INBRIEF

Current Developments in Maine Law

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The First Circuit Significantly Expands The Scope and Reach of The Maine Human Rights Act

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By: Devin W. Deane, Esq.

In a recent decision, *Roy v. Correct Care Solutions, LLC,* 914 F.3d 52 (1st Cir. 2019), the United States Court of Appeals for the First Circuit significantly expanded the scope and reach of employer and non-employer liability under the Maine Human Rights Act ("MHRA"). Addressing "unresolved questions of Maine Law," the First Circuit held:

- Non-employers may be liable for employment-related discrimination under § 4633 of the MHRA;
- Employers may be liable for a hostile work environment created by non-employees as long as the employer knew of the harassment and failed to take reasonable steps to address it; and
- Employers may be liable for retaliation where its adverse action was caused by a third party's action or demand, which the employer knew was motivated by a retaliatory or discriminatory animus.

The case arises out of the Maine State Prison in Warren, Maine. The plaintiff, Tara Roy, worked at the Maine State Prison as a nurse, employed by defendant Correct Care Solutions, LLC—a government contractor that contracted with the Maine Department of Corrections ("MDOC") to provide health care services at the prison.

As alleged by the plaintiff, while working at the prison, several MDOC corrections officers made derogatory comments about the plaintiff and women in general; referred to her using sexual epithets; and spread rumors that she had slept with multiple corrections

officers. After she complained about the conduct to her employer, Correct Care Solutions, corrections officers began ignoring her requests for assistance and frequently left her alone with inmates in violation of prison protocols. The plaintiff reported the protocol violations to her employer, which she claimed were retaliatory and put her at risk of harm. Correct Care Solutions notified the MDOC of the complaints. After investigating at least one of the incidents, the MDOC concluded that the plaintiff had exaggerated the circumstances of the alleged protocol violations. The MDOC revoked the plaintiff's security clearance, which was a requirement of plaintiff's position at Correct Care Solutions. Citing the revocation of her security clearance, Correct Care Solutions terminated the plaintiff's employment.

"CITING A NUMBER OF FEDERAL CASES INTERPRETING...CLAIMS UNDER TITLE VII, THE FIRST CIRCUIT HELD THAT 'AN EMPLOYER CAN BE LIABLE UNDER THE [MAINE HUMAN RIGHTS ACT] FOR A HOSTILE WORK ENVIRONMENT CREATED BY NON-EMPLOYEES AS LONG AS THE EMPLOYER KNEW OF THE HARASSMENT AND FAILED TO TAKE REASONABLE STEPS TO ADDRESS IT.'"

The plaintiff sued the MDOC and Correct Care Solutions alleging, among other things, that she was subjected to a hostile work environment created by the MDOC correction officers; that her employer, Correct Care Solutions, knew of the officers' harassment and failed to take reasonable steps to address it; and that her termination and the revocation of her security clearance were in retaliation for her complaints about the hostile work environment created by the MDOC corrections officers.

The United States District Court for the District of Maine entered summary judgment in the defendants' favor. With respect to the claims against the MDOC, the District Court held that non-employers, like the MDOC in this instance, cannot be liable under the MHRA. With respect to the claims against Correct Care Solutions, the District Court held that the plaintiff did not generate a dispute of fact regarding the existence of a hostile work environment and that the plaintiff's complaints regarding the corrections officers' conduct were not protected activity—and therefore could not be the basis of a retaliation claim—because Correct Care Solutions was without the ability and authority to correct the officers' behavior.

On appeal, the First Circuit reversed summary judgment for each defendant finding error with each of the bases of the District Court's opinion.

Non-employer liability under the MHRA

Relying on the Law Court's decision in *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, 58 A.3d 1083, the District Court concluded that the MHRA allows employment discrimination actions against employers only, and never against non-employer entities like the MDOC. The First Circuit disagreed, holding, based on the text and history of § 4633 of the MHRA, the MHRA allows retaliation claims against any "person," including non-employers. The First Circuit distinguished Fuhrmann, where the issue before the Law Court was individual supervisor liability for a claim under § 4572, the MHRA provision that prohibits unlawful employment discrimination an "employer." In contrast, § 4633 prohibits discrimination by any "person," which, according to the First Circuit, targets actions by third parties, like the MDOC—not the employer, its employees, or agents. The First Circuit declined to extend Fuhrmann's holding to bar suits against non-employer third parties under § 4633.

Employer liability for a hostile work environment created by non-employees

The District Court did not address the issue of whether Correct Care Solutions could be liable for the alleged hostile work environment created by the non-employee, third-party corrections officers. The District Court entered summary judgment for Correct Care Solutions on the basis that the plaintiff did not establish a genuine dispute of fact as to whether the corrections officers' conduct constituted a hostile work environment. The First Circuit disagreed, concluding that the plaintiff had produced enough evidence to generate a dispute of fact as to the existence of a hostile work environment. The First Circuit then addressed Correct Care Solutions' potential liability for the alleged hostile work environment created by the non-employee, third-party corrections officers. Citing a number of federal cases interpreting similar claims under Title VII, the First Circuit held that "an employer can be liable under the MHRA for a hostile work environment created by non-employees as long as the employer knew of the harassment and failed to take reasonable steps to address it."

