INBRIEF

Current Developments in Maine Law

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Maine's Anti-SLAPP Statute: A Tool for Litigators

By J.D. Hadiaris, Esq.

Defending a claim for defamation, libel, or abusive litigation (i.e., malicious prosecution or abuse of process) can be difficult and time consuming. Even when the plaintiff's claim is weak and the damages small, these cases often require substantial discovery practice before a motion for summary judgment can be filed. Factual disputes can preclude summary judgment, and defendants or their insurers may have to consider paying money to settle a case simply to avoid further litigation costs. Given the practical difficulties of defending these claims, it is important to consider Maine's anti-SLAPP statute, 14 M.R.S.A. § 556, when answering a lawsuit that arguably involves the right to "petition."

SLAPP is an acronym for Strategic Lawsuit Against Public Participation. SLAPP litigation, generally, is litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants. *Morse Bros. v. Webster, 2001 ME 70, ¶ 10, 772 A.2d 842, 846*. Maine's anti-SLAPP statute is designed to guard against meritless lawsuits brought with the intention of chilling or deterring the free exercise of a defendant's First Amendment right to petition the government by threatening would-be activists with litigation costs. *Schelling v. Lindell,* 2008 ME 59, ¶ 6, 942 A.2d 1226, 1229. In furtherance of this purpose, the anti-SLAPP statute allows a defendant to file a special motion to dismiss claims against it that are based upon the defendant's exercise of the constitutional right to petition. *Nader v. Maine Democratic Party*, 2013 ME 51, ¶ 12, 66 A.3d 571, 575.

J.D. HADIARIS

The Maine Law Court has repeatedly recognized that Maine's anti-SLAPP statute "very broadly defines the exercise of the 'right to petition.'" *Schelling*, 2008 ME 59, ¶ 11, 942 A.2d at 1230; see also *Nader v. Maine Democratic Party*, 2012 ME 57, ¶ 28, 41 A.3d 551, 560. The Law Court has stressed that it "is clear from the language of section 556 [that] the Legislature intended to define in very broad terms those statements that are covered by the statute." *Schelling*, 2008 ME 59, ¶ 12, 942 A.2d at 1230; *see also Maine's Anti–SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 Me. Bar J. 32, 37 (2008) at 35 (Maine's anti-SLAPP statute "manifests a breadth of scope beyond that of many other states' anti-SLAPP laws"). Section 556's broad definition of the right of petition includes the following:

1. Any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding;
2. Any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding;
3. Any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding;
4. Any statement reasonably likely to enlist public participation in an effort to effect such consideration, or any other statement falling within constitutional protection of the right to petition government.

14 M.R.S.A § 556. The statute does not limit the definition of petitioning activity to statements made to a governmental body or representative. *Id.*; *see also Maine's Anti–SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 Me. Bar J. 32, 37 (2008) at 35 ("Section 556 is by its explicit terms, quite broad, providing its qualified immunity to even the most indirect of exercises of one's right to petition the government"). In *Maietta Construction, Inc. v. Wainwright*, the Law Court held that letters written to the city council, to the mayor, as well as statements made to the newspapers "clearly amount to petitioning activity" for the purposes of the anti-SLAPP statute. 2004 ME 53, ¶7, 847 A.2d 1169. Likewise, in *Schelling*, the Law Court held that a letter to the editor, arguably intended to effect reconsideration of an issue by the Legislature, was within the definition of petitioning activity. 2008 ME 59, ¶13, 942 A.2d 1226, 1230-1231. Other courts have also held that pleadings filed in court constitute "petitioning" activity, because they are "statement[s] reasonably likely to encourage consideration or review of an issue by a … judicial body."

The anti-SLAPP statute provides that a special motion to dismiss "may" be filed within 60 days after the date of service of the complaint, or at any time later at the discretion of the court. Given the 60-day window, it is important to consider whether the statute may apply at the time of the answering of the complaint, or soon thereafter. The 60 day period will expire before the deadline to amend pleadings under the court's Standard Scheduling Order, and courts in Maine have in some cases been unwilling to extend that deadline beyond the 60-day period.

The primary benefit of the anti-SLAPP statute, from the defendant's perspective, is that it gives the defendant the ability to move to dismiss the claim at the outset, before the defense incurs significant costs. It also allows the defendant to move to dismiss a claim where the plaintiff's complaint is not based upon "actual damages." This is important because in defamation or libel cases, a plaintiff is generally allowed to pursue a claim based upon "per se" damages if the alleged defamatory statements are related to the plaintiff's work, allegations of criminal activity, or "scandalous diseases." In other words, a defendant may pursue a claim for nominal damages, even where he has not suffered any actual harm.

