PROFESSIONAL LIABILITY DEFENSE FEDERATION

2020 SURVEY OF LAW

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PROFESSIONAL LIABILITY DEFENSE FEDERATION

2020 SURVEY OF LAW

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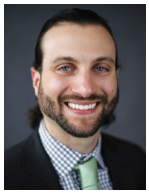

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Editor's Message

James J. Hunter
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The emergence of COVID-19 challenged every aspect of life during 2020. Beyond the human tragedy of the pandemic, uncertainty rattled financial and job markets and blurred the line between work and home life. Yet the practice of law evolved to mitigate the pandemic-fueled disruptions. Michigan Supreme Court Justice Bridget McCormack put it succinctly, noting that the court system underwent more change in six months than in the past 30 years. Given these changes, it is more important than ever to be aware of changes and trends in the law—a goal of this publication.

Despite these hurdles, lawyers, judges, and their support staff worked steadfastly to keep the system moving forward and issued important opinions impacting the law governing professionals throughout the country. We would like to thank the committee chairs, contributors, editors, and staff for their assistance compiling those cases for the second annual PLDF Survey of Law. As we hope 2021 marks a return to better days, we are hopeful that this publication will grow and continue to be a valuable resource for practitioners and insurers in the professional-liability space.

Our Mission

Professional Liability Defense Federation's mission is to enhance the stature and effectiveness of professional liability defense professionals through education, training and the exchange of information.

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CALIFORNIA

In a Case of First Impression, California Trial Court Upholds D&O Policy's "Bump-Up" Exclusion Permitting Insurer to Refuse to Pay $26 Million to Settle Securities Class Action

Phillip R. Maltin | *Raines Feldman LLP*

Officers and directors of Onyx Pharmaceuticals Inc. ("Onyx") agreed to a transaction by which Onyx shareholders received $125 per share from Amgen. Shareholders filed a class action lawsuit, alleging the Onyx's officers and directors (the "Insureds") failed to maximize the share price offered, preferring Amgen's bid while shutting out competing bidders at higher prices. Onyx received multiple layers of insurance, beginning with National Union Fire Insurance Company of Pittsburgh, PA, ("National Union") which issued a D&O policy insuring Onyx for $10 million. National Union provided a defense under a reservation of rights. Ultimately, defense costs and a $4 million contribution to the $30 million class action settlement depleted the lawsuit. Onyx paid the remaining $26 million out-of-pocket, and then demanded that excess insurers reimburse it. They refused, citing the "bump-up" exclusion in the National Union D&O policy. Onyx sued the excess insurers for declaratory relief.

Lawsuits sometimes follow corporate acquisitions, particularly where shareholders of the acquired entity allege the price paid for their stock is too low. In these lawsuits, shareholders may sue to increase or "bump-up" the amount paid for each share of stock. A "bump-up" exclusion in an insurance policy excludes from coverage the increase in the amount paid. It protects the insurer from having to make up the difference between the amounts the acquiring entity pays and the purported fair market value of the acquired entity's stock.

National Union's D&O policy has a "bump-up" exclusion on which the excess insurers relied when they refused to indemnify Onyx for the amount it paid to settle the claim. The exclusion states: "In the event of a Claim alleging that the price or consideration paid . . . for the acquisition . . . of . . . the ownership interest . . . of *an entity* is inadequate, Loss with respect to such Claim shall not include any amount of . . . settlement" increasing the consideration. (Emphasis added.) Onyx argued the bump-up exclusion applies only if the insured is acquiring the stock. The term "the entity" refers to a business other than Onyx. The exclusion should not apply when the insured is the target of the acquisition.

The excess insurers focused on what they claimed is the only "objective manifestation" of the parties' intent beyond the words of the contract: statements by the parties. In 2009, Onyx requested by email that National Union change the contract language so that it would clearly state that the "bump-up" exclusion would apply only if Onyx were to acquire the "securities of another company." National Union refused, leaving the term "an entity" to be construed to apply to the insured and to the acquiring entity.

The California Superior Court (the state's trial court) issued its Proposed Statement of Decision finding the "bump-up" exclusion applies, and the excess insurers have no obligation to indemnify Onyx for the $26 million it paid. The court requested briefing and has not entered a final order. Some policyholder advocates see this as an unwarranted expansion in the use of a bump-up exclusion. However, California has no published case on the subject. The trial court's decision is certain to receive the attention of California's Court of Appeal, and likely its Supreme Court.

Onyx Pharm., Inc. v. Old Republic Ins. Co., Case No., CIV 538248, slip op. at 2 (Cal. Super. Ct., Oct. 1, 2020).

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ALABAMA

Failure to Pay Arbitration Fee Results in Default and Paves Way for Trial Court Proceeding

Eris Bryan Paul | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

In *Fagan,* the trial court improperly compelled arbitration of an employee's dispute against the employee's former employer. The employer was held to be in default under the arbitration agreement by not complying with AAA's demand for payment of its portion of filing fees as determined by the AAA. This resulted in the dismissal of the employee's arbitral proceeding and commencement of the lawsuit in the Circuit Court. The Alabama Supreme Court closely examined Section 9 U.S.C. § 3 and *Pre-Paid Legal Services Inc. v. Cahill,* 786 F. 3d. 1287 (3d. Cir. 2015) which also held, "…failure to pay arbitration fees constitute a 'default' under § 3." The Alabama Supreme Court reversed the order compelling arbitration and remanded the case to the trial court for proceedings consistent with their opinion.

Fagan v. Warren Averett Companies, LLC, No. 1190285, 2020 WL 6252771 (Ala. Oct. 23, 2020).

CALIFORNIA

California Amends and Enacts Independent Contractor Laws Creating a Patchwork of Tests and Exceptions

Phillip R. Maltin | *Raines Feldman LLP*

On September 4, 2020, California's Governor signed a bill creating a constellation of statutes with inconsistent legal tests for determining whether a worker is an employee or an independent contractor. The result is a confusion of standards that deliver varying protection to groups of workers and businesses. Under these statutes, in most situations, California requires the use of the strict "ABC test" to determine whether a person is an independent contractor or employee. In some circumstances, the state permits the more flexible "economic realities test" (enunciated in *S.G. Borello & Sons, Inc. v. Dept. of Ind. Rels.* ("*Borello*"). Separately, on November 3, 2020, California voters passed Proposition 22, which established that drivers in app-based transportation businesses, such as Uber, Lyft, and DoorDash, previously deemed employees by California courts, are independent contractors.

The ABC Test for Independent Contractors

Under the ABC test, found in the new California Labor Code sections 2775 – 2787, a person providing services is an employee, not an independent contractor, unless the hiring entity demonstrates all of the following: (A) The "contractor" is free from the control and direction of the hirer in connection with the work to be performed; (B) The "contractor" performs work outside the hirer's usual business; and (C) The "contractor" customarily works in an independently established trade, occupation, or business and performs that work for the hirer. The hiring business has the burden of proving that it correctly classified the worker as an independent contractor.

The Economic Realities Test for Independent Contractors

Although the ABC test is the default, the new California Labor Code statues permit designated trades, professions, and occupations to by-pass that test and use the more flexible, multi-factor economic realities test found in *Borello* (also called the "*Borello* test"). The elements of the *Borello* test typically include an analysis of (i) who retains the right to control the work, (ii) whether the "contractor's" managerial skill will impact profit and loss, (iii) whether the "contractor" has invested in equipment or materials required for the work, (iv) whether the service requires special skill, (v) how permanent the working relationship is, and (vi) whether the service provided is an integral part of the hirer's business. The *Borello* test applies to diverse occupations. The elements of the *Borello* test may vary with the working being done.

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App-Based Drivers are Independent Contractors

California Proposition 22, codified at California Business & Professions Code sections 7448-7467, establish that app-based drivers working with rideshare and delivery network companies are independent contractors, not employees or agents of the business that operates the network in which the app-based drivers work. The new statutes apply to drivers for Uber, Lyft, and DoorDash. They also establish a unique four-part test for determining whether the driver is an independent contractor, based largely on the degree of control the company exercises over the driver.

An employee misclassified as an independent contractor under the *Borello* test, the ABC test, or Proposition 22 may seek a range of damages and penalties, including unpaid wages, unreceived overtime, and attorneys' fees. Harsh penalties available under California's Private Attorneys General Act ("PAGA") may also be available. These new statutes invite a new generation of wage and hour class actions in California based upon worker misclassification.

Cal. Bus. & Prof. Code §§ 7448-7467.
Cal. Lab. Code §§ 2775 – 2787.

When a Settlement Is Not a Settlement: California's Private Attorneys General Act Complicates Case Resolution

Phillip R. Maltin | *Raines Feldman LLP*

The California Supreme Court in *Kim v. Reins International California Inc.* ruled that a plaintiff employee who settled his individual claims may pursue a representative action under California's Private Attorneys General Act ("PAGA"). PAGA is a statutory scheme that permits an employee to file a lawsuit to recover civil penalties on behalf of themselves, other employees, and the State of California when an employer violates the California Labor Code. The employee must give 75% of the penalties to the State of California and distribute the remaining 25% among the affected employees.

