NORMAN, HANSON & DETROY, LLC

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Current developments in Maine law

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The Case of the Missing Claimant: A Potential Remedy When a Workers' Compensation Claimant's Whereabouts Are Unknown

By Katlyn M. Davidson

What options do an Employer and Insurer have when a workers' compensation claimant, to whom you are paying regular benefits, goes missing and his or her whereabouts are unknown? The Workers' Compensation Act does not provide an answer to this question but a recent decision from the Workers' Compensation Board's Appellate Division did. In the decision of *Johnson v. Home Depot USA, Inc.,* App. Div. Dec. No. 14-2, the Appellate Division addressed this unique issue of when an employee disappears while an employer and insurer are obligated to pay ongoing benefits to the employee.

In this case, the Employee sustained a work-related injury in 2009, which was established by a previous Consent Decree. The Employee also received ongoing partial incapacity benefits pursuant to the terms of the Consent Decree. The benefit checks were sent to the Employee's attorney pursuant to the terms of a designation of payment. The Employee had also granted her attorney a limited power of attorney, which permitted his office to endorse and deposit the benefit checks into a client trust account for later disbursement to the Employee. In 2011, the Employee underwent surgery, after which the employer agreed to pay total incapacity benefits on a voluntary basis. Around the same time, the Employee also filed Petitions for Review and for Payment of Medical and Related Services. When the Employee did not show for the scheduled hearing in March of 2012, it was discovered that the Employee was missing. Her apartment had been abandoned, her family was unable to locate her and a police investigation was unsuccessful in finding the Employee. Due to the Employee's unknown whereabouts, the Employee's daughter was appointed as a temporary guardian and conservator by the Probate Court, which permitted the daughter to receive and deposit the benefit checks on her mother's behalf.

The Employer subsequently filed a 21 Day reduction in July 2012, reducing the Employee's benefits back to the partial level established in the Consent Decree. The Employer also scheduled a section 207 examination, which the Employee did not appear for. The Employer then filed Petitions for Review and Forfeiture, seeking to discontinue the payment of ongoing benefits due to the Employee's unknown whereabouts and failure to appear for the examination. The Petitions were sent by certified mail to the Employee's attorney, the Employee's last known address and to the Employee's daughter. The attorney's office signed for receipt of the mailings but delivery to the Employee's last address and to her daughter was not confirmed by return receipts. The Employee's attorney argued that the Board could not proceed with the Employer's Petitions because service was not made on the Employee pursuant to section 307 of the Workers' Compensation Act.

At the hearing level, the Board ordered that the Employer could stop sending payments to the Employee's attorney immediately and, instead, the Employer should hold the benefits in a separate account for the Employee's benefit pending a decision from the Board on the Petitions. The Board subsequently issued a decision on the merits of the Petitions, finding that

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the Employer could suspend the payment of benefits pursuant to the Consent Decree because the Employer had demonstrated that the Employee's whereabouts were more likely than not unknown. The Board further stated that if the Employee were to reappear in the future, she may petition the Board for the resumption of her benefits as of the date that they ceased. The Board also found that the requirements for service

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of the Petitions were satisfied by virtue of proper service on the Employee's attorney. The Employee's attorney appealed the Board's decision to the Appellate Division.

In its recent decision, the Appellate Division affirmed the findings of the Board, concluding: (1) service of process on the Employee's attorney was sufficient to satisfy the requirements of section 307 given the circumstances of this case; (2) the Board's interim order allowing the Insurer to stop sending benefit payments to the Employee's attorney and instead deposit ongoing payments in a segregated account did not violate the provisions of the Workers' Compensation Act; and (3) the ultimate order to suspend payments also was appropriate and did not violate the Act. In affirming the Board's decision, the Appellate Division acknowledged that the Workers' Compensation Act, as well as the corresponding Board Rules, do not provide for or specifically address this situation. The former Workers' Compensation Act did include a provision that permitted an employer to suspend payments when an employee's whereabouts were unknown. That provision did not carry over into the 1993 Act. Nonetheless, the Division determined that the Board had the authority to fashion such a remedy. The Division commented that the Board's resolution in this case was both a "common sense and practical remedy." It balanced both the Employer's right to be able to monitor and evaluate an employee's continued entitlement to benefits, which would have been thwarted in this case had the Employer been required to continue paying benefits, and the Employee's right to receive benefits to which she is entitled should she reappear and assert her rights in the future.