Employer liability for adverse action caused by a third party's discriminatory animus

In entering summary judgment for Correct Care Solutions on the plaintiff's retaliation claim, the District Court ruled that the plaintiff's complaints were not protected activity because, in its view, Correct Care Solutions lacked the ability and authority to correct the complained-of violations by the corrections officers. Because it concluded that the plaintiff's complaints were not protected activity, the District Court did not address the plaintiff's argument that Correct Care Solutions terminated her because of her complaints. The First Circuit reversed, concluding that the plaintiff's complaints

were protected activity under the MHRA and that factual disputes existed as to whether the plaintiff was terminated in retaliation for her complaints. Rejecting Correct Care Solutions' argument that its reason for firing the plaintiff— the MDOC's revocation of her security clearance—was neutral, the First Circuit held that "a jury could conclude that MDOC's retaliatory animus caused the revocation of the security clearance and, in turn, caused [the plaintiff's] termination." The First Circuit held that an employer may be liable for retaliation under the MHRA where a third party's retaliatory or discriminatory actions or demands caused the employer's adverse action and "the employer knew that [retaliatory or discriminatory] animus motivated the third party's actions or demands and simply accepted those actions or demands."

The First Circuit's opinion is non-binding but likely persuasive authority to Maine courts

Because it was interpreting and applying a state statute, and not reviewing the statute with respect to its constitutionality, the First Circuit's opinion is not binding on Maine state courts' interpretation and application of the MHRA. However, the First Circuit's opinion is likely to be persuasive authority unless and until the Law Court addresses the issues specifically.

Maine Healthcare Law Update

By: Christopher C. Taintor, Esq.

CHRISTOPHER C. TAINTOR

Recent months have seen a handful of court decisions of interest to the medical community. One involves liability insurance coverage for healthcare practitioners who "snoop" in the medical records of persons who are not their patients. A second involves physician immunity for defaming their colleagues and former employees to prospective new employers. The third and most recent addresses the question of how hospitals should handle the conflicting demands of impaired patients and those who claim to have the legal authority to make healthcare decisions for them.

***Medical Mutual Insurance Company of Maine v. Burka:* No Insurance Coverage for Doctors Who Snoop in Patient Records**

In *Medical Mutual Insurance Company of Maine v. Burka*, 899 F.3d 61 (1st Cir. 2018) the First Circuit Court of Appeals addressed a question that has come up with increasing frequency in recent years: what liability insurance coverage, if any, is available to a doctor (or other health care professional) who uses a hospital's electronic medical record to "snoop" on a person with whom he has no professional relationship? In *Burka*, the Court of Appeals found no coverage under a policy which was written to protect against risks associated with the delivery of healthcare services.

Douglas Burka was a surgeon who moved to Maine in 2013 with his wife, Allison, and briefly practiced in the Southern Maine Healthcare system. In 2016, Allison (having taken back her maiden name, Cayne) sued Dr. Burka in both Maine and Maryland. She alleged, among other things, that Dr. Burka had "used his clinical privileges at Southern Maine Medical Center to access [her] medical records"; that he had done so as part of a "campaign to... to learn about her mental and gynecological health and other confidential medical information," which he then exploited in a pattern of "abusive, emotionally destructive and controlling"

behavior; that he continued to enter her electronic record even after she left him and started divorce proceedings; and that because of Dr. Burka's access to her records, Allison was harmed when she chose not to seek out necessary psychiatric treatment. Notably, although Dr. Burka claimed that Allison had given him authority to look at her records when he was advising her about her health, Allison did *not* allege that he had ever been her doctor.

Dr. Burka tendered the defense of both lawsuits to Medical Mutual, under the terms of a policy issued to his employer. Medical Mutual denied that it had a duty to defend, and promptly brought suit in federal court, asking for a judgment declaring that the company had no obligation to defend Dr. Burka in either action. Under Maine law, an insurer declining a defense faces an uphill battle, since a duty to defend exists so long as a complaint, when compared to an insurance policy, "discloses a potential for liability within the coverage and contains no allegation of facts which would necessarily exclude coverage." *Travelers Indemnity Co. v. Dingwell,* 414 A.2d 220, 227 (Me. 1980). Nonetheless, the United States District Court entered a judgment in Medical Mutual's favor, which was affirmed by the First Circuit Court of Appeals.

The critical issue in the lawsuit was whether Dr. Burka's act of accessing his wife's records constituted "Professional Services" within the meaning of the policy – or, more precisely, whether the Complaint left open the *possibility* that he had been providing "professional services." Dr. Burka argued that because the Complaint said nothing about the existence or non-existence of a physician-patient relationship, there was a "potential factual basis" for coverage, which was enough to trigger a duty to defend. The Court disagreed, reasoning:

> The pleading does not merely omit any reference to a doctor-patient relationship between Burka and Cayne; its allegations directly contradict a professional association between them. We note, in particular, Cayne's assertion that Burka's actions involved unauthorized access to her medical records in Maine and improper disclosure to himself. The allegation that Burka was not entitled even to see her records leaves no room for a factual finding that he was involved in her medical treatment. Indeed, the complaint depicts his actions as solely animated by his personal objectives. Accordingly, the complaint unequivocally places Burka's alleged improper access to, and disclosure of, Cayne's medical records outside the Policy's coverage.

