INBRIEF

Current Developments in Maine Law

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e-Discovery: The Discoverability of Metadata

By Devin W. Deane

With increasing frequency in Maine practice, parties in litigation seek production of electronically stored information (ESI) complete with its "metadata" and "embedded data." Often, this request comes in the form of a definition within the party's request for production of documents. For example:

> As used herein, the terms "Document" and "Documents" are used in their customary broad sense to include, without limitation, the following . . . hereinafter referred to as "Electronically Stored Data": (a) e-mail (including attachments); (b) word processing documents; (c) spreadsheets; (d) graphics; (e) animations; (f) presentation documents [. . . etc.]
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> With respect to Electronically Stored Data, this request includes: (a) all data that has been deleted but can be restored; (b) all legacy data (i.e., data that has been retained in obsolete systems or media but which is still in the possession or control of the respondent); (c) all metadata (i.e., information describing the history, tracking, or management of an electronic document, which is not apparent to the reader viewing a hard copy or a screen image), and (d) all embedded data (i.e. draft language, editorial comments and other deleted matter in an electronic document, which may not be apparent to the reader when viewing a hard copy or screen image).
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> Electronically Stored Information should be produced in the form in which it is ordinarily maintained.

DEVIN W. DEANE

Such a request raises significant questions about the discoverability of metadata and embedded data and the parties' obligations to preserve and produce the same.

What is Metadata?

Metadata is "data about data" that is part of an electronic document but not visible on the face of the document. Examples of metadata include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). *Williams v. Sprint/United Mgmt. Co*., 230 F.R.D. 640, 646 (D. Kan. 2005). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. *Id.* Embedded data includes information not usually visible on screen that tracks prior versions of visible material and may contain notes/edits about the visible material. Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice and Procedure, § 2219 (3d ed.)*.

In the usual course of business, many individuals and business entities maintain electronic documents in their "native" formats which include their metadata and embedded data. Unless specifically requested in a different form, the Maine Rules of Civil Procedure obligate parties responding to requests for production of documents to produce responsive documents in the form or forms in which they are ordinarily maintained or in a form that is reasonably usable to the requesting party. M.R. Civ. P. 36(b). However, parties producing documents in their native format may have fears that receiving parties could "undelete" or recover privileged or redacted information from a document's metadata. *Williams*, 230 F.R.D. at 653. Therefore, producing parties may wish to convert electronically stored information into a format that is reasonably usable to the requesting party but does not include embedded data or metadata. As Wright and Miller explain:

> [p]arties producing electronically stored information may be reluctant to provide it in native format. [For example,] [i]f a party has a proprietary software program for using its own data, aspects of the metadata may contain proprietary information. [Moreover,] [p]roducing embedded data may cause difficulties in reviewing the material for responsiveness and for privilege before production. In addition, producing information in native format presents challenges regarding making a record of what was produced (sometimes using a numbering system such as "Bates numbering"), and may make the electronic material manipulable in ways that could raise issues of authenticity. As a result, parties may favor converting their electronically stored information into formats that more closely resemble hard copies in terms of the varieties of information produced, such as TIFF or PDF images. But receiving parties may find such images inadequate, either because they lack possibly relevant information contained in the original electronically stored information or because they cannot be organized or searched by computer [programs] without being input again as is necessary with hard–copy materials.

Wright, Miller, et al. *supra* at § 2219.

The Board of Overseers of the Bar has discussed the ethical considerations of producing and utilizing metadata and embedded data and suggested that in the context of protecting confidential information, it is permissible to "scrub" metadata and imbedded data by converting electronically stored information into PDF or TIFF images to be produced without metadata or embedded data. Me. Prof. Ethics Comm'n, Op. No. 196, (Oct. 21, 2008). The Board concluded that an attorney producing discovery information has an ethical duty to use reasonable care when producing an electronic document to prevent the disclosure of metadata and embedded data containing confidential information. *Id.* Accordingly, the Board also concluded that it is ethically impermissible for an attorney receiving electronic discovery information to "mine" the electronic documents seeking to uncover metadata and embedded data in an effort to uncover confidential information that should be reasonably known not to have been intentionally communicated. *Id.*

However, outside the context of protecting confidential information, Maine courts have not addressed the discoverability of metadata and embedded data pursuant to parties' obligations to produce documents and information as they are ordinarily maintained or in a form that is reasonably usable. M.R. Civ. P. 36(b); M.R. Civ. P. 34 advisory committee note 2008 amend., 3A Harvey, *Maine Civil Practice* 399 (2013-2014 ed.). Thus, as suggested by the advisory committee, Maine practitioners must look to federal case law for guidance. Id. A survey of federal case law suggests a general apprehension among courts to compel the production of metadata and embedded data without explicit discovery requests and a showing of particularized need by the requesting party.

Case Law addressing Metadata's Utility and Discoverability.