Attorney Stephen Hessert of Norman Hanson & DeTroy represents the Employer and Insurer in this matter. □

Workers' Compensation – Appellate Division Decisions

By Stephen W. Moriarty

STEPHEN W. MORIARTY

Refusal of suitable employment.

Section 214(1)(A) provides that if an employer makes a bona fide offer of reinstatement and it is refused without good and reasonable cause, the employee is deemed to have forfeited any disability benefits for the duration of the refusal. A recent decision of the Appellate Division affirmed a hearing officer's decision applying the forfeiture provisions of the statute.

In *Knaut v. Lynco, Inc.*, App. Div. No. 14-3, the claimant was a resident of Farmington at the time that she sustained a compensable injury while working as a long-haul truck driver. The occurrence of the injury was not questioned, and disability benefits were paid following corrective surgery. After the employee had been released to return to work from surgery, the employer offered light duty positions initially in Bangor and then in Hampden. The positions were within the claimant's medical restrictions, and she returned to work.

However, the claimant was unhappy with her assignment in Hampden and requested reinstatement to her former position as a truck driver. However, her limitations could not be accommodated, and she left her job in Hampden and did not return.

Approximately two months later the employer offered an alternative full time position at its Auburn facility, which was actually closer to her home. The employee's physician approved the modified position but the employee felt that it was merely a "make work" offer and that accepting would involve performing repetitive activities. She did not respond to the job offer and the position was eventually filled by another individual.

The presiding hearing officer denied the employee's claim for ongoing compensation and refused to order payment of any benefits following the job refusal. The hearing officer found that the employee had refused a bona fide offer of suitable employment without good cause. Acting as her own attorney, the employee then appealed to the Appellate Division.

On appeal the Division unanimously upheld the hearing officer, and found that the two-part analysis set forth by the Law Court in *Thompson v. Claw Island Foods*, 1998 ME 101, ¶7, 713 A.2d 316, 318 applied to the appeal. To determine whether a job offer is genuine, it must initially be established that the work is consistent with limitations, that it does not pose any threat to health or safety, and that it is within a reasonable distance of the employee's residence. If so, it must then be determined whether the offer was rejected without good and reasonable cause. The Division found that the hearing officer acted within her discretion in rejecting the employee's testimony to the effect that the proposed job

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Stephen W. Moriarty, Editor
Lorri A. Hall, Managing Editor

Norman, Hanson & DeTroy, LLC
P.O. Box 4600, Portland, ME 04112
Telephone (207) 774-7000
FAX (207) 775-0806
E-mail address: 1stinitiallastname@nhdlaw.com
Website: www.nhdlaw.com

was too repetitive and was merely "make work" in nature. The Division upheld the finding that the position was rejected without good cause.

Because the employee was disqualified by statute from receiving any level of compensation pursuant to §214(1)(A), the Division did not reach the issue of the correctness of the imputed work capacity as found by the hearing officer.

Employment status.

The appellant was the sole owner of an unincorporated business known as Lincoln Shuttle, which provided shuttle and courier services. When the owner was unavailable to drive, he engaged two other individuals to transport passengers. Both individuals had executed a form W-9 for purposes of obtaining taxpayer identification numbers. All vehicles were registered to the business and the two drivers were listed on the owner's commercial auto insurance policy. At hearing before the Abuse Investigation Unit, the owner testified that the two drivers were self-employed and that the W-9 tax forms conclusively established their status as such.

Following hearing before the Abuse Investigation Unit, a civil penalty of $2,500 was imposed against the owner for failing to provide workers' compensation coverage. The hearing officer found that the two additional drivers were in fact employees and not independent contractors.

