# News

## Taintor & Pierce Secure First Circuit Victory

Chris Taintor and Russell Pierce recently posted a major appellate victory before the United States Court of Appeals for the First Circuit in *Friedman v. Central Maine Power Company*. In its decision, the First Circuit affirmed an Order of Summary Judgment in favor of Central Maine Power Company in a case challenging the safety of the radiofrequency (RF) energy emitted by CMP's "smart meters." The First Circuit decision is the culmination of six years of litigation, which followed an earlier administrative proceeding before the Maine Public Utilities Commission, an appeal from the Maine Public Utlities Commission (MPUC) to the Law Court, and a complaint to the Maine Human Rights Commission (MHRC).

In the federal lawsuit, the Plaintiff, a CMP customer claimed a violation of three federal disability discrimination laws — the Americans with Disabilities Act, the Fair Housing Act, and the Rehabilitation Act — by charging him a fee to "opt-out" of the company's Advanced Metering Infrastructure (AMI) program. That program created a "mesh network" of electric meters that communicate, through the emission of RF waves, with CMP's billing system, relieving the company and ratepayers of the cost associated with having meters read manually.

When the AMI program was approved by the MPUC, the Commission gave customers the right to "opt out" of the program, either by keeping their analog meter or by having a smart meter in "non-transmitting" mode. However, because smart meters had become CMP's "standard" meters, customers who opted out of the program were required to pay a modest initial fee for the non-standard meter, and an annual fee to cover the additional cost of manual meter-reading. Some customers exercised that option because they believed that having a transmitter in their home was an "electronic trespass," while others harbored concerns about the health effects of RF.

The Plaintiff and others then brought before the MPUC a challenge to the rollout of AMI, arguing that RF emitted by smart meters would create health risks. CMP defeated those challenges at the MPUC, which determined that smart meters posed no risk to the public, and the MPUC's decision was affirmed by the Law Court.

After the Plaintiff was diagnosed with a rare form of cancer, he asked CMP to "accommodate" his disability by waiving the opt-out fee. He alleged that the opt-out was necessary, because exposure to the RF emitted by a smart meter in his home would worsen his cancer. CMP refused his request, because there was no scientific evidence supporting the claim that RF exposure from a smart meter is harmful. The Plaintiff brought a complaint to the MHRC, and eventually in the United States District Court.

In response to CMP's Motion *in Limine*, the United States District Court excluded a number of key opinions proffered by the Plaintiff's experts, which left the Plaintiff without evidence of "specific causation." Because there was no admissible scientific evidence that smart meters posed a risk to the Plaintiff, the District Court entered Summary Judgment in CMP's favor. The First Circuit unanimously affirmed the District Court's judgment.

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For more information, please contact Chris Taintor or Russell Pierce.

## Marjerison Appointed ACTL State Chair

Tom Marjerison was recently appointed as the Chair of the Maine State Committee for the American College of Trial Lawyers. Tom follows in the footsteps of Mark Lavoie who previously served as the Maine State Chair.

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. Learn more at www.actl.com.

## Deane and Mattus Secure Summary Judgment Victory in Products Liability Case

Lyndsey Mattus and Devin Deane recently secured summary judgment in *Johnson v. CedarWorks, Inc.*, Docket No. ROCSC-CV-2023-00016–a products liability case pending in Knox County Superior Court. The plaintiff did not appeal the Court's entry of summary judgment resulting in a final, undisturbed win for CedarWorks, an excellent family business in Mid-Coast Maine.

The case involved an organic, wooden playset that had been donated by CedarWorks to a local Montessori school. The plaintiff claimed that the elastic cord on one of the playset's manipulative play devices, the CedarFone (a wooden phone made to emulate a corded phone and allow for interactive play), was misused in a manner that caused the "Fone" to come into contact with her head causing injury.

After years of litigation, including testimony from a highly-qualified playground safety expert and application of international playground safety standards, Attorneys Deane and Mattus challenged the merits of the plaintiff's claim by filing for summary judgment on the extensive record in the case, and challenged the plaintiff's ability to prove that the CedarFone, and specifically its elastic cord, proximately caused her alleged injuries. The Court agreed and entered summary judgment in CedarWorks' favor without the need for trial.

In its well-penned decision, the Court held that the plaintiff had not produced evidence sufficient to prove that the

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elasticity of the CedarFone's cord attached the handheld "Fone" to the receiver caused her alleged head injury and years of sequelae. After considering evidence from expert engineer witnesses, the Court determined that it would be "speculative" and unreasonable for a jury to conclude that the elasticity of the Fone's cord caused Plaintiff's injuries.

For more information, please contact Lyndsey Mattus or Devin Deane.

## Another Bench-Bar Game for NHD

Norman, Hanson & DeTroy continued its tradition of sponsoring the biannual Bench-Bar Hockey Game to promote collegiality among members of the Maine legal community. We are happy to report that no injuries were reported and a good time was had by all. Kudos to Sam Johnson for organizing another successful game.

## NHD's 50th Anniversary

On November 21st, over 400 people joined the Firm's celebration of its 50th Anniversary at Ocean Gateway in Portland. From the two-person firm of Norman & Hanson founded in 1975, the Firm has steadily grown over the years to its present roster of over fifty attorneys, making it one of Maine's largest law firms. Befitting Norman, Hanson & DeTroy's 70s roots, Motor Booty Affair provided the musical entertainment.

NHD is proud of our 50 years of legal service and look forward to our future together with the attorneys and staff of Thompson, Bowie & Hatch. Thank you to all of our friends and clients for your support. Here is to another 50 years.