In *Wyeth v. Impax Laboratories, Inc.*, the Federal District Court for the District of Delaware held that production in PDF or TIFF formats (rather than their native format complete with metadata) is appropriate unless "the requesting party can demonstrate a particularized need for the native format of an electronic document." *Wyeth v. Impax Laboratories, Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006). Reasoning that the emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata, the court found that the defendant had not demonstrated a particularized need for the metadata it requested. *Id.* at 171 ("most metadata is of limited evidentiary value and reviewing it can waste litigation resources").

Similarly, the Federal District Court for the District of Massachusetts addressed the scope of discoverable metadata in the context of document requests from plaintiff shareholders to the defendant corporations requesting production of all metadata associated with e-mails and Microsoft Word documents. *Dahl v. Bain Capital Partners, LLC*, 655 F. Supp. 2d 146 (D. Mass. 2009). The defendants refused to produce all metadata and instead offered to produce 12 fields of metadata associated with the e-mails and Word documents. *Id*. The court expressed its reluctance to order the production of metadata without a showing of particularized need by the requesting party, explaining:

> First, case law shows wariness about metadata's value in litigation. Many courts have expressed reservations about the utility of metadata, explaining that it does not lead to admissible evidence and that it can waste parties' time and money. Second, Rule 34 militates against the broad, open disclosure of metadata that the Shareholders seek.

Id. Thus, the court denied the shareholders' motion to compel and held that rather than sweeping requests for metadata associated with all e-mails and Word documents, the shareholders must tailor their requests to specific Word documents, e-mails, or sets of e-mails.

The Sedona Principles: Guidelines for e-Discovery Procedure.

The requirement of specific requests supported by a showing of particularized need is echoed within the *The Sedona Principles* for e-discovery procedure. The Sedona Conference, *The Sedona Principles: Best Practice Recommendations & Principles for Addressing Electronic Document Production* (2d ed. 2007) *available at* https://thesedonaconference.org/download-pub/81 (*The Sedona Principles* have been endorsed by many jurisdictions and are published by The Sedona Conference, a

nonprofit legal policy research and education organization comprised of judges, attorneys, and e-discovery experts dedicated to resolving e-discovery production issues). With respect to the production of metadata, *The Sedona Principles* provide that:

> Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.
>
> [And] [i]n determining the appropriate forms of production in a case, requesting parties and counsel should consider: (a) the forms most likely to provide the information needed to establish the relevant facts of the case; (b) the need for metadata to organize and search the information produced; (c) whether the information sought is reasonably accessible in the forms requested; and (d) the requesting party's own ability to effectively manage and use the information in the forms requested. [. . .] To the extent that the requesting party seeks a "native" production or some other form of production with accompanying metadata, the revised [Federal Rule 34(b)] places a burden on the party to make that request explicit.

The Sedona Principles at 60-65.

Conclusion.

In sum, a Maine practitioner faced with discovery requests seeking production of metadata and embedded data should consult recent federal case law and *The Sedona Principles* for guidance. Likely permissible are requests for production of metadata necessary to properly utilize a Microsoft Excel file, for example. *See Williams*, at 230 F.R.D. at 653. However, broad and sweeping requests for production of all metadata associated with all documents requested are objectionable on grounds of lack of specificity, no showing of particularized need, and more traditional grounds of relevance, and undue burden and expense. Most courts generally recognize the limited evidentiary value of metadata and are reluctant to compel production of metadata without explicit requests associated with specific documents supported by a showing of particularized need.

"... BROAD AND SWEEPING REQUESTS FOR PRODUCTION OF ALL METADATA ASSOCIATED WITH ALL DOCUMENTS REQUESTED ARE OBJECTIONABLE ON GROUNDS OF LACK OF SPECIFICITY..."

Norman Hanson & DeTroy cooks and supports a great cause.

Norman Hanson & DeTroy recently had the honor of competing in the "Raising the Bar" culinary competition to benefit Gary's House (Mercy Hospital). On the evening of April 10, 2014, held during the Gary's House annual Gourmet Gala fundraising event, Norman Hanson & DeTroy fielded a team of chefs to compete against three other area law firms in a cooking competition styled on the popular television show Chopped. Attorneys Paul Driscoll, Jennifer Rush, Katlyn Davidson and Sadie Jones cooked a gourmet meal together in less than forty minutes with four mystery ingredients unknown to the competitors until the start of the competition, and all while on stage in front of the crowd. It was a fun and exciting evening in support of a very worthy cause!

DID YOU KNOW

Norman Hanson & DeTroy attorney's are also great chefs. A team recently competed in "Raising the Bar" a fundraiser for Gary's House modeled after the TV show "Chopped."

New Associate: Christopher L. Brooks

CHRISTOPHER L. BROOKS

We are pleased to announce that Christopher Brooks joined the firm as an associate attorney in March, 2014. Christopher attended Gould Academy in Bethel, Maine and subsequently attended Plymouth State University in New Hampshire, where he received a B.A. in English. Christopher's post-graduate studies took him to Boston, where he attended Suffolk University Law School, graduating in 2008. While in law school, Christopher devoted his time to research two distinct areas of the law, the first, health law and policy; and the second, corporate liability for inadequate computer security and the legal and regulatory developments affecting e-Business. Also while in law school, Christopher was a member of the school's Child Advocacy Clinic, through which he provided legal representation, counseling and advocacy on behalf of children and families in civil proceedings, with specific representation tailored toward foster care for those who had "aged out" of custody, and litigating matters pertaining to the preservation of client rights to sibling visitation.