In *Workers' Compensation Board Abuse Investigation Unit v. Eric Ring d/b/a Lincoln Shuttle*, App. Div. No. 14-1, the owner/employer appealed *pro se* and argued that the hearing officer committed error in finding employment status. The Division ruled that tax considerations such as the completion of tax forms were not determinative in establishing the existence of an employment relationship and that all of the facts developed at hearing led to the conclusion that the two additional drivers were in fact employees of the business. The Division considered the criteria for freight transportation or courier and messenger services set forth in §114(2) and found that the Abuse Investigation Unit only had to disprove one of the criteria to find an employment relationship, and that all of the factors weighed in favor of employment. Accordingly, the decision of the hearing officer was affirmed.

Termination for fault.

In *Andrews v. Savage Services, Corp.*, App. Div. No. 13-19 the hearing officer adopted the findings of a §312 examiner and found that the claimant's deep vein thrombosis was work related and that the claimant remained partially disabled as a result of the condition. Taking a variety of factors into consideration, the presiding hearing officer awarded ongoing benefits for partial incapacity at a fixed rate.

This was a gradual injury claim, and the date of injury alleged by the employee coincided with the date of termination for failing to have followed required safety procedures on the job. Thus, the employer argued that the Board should not have awarded benefits pursuant to §214(1)(E) due to termination for fault.

The panel found that §214(1)(E) applies only in cases where there has been post-injury return to work at any job, and that because the employee in this case had never returned to work following his injury the statute did not apply. The panel specifically did not reach the issue as to whether application of the statute would have had an impact or consequence upon the employee's benefit entitlement given the termination for fault.

Fringe benefits.

In *Towle v. Kris-Way Truck Leasing*, App. Div. No. 13-16, the Division addressed the proper treatment of fringe benefits in an extremely short opinion. The presiding hearing officer had awarded partial benefits based upon the pre-injury average weekly wage as well as pre-injury fringe benefits paid by the employer. It appears from the opinion that the partial benefits were awarded based upon an imputed post-injury earning capacity. In other words, the employee evidently had not actually found new employment after having recovered from the injury, but a specific economic earning capacity was deemed to exist.

On appeal the employee argued that the hearing officer erroneously included fringe benefits in the pre-injury average weekly wage given the fact that there were no post-injury benefits of any type, and that the partial rate should not have taken fringe benefits into account. The panel unanimously agreed that the hearing officer had correctly applied the law and had appropriately included fringe benefits within the pre-injury average weekly wage.

Presumption of compensability.

Section 327 of the Act provides that in a claim in which an employee has died or is otherwise physically or mentally unable to testify, there exists a rebuttable presumption that the employee sustained a compensable personal injury and that adequate notice of the injury was given. The application of the presumption was tested in a recent appeal in which petitions seeking dependent's benefits as well as burial expenses and incidental compensation had been awarded under unique factual circumstances, and on appeal the employer challenged the legal basis for applying the presumption.

In *Sullwold v. The Salvation Army*, App. Div. No. 13-13, the claimant was 62 years of age and worked as a portfolio specialist and comptroller of the Salvation Army's eastern territory and his duties included overseeing assets totaling 2.5 billion dollars as well as management of debt financing and a large endowment. In addition, he was in charge of reforming the employer's pension structure, and fellow workers testified that his professional life was unusually stressful. He had a past history of heart problems, and suffered from underlying coronary artery disease and atherosclerosis. The employee worked from a home office and exercised regularly on a treadmill at a pace that enabled him to work while walking. For a number weeks preceding the date of injury the employee experienced chest pain and related symptoms while performing mild exercise.

On the date of injury the employee was at home and during the course of the day received a number of communications associated with his work. At 3:30 p.m. he took a break to walk on his treadmill. The television was on and tuned into a financial news program. His cellphone was reported to be next to him on the treadmill. While exercising the employee suffered a fatal heart attack and was discovered by his wife at approximately 4:00 p.m.

The presiding hearing officer applied the presumption of compensability and found that the employer had failed to rebut the presumption. Dependent's benefits were awarded accordingly.