Although the Court of Appeals recognized that Maine courts historically have "employ[ed] an expansive concept of the duty to defend," it cited a recent decision of the Law Court, *Barnie's Bar & Grill, Inc.* v. *U.S. Liability Insurance Co.*, for the proposition that a "court may neither 'read extrinsic facts or allegations into an underlying complaint' nor 'selectively read facts or allegations out of that complaint in order to conclude that the insurer has a duty to defend.'" Because it was impossible to rule in Dr. Burka's favor without ignoring Allison Cayne's allegations that he had acted maliciously, and with the intent to cause her harm, the Court properly concluded that Medical Mutual owed Douglas no defense as a matter of law.

Argerow v. Weisberg: Immunity for Physicians Who Criticize Their Peers

Section 2511 of the Maine Health Security Act grants immunity from suit to physicians (and some others) "for making any report or other information available to any . . . professional competence committee . . . committee pursuant to law." A "professional competence committee" is any committee which has "responsibility effectively to review the professional services rendered in [a healthcare] facility for the purpose of insuring quality of medical care of patients therein." The term can include a credentialing, peer review, quality assurance, or medical executive committee, as long as its purpose is at least in part to "maintain or improve... quality of care," "reduce morbidity and mortality," or "establish and enforce appropriate standards of professional qualification, competence, conduct or performance."

In *Strong v. Brakeley,* which was decided in 2016, the Maine Supreme Judicial Court ruled that for physicians, the immunity afforded by Section 2511 is absolute – that is, even if a doctor who is asked to comment on the competence or character of a peer maliciously lies in response to that inquiry, he cannot be held liable for damages. The Court reasoned that the immunity provision is intended to encourage the candid reporting which is essential to promoting quality in the healthcare profession, and that allowing liability upon proof of bad faith would discourage doctors from exposing incompetent or unprofessional colleagues.

In *Argerow v. Weisberg,* 2018 ME 140, 195 A.3d 1210, the Law Court took the immunity analysis one step further. In that case Argerow, a nurse practitioner, resigned from her position with Dr. Weisberg and accepted a job at Mercy Hospital. In a lawsuit against both Weisberg and Mercy, Argerow alleged that Weisberg, who had an incentive to retaliate against her because she had testified against him in a workers compensation hearing, then contacted Mercy and accused her of incompetence, which led the hospital to withdraw its job offer. The Superior Court dismissed the complaint, citing Section 2511 of the MHSA. Argerow appealed and the Law Court affirmed the dismissal.

For a majority of the Law Court, the case was a simple application of the rule it had established in *Strong v. Brakeley.* However, two justices dissented, arguing that the Court had gone too far. Most notably, the dissenters said that it was error for the Superior Court, and a majority of the Law Court, to treat any and all information presented to a hospital as falling within the scope of Section 2511. In their view, Argerow should have been allowed to conduct some limited discovery focused on the immunity defense before the Superior Court ruled on the motion. They argued that "[t]he Court's decision expand[ing] the scope of immunity to include *any* information supplied to any representative of a hospital by a physician" was wrong, because the statute was "intended to apply to information supplied by a *qualified* reporter to an *appropriate* authority during a *legitimate* peer review process." According to the dissenters, context is critical in deciding questions of immunity, and from the complaint alone the Court could not know "to whom Weisberg placed his call or report,.. or whether that person could be properly deemed an appropriate 'board, authority, or committee' pursuant to Section 2511."

Argerow illustrates the difficult policy choices confronted by a court called upon to interpret and apply an immunity statute like Section 2511. There is no doubt that important public policies are served by

encouraging doctors and representative of health care organizations to be candid about the shortcomings of their peers. Patients can be harmed if doctors and hospitals are afraid to divulge that information to organizations that are prepared to hire their former employees, because they might be sued for defamation or on some other theory. On the other hand, as the law has now developed, healthcare professionals like Argerow have no recourse for even the most savage, career-crippling falsehoods, shared behind closed doors and with malicious purpose, regardless of the existence of any formal credentialing, peer review, or quality assurance process.

Nason v. Pruchnic: **New Challenges for Malpractice Trials**

In *Nason v. Pruchnic*, 2019 ME 38 (Me. Sup. Jud. Ct., March 12, 2019), the Law Court affirmed a $2,000,000.00 judgment in favor of a patient in a medical malpractice case. The Court touched on two trial issues of recurring significance in negligence litigation, one involving the admissibility of evidence and the other involving the burden of proving damages.

In *Nason*, the plaintiff broke a bone in his hand at work and sought treatment from the defendant, a hand surgeon, who implanted a screw in the scaphoid bone. The screw was mistakenly placed so that it protruded from the bone into surrounding cartilage, causing damage to the cartilage. Although the screw was eventually removed, a series of surgical procedures left the patient with permanent pain and impairment of the wrist.