## Pierce Preserves Appeal Win Before SCOTUS

Russell Pierce, Jr. recently preserved an appellate ruling in our clients' favor in response to a petition for writ of *certiorari* filed in the Supreme Court of the United States.

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In March 2025, Joe Mavodones and Devin Deane prevailed in the Law Court in *Hogan v. Lincoln Medical Partners, et al.,* 2025 ME 22, 331 A.3d 463, which affirmed the trial court's dismissal of various tort claims asserted against medical providers arising out of the alleged administration of a vaccine.

The Law Court's holding was the first time that the Court had addressed the Public Readiness and Emergency Preparedness (PREP) Act, a federal statute that provides broad immunity from tort liability to licensed health professionals, among others, for physical or mental injuries that are alleged to have been caused by the administration of a vaccine during a public health emergency declared by the Secretary of the U.S. Department of Health and Human Services.

Following the Law Court's decision, the plaintiffs filed a petition for writ of *certiorari* in June 2025, asking the Supreme Court of the United States to review the Law Court's decision and reverse its application of the federal PREP Act. Russell Pierce, Jr. defended the Law Court's application of the PREP Act before the Supreme Court and argued against granting the petition, including through submission of a brief in opposition to the plaintiffs' petition.

After briefing was completed, the Supreme Court summarily denied the petition for writ of *certiorari* on November 10, 2025. The Supreme Court's ruling preserved the Law Court's decision in *Hogan* and its application of the PREP Act to similar, future claims that may arise in Maine.

## NHD's Honors from Best Lawyers

Norman, Hanson & DeTroy is proud to announce that fourteen of its attorneys have been named to the 32nd 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:

James M. Bowie, 2007-2026: Insurance Law, Legal Malpractice Law – Defendants, Mediation.

Robert W. Bower, Jr, 2008-2026: Labor Law, Worker's Compensation Law – Employers.

Jonathan W. Brogan, 2005-2026: Medical Malpractice Law – Defendants, Personal Injury Litigation – Defendants.

Paul F. Driscoll, 2006-2026: Litigation – Real Estate, Real Estate Law.

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John W. Geismar, 2009-2026: Tax Law.

Robert C. Hatch – 2016-2026: Arbitration, Insurance Law, Litigation – Insurance, Mediation, Professional Malpractice Law – Defendants.

Kelly M. Hoffman, 2018-2026: Litigation – Labor and Employment, Professional Malpractice Law – Defendants.

Mark G. Lavoie, 2012-2026: Medical Malpractice Law – Defendants, Personal Injury Litigation – Defendants.

Thomas S. Marjerison, 2008-2026: Personal Injury Litigation – Defendants.

Russell B. Pierce, Jr., 2012-2026: Appellate Practice, Bet-the-Company Litigation, Commercial Litigation.

James D. Poliquin, 2005-2026: Appellate Practice, Bet-the-Company Litigation, Commercial Litigation.

Daniel P. Riley, 2007-2026: Government Relations Practice.

John R. Veilleux, 2010-2026: Insurance Law, Personal Injury Litigation – Defendants.

David P. Very, 2024-2026: Legal Malpractice Law – Defendants.

Best Lawyers also designated Samuel G. Johnson for Insurance Law as "Ones to Watch" for the 2026 edition of The Best Lawyers in America

## NHD's "Lawyers of the Year"

Norman, Hanson & DeTroy is proud to announce that four attorneys have been designated by *Best Lawyers* as the "Lawyer of the Year" for 2026 for the greater Portland area. We congratulate them for having achieved this impressive recognition.

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

Robert C. Hatch – Arbitration, Insurance Law, and Insurance Litigation.

Russell B. Pierce, Jr. – Appellate Practice, Bet-the-Company Litigation, and Commercial Litigation.

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

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## Lyndsey Mattus Joins NHD

Norman, Hanson & DeTroy is proud to announce that Lyndsey Mattus has joined the firm as an Associate in our litigation group focusing primarily on professional malpractice defense. Lyndsey recently served as a judicial law clerk for the Honorable Richard W. Mulhern and James F. Martemucci of the Maine Superior Court. In her role as the State of Maine's first Trial Court Law Clerk, she also supported various District Court Judges in York County.

Lyndsey graduated *summa cum laude* from Roger Williams University and earned a Juris Doctor degree from the University of Maine School of Law. During law school, Lyndsey competed on Maine Law's Judge John R. Brown Admiralty Moot Court Competition team, was a member of the Women's Law Association, and completed a judicial externship with the York County District Court. She also worked as a student attorney for the Maine Clinical Program's General and Rural Practice Clinics to provide free legal services to Mainers in York, Cumberland, Androscoggin, and Aroostook Counties.

## Cecilia Shields-Auble Joins the Firm

Norman, Hanson & DeTroy is pleased to announce that Cecilia J. Shields-Auble has joined the firm as an associate in the firm's litigation group. Her practice includes criminal and civil litigation in both state and federal courts. Recently, Cecilia served as a law clerk for Judge Karen Frink Wolf of the U.S. District Court for the District of Maine as well as for Justices John O'Neil Jr., Daniel Billings, and Thomas Warren of the Maine Superior Court.

Cecilia graduated *cum laude* from the University of Maine School of Law where she received the Justice Sidney W. Wernick prize for legal writing, served as the head case note and comment editor of the *Maine Law Review*, mentored first-year law students as a legal writing teaching assistant, and competed on the criminal law moot court team. During law school, Cecilia completed judicial externships with Judge Wolf as well as Justice Catherine R. Connors of the Maine Supreme Judicial Court, interned in the criminal division of the U.S. Attorney's Office for the District of Maine, and assisted low-income Mainers as a student attorney in the Cumberland Legal Aid Clinic.