On appeal the case was heard by a panel en banc; in other words, every hearing officer of the Board participated in the

panel except for the officer who decided the underlying claim. The Executive Director ordered the unprecedented en banc panel in order to achieve a unified Board position on the legal issues presented.

In a 6-1 decision, the panel affirmed the decision of the hearing officer. Relying upon a 1978 decision of the Law Court, the panel ruled that the §327 presumption may be applied where:

1. An incident has occurred resulting in the death of an employee;
2. A claim for compensation has been filed as a result; and
3. The filing of the claim is a rational act.

To establish a "rational act" a moving party need only show that the evidence and supporting testimony could potentially result in an award of benefits. Given all of the circumstances the death, the panel ruled that the prerequisites for application of the presumption had been satisfied.

On appeal the employer argued that the Board had improperly shifted the burden of proof to the employer, and instead should have required the employer merely to have produced contrary evidence, thus leaving the ultimate burden of proof with the moving party. The panel held that when the presumption has been invoked and applies, the burden shifts to the opposing party to negate all of the facts established by the presumption. Although there was conflicting evidence of record, the hearing officer found that the employer did not rebut the presumption. Having found no error on the part of the presiding hearing officer, the panel affirmed the decision.

Hearing Officer Greene filed a lengthy and detailed dissenting opinion in which he argued that the presumption should not have been applied and that without the benefit of the presumption the moving party did not meet the required burden of proof.

The employer has filed a Petition for Appellate Review with the Law Court. □

Reporting Unclaimed Property in Maine – Basic Compliance Guidelines

By Darya I. Haag

Maine's Uniform Unclaimed Property Act (the "Act") requires all businesses, including state and federally chartered credit unions, insurance companies, and any companies doing business in the state of Maine, to report and remit any unclaimed funds or other property reportable as such under the state law to the Treasurer of State (also referred to as the "Administrator"). See 33 M.R.S. § 1951 et seq. Most types of property become reportable if not claimed by the apparent owner for three (3) or more years as of June 30th (December 31st for life insurers and for issuers of gift card obligations) of each year. Failure to report and remit the unclaimed property to the Treasurer triggers statutory penalties, including 18% interest accruing from the applicable reporting date and a $200 daily penalty, which is increased substantially in the event of wilful failure to comply with the Act or for submitting a fraudulent report.

• Compliance Steps Overview

The compliance process is relatively straightforward, with consistent and accurate record maintenance being one of its key elements. For most businesses, with the exception of life insurance companies and issuers of gift card obligations that are subject to a different set of reporting deadlines, it can be summarized as consisting of the following four steps: (1) identification of unclaimed property as of June 30th of each year; (2) sending of notification letters to all owners of unclaimed property valued at $50 or more between July 1st and September 1st; (3) electronically filing the annual report with and remitting the unclaimed property to the Treasurer before November 1st ; and (4) if there is no unclaimed property to report, filing of a Negative Report unless three consecutive Negative Reports have previously been filed and there is still no unclaimed property to report.

• Unclaimed Property

Unclaimed property consists of money and other personal assets that are considered lost or abandoned when an owner cannot be located after a specified period of time (the so-called "dormancy period"). It includes bank and credit union accounts, unpaid wages, uncashed checks, certificates of deposit, share certificates, stocks, overpayments, gift certificates, paid-up life insurance policies, commissions, death benefits, dividends, insurance payments, money orders, refunds, and contents of safe deposit boxes. Unclaimed property does not include real estate, animals or vehicles.

• Dormancy Period

Property must be reported with the Treasurer as unclaimed upon the expiration of the dormancy period, which is

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determined by the type of property as of June 30th (December 31st for life insurers and issuers of gift obligations) of each year. For most types of property, including checking and savings accounts, escrow accounts, health savings accounts, mutual funds, pension and profit sharing plans, security deposits, unclaimed loan collateral, dividends, cash, checks, royalties, worker's compensation benefits, bonuses, customer overpayments, discounts, and membership fees, the dormancy period is three (3) years. 33 M.R.S.A. § 1953.

