Defendants

John H. King, Jr. – 2018
Worker's Compensation Law – Employers

Mark G. Lavoie – 2018
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Thomas S. Marjerison – 2018
Personal Injury Litigation – Defendants

Stephen W. Moriarty – 2018
Worker's Compensation Law – Employers

Russell B. Pierce – 2018
Appellate Practice

Commercial Litigation
Ethics and Professional Responsibility Law
Product Liability Litigation – Defendants
Professional Malpractice Law – Defendants

James D. Poliquin – 2018
Appellate Practice
Bet-the-Company Litigation
Commercial Litigation
Insurance Law
Personal Injury Litigation – Defendants

Daniel P. Riley – 2018
Administrative/Regulatory Law
Government Relations Practice

Roderick R. Rovzar – 2018
Corporate Law
Real Estate Law

John R. Veilleux – 2018
Insurance Law
Personal Injury Litigation – Defendants

In addition, three attorneys have been designated by *Best Lawyers* as the "Lawyer of the Year" for 2018 for the greater Portland area. We congratulate the following attorneys for having achieved this impressive recognition.

James D. Poliquin – 2018 Appellate Practice

Jonathan W. Brogan – 2018 Personal Injury Litigation – Defendants

Stephen W. Moriarty – 2018 Workers' Compensation Law – Employers

Update on Federal Disability Discrimination Law

By Christopher C. Taintor, Esq.

Disability discrimination has been a fertile area of litigation for several years. The United States Equal Employment

Opportunity Commission reports that in fiscal year 2016, it received more than 28,000 charges which included some allegation of discrimination on the basis of disability – roughly double the number reported in 2005. Although only a fraction of those administrative charges end up in court, the number of lawsuits filed is large, and likely has been fueled by the 2009 amendments to the Americans with Disabilities Act, which were enacted with the avowed purpose of lowering barriers to recovery.

The first half of this year has been no exception. In the past few months federal courts of appeals, where most disability discrimination law is made, have decided several cases touching on significant and frequently-litigated issues. The issue that has received perhaps the most attention is this: how do employers and courts identify a job's "essential functions"? The question is particularly important because the law is settled on one key point – no employer is required to "accommodate" a disabled employee by relieving her of the need to perform a job's essential functions. Stated another way, an accommodation that involves changing a job's essential functions is, per se, not "reasonable." Therefore, if an employer can persuade a court that the function its employee asks to have modified is "essential," it will be entitled to judgment as a matter of law and able to avoid a trial. It is no surprise, then, that this is an issue that gets aggressively litigated.

This article first summarizes the recent "essential function" cases that have been decided in the courts of appeals. Next, it discusses a new First Circuit decision dealing with the question of when a lengthy period of leave is a "reasonable accommodation." Finally, it describes a new federal district court decision that may open the door to expanding employment protections to some transgender individuals under the ADA.

1. "Essential Function" Cases

In *Mason v. United Parcel Service Co.*, 674 Fed. Appx. 943 (6th Cir., Jan. 10, 2017), the plaintiff had lifting restrictions as the result of an injury she sustained while working for UPS. Because the restrictions were permanent, she requested accommodations which would have relieved her of the need to lift "heavy" packages, as well as the need to lift any packages above her shoulders or lower them to foot level. All those tasks were identified as essential parts of her position in the company's job description. The court rejected the argument that the plaintiff should be relieved of the various lifting requirements because, it said, "that would essentially transform the position into another one by eliminating essential functions of the job as it exists." The *Mason* court then analyzed and rejected the plaintiff's contention that she should be allowed to rely on her co-employees to assist with the lifting she could not do herself. Because the package center where she worked was "leanly staffed" and "require[d] all employees to perform their functions," the court concluded that shifting Mason's duties to others would "significantly disrupt" operations.

Later the same month the Sixth Circuit decided another case, *Williams v. AT&T Mobility Services, LLC*, 847 F.3d 384 (6th Cir. 2017), where it again considered the effect that a requested accommodation might have on a disabled employee's co-workers. The plaintiff was a Customer Sales Representative (CSR) who suffered from depression and anxiety. CSRs worked eight-hour shifts, typically handling 40 to 50 calls per shift. The plaintiff sometimes needed to "log out" and take time to compose herself after very stressful calls. To deal with that stress she requested accommodation in the form of leave from work for treatment, flexible scheduling, and additional breaks during her shifts. The evidence established, though, that "[i]f a CSR is not logged in to her workstation, any calls that would

have otherwise gone to her are rerouted to another CSR," and that the consequences of her unscheduled absences included "potential increases in customer wait times and decreases in the quality and speed of customer service," as well as "increased workplace tensions and decreased morale among the CSRs." Because, the court reasoned, "[r]egular, in-person attendance is an essential function . . . of most jobs, especially the interactive ones," the accommodations the plaintiff had requested were not reasonable.