At trial, the judge admitted the patient's hospital records, but only after redacting sections of several reports in which radiologists had offered opinions as to potential causes of the plaintiff's wrist problems, based on their review of his imaging studies. On appeal, the physician-defendant argued that the excluded excerpts were admissible either by statute or under exceptions to the general prohibition against hearsay evidence. The Law Court affirmed, though, reasoning that they were "statements of nontreating and nontestifying radiologists offering their expert opinions as to potential causes of visual findings," and that they were properly excluded because Pruchnic had not designated the authors as expert witnesses.

This aspect of the *Nason* decision will create new challenges for litigants on both sides of medical malpractice cases, and personal injury cases generally. Especially in cases with voluminous medical records, lawyers will be well-advised to parse through every record carefully to make sure that every doctor who participated in a plaintiff's care, and who expressed an opinion on paper, is identified as a potential testifying expert. They may then be required to offer those opinions at trial solely through live witnesses, rather than by offering the medical records into evidence.

The second significant issue addressed in the *Nason* case was the allocation of the burden of proving damages, where a plaintiff has a pre-existing injury or other limiting condition. The Law Court ruled several years ago, in *Lovely v. Allstate Ins. Co.*, 658 A.2d 1091 (Me. 1995), that in a negligence case, "whenever the defendant, in response to the damage claimed, produces evidence of a preexisting or subsequent injury which the defendant asserts is the cause of some portion of the plaintiff's problems," the burden falls on the defendant to differentiate between the damage he caused and the damage the plaintiff would have suffered in the absence of his negligence. The purpose of the so-called "single injury rule" is to "place any hardship resulting from the difficulty of apportionment on the proven wrongdoer and not on the innocent plaintiff."

In the *Nason* case, the pre-existing condition issue was raised in several ways. First, defense counsel told the jury in his opening statement that "there were other abnormalities in [Nason's] wrist which [had] nothing to do with the screw." The defense expert then testified that the extent of injury to the plaintiff's wrist could have been due to "wear and tear from an active life" or degenerative changes, as well as the trauma of the multiple surgeries. Finally, during closing arguments defense counsel reminded the jury that there were "other things going on in Mr. Nason's hand in different areas of the wrist," and that there was "evidence of cysts and a degenerative process even before the screw [was] placed." This evidence, the Law Court said, was sufficient to shift to the defendant the burden to prove what part of the harm was due to factors for which he bore no responsibility.

Although the single injury rule has been understood to be the law of Maine for more than twenty years, *Nason* illustrates the risk, and the evidentiary challenges, faced by any defendant hoping to limit his exposure in a case involving a plaintiff with pre-existing injuries. It is not enough to point out the pre-existing condition; unless the defendant can prove that some specific part of the plaintiff's harm is due to that condition, he will face legal responsibility for all of it.

"PATIENTS CAN BE HARMED IF DOCTORS AND HOSPITALS ARE AFRAID TO DIVULGE INFORMATION [ABOUT PEERS OR FORMER EMPLOYEES]... BECAUSE THEY MIGHT BE SUED FOR DEFAMATION OR ON SOME OTHER THEORY. ON THE OTHER HAND, AS THE LAW HAS NOW DEVELOPED, HEALTHCARE PROFESSIONALS ...HAVE NO RECOURSE FOR EVEN THE MOST SAVAGE, CAREER-CRIPPLING FALSEHOODS, SHARED BEHIND CLOSED DOORS AND WITH MALICIOUS PURPOSE, REGARDLESS OF THE EXISTENCE OF ANY FORMAL CREDENTIALING, PEER REVIEW, OR QUALITY ASSURANCE PROCESS."

Workers' Compensation: Appellate Division Decisions

By: Katlyn M. Davidson, Esq.

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Period of Refusal for a Job Offer

In the decision *Tiner v. Oak Grove Center,* Me. W.C.B. No. 18-30 (App. Div. 2018), the Appellate Division addressed the "period of refusal" regarding an employee's refusal of an offer of suitable employment pursuant to section 214. In prior litigation, the presiding ALJ found that the employee had sustained a work-related injury but denied the claim for incapacity benefits on the basis that the employee had refused a bona fide offer of reasonable employment under 39-A M.R.S.A. § 214(1)(A). The ALJ had also denied the employee's claim on an alternative basis that she suffered no earning incapacity on account of the injury.

Following this first decision, the employee filed a Petition for Review seeking to establish entitlement to incapacity benefits. In connection with this, the employee submitted some work search evidence and also claimed that the "period of refusal" of the employer's prior job offer had ended. With respect to the latter contention, the employee relied on the fact that she contacted several employers who are owned by the same parent company as Oak Grove (the employer with whom the work injury occurred). The ALJ found that the employee had contacted these related facilities to ask about advertised positions but that the employee did not identify herself as a former employee of Oak Grove when making these inquiries. Consequently, the ALJ denied the employee's Petition for Review. In doing so, the ALJ specifically found that the employee's contact with the related facilities was not sufficient to end the period of refusal. The ALJ further found that the employee's work search was inadequate because the employee had regularly presented her restrictions to employers at the point of initial contact before any application or resume were submitted. As a result, the ALJ found that her economic circumstances had not changed to overcome the *res judicata* effect of the prior Decision. As a result, the employee was denied incapacity benefits and the employee appealed.