For stock or other equity interests in a business association or financial organization, except with respect to property distributable in the course of a demutualization or related reorganization of an insurance company, the dormancy period expires three (3)

years after the earlier of: (a) the date of the most recent dividend, stock split or other distribution unclaimed by the owner; or (b) the date of the 2nd mailing of a statement of account or other communication that was returned as undeliverable or after the holder discontinues communications to the owner.

Property in an individual retirement account, benefit plan or other account or plan qualified for tax deferral under the income tax laws, is deemed unclaimed three (3) years after the earliest of the date of the distribution or attempted distribution of the property, the date of the required distribution as stated in the plan or trust agreement, or the date, if ascertainable by the holder, specified in the income tax laws by which distribution of the property must begin to avoid the tax penalty.

For wages, payroll and salary, utility deposits, and refunds and rebates this period is one (1) year. For unredeemed gift certificates it is two (2) years. This period is fifteen (15) years from the date of issuance for travelers checks, and seven (7) years for money orders, both of which are reported to the state where they were issued, unless such state does not have unclaimed property laws.

• Indication of Interest by Property Owner

Property is considered unclaimed if, for the duration of the dormancy period, the owner has not communicated with the holder concerning the property and has not otherwise indicated an interest in the property. An *indication of interest* by the owner includes: (a) presentment of a check or other instrument of payment of a dividend or other distribution, or, with respect to a distribution made by electronic means, evidence that the distribution has been received; (b) owner-related activity in the account in which the property is held, including a direction by the owner to modify the amount or type of property held in the account; or (c) the making of a deposit or withdrawal from a bank or credit union account. A communication with an owner by person other than the holder or the holder's representative who has not identified the property to the owner in writing is not considered an indication of interest.

• Owner Notification

Holders of any unclaimed property valued at $50 or more must send a notification letter to the apparent owner's last known address between July 1st and September 1st (January 1st and March 1st for life insurers) and before filing of the report containing the following information: (a) amount of the unclaimed property; (b) identifying information such as account number or policy number; (c) contact information of the holder; (d) date by which the property must be claimed before it is remitted to the state; and (e) notice that the state law requires holders of unclaimed property to report and remit such property upon the expiration of the applicable dormancy period.

• Dormancy Charges

Holders may not deduct any fees from the unclaimed property imposed for the apparent owner's failure to claim the property *unless* there is a valid written contract between the holder and the owner under which the holder may impose such charge *and* the holder regularly imposes such charge without reversing or canceling it. Such charge may not in an unconscionable amount. The holder, however, is not prohibited from deducting fees or charges in lieu of those fees or charges related to the owner's failure to claim the property within a specified period of time when such fees or charges are deducted from the property before the date the property is presumed abandoned.

• Penalties

Holders that fail to report and remit the unclaimed property within the prescribed deadlines may be subject to various penalties set forth in 33 M.R.S. § 1975, including 18% interest accruing from the date the property should have been paid or delivered, together with a daily penalty of $200 (up to a maximum of $5,000). The daily penalty goes up to $1,000 (up to a maximum of $5,000, plus 25% of the value of any property that should have been reported) for wilful failure to comply with the Act or for submitting fraudulent reports.

• No Minimum

All unclaimed property, no matter how small, must be reported and remitted to the Treasurer of State who safeguards the property forever or until it is claimed by the rightful owner.

• Reporting Deadline

The annual reporting deadline is November 1st (May 1st for life insurers and for issuers of gift card obligations) which may be extended upon request.

• Online Reporting

Holders of unclaimed property are required to submit annual reports electronically absent a special exemption from the Treasurer. A typical annual report will include the following information: (a) a description of the property; (b) the apparent owner's name, last known address, social security number or federal tax identification number, and date of birth if value of the property is $50 or more; (c) an aggregated amount of items valued under $50 each; and (d) the date of last activity or contact with the apparent owner.

