INBRIEF

Current Developments in Maine Law

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Eternal Vigilance is the Price of Liberty

By: Daniel P. Riley, Esq.

While the common law of Maine is made through the legal decisions handed down by the Maine Supreme Court and the Superior courts, more of the law that governs our state is enacted each year in the Maine State House in Augusta. During each two year legislative session, the legislature normally considers between two and three thousand bills introduced by individual legislators, the Governor or state agencies and departments. The legislative requests which make it through the legislative process and are finally passed or enacted become resolves, constitutional resolutions, private and special laws and, finally, the public laws which create the statutes of our state.

The quotation, "Eternal vigilance is the price of freedom" is often attributed to Thomas Jefferson. These words actually derive from a 1790 speech made by Irish lawyer and politician John Philpot Curran in Dublin when he said "The condition upon which God hath given liberty to man is eternal vigilance". Perhaps it is our common ancestry, or my time as a naval officer, that make Curran's words ring so true to me as a legislative counsel and lawyer/lobbyist standing watch over the legislative process for the past twenty years.

When one considers the sheer number of legislative proposals considered during each legislative session, and their potential impact on Maine's business environment, eternal vigilance is required. According to the Office of the Revisor of Statutes, Maine has historically had a high percentage of bills become law. The last three Maine legislatures, on average, enacted into law over 40% of the bills they considered. While most of these bills were amended during the process,

DANIEL P. RILEY

the sheer volume of new laws enacted each year bears notice.

Even during this past First Regular session of the 127th Maine Legislature, with the lack of cooperation between the LePage Administration and the leadership of the House and Senate, almost 500 of the over 1500 bills submitted were enacted by both chambers of the legislature and were sent to the Governor. While Governor LePage vetoed a record 178 of these bills, 126 of them still became law without his signature, not counting the 65 bills which became law as a result of the Opinion of the Justices which determined that the Governor missed the 10 day window to veto the bills once they were delivered to him by the Senate.

Our legislative process here in Maine is one of the most open and transparent in the country. While other states allow committee chairs a great deal of discretion over which bills receive hearings, every legislative document or "bill" receives a public hearing before one of the sixteen Joint Standing Committees. Here in Maine, the hearing process provides the key opportunity to present clients' positions on particular bills. Maine's public hearings allow any interested party the opportunity to present oral and written testimony and to offer witnesses to testify on their behalf. These public hearings form the record the committee members use to decide how to vote on legislation which comes before them and then defend their votes before their caucuses in the House and Senate before the bills are debated on the floor. While there are multiple opportunities to present a client's views on bills during the legislative process, the public hearings are normally the most important.

The public hearing and committee work session process is the primary filter for legislators to deliberate on legislation and determine whether a bill should be sent to the floor as drafted, be amended in some way, or simply does not merit further action. Since the Joint Standing committees are made up of three senators and ten representatives, bills which are reported out of committee go directly to the floor of the House or Senate depending upon the primary sponsor. This avoids the process used in Congress and many other state legislatures where each body has separate committees of jurisdiction and committees of conference are required to work out the differences between the different versions of the bills. The Joint Rules of the Legislature also allow that if only one member of a thirteen member committee votes in favor of some version of a bill, the bill is reported out to the floor of the House and Senate for debate.

Our open legislative process, combined with the relatively inexpensive market for print, radio and television advertising, make our state one of the testing grounds for national efforts to change the laws of our nation using a state by state approach. While our initiated referenda process has been used more often in recent years to make changes to Maine statutes, it is an expensive process requiring gathering a sufficient number of signatures of citizens to get questions on the ballot and then run the campaign necessary to gain sufficient support. Recent history has shown that those who choose the referenda process normally do so after failing to achieve their goals through the legislative process. The combination of these aspects of our legislative process make Maine a favorite target for national groups looking to establish legislative precedents or "beachheads" since, if they can convince a legislator to sponsor their proposed legislation, they are guaranteed a public hearing and have a high likelihood of the bill being debated on the floor of the House or Senate providing free publicity and momentum for their cause.

While my partners review the Superior Court slip opinions and decisions of the Law Court to keep up on the common law precedents governing the judicial process, I monitor the legislative process, advise my clients of pending legislation which may impact their businesses and then represent them as legislative counsel before the Joint Standing Committees of the Maine Legislature in their public hearings and work sessions during which they consider each piece of legislation within the committee's jurisdiction. My colleague, Kevin Gillis, focuses his practice on the worker' compensation arena and provided an overview of the workers' compensation legislation enacted in the recent legislative session in the Summer 2015 edition of In Brief. Kevin's expertise and experience in workers' compensation law is well respected by the legislators who serve on the legislature's Labor and Commerce and Insurance committees. He monitors all of the workers' compensation legislation and testifies on behalf of the larger employers through their association.