Defendant Reins International is an international restaurant group that required its employees to agree to resolve employment-related disputes through arbitration. Its arbitration agreement included a class-action waiver. Kim, the plaintiff employee, sued for violations of the California Labor Code. Among them were alleged failures to pay wages, permit meal and rest breaks, provide accurate wage statements, and pay waiting time penalties for late payment of wages. Kim also sued for violations of PAGA. The trial court granted the employer's motion to compel arbitration of Kim's individual wage and hour claims; it stayed the portion of the action under PAGA until arbitration had ended. During arbitration, the plaintiff settled his individual claims. The employer then moved for summary adjudication of the PAGA action, arguing the plaintiff lacked standing because he had settled his claims at arbitration and was no longer "aggrieved." The trial court granted the motion and dismissed the action. The Court of Appeal agreed. The California Supreme Court reversed the decision to dismiss the lawsuit.

At the heart of a PAGA claim is the *violation*, not the *injury*. The employee may settle their individual claims but preserve standing to pursue penalties under PAGA. Compensating an employee for an injury is different from compensating an employee because the business violated a statute. For example, if an employee misses a meal break, the employee suffers harm in the form of a lost lunch hour. The statute violated enunciates the compensation the business must pay the employee: an additional hour of pay. The business has also violated the statute, subjecting it to civil penalties under PAGA. The harm redressed through the statute (the additional hour of pay) is different from the violation redressed through PAGA (the penalty).

Moreover, standing is not linked to the plaintiff suffering every injury alleged in the lawsuit. For PAGA to apply, an aggrieved employee need not suffer harm. The fact that a business violated a statute is enough. An employee who suffers one unlawful practice has standing to file a representative action seeking PAGA penalties even if the person did not experience every violation alleged.

Under *Kim v. Reins International California Inc*., insurers and California employers may no longer rely on the settlement of an individual's wage claims to resolve PAGA actions. This is likely to prompt insureds to refuse to settle individual claims to preserve coverage in defending against PAGA claims.

Kim v. Reins International California, Inc. (2020) 9 Cal.5th73, 459 P.3d 1123, 259 Cal.Rptr.3d 769 (2020).

COLORADO

Colorado Supreme Court holds that the State and Political Subdivisions Can Be Liable for Claims under the Colorado Anti-Discrimination Act

Scott A. Neckers | *Overturf McGath & Hull PC*

This case required the Colorado Supreme Court to decide whether claims against a governmental entity for compensatory relief under the Colorado Anti-Discrimination Act ("CADA") are barred by operation of the Colorado Governmental Immunity Act ("CGIA"). The Court was also asked to decide whether CRS § 24-34-405(8)(g), which allows for compensatory damages against "the state," should be read to include political subdivisions of the state and whether front pay is compensatory in nature, lies in tort, and is therefore barred by the CGIA. The Court concluded that (1) claims for compensatory relief under CADA are not claims for "injuries which lie in tort or could lie in tort" for purposes of the CGIA, and therefore public entities are not immune from CADA claims under the CGIA; (2) "the state," as used in CRS § 24-34-405(8)(g), includes political subdivisions of the state, and thus political subdivisions are not immune from claims for compensatory damages based on intentional unfair or discriminatory employment practices; and (3) front pay is equitable and not compensatory in nature under CADA, and age discrimination and retaliation claims seeking front pay do not lie and could not lie in tort for CGIA purposes. A companion case, *Denver Health and Hospital Authority v. Houchin*, 477 P.3d 149 (Co. 2020) was decided the same day and on the same grounds.

Elder v. Williams, 477 P.3d 694 (Co. 2020).

MONTANA

Defamation and Intentional Interference Claims Allowed Despite Being Filed After the Statute of Limitations for Employment-Related Claims

Hannah Stone | *Milodragovich, Dale & Steinbrenner, PC*

In January 2018, University of Montana women's soccer coach Mark Plakorus was informed his contract would not be renewed following an investigation regarding complaints against him filed by players. The players stated he was text messaging them too often and too late at night. During the investigation, the University found Plakorus had used his school-issued cellphone to text escort services while the team played in Las Vegas. Shortly after being notified of the non-renewal, a local newspaper published an article regarding the investigation and findings, highlighting the text messages. Other news agencies picked up the story and published partially redacted copies of the cellphone records, personnel file and decision not to renew the contract.

Plakorus sued the school in April 2019 alleging violation of his right to privacy, defamation, and breach of contract. He amended his complaint four months later to add claims of tortious interference, negligence and invasion of privacy. The University filed a motion to dismiss on the basis that the tort claims arose from the employment claim and thus were barred by the one-year statute of limitations. Like wrongful termination claims, state employment contract claims are subject to a one year statute of limitations. Mont. Code Ann. § 18-1-402; Mont. Code Ann. § 39-2-911. The lower court granted the motion and dismissed Plaintiff's case.

On appeal, the Montana Supreme Court determined the gravamen of the claim, not the title, dictates the applicable law. The Court concluded the privacy and negligence claims were based on duties that arose from the employment agreement, his contract with the University, and the policies that governed it. As such, the district court's dismissal on statute of limitations grounds for those claims was affirmed.

With respect to the defamation and tortious inference claims, the Court determined the allegations, if taken as true,

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demonstrated the University made accusation it knew or should have known would tarnish Plaintiff's character and "destroy his career." Tort claims have a two or three year statute of limitations based on the claims pled. Mont. Code Ann. § 27-2-204. As such, the Court allowed the tort claims for defamation and interference to survive based on the longer statute of limitations. The Court thus expanded the type of actions and time for suits against employers for claims arising in this state.

Plakorus v. University of Montana, 477 P.3d 311 (Mont. 2020).

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ALABAMA

United States Court of Appeals for the Eleventh Circuit Reverses Tax Court Determination, Finding Certain Easements "Granted-in-Perpetuity"

Eris Bryan Paul | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

In 2005, 2006, and 2007, Pine Mountain Preserve LLLP ("Pine Mountain") granted the North American Land Trust conservation easements over large parcels of land near Birmingham, Alabama. Pine Mountain claimed tax deductions for the easements under *Internal Revenue Code* §170, but the IRS denied them. Pine Mountain challenged the IRS's denials in the United States Tax Court, which made three determinations that together, became the focal points of this appeal.

Under *Internal Revenue Code* §170, a qualifying conservation easement requires that: (1) the easement must impose "a restriction (granted in perpetuity) on the use which may be made of the real property," IRC §170 (h)(2)(C); and (2) the grant must ensure that the easement's "conservation purposes" are "protected in perpetuity." *Id.* §170 (h)(5)(A). The Tax Court (1) held that certain 2005 and 2006 easements were not "granted in perpetuity" because, although Pine Mountain had agreed to extensive restrictions on its use of the land, it had reserved itself to limited development rights within the conservation areas; (2) found that a 2007 easement complied with §170(h)(5)(A)'s requirement that the easement's conservation purposes be "protected in perpetuity," despite its inclusion of a clause permitting the contracting parties to bilaterally or amend the grant; and (3) valued the 2007 easement at $4,779,500.00, almost exactly midway between the parties' wildly divergent appraisals.

In this case, the 11th Circuit reversed in part, and remanded in part. It held (1) that the 2005 and 2006 easements were "granted-in-perpetuity" despite the development rights; affirmed issue (2), holding that the existence of an amendment clause in an easement does not violate the "protected-in-perpetuity" requirement; and reversed on issue (3), holding that the tax court's averaging method when faced with competing experts contravened the applicable regulations, which required valuations based on comparable sales or diminished value findings. On remand, the Tax Court was instructed to evaluate the fair market value of the conservation restriction at the time of the contribution.

Pine Mountain Preserve, LLLP v. Commissioner of the IRS, 978 F. 3d 1200 (11th Cir. 2020).

FLORIDA

Court Finds Fraud and Conspiracy Claims Properly Alleged

Stephen B. Sambol | *Marteer Harbert, P.A.*

In *Gilison v. Flagler Bank*, investors sued the bank and its accountants, one of whom served as President and CEO and the other accountant was on the board, for their part in aiding and abetting a fraud. The fraud involved assisting one of the bank's clients, a car dealership, by leading investors to believe loans that were made to the dealership were properly documented on the dealership's books and records, and concealing that the dealership obtained duplicate titles for cars financed by the investors. This scheme which was part of a floor plan financing program allowed the dealership to collect money from the sale of the cars and pay the bank while avoiding repaying the investors. In addition to the fraud and aiding and abetting claims, the investors further alleged the accountants failed to engage in generally accepted accounting principles, which allowed the bank to received funds that were owed to the investor Plaintiffs. The court found that the Plaintiffs properly alleged an underlying fraud, the bank's knowledge of the fraud, and aiding and abetting. The court also found there were sufficient facts to prove a conspiracy.

Gilison v. Flagler Bank, 303 So.3d 999 (Fla. Dist. Ct. App. 2020).

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VIRGINIA

Accounting Firm's Engagement Agreement Barred Recovery of Consequential Damages

J. Peter Glaws, IV | *Carr Maloney P.C.*

In *Gradillas Court Reporters, Inc. v. Cherry Bekaert, LLP*, the U.S. Court of Appeals for the Fourth Circuit affirmed the federal district court's grant of summary judgment in favor of a defendant account firm. *See Gradillas Court Reporters, Inc. v. Cherry Bekaert, LLP*, No. 2:17cv597 (E.D. Va. Nov. 6, 2018).