Prior to law school, Cecilia graduated from Berry College in Rome, Georgia, where she studied public relations and was a four-year member of the equestrian team. She moved to Maine after graduation and worked in the greater Portland area's marketing industry for several years. In her free time, Cecilia enjoys fly fishing, gardening, and cooking.

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## Marjerison Appointed to Federal Court's Local Rules Committee

Tom Marjerison was recently appointed to the Local Rules Advisory Committee for the United States District Court for the District of Maine. Tom represents clients in civil and criminal trials in state and federal courts and is the Vice-Chair of the State Committee for the American College of Trial Lawyers. Tom previously served on the State Advisory Committee on the Maine Rules of Criminal Procedure from 1999-2009.

## Another Law Court Win for Taintor

The Maine Supreme Judicial Court, sitting as the Law Court, recently decided the case of *Carol Cutting v. Down East Orthopedics*. The Court affirmed a judgment on a defense verdict obtained by JD Hadiaris and Mark Lavoie after a seven-day medical malpractice trial. The Law Court's decision is the culmination of nearly nine years of litigation, which included not only the state-court malpractice suit but also two separate suits brought by Cutting in federal court. Chris Taintor represented Down East Orthopedics on the appeal.

The case arose out of a procedure on Cutting's shoulder that was performed by an orthopedic surgeon in November 2013. Cutting had been having shoulder pain for three years. Pre-operative imaging revealed joint narrowing, mild arthritic changes at the acromioclavicular joint, supraspinatus tendinopathy, and a partial rotator cuff tear. Her surgeon offered a procedure aimed at "cleaning up" the structures around the acromion, to minimize wear and tear on the rotator cuff, and to effectively relieve her long-standing pain.

When the procedure was performed, the surgeon found, in addition to a partial tear of the rotator cuff, a full-thickness tear that had not been identified either by imaging or by exam. Surgical repair of a full thickness tear requires immobilization of the shoulder for at least six weeks post-surgically, and the success of the procedure hinges completely on postoperative compliance with the immobilization protocol. Because Cutting suffers from Tourette's Syndrome, which causes involuntary rapid and forceful arm movements, the surgeon determined that her inability to keep the shoulder immobilized post-operatively made it imprudent to repair the full-thickness tear.

In late 2016, Cutting filed, almost simultaneously, a medical malpractice Notice of Claim in state court and a separate suit in federal court. In the federal case, Cutting sought to hold Down East liable under the Americans with Disabilities Act, alleging that the surgeon had refused to repair the full-thickness rotator cuff tear not because it was medically inadvisable, but solely because of discriminatory animus aimed at patients with disabilities. The Court

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granted summary judgment to Down East in that case.

In May 2018, Cutting's malpractice claim was presented to a prelitigation screening panel, as required by the Maine Health Security Act. After the panel found unanimously in favor of Down East – and while the ADA and malpractice suits were still pending – Cutting filed a second federal lawsuit, this one asking the court to declare invalid, on constitutional grounds, the prelitigation screening process. Essentially, Cutting asked the federal court to rule that the finding of the panel that heard her case would be inadmissible at trial, because it was the product of a constitutionally defective process. The Court granted Down East's motion to dismiss that suit. The Court agreed that it had no jurisdiction to adjudicate the constitutionality of the MHSA – rather, that question could only be resolved by the state court that would be called upon to decide, at trial, whether to admit the panel finding.

The malpractice case finally went to trial in September 2023 – ten years after the surgery and seven years after Cutting first brought suit. Over Cutting's objection, the Superior Court admitted the panel finding into evidence. At the close of the plaintiff's case, the trial judge ruled that the evidence was legally insufficient to support a claim for punitive damages, and he dismissed that claim. On the seventh day of trial, after deliberating for less than three hours, the jury returned a defense verdict.

On appeal, Cutting argued (1) that the trial judge had improperly limited her counsel's cross-examination of the defense expert, (2) that the trial judge abused his discretion by admitting the Prelitigation Screening Panel's finding, and (3) that the court erroneously dismissed the punitive damage claim.

The Law Court deemed the first argument unworthy of discussion, limiting itself to a discussion of the panel findings and the punitive damage argument.

The Court started by observing that it had previously "examined in several cases challenges to the admission at trial of prelitigation screening panel findings." Based on its prior decisions, the Law Court found no error in the trial judge's ruling. With respect to Cutting's contention that the panel members had "prejudged" the case, and that their prejudgment was discernible from the fact that they had expressed their willingness to decide the case on the basis of the parties' written submissions, the Court found it significant that "she did not file any objection to the conduct of the panel chair or other members or seek removal of any of the panel members" – instead, she had proceeded to hearing without objection, and had raised concerns about the fairness of the process only after she lost. The Court also rejected the notion that "the panel process is generally 'skewed in favor of' defendants and almost never results in unanimous findings against them." "Contrary to Cutting's suggestion," the Court said, "there [was] nothing in this record supporting these assertions."