• Remittance of the Property and Indemnification for Compliance

Except for property held in a safe deposit box or other safekeeping depository, unclaimed property described in the annual report should paid over to the state at the time when the report is filed. If the property is an automatically renewable deposit and a penalty or forfeiture in the payment of interest would result, the remittance period is extend until a penalty or forfeiture would no longer result. Tangible property held in a safe deposit box may not be delivered to the administrator until 120 days after filing the report. The holder and anyone acting on behalf of the holder in accordance with the Act *is not liable* to the apparent owner and will be *indemnified* against claims of any person in accordance with 33 M.R.S. 1961. See 33 M.R.S. § 1959 (4).

• Record Retention

Holders must maintain records with reported information for ten (10) years after filing the report, unless a shorter period is allowed by the Treasurer. Electronic record storage (scanned documents, microfilm or fiche, etc.) is acceptable provided the records remain accessible upon request.

• Negative Reports

Entities that are incorporated or located in Maine that are not holding any unclaimed property and have never filed an unclaimed property report before, or have filed at least one positive report within the last three years, must file a Negative Report online at, https://www.maine.gov/treasurer/unclaimed_property/report_property/negative_reports.html.

For further information about complying with Maine's Uniform Unclaimed Property Act please contact the firm's Commercial Group or Credit Union Group. □

Recent Decisions From The Law Court

By Matthew T. Mehalic

MATTHEW T. MEHALIC

Maine tort claims act damages caps

In *Callaghan v. City of So. Portland*, 2013 ME 78 (Sept. 10, 2013), two City of South Portland employees filed a complaint seeking a declaration that certain provisions of the City's personnel policy violated their First Amendment rights. The employees also sought permanent injunctive relief from the enforcement of the provisions. The provisions at issue prevented a City employee from, seeking any South Portland elective office; using the influence of employment for or against any candidate for City elective office; circulating petitions or campaign literature for any City elective office; soliciting or receiving contributions or political service from any person for or against any candidate for a City elective office; or using City facilities, equipment, materials etc. to assist or advocate for or against any candidate for any county, state, federal or City elective office.

The Superior Court held that the policies violated all City employees' First Amendment rights and enjoined the City from enforcing the policies against City employees. The Law Court affirmed the Superior Court's holding as it pertained to the two City employees, but vacated the judgment to the extent it invalidated the personnel policy as to City employees who were not parties to the lawsuit. The basis for the Court's decision was that the City did not demonstrate that its interest, as an employer, in providing efficient public services outweighed the employees' interest, as citizens, in commenting on a matter of public concern. Therefore, the City's personnel policy intruded on and violated the two employees' First Amendment rights.

It is important to note that the decision is confined to what a government employer may or may not restrict and does not transcend to a private employer's ability to establish policies in personnel manuals.

No duty to monitor sleep patterns at teenage sleepover

In *Bell v. Dawson*, et al., 2013 ME 108 (Dec. 10, 2013), the Law Court refused to recognize a duty to monitor sleep patterns of teenagers at a sleepover. The case was successfully defended by Jonathan Brogan of Norman, Hanson & DeTroy who prevailed on summary judgment in the Superior Court and on appeal in the Law Court.

The facts were that Bell, a thirteen year old boy, and one or two of his friends went to hang out in the Dawsons' garage. The Dawsons were an adult couple that lived on a two acre property. The Dawsons allowed Bell and his friends to hang out in their garage and smoke cigarettes. The night before Bell was injured, he slept over at the Dawsons' house. He was hanging out there in the evening and called his mother to ask about sleeping over at a friend's house. Mrs. Dawson later called Bell's mother pretending to be Bell's friend's mother. Bell's mother agreed to the sleepover, not knowing that Bell was actually at the Dawsons.

The Dawsons began drinking alcohol and went to bed about 10:30 pm. The evidence revealed that Bell left the Dawsons around 1:00 AM and did not return until around 3:00 or 4:00 AM. That morning, Bell left the Dawsons and arrived home around 7:00 AM. He spoke with his parents and subsequently left on his skateboard. Bell's mother recognized that Bell was tired during this interaction and that he was more prone to accidents when he was tired.