Stevens v. Rite Aid Corporation, 851 F.3d 224 (2d Cir. 2017), involved a pharmacist who asked to be accommodated because of his "needle phobia." Rite Aid had made a business decision in 2011 to start requiring pharmacists to perform immunizations. Stevens argued that he could be accommodated by either hiring a nurse or assigning him to a "dual pharmacist" store, so that all immunizations could be performed by a colleague. The court reasoned, however, that "[t]hose steps would be exemptions that would have involved other employees performing Stevens' essential immunization duties." Because "[a] reasonable accommodation can never involve the elimination of an essential function of a job," the court of appeals held that Rite Aid was not required to grant the plaintiff those exemptions.

In another Sixth Circuit case, *Green v. BakeMark, USA, LLC* , 2017 WL 1147168 (6th Cir. March 27, 2017), the plaintiff was an "operations manager" with supervisory responsibilities, who historically had worked a minimum of 50 hours per week in that position. After suffering an on-the-job injury he asked to be accommodated with a part-time (20 hour a week) schedule. The trial court granted the employer summary judgment, and the court of appeals affirmed. After observing that "Green's own experience working long hours as an operations manager belies any claim that he could perform the essential functions of the position working four hours a day, five days a week," the court noted that "the written job description for operations manager emphasizes the position's full-time nature by stressing the 'supervisory responsibilities' inherent in the position, including 'closely interacting with department associates,'" and found it "difficult to fathom how Green could adequately fulfill his supervisory role if he were there to supervise and interact with the associates only part-time." At best, the court reasoned, "Green's proposed accommodation would have allowed him to perform only some functions of his position, some of the time." Because "the ADA requires more," the court affirmed the entry of summary judgment in the employer's favor.

2. The First Circuit Takes Up the Issue of Extended Leave

Although all federal appellate decisions interpreting the ADA are significant, cases decided by the Court of Appeals for the First Circuit, which includes Maine, directly control cases brought here. Most of the cases handed down by the First Circuit so far this year have broken little ground. One case, however, is worth noting because it deals with the recurring challenge employers face when they are asked to honor requests for extended leave from work.

In *Echevarria v. AstaZeneca Pharm*., LP, 856 F.3d 119 (1st Cir 2017), one of the questions presented was whether the plaintiff, who had taken a lengthy period of leave due to depression and anxiety, was entitled to another 12 months as an accommodation. The First Circuit held that the requested accommodation was not "facially reasonable." In its analysis of this issue the court quoted at length from a recent decision that had been authored by Justice Neil Gorsuch (the newest member of the Supreme Court) when he was sitting on the Tenth Circuit Court of Appeals, which the court said "nicely captured the dilemma that lengthy leave requests pose for employers." In that case Justice Gorsuch had explained that although leaves of absence can be "reasonable accommodations" in some

circumstances, lengthy periods of leave typically do not qualify because "reasonable accommodations – typically things like adding ramps or allowing more flexible working hours – are all about enabling employees to work, not to not work" (and it was not at all clear that the leave requested in *Echevarria* would actually be "effective" to get the plaintiff back to work).

The First Circuit went on to observe in *Echevarria* that "[c]ompliance with a request for a lengthy period of leave imposes obvious burdens on an employer, not the least of which entails somehow covering the absent employee's job responsibilities during the employee's extended leave." The court said that an employee's "facial-reasonableness showing must take these obvious burdens into account." Because the plaintiff had not satisfactorily explained how her employer should be expected to deal with the burdens imposed by her extended absence, the summary judgment entered for her employer was affirmed.

3. New Development: Gender Dysphoria as a Protected Disability

Finally, in *Blatt v. Cabela's Retail, Inc.,* 2017 WL 2178123 (E.D. Pa. May 18, 2017), a court for the first time has ruled that a transgender employee may proceed with a discrimination claim under the ADA. Courts applying Title VII previously have said that sex discrimination laws prohibit anti-transgender discrimination in the workplace. *Blatt* is unique because it says that a transgender employee with gender dysphoria may also be protected by the ADA.