Following law school and prior to returning to Maine, Christopher served as (i) contract counsel for one of the world's leading full-service loan sale advisors for commercial, consumer and specialty finance debt in Boston, Massachusetts; and (ii) legal counsel for a then-Brooklyn, New York based for-profit social entrepreneurship venture. Returning to Maine in 2011, Christopher served as an associate with one of Maine's oldest law firms, where he remained until joining Norman, Hanson & DeTroy, LLC in March. Christopher's current legal practice is primarily devoted to financially distressed situations, creditors' rights and commercial transactions, with a focus on dispute resolution and litigation.

The Ultimate Sanction: Dismissal With Prejudice

Bayview Loan Servicing v. Bartlett, 2014 ME 37 (March 4, 2014)

By: Christopher L. Brooks

On November 11, 2009, the holder of John H. Bartlett and Cheryl J. Bartlett (hereinafter "Appellees")' mortgage loan, U.S. Bank National Association (hereinafter "U.S. Bank"), filed a foreclosure complaint in the Biddeford District Court, seeking to foreclose its first-priority mortgage on Appellees' primary residence. Pursuant to 14 M.R.S. §6321-A and Maine's Foreclosure Diversion Program, the Court issued an Order for Mediation which, in pertinent part, stated that "[t]he Court may sanction parties and/or counsel who fail to attend and participate in mediation." Despite the requirement to appear, neither U.S. Bank nor its counsel appeared at the initial mediation session. In response, Appellees filed a motion to dismiss U.S. Bank's foreclosure action with prejudice, resulting in a June 22, 2010 dismissal and imposition of a $500.00 fine payable to the Foreclosure Diversion Program. By Order dated August 11, 2010, this dismissal was ultimately vacated.

More than eighteen months after the initial mediation session and the dismissal now vacated, a second mediation session was held. During this second mediation session, the parties collaborated on the framework for a loan modification; however, the proposal ultimately offered included a monthly payment higher than originally estimated. Citing this increase as a cause for rejection, Appellees asked for a third mediation session to be held. Prior to this third mediation session, Appellees' mortgage loan was transferred to Bayview Loan Servicing, LLC (hereinafter "Appellant"). On the date of the third mediation, counsel for Appellant encountered a myriad of issues, the least fatal of which a flat tire. Due to the recent loan transfer and failure to communicate the same, counsel appeared at the mediation by telephone without the benefit of its client – the Appellant.

In response to Appellant's failure to appear, Appellees filed their second motion to dismiss with prejudice. While their motion was denied, the Court offered words of caution. Specifically, the Court concluded that the ultimate sanction of dismissal with prejudice was not warranted "yet"; however, "if there is a future breach by [Appellant] there is a risk that the court could, upon motion and after proper process, dismiss

this case with prejudice." In assessing further penalty, the Court imposed the following sanctions against Appellant; (i) the tolling of interest and fees from the date of the first mediation session (ii) the reimbursement of some of Appellees' expenses; (iii) payment of some of Appellees' attorney fees; and (iv) a $1,000.00 fine to the Foreclosure Diversion Program. In addition to these sanctions, a fourth mediation session was ordered.

On the day of the fourth mediation, Appellant's counsel used an incorrect telephone number when attempting to call Appellant's representative at the start of the session. With patience exhausted, the parties were dismissed and the mediator's report was prepared. Following this latest attempt to mediate, Appellees filed a third motion to dismiss with prejudice. This motion was granted over Appellant's objection on April 2, 2013. Appellant appealed to the Law Court.

Through new counsel, Appellant argued that the Court erred or abused its discretion in dismissing the foreclosure action with prejudice, contending that (i) mediation was not required; (ii) the Court misunderstood the legal ramifications of a dismissal with prejudice; (iii) the Court's order was based on improperly filed and factually inaccurate motions; (iv) the Court improperly weighed the prejudice to Appellant and "windfall" to the Appellees; and (v) the Court "delegated" its fact-finding role to the mediator by failing to hold a testimonial hearing.

i. Applicability of Mediation.

Pursuant to Rule 53, Maine's Foreclosure Diversion Program governs (a) all foreclosure actions filed *after* December 31, 2009, against owner-occupants; and (b) all foreclosure actions filed *on or before* December 31, 2009, against owner-occupants *who are ordered* by the Court to mediation. Pursuant to the procedure in effect at the time of the foreclosure filing, Appellant argues that it was incumbent upon Appellees to request, by motion, that the Court order a foreclosure mediation. Nonetheless, Appellant's argument failed as the issue was not properly preserved by counsel; having acquiesced in the Court's mediation order and having raised no objection to mediation.

ii. Ramifications of Dismissal With Prejudice.