Applying Virginia law, the district court entered judgment in favor of the accounting firm, holding that a broad engagement letter between the parties constituted an umbrella agreement under its plain terms, whereby the accountants would provide varied professional services to plaintiff upon request. The agreement therefore governed the consulting services at issue. As such, the limitation of liability provision in the engagement letter was fully enforceable under Virginia law and barred recovery of consequential damages such as the lost profits sought by the plaintiff. The court also granted judgment on plaintiffs' alternative "professional negligence" claim because under Virginia law, the duty owed by a professional consultant to their client arises solely by virtue of the parties' contract. Therefore, because a tort action cannot be based on a negligent breach of contract, plaintiff could not maintain a separate, non-contractual, claim.

Gradillas Court Reporters, Inc. v. Cherry Bekaert, LLP, 799 F. App'x 205, 205 (4th Cir. 2020).

Fourth Circuit Upholds Arbitration Award Against Brokers

J. Peter Glaws, IV | *Carr Maloney P.C.*

In *Interactive Brokers LLC v* Scaroop, investors appealed the U.S. District Court for the Eastern District of Virginia's order vacating an arbitration award in favor of the investors against former broker. The investment manager on the investors' account allegedly traded high-risk securities through portfolio margin accounts in violation of FINRA Rule 4210(g). As a result of a significant market correction on August 24, 2015, the investors' account value dropped by 80%. Because the account value fell below the margin requirements, the broker liquidated the accounts and ultimately the investors owed nearly $400,000 to the broker. Investors initiated arbitration proceedings against the broker, asserting a myriad of claims.

An arbitration panel awarded investors the value of their accounts on the day before the investment manager improperly purchased securities through portfolio margin accounts. The arbitrators did not articulate their reasoning because the parties waived their right to a reasoned decision. The Fourth Circuit reiterated federal and Fourth Circuit law favoring arbitration and deference to arbitration awards, and held that the arbitrators' award in favor of investors was not in manifest disregard of the law. While the broker argued that the arbitrators improperly based their award on violation of the FINRA Rule because those Rules do not provide a private right of action, the court noted that the investors did not bring a specific cause of action under FINRA. They alleged, among other things, breach of contract. Thus, because the contract between the parties incorporated all applicable laws and regulations, the broker's violation of FINRA rules reasonably supports a breach of contract claim and the arbitration award in favor of the investors was reasonable.

The Fourth Circuit also held that the compensatory damages and award of attorney's fees were not in manifest disregard of the law because Connecticut law, which the contract stated governs, supports such damages under the circumstances. With regard to compensatory damages, it was reasonable to award investors the value of their investment accounts on the day before the improper investments because contract damages under Connecticut law—similar to Virginia and many other states—are intended to place the parties in the same position as if the contract had not been breached.

Interactive Brokers LLC v. Scaroop, 969 F.3d 438 (4th Cir. 2020).

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PLDF Survey of Law
Healthcare Malpractice

ALABAMA

Alabama Supreme Court Prohibits Discovery of Other Acts and Omissions

Walter J. Price | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

The Alabama Supreme Court of Alabama granted the hospital's writ of mandamus and directed the trial court to vacate its order compelling a hospital to respond to certain interrogatories and requests for production. The case arose out of the suicide by an outpatient psychiatric program patient who leapt to her death from a hospital parking deck. Generally, plaintiff alleged that the hospital breached the standard of care by not providing a safe environment for the patient's care.

In discovery, plaintiff sought information about contemplated changes and modifications to the parking deck following prior suicides. The plaintiff argued that because information about the earlier suicides was not requested, the prohibition against discovery of other acts and omissions pursuant to the Alabama Medical Liability Act was not applicable. The Supreme Court of Alabama disagreed. It found that the information sought was "inextricably intertwined" with the other suicides and did not address the alleged breach of the standard of care owed by the hospital to this patient. Thus, the Court ruled that plaintiff was not entitled to the requested discovery.

Ex parte BBH BMC, LLC, 299 So. 3d 961 (Ala. 2020).

Court finds HIPAA Does Not Prevent Ex Parte Contact with Healthcare Providers

Walter J. Price | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

In an important holding addressing informal discovery via ex parte meetings with physicians and other healthcare providers, the Supreme Court of Alabama determined that nothing in Alabama law prohibits counsel, including defense counsel, from

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seeking ex parte interviews of plaintiff's treating physicians. Likewise, the Court determined that HIPAA does not prohibit ex parte interviews with treating physicians as long as a qualified protective order satisfying 45 C.F.R. 164.512(e) is in place. The Court did note that there may be exceptional circumstances that, if good cause is shown, may justify the imposition of conditions and/or restrictions on such ex parte interviews though such was not the case here.

Ex parte Freudenberger, No. 1190159, 2020 WL 3526361 (Ala. June 30, 2020).

Court Outlines Expert Witness Requirements of the Alabama Medical Liability Act

Walter J. Price | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

This case involved claims against a board-certified surgeon in which the patient asserted she underwent an unnecessary surgical procedure based upon the physician's alleged statement that the patient had cervical cancer. The Supreme Court of Alabama affirmed summary judgment based upon the failure of the plaintiff to provide expert testimony from a similarly situated expert witness establishing that the standard of care had been breached.

Specifically, the case involved interpretation of Ala. Code § 6-5-548(c)(3) which addresses the requirements that an expert witness must meet in order to testify about care provided by a medical specialist. These requirements include being licensed by the appropriate regulatory board or agency of Alabama or some other state, that the physician is trained and experienced in the same specialty, that the expert witness is certified by an American board in the same specialty, and has practiced in this specialty during the year preceding the alleged breach of the standard of care. Undertaking a plain reading of the statute, the Court held that the plaintiff's expert witness was not qualified as he was not certified by an appropriate American board in the same specialty at the time he provided his expert opinion. The fact that the witness had previously been board-certified was insufficient to meet the mandates of the Alabama Medical Liability Act.

Hannah v. Naughton, No. 1190216, 2020 WL 5742000 (Ala. Sept. 25, 2020).

Physician's Actions Found Outside the Line and Scope of Her Employment

Walter J. Price | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

The Supreme Court of Alabama reversed and rendered a $300,000.00 verdict entered against Medical Center Enterprise. Plaintiffs claimed that the hospital was vicariously liable for the actions of an employed physician who injected herself into a friend's child custody issue by accessing prescription drug records for the wife of the friend's ex-husband.

Since the individual was not a patient of the physician or the hospital, the prescription records were protected by HIPAA. In reversing the jury verdict, the appellate court declined to address whether HIPAA created a private right of action under Alabama law. Instead, the Supreme Court of Alabama determined that the physician's actions were not in the line and scope of her employment as a hospitalist at Medical Center Enterprise; but, were personally motivated instead. Further finding that the actions provided no benefit to the hospital, the Court held that the hospital could not have ratified the physician's actions and could not be vicariously liable for her conduct.

QHG of Enter., Inc. v. Pertuit, No. 1181072, 2020 WL 5740827 (Ala. Sept. 25, 2020).

Alabama Supreme Court Clarifies Standard of Proof and Expert Witness Requirements

Walter J. Price | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

The Alabama Supreme Court reversed a judgment as a matter of law entered in favor of the defendant physician in a case involving the alleged failure of a family practice physician to advise the patient of an abnormal, elevated PSA level. Multiple issues were raised at the appellate level, though two are noteworthy.

First, the Supreme Court of Alabama has frequently noted that the plaintiff must prove the alleged negligence probably, not possibly, caused the plaintiff's injury. However, noting that in cases where there is evidence that prompt diagnosis and

treatment would have placed the patient in a better position than he was as a result of inferior medical care, the case may be properly submitted to the jury. Along those same lines, the court noted the apparent limitations presented by a "failure-to-diagnose" the case as information regarding the patient's prognosis if earlier treatment had occurred is necessarily based on less evidence than would have been available if that earlier treatment had actually occurred.

Another significant issue addressed by the appellate court involved the qualification of plaintiff's standard of care expert witness. At the time of the treatment to the patient, the expert witness was practicing as a part of the aerospace residency program at the Naval Air Station in Pensacola, Florida. He testified that he "moonlighted" in urgent care centers, and was not, at the time, practicing in a community-based family practice program. So, he would not have been in the position to oversee or manage any system of notification patients on a daily basis. While the Alabama Medical Liability Act requires a similarly situated witness practice in the same specialty during the year preceding the date that the alleged breach of the standard of care occurred, the *Spencer* Court held such refers "to the actual practice of the specialty at issue rather than the exact setting in which the defendant doctor practices the specialty."

Spencer v. Remillard, No. 1180650, 2020 WL 5268048 (Ala. Sept. 4, 2020).