When filing a special motion to dismiss under the anti-SLAPP statute, the defendant has the initial burden of demonstrating that the anti-SLAPP statute applies by showing that the claims are based on the defendant's conduct in exercising his/her constitutional right to petition. If the moving party establishes that the anti-SLAPP statute applies, the burden shifts to the non-moving party, and under the second step, the court *must* dismiss the action unless the non-moving party makes a *prima facie* showing, through pleadings and affidavits, that at least one of the moving party's petitioning activities "was devoid of any reasonable factual support or any arguable basis in law … and caused actual injury to the [non-moving] party." *Town of Madawaska v. Cayer*, 2014 ME 121, ¶ 9, 103 A.3d 547, 550; (citing Nader, 2013 ME 51, ¶ 14, 66 A.3d 571). This can often be a difficult burden for the plaintiff to prove, and one that the plaintiff would not need to meet if the case were to go to trial.
If a party succeeds on his or her special motion to dismiss, the court has discretion to award attorney's fees to the defendant.

The other benefit is that the special motion to dismiss under the anti-SLAPP statute is generally decided based upon a limited factual record. The defendant will generally move to dismiss based upon the allegations of the complaint, and may attach affidavits if necessary. The plaintiff will then respond by submitting affidavits as well. The court will make a decision on the motion to dismiss by considering this limited record.

Additionally, unlike the denial of a summary judgment motion, the denial of a special motion to dismiss is immediately appealable. Therefore, if the defendant loses a special motion to dismiss, he or she can appeal the decision to the Law Court before expending any further significant funds on discovery (discovery is stayed upon the filing of a special motion to dismiss). The appeal from a denial of a special motion to dismiss is generally reviewed *de novo*, meaning the trial court's ruling is not given any weight on appeal.

Based upon these potential benefits, it is important consider the anti-SLAPP statute's special motion to dismiss whenever a complaint for defamation or abusive litigation is filed. Doing so may protect defendants and their insurers from costly litigation, and from having to consider "nuisance" settlements.

Federal Gift Tax Returns Shortcuts in Valuation Procedures Can Prevent the Running of the Three Year Statute of Limitations

DORIS V. RYGALSKI

"A SINGLE TAXPAYER IS ALLOWED TO GIFT UP TO $14,000 PER YEAR PER INDIVIDUAL BEFORE A GIFT TAX IS IMPLICATED. ANY GIFT UNDER THIS LIMIT DOES NOT REQUIRE TAX DOCUMENTATION."

By: Doris V. Rygalski, Esq.

The vanished employee.

In 2015, a single taxpayer is allowed to gift up to $14,000 per year per individual, related or not, before a gift tax is implicated.[1] This $14,000 gifting limit, which is adjusted for inflation annually, is known as the "annual exclusion" in the estate and gift tax parlance.[2] Any gift under this limit does not require any tax documentation. Any gift over the annual exclusion amount in a given year, on the other hand, triggers the requirement for the filing of a Gift Tax Return (Form 709, "United States Gift (and Generation-Skipping Transfer) Tax Return") in the year of the gift. This does not necessarily mean that a gift tax will be owed. The current *lifetime* gift-tax exemption for each U.S. resident is $5,430,000. It is adjusted annually for inflation. Accordingly, a tax payment is unlikely to be due for most individuals at this time. However, at a taxpayer's death, all taxable gifts over the taxpayer's lifetime must be disclosed on the estate tax filing (Form 706). At that time, the IRS will review, or reexamine, all Form 709s that have been filed in order to assess how much of the exemption the deceased taxpayer has used up and whether there will be any gift tax due.

Because of the generous tax exemption levels under the current gift tax law and if the present set of laws do not get changed or repealed, most taxpayers will never use up their full exemption amount over their lifetime. Unfortunately, there is presently a lot of debate in the U.S. Congress about the Estate and Gift Tax laws. The exemption limits are likely to change. If the exemption is reduced, the issue could pose problems for some taxpayers

[1] Charities and non-U.S. citizens have, or are subject to, different gift tax requirements that are beyond the scope of this article.

