INBRIEF

Current Developments in Maine Law

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Developments in Litigation Under Maine's Whistleblower Protection Act

By: Christopher C. Taintor, Esq.

Litigation under Maine's Whistleblower Protection Act (WPA) is a growth area. Since 2010 the Maine Supreme Judicial Court has handed down decisions in 10 cases where the WPA was invoked as the principal or sole basis for liability. In that period there have also been more than 30 WPA decisions handed down by the United States District Court for the District of Maine and the same number by the Maine Superior Court.

Two developments in the case law just this year have gone a long way toward clarifying the scope of liability under the WPA. In two cases decided a few months apart, the First Circuit Court of Appeals ruled that the "job duties exception," once thought to represent a powerful defense to WPA liability, is far narrower than employers had hoped. On the other hand, the Maine Supreme Judicial Court, sitting as the Law Court, made it clear that employees suing in state court on the theory that they have been "constructively discharged" in retaliation for their whistleblowing activity will face an uphill battle.

1.The First Circuit Finds No "Job Duties Exception" to the WPA.

In two recent cases, the First Circuit Court of Appeals has made it clear that an employee's report of illegal activity may constitute protected activity even if reporting

CHRISTOPHER C. TAINTOR

that activity falls generally within the scope of his job duties.

The Court first addressed the issue in *Harrison v. Granite Bay Care*, 811 F.3d 36 (1st Cir. 2016). In that case the plaintiff was a Licensed Clinical Social Worker ("LCSW") who served as Training Director for his employer, Granite Bay, an entity which operates group homes and provides services to adults who have cognitive and developmental disabilities. As an LCSW, Harrison was legally mandated to report to the Department of Health and Human Services ("DHHS") incidents of suspected abuse, neglect, or exploitation of Granite Bay's clients. Harrison did report to DHHS what he believed to be instances of both neglect (understaffing of one corporate office, and the failure to take necessary precautions for the protection of a client) and exploitation (failing to timely pay a client for cleaning and maintenance work). Within three months of making the report he was fired. Harrison sued, alleging that he had been fired in retaliation for making the report, and thus in violation of the WPA.

In the U.S. District Court (to which the case was removed) Granite Bay moved for summary judgment on various grounds. Its threshold argument was that Harrison had not engaged in protected activity – that is, he was not a "whistleblower" at all – because he was simply doing his job when he made the report to DHHS. In addition to the fact that Harrison was a "mandated reporter" – and therefore had no choice but to notify DHHS of his suspicions – Granite Bay made much of the fact that its personnel policies require LCSWs to report unlawful activity. The District Court judge, relying on an earlier First Circuit decision, *Winslow v. Aroostook County*, 736 F.3d 23 (1st Cir.2013), granted the motion, reasoning that an employee who has simply done his job has not engaged in activity that is protected under the WPA.

On appeal, the First Circuit held that the District Court judge had read too much into *Winslow*. That case, the court said, had not created a broad "job duties exception"; rather, the reason there had been no statutorily-protected whistleblowing in *Winslow* was that the plaintiff in that case had done nothing more than convey information about unlawful activity at the express direction of her supervisor. The *Harrison* court found it significant that the plaintiff in *Winslow* had not discovered the unlawful activity and had done nothing to initiate or originate a report to the government – she was, in essence, just a conduit for it. In short, the plaintiff in *Winslow* was not protected by the WPA because she had not "intended to expose a potential illegality" and she was generally not "motivated by whistleblowing concerns."

The *Harrison* case was different, the First Circuit said, because the plaintiff there, unlike the plaintiff in *Winslow*, had done more than carry out his employer's express orders. He had made an affirmative, personal decision to step forward and report to state authorities conduct which he had reported to his employer but had gone uncorrected. The First Circuit acknowledged that "a particular employee's job duties may be relevant in discerning his or her actual motivation in reporting information." It held, however, that the "critical point" when analyzing whether a plaintiff has engaged in WPA-protected activity is the employee's "motivation in making a particular report or complaint."

The First Circuit revisited this issue in *Pippin v. Boulevard Motel Corp.*, 2016 WL 4537894 (1st Cir. Aug. 31, 2016). In that case, as in *Harrison*, the District Court had granted summary judgment to an employer based on the "job duties exception." The employer argued in *Pippin* that two employee-plaintiffs were not "whistleblowers" because they had done nothing more than help a subordinate present a complaint of sexual harassment to corporate management. The employer emphasized that the plaintiffs had not offered their own opinions about the merit of the harassment complaint, or what should be done about it. As it had done in *Harrison*, however, the Court of Appeals overturned the judgment. The Court observed that "opposition to unlawful activity may take forms other than express statements of opposition." The plaintiffs in *Pippin* had questioned the integrity of the investigation: they had raised concerns about whether the employer had taken the charges seriously, and about whether there had been pressure to ignore, cover up, or excuse the harassment. That "purposive conduct," which reflected their opposition to the sexual harassment, was enough to permit a jury to conclude that their initial report "was made to shed light on and 'in opposition to' [the defendant's] potential illegal acts."

As the reversals by the First Circuit in both *Harrison* and *Pippin* make clear, whatever is left of the "job duties exception" is unlikely to benefit employers much, at least at the summary judgment stage of a whistleblower suit. Employers will no longer be able to escape liability under the WPA simply by pointing to policies which mandate that their employees report wrongdoing, and arguing that an employee who engaged in protected conduct was "just doing her job." The relevant question, instead, will be whether any given employee's report of corporate misfeasance was subjectively motivated by a desire to "oppose" the misconduct.