Similarly, my practice involves representing a variety of trade associations and companies headquartered both here in Maine and across the country as their legislative counsel. I review every piece of legislation that is printed during the legislative session, provide weekly reports to my clients on newly printed bills of potential interest to their company or industry and provide them with a weekly report tracking the status of those bills identified as of particular interest. In addition, I regularly testify on my clients' behalf at public hearings, "stepping into their shoes", so to speak, to exercise their constitutionally guaranteed right to petition their government and voice their views on legislation. Presenting expert witnesses in the public hearing process is often the most effective and persuasive tactic. In my experience, "setting the table" through brief summary testimony and then presenting a subject matter expert, like Kevin, as a witness at a public hearing provides the committee members with testimony that assists them in understanding the issues involved in a piece of legislation while ensuring they will remember the arguments presented regardless of how many other witnesses may testify at a particular hearing. Many of the advocacy skills utilized in jury trials are transferrable to the legislative hearing process.

These same skills can be brought to bear on behalf of our clients in the regulatory setting which often fills the gap between the legislative and judicial processes. We have had great success this year in this type of situation where the legislature directed the Maine Public Utilities Commission ("PUC") to ensure that utilities operate within their statutory franchise areas and do not use their monopoly power to reduce competition in unregulated marketplaces. Attorney David Herzer put his twenty-three years of experience to very effective use representing a trade association in proceedings before the Maine PUC winning a number of important victories for our client, while I represented the association on similar issues in the legislative process. David's advocacy in the PUC regulatory process provided our client with an effective "one-two punch" on their behalf.

Since joining Norman Hanson & DeTroy last year, I have been impressed with

the many opportunities to work collaboratively with my colleagues like Kevin and David in the intersection between their practices and my own. The firm's large insurance defense practice is another such area where there may be opportunities to make statutory changes which, as was the case in the early 1990's with workers' compensation reform legislation, can improve the marketplace. The firm's experience and expertise in the financial services industry is another area which is always the subject of multiple pieces of legislation each session and the firm's in-house knowledge of the laws governing this industry would be a real asset in the legislative arena.

Despite the news reports of likely gridlock in Augusta during the Second Regular session in 2016, recent history indicates that a significant percentage of the 176 bills carried over from the First Regular session, and the 63 allowed in or tabled by the Legislative Council this fall, will be successfully enacted into law. Given Maine's uniquely open and fast moving legislative process, one must monitor it to protect against legislation which may be harmful to your business. Each legislative session also provides an opportunity to change Maine law to one's benefit. Norman Hanson & DeTroy now maintains a daily presence in the Maine State House during the legislative session should you need legislative counsel to "stand the watch" and vigilantly represent your interests in Augusta.

"I REVIEW EVERY PIECE OF LEGISLATION THAT IS PRINTED DURING THE LEGISLATIVE SESSION, PROVIDE WEEKLY REPORTS TO MY CLIENTS ON NEWLY PRINTED BILLS OF POTENTIAL INTEREST TO THEIR COMPANY OR INDUSTRY AND PROVIDE THEM WITH A WEEKLY REPORT TRACKING THE STATUS OF THOSE BILLS IDENTIFIED AS OF PARTICULAR INTEREST."

Workers' Compensation– Appellate Division Decisions

STEPHEN W. MORIARTY

By: Stephen W. Moriarty, Esq.

Determining entitlement to partial.

In *Fuller v. Edward D. Jones & Company*, App. Div. Dec. No. 15-30 the employee sustained two occupational injuries and sought benefits for partial incapacity following the occurrence of the injuries. While the ALJ granted the protection of the Act for both injuries, benefits for partial were denied on the grounds that the employee failed to establish a reduction in earning capacity. Based upon the nature of the employment the claimant's earnings had varied significantly from week to week due to a variety of factors inherent in the employment. This fluctuation of earnings continued during the claimed periods of incapacity. The ALJ averaged the earnings during the claimed periods and found no loss of income.

On appeal the employee argued that the ALJ was compelled to award benefits based upon a difference between the average weekly wage and post-injury earnings, either on a week-to-week or on a month-to-month basis. The Division unanimously disagreed and held that the Act "does not prescribe a particular method for evaluating an injured employee's post-injury earning capacity". The Division found nothing in the statute to prevent the ALJ from utilizing an overall averaging method to determine loss of earning capacity following the injuries.

Discrimination.

Pursuant to the terms of a collective bargaining agreement between the employee and the employee's labor union, the employee was entitled to annual vacation time based upon the number of hours worked in the previous year, and could take the accrued vacation

either as time off or as additional pay. The employee sustained a compensable injury in August 2007 and was out of work for periods of time in 2009 and 2010. As a result of the time lost from work resulting from the injury the employee received less in vacation and bonus pay and filed a Petition to Remedy Discrimination.

Relying upon the decision of the Law Court in *Lindsay v. Great Northern Paper Company*, 532 A.2d 151 (Me. 1987), the employee argued that he had been financially penalized for taking time off to recover from his occupational injury. The ALJ found that the provisions of the collective bargaining agreement were not retaliatory or punitive in nature, and were not rooted in the exercise of rights under the Act. Accordingly, the discrimination claim was denied. The employee appealed, and in *Estate of Justard v. NewPage Corp.*, App. Div. Dec. No. 15-28 the Division affirmed the decision of the ALJ in a 2 -1 opinion. The majority discussed Lindsay, in which the Court had recognized an implicit right to recover from an injury and had found that a suspension without pay based upon a no-fault absenteeism policy was discriminatory under the Act. However, in the years since *Lindsay* was decided, the Court has declined to find discrimination in the neutral application of employer personnel policies.