Proximate Causation Question Leads to Reversal of Judgment as a Matter of Law

Walter J. Price | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

The Supreme Court of Alabama reversed judgment as a matter of law entered in favor of the defendant physician. The plaintiff asserted that the surgeon performed an unnecessary cholecystectomy which was followed by the patient's death due to an alleged failure to surgically clip the cystic artery causing bleeding that led to, or contributed to, the patient's death. Causation testimony was highly disputed, largely because the patient's body was exhumed more than two years after the death and it was noted during the autopsy that the body was severely decomposed. While the Court found that the plaintiff submitted sufficient evidence to cause a jury question as to the issue of the proximate cause of death, it further noted that the defense expert witness could not completely rule out the possibility that the surgery was a contributing factor in the patient's death seemingly shifting the burden on the defendant to dispute proximate cause in order to support the judgment as a matter of law.

Williams as next friend of Williams v. Barry, No. 1180352, 2020 WL 3478528 (Ala. June 26, 2020).

Alabama Supreme Court Clarifies the Need for Expert Testimony

Walter J. Price | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

In *Youngblood v. Martin*, Supreme Court of Alabama reversed a jury verdict against the physician and ordered that the trial court enter judgment as a matter of law. The case arose out of an outpatient sinus surgery following which the patient developed pulmonary edema and subsequent problems with her oxygen saturation. Despite being transferred to the intensive care unit of the hospital, she died four days after the surgery.

In addressing the required proof under Ala. Code § 6-5-548(c), the court confirmed that the plaintiff's counsel failed to establish that the plaintiff's expert witness was licensed to practice medicine at the time he gave his testimony. Thus, the testimony was inadmissible and, therefore, plaintiff did not present any evidence to the jury indicating that Dr. Youngblood breached the standard of care or that the breach proximately caused the patient's death.

Youngblood v. Martin, 298 So. 3d 1056 (Ala. 2020).

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COLORADO

Colorado's Corporate Practice of Medicine Doctrine Results in Reversal of Verdict Against Ambulatory Surgery Center for Injury Based on Provider's Negligence

Scott A. Neckers | *Overturf McGath & Hull PC*

This case involved the corporate practice of medicine doctrine, which prohibits a corporation that employs a physician from interfering with the physician's medical judgment. Plaintiff claimed negligence against an ambulatory surgery center after she was severely injured during a procedure to treat her back pain. The Colorado Court of Appeals reversed the jury's verdict for the plaintiff, applying the corporate practice of medicine doctrine. It held that the ambulatory surgery center was not liable to plaintiff for failing to protect the plaintiff from the treating physician's negligence.

Plaintiff Smith visited SpineOne for an evaluation of her back pain. Khan, a SpineOne employee and Smith's treating physician, performed an epidural injection in her spine at Surgery Center at Lone Tree, LLC (SCLT), an ambulatory surgical center. Khan used the drug Kenalog off-label (in a way not approved by the US Food and Drug Administration) and did not obtain Smith's informed consent to his off-label drug use. Smith subsequently lost all feeling in her lower extremities. She was eventually diagnosed with paraplegia and remains permanently paralyzed below the waist. Smith and her husband sued Khan, SpineOne, and SCLT. The Smiths settled their claims against Khan before trial, and the trial court dismissed their claims against SpineOne. As to SCLT, a jury found in the Smiths' favor and awarded them $14,905,000 in damages. Applying Colorado's Health Care Availability Act (HCAA), the trial court reduced the verdict to $6,974,692.27.

SCLT appealed the judgment to the Colorado Court of Appeals. SCLT argued and the Court of Appeals agreed that the corporate practice of medicine doctrine barred Smiths' negligence claims, and thus the claim should not have been submitted to the jury. The decision to administer a certain medication to a patient in a certain situation is a medical decision made by a physician alone. Because SCLT could not dictate to Khan how he could use Kenalog, SCLT could not be held vicariously liable for Khan's negligent administration of that drug. Further, a health care facility generally has no obligation to obtain a patient's informed consent. Accordingly, as a matter of law, the trial court should have dismissed the corporate negligence and uninformed consent claims against SCLT. The Court found that judgment should have been entered on behalf of SCLT, and reversed the judgment.

Smith v. Surgery Center at Lone Tree, LLC, 2020 COA 145 (CA 10/15/20).

ILLINOIS

Wrongful Death Claim May be Brought Where Alleged Medical Negligence Leads to a Legal Voluntary Abortion

Ryan J. Gavin | *Kamykowski, Gavin & Taylor, P.C.*

The Illinois Wrongful Death Act authorizes actions for the wrongful death of an unborn child regardless of its "state of gestation or development." (740 ILCS 180/2.2). The statute goes on to prohibit such wrongful death actions where (1) the pregnancy is terminated by a lawful abortion with requisite consent, or (2) where negligence is alleged against a health care provider who did not know and had no medical reason to know of the mother's pregnancy. In *Thomas v. Khoury* the Appellate Court of Illinois was called upon to reconcile the statutory language where the alleged negligence of a health care provider who had reason to know of the pregnancy led to a voluntary abortion.

The patient in *Thomas* presented to a health care provider for elective surgery. Standard pre-operative screening for pregnancy was performed. Elevated hCG in the patient's blood and urine indicated that she could be pregnant. An ultrasound examination was likewise consistent with a pregnancy of less than four weeks gestation but not conclusive. The patient alleged her physician told her she was not pregnant and could safely proceed with surgery. The procedure was performed under general anesthesia.

Post-operatively, the patient presented to another institution for treatment of an infection. She was then confirmed to be pregnant. However, the anesthesia and other medications received in connection with her surgery and infection increased the risk of serious malformations in the fetus. The patient therefore made

the voluntary decision to terminate her pregnancy.

The patient brought a claim under the Wrongful Death Act for the loss of her unborn child. The trial court certified to the Appellate Court the question of whether the Wrongful Death Act "bars a cause of action against a defendant physician or medical institution for fetal death if the defendant knew or had a medical reason to know of the pregnancy and the alleged malpractice resulted in a non-viable fetus that died as a result of a lawful abortion with requisite consent."

The Appellate Court answered the certified question by finding that the claim was not barred by the prohibition on actions where pregnancy is terminated by a lawful abortion. The statute was found to allow a claim where a plaintiff can establish an actionable injury to the fetus without regard to abortion being the ultimate factual cause of death. Here, the patient alleged the defendant health care providers had medical reason to know of her pregnancy and committed misconduct that injured the fetus such that they caused its death by a lawful abortion. Thus, the certified question was answered with a "no" and the claim could proceed.

Thomas v. Khoury, __N.E.3d__, 2020 Ill. App. (1st) 191052.

Identification of Specific Acts of Negligence Does Not Preclude Submission of *Res Ipsa Loquitor* Claim

Ryan J. Gavin | *Kamykowski, Gavin & Taylor, P.C.*

Res ipsa loquitor may serve as the basis for submission of a medical malpractice claim when it is demonstrated that the plaintiff was injured (1) in an occurrence that does not ordinarily happen in the absence of negligence, and (2) by an agency or instrumentality within the exclusive control of the defendant(s). The doctrine is a form of circumstantial evidence and is not to be invoked where the specific cause of injury is known unequivocally. When the cause of injury is known with precision, there is no need to infer that the injury was caused by an unknown act or force. In *Willis v. Morales* the Appellate Court of Illinois reversed a defense verdict where the plaintiff, whose experts identified specific potential mechanisms of injury, was denied a *res ipsa loquitor* jury instruction.

In *Willis* the plaintiff underwent a twelve-hour plastic surgery procedure and arrived in the recovery room with very swollen arms. She was subsequently diagnosed with injuries to the median nerves in both arms. She brought a medical malpractice claim and, prior to a trial against her surgeon and the anesthesiology team, the court granted a motion in limine barring evidence or testimony that plaintiff's injuries would not have occurred in the absence of negligence. The case proceeded to trial with testimony from the plaintiff's experts that the injuries occurred during surgery, there were multiple potential negligent acts that could have caused the injuries, but no specific mechanism could be unequivocally identified as the culprit. In closing argument, the defendants emphasized that plaintiff had not proven the cause of her injuries. The trial ended with a verdict in favor of the defendants.

The Appellate Court ruled that it was error to exclude evidence and instructions regarding *res ipsa loquitor* at trial. The fact that the plaintiff's experts knew compression caused the injuries and identified specific sources of compression did not preclude submission on a *res ipsa loquitor* theory. The plaintiff, but for the trial court's pretrial ruling, would have presented opinion testimony that the injuries alleged would not ordinarily happen in the absence of negligence. Her evidence of specific sources of the injury served to identify the possible instrumentalities of her injury and establish that all were in the control of the defendants. The judgment was reversed and the case remanded to the trial court.

Willis v. Morales, __N.E.3d__, 2020 Ill. App. (1st) 180718.

MISSOURI

Defense Expert Testimony Identifying Alternative Possible Causes of Infant's Brain Injury Was Speculative and Inadmissible

Ryan J. Gavin | *Kamykowski, Gavin & Taylor, P.C.*

In birth injury cases causation is typically a hard-fought battle of the experts involving the explanation of medically sophisticated theories to the jury. From the defense perspective,

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there may be multiple alternative mechanisms to explain the infant's injury. In *Linton v. Carter*, however, the Court of Appeals of Missouri ruled that a defense expert's testimony explaining multiple possible causes of the infant's injury should have been excluded by the trial judge.