2. The Law Court Signals That Claims of "Constructive Discharge" Will Be Subject to Close Scrutiny.

This summer, at about the same time the First Circuit was deciding *Pippin*, the Maine Supreme Judicial Court decided *Sullivan v. St. Joseph's Rehab. & Residence*, 2016 ME 107, 143 A.3d 1283. The plaintiff in that case sued her employer, a nursing facility, on the theory that she had been forced out of her job by poor treatment which began after she complained to her superiors about resident safety issues. She alleged that she had voiced concerns about "cost-cutting measures" – essentially staff cut-backs – which she thought could "affect the health of the residents, resulting in negative outcomes or potential negative outcomes." She also claimed that she had told her supervisor that the facility was admitting patients it was not equipped to care for. After the plaintiff voiced these concerns, she said, she was excluded from meetings and decision-making; subjected to rude, harsh criticism; accused of not being "on board" with management; and eventually given a 30-day "performance plan"—essentially a warning to improve or be subject to discharge – which she felt was unjustified. She quit the day after she received the warning, eventually testifying that she "felt compelled" to do so.

On the basis of those facts, the Superior Court granted the employer summary judgment on Sullivan's claim that she had been "constructively discharged." On appeal, the Law Court affirmed. The Court acknowledged that an employee who quits may, in certain circumstances, demonstrate that she has suffered an "adverse employment action," but agreed with the trial judge that Sullivan's evidence was legally insufficient to clear that hurdle.

The Law Court, looking (as it typically does) to federal employment discrimination law for guidance, explained that "[c]onstructive discharge may be found when, due to the actions of the employer, an employee's 'working conditions were so difficult or unpleasant that a reasonable person in [the employee's] shoes would have felt compelled to resign.'" The Court emphasized that this test is an objective one. In other words, the fact that a particular plaintiff "felt compelled" to resign is not controlling; the question is whether the conditions of the job were "exceptional and objectively unbearable." The *Sullivan* Court, although required to assume the truth of the plaintiff's testimony, found that the reasons she gave for resigning did not "rise to the level where her *only option* was to quit."

The Law Court's decision in *Sullivan* is consistent with a wealth of federal case law which creates substantial barriers to employees who quit their jobs and then claim that they should be treated as though they had been fired. The case law demonstrates that employees will be hard put to prove "constructive discharge" if they have simply been reassigned, but have not been "demoted" or lost pay, *Gu v. Boston Police Dep't,* 312 F.3d 6, 14 (1st Cir. 2002); if they wait weeks or months after the alleged retaliation to quit, *Gerald v. Univ. of Puerto Rico,* 707 F.3d 7, 26 (1st Cir. 2013); and if other employees subjected to similar treatment stay on the job. *Ahern v. Shinseki,* 629 F.3d 49, 59 (1st Cir. 2010). All in all, it is not enough to show that an employer, or an individual supervisor, behaved in a way that can fairly be characterized as "tough, insensitive, unfair, or unreasonable." Constructive discharge can be shown only in those exceptional cases where the preferred response to discrimination – "staying on the job while seeking redress" – is simply not a viable option. *Keeler v. Putnam Fiduciary Trust Co.,* 238 F.3d 5, 10 (1st Cir. 2001).

As whistleblower cases continue to work their way through the courts, novel issues will continue to arise. For now, these recent Law Court and the First Circuit decisions have articulated rules – some pro-employee, some pro-employer – that will be useful in guiding decision-making in this rapidly-evolving area of the law.

Maine's New Opioid Prescribing Law Begins to Take Effect

By: Carl E. Woock, Esq.

CARL E. WOOCK

Earlier this year, Governor Paul LePage signed into law An Act To Prevent Opiate Abuse by Strengthening the Controlled Substances Prescription Monitoring Program (LD 1646) ("the Act"). Key portions of the law took effect on July 29, 2016. The law has two major consequences: first, it limits how much and how often doctors can prescribe opioids to patients, and second, it requires prescribers to check patient information in the state's Prescription Monitoring Program ("PMP") when ordering or renewing patient prescriptions. The following is a summary of the law's effects and some initial takeaways relevant to the Workers' Compensation arena.

1. Dosage and Duration Limits

The Act restricts opioid prescriptions to a dosage of no more than 100 morphine milligram equivalents (MME) per day of any opioid or combination of opioid-containing medications. By way of comparison, the federal Centers for Disease Control recently established prescribing guidelines which state that prescribers "should avoid increasing dosage to ≥90 MME/day" for chronic pain. Maine's prescriber restrictions apply to nurse practitioners (32 M.R.S.A. § 2210), osteopaths (32 M.R.S.A. § 2600-C), doctors (32 M.R.S.A. § 3300-F), podiatrists (32 M.R.S.A. § 3657), dental professionals (32 M.R.S.A. § 18308), and even veterinarians (32 M.R.S.A. § 4878). In addition to these dosage limits, the law limits providers to writing prescriptions of up to a 7-day supply for "acute pain," and a 30-day supply for "chronic pain."

The Act carves out specific exceptions to the opioid limit, PMP checks, and durational limits for the following situations: patients with cancer, patients receiving hospice care, end-of-life care or palliative care, patients receiving medication for substance use disorder, and patients

having medication administered by health professionals in hospitals and nursing homes. There is also a temporary catchall exception to the prescription limits, expiring at the end of the year, for patients who have a documented medical necessity for receiving opioid medication. Other exceptions may yet be promulgated by Department of Health and Human Services rulemaking.