For example, in *Laskey v. Sappi Fine Paper*, 2003 ME 48, 820 A.2d 579, no discrimination was found where the employee was terminated on the grounds that he could no longer perform the essential functions of his job. Similarly, in *Jandreau v. Shaw's Supermarkets*, Inc., 2003 ME 134, 837 A.2d 142, the Court found no discrimination where an employee who was unable to return at all was let go on the basis of a company absenteeism policy permitting termination when an employee had been out of work for any reason for greater than six months. More recently the Court ruled in *Maietta v. Town of Scarborough*, 2004 ME 97, 854 A.2d 223, that the key issue in a discrimination claim is whether adverse employment action was retaliatory in nature or substantially or significantly grounded in the exercise of rights under the Act.

In denying the employee's appeal, the majority found that the provisions of the collective bargaining agreement were not intended to be punitive or to retaliate against an injured worker who has lost time as the result of an injury. Accordingly, the majority found that the loss of vacation time or pay was not rooted substantially or significantly in the employee's exercise of rights under the Act.

The dissenting member of the panel found that taking time off from work as the result of the injury was not counterbalanced by any compelling business interests on the part of the employer. The dissenting member would have vacated the decision and remanded the matter to the Board for further proceedings.

Statutory presumptions.

Section 217 of the Act sets forth the procedures by which an employee may seek an evaluation for suitability of vocational rehabilitation and eventual implementation of a voc rehab plan. Effective August 30, 2012 the statute was amended by adding subsection (8) which created a presumption that work is unavailable to an employee for as long as he or she continues to participate in an employment rehabilitation plan. Significantly, the language of the statute does not designate whether the presumption is to be considered as "conclusive" or "rebuttable".

In *Axelsen v. Interstate Brands Corp.*, App. Div. Dec. No. 15-27, the employee had been injured in 2011 and voluntary payments for total incapacity were initiated. Ultimately in 2013 benefits were reduced by a 21-day certificate and the employee filed both a Petition for Review and a Petition for Award. While these matters remain pending, he also filed an application for employment rehabilitation services and a vocational rehabilitation plan was developed. The Office of Medical/Rehabilitation Services granted the application and ordered implementation of the plan.

From that point forward the employee participated in the rehabilitation program, and the ALJ was required to determine whether the presumption of unavailability of work automatically applied. The ALJ determined that the statutory presumption was conclusive, and found that work remained unavailable to the employee throughout the duration of participation in the plan. Benefits for ongoing 100% partial incapacity were awarded.

The employer appealed and oral argument took place before an *en banc* panel of the Appellate Division at the Comp Summit Seminar in early September. The Division noted that the Act contains three presumptions which are explicitly designated as conclusive, but that the Legislature had not in any manner categorized the presumption set forth in §217(8). Accordingly, in a unanimous decision, the panel ruled that the statute therefore created "an ordinary, rebuttable presumption only". As a result, the award of 100% partial benefits was vacated and the matter was remanded for further proceedings.

The Division specified that when an employee establishes participation in a rehabilitation plan ordered by the Board, the burden then shifts to the employer to prove that it is more likely than not that work is available to the employee. In determining whether or not an employer has rebutted the presumption, an ALJ must consider work search activities, labor market evidence, and the practical effects of plan participation upon the availability for work.

Kevin Gillis represented the employer at hearing and before the Division.

Home renovations.

The claimant had pre-injury, non-occupational paraplegia and then sustained an occupational injury to his right arm which decreased his mobility and his ability to personally care for himself. A physician recommended that the employee improve the degree of accessibility to his home, and various renovations were carried out to the kitchen, two bedrooms, and two bathrooms. The employer declined to voluntarily pay for the modifications, and the employee filed a Petition for Payment of Medical and Related Services pursuant to §206.

In *Gray v. Prudential Insurance Company of America*, App. Div. Dec. No. 15-26 the Division affirmed an ALJ decision granting the petition and ordering payment for the cost of renovations. On appeal the employer argued that the home modifications were not medical services within the meaning of §206. The Division side-stepped that issue and instead focused entirely upon whether the renovations qualified as "mechanical" or "physical aids made necessary by the injury" within the language of the statute. The Division relied upon the Law Court's Decision in *Brawn v. Gloria's Country Inn*, 1997 ME 191, 698 A.2d 1067 in which the Court approved the purchase of a specially adapted van for use by an employee who had been rendered

quadriplegic as the result of an occupational injury. In that Decision the Court found that the modified van was a physical aid within the meaning of the statute and was an expense for which the employer was responsible. Following *Brawn*, the Division found that the home renovation expenses were reasonable and proper and were consistent with the ultimate purpose of §206.

It is significant to note that the Division did not comment upon a number of issues raised by the employer. For example, the Division did not define those expenses which are medical in nature pursuant to §206(1), and similarly did not define the meaning of a "mechanical aid." The employer had also argued that physical aids as described in §206(8) must either be attached to the body or must have become an extension of the body as the result of the injury in order to be compensable. Another unresolved issue was whether expenses on the scale of home renovations should only be ordered when it is clear that they will be permanently required by the injured employee.