In *Linton* a pre-term infant was delivered via emergency Cesarean section and ultimately diagnosed with a brain injury known as Periventricular Leukomalacia ("PVL"). The plaintiff's theory was that the infant's injury occurred in the minutes prior to the Cesarean section when the umbilical cord was compressed following rupture of the mother's membranes. The defendants offered a neonatology expert who disagreed with Plaintiff's theory as to the cause and timing of PVL. In support of his opinion, the expert offered multiple alternative potential causes. He went on to testify, however, that he could not identify the precise cause of the infant's PVL and did not believe anyone could.

The plaintiff argued that the defense neonatologist's opinions regarding alternative potential causes were inadmissible absent testimony, to a reasonable medical certainty, that each caused or contributed to cause the infant's PVL. The defendants countered that, because they did not bear the burden of proof, they could offer reasonable alternative causation theories without affirmatively claiming, to a reasonable degree of medical certainty, they knew the precise cause. The Court of Appeals, in a 2-1 decision, agreed with the plaintiff and held that because the expert's "opinions were not stated to a reasonable degree of medical certainty, they were irrelevant and speculative and therefore were of no value to the jury." The Court of Appeals further found that reversal was warranted because the expert was the only neonatologist to testify and his opinions were highlighted during the defendants' closing arguments.

The dissenting judge charged the majority with ignoring Supreme Court of Missouri precedent explicitly authorizing evidence of alternative causes even when expressed as possibilities. The dissent explained in great detail how the expert identified evidence supporting his opinion that the infant had not suffered a profound brain injury in the minutes prior to delivery. Having testified to a reasonable degree of medical certainty that the PVL was not caused by the alleged negligence of defendants, he was entitled to offer reasonable alternative possibilities. Because the defendants had no burden to disprove causation or affirmatively prove an alternative cause, the dissent concluded that the testimony regarding possible causes was admissible to rebut the plaintiff's theory of causation.

Linton v. Carter, 2020 Mo. App. LEXIS 1402 (Mo. App. W.D. 2020).

Tolling of Statute of Limitations for Continuing Care Ceases When the Necessity Giving Rise to Treatment Ends Even When Injuries Discovered Later

Ryan J. Gavin | *Kamykowski, Gavin & Taylor, P.C.*

Missouri law generally requires that claims of medical negligence be brought within two years of the date of the alleged negligence. There are limited exceptions to this general rule. One of these is the "continuing care exception" that tolls the statute of limitations until the necessity that gave rise to the care relationship has ended (unless the physician-patient relationship is terminated by one or both parties earlier). This allows the patient, who has a limited window within which to file suit, to avoid choosing between suing a health care provider during a course of treatment or forfeiting a viable cause of action.

In *Newton v. Mercy Clinic East Communities,* the plaintiff had an ovarian cyst removed by the defendant OB-GYN in July 2012. The patient continued with three months of post-operative care including treatment of an infection. The patient then had two final post-operative evaluations in February and June 2013.

The patient returned to the defendant OB-GYN for a routine well-woman examination in January 2015 and reported difficulty conceiving. Diagnostic testing revealed that the patient's fallopian tubes were damaged. In June 2016 the patient filed her suit alleging that the defendant OB-GYN provided negligent post-operative care almost four years earlier in July and August 2012.

The parties agreed that the last possible date the patient received treatment for the cyst and infection was June 2013. The patient argued, however, that the necessity giving rise to the care relationship continued until 2015 when she returned with an injury allegedly caused by negligent treatment in 2012. The Supreme Court of Missouri rejected this argument. The determination of when the necessity giving rise to the patient care relationship has ended is an objective standard without inquiry into what either party knew or should have known of the injury. In this case, the necessity ended with the final post-operative evaluation. If the court accepted the patient's argument, it would have effectively rewritten the statute of limitations to commence with the patient's discovery of the consequences of the provider's alleged negligence. The Missouri legislature, however, has specifically rejected enactment of a discovery rule for commencement of the medical negligence statute of limitations.

The Supreme Court of Missouri refused to extend the continuing care rule as advocated by the patient and affirmed the trial court's entry of summary judgment in favor of the defendant.

Newton v. Mercy Clinic East Communities, 596 S.W.3d 625 (Mo. banc 2020).

Expert Witness's History of Tort Reform Advocacy Should Not Have Been Excluded During Cross-Examination

Ryan J. Gavin | *Kamykowski, Gavin & Taylor, P.C.*

A patient brought a medical negligence action against her orthopedic surgeon for damages allegedly caused by a delay in surgically treating fractures of her ankle and calcaneus. The case went to a jury and both sides presented the testimony of orthopedic-surgery experts. The case ended in a verdict for the defendant surgeon.

On appeal the patient alleged she had been unfairly and improperly limited in her cross examination of the defendant's expert. Specifically, the defendant's expert had served as the president of a local medical society. In this capacity he had advocated to the state legislature in favor of enforcement of statutes of limitations on certificates of merit and for statutory caps on medical negligence damages awards. The patient argued at trial that the expert could be cross-examined regarding this advocacy as it tended to show a bias against malpractice claims. The patient relied on a recent appellate decision allowing a defense expert to be cross-examined regarding his frustration with being sued by his own patients, as that testimony tended to show the expert was hostile towards medical-malpractice claims. The defendant surgeon argued that tort reform advocacy in a representative capacity on behalf of a local medical association was distinguishable as it did not reflect a personal individual bias.

The Court of Appeals of Missouri reversed the trial court's ruling. The Court of Appeals acknowledged that trial judges are given considerable discretion as to the scope and extent of cross-examination into a witness' bias or prejudice to limit cumulative evidence or prevent confusion. However, because the bias of a witness is always relevant, the trial court does not have authority to completely prohibit inquiry into the area. In this case, the jury could have viewed the expert's interest in tort reform as a personal financial interest in limiting medical malpractice awards. It was therefore reversible error to prohibit the patient's counsel from questioning the expert regarding these activities.

Revis v. Bassman, 604 S.W.3d 644 (Mo. App. E.D. 2020).

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CALIFORNIA

California Federal Court Dismisses Claim Against Broker for Alleged Failure to Procure Business Interruption Coverage for COVID-19

Frederick J. Fisher | *Fisher Consulting Group, Inc.*

In *Casa Colina, Inc v Hartford Fire Insurance Co*, a California federal court dismissed a professional negligence claim against an insurance broker that alleged the broker failed to procure business interruption coverage to cover losses arising from COVID-19. Plaintiffs provides rehabilitative and medical surgical services. They filed a complaint in California state court against the insurer and the insurance broker. The original complaint alleged that the insurer breached its business interruption policy with the plaintiffs by denying them coverage for losses caused by the COVID-19 pandemic. The complaint also alleged negligence against the broker for failing to obtain appropriate coverage, failing to accurately represent the coverage obtained, and failing to properly warn plaintiffs about potential coverage limitations, gaps or exclusions. The defendants removed the action to federal court based on diversity.

Plaintiffs argued that the insurance agent was subject to a heightened standard of care because they alleged the agent misrepresented the nature and scope of coverage. Under California law an agent ordinarily only has an obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured. Agents generally do not have a duty to volunteer to an insured that that they should procure additional or different coverage, unless there is a specific request, a misrepresentation by the agent, or the agent assumes additional duties (e.g., by holding themselves out as an expert in a given field of insurance requested by the insured).

Here, plaintiffs alleged that the only representation made by defendant was that plaintiffs would receive "full and adequate insurance." The court held that didn't amount to a misrepresentation that would trigger a heightened duty. The court also found that the broker did not have an affirmative duty to warn about potential coverage gaps or exclusions absent specific inquiry and that they never held themselves out as expert. Since none of the normal exceptions applied, the plaintiffs could not prevail on their negligence claim against the broker. The court dismissed the negligence claim and denied the plaintiff's motion for remand.

Casa Colina, Inc, et.al. v Hartford Insurance Company (USDC for the Central Dist. of California, CV 20-7809DMG (KSx).

GEORGIA

When an "Agency" isn't an "Agent"

Frederick J. Fisher | *Fisher Consulting Group, Inc.*

Typically, an "agent" can commit a principal to whatever the agent supposedly does and/or intends to do. This of course may be true until they aren't an "agent." In *American Reliable Insurance Company v. Lancaster*, the Georgia Court of Appeals reversed the denial of the insurer's summary motion concerning the insurer's denial of fire loss claim. The policyholder had, for quite some time, been remitting premiums to their "agent". Yet at some point the insurance company advised the Lancasters that the insurer had terminated their "agent's" authority to receive premiums on behalf of the company. For whatever reason, the Lancasters continued paying their premium to their "agent" who apparently failed to remit the premium to the insurance company.

The insurance company eventually denied coverage on a claim because they had terminated the policy for nonpayment of premium. Litigation ensued and the trial court denied the insurance company's summary motion, holding there was a triable issue of fact as to whether or not there was any agency. The appellate court reversed. The Court of Appeals ruled that the records showed American Reliable had terminated the agency's authority to accept policy premiums and that the Lancasters received notice of the termination in the renewal and cancellation notices. The notices sent to the Lancasters stated the premium payment was to be paid American Reliable and not to the agent. They had apparently ignored those instructions. Thus, the Court of Appeals determined there was no travel issue of fact and reversed the trial court's ruling. They also found that the "agent" was not an actual agent and lacked apparent agency because the notices to the policyholder expressly stated that the premium payment was to be paid to the insurer and not to the agent.