The *Blatt* decision is brief and to the point. Kate Lynn Blatt, a transgender woman, sued Cabela's, claiming that while working there she was subjected to discrimination – she was not permitted to wear a name tag with her female name, or use the women's restroom – and that she was harassed by co-workers. Cabela's moved to dismiss her ADA claims on the ground that Section 12211 of the ADA excludes from coverage "gender identity disorders not resulting from physical impairments." In response, Blatt argued that the ADA's exclusion of gender identity disorders violated her Constitutional right to equal protection of the laws. The judge ruled that the ADA can, in fact, cover gender dysphoria, a condition "which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling." Because Blatt sufficiently alleged that gender dysphoria "substantially limited" her "major life activities" – including interacting with others, and social and occupational functioning – the court denied the employer's motion to dismiss and allowed the ADA claim to go forward.

Although *Blatt* has been described in the press as a "landmark" advance for transgender workers, it may not have very broad practical implications. The court did not question the assumption that the ADA protects only gender dysphoria, and not transgenderism generally. Furthermore, since transgender individuals have already found protection from employment discrimination under Title VII, the more limited safeguards recognized in *Blatt* may not add much. At the very least, though, the decision is yet another indication that the protections afforded by the ADA will continue to evolve, and that litigation under the Act will continue to grow.

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E-Discovery: Traps for the Unwary

By Jonathan W. Brogan, Esq.

We all live in an information exploded age. E–mail, social media, computer files and records, satellite tracking systems, and video are a daily part of all of our lives. Because they are a part of all of our lives, they have now become an integral part of the discovery process and a potential tool for plaintiffs' attorneys with weak cases to try to trap unwary small businesses and even potential defendants in simple automobile or premises liability cases.

More and more potential defendants in litigated matters are receiving, along with a notice of claim, a letter from a plaintiff's attorney asking that a "litigation hold" be placed on all of their electronic information and files. This article will deal with some of the state and federal rules associated with the production of these documents, the potential penalties for not protecting these documents, and the practicalities of electronic discovery in Maine.

The Maine Rules of Civil Procedure and the Federal Rules of Civil Procedure differ substantially, now, on the issue of what is "discoverable". Under the Federal Rules of Civil Procedure, Fed.R.Civ.P. 26(b)(1), the scope of discovery is:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the party's relative access to the relevant information, the party's resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

This discovery rule, adopted in 2015, changed what had been the scope of discovery for more than 40 years.

In Maine, however, the old scope of discovery still exists. Maine Rule of Civil Procedure 26(b)(1) states that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter . . . and appears reasonably calculated to lead to the discovery of admissible evidence.

Under the Federal Rules, if substantial electronic information is sought, an e-discovery order is usually entered and the division of costs associated with the discovery is evaluated. Unfortunately, in Maine, given the limited resources of our courts, it is a much less regulated process.

Litigation holds are often used in significant products liability or other commercial cases involving large corporations with legal departments and guidelines regarding litigation holds. This article will not address those situations. The article is focused on local businesses and events that may result in litigation. What does the small company do when it receives the boilerplate "litigation hold" letter? Also, what does a non-commercial driver involved in an automobile accident, for which he has insurance, do when he receives the same litigation hold letter?

Under the Federal Rules, the issue of proportionality is important. Although the State Rules have not adopted proportionality, yet, but clearly that issue may be brought to the attention of the Superior Court Judge and the issue of the relevance of the potential plaintiff's attorney's request for extensive personal information on handheld devices or home computers can be addressed. The best way to address it is to first try to protect as much information as possible, document what was done to protect it and do it immediately. Once that information is protected and available, then whether or not it will ever be produced is easier to evaluate.

But what happens when the potential defendant is contacted years after an accident? Maine has a 6 year statute of limitations. Many times the person is not contacted about potential litigation in an accident until years later. As most know, many electronic devices have automatic purging and/or the people who own those devices do their own deletions. That issue is dealt with by both the Federal Rules and the State Rules under Rule 37 and typically it must be shown that there was some intent to deprive the other side of information before any sanctions result.