The Appellate Division affirmed the decision of the ALJ regarding the period of refusal analysis. Relying on the prior Law Court decision of *Loud v. Kezar Falls Woolen Co.,* 1999 ME 118, 735 A.2d 965, the Appellate Division noted that some kind of "affirmative step" is required for an employee to end the period of refusal and that "speaking informally and in generalities" with an employer is not sufficient. Accordingly, the Appellate Division agreed with the ALJ's determination "that failing to identify oneself to the employer as a former employee seeking to return to work after an injury fell short of the level of communication required by section 214(1)(A)." The Appellate Division, although noting that it did not have to reach this issue, then went on to address the ALJ's alternative denial of benefits based on the work search evidence. The Appellate Division affirmed the ALJ's analysis regarding the employee's work search and that it did not show a change in circumstances.

Subsequent gradual injuries

The Appellate Division recently addressed whether an employee can sustain a second gradual injury involving the same body part in the decision of *Gurney v. Mercy Hospital & VNA Home Health Hospice,* Me. W.C.B. No. 19-6 (App. Div. 2019). In the underlying decision, the ALJ found that the employee sustained two gradual injuries involving her upper extremities. The first gradual injury occurred in 2011 while the employee was working for Mercy Hospital from repeatedly lifting a patient, causing her to experience pain in her bilateral forearms and elbows. The employee improved substantially from this injury and was able to resume regular duty work. Then, in 2012, the employee sustained an acute bilateral upper extremity injury from lifting a patient while working for the same employer, Mercy Hospital. Subsequently, in 2014, the employee alleged another work injury in the form of a gradual injury to her upper extremities from patient care. This time, the employee was working for a different employer, VNA Home Health. The employee filed Petitions on all three dates of injury, seeking lost time and medical benefits. Relying on the results

of a section 312 examination, the ALJ found that the employee sustained three work injuries; a gradual injury in 2011 with Mercy, an acute injury in 2012 with Mercy, and a second gradual injury in 2014 with VNA. Consequently, the ALJ ordered the payment of medical bills with apportionment reimbursement between the two employers.

VNA Home Health, the employer found responsible for the 2014 second gradual injury, appealed the ALJ's Decision. VNA argued that, as a matter of law, an employee cannot suffer two distinct gradual injuries involving the same body part with the same symptoms caused by performing the same type of work. In support of this position, VNA cited to the Law Court decision of *Derrig v. Fels Co.*, 1999 ME 162, 747 A.2d 580. The Appellate Division, however, disagreed with VNA's position and distinguished the *Derrig* decision. Instead, relying on a prior decision by the Appellate Division that dealt with a similar argument (*Eck v. Verso Paper*, Me. W.C.B. No. 16-20 (App. Div. 2016)), the Appellate Division reasoned: "To argue that an employee can sustain only one gradual injury to the same body part is to argue, in essence, that a gradual injury can never resolve or be significantly aggravated over time by future employment or activities." *Gurney*, ¶ 9. Thus, the Appellate Division affirmed the ruling of the ALJ that the employee sustained two, distinct gradual injuries in 2011 and 2014 while working for different employers. Thus, this is the second time that the Appellate Division has decided that an employee can sustain two gradual injuries of similar nature.

Recent Decisions From the Law Court

By: Matthew T. Mehalic, Esq., CPCU

MATTHEW T. MEHALIC

Breach of Home Construction Contracts Act Does Not Entitle Homeowner To Substantial Damages Or Recovery of All Attorney's Fees Incurred in Prosecuting Claim

In *John Sweet II v. Carl E. Breivogel* et al., 2019 ME 18 (Jan. 29, 2019), the Law Court looked at the connection between the Home Construction Contracts Act (HCCA) and the Unfair Trade Practice Act (UTPA). The case arose out of the home construction of a timber frame home by Sweet for the Breivogels on Mount Desert Island. The parties had exchanged communications prior to the commencement of construction. The Breivogels were shown several examples of Sweet's construction. Sweet gave the Breivogels estimates for construction of similar homes he showed them. The Breivogels inquired about whether Sweet could build them a saltbox style timber frame home for $275,000. The Breivogels contended that they believed they had requested a fully completed home, ready for occupancy. Sweet contended that he understood that the Breivogels only wanted an enclosed, weather tight timber frame home – including only a frame, walls, roof, insulation, doors, windows, chimney, and exterior shingles.