The Law Court then turned to the punitive damage argument. The Court agreed with Down East that "[p]unitive damages may be awarded only if the plaintiff has also been awarded actual or compensatory damages based on tortious conduct of the defendant," and "because the jury found that Down East was not liable for medical negligence, the jury could not award any damages at all, let alone punitive damages." In a footnote, the Court gave short shrift to Cutting's theory that she was nevertheless prejudiced by the dismissal of the punitive damage claim. Her theory was that because her lawyer had discussed punitive damages in her opening statement, and then no punitive damage claim was presented to the jury at the close of the evidence, "the jurors may have incorrectly

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assumed that the *court* did not think the evidence supported her *negligence* claim and might have been improperly influenced by that misimpression." The Court found "no merit to this speculation," observing that "Cutting made the strategic choice to discuss punitive damages in her opening statement, and the prejudice she posits could only result from the jury failing to follow the court's instructions."

In summary, the Law Court unanimously found that each of Cutting's arguments on appeal was completely without merit.

## JD Hadiaris Obtains Unanimous Defense Verdict on Behalf of Orthopedic Surgeon

JD Hadiaris successfully defended an orthopedic surgeon from Maine, obtaining a unanimous defense verdict in a jury trial at Androscoggin County Superior Court.

The case arose from the orthopedic surgeon's repair of a femoral neck fracture (combined with a femoral shaft fracture), which occurred in a snowmobile crash. The plaintiff alleged that the surgeon was negligent in his reduction and fixation of the femoral neck fracture, which went on to nonunion following surgery. The plaintiff underwent several additional revision procedures performed by another orthopedic surgeon, but those surgeries failed, and the patient eventually required a total hip arthroplasty after she was diagnosed with avascular necrosis. The plaintiff asked the jury to award $4 million in damages.

The defense argued that the surgeon's reduction and fixation of the femoral neck fracture were reasonable and appropriate, and that the plaintiff's complications were not result of any alleged negligence on the part of the surgeon. Top experts from New England and beyond were called by the defense team. The experts explained that femoral neck fractures caused by high energy traumatic injuries like the one the plaintiff experienced put patients at high risk for nonunion and avascular necrosis, even when repair is correctly performed – as it was here by the orthopedic surgeon.

As a result of these high-energy injuries, the limited blood supply to the femoral neck and head is often disrupted, and that disruption can result in inability of the fracture to heal (nonunion) and eventually death of the bone (avascular necrosis). The fact that the plaintiff experienced these well-known complications following her injury was not an indication that the surgery was performed in a negligent or improper manner.

After the weeklong trial, the jury deliberated for less than half an hour before returning a unanimous defense verdict for JD's client.

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# Law Court Win for Chris Taintor

On June 26th, the Maine Supreme Judicial Court, sitting as the Law Court, handed down a long-awaited decision in *Smith v. Henson*, holding that the damages recoverable for "pecuniary injuries" under the Wrongful Death Act are limited to the amounts that would have benefited the persons on whose behalf the suit is brought. NHD's Chris Taintor represented the prevailing defendants.

The appeal arose from a medical malpractice action in the Superior Court, brought by the parents of a young unmarried man who had recently graduated from college and was preparing for a career as an accountant, and who tragically died after his Lyme Disease went undiagnosed. The Defendants were represented by another firm throughout the litigation. However, NHD was consulted early on as appellate counsel, with the expectation that, given the overwhelming difficulty of mounting a persuasive liability defense, there would be a substantial verdict, including a large award for pecuniary injuries arising from the death. There was eventually an award to the Plaintiffs which included $2,000,000 for the decedent's loss of future earnings.

The focus of the parties' dispute involved the interpretation of language in the Wrongful Death Act that allowed a jury to award damages as "fair and just compensation with reference to the pecuniary injuries resulting from the death." The centerpiece of the Plaintiffs' argument was a 2009 amendment to the Act. Before the amendment, the Act specified that damages for pecuniary injury could only be recovered by "the persons for whose benefit the action was brought." The amendment deleted that phrase, so the statute simply provided that damages for pecuniary injury could be awarded, but it didn't say to whom they could be awarded.

The Wrongful Death Act establishes a hierarchy of persons who are entitled to recover damages on account of a negligently caused death. For an adult without a spouse or children, recovery is for the exclusive benefit of the decedent's parents, if living. Consequently, the plaintiffs in Smith – that is, "the persons for whose benefit the action is brought" – were the decedent's parents. They took the position throughout the case that under the Act, as amended, they were entitled to recover damages for the loss of their son's lifetime earnings without having to prove that he would have provided them any support. The defendants, on the other hand, argued that the amendment had not changed the fundamental principle that the purpose of the Act is to compensate surviving members for their actual losses; thus, because the parents had no expectation that their son would support them, they suffered no "pecuniary injuries resulting from the death," and they were therefore entitled to no "compensation" under that part of the Act.

The trial judge agreed with the plaintiffs, denying the Defendants' motions for partial summary judgment and directed verdict, and permitting them to present their pecuniary injury claim to the jury. After the Superior Court denied a post-trial motion asking to have the pecuniary injury award thrown out, the Defendants brought their appeal, challenging only that component of the jury award, while taking no issue with the awards for the decedent's conscious suffering and for the parents' loss of their son's society and companionship.

On appeal, the Law Court vacated the award of damages for pecuniary injury. In a lengthy opinion, and with two members dissenting, the Court reasoned that the legislative history of the 2009 amendment did not support the view that the Legislature intended to fundamentally broaden the right to recover damages for pecuniary injuries.

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Additionally, and importantly, the Court reasoned that allowing recovery by the *Smith* plaintiffs would be "in derogation of the black-letter common law principle that, in order to support compensatory damages, the wrongful conduct must have been the proximate cause of the underlying loss *to the claimant*."