[2] Married couples can join in a gift by filing a Form 709 and electing to "gift split." This allows them to transfer up to $28,000 in a single gift without using any of their lifetime gift-tax exemption.

who have made gifts of hard-to-value assets, like shares of closely held family businesses, over their lifetime and either failed to file a Form 709 to document the transfers or filed an inadequate Form 709.

If no gift-tax return is filed, the statute of limitation never starts to run as to the gift transaction. Generally, in the case of timely submitted federal tax filings, the statute of limitations bars the Internal Revenue Service ("IRS") from questioning a tax return after three years has passed from the date on which the tax return is filed. *See* 26 U.S.C. § 6501(a). With the *gift* tax return, however, there are additional requirements. Specifically, the three-year limitations period will start to run only if it is accompanied by an "adequate disclosure" of the gift and the valuation method(s) used in appraising the gift. *See* 26 U.S.C. § 6501(c)(9) and 26 C.F.R. § 301.6501(c)-1(f). This "adequate disclosure" requirement can be met by obtaining an appraisal performed by an independent appraiser that meets the requirements of §301.6501-1(f)(3). Alternatively, the "adequate disclosure" requirement can be met by the submission of the following information by the taxpayer with Form 709, including:

> (i) A description of the transferred property and any consideration received by the transferor;
>
> (ii) The identity of, and relationship between, the transferor and each transferee;
>
> (iii) If the property is transferred in trust, the trust's tax identification number and a brief description of the terms of the trust, or in lieu of a brief description of the trust terms, a copy of the trust instrument;
>
> (iv) . . . [A] detailed description of the method used to determine the fair market value of property transferred, including any financial data (for example, balance sheets, etc. with explanations of any adjustments) that were utilized in determining the value of the interest, any restrictions on the transferred property that were considered in determining the fair market value of the property, and a description of any discounts, ... In the case of a transfer of an interest that is actively traded on an established exchange, . . ., recitation of the exchange where the interest is listed, the CUSIP number of the security, and the mean between the highest and lowest quoted selling prices on the applicable valuation date. . . . In the case of the transfer of an interest in an entity (for example, a corporation or partnership) that is not actively traded, a description must be provided of any discount claimed in valuing the interests in the entity or any assets owned by such entity. In addition, if the value of the entity or of the interests in the entity is properly determined based on the net value of the assets held by the entity, a statement must be provided regarding the fair market value of 100 percent of the entity (determined without regard to any discounts in valuing the entity or any assets owned by the entity), the pro rata portion of the entity subject to the transfer, and the fair market value of the transferred interest as reported on the return. . . . If the entity that is the subject of the transfer owns an interest in another non-actively traded entity (either directly or through ownership of an entity), the information required in this paragraph . . . must be provided for each entity if the information is relevant and material in determining the value of the interest; and
>
> (v) A statement describing any position taken that is contrary to any proposed, temporary or final Treasury regulations or revenue rulings published at the time of the transfer.

26 C.F.R. §301.6501-1(f)(2). Whether a gift tax return meets the foregoing "adequate disclosure" requirements depends on the facts of each case.

A 2014 case highlights the consequences of not following the prescriptions of Section 301.6501(f) when a Form 709 is filed.

Estate of Hazel F. Hicks Sanders v. Comm'r, T.C. Memo. 2014-100.

In *Estate of Hazel F. Hicks Sanders v. Comm'r*, T.C. Memo. 2014-100, the decedent made gifts from 1999 to 2008 of stock in a family business that was started by her late husband in 1953. For each of the years in question, the decedent timely filed a Form 709, reporting the gifts of stock. She passed away on April 5, 2008. Her estate reported (in the Federal Estate Tax Return (Form 706)) that the value of the stock she continued to hold at the time of her death was $3,696,570 (or $90 per share).

In 2012, the IRS examined all of the Form 709s that the decedent filed and issued deficiency notices for Federal gift tax for 9 out of the 10 years. Probably because it perceived the three-year statute of limitation barred such a review, the estate did not challenge the notices. As a result, the IRS increased the value of the of the adjusted taxable gifts the estate reported on Form 706 by adding $3,248,618 to reflect the determinations in the gift tax deficiency notices. The IRS then issued a deficiency notice to the estate for additional Federal estate taxes to be paid. The estate appealed the imposition of the deficiency, asserting that the IRS was time barred from revaluing the gifts reported in the Form 709s the decedent filed during her life. The estate asked for summary judgment on this issue.