The Breivogels authorized Sweet to begin construction, but there was no contract. The Breivogels asked Sweet when they would formalize the project terms and Sweet responded that he had never signed a written contract in over thirty years. They did agree

"THE SUPERIOR COURT DETERMINED THAT [A BUILDER] VIOLATED THE HOME CONSTRUCTION CONTRACT ACT BY FAILING TO PROVIDE A WRITTEN CONTRACT, WHICH ALSO RESULTED IN A FINDING OF VIOLATION OF THE UNFAIR TRADE PRACTICES ACT." ALTHOUGH "THERE WAS NO LOSS SUSTAINED BECAUSE OF [THE] FAILURE TO PROVIDE A CONTRACT," THE COURT AWARDED "ATTORNEYS' FEES OF $30,000, AS ALLOWED UNDER THE UNFAIR TRADE PRACTICES ACT." THE DECISION REEMPHASIZES THAT EVEN IN THE ABSENCE OF DAMAGES, IN AN ACTION UNDER THE UTPA "ATTORNEYS' FEES AND COSTS AWARDED MAY BE SUBSTANTIAL – ESPECIALLY WHEN CONSIDERING THAT THE CONTRACTOR VIOLATING THE HOME CONSTRUCTION CONTRACT ACT WILL HAVE COSTS AND FEES OF HIS OR HER OWN."

that the Breivogels would be billed biweekly and pay for all materials and labor at a rate of $32/hour. Throughout the construction, Sweet sent the Breivogels emails containing photographs of the progress and biweekly invoices.

Upon completion of the work that Sweet had believed the Breivogels had originally requested, it was understood by both parties that Sweet would continue to construct a fully completed home ready, for occupancy. "At this point, the Breivogels determined, without informing Sweet, that they would have Sweet continue to work on the project, but would initiate legal action against him after they obtained a certificate of occupancy. They intended to seek damages for payments made in excess of $275,000." *Id* at ¶ 9. Despite this, the Breivogels paid Sweet a total of $601,195.75 through the end of construction. Sweet invoiced the Breivogels a total of $602,250.98, but the Breivogels refused to pay any additional amounts. Sweet then placed a lien on the home for $51,953.94 for unpaid labor and plumbing work and filed an action against the Breivogels. The Breivogels filed counterclaims for negligence, breach of contract, fraud, negligent misrepresentation, breach of the implied warranty of workmanship, and violation of the Unfair Trade Practices Act.

The Superior Court determined that Sweet was entitled to the money he had received under a theory of quantum meruit for the work he performed in constructing the home, but also held that he overcharged the Breivogels by $640.77. On the Breivogels' counterclaims, the Superior Court held that they failed to establish that Sweet was negligent, that he breached any contractual obligation to perform in a workmanlike manner, that he breached an implied warranty, or that Sweet committed fraud or negligent misrepresentation. The Superior Court did determine that Sweet violated the Home Construction Contract Act by failing to provide a written contract, which also resulted in a finding of violation of the Unfair Trade Practices Act. The Superior Court awarded costs to the Breivogels in the amount of $3,832.43 and attorneys' fees of $30,000, as allowed under the Unfair Trade Practices Act. The Breivogels appealed the Superior Court judgment arguing that the Superior Court erred in (1) concluding that they failed to establish their counterclaims for fraud, negligent misrepresentation, and breach of contract; (2) "calculating the damages recoverable under the Unfair Trade Practices Act arising out of the violation of the Home Construction Contract Act; and (3) awarding insufficient attorneys' fees." *Id.* at ¶ 13.

The Law Court held that the Superior Court did not err in its determinations in regards to the counterclaims for fraud, negligent misrepresentation, and breach of contract.

In regards to the calculation of damages recoverable under the Unfair Trade Practices Act, the Court found that the trial court was correct in awarding only the amount overcharged by Sweet - $640.77.

> In this case, while it is clear that the parties did not sign a contract or share an exact understanding of the scope and terms of construction, the court's application of quantum meruit was appropriate. The parties engaged in months of discussions and planning before the project began and remained in fairly constant communication throughout every phase of construction...The Breivogels permitted Sweet to continue the project beyond the [weather tight] phase – the point at which the Breivogels realized that Sweet had a different understanding of the scope and cost of construction – and allowed him to continue working until their home was fit for occupancy.

Id. at ¶ 18. Furthermore, the Court determined that the amounts charged by Sweet to the Breivogels was appropriate for the product received.

In regards to the Breivogels recovery under the Unfair Trade Practices Act, the Court also found that the trial court was correct in the awarded damages. "To recover under the [Unfair Trade Practices Act], a party must demonstrate a loss of money or property as a result of a UTPA violation." *Id.* at 21. In performing this analysis, the court looks to whether the homeowner has suffered a financial or tangible loss, whether the materials claimed to be furnished were in fact furnished, and whether the price charged was fair and reasonable. The Court determined that the Breivogels failed to establish that they did not receive value for their payments. There also was no loss sustained because of Sweet's failure to provide a contract.

Finally, in regards to the award of attorneys' fees, the Court determined that the Superior Court award was appropriate. "An award of attorney fees pursuant to the [Unfair Trade Practices Act] is recoverable only to the extent that it is earned pursuing a UTPA claim." *Id.* at ¶ 24. The Breivogels argued that they were entitled to recover all of their attorneys' fees because all of the claims were inextricably entwined with, and arose from the UTPA violations. The Law Court rejected this argument and held that the Superior Court properly exercised its discretion where the Breivogels failed to distinguish between the fees incurred associated with the UTPA violation and those associated with the counterclaims.

This decision reemphasizes that violation of the Home Construction Contract Act does not necessarily result in an imposition of damages, but the attorneys' fees and costs awarded may be substantial – especially when considering that the contractor violating the Home Construction Contract Act will have costs and fees of his or her own.