American Reliable Insurance Company v Lancaster, 849 S.E.2d 697 (Ga. App. 2020).

MASSACHUSETTS

No Cause of Action Against Insurance Broker Where Bad Advice Did Not Cause Damage

Conor J. Slattery | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Cappuccio v. Public Serv. Ins., Co.*, the plaintiff Linda Cappuccio sued her insurer, Public Service Insurance Co. ("Public Service"), and her insurance broker, Allan Insurance Agency ("Allan Insurance"). Cappuccio claimed that Allan Insurance gave her bad advice following the vandalism of Cappuccio's business, Strega Realty Trust ("Strega"), by a former tenant. The tenant caused substantial damage to the property when vacating the premises in accord with a settlement agreement entered into with Strega. Upon discovering the vandalism, Cappuccio contacted the president of Allan Insurance, the insurance broker that assisted her in renewing Strega's commercial property insurance policy through Public Service.

Allan Insurance's president visited the premises to inspect the damage and discussed Cappuccio's need to file an insurance claim for the damage. In the ensuing legal battle, Allan Insurance took the position that its president advised Cappuccio to file an insurance claim under Strega's property policy with Public Service and under the former tenant's policy. Cappuccio claimed that she was advised only to make a claim under the former tenant's policy. The former tenant's insurer ultimately denied Cappuccio's claim because the policy explicitly excluded damage resulting from the tenant's vandalism. Cappuccio did not submit a claim to Public Service until just over two years following the vandalism, which prompted Public Service to issue a reservation of rights letter until it determined if the delayed notice violated the notice terms of the insurance policy.

Cappuccio then proceeded to initiate an action against Public Service for breach of contract and unfair settlement practices, and against Allan Insurance for negligence. Allan Insurance argued that even if its president negligently advised Cappuccio only to file a claim under the tenant's policy, that negligence was not a proximate cause of harm to Cappuccio, because the Public Service policy would not have covered the claim in any event as it excluded coverage for criminal acts that are committed by "anyone to whom you entrust the property for any purpose." The court agreed, holding that because the damage was deliberately caused by the tenant as they vacated the premises, the entrustment exclusion precluded coverage, and granted summary judgment in favor of Allan Insurance.

Cappuccio v. Public Serv. Ins. Co, 2020 WL 4581672 (Mass. Sup. Ct. 2020).

PENNSYLVANIA

Federal Court for eastern District of Pennsylvania Rules That Insurance Producer Cannot Be Liable for Denial of Covid-19 Business Interruption Claim

Frederick J. Fisher | *Fisher Consulting Group, Inc.*

The plaintiff in *Wilson v Hartford Casualty Co*, Rhonda Hill Wilson, is an attorney and the sole owner of her law firm located in Philadelphia. Her insurance broker (USI Insurance Services) is incorporated North Carolina and headquartered in New York. USI has offices in Pennsylvania, and is an agent of the The Hartford insurance company. Before 2019, the insured obtained their policy from Hartford through their broker, USI. Common to most policies at that time, the policy included coverage for civil authority decisions such as business interruptions caused by order of civil authority. The policy provided extended business coverage for lost-business income and extra expense coverage.

In or about March 2020, plaintiff's law office was required to close because of various COVID-19 related government closure orders prohibiting non-life-sustaining businesses from staying open. Thus, plaintiffs allege that as a result they suffered direct and actual losses due to the COVID-19 pandemic. They claim they also suffered a covered loss of property because of direct physical damage and loss of property at the scheduled premises. In addition, they alleged that the virus caused physical harm to property that devalued the usefulness and/or normal functions of the business. Plaintiffs submitted timely insurance claims to Hartford, which investigated the matter and determined that plaintiffs were not entitled to coverage of the policy due to a virus exclusion contained in the policy. Plaintiffs then filed a

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lawsuit for declaratory judgment, breach of contract and injunctive relief.

The court did not decide whether the policy afforded coverage to plaintiffs for their COVID-19 losses. But the court found that the policy's virus exclusion unambiguously barred any coverage that plaintiffs could claim. For that reason, the court dismissed the claims against Hartford. In addition, the court found that plaintiffs' argument that the insurance brokerage failed to deliver the appropriate coverage was incorrect. USI helped procure the policy but was not a party to the policy. Other than the usual agency argument, the law firm had not alleged any independent basis to establish liability against USI. Thus, the court also dismissed the claims against USI.

Wilson v Hartford Casualty Co., __F.Supp.3d__ (E.D. Penn. 2020).

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PLDF Survey of Law – Legal Malpractice

CALIFORNIA

Statute of Limitations Not Tolled Because Attorney Did Not Formally Withdraw and Breach of Fiduciary Duty is Not "Actual Fraud" to Fall Outside the Statute

Jennifer K. Saunders | *Haight Brown & Bonesteel, LLP*

Huyen Nguyen filed an action against her attorney, Karen Ellen Ford, alleging legal malpractice and breach of fiduciary duty in November of 2018. Nguyen, a dentist, hired Ford to represent her in a discrimination lawsuit she wished to file against her former employer, Monterey Dental Clinic. The action was filed in the federal district court. The clinic then filed a motion for summary judgment which was granted and judgment was entered against Nguyen on August 27, 2014. During appeal from the judgment, Ford filed a motion to withdraw and it was granted on April 17, 2015. Ford did not file a such a motion in the district court proceeding, but did file a notice of withdrawal as attorney for Nguyen and a notice of lien on April 30, 2015, both of which were served on Nguyen and identified Ford as "former counsel."

Ford filed a demurrer to the complaint alleging that it was barred by the statute of limitations controlling actions against attorneys because it was filed more than one year after Nguyen knew the facts or had she acted with reasonable diligence should have discovered, the facts constituting the wrongful act or omission, the only exception being for actual fraud. In upholding the trial court's ruling in favor of Ford, the Court of Appeal confirmed that although it has been recognized there are commonly taken actions which end an attorney-client representation such as consent of the client or completion of the task for which the lawyer

was retained, the fact that Ford did not obtain a withdrawal order in the district court matter did not toll the statute's applicability under the guise of the "continuous representation" provision. Specifically, the court noted that Nguyen was on notice by April 30, 2015 when the notice of withdrawal and notice of lien were served that the relationship no longer continued and with no pleading alleging otherwise, under application of the objective standard, the action was rightfully barred by the one year statute.

The Court of Appeal also confirmed that the breach of fiduciary duty cause of action is not "actual fraud" to take it outside the purview of the one year statute of limitations and confirmed that the application of Section 340.6 depends on "proof that an attorney violated a professional obligation as opposed to some generally applicable *nonprofessional* obligation." Here because the action related to alleged breaches arising out of professional obligations, as opposed to a nonprofessional relationship, Section 340.6 applied and did not permit the exception for fraud to apply.

Nguyen v. Ford, 49 Cal. App. 5th 1 (2020), *as modified* (May 13, 2020).

Anti-SLAPP Motion Successfully Precludes Action Where Plaintiff Fails to Present Proof of a Probability of Success

Jennifer K. Saunders | *Haight Brown & Bonesteel, LLP*

Chu, a lawyer, was sued by Zhang for malicious prosecution because Chu added Zhang as a defendant in an underlying lawsuit, which was later dismissed without prejudice. Chu filed a special motion to strike under California's anti-SLAPP statute found in Code Civ. Proc., § 425.16. The trial court granted the motion, finding there was no evidence that Zhang had a probability of success on his malicious prosecution action against Chu.

The Court discussed the elements required in a malicious prosecution action and analyzed the evidence presented in the context of a special motion to strike which requires an analysis using a two-step process. The first step requires the defendant demonstrate that the action arose from a protected activity, by showing that the act of which the plaintiff complains was taken in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue as defined in the Anti-SLAPP statute. It was not disputed that Chu met the first step. The second step is akin to the summary judgment procedure that requires proof by plaintiff of a probability he will prevail and in this case required Zhang to present evidence establishing a probability he would prevail in his malicious prosecution action. The failure to present evidence that Zhang had a probability of success on his malicious prosecution claim was fatal and the trial court properly granted Chu's special motion to strike Zhang's lawsuit.

Zhang vs. Chu, 46 Cal.App.5th 46 (2020).

COLORADO

Personal Representative does not Stand in the Shoes of the Decedent for Purposes of Attorney-Client Privilege in Colorado

Scott A. Neckers | *Overturf McGath & Hull PC*

In the matter of *In re Estate of Louis Rabin*, the Colorado Supreme Court reversed a decision of the Colorado Court of Appeals that had held that a personal representative was entitled to take possession of client files of the decedent as "property" under Colorado's Probate Code, C.R.S. § 15-12-709, because the personal representative steps into the shoes of the decedent for purposes of attorney-client privilege. At the trial court level, the personal representatives subpoenaed the legal files that were in possession of the longtime attorney for the decedent. The Supreme Court ultimately sided with the attorney on all issues, including an attorney's property rights in client files, whether the attorney-client privilege automatically passes to the personal representative upon a decedent-client's death, and the circumstances under which the Colorado Rules of Professional Conduct would allow a lawyer to reveal information relating to the representation of a deceased client to the personal representative.