The IRS responded that the statute of limitations did not run on the relevant gift tax forms because none of the forms "adequately disclosed" the nature of the business stock or the basis of the value reported. In particular, the IRS asserted that the business owned, but did not disclose, its ownership of another closely held entity—"something the regulations require if that information is relevant and material in determining the value of the JSI stock." *Sanders*, T.C. Memo 2014-100 (citing 26 C.F.R. § 301.6501(c)-1(f)(2)(iv).) The Tax Court agreed and denied the estate's motion for partial summary judgment.

The Lesson.

When making a gift of a valuable asset for estate planning purposes (or otherwise), fully describing the asset that is being gifted and carefully detailing the method and bases for its valuation is essential in order to trigger the running of the statute of limitations. Whether a one-time gift is considered or whether gifting is contemplated over time, err on the side of providing more information, not less. The *Sanders* case demonstrates that terrible tax consequences will likely flow from IRS scrutiny of a prior tax filing because adequate disclosures were not made.

(Editor's Note: If this article triggers questions about your gift-tax issues, direct questions to Doris at drgyalski@ nhdlaw.com.)

Workers' Compensation–Appellate Division Decisions

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NOC following 21-day discontinuance.

The Appellate Division has issued a significant decision that arguably expands the circumstances in which a NOC must be filed in order to avoid a violation of Ch. 1, §1 of the WCB Rules. In *Parker v. Pepsico, Inc.*, App. Div. Dec. No. 15-16, the employee sustained an occupational injury to the back and neck on April 28, 2006, and the employer voluntarily paid benefits for total incapacity until September 2008. At that point the employer filed a 21-day letter advising of the discontinuance of benefits. As a result payment of benefits stopped on September 26, 2008 and the employee never challenged the action taken by the employer by filing a Petition for Review with a Motion for Provisional Order. At the time that the benefits for the 2006 injury were discontinued the employee was actually receiving benefits for total incapacity based upon an earlier injury, and continued to receive benefits until that injury was settled in October 2011.

On February 3, 2012 the employee filed a Petition for Restoration (and not a Petition for Review) on the 2006 date of injury, and a NOC was filed more than 14 days later. The presiding hearing officer found that the NOC was untimely and ordered payment of benefits for total incapacity from the filing of the Petition for Restoration until the date of the Board Decree.

The employer argued that it was not required to file a NOC on the grounds that the earlier 21-day certificate fully informed the employee of the existence of a dispute and an unwillingness to continue to pay benefits based upon the 2006 injury. The employer asserted that a NOC would have been redundant and would not have communicated any new information concerning the employer's intentions regarding the 2006 injury. The employer also pointed out that the Petition for Restoration claimed benefits as of the effective date of the 21-day letter.

On appeal the panel affirmed the hearing officer and ruled that the duty to file a NOC was triggered when the employee filed his Petition for Restoration, and that such filing was a claim for benefits within the meaning of the Rules. The panel noted that the dispute resolution process had not been initiated by the filing of the original 21-day letter, as that filing was never challenged by the employee. The Division ruled that the Petition for Restoration represented a new claim for benefits and that the rule applies whenever a new claim is asserted. The panel agreed that the presiding hearing officer correctly determined that a timely NOC was required under the circumstances.

It is clear from this decision that the Board will broadly apply the provisions of Ch. 1 of the Rules even where a NOC might otherwise appear to be unnecessary or duplicative. Any doubt in unusual situations should be resolved in favor of the filing of a NOC, to include situations in which an employer had previously contested liability for the injury in question by filing a 21-day letter.

Determination of benefit level.

The employee sustained an original upper extremity injury in 1991 while working for S. D. Warren and his average weekly wage was $970.10. Bilateral carpal tunnel releases were

"ANY DOUBT IN UNUSUAL SITUATIONS SHOULD BE RESOLVED IN FAVOR OF THE FILING OF A NOC, TO INCLUDE SITUATIONS IN WHICH AN EMPLOYER HAD PREVIOUSLY CONTESTED LIABILITY FOR THE INJURY IN QUESTION BY FILING A 21-DAY LETTER."

performed, but chronic symptoms developed and he elected to take an early retirement. Afterward the employee found lighter and less demanding employment with the Scarborough School Department in a part-time position as a custodian.

Due to persistent hand problems, the employee claimed a second occupational injury with the School Department occurring on January 21, 2010.

In *Damon v. S. D. Warren Company et al.*, App. Div. Dec. No. 15-12, the Board granted both a Petition for Review for the original 1991 injury as well as a Petition for Award and Apportionment for the more recent injury. At the time of the second injury the average weekly wage was $282.20 and ongoing benefits were paid based upon this significantly lower wage. The employee appealed to the Appellate Division, arguing that it was error not to award benefits based upon the 1991 average weekly wage on the grounds that that injury continued to affect the employee's work capacity.