No Res Judicata Effect Against Non-Party To Prior Small Claims Judgment

In *Ring v. Leighton v. McGaw*, 2019 ME 8 (January 22, 2019), the Law Court held that "claim preclusion cannot, because of the unique limitations of small claims procedure, operate to bar a subsequent suit brought in District or Superior Court by a person who was not an actual party to the small claims action, but rather was at most in privity with the defendant in the small claims case." *Id.* at ¶ 2. The case arose out of an automobile accident. An individual, Clinton McGaw was driving a vehicle owned by Eric Ring. McGaw was involved in a collision with Daniel Leighton. Leighton brought a small claims action against McGaw and the court held that McGaw was negligent, awarding damages to Leighton. Subsequently, Ring filed a complaint in the Superior Court alleging that Leighton was negligent and caused Ring economic harm. The Superior Court entered summary judgment against Ring, holding that the prior judgment in Leighton's favor had res judicata effect and barred Ring's claim for negligence against Leighton.

On appeal, Ring argued that the small claims judgment did not have preclusive effect. The Law Court looked to the uniqueness of and purpose behind small claims actions, which is to provide a "simple, speedy and informal court procedure for the resolution of small claims." *Id.* at ¶ 11 (quoting 14 M.R.S. § 7481). The Court reviewed the unique rules applicable to the small claims process, including, but not limited, to the lack of application of the rules of evidence, the lack of a jury, the damages ceiling, and the inability of a defendant to file a counterclaim.

The Court then shifted gears to 14 M.R.S. § 7485, which provides in part,

> Any fact found or issue adjudicated in a proceeding under this chapter may not be deemed found or adjudicated for the purpose of any other cause of action.

Id. at ¶ 16. The Court held that Ring was correct that the statute barred the small claim's court's finding that McGaw was at fault in the accident from being res judicata in any other cause of action. The Court drew attention to the fact that Ring had not been a party in the prior small claims proceeding, so he had no opportunity to challenge the findings that were being used offensively against him. The Court also drew attention to the fact that even if Ring had wanted to intervene in the Leighton v. McGaw small claims action he would not have had a basis to do so under the Small Claims Act or the small claims rules. Also, if Ring had filed his own small claims action and joined Leighton's action against McGaw, Ring would have been limited in the damages sought and the claim would have been resolved in the informal small claims setting without a jury. Ring would have been forced to give up some of the rights he has if he elected to proceed in the District Court or Superior Court outside the small claims forum. The Court concluded,

> We recognize that in this case the small claims process results in Leighton being required to relitigate liability issues previously addressed in his earlier small claims case against McGaw – a result that, in other contexts, would ordinarily be precluded by res judicata principles if Ring were found to be in privity with McGaw. However, that said, Leighton made the choice to pursue a small claim solely against McGaw in small claims court. Having sought the benefits of the small claims process, Leighton is subject to the limitations of 14 M.R.S. § 7485.

Id. at ¶ 24.

In a concurring opinion, Chief Justice Saufley and Justice Alexander encouraged the Legislature to rectify what they felt was an unfair situation. In their opinion, the Legislature should amend the small claims statutes in order to avoid "further, duplicate adjudication of the same issue." *Id.* at ¶ 29. The unique setting and purpose behind small claims actions should not have the result of forcing a successful party to relitigate the termination of negligence and damages involving the same underlying accident.

It will be interesting to see whether the Legislature takes up this issue and seeks to eliminate the unfairness the Law Court feels currently exists in the small claims context. This could have serious ramifications for those not a party to a small claims matter and to liability insurers defending those non-parties.

" BECAUSE THE PURPOSE OF THE SMALL CLAIMS ACT IS TO PROVIDE A "SIMPLE, SPEEDY AND INFORMAL COURT PROCEDURE FOR THE RESOLUTION OF . . . CLAIMS" WHERE LESS THAN $6,000.00 IS AT STAKE, THE USUAL RULES OF CLAIM PRECLUSION DO NOT APPLY. A LITIGANT WHO WINS HIS CASE IN SMALL CLAIMS COURT CAN BE SUBJECT TO "FURTHER, DUPLICATE ADJUDICATION OF THE SAME ISSUE," AND PERHAPS A CONTRARY RESULT, IN SUPERIOR COURT.

New Members

We are pleased to announce that three of our attorneys, Katlyn M. Davidson, Kelly M. Hoffman, and Darya I. Zappia, were selected to become members of the firm effective in January of 2019

KATLYN M. DAVIDSON

Katlyn M. Davidson

Katlyn focuses her practice on the representation of employers and insurers in workers' compensation matters before the Workers' Compensation Board and the Maine Supreme Judicial Court. She also counsels her clients on employment related issues that come up with an employee's workers' compensation claim. She is a native of Bath and Yarmouth, Maine. She graduated from Yarmouth High School and then went on to attend Fairfield University for her undergraduate studies and then Vanderbilt Law School to earn her law degree. While in law school, Katlyn served as an Associate Justice for the Moot Court Board Managing Council and was the Policy Project Coordinator for the Women Law Students Association. Also during law school, she interned with the United States Attorney's Office for the District of Maine and participated in a post-graduate externship with the Federal Defender's Office for the District of Maine.