The Act also affords a taper-down period for high-dosage patients who would not otherwise fall under an exception. Patients who are prescribed opioid medication of more than 100 MME per day are permitted a prescription limit not to exceed 300 MME per day after January 1, 2017, but these patients must not prescribed more than 100 MME daily opioid medications by July 1, 2017.

2. Prescription Monitoring and Prescriber Education

As of January 1, 2017, upon initial prescription of an opioid medication and every 90 days for as long as that prescription is renewed, a prescriber must check prescription monitoring information for records related to that person. The Act also mandates that all prescribers participate in electronic prescribing through the Department of Health and Human Services by July 1, 2017. A prescriber who might not be able to participate in the electronic prescribing system due to technological limitations can get an exception from the Commissioner of Health and Human Services. Finally, by December 31, 2017, prescribers must complete 3 hours of continuing education every 2 years regarding opioid medication.

Dispensers, on the other hand, must check and submit information to the PMP system only under specified conditions (e.g. where they are dealing with an out-of-state patient or prescriber).

3. Penalties

A prescriber who violates these new provisions commits a civil violation of $250 per incident but not exceeding $5,000 per calendar year, as enforced by the Department of Health and Human Services.

For dispensers, failure to check or submit information in the PMP is grounds for the same fine scheme as described above, as well as discipline from the Maine Board of Pharmacy.

4. A Tool for Workers' Compensation Defense?

The main takeaway is that the law sets out a defined ceiling for patient opioid prescriptions, so employees treating work injuries through opioid medication exceeding the 100 MME limit will warrant extra scrutiny with respect to their treatment. But remember: the Act does provide circumstances for higher opioid doses depending on the severity of the injury or other factors. Even if the employee is overprescribed opioids in violation of the Act, enforcement is in the hands of DHHS, not the employer or insurer. We will keep an eye on DHHS rules as they expand the exceptions to dosage and duration limits moving forward.

"AS OF JANUARY 1, 2017, UPON INITIAL PRESCRIPTION OF AN OPIOID MEDICATION AND EVERY 90 DAYS FOR AS LONG AS THAT PRESCRIPTION IS RENEWED, A PRESCRIBER MUST CHECK PRESCRIPTION MONITORING INFORMATION FOR RECORDS RELATED TO THAT PERSON."

Workers' Compensation – Appellate Division Decisions

By: Stephen W. Moriarty, Esq.

STEPHEN W. MORIARTY

Unexplained Falls.

Unexplained falls are closely related to idiopathic falls, but yet are distinct. While an idiopathic fall occurs as the result of some type of internal weakness or personal illness not related to employment (such as a fainting spell), an unexplained fall on the job occurs for no known reason whatsoever. It has long been recognized that unexplained falls are not compensable, and the Appellate Division has recently upheld this important principle.

In *Peaslee v. South Portland School Department*, App. Div. Dec. No. 16-27 (September 28, 2016) the employee worked as a part-time playground and lunch aide and sustained a shoulder injury when she fell onto a paved portion of a schoolyard playground while monitoring a recess. It was undisputed that the injury occurred in the course of employment. However, the employer maintained that the injury did not arise out of the employment because the employee, both in her testimony and in contemporaneous statements made to employer personnel, could not explain how or why she fell. The evidence showed that at the time of the injury the weather was clear, sunny, and dry and that the playground area was completely free of debris or any defects in the surface such as cracks or potholes. Citing *Morse v. Laverdiere's Super Drugstore*, 645 A.2d 613 (Me. 1994) the ALJ concluded that the employee had sustained an unexplained fall while at work, and that the resulting right shoulder injury was not compensable.

The employee appealed to the Appellate Division. While the Division's decision is brief and does not recite the facts of the case in detail, the Division nevertheless found that the employee had failed to establish that her injury had arisen out of her employment and concluded that the findings of the ALJ were fully supported by competent evidence. The employee had argued that the various compensability considerations set forth by the Law Court in *Comeau v. Maine Coastal Services*, 449 A.2d 363 (Me. 1982) compelled a conclusion that the injury was compensable but the Division implicitly rejected this argument and ruled that the ALJ was not required to find that the injury had arisen from employment. As a result, the employee's appeal was denied and the non-compensability of unexplained falls still stands as good law.

Medical Marijuana.

The Maine Medical Use of Marijuana Act (MMUMA) took effect in late December 2009 following approval by the voters in a statewide referendum. The statute permits the conditional use, possession, and furnishing of marijuana for medical purposes for treatment of an individual's debilitating medical condition, including intractable pain. It was only a matter of time before the issue of an employer's responsibility to pay for the acquisition and use of medical marijuana would arise in the context of an employer's obligations under the Workers' Compensation Act.

Section 206 of the Act broadly entitles an injured worker "to reasonable and proper medical, surgical and hospital services, nursing, medicines and mechanical surgical aids, as needed, paid for by the employer." This section has been interpreted to require an employer to pay for diverse items such as specially modified vehicles, home renovations, and palliative treatment. In the past one and one-half years there have been several Administrative Law Judge decisions approving the use of medical marijuana for the treatment of chronic and severe pain resulting from occupational injuries. The Appellate Division has now issued two opinions on the subject.