The more difficult issue is once a person is put on notice what sources of information should be protected. Typically a litigation hold letter is general by nature and is attempting to put as wide a hold on electronic documents as possible. One thinks immediately of cell phone records, computer records, video records (surveillance or otherwise), and social media postings as information that should be requested or segregated so as to protect them from routine or inadvertent destruction. But, in many cases, there are other forms of information that small business owners forget may be the focus of the plaintiff's later motions for sanctions. For instance, many businesses that use motor vehicles have satellite tracking systems. Satellite tracking systems have become more and more sophisticated and offer the subscribers a wealth of information about the vehicles that are being tracked. That information includes the vehicles' locations, their average speeds, whether someone is abusing the vehicle by speeding or otherwise, and specific information at or near the time that a motor vehicle accident has occurred. Small businesses use this information to help them control costs and work with their employees to be safe. Plaintiffs' attorneys use this information to try to extract potential damaging data about the driver's lack of care and the owner's failure to monitor its driver.

Once one determines a satellite tracking system exists, gather all the information available and store it safely. Many times the satellite tracking data is stored in the cloud and destroyed after a period of time (typically one year) to allow other information to be stored. If a small business using a satellite tracking system is not aware of the numerous sources of information that might be available to a plaintiff's attorney, it may simply overlook this electronic data. If it does, a later sanctions request may mean that the jury is instructed that information was destroyed that may have been damaging to the liability defense of the defendant. Needless to say any jury hearing that information was "destroyed" will begin to think that the defendant had something to hide and that the information would have hurt the defense and helped the plaintiff.

Social media is even more difficult to control. Potential defendants have an ability to destroy any defenses in a case with their Facebook postings or tweets. Many times they believe they are protecting themselves by going on social media and explaining "their side of the story". It must be impressed upon potential defendants that they need to stay off social media and not discuss potential litigation or their defenses. If a "litigation hold" letter is sent to a defendant, then their social media information should be segregated and the defendant should be told that neither he nor any of his employees should be on social media discussing this potential matter or anything about it. If

contacted about it, they should simply not respond. If someone makes an accusation that they believe they need to defend, they should abstain.

There are numerous vendors who may be of help in protecting potential electronic information for discovery. They are expensive but can be extremely helpful especially when the information sought is "metadata" or other information that is typically beyond the expertise of insurance professionals, lawyers, or defendants. An analysis of when an electronic discovery vendor is useful should be made between the insurance professional and their attorneys.

In conclusion, the most important thing for potential defendants and insurance professionals to do when confronted with a "litigation hold" letter is to react and respond. Identify the information that may be available, segregate that information immediately, request any information (including cell phone information or other information from outside agencies) as soon as possible and store that information. If there is video, surveillance or otherwise, immediately segregate it. When investigating an accident, identify what video sources are available, whether there were cameras on the motor vehicles or at the area where the alleged slip and fall or other accident took place, and protect it.

If the motor vehicles involved have satellite tracking systems, find out what the satellite tracking systems provide, contact the satellite tracking system providers and get that information and save it.

Computer information should be saved and protected and stored. Find out from the potential defendant what routine destruction systems they have on their computers so that information is not destroyed unwittingly.

Most importantly, if the "litigation hold" letter received is prior to the start of litigation, ask the requesting lawyer to provide more specific requests than are typical. Many times plaintiffs' attorneys imagine they have asked for information that no reasonable person would see within a request. They then use that request to try to elicit sanction orders from the court. Though they are typically unsuccessful, it is easier to simply ask the plaintiffs' lawyers what they are looking for and determine if that request is a reasonable request. E-discovery is a trap for the unwary. Reasonable reaction, and documentation, as a response to a "litigation hold" letter will help prevent sanctions later.

WC Law Court decision issued on July 20, 2017 – Res Judicata and Permanent Impairment

It has long been established that when an issue is litigated to a final conclusion before the Workers' Compensation Board, the matter may not be re-litigated in a subsequent proceeding. This doctrine is known as res judicata, which literally means "thing adjudged", and although the concept arose in courts of general jurisdiction it has been found by the Law Court to be fully applicable to workers' compensation proceedings. A recent decision of the Court

addressed the application of res judicata to permanent impairment determinations.

In *Bailey v. City of Lewiston*, 2017 ME 160 (July 20, 2017), the employee sustained an occupational respiratory injury in 2001 and by decree was awarded ongoing benefits for partial incapacity. Ultimately the employee sought a Board determination of PI, and relying upon the opinion of a Section 312 examiner the Board established the level of PI at 32%. Benefits for partial continued without durational limit because the extent of impairment exceeded the applicable threshold.