Bell went back to the Dawsons. As he was riding his skateboard down the Dawson's driveway into the roadway he was struck by a motorist and sustained injuries. It was alleged that Bell's judgment was impaired on the day of the accident because he was tired from his unsupervised activities the previous night. There was no indication in the record that the Dawsons knew that Bell had returned to their property or that they witnessed the accident. The motorist who struck Bell, claimed that if anything prevented her from seeing Bell, it was the trees on the Dawsons' property that obstructed her view.

Bell filed a complaint against the Dawsons alleging negligent supervision and that the Dawsons' negligently created or allowed dangerous topographical conditions contributing to the accident. The Superior Court entered summary judgment in favor of the Dawsons and the Law Court affirmed.

The Law Court determined that the custodial relationship that was formed when Bell and the Dawsons deceived Bell's mother into letting him stay overnight was severed when Bell left in the morning and returned to his parents' home. At that point, Bell reestablished his parents' custodial relationship.

Bell argued that a fact-finder could have found that the Dawsons' negligent supervision during the night when the custodial relationship existed created the risk of harm – Bell's fatigue – that proximately caused his injuries the next morning. However, the Law Court refused to extend the Dawsons' duty to (1) ensure that a child actually obtains sufficient sleep throughout the night, or (2) know exactly how much sleep a child gets so that the adult can assess whether it was enough for that particular child to engage in some future activity, even an activity that occurs after the child has left that adult's custody. Furthermore, the Court found no evidence that Bell's fatigue proximately caused the accident. Any finding of a causal link based on the record evidence would have been based on pure speculation.

The final issue examined by the Law Court was whether the Dawsons had a duty to Bell, after he left their premises, to have provided an unobstructed view of the driveway on their premises from the roadway. As in the decision of *Radley v. Fish*, 2004 ME 87, 856 A.2d 1196, the Court declined to impose a duty on landowners to trim back vegetation on their premises that

may be alleged to be in the vicinity of the intersection of roadways and driveways or walkways.

Landlord not liable for actions of tenants' dog

In *Fields v. Harden*, et al., 2013 ME 93 (Nov. 5, 2013), the Law Court affirmed summary judgment in favor of landlords finding that they were not liable to an individual who was attacked multiple times by the landlords' tenants' dog because there was no evidence that the landlords possessed or controled the dog.

The multiple dog attacks occurred over a period of time. In response to hearing of the attacks, the landlords instructed their tenants to keep the dog on a leash when it was outside, and later on, instructed their tenants to fence the dog, neuter the dog, and take the dog to training classes. The Law Court held that this did not amount to control over the dog that would subject the landlords to liability, nor was there incidental control that derived from being able to threaten the tenants with nonrenewal of a lease or with eviction.

No liability for fraudulent concealment when party does not have knowledge

In *Picher v. Roman Catholic Bishop of Portland*, 2013 ME 99 (Nov. 12, 2013), the Law Court addressed whether the Roman Catholic Bishop of Portland, the Diocese, was liable to Picher for fraudulent concealment of information allegedly pertaining to an abuser's improper interactions with minors. The Law Court affirmed summary judgment granted in favor of the diocese because it found that there was no evidence, let alone, clear and convincing evidence, that the Diocese had knowledge, before or during the time when Picher was abused, that Melville, (the abuser), was a sexual abuser of minors. The information that the Diocese did have, was not the type of material information that triggered a duty to disclose. Furthermore, the Diocese was not aware of the abuse while it was happening or soon after, such that it would have had a duty to reveal information to prevent additional abuse. Therefore, the Court concluded that the Superior Court was correct to conclude that there was no evidence that could establish a breach of any duty to disclose under the count for fraudulent concealment.

In reaching its holding the Law Court did review the elements of fraudulent concealment and once again recognized that fraudulent concealment required the presentation of clear and convincing evidence. The elements include (1) a failure to disclose, (2) a material fact, (3) when a legal or equitable duty to disclose exits, (4) with the intention of inducing another to act or refrain from acting in reliance on the non-disclosure, and (5) the plaintiff in fact relied upon the non-disclosure to the plaintiff's detriment.