In re Estate of Louis Rabin, 474 P.3d 1211 (Co. 2020).

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IOWA

Affirming Summary Judgment for Attorney upon Finding that Assignment of Malpractice Claims to a Litigation Adversary is Impermissible

Jacqueline M. DeLuca, **Mark Laughlin**, and **Jonathon H. Latka** | *Fraser Stryker, PC LLO*

In *Gray v. Oliver*, plaintiffs Jeff and Janice Gray, as judgment creditors, sued the underlying defendant's attorney for legal-malpractice. In the underlying case, the Grays sued the defendant-attorney's former client for damages stemming from the forcible rape of their daughter. After trial, the jury returned a verdict of $127 million against the defendant, who appealed, arguing that the amount was excessive. Over the course of the litigation, the underlying defendant's attorney largely failed to take any action. The defendant-attorney even failed to respond to a settlement offer for $2 million.

While the appeal was still pending, the Grays caused a writ of execution to be issued on the $127 million judgment. The sheriff, pursuant to the writ, levied on the underlying defendant's right to any claim that he had against his attorney. The Grays purchased the right for $5,000 at the sheriff's sale. Then, while still defending the $127 million judgment on appeal, the Grays filed a legal malpractice action against the defendant-attorney as successors in interest to the former client. Finding the malpractice suit to violate public policy, the district court granted summary judgment for the attorney. The Grays appealed.

The Supreme Court of Iowa ultimately affirmed the district court's decision. It concluded that the involuntary assignment of legal-malpractice claims as well as the assignment of claims to former litigation adversaries contravenes public policy and undermines the attorney-client relationship. The Court noted that in the pending appeal, the Grays were defending the $127 million judgment, but they were simultaneously arguing in a separate action that a competent lawyer would have achieved a greatly diminished award. The Supreme Court asserted that prohibiting the assignment of malpractice claims to former litigation adversaries prevents "this sort of gamesmanship."

Gray v. Oliver, 943 N.W.2d 617, 626 (Iowa 2020).

Affirming Summary Judgment when Plaintiffs Failed to Produce an Expert Witness

Jacqueline M. DeLuca, **Mark Laughlin**, and **Jonathon H. Latka** | *Fraser Stryker, PC LLO*

Plaintiffs filed a legal-malpractice suit against their former attorney who represented them in a complex utility dispute against the United States Department of Agriculture. The defendant attorney also provided advice regarding a discrimination claim against a local power cooperative. Regarding the utility dispute, the attorney's law firm represented the plaintiffs in federal court, where they lost on summary judgment and a subsequent appeal to the Eight Circuit Court of Appeals. He explained to his clients that res judicata principles prevented them from suing in state court. After analyzing the discrimination claim, the attorney offered a seven-page position letter concluding that no good-faith argument for discrimination existed. At that point, the attorney's relationship with the plaintiffs became "rocky" and the attorney withdrew.

Plaintiffs subsequently filed a legal-malpractice complaint, claiming that the attorney's failure to pursue both claims fell below the standard of care. After the plaintiffs failed to provide an expert witness in compliance with Iowa Code § 668.11, the defendant attorney moved for summary judgment, which the district court granted. In a memorandum opinion, the Court of Appeals of Iowa noted that only in exceptional cases would a legal-malpractice case proceed without expert testimony. Finding the case to be unexceptional and the lack of expert testimony to be fatal to the Plaintiffs' claim, the Court of Appeals affirmed the district court's decision.

Swecker v. Lamson, Dugan & Murray, LLP, No. 19-1223, 2020 Iowa App. LEXIS 693 (Ct. App. July 22, 2020).

ILLINOIS

Lack of standing for mere violation of FDCPA in Seventh Circuit

Donald Patrick Eckler | *Pretzel & Stouffer, Chartered*

All issued in mid-December 2020, the Seventh Circuit held in a series of Fair Debt Collection Practices Act cases ("FDCPA") that in the absence of concrete harm, the debtor did not have Article III standing to support subject matter jurisdiction in federal court. The court held that a mere violation of the FDCPA (and these cases involved various violations) does not support standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, (2016) and *Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329 (7th Cir. 2019).

In *Bazile*, the court remanded the case for proceedings before the district court to determine if interest was actually accruing following the issuance of a dunning letter that referenced an increase in the amount owed due to interest. In the absence of accruing interest, the court held that there would be no standing.

Nettles v. Midland Funding, LLC, 983 F.3d 896 (7th Cir. 2020), *Larkin v. Finance System of Green Bay, Inc.*, 982 F.3d 1060 (7th Cir. 2020), *Bazile v. Finance System of Green Bay, Inc.*, 983 F.3d 274 (7th Cir. 2020), *Gunn v. Thrasher, Buschman & Voelkel, P.C.*, 982 F.3d 1069 (7th Cir. 2020), *Spuhler v. State Collection Service, Inc.*, 983 F.3d 282 (7th Cir. 2020), and *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067 (7th Cir. 2020).

Statute of Limitations Bars Claim Against Illinois Lawyer Because Fees to Subsequent Counsel Were Incurred

Donald Patrick Eckler | *Pretzel & Stouffer, Chartered*

In *Zweig v. Miller*, the court affirmed the grant of summary judgment in favor of the defendant lawyers because "plaintiff failed to file his complaint within the two-year statute of limitations [735 ILCS 5/13-214.3(b)], which began to run, at the latest, when he knew, as a matter of law, of his injury and that it was wrongfully caused, i.e., when he incurred legal fees directly caused by hiring additional counsel to attempt to achieve a result in the underlying case that was not achieved during defendants' representation."

The court rejected the plaintiff's claim that the cause of action only began to accrue when the underlying litigation settled because it was not until then that he suffered pecuniary injury. Under Illinois law for the statute to accrue the client must suffer loss that is not speculative as defined by their existence, not the amount of those damages. "[A] malpractice claim can accrue before an adverse judgment if it is 'plainly obvious *** that [the plaintiff] has been injured as the result of professional negligence or where an attorney's neglect is a direct cause of the legal expense incurred by the plaintiff.'"

Zweig v. Miller, 2020 IL App (1st) 191409.

Statute of Limitations Does Not Run Until Judgment Entered in the Underlying Matter

Donald Patrick Eckler | *Pretzel & Stouffer, Chartered*

In reversing the grant of summary judgment in favor of the defendant law firm, the Illinois Appellate Court, First District held that the plaintiff's complaint was timely filed, despite having knowledge of the potential claim more than two years before filing suit. The defendant attorney represented the plaintiff in an underlying transaction. Plaintiff was then sued plaintiff for breach of fiduciary duty arising from the underlying transaction. Plaintiff's new counsel advised him that actions taken by his former attorney likely made the plaintiff liable and that the advice given by counsel to take those actions was likely malpractice. Then, consulting with counsel on those issues, plaintiff did not file suit against his former lawyers for 6 years. The trial court granted summary judgment in favor of the defendant attorneys, holding that the legal-malpractice claim accrued when his new attorneys advised him of the malpractice.

On appeal, the court appellate court held that the payment of attorney's fees to subsequent counsel was not a plainly obvious injury and that the limitations period only began to run when a judgment was entered against the plaintiff. The court appears to distinguish between situations where the legal-malpractice plaintiff was a plaintiff in the underlying suit (*Construction Systems, Inc. v. FagelHaber*, 2019 IL App (1st) 172430 and *Nelson*

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v. Padgitt, 2016 IL App (1st) 160571) and thus damages to support filing suit existed, and cases in which the legal-malpractice plaintiff was a defendant in the underlying suit (*Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349 (1st Dist. 1998) and *Warnock v. Karm Winand & Patterson*, 376 Ill. App. 3d 364 (1st Dist. 2007)) and no judgment entered yet and thus no damages to support filing suit.

Suburban Real Estate v. Carlson, 2020 IL App (1st) 191953.

MASSACHUSETTS

Trial Judge Erred In Granting Summary Judgment on Liability Against Attorney

Conor J. Slattery | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Healy v. Hammond*, Attorney George Hammond drafted a joint petition for divorce and a separation agreement for his client, Lynn DiPietro. The husband, Budd Healy, did not have his own counsel. A Probate and Family Court judge, after conducting a colloquy, concluded that the separation agreement was fair and reasonable, and entered a judgment of divorce. Two years late, Healy (now represented by his own counsel) commenced a modification proceeding, alleging that the division of assets had not been equitable, and that he was entitled to alimony due to a post-divorce diagnosis of alcohol-related dementia. The Probate and Family Court judge found that Healy was precluded from challenging the separation agreement, but awarded Healy alimony based on the changed circumstance of his diagnosis.

While the modification proceeding was pending, Healy brought a legal malpractice action against Hammond, claiming that Hammond acted unethically and negligently in representing both Healy and DiPietro in the divorce proceeding. Healy was deemed incompetent to testify in that proceeding, and Hammond denied that he represented Healy in the divorce, but the Superior Court nevertheless entered summary judgment for Healy on liability, concluding that Hammond "behaved toward Healy like counsel and did legal work for Healy." The matter then proceeded to trial on the issues of causation and damages. The jury returned a verdict for Hammond, concluding that the joint representation was not a cause of any loss to Healy.