On appeal the Division upheld the decision of the hearing officer. The panel noted that after returning to work following the second injury the employee elected, for personal and related reasons, to work only 20 hours per week, and observed that he had turned down opportunities to work additional hours. Furthermore, he did not conduct a work search for other employment. Because the employee elected to work fewer hours for personal reasons, the panel observed that the average weekly wage in 2010 more accurately reflected the loss of future earning capacity than the original 1991 wage, and that there was no misapplication of law in determining that the 2010 average weekly wage provided the appropriate basis for the award of ongoing benefits.

Change of circumstances requirement.

In a sharply split 2 – 1 decision, the Appellate Division imposed a unique change of circumstances burden upon the employer in a case involving claims of three separate occupational injuries. In *Traussi v. B&G Foods, Inc.*, App. Div. Dec. No. 15-10, the employee sustained an initial compensable back injury in 2006 and had been awarded benefits for a closed period of total as a result. After having returned to work the employee sustained another back injury in 2010 and sought additional benefits for both injuries. In a 2011 Decree the presiding hearing officer found that the employee had sustained a second compensable injury and awarded benefits for total incapacity based upon both injuries coinciding with the period of time out of work. However, the hearing officer refused to award ongoing partial benefits.

Ultimately the employee then claimed to have sustained a third back injury in 2011 and filed petitions for all three injuries seeking an award of ongoing benefits from the date of the third injury forward. The hearing officer found that the 2010 injury was only a temporary aggravation of the 2006 injury and did not play a role in ongoing disability. She also found that the final claimed injury did not contribute to ongoing disability in a significant manner, and only awarded the protection of the Act. Ongoing benefits for fixed partial incapacity were awarded based solely upon the initial 2006 injury. The hearing officer declined to revise her decision in response to a Motion for Findings of Fact, and the employee appealed.

In spite of the fact that no ongoing benefits based upon the 2010 injury had been awarded in the 2011 Decree, a majority of the panel found that because the 2010 incident was determined to have been compensable the hearing officer was bound by this finding in a proceeding for additional benefits in the absence of a showing of a change of circumstances. In other words, the majority gave ongoing "res judicata" effect to the 2011 decision on the causation issue, even though no ongoing benefits were awarded at the time. The majority found that the hearing officer committed error by failing to address the issue of whether circumstances had changed since the 2011 Decree, thus severing the causal link between the 2010 injury and ongoing disability.

The dissenting member of the panel pointed out that "the causative effects of an injury are capable of ending at some point", and that when benefits are awarded for a closed period no conclusion can be inferred regarding a continuing causal relationship between an earlier injury and a new ongoing claim. In other words, a finding of causal responsibility in the past should not relieve an employee of the burden of proofing continuing causation for future periods of incapacity. The dissenting panel member would not have given res judicata effect to the earlier Decree in a claim for new disability.

The majority opinion expands the concept of res judicata in a manner not previously seen. The majority ruled, in effect, that an initial finding of compensability necessarily establishes continuing causation at a later point in time unless there is comparative medical evidence to the contrary. The opinion implies that an employer bears the burden of establishing by comparative medical evidence that a finding of causation at one point in time does not support a conclusion of continuing causation at a later point. It has always been understood that the burden of proof in a subsequent proceeding for additional benefits rests with the employee as the moving party. Although an earlier finding of compensability may assist an employee in meeting the burden of proof, it should not shift the burden to the employer to prove a negative.

Maximum benefit.

In *Freeman v. NewPage Corporation*, App. Div. Dec. No. 15-8, the employee was a high-level wage earner who sustained two separate occupational injuries in 2007 and 2011. Both injuries triggered the maximum benefit level for total incapacity as established by §211. The employee claimed that she was entitled to additional benefits above and beyond the maximum rate during a closed period of time in which she had been totally disabled as the combined result of both injuries.

The employee was already receiving benefits at the maximum rate based upon the initial injury, and the hearing officer granted the protection of the Act for the second injury but declined to award additional disability benefits. The employee appealed to the Appellate Division.