In *Noll v. Lepage Bakeries, Inc.*, App. Div. Dec. No. 16-25 an en banc panel consisting of seven Administrative Law Judges unanimously ruled that the use of medical marijuana consistent with MMUMA was a reasonable and proper form of medical treatment for which the employer was responsible. The parties stipulated that prescription pain medication had been ineffective in addressing the complaints of chronic pain, and that the treating physiatrist had recommended that the employee obtain a medical marijuana assessment. Another health care provider performed the assessment and found that the employee qualified for the use of medical marijuana.

In its appeal, the employer argued that marijuana is a Schedule I drug under the federal Controlled Substances Act and that the possession or dispensing of marijuana is a federal crime. The Division noted that the U.S. Department of Justice has issued a guideline to federal prosecutors advising it

would be an inappropriate use of resources to prosecute the prescribers and users of marijuana pursuant to a state statute allowing such practice. The Division found no basis in federal law or policy that would preclude an employer from reimbursing an employee for all costs associated with the use of medical marijuana pursuant to the provisions of MMUMA.

The employer, which was self-insured, also argued that it was a private health insurer and that MMUMA specifically excludes private health insurers from any financial responsibilities for the costs of the use of medical marijuana. The Division noted that in Maine workers' compensation insurance is defined by statute as casualty insurance, and not health insurance, and concluded that the self-insured employer was not a private health insurer within the meaning of MMUMA. Accordingly, the use of medical marijuana was covered by §206. The panel also noted the Legislature did not exempt either workers' compensation carriers or self-insured employers from the obligation to reimburse employees for the costs related to the use of medical marijuana.

Therefore, the Division affirmed the underling Administrative Law Judge's decree requiring the employer to pay for the use of medical marijuana.

In a decision issued on the same date a separate three-member panel of the Division affirmed an ALJ decision approving the use of medical marijuana as "reasonable, proper, and necessary". In *Bourgoin v. Twin Rivers Paper Company, LLC,* App. Div. Dec. No. 16-26 the same legal defenses were raised as in Noll and the Division followed the decision of the Noll panel. The facts in Bourgoin were particularly difficult as the employee had been out of work since late 1989 or early 1990 resulting from an occupational back injury. He had received ongoing benefits for total incapacity following his departure from work, and suffered from a severe chronic pain syndrome. He had also been diagnosed with RSD and with psychological consequences related to the back injury. Treatment at some of the most prominent medical facilities in the country had been unsuccessful and the employee became dependent upon narcotic medications. The medications were ineffective and caused severe side effects.

Notwithstanding the employee's experience with narcotics, a §312 examiner "recommended continued use of strong narcotic medications". The Division rejected the opinion of the §312 examiner on the grounds that prior use of narcotics had "failed miserably". The Division found no error in the rejection of the examiner's opinion and affirmed the ALJ's decision regarding the use of medical marijuana.

In both cases Petitions for Appellate Review have been filed with the Law Court.

Ambiguous §312 Opinion.

As is well known, an ALJ is required to accept the opinion of a §312 examiner unless there is clear and convincing evidence to the contrary. In some cases, however, a written opinion may be ambiguous, and the Appellate Division has ruled that in such circumstances an ALJ is not required to adopt an opinion that is "susceptible of more than one meaning".

In *Thurlow v. Rite Aid of Maine, Inc.,* App. Div. Dec. No. 16-23 the examiner commented that the employee "has been restricted to 18 hours", but it was unclear whether he was simply describing current restrictions or limits which had existed in the past. The ALJ did not adopt the examiner's opinion in light of its uncertainty, and the Division held that clear and convincing evidence to the contrary was not required under the circumstances.

Post-Injury Earning Capacity.

In cases of entitlement to benefits for partial incapacity, §214(1)(D)(2) provides that if an employee has been employed following an injury for 100 weeks or more and has lost his or her job through no personal fault, a new wage earning capacity may be established based upon the customary wages paid at the time of termination. If such employment has lasted for 250 weeks or more, there is a presumption that a new wage earning capacity has been established. If a new capacity is established, entitlement to partial is to be calculated upon the difference between the pre-injury average weekly wage and the new earning capacity.

In *Lieberman v. Wal-Mart,* App. Div. Dec. No. 16-21 the employee had returned to work for the pre-injury employer for more than four years but less than 250 weeks prior to the point at which he was terminated due to an inability to accommodate restrictions. Following termination, the employee found new and substantially lower-paying employment with a different employer. The pre-injury employer argued that ongoing entitlement to partial ought to be based upon the new wage earning capacity established after 100 weeks of post-injury employment rather than upon the original pre-injury average weekly wage.

The ALJ disagreed and awarded continuing benefits based upon §214(1)(D)(3), which requires that entitlement should be based upon the difference between current actual earnings and the original pre-injury average weekly wage. On appeal the employer argued that the methods of calculating partial under §214(1)(D) should be applied in descending order and that the ALJ should have determined whether or not a new wage earning capacity had been established. The Division affirmed the ALJ and held that once the claimant had secured new employment of any type benefits for partial must be calculated based upon the earnings from that employment.

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

Multiple Gradual Injuries.

In *Derrig v. Fels Co.,* 1999 ME 162, 747 A.2d 580 the Law Court defined a gradual injury as "A single injury caused by repeated, cumulative trauma without any sudden incapacitating event." In a recent decision the Appellate Division addressed the issue of whether there could be more than one gradual injury as a medical condition evolves over time.