The net result of the Law Court's decision, at least for now, is to confirm the principles that historically have limited the recovery of damages for wrongful death. Damages for the loss of a decedent's income-earning capacity will be recoverable only by those who can demonstrate that they personally have suffered economic harm. It is reasonable to expect, however, that the battle over this issue will continue in the Maine Legislature

## Thompson, Bowie & Hatch Joins NHD

Norman, Hanson & DeTroy is pleased to announce that Thompson, Bowie & Hatch joined our firm July 1, 2025. It has been a pleasure to welcome an outstanding and experienced group of attorneys and staff.

Since 1978, our two firms have developed reputations as the preeminent litigation and commercial firms in Maine and our merger will strengthen our ability to provide outstanding legal services to our clients.

With the addition of 10 lawyers from Thompson, Bowie & Hatch, Norman, Hanson & DeTroy will grow to over 50 lawyers, making it one of the larger firms in the State of Maine. As the firm enters its 50th year, we look forward to a bright future.

For more information, please feel free to contact the firm's Managing Attorney, John Veilleux.

## Charlie Bloom Joins NHD

Norman, Hanson & DeTroy is pleased to announce that Charlie Bloom recently joined the firm as an Associate Attorney in the firm's Commercial Group. Charlie represents individuals and businesses in real estate transactions including purchase, sale, leasing, and financing transactions, as well as permitting matters before municipal and state boards and agencies. He also has experience assisting clients with subdivision of real estate and creation of condominiums, road associations, and homeowners associations.

In addition to his transactional practice, Charlie regularly assists clients with real-estate-related disputes, such as those involving boundary, easement, partition, and covenant issues. Charlie has a deep understanding of land title issues and is licensed to issue title insurance policies through NHD's in-house title insurance agency, Allagash Title

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Services, LLC.

Charlie joined NHD after practicing for several years in Bangor and Portland with another of Maine's largest law firms. He earned his J.D. from the University of Connecticut School of Law where he was an editor of the *Connecticut Law Review* and received a Certificate in Energy and Environmental Law. During law school, he interned for Hon. Alfred V. Covello at the U.S. District Court for the District of Connecticut and held a clerkship with the U.S. Department of Justice, Environment and Natural Resources Division, Land Acquisition Section.

Charlie earned a B.A. in Environmental Studies from Carleton College, where he also earned a Certificate in French Language and Literature, received honors in music performance, and was the principal tuba in the college's orchestra and symphonic band. He is also an FAA-licensed pilot. Charlie lives in Brunswick with his fiancée, Katja, and in his free time enjoys traveling, skiing, camping, hiking, and exploring Maine's waterways by canoe.

## Christine Johnson Elected President of Cumberland Bar Association

Norman, Hanson & DeTroy is pleased to announce that Christine Johnson has been elected President of the Cumberland Bar Association. The Cumberland Bar Association is one of the oldest organized bar associations in the United States and currently has more than 500 members.

Christine has served on the CBA board for several years and has actively contributed to its mission of enhancing the professional lives of attorney members. This includes organizing and providing quality continuing legal education programming, supporting access to justice projects through grants and hosting a variety of events within the legal community.

## Kendall Wins MITC President's Award

Norman, Hanson & DeTroy is proud to announce that Adrian Kendall is one of this year's recipients of the Maine International Trade Center's President's Award. The President's Award is given to an individual or organization that has displayed exceptional support to Maine International Trade Center. Click here for video regarding Adrian Kendall and the President's Award.

In presenting the award at MITC's signature Trade Day event, hosted at the LL Bean headquarters, MITC President

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Wade Merritt noted that he and the Trade Center had developed a professional relationship that spanned more than two decades with Adrian, whose international experience, legal expertise, and calm solutions mindset has made him a trusted friend and sounding board.

In his acceptance remarks, Adrian expressed his deep gratitude to Wade and the Trade Center for the continued trust and confidence placed in him, and for the many opportunities that MITC had offered over the years. He stressed the importance of the Trade Center, and many other players in the economic development space, in helping Maine businesses to grow, and also in providing hope to communities, providing Maine jobs for our graduates, and opportunities to attract our younger workforce back to the great State of Maine. Adrian was a previous recipient of the President's Award in 2016, and the only one to receive it twice.

## NHD Sponsors Bench-Bar Game

As part of our commitment to promoting collegiality and civility among members of the Bar, Norman, Hanson & DeTroy sponsored the biannual Bench-Bar Hockey Game. The firm has sponsored these games for the past 12 years. We are happy to report a good time was had by all and no fisticuffs were reported.

## Brogan Named Lawyer of the Year

Norman, Hanson & DeTroy is pleased to announce that Jonathan Brogan has been named "Lawyer of the Year" for 2025 in Personal Injury-Defense by *Best Lawyers in America.* Jonathan has been named one of the "Best Lawyers" since 2011 and has received "Lawyer of the Year" in Personal Injury-Defense three other times (2015, 2018, 2021), as well as "Lawyer of the Year" in Medical Malpractice-Defense (2017). Jonathan is a Fellow of the American College of Trial Lawyers and is a Member of The National Academy of Distinguished Neutrals.

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# NHD Attorneys Recognized by Best Lawyers in America

Norman, Hanson & DeTroy is pleased to announce that *Best Lawyers in America* has again recognized our firm in its Top Tier (Metropolitan Tier 1) of Maine firms in the following areas: Appellate Practice, Bet-the-Company Litigation, Commercial Litigation, Ethics and Professional Responsibility Law, Insurance Law, Medical Malpractice Law-Defendants, Personal Injury Litigation-Defendants, Product Liability Litigation-Defendants, Professional Malpractice Law-Defendants, Workers' Compensation Law-Employers.