On appeal the employee argued that capping benefits at the maximum rate would penalize high-wage earning employees, but the Division disagreed. The panel specifically found that §211 establishes a maximum rate for all compensable injuries, including those situations in which a period of incapacity is attributable to more than one injury. Noting that Law Court has disapproved of recovery based upon more than one wage for a single period of incapacity in multiple injury contexts, the Division concluded that the maximum rate establishes a cap on overall weekly benefits even when more than one compensable injury is involved.

Palliative care.

In *Boucher v. John F. Murphy Homes, Inc.*, App. Div. Dec. No. 15-6, the employee sustained a compensable injury to her neck, upper back and shoulder and following surgery was left with residual myofascial pain. Most of her ongoing care involved physical therapy, chiropractic treatment, and massage therapy. Ultimately the employer controverted ongoing massage therapy and the employee filed a Petition for Payment.

A §312 examiner found that the employee was not a candidate for further surgery and treatment options were limited. He concluded that massage therapy had been reasonable and necessary, although he described it "as purely palliative". Treatment which is palliative in nature produces symptomatic relief on a short-term basis but does not generally restore physical function or bring about a cure. In this case the employee testified that she experienced reduced symptoms for up to two weeks following each session of massage therapy.

The presiding hearing officer granted the Petition for Payment and ruled that if treatment is merely palliative it may still be necessary and reasonable within the meaning of §206 and approved ongoing massage therapy on an unlimited basis.

The employer appealed and the Appellate Division granted the appeal in part. The panel ruled that palliative, non-curative treatment was compensable and within the scope of the Act. The panel then turned to the issue of ongoing massage therapy under circumstances in which there was no continuing oversight by a primary care provider. It ruled that there should be a reasonable time limit on the approval of future massage therapy. Interestingly, instead of remanding the issue to the hearing officer for further determination, the panel on its own initiative imposed an eighteen month limit on the duration of pre-approved therapy. The panel ruled that during that period of time the employer could seek a modification of the order based upon changed circumstances, and also that before or after the end of the eighteen month period the employee could file another Petition for Payment and offer evidence in support of continued therapy.

It remains to be seen with hearing officers will uniformly pre-approve certain types of treatment in eighteen month increments or whether they will endorse different periods of time based upon the unique facts of each case.

> "THE PANEL RULED THAT PALLIATIVE, NON-CURATIVE TREATMENT WAS COMPENSABLE AND WITHIN THE SCOPE OF THE ACT."

Refusal of suitable employment.

In *Tremblay v. L. L. Bean*, App. Div. Dec. No. 15-4, the employee filed Petitions for Award for bilateral injuries to her Achilles tendons occurring on June 1, 1996 and September 18, 2003. In the time period between the two injuries and the years following the second injury the employee had been accommodated in a variety of positions and did not experience any wage loss despite continuing symptoms. The last assignment at L. L. Bean was in the first aid department but she stopped working after three days and accepted a severance package, thereby terminating her employment.

The presiding hearing officer granted the protection of the Act for the two claimed injuries but refused to award ongoing incapacity benefits after the employee stopped working on the grounds that she had resigned from suitable employment and without good and reasonable cause. The employee appealed to the Appellate Division.

On appeal the Division noted that §214(1)(A) enables an employer to extend an offer of reasonable employment to an injured worker. If a position is refused or declined, a two-part analysis is triggered. First, a hearing officer must determine whether or not the offer of employment was genuine. It must consider whether the duties of the proposed position fell within current work restrictions. Secondly, a hearing officer must determine that the offered position was refused without good and reasonable cause, and all relevant factors must be considered.

In the pending case the hearing officer found that the position in the first aid department was within the employee's medical restrictions and that the employee's perception that she lacked necessary training and therefore felt overwhelmed did not constitute good and reasonable cause for leaving the position and terminating her employment. Accordingly, the Division denied the employee's appeal and found that the decision of the hearing officer refusing to award ongoing disability was based upon competent and reliable evidence.

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq.

MATTHEW T. MEHALIC

No Breach of Contractual Duty of Good Faith by Bank

In *Mark Chartier v. Farm Family Life Insurance Co.*, 2015 ME 29 (March 17, 2015), the Law Court held that Farm Family Life Ins. Co., its agent, and a bank where a joint checking account was maintained by a couple did not breach a fiduciary duty, did not breach the implied covenant of good faith and fair dealing, and were not liable for negligence. The case arose out of a husband purchasing an annuity life insurance policy, naming his wife as the primary beneficiary, and the wife cashing out the policy and taking some of the funds. The couple had opened a joint checking account that authorized each other to endorse on one another's behalf and provided that both individuals were joint owners of the checking account.