Accordingly, employers should not hesitate to challenge a claim for home improvements or renovations if they are not medical or mechanical in nature and if an employee is still recovering from the effects of the injury.

"THE DIVISION... FOCUSED ENTIRELY UPON WHETHER THE RENOVATIONS QUALIFIED AS 'MECHANICAL' OR 'PHYSICAL AIDS MADE NECESSARY BY THE INJURY' WITHIN THE LANGUAGE OF THE STATUTE."

Department of Justice Promises Increased Scrutiny of Corporate Compliance

ADRIAN P. KENDALL

By: Adrian P. Kendall, Esq.

Corporate compliance programs are an organization's internal policies, procedures, and implementation actions that are intentionally designed to prevent and detect violations of laws and regulations – especially in the international business world. Because the penalties for those violations can include crippling financial penalties and criminal convictions, corporate compliance programs are critical risk management tools for businesses and not for profits alike. So when United States Assistant Assistant Attorney General Caldwell, the head of the U.S. Department of Justice's Criminal Division who oversees all compliance prosecutions in the United States, spoke at a meeting of the SIFMA (Securities Industry and Financial Markets Association) Compliance and Legal Society on November 2, 2015, the business community sat up and listened.

Attorney General Caldwell's comments drove home the point that, in order to maintain fair access to international markets and to prevent fraud and abuse, the private sector "must maintain robust, effective compliance programs that account for international business realities." The main points of her speech are summarized below:

"Paper Compliance Programs" a Start, but Not Enough.

Acknowledging the critically important role of compliance officers, she stressed that the Department of Justice looks carefully at whether compliance programs are simply "paper

programs," or whether the organization and its culture *actually* support compliance.

Assistant Attorney General Caldwell noted that a surprising number of companies still lack rigorous compliance programs, and even more companies have what appear to be good structures on paper, but fail in practice to devote adequate resources and management attention to compliance. She added: "Still other companies fail to consider obvious risks, even in important parts of their businesses, and their compliance programs are not tailored to their specific industries or locations for operations."

The areas of DOJ compliance scrutiny include fraud, money laundering, sanctions, the Foreign Corrupt Practices Act (FCPA), International Emergency Economic Powers Act (IEEPA), Trading with the Enemy Act (TWEA): in short laws of concern to all enterprises with international activities.

7 Compliance Program Focus Areas.

As to the role of the new Compliance Counsel, Assistant Attorney General Caldwell stated she will help the Criminal Division evaluate each compliance program with a more expert eye. Caldwell also offered these 7 areas of particular focus, which were clearly also meant to be tips for compliance officers and the international business community as a whole:

1. **Does the business ensure that its directors and senior managers provide strong, explicit and visible support for its corporate compliance policies?**
2. **Do the people who are responsible for compliance have stature within the company? Do compliance teams get adequate funding and access to necessary resources? *NOTE: The DOJ does not expect a smaller company to have the same compliance resources as a Fortune-50 company.***
3. **Are the institution's compliance policies clear and in writing? Are they easily understood by employees? Are the policies translated into languages spoken by the company's employees?**
4. **Does the institution ensure that its compliance policies are effectively communicated to all employees? Are its written policies easy for employees to find? Do employees have repeated training, which should include direction regarding what to do or with whom to consult when issues arise?**
5. **Does the institution review its policies and practices to keep them up to date with evolving risks and circumstances? *NOTE: This is especially important if a U.S.-based entity acquires or merges with another business, especially a foreign one.***
6. **Are there mechanisms to enforce compliance policies? Those include both incentivizing good compliance and disciplining violations. Is discipline even handed? *NOTE: The department does not look favorably on situations in which low-level employees who may have engaged in misconduct are terminated, but the more senior people who either directed or deliberately turned a blind eye to the conduct suffer no consequences. Such action sends the wrong message – to other employees, to the market and to the government – about the institution's commitment to compliance.***
7. **Does the institution sensitize third parties like vendors, agents or consultants to the company's expectation that its partners are also serious about compliance? *NOTE: This means more than including boilerplate language in a contract. It means taking action – including termination of a business relationship – if a partner demonstrates a lack of respect for laws and policies. And that attitude toward partner compliance must exist regardless of geographic location.***

When the Criminal Division evaluates a company's compliance policy during an investigation, they look not only at how the policy reads on paper, but also at the messages conveyed to employees, including through in-person meetings, emails, telephone calls and compensation. The DOJ will look at whether, as a whole, a company tolerated compliance failures year after year because the alternative would have meant a reduction in revenues or profits.

Though not exhaustive, the public reminder of these important compliance program elements means that they should only be ignored at the private sector's peril.

We're from the Government and We're Here to Help.

Assistant Attorney General Leslie R. Caldwell concluded her address with the sobering message that the role of the US DOJ Criminal Division is to help management clearly see not only what a "devastating effect an inattention to compliance can have, but also the positive effect that a true dedication to compliance can have on the outcome of a matter."