In *Eck v. Verso Paper,* App. Div. Dec. No. 16-20 the employee had initially developed bilateral thumb pain in the course of his employment in 1999, and then later developed more extensive upper extremity symptoms in 2012. A §312 examiner found that carpal tunnel syndrome had developed back in 1999 and that the condition had been significantly aggravated by work performed in the years since. The ALJ found that the employee had established the occurrence of a second gradual injury to the same portion of the body in 2012, and granted a Petition for Award and a Petition for Payment for the 2012 injury.

The Appellate Division found that even though the employee had worked for a single employer throughout, the Derrig definition of a gradual injury did not prohibit a finding of the occurrence of two successive gradual

injuries. The opinion of the §312 examiner supported such a result, and the Division found that the ALJ had not misconceived applicable law by finding the occurrence of two injuries.

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

Durational Limits.

In *Ouellette v. Twin Rivers Paper Company, LLC,* App. Div. Dec. No. 16-18 the employee sustained an occupational injury while working for Fraser Paper and was awarded benefits for partial incapacity. At some point thereafter ownership switched to Twin Rivers, and in fact Twin Rivers was the employer at the time that the decree was issued. Benefits continued notwithstanding the change in ownership. The employee ultimately received partial benefits in excess of 520 weeks and Twin Rivers filed a Petition for Review seeking termination based upon expiration of the limit. The Board granted the employer's Petition and ordered that payment of benefits cease.

On appeal the employee argued that because Fraser Paper was the employer at the time of injury, only benefits paid by that entity "counted" toward the 520 week cap. The Division rejected the argument and ruled that it had been determined in the earlier decree that Twin Rivers was the employer of record. No appeal had been taken from that earlier decree, and therefore all payments made by Twin Rivers were to be applied against the durational limit. Because payments made by both employers exceed the 520 week cap, the employee's entitlement to partial benefits had expired.

"UNEXPLAINED FALLS ARE CLOSELY RELATED TO IDIOPATHIC FALLS, BUT YET ARE DISTINCT. WHILE AN IDIOPATHIC FALL OCCURS AS THE RESULT OF SOME TYPE OF INTERNAL WEAKNESS OR PERSONAL ILLNESS NOT RELATED TO EMPLOYMENT (SUCH AS A FAINTING SPELL), AN UNEXPLAINED FALL ON THE JOB OCCURS FOR NO REASON WHATSOEVER. IT HAS LONG BEEN RECOGNIZED THAT UNEXPLAINED FALLS ARE NOT COMPENSABLE, AND THE APPELLATE DIVISION HAS RECENTLY UPHELD THIS IMPORTANT PRINCIPLE."

New Associate

MARK V. BALFANTZ

We are pleased to announce that Mark V. Balfantz joined the firm as an associate attorney in August 2016. Mark graduated from the University of Delaware in 2001 with a B.S. in Business Administration: Finance. After graduation, Mark attended Temple University Beasley School of Law. While in law school, Mark was the president of the Asian Pacific American Law Students' Association, a staff member of Temple's Political and Civil Rights Law Review, and worked at the Chester County District Attorney's Office.

Following graduation from law school, Mark joined the United States Marine Corps. At his first duty station, Mark provided legal assistance to military service members and their families for over a year before deploying to Iraq. In Iraq, Mark advised commanders in various operational legal areas and helped develop the rule of law by working with Iraqi judges and police to establish a working criminal justice system in a small Iraqi town.

After a year in Iraq, Mark returned to the United States to serve as a military prosecutor for several months before being stationed in Washington, D.C. as an appellate government counsel. In this role, Mark represented the United States by working to preserve convictions and sentences on appeal. Mark advocated for the United States by writing numerous briefs filed with the military appellate courts, Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces, and arguing before the courts fourteen times.

Mark's final duty station was at the Office of the Military Commissions, where Mark served on a defense team representing one of the five detainees held in Guantanamo Bay charged with offenses related to the terror attacks of September 11, 2001.

After ten years of service, Mark left the military with the rank of Major. Mark and his family moved to Maine to settle down near family, enjoy the culture of Portland, and explore nature throughout Maine. Mark restarted his legal career as a law clerk for the Maine Superior Court serving several judges in Portland, Auburn, and Augusta, prior to joining Norman, Hanson & DeTroy.

Mark lives in Portland with his wife, Anna, and his two children, Teddy and Sybil. Mark enjoys being active in the local community. He is the secretary of the local Post of the Veterans of Foreign Wars. Mark also works with Portland Empowered, which is a group that helps students and parents to shape educational opportunities throughout Portland's high schools.

JESSICA S. SMITH

New Associate

We are pleased to announce that Jessica S. Smith joined the firm as an associate in September 2016, having worked as an extern for the firm since the autumn of 2015. Jessica graduated from Miami University of Ohio in 2006 where she studied Public Administration and History. Prior to law school she spent several years working for a strategic consulting firm that helped clients with corporate strategy, complex transaction management, and market entry in developing and foreign markets.

Jessica graduated from the University of New Hampshire, School of Law in May 2016 in the top third of her class. She participated in the Consumer and Commercial Law Clinic as a student where she helped low-income residents with legal issues and assisted the New Hampshire Attorney General's Office investigate consumer complaints.

While in law school Jessica worked for an engineering consulting firm where she assisted with land valuation of special purpose property as well as in preparation for expert witness assignments. Jessica also worked as a summer associate at a leading defense firm in Boston, MA that specializes in toxic tort law.