The wife cashed out the policy by signing her husband's name to the form making it look like his signature and signed her own name as a witness. She then submitted the form to Farm Family. A check was issued to the husband and mailed to the couple's home. The wife deposited the check in the joint account without indorsement and only with "For Deposit Only" on the check. Two week later she withdrew $40,000 from the joint account and on the same day informed her husband she wanted a divorce. The husband, Chartier, filed the complaint against the defendants.

Summary judgment was granted in favor of the defendants and affirmed by the Law Court. In reaching its decision the Law Court declined to discuss the claims against Farm Family, its agent, and the bank for breach of fiduciary duty and negligence, and his claims for breach of the duty of good faith and fair dealing against Farm Family and its agent due to the unpersuasive nature of the arguments and the summary judgment record. It did review the allegation against the bank arising from the bank's acceptance of the check without indorsement and deposit of the same.

The Court looked to whether the bank had breached a contract with Chartier by not complying in good faith with the Maine Uniform Commercial Code or by failing to perform under a regulated contract. The Court held that the bank was authorized to accept the check for deposit without the endorsement of the party to whom the check was made payable pursuant to the UCC, and therefore, did not breach the contract. The bank also performed under the contract due to Chartier's admission that the terms of the checking account agreement allowed both him and his wife joint ownership of the account proceeds. Therefore, the bank did not breach a contractual obligation of good faith or fail to perform under the contract terms.

Spite Fence Must be Removed

In *Robert L. Rice v. James C. Cook*, 2015 ME 49 (May 5, 2015) the Law Court addressed a land dispute between two neighbors. Specifically, the dispute concerned the erection of fences by both neighbors. The first fence was erected by the Cooks to shield from sight trash and equipment on the Rice's property. The Rices responded by building a fence and hanging equipment and placing trash on the outside of the fence. The Rices also built another fence in excess of six feet in height that restricted the view of the Cooks, pointed surveillance cameras at the Cooks' property, and played loud music at all hours of the day. The Superior Court issued an injunction that required the Rices to remove or reconstruct the fences, to limit the height to six feet from the ground, restrict the fence length in relation to a lake so the Cooks' view was not impacted, remove surveillance cameras pointed at the Cooks, remove the equipment and trash from the outside of the fence, and limit music to a reasonable volume only when the Rices were outside to listen to the music. The Law Court affirmed the Superior Court's judgment on appeal.

In doing so, the Law Court discussed the "Spite Fence Statute" and jurisprudence. It recognized that an individual's right to use his property for the "sole purpose of injuring others is not one of the immediate rights of ownership." The Court continued to cite to 17 M.R.S. § 2801 that classifies "any fence or other structure in the nature of a fence, unnecessarily exceeding 6 feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property" a nuisance. The Court drew on the prior decision of *Peters v. O'Leary*, 2011 ME 106, that held that planting of sixty-one arborvitae and thirteen pear trees in a manner designed to provide a continuous barrier between properties was a spite fence due to the malicious motive of reducing the neighbor's view. In the *Rice v. Cook*, matter the Court also found based on the evidence that Rice intended to annoy and interfere with the Cooks' use of their property and affirmed the Superior Court order. The lesson learned from this decision is that one should not unnecessarily erect a fence or other barrier that restricts a neighbor's view, no matter what the differences are between the neighbors.

No Agency Relationship

In *Paul Remmes v. The Mark Travel Corporation*, 2015 ME 63 (May 12, 2015), the Law Court held that an individual who accepted funds from customers for travel was the agent of the travelers and not the agent of the travel company through which the agent placed the reservations. The case arose from a situation where the plaintiffs gave a purported travel agent a check to book travel and lodging to the Dominican Republic. The travel agent took some of the funds and booked airfare through Mark Travel. The travel agent then used credit card information of other clients to pay for the plaintiffs' lodging without the other clients' knowledge or consent. Mark Travel discovered the fraud by the travel agent and rescinded the plaintiffs' lodging reservation. The travel agent made off with the plaintiffs' remaining funds. The plaintiffs sought to hold Mark Travel liable for their lost funds by arguing that the travel agent was the agent of Mark Travel.

The Law Court held that the travel agent was not the agent of Mark Travel. In doing so it looked to whether there was a written contractual relationship between the travel agent and the travel provider, in this case, Mark Travel. The Court cited to the Restatement (Third) of Agency § 3.14 cmt. c, which provides,

> [A] travel intermediary who purchases a plane ticket for a prospective traveler acts as the prospective traveler's agent in buying the ticket. If an airline authorizes the intermediary to issue tickets on its behalf and to collect and hold customer payments, the intermediary acts as the airline's agent in so doing.