In issuing its order of dismissal, the Court claimed awareness of the gravity of the sanction it imposed, stating the standard by which the imposition may be warranted and relating it to the deprivation of Appellees' mediation/resolution opportunities. In the same breath, the Court prohibited Appellant from collecting any of its attorneys' fees and costs – something that would go without saying with a dismissal with prejudice. Noting this discrepancy, counsel suggested that the Court did not fully understand "the law applicable to its exercise of discretion" as required by Bradbury. *Bradbury v. City of Eastport*, 2013 ME 72 ¶12. Declining to consider the more general issue (i.e., the potential *res judicata* effect of a dismissal with prejudice), the Law Court relied upon the Court's indication that it was aware of the gravity of the sanction it imposed, and thus found it unnecessary that the Court explicitly discuss the potential effects of its order.

iii. Reliance upon Appellees' Motions to Dismiss.

Intended to foster the parties' focus on the mediation process, 14 M.R.S. §6321-A(9) specifically precludes entry of a final judgment until a mediator's report has been completed; and likewise, Rule 93(d)(1) prohibits the filing of dispositive motions. Despite these prohibitions, Appellees repeatedly filed motions to dismiss; believed by Appellant to be factually inaccurate. Despite being captioned as Motions to Dismiss, the Law Court found that Appellant's motions were, effectively, motions for sanctions, and that it would be irrational to interpret Rule 93 to permit the imposition of sanctions (including dismissal), but to prohibit the aggrieved party from requesting the same. Furthermore, as Appellant did not argue that the Court's factual findings were clearly in error, the Law Court failed to find that the Court relied upon the factual misrepresentations, and thus those factual misrepresentations were of no consequence.

iv. Weighing of Prejudice to Appellant and Windfall to Appellees.

In exercising its discretion under Rule 16(d), "the trial court must resolve certain questions, including whether to impose the sanction on the party or counsel, or both, and what sanction to

"SPECIFICALLY, THE COURT CONCLUDED THAT THE ULTIMATE SANCTION OF DISMISSAL WITH PREJUDICE WAS NOT WARRANTED "YET"

impose." *Unifund CCR Partners*, 2009 ME 19, ¶11 (quoting *Pelletier v. Pathiraja,* 519 A.2d 187 (Me. 1986)). As prescribed by *Pelletier*, "the answers will depend upon the particular circumstances and [depend] upon the functions to be served by the sanction." Acknowledging that it was not an isolated incident that warranted dismissal with prejudice, but rather a pattern of "disruptive behavior" that has "deprived the [Appellees] of three opportunities to mediate and hopefully resolve their case", Appellant argued that the Court ignored (i) its participation at one mediation; (ii) its offer of a loan modification; and (iii) the extenuating circumstances that resulted in its failure to appear at two other mediations. As the Court considered and rejected Appellant's excuses for failure to appear at three of the four mediation sessions, the Law Court found that the weighing of the facts and choices was well within the bounds of reasonableness, and therefore not an abuse of discretion.

v. Delegation of Fact-Finding Role to Mediators.

In its appeal, Appellant argued that the Court delegated its role as fact-finder to the mediator, thus suggesting that the Court should have held a testimonial hearing. Because Appellant raised this issue for the first time in its reply brief, the Law Court found that Appellant had failed to properly preserve its argument. Nonetheless, the Law Court opined that, even were a testimonial hearing held, the Court had sufficient information to render a decision based upon Appellant's prior failures to appear.

Finding that the Court did not err or abuse its discretion, the judgment was affirmed.

With foreclosure fraud and predatory lending still ripe in the minds of the legislature and the judiciary, institutional lenders have recently fallen victim to the heightened scrutiny of newly-enacted foreclosure laws and rules designed to level the playing field between lender and borrower. Given this ever-changing landscape, it is incumbent upon lenders (and their counsel) to be acutely aware of the intricacies thereof. In this most recent example, Appellant's non-appearance at the initial mediation carried with it the express authorization of the Court to issue sanctions; and while non-fatal at the foreclosure's infancy, Appellant's initial non-appearance set the tone for what the Court came to see as a pattern of disruptive behavior. Had Appellant (and its counsel) been more mindful of the intricacies of foreclosure law and the penalties of non-compliance therewith, Appellant may have avoided the ultimate sanction it now faces: a *dismissal with prejudice.*

Workers' Compensation– Appellate Division Decisions

By: Stephen W. Moriarty

STEPHEN W. MORIARTY

Arising out of and in the course of.

It is well-established that a personal injury must both arise out of and occur in the course of employment in order to be compensable. Both elements of the classic compensation formula must be established in order for an employee to prevail. Two recent decisions of the Appellate Division illustrate how fact-specific a determination of this type may be, and how difficult it is to prevail upon the defense that one of the requirements has not been satisfied.

In *Levasseur v. Albert Farms, Inc.*, App. Div. No. 14-7, the claimant was a long-haul truck driver who stopped to go grocery shopping while traveling from South Portland to Madawaska, and injured his leg when he slipped on ice while shopping. The employer contended that the employee had deviated from the course of his employment and was engaged in a purely personal activity at the time of his injury, and that therefore the injury was not compensable. The hearing officer granted the employee's Petition for Award and found that the injury both arose out and occurred in the course of employment.