Adrian Kendall is a member of the firm's Corporate and Commercial Law Group and specializes in matters of international commercial law and related regulatory compliance. He frequently assists clients engaged in international business and in establishing and implementing compliance programs. Norman Hanson DeTroy is a proud member of ALFA International, a global network of more than 150 law firms that work together to provide clients with high-quality, cost-efficient legal services worldwide.

Recent Decisions From The Law Court

MATTHEW T. MEHALIC

By: Matthew T. Mehalic, Esq.

Credit Against Verdict for Payments Made for Medical Care Before Judgment Vacated

In *Kimberly Wood v. Neal E. Wood, Jr.*, 2015 ME 140 (Nov. 3, 2015), the Law Court vacated the Superior Court's credit to the Defendant, Neal Wood's insurer for amounts the insurer paid directly to the Plaintiff, Kimberly Wood's medical providers before the lawsuit was commenced.

The action arose out of a motorcycle accident where Kimberly was a passenger on a motorcycle driven by Neal. Both Kimberly and Neal were named insureds on a motorcycle insurance policy that included medical payments coverage. The Court found that Kimberly had $5,000 in medical payments coverage under the policy as an "insured person." Prior to the commencement of litigation, Neal and Kimberly's insurer issued seven different payments to Kimberly's medical providers totaling $5,619.69. Four of the payments listed Neal as the "insured", Kimberly as the "claimant", and referenced the claim number. The other three checks made no referenced to the insured, the claimant, or the claim.

A complaint was filed by Kimberly against Neal and the case proceeded to trial. A jury returned a verdict finding Neal negligent and awarding $50,000 to Kimberly. Neal moved to amend the judgment pursuant to 24-A M.R.S. § 2426 to get a credit for the $5,619.69 issued prior to commencement of the lawsuit. The Superior Court granted the credit and Kimberly appealed.

In addressing the appeal, the Law Court looked to the specific language of 24-A M.R.S. § 2426 and determined that in order for Neal's insurer to get the credit five conditions had to be satisfied. Those five conditions were: "(1) a prepayment is made; (2) the prepayment was made by a person or by an insurer 'by virtue of an insurance policy'; (3) the prepayment was made 'on account of bodily injury or death or damage to or loss of property of another'; (4) a settlement 'with respect to the same damage, expense, or loss' is reached or 'any judgment . . . therefor' is rendered; and (5) the settlement or judgment is 'in favor of [the] person to whom or on whose account payment was made.'"

The argument made by Kimberly was that because the payments made pre-suit were pursuant to her own medical payments coverage in the policy, they were not issued pursuant to her or Neal's obligation to another person. Therefore, the pre-suit payments were outside the scope of section 2426. The Law Court looked to the legislative intent behind the statutory section and determined that the intent was "meaningless as to an insurer's obligation to its own insured, as in the case of medical payments coverage, because an insured would have no cause to later attempt to prove liability against herself."

The Law Court vacated the Superior Court's amended judgment giving Neal's insurer a credit because the Superior Court determined that section 2426 applied equally to medical payments or liability payments and no factual determination was made as to whether the pre-suit payments had been medical or liability payments. "Whether [the insurer's] pre-payments to Kimberly's medical providers were indeed 'medical payments' pursuant to the policy's coverage of Kimberly, or 'liability payments' pursuant to the policy's coverage of Neal, is dispositive of whether section 2426 operates to afford a credit for those pay-

"THIS DECISION HIGHLIGHTS THE IMPORTANCE OF THOROUGH RECORDED STATEMENTS EARLY ON IN CLAIMS. THE ADMISSIONS MADE IN RECORDED STATEMENTS WERE KEY POINTS THAT THE LAW COURT SEIZED UPON IN FINDING THAT THERE WAS CREDIBLE AND SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT."

ments." Therefore, the case was remanded for a factual determination of the type of prepayments made.

Sufficient Evidence Supports Comparative Negligence Finding

In *Estate of Paul J. Gagnon v. Keith Anthony*, (Nov. 10, 2015), the Law Court addressed whether evidence admitted at trial was sufficient to support a jury's finding that Paul Gagnon was at least as negligent as Keith Anthony and whether the trial court erred by denying Gagnon a new trial.

The matter arose from Gagnon and Anthony's attempt to safely fell a rotted tree at Anthony's residence. Both men were described as experienced woodcutters. Gagnon used a chainsaw to make a wedge cut in the tree and Anthony used the bucket of his Bobcat skid-steer to push the tree and a limb on the tree away from his home and a sapling. In the process, the tree "exploded" and the limb fell on Gagnon causing him injury. A complaint was filed that alleged that Anthony was negligent in failing to warn Gagnon of the rotten condition of the tree and in his operation of the Bobcat skid-steer.

At trial a jury found that both individuals were negligent and that Gagnon was at least as negligent as Anthony in causing his own injuries. The Plaintiff's motion for a new trial was denied. Upon review the Law Court refused to hold that the admitted evidence was insufficient to support the verdict. The Court utilized a clear error standard of review and found that there was credible evidence in the record to support the verdict. The evidence commented upon was that both men were experienced cutting trees, both men were aware that the tree was rotten, neither man expected the tree to explode, Gagnon before suit in a recorded statement had commented that the tree broke too soon, and Gagnon before suit in a recorded statement had placed no blame on Anthony and stated that Anthony was not doing anything inappropriate with the Bobcat skid-steer. Because of the sufficiency of the evidence the Court held that the trial court did not abuse its discretion in denying a new trial.