Jessica lives in Freeport with her fiancé, Gregory Knights, a Portland firefighter. Jessica enjoys traveling to new places and being outdoors.

Recent Decisions From The Law Court

MATTHEW T. MEHALIC

By: Matthew T. Mehalic, Esq.

Summary Judgement Affirmed Where No Evidence of Proximate Causation

In Estate of Lois W. Smith v. Timothy Salvesen, 2016 ME 100 (July 7, 2016), Eugene Smith brought a complaint for the wrongful death of his wife, Lois, against Salvesen. The Smiths were staying at Salvesen's guesthouse while they were attending a Hebron Academy event. The school's staff gave the Smiths directions and passcode to enter Salvesen's guesthouse and told the Smiths they would be staying on the second floor. No room was specified, no other information was provided about the accommodations, and the Smiths did not speak with Salvesen. Upon their arrival, the Smiths selected a room on the second floor, not realizing that it was a two floor unit with the bedroom on the second floor and a private living room on the first floor connected by a private staircase. After the Smiths went to bed Eugene woke up around 7 AM to a loud crash and Lois' scream. He got up and noticed for the first time the staircase. Lois was lying on a landing of the staircase. She was transported to a hospital and died the next day from the injuries she sustained.

Eugene filed a complaint alleging that the premises were unreasonably dangerous, in part because the private staircase did not conform with the Life Safety Code and the defects proximately caused Lois' fatal injuries. Salvesen moved for summary judgment, arguing that the evidence did not support proximate causation. Key to the motion was that no one knew how or from where Lois fell. In addition, the deficiencies in the steps were unable to be connected to the reason Lois fell. The deficiencies identified by Plaintiff's expert were lack of uniformity in the riser height and railing heights that conflicted with the Code requirements for height and slope.

In Eugene's opposition to the motion for summary judgment, affidavits were submitted by Eugene and his expert that contradicted with Eugene and the expert's deposition testimony. Both Eugene and his expert testified at their depositions to a lack of knowledge of how or from where Lois fell. The affidavits attempt to place Lois at the top of the stairs, support that she encountered the deficiencies in the stairway, and the deficiencies proximately caused Lois to fall. The Superior Court rejected Eugene's affidavit to the extent it conflicted with his earlier testimony and rejected the expert's affidavit because it disclosed new opinions not previously disclosed, not testified to at the deposition, and was conjecture. Eugene appealed the entry of summary judgment in favor of Salvesen.

The Law Court affirmed the Superior Court relying in part upon the earlier decision of *Zip Lube, Inc. v. Coastal Sav. Bank*, 1998 ME 81, ¶ 10, 770 A.2d 638 (concluding that a trial court properly excluded a portion of a party's affidavit that was "directly contrary to her prior sworn testimony.") The Court found that Eugene's affidavit was properly excluded because it did conflict with his earlier testimony and furthermore, he was not competent to testify from where or how Lois fell due to the fact that he was asleep. The Court also found that the expert's affidavit was properly excluded because it conflicted with his earlier testimony about what contributed to Lois' fall and it exceeded the bounds of the expert witness designation. The Court specifically pointed to the fact that there had been no supplementation to the original designation to disclose that the expert would be offering any opinion on causation.

The other challenge raised by Eugene on appeal was that the trial court erred because a jury could reasonably infer causation from the evidence that aspects of the stairway were defective because they did not meet the Life Safety Code standards. The Law Court found that Salvesen owed a duty of care to Lois, that the existence of the deficiencies in the stairs was a breach of that duty, but did not agree that proximate cause was established by the evidence. The principle reasons for this determination was that the evidence did not establish that Lois fell when she was on the staircase or that she encountered either of the staircase's dangerous defects. Inferring proximate causation in light of the facts would necessitate a jury resorting to guesswork.

This decision illustrates that the Superior Court and the Law Court are still willing under the appropriate facts to grant judgment as a matter of law when no prima facie evidence of proximate causation exists. A motion for summary judgment on this issue and other similar issues remains a useful tool.

Uninsured Motorist and Medical Payments Coverage Exclusions and Limitations Upheld

In *Alberta Graf v. State Farm Mutual Automobile Ins. Co.*, 2016 ME 109 (July 14, 2016), the Law Court addressed an exclusion in a State Farm uninsured motorist coverage, proper application of an offset, and a limitation in medical payments coverage. The case arose from a motor vehicle accident

where Graf was struck from behind by an under insured motorist (UIM). Graf settled with the consent of State Farm her claim against the tortfeasor for liability limits of $50,000. She then claimed UIM benefits under two separate State Farm policies. One of the policies, Policy 1, was in her husband's name and insured a vehicle not involved in the accident. Policy 1 provided "There is no coverage... for bodily injury to an insured [sustained] while occupying a motor vehicle owned by... you, your spouse or any relative if it is not insured for this coverage under this policy." Policy 1 had UIM limits of $1 million and medical payments coverage of $100,000. The other policy, Policy 2, was in Graf's name and included the vehicle Graf was driving at the time of the accident as a covered auto. Policy 2 had UIM limits of $300,000 and medical payments coverage of $100,000. Policy 2 provided that "The uninsured motor vehicle coverage shall be excess over and shall not pay again any medical expenses paid under the medical payments coverage." It also provided with respect to medical payments coverage that there would be no medical payments coverage "to the extent workers' compensation benefits are required to be payable." For medical bills to be covered under the medical payments coverage they had to be incurred within three years of the accident.