The employer appealed and the Appellate Division affirmed the decision of the hearing officer. The Division initially found that the employee had established a sufficient connection between the injury and employment activities pursuant to *Comeau v. Maine Coastal Services*, 449 A.2d 362 (Me. 1982), and deferred to the decision of the hearing officer. In addition, the Division found that the "traveling employee" exception to the "going and coming rule" applied. In particular, the Division noted that although the employee was technically off duty at the time of the injury, he was engaged in a business trip and had stopped along an employer-approved route between the point of departure and his ultimate destination.

Furthermore, the stop for grocery shopping had a business purpose in that the employee had to purchase supplies for another business trip that he was scheduled to take within a short period of time. The Division found no misapplication of the law.

A different result was reached in the more recent decision of *Johnson v. Sure Winner Foods*, App. Div. No. 14-15. In this case the facts showed that the employee had completed a delivery route and had parked his company vehicle before driving his own vehicle to the home of a co-worker. The primary purpose of the visit was social, but the employee also picked up a hand-held scanner which had been issued by the company. He planned to use it on the next day while making deliveries. However, the use of the scanner was not required and the employer had no knowledge of the employee's intent to use it. The hearing officer found that using the scanner might only have produced a small benefit to the employee and that the trip to the home of the co-worker was not expressly permitted or consented to by the employer. After two hours of socializing at the home of the friend, the employee was injured in a traffic accident while driving home.

The hearing officer denied the employee's Petition for Award, and he appealed. He argued before the Division that the "dual purpose" doctrine applied since the trip to the friend's home had both a business and personal purpose. The hearing officer had found that the business purpose of the trip was particularly small in relation to the personal purpose. The Division deferred to the judgment of the hearing officer and denied the appeal, finding that the injury did not arise out of or occur in the course of employment. The employer was represented by Lindsey Morrill Sands of Norman, Hanson & DeTroy at hearing and on appeal.

Independent contractors.

The provisions of the Act relating to independent contractors and construction subcontractors are complex and do not provide an employer with a thoroughly reliable method of determining the employment status of an individual in advance. A recent decision of the Appellate Division did little to clarify the situation and left the issue as murky as ever.

In *Holyoke Builders, Inc.* (Holyoke) *v. WCB Abuse Investigation Unit* (AIU) App. Div. No. 14-11, the AIU brought a complaint against Holyoke alleging that it had misclassified individuals who were actually employees as independent contractors and had failed to secure the payment of workers' compensation benefits for those individuals. Holyoke had procured a workers' compensation policy and paid a premium based on payroll for workers that it considered to be employees, but there were an additional 16 individuals who performed work for Holyoke which were considered by Holyoke to be independent contractors and were accepted by the insurer to be independent contractors. A predetermination of independent contractor or construction contractor status had been obtained from the Board for all such individuals. As required by law, Holyoke's insurance policy provided that any worker determined to be an employee would be covered in the event of an injury regardless of whether a premium had been paid for that employee.

The AIU hearing officer determined that nine of the disputed workers were actually employees and that Holyoke had failed to secure coverage for them. A penalty in the amount of $30,000 was imposed, and Holyoke appealed to the Appellate Division.

The Division in a 2 – 1 decision affirmed the decision in part. The Division initially concluded that the hearing officer was correct that Holyoke was required to secure the payment of workers' compensation benefits for all employees and that Holyoke did not meet this obligation when he had not paid a premium for all such workers, even though the policy provided coverage for all such workers. The Division also affirmed the hearing officer's decision that nine of the disputed individuals were actually employees whereas the status of the seven others could not be determined.

However, the Division found the penalty provision of the statute to be ambiguous, and narrowly construed the section against the imposition of a penalty. Although the Division recognized that the Legislature intended to penalize noncompliant employers, it held that assessing a penalty "would subject an employer to a penalty for failing to recognize the legal status of its employees when that status is dependent upon a complicated legal analysis that was preliminarily determined in the employer's favor by the very agency later charged with making the ultimate legal determinant." Accordingly, the AIU's penalty assessment was vacated.

At its meeting held on May 13, the Board voted to appeal the decision to the Law Court pursuant to the provisions of §322. The employer will cross-appeal from the decision. The Law Court has the

"IN THIS CASE THE FACTS SHOWED THAT THE EMPLOYEE HAD COMPLETED A DELIVERY ROUTE AND HAD PARKED HIS COMPANY VEHICLE BEFORE DRIVING HIS OWN VEHICLE TO THE HOME OF A CO-WORKER."

discretion to accept or reject the case for review on appeal, but the likelihood of acceptance is greater when the appealing party is the agency charged with management of the Workers' Compensation Act.

Discrimination.

In *Bellefleur v. Fraser Paper Ltd*, App. Div. No. 14-10, the employee had sustained two uncontested occupational injuries and the resulting restrictions were accommodated by the employer. On two occasions the employee declined to perform assigned tasks on the grounds that the work exceeded his limitations, and he was excused from performance. Shortly afterward, surveillance disclosed that the employee was performing activities beyond his limitations. In addition, the employee denied to a §207 examiner that he had engaged in the activities observed.
As a result the employee was then terminated on grounds of dishonesty. A union grievance followed, and ultimately the employee was reinstated to his employer and all allegations of dishonesty were stricken from his record.