*Best Lawyers in American* recognizes the outstanding achievements of legal professionals who have demonstrated unparalleled expertise and dedication in their fields. The following attorneys were also honored in the 2025 edition:

- Robert W. Bower, Jr. (Recognized in Best Lawyers since 2008): Labor Law-Union; Workers' Compensation Law-Employer.
- Jonathan W. Brogan (Recognized in Best Lawyers since 2005): Medical Malpractice Law-Defendants; Personal Injury Litigation-Defendants.
- Paul F. Driscoll (Recognized in Best Lawyers since 2006): Litigation-Real Estate, Real Estate Law.
- John W. Geismar (Recognized in Best Lawyers since 2009): Tax Law.
- Kelly M. Hoffman (Recognized in Best Lawyers since 2018): Professional Malpractice Law-Defendants.
- Mark G. Lavoie (Recognized in Best Lawyers since 2012): Medical Malpractice Law-Defendants, Personal Injury Litigation-Defendants.
- Thomas S. Marjerison (Recognized in Best Lawyers since 2008): Personal Injury Litigation-Defendants.
- Russell B. Pierce, Jr. (Recognized in Best Lawyers since 2012): Appellate Practice, Commercial Litigation, Ethics and Professional Responsibility Law, Product Liability Litigation-Defendants, Professional Malpractice Law-Defendants.
- James D. Poliquin (Recognized in Best Lawyers since 2005): Appellate Practice, Bet-the-Company Litigation, Commercial Litigation, Insurance Law, Personal Injury Litigation-Defendants.
- Daniel P. Riley, Jr. (Recognized in Best Lawyers since 2007): Government Relations Practice.
- John R. Veilleux (Recognized in Best Lawyers since 2010): Insurance Law, Personal Injury Litigation-Defendants.
- David P. Very (Recognized in Best Lawyers since 2024): Legal Malpractice Law-Defendants.

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*Best Lawyers in America* also recognized the following lawyers as *Ones to Watch*:

- Devin W. Deane (Recognized in *Best Lawyers: Ones to Watch in America* since 2021): Insurance Law, Labor and Employment Law-Employee, Medical Malpractice Law-Defendants, Personal Injury Litigation-Defendants.
- Grant J. Henderson (Recognized in *Best Lawyers: Ones to Watch in America* since 2021): Labor and Employment Law-Employee.
- Samuel G. Johnson (Recognized in *Best Lawyers: Ones to Watch in America* since 2021): Insurance Law.
- Christine A. Johnson (Recognized in *Best Lawyers: Ones to Watch in America* since 2021): Workers' Compensation Law-Employers.

## Law Court Victory for Mavodones and Deane

Joe Mavodones and Devin Deane recently prevailed in the Law Court in *Hogan v. Lincoln Medical Partners, et al.*, 2025 ME 22, — A.3d —, which affirmed the trial court's dismissal of various tort claims asserted against medical providers arising out of the alleged administration of a vaccine. The Law Court's holding was the first time that the Court has addressed the Public Readiness and Emergency Preparedness (PREP) Act, a federal statute that provides broad immunity from tort liability to licensed health professionals, among others, for physical or mental injuries that are alleged to have been caused by the administration of a vaccine during a public health emergency declared by the Secretary of the U.S. Department of Health and Human Services.

In *Hogan*, the parents asserted various tort claims against medical providers arising out of the alleged administration of a vaccine at a school vaccination clinic. In the trial court, the medical providers filed a motion to dismiss the claims pursuant to the PREP Act. The PREP Act provides immunity for "all claims for loss caused by, arising out of, relating to, or resulting from the administration" of a vaccine or other "covered countermeasure" during a declared public health emergency. The only exception to the PREP Act's immunity provision is a federal cause of action filed in Washington, D.C., for any claims asserting "death or serious physical injury" caused by a person's "willful misconduct" in the administration of a vaccine or covered countermeasure. In this case, the trial court granted the motion to dismiss, finding that the medical providers were each immune from liability for the asserted claims.

On appeal, the Law Court affirmed the trial court's dismissal, concluding that the PREP Act's immunity language is "plain, broad, and unambiguous with respect to immunity from tort liability." As a result, the Court determined that the medical providers were immune from suit for any alleged injury resulting from the administration of the vaccine during a public health emergency. The Law Court also determined that the common law tort claims asserted were preempted by the PREP Act, at least to the extent that the claims sought recovery for

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any tortious conduct for which the medical providers had immunity under the Act.

For more information, please contact Joe Mavadones.

## Bill Campbell Joins NHD

We are pleased to announce that Bill Campbell has joined Norman, Hanson & DeTroy as an associate in our Litigation Practice Group where he will focus his practice on defending professional negligence and personal injury claims. He also will be representing individuals and business entities in matters involving commercial, construction, and landlord-tenant disputes.

Bill graduated from the University of Maine School of Law in 2023, where he earned a certificate in Business and Transactional Law with distinction. During law school, Bill served as a Summer Associate with two Maine law firms and externed with MaineHealth's in-house counsel group.

Prior to law school, Bill attended Husson University where he studied law, interned with the Federal Defenders Office in Bangor, and was a defensive end on the Husson University football team.

A lifelong Mainer, Bill enjoys hiking, fishing, and golfing in his spare time.

## Sam Johnson Elected as Member of Firm

We are proud to announce that Sam Johnson has been unanimously elected as a Member (Partner) of Norman, Hanson & DeTroy. Sam has posted an impressive list of appellate and trial wins over the past 6 months, but is best known for organizing the semi-annual Maine Bench-Bar Hockey Game.