While trial preparations were underway, Graf invoked an arbitration clause contained within the policy. The parties agreed to arbitrate the amount of damages the accident caused Graf. It left to the courts any issues relating to the amount of UIM coverage available to Graf. The agreement to arbitrate did not require the arbitrators to identify the amount of medical expenses incurred within three years after the accident or the amount of expenses required to be payable by workers' compensation. Some of Graf's damages had been paid through workers' compensation.

The arbitrators determined that the accident caused Graf damages of $378,000. Of that amount, $125,000 were attributed to unspecified medical bills. After subtracting the $50,000 from the settlement with the tortfeasor, the arbitrators reported that Graf's net damages totaled $328,000.

State Farm subsequently filed a motion with the Superior Court to reduce the arbitration award to the UIM and medical payments coverage provided by the policies. The Superior Court granted the motion to reduce determining, "that Graf had UM/UIM coverage pursuant only to her own policy – Policy 2; that she was not entitled to medical payments coverage pursuant to either policy; and that, because the available uninsured coverage on her policy totaled $300,000 and Graf had already received $50,000, she was entitled to a total of $250,000 from State Farm." *Id.* at ¶ 8. Graf appealed the judgment.

On appeal, the Law Court affirmed the Superior Court's determination that Policy 1 excluded coverage due to the policy language excluding coverage for injury sustained in a vehicle not covered by the policy. The Court held the exclusion was not ambiguous, did not conflict with the UM/UIM statute (24-A M.R.S.A. § 2902), and was not against public policy.

The Law Court also addressed the application of the offset from the tortfeasor's payment. Referencing the decision of *Farthing v. Allstate Ins. Co.*, 2010 ME 131, 10 A.3d 667, and section 2902(4) of the UM/UIM statute, the Court restated the principle that when total damages are greater than the amount of UM/UIM coverage insurers offset the amount of coverage available in the UM/UIM policy, rather than the amount of damages incurred, by the amount actually paid by the tortfeasor. Therefore, the Court concluded that the Superior Court was correct in its application of the offset to the UM/UIM coverage limit of $300,000.

Finally, the Law Court looked at whether the Superior Court was correct in determining that Graf was not entitled to any medical payments coverage under Policy 2, separate from UM/UIM coverage. Because neither the arbitrators nor the Superior Court had determined the amount of medical expenses incurred within three years of the accident or whether any of the medical expenses were required to be payable by workers' compensation the Law Court remanded to the Superior Court for findings on "how much, if any, of the $125,000 of arbitration-awarded medical expenses were incurred within three years after the accident and were not required to be paid by workers' compensation." *Graf,* at ¶ 22. The remand was necessary because the damage award of $378,000 was less than the Court determined potential maximum available coverage of $400,000 ($100,000 in medical payments coverage and $300,000 from the combined payment from the tortfeasor of $50,000 and UM/UIM coverage after the offset of $250,000). Thus, the Law Court reversed the Superior Court on the issue of whether medical payments coverage was recoverable under Policy 2.

Included in the text on this final issue was the Court's indication that the limitation on medical payments incurred within three years of the accident was valid, the limitation of medical payments coverage to situations where workers' compensation benefits are not required was valid, and the prohibition of double payments in the UM/UIM coverage was valid. There was no indication that any of these provisions were contrary to the UM/UIM statute or invalid on public policy grounds.

Due Diligence Does Not Require Searching Registry of Deeds

In *Drilling & Blasting Rock Specialists, Inc. v. Paul Rheaume,* 2016 ME 131 (August 16, 2016), at issue was the statute of limitations applicable to claims for intentional and negligent misrepresentation. Drilling & Blasting Rock Specialists, Inc., (DBRS) purchased from T.W. Dick Company, Inc. (TWD), whose owner was Rheaume, a parcel of real property in 2006. The property was conveyed to DBRS by a warranty deed that did not mention an outstanding mortgage on the property and represented the property as free from encumbrances. Two months before the transaction, TWD had purchased the same parcel from a Robert McKee and delivered to him a promissory note and mortgage that was recorded in the Kennebec County Registry of Deeds.

In the real estate transaction between DBRS and TWD, TWD was represented by counsel who prepared a title search on the property, but the results were not disclosed to DBRS. DBRS was unrepresented by counsel in the transaction and did not perform a title search. DBRS relied upon the representations contained in the warranty deed with respect to the absence of encumbrances on the parcel. DBRS denied that it was aware of the mortgage on the parcel until 2013. Judgment was entered against TWD, but the judgment did not resolve the claims against Rheaume for

intentional and negligent misrepresentation.

Rheaume moved for summary judgment claiming that both claims were barred by the six-year statute of limitations. The Superior Court agreed. DBRS appealed arguing that the limitations period should be extended pursuant to 14 M.R.S.A. § 859, which tolls the limitations period until "6 years after the person entitled [to such action] discovers that he has just cause of action."