This decision highlights the importance of thorough recorded statements early on in claims. The admissions made in the recorded statements were key points that the Law Court seized upon in finding that there was credible and sufficient evidence to support the verdict. It is likely that the factfinders also seized on the admissions and the about face the Plaintiff attempted in order to impose liability on the Defendant. It is not clear how the recorded statements were utilized, but having a transcript and the actual recording is important to contrast live testimony with the prior contradictory recording of the same individual.

New Associate: Carl E. Woock

CARL E. WOOCK

We are pleased to announce that Carl Woock joined the firm as an associate attorney in October 2015. Carl is a graduate of Bowdoin College, where he double majored in English and Government & Legal Studies. After graduating from Bowdoin in 2010, Carl worked as a litigation paralegal at a law firm in Lewiston. Carl then attended the University of Illinois College of Law, graduating cum laude in May 2015.

At law school, Carl was one of four moot court participants invited to argue in front of a federal appellate judge and two federal district court judges during the law school's Honorary Round competition in 2014. Carl also worked with the Illinois Office of the State Appellate Defender, writing an appellate brief on the behalf of an indigent convict. Finally, Carl received coauthorship credit for a law review article written with Jason Mazzone, a professor of constitutional law, titled "Federalism as Docket Control." The article was published in the North Carolina Law Review in December 2015.

Carl played varsity soccer during his four years at Bowdoin and served as an assistant coach for a competitive youth team while studying law in Illinois. Carl also enjoys skiing, both in North America and in the Alps, as well as running, hiking, and camping.

He currently lives in Portland's West End with his wife, Caroline, a Bowdoin alumna who works at the Bowdoin College Museum of Art.

Subpoenas and Privileged Materials

THOMAS S. MARJERISON

By: Thomas S. Marjerison, Esq.

Laws governing subpoenas are more often honored in the breach than observance. Attorneys and the governmental agencies often take the misguided view that subpoenas confer *carte blanche* rights to secure documents and many subpoenaed parties merely hand over materials that are subject to protection under state and federal law. Both practices are fraught with peril.

A subpoena is merely a formal demand for a party to testify or to produce evidence. In civil cases, Rule 45 of the Maine Rules of Civil Procedure govern the issuance of subpoenas. In criminal cases, Rule 17 governs trial subpoenas and Rule 6 address grand jury subpoenas.

Subpoena to Testify

A subpoena ad testificandum merely requires a person to appear to provide testimony. Subpoenas for testimony rarely raise privacy concerns unless testimony regarding privileged or protected matters is sought.

Since the party asserting the protection will likely be at a deposition or trial, these issues are often resolved before any testimony is sought. The sole danger area is when testimony regarding confidential health care or financial information regarding a non-party is sought.

Subpoena to Produce Documents

A subpoena *duces tecum* requires the production of documents and presents numerous dangers for both a party seeking documents and the party producing them. Often these subpoenas require production of documents outside of a court hearing or deposition, which provides an ideal environment for the inadvertent production of protected or privileged materials.

Many attorneys adopt the "shotgun approach" of asking for every document in the world rather than a specific statement of the materials. The danger in this approach concerns the production of privileged or protected materials.

Many subpoenaed parties take the same "shotgun approach" in producing documents. Since they do not have a dog in the fight, they merely turn over every single document they possess regardless whether the materials may be protected or privileged. In both scenarios, attorneys and parties expose themselves to significant and unnecessary liability.

The rule is simple. A subpoena does not trump privacy protections and privileges afforded under state and federal law. The case law on this issue could not be clearer.

Subpoenas for Protected and Privileged Materials

In response to a pattern of inadvertent disclosures of protected and privileged materials, Maine adopted Rule 17(d) and Rule 17A, which sets forth a procedure for the production of materials that may be protected by a privacy protection or privilege. Despite the clear dictates of the rule, its requirements are often overlooked.

Many medical providers receive subpoenas for records and meekly hand them over to the State without determining whether there is a valid medical release. In most criminal cases, a defendant is not going to consent to the production of his or her medical records

"THE RECEIPT OF A SUBPOENA OFTEN CAUSES UNNECESSARY STRESS. HOWEVER, A FIRM UNDERSTANDING OF THE LAWS AND RULES RELATING TO SUBPOENAS WILL MINIMIZE ANY LEGAL LIABILITY AND MAKE COMPLIANCE WITH A SUBPOENA FAR LESS STRESSFUL."

and these records should not be produced without a court order.

The solution to this problem is simple. Upon receipt of a subpoena for medical records, the producing entity should merely have their counsel ask the prosecuting attorney whether they have read Rule 17A of the Maine Rules of Criminal Procedure and whether they realize they expose themselves to ethical sanction if they do not comply with that rule. This simple conversation usually makes the process easier.

After this conversation, the State will seek permission from the Court to serve the subpoena. If the Court determines the subpoena is appropriate, the materials will be produced to the Court for in camera review.