Samuel G. Johnson's practice includes all aspects of civil litigation in state and federal court.  Sam is a skilled advocate who has successfully represented clients at trial and on appeal before the Maine Law Court and the First Circuit Court of Appeals.  Sam has been recognized by New England Super Lawyers as a Rising Star in litigation each year since 2021. Rising Stars recognizes attorneys who are either 40 years old or younger or in practice for 10 years or less. Each year, no more than 2.5% of the lawyers in New England are selected as Rising Stars. Sam has also been recognized in the Best Lawyers in America "Ones to Watch" for his work in insurance law each year since 2021.

Before joining Norman, Hanson & DeTroy, Sam served as a law clerk to Justice Donald G. Alexander of the Maine

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Supreme Judicial Court. He graduated from the University of Maine School of Law where he served as the executive editor of the Maine Law Review and as a teaching assistant for two legal writing and civil procedure courses. During law school, Sam interned at the United States Attorney's Office in both the Appellate and Criminal divisions. He also assisted low-income Mainers with a variety of legal issues as a student attorney at the Cumberland Legal Aid Clinic.

Prior to law school, Sam graduated from Lawrence University in Appleton, Wisconsin, where he studied economics and was a four-year member of the ice hockey team. He returned to Maine following graduation, at which time he managed a seasonal seafood restaurant and worked for a restoration company in Scarborough.

Sam lives in his hometown of Portland with his wife, Lydia, and their two daughters. In his free time, Sam enjoys playing hockey, golfing, and exploring the outdoors.

## NHD at Maine College of Trial Advocacy

Norman, Hanson & DeTroy was well represented at the recent Maine College of Trial Advocacy with Tom Marjerison, Kelly Hoffman and Devin Deane serving as instructors, and Erika Roberge-Kepler, Joe Mavodones, and Kelsey Kenny attending as students.

The Maine College of Trial Advocacy is an intensive two (2) day clinical courtroom experience directed by leading Maine trial lawyers and judges as faculty members. Throughout the clinical workshop, student participants delivered at least one opening, one closing, and direct and cross-examinations of a fact and expert witness, while faculty members critiqued these live and recorded hearings.

## Russ Pierce Prevails in First Circuit

Russell Pierce brought to a successful close complex litigation involving novel defamation and anti-SLAPP statutory claims in *Franchini v. Investor's Business Daily*. The First Circuit's judgment and mandate in favor of Investor's Business Daily, LLC (now an indirect subsidiary of News Corporation), became final on November 14, 2024, after many years of battle and perseverance in federal trial and appellate courts. The case even involved at one point relatively rare "certified question" appellate proceedings in which the First Circuit Court of Appeals asked the Maine Supreme Judicial Court (Law Court) for guidance on a question of Maine law. *See Franchini v. Investor's Business Daily*, 2022 ME 12.

Ultimately, Pierce's client was fully vindicated, achieving summary judgment on unique First Amendment theory involving "voluntary limited-purpose public figure" status of the Plaintiff and concepts of constitutional "actual

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malice" in defamation law. The First Circuit's final opinion was issued this summer and a petition for rehearing was later denied. Accordingly, the First Circuit's final mandate and judgment in favor of the client was entered in court in November.

Russell Pierce counsels and represents businesses, non-profit organizations, and individuals in a broad civil litigation practice throughout the state of Maine and in the First Circuit Court of Appeals. Individuals and businesses from other states also often turn to Russ for handling this broad range of cases – matters such as class actions, complex business litigation, professional negligence and malpractice defense, tort and contract law, property rights, product liability, constitutional law and civil rights, First Amendment rights and defamation claims, and environmental and conservation law.

## Lucy Weaver Joins Firm

Norman, Hanson & DeTroy is pleased to announce that Lucy Weaver has joined the firm as an Associate in the Corporate and Commercial Group. Lucy graduated *cum laude* from the University of Maine School of Law in 2024 and from Colby College in 2019, where she studied history and Russian and was a member of the women's crew team.

During law school, Lucy served as an editor of the *Maine Law Review* and her article, *What the Cluck? Backyard Chickens and Maine's Mysterious Right to Food*, was published in the journal's 76th volume. She interned with Friends of Casco Bay, where she worked to address water quality issues facing Portland's watershed. She also assisted asylum seekers with Maine Law's Refugee and Human Rights Clinic.

A lifelong Mainer, Lucy lives in Portland with her partner, Will, and their two cats.

## Pattershall Elected as Member of Firm

We are proud to announce that Brad Pattershall has been unanimously elected as a Member (Partner) of Norman, Hanson & DeTroy. Brad joined NHD in 2022 after working as partner at another Portland law firm and then establishing and growing a solo practice in Brunswick, Maine.  Brad has a broad-based litigation practice in which he represents individuals and businesses in construction, contract and commercial disputes, personal injury and products liability claims, landlord/tenant disputes, and criminal proceedings.  A Maine native, Brad earned a B.A. from Colby College in 1994, and received his J.D. cum laude from the University of Maine School of Law in 1999.

Brad has been recognized as a Local Litigation Star in Benchmark: Litigation and as a Rising Star in Super Lawyers

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New England. His reported decisions have addressed the Fourth Amendment rights of juveniles, the Free Exercise Clause of the First Amendment, the limits of personal jurisdiction in Maine, the doctrine of *res ipsa loquitur* in the area of products liability, and the bounds of the lawful use of deadly force by law enforcement. Regardless of the subject matter, Brad effectively guides his clients through each phase of litigation. He takes a big-picture view of each case to assure that his representation of each client is as efficient as possible in light of the stakes involved and each client's needs.