On appeal the Law Court affirmed dismissal of the negligent misrepresentation claim, but reversed the Superior Court on the intentional misrepresentation claim. The Court determined that a question of fact existed as to whether DBRS exercised sufficient diligence to avoid a finding that it should have discovered the cause of action earlier for purposes of determining when the limitations period on its fraud claim commenced. The discovery rule, tolling the six-year limitations period, explained the Court, is a provision that "prevents the commencement of the limitations period until the existence of the cause of action or fraud is discovered or should have been discovered by the plaintiff in the exercise of due diligence and ordinary prudence." *Id.* at ¶ 19. The Court found that,

> When viewed in the light most favorable to DBRS, the record in this case permits conflicting inferences as to whether DBRS should, in the exercise of due diligence, have discovered the fraud within six years of its occurrence... Based on [the] facts, a fact-finder could rationally infer that a reasonably prudent property purchaser would verify the accuracy of the representations in the seller's warranty deed. However, the record contains no indication that DBRS was on notice of any facts that would necessarily have caused a reasonable purchaser to undertake an independent investigation, and therefore a fact-finder could infer that DBRS acted reasonably by relying upon the warranty deed. *Id.* at ¶ 30.

Left unresolved by the Court by its decision was whether receipt of a free-of-encumbrances representation in a warranty deed was sufficient to satisfy the duty of due diligence and prevent the commencement of the limitations period on a fraud claim. However, the Court did make clear that an individual accused of egregious fraud cannot seek protection as a matter of law behind a constructive notice standard.

NHD Attorneys Designated as "Lawyer of the Year"

Norman, Hanson & DeTroy is proud to announce that two of its attorneys have been designated by *Best Lawyers* as the "Lawyer of the Year" for 2017 for the greater Portland area. We congratulate the following attorneys for having achieved this impressive recognition.

Jonathan W. Brogan
Medical Malpractice Law – Defendants

David L. Herzer, Jr.
Insurance Law
Professional Malpractice Law – Defendants

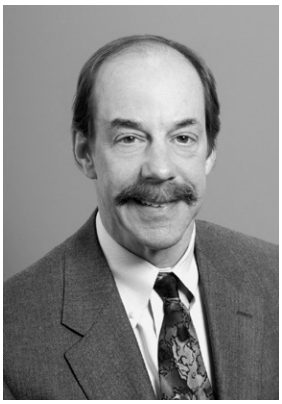
NHD Attorneys Listed in "Best Lawyers"

Norman, Hanson & DeTroy is proud to announce that fifteen of its attorneys have been named to the 2017 edition of *The Best Lawyers in America*, the oldest and most respected peer review publication in the legal provision. First published in 1983, *Best Lawyers* is based on an exhaustive annual peer-review survey comprising nearly 4 million confidential evaluations of some of the tops attorneys in the country. The *Best Lawyers* list appear regularly in Corporate Counsel Magazine, and is published with collaboration with *U.S. News & World Report.*

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

Jonathan W. Brogan
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Paul F. Driscoll
Litigation – Real Estate
Real Estate Law

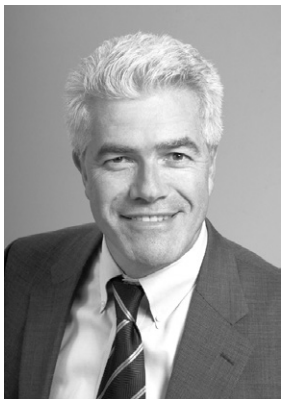


John W. Geismar
Tax Law

David L. Herzer, Jr.
Insurance Law
Personal Injury Litigation – Defendants
Professional Malpractice Law – Defendants

Stephen Hessert
Worker's Compensation Law – Employers

John H. King, Jr.
Worker's Compensation Law – Employers



Mark G. Lavoie
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Thomas S. Marjerison
Personal Injury Litigation – Defendants

Stephen W. Moriarty
Worker's Compensation Law – Employers

Russell B. Pierce
Appellate Practice
Commercial Litigation
Ethics and Professional Responsibility Law
Product Liability Litigation – Defendants
Professional Malpractice Law – Defendants

James D. Poliquin
Appellate Practice
Bet-the-Company Litigation
Commercial Litigation
Insurance Law
Personal Injury Litigation – Defendants

Daniel P. Riley
Administrative/Regulatory Law
Governmental Relations Practice

Roderick R. Rovzar
Corporate Law
Real Estate Law

John R. Veilleux
Insurance Law
Personal Injury Litigation – Defendants

Kudos

At the annual Comp Summit Seminar held in late August at The Samoset in Rockport, **STEVE MORIARTY** and **LINDSEY SANDS** participated in a panel designed to assist those employer and insurer representatives who are new to the system to become familiar with the system and with dispute resolution procedures.

MATT MEHALIC has been awarded the professional insurance designation Chartered Property Casualty Underwriter (CPCU®) by The Institutes. The Institutes are an educational organization that confers the CPCU designation on persons who complete eight rigorous courses and examinations and meet its ethics and experience requirements. Matt focuses his practice on insurance related matters, including coverage analysis, first-party claim analysis and civil litigation. He also works with state agencies on behalf of insurers. We congratulate Matt on this achievement.

CHIP HEDRICK has been elected to a three-year term on the Board of Directors of the Common Ties Mental Health Services. Common Ties is a non-profit, tax-exempt organization headquartered in Lewiston which provides case management and housing services to clients in the Androscoggin Valley area who have mental health issues.

The International Association of Industrial Accident Boards and Commissions (IAIABC) held its 102nd annual convention in Portland in September, and **STEVE MORIARTY** participated in a panel discussion comparing Maine's dispute resolution procedures with those of several other states.

JON BROGAN co-hosted a webinar entitled "Personal Injuries: Valuing the Impact" presented on behalf of Business Valuation Resources. Jon also just won his 15th club championship at Purpoodock Club in Cape Elizabeth.

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Return Service Requested

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