By taking this simple step, the entity producing the documents has avoided any risk of liability and has also served notice that the State must follow the rules and cannot merely fire off subpoenas whenever they want a document. The result will be fewer subpoenas and less work for the records department.

The production of protected and privileged documents in a civil case is less of an issue since parties waive many privileges by claiming medical or emotional injuries. The civil rule requires that an opposing party be provided with a copy of the subpoena, which would allow the opposing party to move to quash a subpoena. See M.R.Civ.P. 45.

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The Maine Civil Rules of Procedure do not provide an equivalent procedure for *in camera* review by the court of protected or privileged materials, but the principle is the same. Protected and privileged materials should never be produced without a valid release from the person or party entitled to the protection or privilege or if there is no release, without a court order. A mere subpoena is never enough.

Record Searches pursuant to Subpoenas

The final problem concerns the State's use of a subpoena to conduct a records search. Often this happens in an administrative context where a representative of a state agency shows up with a subpoena and demands the immediate production of documents. It is important to remember that a subpoena is not a search warrant. Subpoenas in civil cases must be served 14 days prior to the response date so that parties have adequate notice and time to file objections and motions to quash. M.R.Civ.P. 45(b)(1). The comparable criminal rules does not provide a time period, but any requests for production must be reasonable so that parties may move to quash or modify a subpoena. M.R.Crim.P. 17(c) & (i).

In this scenario, counsel should be contacted immediately to avoid any appearance of impropriety or claimed attempt to obstruct justice. Counsel can point out violations of the applicable rule and file an immediate motion to quash. M.R.Civ.P. 45(d).

The receipt of a subpoena often causes unnecessary stress. However, a firm understanding of the laws and rules relating to subpoenas will minimize any legal liability and make compliance with a subpoena far less stressful.

New Member: Joshua "J.D." Hadiaris

We are pleased to announce that Joshua D. "J.D." Hadiaris has been elected a member of the firm as of January 1, 2016.

J.D. is a member of the firm's litigation group, concentrating in general litigation and professional liability matters. He regularly represents lawyers and other professionals in defending malpractice, third-party liability, and regulatory matters. J.D.'s practice also includes representation of clients in business and contractual disputes, probate litigation, and criminal matters. J.D. has been with the firm as an associate since 2011. Prior to joining Norman Hanson & DeTroy, J.D. worked at another Maine law firm for four years.

J.D. has been recognized as a Rising Star by *New England Super Lawyers* every year since 2011.

J.D. is a graduate of Colby College, where he majored in Government and played goalie on the men's hockey team. In 2002-2003, J.D. led the NCAA in goals against average, and he was called up to dress in several American Hockey League games with the Norfolk Admirals and the Lowell Lock Monsters after his senior season ended. He later attended law school at New England School of Law, Boston, while working at several law firms in Boston. He graduated cum laude in 2007.

JOSHUA "J.D." HARDIARIS

J.D. lives in Saco with his wife, Ariana, and their son. J.D. is a past member of the Board of Trustees of the Dyer Library and Saco Museum. His family serves a free Christmas dinner every year to members of the community at Traditions Restaurant in Saco.

New Member: Matthew T. Mehalic

MATTHEW T. MEHALIC

We are pleased to announce that Matthew Mehalic will become a member of the firm to be effective January 1, 2016. Matt joined the firm in September 2007 as an associate attorney in the litigation practice group. In his eight years at the firm he has focused his practice on handling insurance coverage and defense matters for clients based both in Maine and around the nation.

Matt is a Maine native, born and raised in Cape Elizabeth. He attended the University of Michigan in Ann Arbor and graduated in 2002 with a double major in classical archaeology and anthropology. Matt followed up his undergraduate studies by working for two years in New York City at a large law firm in the litigation department. He realized during this experience that he wanted to practice law and return to his roots. He enrolled at the University of Maine School of Law and graduated in 2007. Matt immediately joined the firm after law school graduation.

Since joining the firm Matt has cultivated his practice by advising clients outside of the litigation setting and in matters pending in the District Courts, Superior Courts, and Supreme Judicial Court of Maine. In addition to Maine, Matt is admitted to practice in Massachusetts and the United States District Court for the District of Maine. Matt has been recognized as one of the New England Rising Stars by Super Lawyers since 2013. He is in the process of working towards obtaining a CPCU designation, which he hopes to complete in the upcoming year. He is the Maine Vice President for the Tri-State Defense Lawyers Association. He is also a member of the Maine State Bar Association and Cumberland County Bar Association. This past summer Matt attended the 2015 ALFA International Insurance Law Roundtable in New York City which focused on emerging issues across the country in insurance coverage and first-party claims.

Matt lives in Falmouth with his wife, Kimberly, his two sons, Mason and Winston, and his Weimaraner, Lola. Matt enjoys almost all outdoors activities, but especially skiing, golf, and boating.

In Memoriam

Marya R. Baron

We are deeply saddened to announce the passing of our former associate, Marya R. Baron, in November following a prolonged illness. Marya was a Cape Elizabeth native who attended Grinnell College in Iowa, receiving a B.A. in history. She worked in public relations and marketing in a variety of locations, including New York City, small-town Pennsylvania, and Portland, and ultimately became an Assistant Dean at the University of Southern Maine in the Division of University Outreach.