From 2016 to 2020, after nominations by Governors LePage and Mills, Brad served as a Commissioner on the Maine Commission on Governmental Ethics and Election Practices. In 2017 Brad was elected to serve on the board of directors of Maine Golf, the non-profit governing body of amateur golf in Maine. He was a recipient of a four-year scholarship from Maine Golf as an undergraduate and earned a varsity letter in baseball as well. In law school, Brad was a member of the Moot Court Board, and in 1998 he studied law at the Université du Maine in Le Mans, France, where his classes were taught in French.

## Wesley Birdsong Joins NHD

Norman, Hanson & DeTroy is pleased to announce that Wesley Birdsong has joined the firm's Corporate and Commercial Group. Wesley graduated from the University of Maine School of Law in 2023.

While in law school, Wesley served as the Executive Editor of the Ocean & Coastal Law Journal, recognized as the 1L Prize Arguer, received the Gignoux Award for Appellate Advocacy and the Pro Bono Public Award. He also practiced as a Student Attorney with the Cumberland County District Attorney's Office. While a Student Attorney, Wesley had the privilege of authoring an appellate brief and successfully argued the appeal before the Law Court in *State v. Gibb*, 2023 ME 4. In addition, he holds a Master of Business Administration degree from Wagner College.

Wesley grew up in Arkansas and spent a portion of his professional life in New York City. He fell in love with all that Maine has to offer and made it his home in 2018. Wesley lives in Portland and enjoys his adventures throughout Maine.

## Pro Bono Asylum Victory for Deane

Devin Deane's clients were recently granted asylum by the United States Department of Homeland Security after years of prosecuting their application for asylum. Devin's p*ro bono* efforts culminated in a hearing before the Boston

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Asylum Office in October 2024.

Devin's clients, a mother and two children, fled to the United States from their home in Africa after being persecuted because of their ethnicity and political opinions. Devin pursued the family's case before the Department of Homeland Security for several years, which resulted in DHS's determination that his clients were, in fact, persecuted because of their race and involvement in a political party that opposed the ruling regime and they had a well-founded fear of future persecution if they were forced to return to their home country.

Devin is honored to have helped the family find safety in the United States after experiencing unimaginable horrors in their home country. Now safe, and legally residing in the United States, the family can pursue their own American dream, including permanent resident status and eventually U.S. citizenship.

## Christine Johnson Elected to Firm Membership

Norman, Hanson & DeTroy is proud to announce that Christine Johnson was unanimously elected as a Member (Partner) of the Firm. Christine primarily represents employers in worker's compensation matters.

Prior to joining Norman Hanson & DeTroy, Christine's practice focused on real estate, with an emphasis on foreclosure litigation and creditor rights. She also has experience in probate, bankruptcy, and debt collection. While attending the University of Maine School of Law, she completed an externship at Pine Tree Legal and served as a student attorney at the Cumberland Legal Aid Clinic. Prior to law school, she attended the University of Vermont and the University of Southern Maine. Christine lives in Buxton with her husband and two daughters.

## 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.

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## NHD Sponsors Bench-Bar Hockey Game

## Sam Johnson & Marjerison Secure Law Court Win

Sam Johnson and Tom Marjerison recently posted an appellate victory for their clients in *Davis v. Squirrel Island Corp., et al*. In its Memorandum of Decision, the Maine Law Court affirmed the Lincoln County Superior Court's granting of Defendant's Motion to Dismiss. The Law Court adopted the argument set forth in the lower court that Plaintiff did not have standing to be entitled to relief. Accordingly, the Superior Court properly held that it did not need to reach the Plaintiff's allegations in her complaint.

For more information on this case or standing issues, please contact Sam Johnson.

## Presenter at 2024 Legal Year in Review

Matt Mehalic was invited to speak at the 2024 Maine State Bar Association's Legal Year in Review on Insurance at the Augusta Civic Center. Matt will join a number of peers in presenting on their respective areas of expertise and the developments in these fields over the past year. Matt is looking forward to discussion of new decisions and issues in insurance law with fellow members of the bar.

## 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

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liability claim against the restaurant.

In *Fama*, an action was brought 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.

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## 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.

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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

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than blood."

## Seminar on Businessowner's Policy and 30(b)(6) Depositions

Matt Mehalic and Sam Johnson presented a seminar addressing common third-party liability coverage issues under a Businessowners policy and also provided helpful hints for 30(b)(6) depositions of insurance professionals at the Concord Group Insurance Companies on August 1, 2024. The presentation gave Matt and Sam an opportunity to offer insights into application of insurance provisions in real world claim scenarios. Matt was appreciative of the invitation by the Concord Group Insurance Companies to offer this seminar and speak with the claims professionals. He invites other clients of the firm to contact him should they have a need for a seminar or discussion of insurance coverage or liability related matters.

## 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

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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

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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

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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.

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## 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.

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## 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

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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

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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.

## 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.

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## 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.*"

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- 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

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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

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- 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.

## 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

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## 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

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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.

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# 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 Attorney Matthew T. Mehalic 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 an 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.

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Mehalic mmehalic@nhdlaw.com.

## 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

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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.

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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.

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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.

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## 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.

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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.

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## 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

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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

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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-

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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.

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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

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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

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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)

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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

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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."

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*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.

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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,*

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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.

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## 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

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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

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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.

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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

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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;

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- 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.

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## 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*

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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

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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

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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

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# 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

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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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