Several years after PI had been established, the employer filed both a Petition for Review and another Petition to Determine the Extent of Permanent Impairment based upon a significant change in medical circumstances. Specifically, the same Section 312 physician found that the employee's medical condition had improved dramatically from the time of the first exam such that the level of PI had improved to 0%. The ALJ found that the issue of PI was not barred by res judicata and granted the employer's petitions. Because the level of PI was 0% and because partial benefits in excess of the durational limit had been paid by the time of the decree, payment of benefits ceased.

On appeal the Appellate Division reversed the decision of the ALJ and found that the initial PI determination was final and could not be re-evaluated. The employer then appealed to the Law Court.

In its decision the Court distinguished Board determinations on the nature and extent of incapacity from Board findings of the level of PI resulting from an injury. Regarding disability determinations, the Court recognized that the degree of incapacity may fluctuate and that parties may establish a change in the level of incapacity by comparative medical or economic evidence. However, the function of PI under the Act is to determine whether or not an injured worker's entitlement to partial is either capped or not, and the Court ruled that the purpose of the statute would be circumvented if a party could seek a modification of a PI determination in order to alter the durational length of entitlement to partial. As the Court held: "…the workers' compensation statute provides no opportunity for a redetermination of a hearing officer's or ALJ's findings regarding permanent impairment or MMI".

The Court's decision is broad enough to preclude an employee from seeking an increase in the level of PI after the Board had previously ruled upon the issue. Therefore, although res judicata will not prevent the parties from relitigating the extent of disability based upon changed circumstances, once PI has been established by the Board the matter is considered to have been finally determined and cannot be re-opened.

Ransomware: How to React When Prevention Fails

A variant of "Petya" is just the latest massive ransomware cyberattack currently crippling businesses and government offices across Europe and the United States. The particular focus on the Ukraine again points to Russia as the likely source, but the true identity of the actors is still unknown.

The increased sophistication and frequency of these threats are a timely reminder that a well-thought-out response plan can help minimize damage and preserve companies' reputations. Here are key steps to consider when it's too late for stress tests, policy reviews and software patches, and all other preventive measures have failed:

Immediate Action

1. Implement. Implement the company security incident response and business continuity plan, making sure that individuals in decision making authority chain are available and kept updated.
2. Quarantine. Isolate the infected computer or systems as soon as ransomware is detected to prevent it from attacking network or share drives.
3. Secure Backup Data. Immediately secure backup data or systems by taking them offline. Ensure backups are free of malware.
4. Secure Unencrypted Data. Secure any partial portions of the ransomed data that might exist.
5. Reset Passwords. Change account and network passwords after the corrupted system has been isolated from the network. Remember to also change system passwords once the malware is removed from the system.
6. Stop the Loading; Assess. Registry values and files should be deleted to stop the program from loading. determine which stakeholders and interests could be implicated, and evaluate the prospects for quick remediation.
7. Insurance. Identify any potentially responsive insurance coverages for carrier notification.
8. Report. Contact law enforcement. In the United States, the recommended contact is the local Federal Bureau of Investigation (FBI) or U.S. Secret Service field office.

To Pay or Not to Pay.

The decision of whether or not to pay the ransom is a decision fraught with its own risks that require evaluation of all realistic options to protect shareholders, employees, and customers.

Generally speaking, our advice is not to pay the ransom, but victims will want to evaluate a number of factors, including the technical feasibility, timeliness, and cost of restarting systems from backup, the possibility of preventing sensitive company and customer data from being being further compromised, and the ability to tell customers that the company did attempt to protect their data by paying the ransom.

If you are a ransomware victim, you'll want to also consider the following factors:

- First and foremost: Paying a ransom does not guarantee that you will regain access to your data. Many victims are never provided with decryption keys after paying a ransom for the simple reason that once the payment has been received there's little incentive to release the keys.
- Others are subject to additional payment demands during the same ransomware event once they've shown themselves willing to pay.
- By paying, you may be making yourself more of a target for cyber criminals.

- Although many ransomware events appear to be state or quasi-state action that are designed more to disrupt than to extort money, payment nonetheless encourages this criminal activity.
- If you do decide to pay, consider acceptable payment methods (i.e., paying through bitcoin and not through credit cards). In no event should payment come from an existing financial institution or bitcoin account.

Prevention and avoidance are still the best way to avoid the risks and costs of a malware intrusion, but a response plan has to be part of every company's cyberattack response toolbox.