Emails satisfy the statute of frauds requirement for land sale transactions

In *McClare v. Rocha*, 2014 ME 4 (Jan. 14, 2014), summary judgment was entered in favor of Rocha, a holder of property in Bangor, for specific performance of a land sale transaction. Rocha held the property as a tenant in common with McClare and another party Merrill. Rocha, assisted by his counsel, and McClare, assisted by his counsel, had discussions regarding the possible sale of McClare's interest. Rocha's attorney emailed McClare's attorney indicating that Rocha offered to acquire the McClare interest for one third of the assessed value. The email also indicated that that Rocha would be happy to speak with McClare if that would facilitate an agreement. McClare's attorney responded to the email stating that "My client accepts your clients offer . . ." Several months later, Rocha had not provided the purchase funds to McClare. McClare filed a complaint seeking specific performance of the contract for the sale of his interest in the property to Rocha or, in the alternative, partition of the property. Summary judgment was entered in favor of Rocha on the grounds that no valid contract was formed. McClare appealed to the Law Court.

The Law Court reversed the entry of summary judgment in favor of Rocha and remanded the matter to the Superior Court. In doing so, the Law Court held that under the Uniform Electronic Transactions Act (UETA), 10 M.R.S.A. §§ 9401-9420, an email or other electronic record satisfied the requirement that a record be in writing and signed. Therefore, the Court held that the statute of frauds, 33 M.R.S.A. § 51, would not bar enforcement of a contract for the sale of land based on an exchange of emails, if a valid contract existed.

The Court subsequently found that considering the evidence in the light most favorable to the non-prevailing party there were disputed issues of material fact on the dispositive issues of whether there was a valid and enforceable contract and reversed the entry of summary judgment. □

Lance Walker Appointed To Become District Court Judge

LANCE WALKER has been appointed by Governor Paul R. LePage to become a judge of the Maine District Court. Because the judicial confirmation process was still underway at the time we went to press, we will offer a feature article on Lance and his nomination in our next edition. Congratulations, Lance!

LANCE E. WALKER

KUDOS

MARK DUNLAP participated as a presenter in a panel discussion at the annual mid-winter meeting of the Maine State Bar Association. The panel focused upon the appropriate use of technology (primarily e-mailing and texting) for attorneys in their dealings with their clients and with other attorneys. Among other things, the panel considered when the use of technology is most helpful and appropriate as opposed to a telephone call or an in-person meeting.

LINDSEY MORRILL SANDS has been selected as one of the Top 40 Lawyers Under 40 in Maine by the American Society of Legal Advocates ("ASLA"). ASLA is a nationwide organization which seeks to recognize exceptional legal talent and early promise among the next generation of great lawyers. Lindsey was chosen due to her superior litigation skills. Her practice focuses on workers' compensation defense.

NORMAN, HANSON & DeTROY has received the 2013 Immigrant Legal Advocacy Project Volunteer Award for Pro Bono Firm of the Year. The firm will be honored at an annual meeting in February. The firm was also recognized by the Maine State Bar Association for the contributions of **PETER DeTROY, TED KIRCHNER, LANCE WALKER, DAVID GOLDMAN, DARYA HAAG, and DEVON DEANE** for having donated their time on behalf of those seeking asylum from their home countries of the Democratic Republic of Congo and Burundi.

DAVE HERZER has written a chapter in a publication by Massachusetts Continuing Legal Education/New England, a nonprofit publisher of legal reference materials entitled "Expert Depositions – Medical Care Providers, Accountants, and Economists". The publication is intended to give a practitioner's and insider's understanding of procedures and practice in Maine, and publication is expected in March 2014.

RUSS PIERCE was appointed by the City Council of South Portland to serve as one of three members of a special Draft Ordinance Committee to propose ordinance language for waterfront protection and land use planning in the context of a petroleum pipeline project transporting tar sands oil from western Canada to Portland Harbor. The work of the Committee recently received high editorial praise in Maine's largest daily newspaper. □

Norman, Hanson & DeTroy, LLC
415 Congress Street
P.O. Box 4600
Portland, Maine 04112

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