The employee then filed a Petition to Remedy Discrimination based upon his termination. The petition was denied by the presiding hearing officer on the grounds that at the time of the termination the employer believed in good faith that the employee had been untruthful concerning the extent of his restrictions. On appeal the Division affirmed the hearing officer's decision and found that at the point at which adverse employment action was taken the employer was acting in good faith. The Division further rejected the employee's argument that the employer had waived its defenses to the discrimination claim by subsequently negotiating a resolution of the grievance which deleted allegations of dishonesty. The Division emphasized that the critical issue was the status of the employer's state of mind at the time that disciplinary or adverse personnel action was taken, and that the employee had failed to sustain his burden of proof by showing that the termination was substantially based upon an assertion of rights under the Act.

Thus, in a discrimination claim the appropriate focus remains upon the employer's beliefs and motivations at the time of the alleged discriminatory conduct, and not upon events which occurred thereafter.

Protection of the Act.

Pursuant to §307(1) any interested party may file a petition with the Board seeking a determination of rights under the Act. In a recent decision the Division interrupted the language broadly in a claim for recognition of the occurrence of an injury.

In *Mahar v. Blueberry Ford, Inc.*, App. Div. No. 14-8, the employee struck his head while on the job and experienced neck pain. He lost no time from work and was never placed on limitations. He filed a Petition for Award in order to obtain the protection of the Act for his injury.

The protection of the Act establishes as a matter of law that an injury occurred, and that it arose out of and in the course of employment. Lost time from work or resulting medical consequences have generally not been considered to be necessary to obtain recognition of an injury. It should be noted that the mere legal recognition of an injury does not establish continuing causation or any future entitlement to benefits, and that in such a situation an injured worker would bear the burden of proof if actual benefits were claimed.

The presiding hearing officer denied the Petition for Award, but the Appellate Division reversed and without elaboration found that because the evidence supported the occurrence of the injury the claimant was entitled to the protection of the Act. As a result, §307 may be utilized under circumstances in which an injured worker seeks no benefits but merely a determination that a compensable injury occurred.

Ordinary activities in the workplace.

Generally speaking, ordinary activities of daily living performed in the workplace are not compensable if an injury results. However, a line can be crossed if employment is found to contribute an increased risk of injury.

In *Gray v. R.S.U. #38*, App. Div. 14-14, the employee injured her knee when she stopped abruptly at the base of a ramp prior to turning into an office where she worked. The hearing officer granted the Petition for Award finding that the ramp presented a risk of injury above and beyond that faced outside of the workplace. In affirming the decision of the hearing officer, the Appellate Division did not address the evidence in detail, but merely found that there was evidence supporting the factual findings. The Division noted that the law does not require a hearing officer to reach the "correct" conclusion, but merely requires a decision that is not arbitrary or without rational foundation. Under this standard, if an opposite decision had been reached on the same facts the decision would have withstood appellate scrutiny.

Recent Decisions From The Law Court

By: Matthew T. Mehalic

MATTHEW T. MEHALIC

Duty to Defend Not Appealable Where There Is No Pending Litigation

In *Irving Oil Limited, et al. v. ACE INA Insurance*, 2014 ME 62 (May 1, 2014), the Law Court held that although a decision about whether an insurer has a duty to defend is typically appealable under the death knell exception, it is not appealable where the underlying lawsuits giving rise to the question of whether there is a duty to defend have been settled. The underlying lawsuits alleged that Irving Oil introduced harmful gasoline additives into the environment.

Irving Oil had primary insurance with Royal Canada during the applicable time periods and the limits of that policy were exhausted. ACE provided excess coverage during those same time periods. Irving Oil sought a defense from ACE in the underlying lawsuits that had not been satisfied by the primary insurance limits.

The Superior Court decided among other issues, that it was unable to determine whether a duty to defend existed because it could not resolve what the meaning was of a particular policy provision that triggered the duty to defend and duty to indemnify in the ACE excess policy. However, this decision was not a final judgment as additional issues remained undetermined in the underlying declaratory judgment action filed by Irving Oil. Despite this, Irving Oil appealed the Superior Court opinion on the issue of whether there was a duty to defend.

In addressing the appeal, the Law Court stated that generally the question of whether there is a duty to defend by an insurer is appealable. The reason for this is that when an insured is a defendant in an active lawsuit, then a trial court's order declaring that the insurer has no duty to defend, or an order declining to decide the question, deprives the insured of an insurer-provided defense in the initial stages of the action. It is in the initial stages of an action that assessment of the suit's viability, conducting settlement negotiations, deciding whether to settle, engaging in discovery, and filing a motion for summary judgment take place, which according to the Court are crucial stages of the litigation. The Court stated that an insurer's expertise in defending cases is just as essential in the critical pretrial phase as it is at the trial itself; "indeed, given the large number of civil cases that do not proceed to trial, perhaps more so."