Under the Restatement, the Law Court held that the travel agent was the plaintiffs' agent only. The Law Court also held that there was no agency under a theory of apparent agency because Mark Travel was not aware of all the material facts to the transaction, i.e., that credit card fraud was committed. Therefore, judgment was entered in favor of Mark Travel. The travel agent failed to appear in the matter.

"THE LAW COURT DISCUSSED THE "SPITE FENCE STATUTE" AND JURISPRUDENCE. IT RECOGNIZED THAT AN INDIVIDUAL'S RIGHT TO USE HIS PROPERTY FOR THE 'SOLE PURPOSE OF INJURING OTHERS IS NOT ONE OF THE IMMEDIATE RIGHTS OF OWNERSHIP."

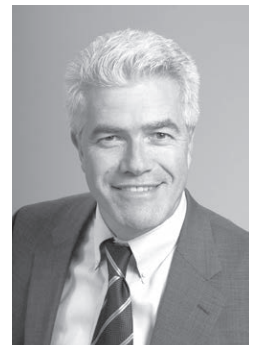
NH&D Recognized Among The Best By *Benchmark Litigation*

The 2015 edition of *Benchmark Litigation's* "The Guide to America's Leading Litigation Firms and Attorneys" has listed NH&D among the top 5 of the "Highly Recommended" law firms in the State of Maine. The following attorneys have received individual recognitiontion.

Local Litigation Stars

Jonathan W. Brogan

Peter J. DeTroy



Mark G. Lavoie

Leading Insurance Attorney

James D. Poliquin

Future Stars

David L. Herzer, Jr.

Thomas S. Marjerison

NH&D Attorneys Recognized by *Chambers*

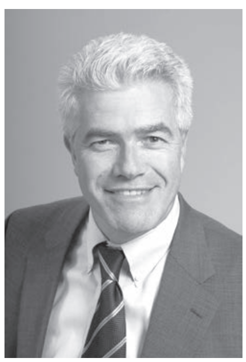
Chambers USA 2015 has recognized Mark Lavoie as a "Star" attorney, having received exceptional recommendations from fellow practitioners.

The following NH&D attorneys have received the "Ranked Lawyer" distinction in the publication.

Emily A. Bloch

Jonathan W. Brogan

Peter J. DeTroy



Mark G. Lavoie

Russell B. Pierce

James D. Poliquin

Christopher C. Taintor

Kudos

ADRIAN KENDALL was featured in the May 4, 2015 edition of *Mainebiz*, Maine's most respected business newspaper. The edition focused on international trade, issues concerning foreign exchange, and the implications for business management. Adrien was quoted extensively in the article about his advice to companies on how to best manage foreign currency exchange risks in international transactions.

NH&D was a co-sponsor of the 20th Maine HR Convention held at the Samoset Resort in early May. The convention is Maine's premiere educational event for current legal and related developments in the field of human resources.

MARK LAVOIE has given presentations at the Cary Medical Center in Presque Isle and the Down East Community Hospital in Machias, as well as before the Maine Association of Eye Surgeons on the challenges of electronic health records.

BOB BOWER has been appointed by Governor LePage to be a member of the Governor's Civil Service Review Panel. Bob also serves as a member of the Maine Labor Relations Board.

NH&D co-sponsored the Maine Restaurant & Lodging Expo, the leading trade show for Maine's hospitality industry. **BOB BOWER** and **DAVE HERZER** spoke to those attending on the complexities of state and federal wage and hour law as they relate to the unique compliance challenges that the hospitality industry faces.

JOHN BONNEAU'S wife, Doris has been inducted into the Franco-American Hall of Fame. A ceremony was held in March at the Franco Center in Lewiston to honor Doris. At the ceremony Doris was also awarded the *Chevalier Des Palmes Academiques* by the French government. NH&D congratulates Doris on such well-deserved honors.

Global Awards Corporation LiveWire has presented "Lawyer of the Year" recognitions to **PETER DeTROY** for white collar criminal law and **JONATHAN BROGAN** for alternative dispute resolution.

JONATHAN BROGAN has co-authored a chapter addressing economic damages from personal injury in a newly-published book titled *"The Comprehensive Guide to Lost Profits and Other Commercial Damages"*.

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