In the past, Katlyn has volunteered with the organizations My Sister's Keeper and was the chair of the local chapter of the national organization Dining For Women. She currently serves on the Board of Directors for Group Main Stream. Katlyn resides in Freeport with her husband Andy and young son Henry.

Darya I. Zappia

Darya counsels her clients on matters involving corporate law, real estate and intellectual property. She serves industries as diverse as IT, health, hospitality, finance and arts, to name a few. From business formation, to M&A's, to real estate development, to transactions involving intellectual property, Darya has assisted individuals, start-ups, accomplished businesses and institutional clients to achieve their objectives in an efficient and intelligent manner. She dedicates her pro bono time to helping Maine's immigrants and churches. Darya received her bachelor's degree from Minsk State Linguistic University and graduated *cum laude* from the University of Maine School of Law, during which time she served as a judicial intern in the Chambers of the Honorable Kermit V. Lipez of the United States Court of Appeals for the First Circuit. Darya is an avid swimmer and snowboarder. She lives in Old Orchard Beach with her husband, two children and five pets.

DARYA I. ZAPPIA

Kelly M. Hoffman

KELLY M. HOFFMAN

Kelly attended the University of Maine School of Law, after which she decided to stay in Maine and joined NHD in 2010. Her practice ranges from employment and discrimination matters, insurance defense and subrogation, and professional liability defense, to business defense and prosecution, OSHA compliance and investigations, and tax concerns. Kelly is frequently sought by insurance companies, hospitals, educational institutions, small business employers, educators, and medical professionals to present at seminars on matters of employment, ethics, risk management, and professional liability. New England Super Lawyers has consistently recognized her as a Rising Star, and Best Lawyers recognized Kelly in 2018 for her work in: Litigation – Labor and Employment and Professional Malpractice Law – Defendants.

During law school, Kelly worked as a summer associate at the Viennese law firm of Hausmaninger Kletter in Austria, assisting multi-national corporations in resolving disputes and participating in complex international arbitration. She was awarded recognition for writing Best Respondent's Brief as a member of Moot Court Board and served as editor for the Ocean and Coastal Law Journal, authoring an article about the international debate surrounding alewives and the use of shared fishing ladders by Canada and the United States.

In addition to her law career, Kelly is actively involved in the local and national field hockey scene. As goalkeeper during her undergraduate studies at Johns Hopkins University, Kelly was recognized as a star athlete and honored as an All-American in field hockey. In 2018, she was named by the U.S. Women's Masters Olympic Field Hockey Committee to its traveling team and represented Team USA during the International Hockey Federation (FIH) Masters World Cup, which took place in July and August in Terrassa, Spain. Kelly resides in Portland with her wife Beth Hoffman, their twin daughters, and dog.

Farewell Old Friend

DAVE L. HERZER, JR.

Dave Herzer left the firm in mid-March to embark on a new career as the General Counsel for Portland-based Constant Energy Capital Management, which provides financing for energy upgrades to homes and businesses in a number of states across the country. Dave first joined the firm in 1991 as a summer associate and has been an integral part of the NHD family ever since. We are sad to see Dave go but wish him the very best in the next phase of his professional life.

Kudos

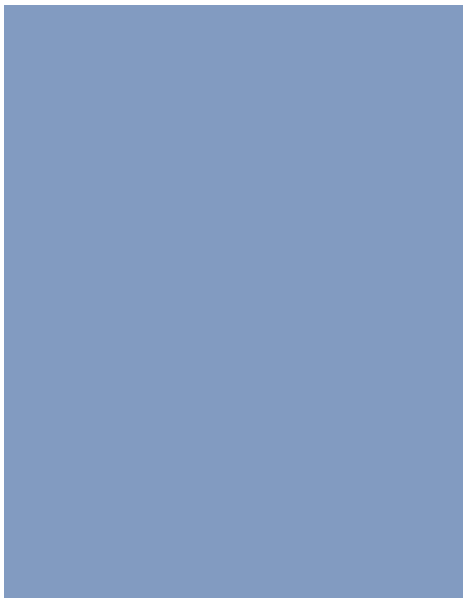
MARK LAVOIE has been asked again to participate in the Maine College of Trial Advocacy in May, at which time he will give the Harvey Ethics Lecture.

MARK LAVOIE serves as the State Chair of the American College of Trial Lawyers. In that role, Mark helped coordinate the regional rounds of the ACTL national trial competition, which was hosted this year by the University of Maine Law School. Mark judged five mock trials, including the finals round, with other lawyers and members of the judiciary from all over the Northeast.

MARK LAVOIE has been recognized as one of the Top 100 Attorneys in New England by The American Registry.

ELIZABETH BROGAN spoke at the 2018 annual meeting of the Maine Healthcare Association Workers' Compensation Fund about workers' compensation rule changes of interest to the long-term care community.

In addition to being named to the 2019 edition of The Best Lawyers in America for her work in Labor and Employment Litigation, **KELLY HOFFMAN** was also recognized in the 2019 edition for her defense work in Professional Malpractice Law.



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Return Service Requested

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