Notwithstanding the Court's recognition of the insurer's critical role in the pretrial phases of litigation, the Court refused to allow Irving Oil to appeal the decision due to the fact that the underlying lawsuits had all been settled. ACE's liability for defense costs in the settled matters would be resolved at sometime in the future when the issue of indemnification was also addressed. The Court held that, "The cost or delay incident to litigating liability for defense costs to final judgment will not, by itself, cause a loss of substantial rights or permanent foreclosure of relief to justify

"THE DEFENDANT FAILED TO RELOCATE THE PLAINTIFFS AND LITIGATION COMMENCED, INCLUDING COUNTS FOR NEGLIGENCE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND PUNITIVE DAMAGES."

an interlocutory appeal pursuant to the death knell exception to the final judgment rule."

In reaching this holding, the Court also rejected an argument from Irving Oil that because future similar lawsuits were likely to be inevitable, Irving Oil needed to have the Court's opinion on whether ACE had a prospective duty to defend it in those inevitable matters. The Court recited its well-established precedence that prohibits advisory opinions in rejecting this argument.

Expert Qualification, Evidentiary Issues, Jury Instructions, and Punitive Damages in Lead Paint Litigation

In *Paula Bratton, et al. v. Halsey McDonough*, 2014 ME 64 (May 6, 2014), the Law Court examined a case arising from a family's occupation of a home containing lead paint. Several legal issues arose that dealt with expert qualification, evidentiary issues, proper jury instructions, and punitive damages. The plaintiffs leased a home from defendant. Shortly after beginning their occupation, medical tests revealed that the plaintiffs' children had elevated levels of lead in their blood. The plaintiffs performed a home lead paint test which revealed the presence of lead paint. The plaintiffs contacted the defendant who dismissed their concerns and explained the test results as being a side-effect of living along a busy road. When the plaintiffs had a third child medical tests reveal elevated lead levels as well, the Department of Health and Human Services became involved. The defendant failed to relocate the plaintiffs and litigation commenced, including counts for negligence, intentional infliction of emotional distress, and punitive damages. The Superior Court entered judgment as a matter of law on several of the counts pleaded by the plaintiffs and a jury verdict was entered on the remaining counts in favor of the defendant. The plaintiffs appealed.

One of the issues on appeal was whether the Superior Court improperly excluded opinions of two of the plaintiffs' experts. The two experts did not possess medical degrees and the Superior Court determined that the opinions expressed by the experts on causation were not sufficiently reliable. Therefore, their opinions on causation were excluded. One of the experts was a toxicologist. Looking to federal case law, the Law Court held that when the only argument against the admission of a toxicologist's opinion is the lack of a medical degree the opinion is still admissible as reliable evidence of causation. The other expert was a brain injury specialist with a special education degree. His qualifications included that he had worked under the direction of a board-certified neurologist and psychiatrist, operated a center for neurological rehabilitation, ran a day treatment program for people with brain injuries, and lectured on rehabilitation of individuals with brain injuries and on brain behavior relationships. He also testified that he had taken courses on brain injury, read extensively on the subject, was the only member on the editorial board of the Journal of Neurology who did not have a medical degree, and was certified by the American Academy for the Certification of Brain Injury Specialists. The Law Court held that this level of qualification was sufficient for the expert to opine on causation. If anything, the lack of a medical degree went to the weight a factfinder would ascribe to the opinions.

The next issue addressed by the Court concerned whether proper jury instructions were read by the Superior Court in regards to the issue of proximate causation. The plaintiffs had proffered as a proposed jury instruction language from the decision of *Lovely v. Allstate Insurance Co.*, 658 A.2d 1091, 1092-93 (Me. 1995). Once again the Law Court agreed with the plaintiffs and held that the Superior Court erred in not reading to the jury instructions that specifically stated that it was the defendant's burden of proof to present evidence of apportionment of damages to independent or subsequent causes and that made it clear that it was the defendant's burden to differentiate causation from prior conditions.

The Law Court continued to address whether the defendant was entitled to judgment as a matter of law on the intentional infliction of emotional distress counts. The Court held that the Superior Court erred in this regard, as well. Viewed in the light most favorable to the plaintiff, the Law Court held that the evidence showed that the defendant allowed the plaintiff family with young children to live in a house that exposed the children to toxic levels of lead for several years. The evidence also showed that, even after the house had been declared a lead hazard by the State and although the defendant had a legal duty to relocate the plaintiffs, he failed to do so for four months. The Court refused to hold as a matter of law that no reasonable juror could find the defendant's actions were extreme and outrageous, which would support plaintiffs' count for intentional infliction of emotional distress. In addition, the Court found that evidence that established the plaintiffs' children's fear about residing in the house and restriction in accessing certain areas of the house in precaution to avoid further exposure was sufficient evidence to support infliction of severe emotional distress on the children.

Finally, the Court held that the defendant's affirmative misrepresentation to the plaintiffs that there was no lead in the house when he knew there was lead present was sufficient for a factfinder to find implied malice, which would support an award for punitive damages. Therefore, judgment as a matter of law on this count of plaintiffs' complaint was also reversed.