She attended the University of Maine School of Law and graduated summa cum laude in 2010. While at UMSL she was an editor of the Maine Law Review and worked as a legal researcher and assistant to one of her professors.

Marya joined NH&D in September 2011 and during her time with the firm performed research and appellate work in several areas of the firm's practice.

We offer our condolences to Marya's husband, Otis, and her daughter, Violet.

2016 New England Super Lawyers and Rising Stars

Several NHD attorneys recognized in the 2016 edition of New England Super Lawyers and New England Rising Stars

Norman, Hanson & DeTroy is proud to announce that that the 2016 edition of New England Super Lawyers and the 2016 New England Rising Stars has recognized several of our attorneys for inclusion in the publications. We congratulate each of these attorneys for this accomplishment.

Super Lawyers

Aaron K. Baltes
General Litigation

Jonathan W. Brogan
Prof. Liability General – Defense

Peter J. DeTroy
"Top 100" 2015
Prof. Liability – Defense

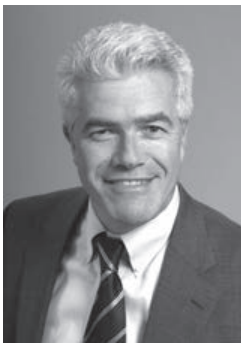
Kevin M. Gillis
Workers' Compensation

David L. Herzer, Jr.
Prof. Liability Med Mal. – Defense

Stephen Hessert
Worker's Compensation

John H. King, Jr.
Worker's Compensation

Theodore H. Kirchner
Employee Litigation – Plaintiff



Mark G. Lavoie
Prof. Liability Med Mal. – Defense

Thomas S. Marjerison
Prof. Liability General – Defense

Russell B. Pierce
Civil Litigation – Defense

James D. Poliquin
Insurance Coverage

Jennifer A.W. Rush
Prof. Liability Med Mal. – Defense

Super Lawyers Rising Stars

David A. Goldman
Business Litigation

Darya I. Haag
Intellectual Property Litigation

Joshua D. Hadiaris
General Litigation

Kelly M. Hoffman
General Litigation

Matthew T. Mehalic
Insurance Coverage

Kudos

KEVIN GILLIS, the Executive Director of the Workers' Compensation Coordinating Council and the Maine Council of Self-Insurers, as well as the administrator of the Maine Self-Insurance Guarantee Association, organized and presided at the annual meeting of these organizations in early November. **STEVE MORIARTY** addressed those attending and summarized case law to date regarding the medical use of marijuana in the workers' compensation context.

Congratulations to **CHRIS TAINTOR, DAVE GOLDMAN, and DARYA HAAG** on their recognition for pro bono work by the Maine Supreme Judicial Court through the Katahdin Council Recognition. The Katahdin Council Recognition program was created by the Court in response to a proposal by the Justice Action Group to focus the public's attention on the critical role that pro bono plays in maintaining a vibrant civil justice system.

In November **KELLY HOFFMAN** presented at an NBI seminar entitled "Troubleshooting HR Legal Nightmares" in Portland. Her topic was "Nightmare #1 Hiring and Recruitment Mistakes that Lead to Trouble". **KELLY** highlighted extensive legal mistakes employers have made and provided up-to-date information concerning current rules and regulations facing employers to ensure that hiring and recruitment procedures run smoothly.

LINDSEY MORRILL SANDS has been selected as one of the top 100 Litigation Lawyers in the State of Maine for 2016 by the American Society of Legal Advocates ("ASLA"). ASLA is a nationwide organization and this recognition is given to less than 1.5% of attorneys overall nationwide. **LINDSEY'S** primary practice is the defense of workers' compensation claims brought in both Maine and New Hampshire.

In December **STEVE HESSERT and STEVE MORIARTY** spoke at a program sponsored by Sterling Education Services on a variety of current workers' compensation topics in Maine.

In October **MARK LAVOIE** spoke before an association of radiology technicians at Maine Medical Center as well as before the Maine Dartmouth Residency Program at MaineGeneral Hospital on the anatomy of a medical malpractice claim in Maine.

In International Law and Trade News, **ADRIAN KENDALL** recently briefed Congresswoman Chellie Pingree from Maine's First District and a delegation of Maine's business and environmental leaders prior to their informational visit to Germany which was sponsored by the Aspen Institute. The delegation met with high-ranking German political figures and business leaders, as well as members of the U.S. Diplomatic Missions in Germany. In October, **ADRIAN** was also invited to share his international trade expertise with business leaders in the medical industry from Maine, New Hampshire, Vermont, Rhode Island, and Connecticut who made up the "Best of New England" delegation to MEDICA. MEDICA is the world's largest trade fair for the medical industry and takes place annually in Düsseldorf, Germany.

DEVIN DEANE and his wife Elise welcomed their new son and first child, Tate, on November 24.

Fall 2015 issue

Return Service Requested

Norman, Hanson & DeTroy, LLC
Two Canal Plaza
P.O. Box 4600
Portland, Maine 04112