The Court held that the plaintiffs were entitled to a new trial on the identified counts and remanded to the Superior Court for further proceedings.

Maine's Oldest Business Seeks NHD's Expertise to Sell Its Name

DARYA I. HAAG

By: Darya I. Haag

When Joy Piscopo, the owner of one of Maine's oldest businesses, was approached with an offer to buy the name F.O. Bailey, Norman Hanson & DeTroy was honored to have been selected by Ms. Piscopo as counsel to assist her with negotiating, structuring and accomplishing this truly historic transaction. Ms. Piscopo sold the name F.O. Bailey and associated good will, together with certain property associated with the purchased name, but the corporation, now known as Joy Piscopo Antiquarian Services, retained ownership of all of its other assets.

Ms. Piscopo and her husband Jack Piscopo purchased the company in 1977, but the origins of the business date back to 1819 when it was operated as a general merchandise store at Ingraham Wharf by Henry Bailey. After Henry Bailey passed in 1867, the business was carried on by his son, F.O. Bailey and was incorporated with the State of Maine in 1912. In May of 2012, Secretary of State Charlie Summers specially acknowledged the company for achieving 100 years of incorporation. Since 1977, Ms. Piscopo has used her extraordinary talents to become a dominant player in the antiquarian business, with her name recognized by the industry experts and antique connoisseurs across the country. Today, Ms. Piscopo continues to provide the same expert antiquarian services to clients from different parts of the United States under the new corporate name Joy Piscopo Antiquarian Services and the long-standing motto "Serving Maine with Integrity, Expertise and Experience."

Darya Haag of NHD, who specializes in intellectual property and commercial law, was the lead attorney in this transaction.

> "AFTER HENRY BAILEY PASSED IN 1867, THE BUSINESS WAS CARRIED ON BY HIS SON, F.O. BAILEY AND WAS INCORPORATED WITH THE STATE OF MAINE IN 1912."

NHD Recognized By Chambers & Partners

Chambers & Partners has recognized NHD as among the top five litigation and general commercial practice firms in Maine. Mark Lavoie was singled out for special recognition as a "star individual" in the area of medical malpractice and insurance. Also recognized were Emily Bloch, Jonathan Brogan, Peter DeTroy, Russell Pierce, James Poliquin and Christopher Taintor for their professional achievement.

Kudos

Former member of the firm **LANCE WALKER** was sworn in as a Judge of Maine District Court on May 2, 2014. We all wish Lance the very best in his new career.

MATT MEHALIC and his wife Kimberly welcomed the arrival of their second child, Winston Charles Mehalic, on March 15, 2014.

STEVE HESSERT presented at the ALFA International Workers' Compensation Seminar in Charleston, South Carolina in April. The topic was Management of Catastrophic Injury Claims. Angela Moustrouphis from Hanover Insurance in Portland, Jodie Massengill from the Houston office of Sysco, Inc., and Dr. Stephen Moskowitz from Paradigm were all panel members.

JOHN VEILLEUX was elected to a 4th term as President of Casco Bay Hockey Association, Maine's largest youth hockey problem with nearly 900 players and 150 coaches. CBHA is entering its 42nd season as a non-profit hockey association serving all of the communities in greater Portland. This will be John's 9th season as a member of the board.

MATT MEHALIC wrote a chapter in a reference work published by Massachusetts Continuing Legal Education/New England

> At his best, man is the noblest of all animals; separated from law and justice he is the worst. - Aristotle

titled "Physical and Mental Examinations of Persons under Rule 35 of the Maine Rules of Civil Procedure". The chapter is included in A Practical Guide to Discovery & Depositions in Maine which was published during the winter of 2014.

TOM MARJERISON and **JOHN VEILLEUX** have been spearheading a campaign on behalf of Casco Bay Hockey to build a new pavilion-style hockey rink in Falmouth. The arena will be a non-profit seasonal hockey rink for several local hockey teams and in the off season will be used for "box lacrosse", indoor soccer, and other sporting and community events. Final approval is anticipated shortly by the Town of Falmouth, with an eye to a November 1, 2014 opening. NHD is a Gold Medal Sponsor of the Casco Bay Arena.

MARK LAVOIE and **JENNIFER A. W. RUSH** have been admitted to the New Hampshire Bar.

DAVE HERZER and John Gross of Medical Mutual Insurance Company presented two informal seminars to physicians and other staff at the Calais Regional Hospital on the issues of patient elopement, leaving against medical advice, and leaving without being seen.

At the annual summer meeting of the Maine State Bar Association **TOM MARJERISON** and **JONATHAN NATHANS** participated in a panel presentation regarding "The Hidden Pitfalls of the Grand Jury Process". **DEVIN DEANE** also took part as a panel presenter addressing "The Ethical Implications of Social Media: Judges, Lawyers and Juries".

SADIE JONES and her husband Chandler welcomed their new son Robinson Mcilhenny to the world on June 17 at 4:36 a.m. "He is great and we couldn't be happier."

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