Both parties appealed. The Appeals Court held that the trial court had erred in entering summary judgment on liability for Healy. The court noted that there was conflicting evidence as to the existence of any attorney-client relationship between Hammond and Healy. The court also held that it was error to enter summary judgment for Healy without resolving the issue of causation, because causation was an essential element of Healy's malpractice claim.

Avoiding the need for a new trial, the Appeals Court also affirmed the jury verdict in favor of Hammond, holding that the jury properly was instructed on the elements of causation and harm, and could have concluded that Healy caused his own injury by choosing not to hire an attorney in the divorce proceedings.

Healy v. Hammond, 158 N.E.3d 886 (Table) (Mass. App. Ct. 2020).

Business Transactions Between Attorneys and Clients Are Not *Per Se* Invalid

Conor J. Slattery | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Foley v. Tevnan*, the plaintiff Ann Foley sued Attorney Charles Tevnan, alleging that Tevnan committed a breach of contract, breached the covenant of good faith and fair dealing, and breached his fiduciary duty to her when he accepted a 25% interest in a trust as payment for legal services. Foley argued that the business transaction should be void as a matter of public policy. The case was tried jury-waived. The trial judge found that the plaintiff was a sophisticated, intelligent, competent and savvy business-person who had run an insurance agency for over twenty years and was more than able to understand the consequences of agreeing to give away a twenty-five percent interest in her trust. The trial judge also found that Tevnan had advised the plaintiff to seek independent counsel, but the plaintiff insisted that she did not need such advice. Finally, the trial judge took into account that the trust property was acquired for $160,000, that Tevnan had performed well over 100 hours in legal services to Foley's benefit, and that Tevnan's 25% interest in the trust was fair compensation for those services.

The Appeals Court affirmed. The court held that while business transactions between an attorney and a client are subject to "careful scrutiny," the presumed influence of an attorney over a client may be neutralized by independent advice given to the client "or by some other means." The court held that the evidence considered by the trial judge established that Tevnan properly advised his client to seek independent legal counsel, that there was no fundamental unfairness in the transaction, and that the transaction was equitable.

Foley v. Tevnan, 2021 WL 19156 (Mass. App. Ct. 2021).

State Court Judge Unable to Have Indictment Tossed on Judicial Immunity Grounds

Conor J. Slattery | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *United States v. Richmond Joseph*, a state court judge, Shelley Richmond Joseph, was indicted on charges of conspiracy and obstruction of justice for allowing an individual wanted by Immigration and Customs Enforcement ("ICE") to escape out a back door of a courthouse. The ICE officer arrived at the courthouse seeking to take into custody an individual who had been arrested days earlier. The individual was the subject of an immigration detainer and a warrant based on an order which would have resulted in the individual's removal from the United States. The indictment alleged that the defendants orchestrated the exit of the individual from the courthouse out a back door, permitting him to evade the ICE officer waiting for him at the main entrance to the courthouse.

Judge Richmond Joseph moved to dismiss the indictment, arguing that she was shielded from prosecution under the doctrine of judicial immunity, and that the charges violated the separation of powers clause of the U.S. Constitution. A group of 61 retired Massachusetts judges, together with numerous law professors and scholars, filed an amicus brief in support of the judge's motion to dismiss.

The federal district court denied the judge's motion to dismiss, holding that there were issues of fact that would need to be resolved before determining whether the judge was entitled to judicial immunity or whether the charges violated the Tenth Amendment, such as whether the judge was acting within the scope of her judicial duties.

United States v. Richmond Joseph, 2020 WL 4288425 (D. Mass. 2020).

Law Firm's "Pens Down" Email Leads to Potential Liability

Conor J. Slattery | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Caper v. Foley & Lardner, LLP*, plaintiff Adam Caper sued his former law firm for damages arising out of alleged poor advice concerning salary deferment payments. Caper's company Synchrony Venture Innovations, Inc. ("SI"), was advised by its attorneys at Foley & Lardner, LLP that it could defer salary payments to its new Chief Operating Officer ("COO") as an interim cost-savings measure while SVM pursued financing arrangements. The COO later sued SI for non-payment of wages under the Massachusetts Wage Act, causing SI to incur significant legal fees and other monetary losses.

SI and Foley attorneys had several discussions concerning Foley's potential culpability for the legal exposure SI faced on account of the Wage Act claim filed by its former COO. The former COO submitted a settlement offer of $60,000 to SI, and SI in turn asked Foley to contribute $40,000 towards the settlement payment. In response to SI's request for contribution, SI's lead attorney sent a "pens down" e-mail to his colleagues at Foley & Lardner regarding work for SI. This "pens down" e-mail turned out to have significant consequences, as Foley was in the process of documenting a significant investment in the company, and SI alleged that Foley's failure to move forward with the paperwork caused the deal to collapse.

Caper subsequently asserted claims against Foley for malpractice, breach of fiduciary duty, misrepresentation, and unfair trade practices. In response to Foley's motion for summary judgment, the court found substantial evidence to support the claim that Foley committed malpractice when it advised SI it could defer salary payments to its COO. Additionally, the court found that a genuine issue of material fact existed as to whether the "pens down" e-mail constituted a legitimate effort by Foley to withdraw from the representation based on the conflict created by

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SI's demand, or if it was merely an attempt to strong-arm SI into agreeing to a more favorable settlement with Foley when SI was about to close an important financing deal. The court therefore denied Foley's summary judgment on Capers' breach of fiduciary duty, misrepresentation, and unfair trade practices claims.

Caper v. Foley & Lardner, 2020 WL 977050 (Mass. Sup. Ct. 2020).

Lawyer Appointed as Conservator Argues for Quasi-Judicial Immunity

Conor J. Slattery | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Hornibrook v. Richard*, plaintiff Kevin Hornibrook, as guardian of his mother Kathleen Hornibrook, brought a legal malpractice action alleging breach of fiduciary duty, conversion, and fraud against Attorney Cherilyn Richard, who had been appointed by a Probate and Family Court judge to serve as a conservator for Kathleen. At the time of the events in question, Kathleen suffered from Alzheimer's type dementia, and resided in a nursing home. Kevin's claims against Attorney Richard arose out of a long-running dispute between Kevin and Attorney Richard as to whether Attorney Richard was taking appropriate action to return Kathleen to her home, including the steps necessary to evict her son Francis from the property so that the upstairs unit could be rented. Kevin alleged that as a result of Attorney Richard's inaction, Francis was never evicted, and the lender that held a mortgage on the property ultimately commenced foreclosure proceedings. After the foreclosure proceedings were commenced, Attorney Richard was able to sell the house at fair market value, but Kevin alleged that most of those monies were taken by Medicaid to pay for her nursing home services, where she resided until her death.

In the subsequent malpractice action, Attorney Richard moved to dismiss all of the claims brought against her, on the basis that court-appointed conservators are entitled to quasi-judicial immunity. The trial court judge declined to apply the immunity doctrine, however, finding that the plaintiff should be entitled to show through discovery that Attorney Richard's actions fell outside the scope of the authority granted to her by the court. Attorney Richard took an immediate appeal from the decision, and the case is now pending before the Massachusetts Supreme Judicial Court.

Hornibrook v. Richard, No. 2019-0395 (Mass. Sup. Ct. 2020).

MICHIGAN

Arbitration Clause in Attorney-Client Agreement Bars Legal-Malpractice Action

James J. Hunter | *Collins Einhorn Farrell PC*

The Michigan Court of Appeals held that an arbitration clause in an attorney-client engagement agreement barred a subsequent legal-malpractice lawsuit. In *Tinsley v Yatooma*, the plaintiffs retained the attorney-defendants to represent them in an underlying legal-malpractice action. The engagement agreement contained a provision for binding arbitration encompassing claims of attorney malpractice. The engagement agreement expressly provided that by agreeing to binding arbitration, the plaintiffs waived the right to submit the dispute to a court and the right to a jury trial. Plaintiffs also had independent counsel review the engagement agreement before voluntarily signing it.

Plaintiffs sued their former attorneys for legal malpractice, alleging that they settled the underlying litigation for less than the case was worth. The attorney-defendants moved to dismiss the case under MCR 2.116(c), arguing that the arbitration agreement barred the lawsuit. Plaintiffs countered that the arbitration clause violated the Michigan Rule of Professional Conduct 1.8(h)(1), which prohibits a lawyer from "mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement[.]."

Plaintiffs also cited State Bar of Michigan Ethics Opinion R-23 (July 22, 2016) that indicated an arbitration clause in an attorney-client agreement violates MRPC 1.8(h) unless, before signing the agreement, the client is fully informed of the provision's consequences in writing *or* consults with independent counsel regarding the provision. Plaintiffs submitted affidavits averring that defendants didn't specifically advise them to discuss the arbitration provision. But it was undisputed that independent counsel reviewed the engagement agreement. The

trial court ruled in favor of the attorney-defendants because plaintiffs consulted with independent counsel.

The Court of Appeals affirmed the trial court's decision. The court questioned whether the arbitration provision even triggered MRPC 1.8(h)(1), noting that arbitration may not actually limit an attorney's liability to a former client. Yet, assuming the rule applied, the court held that the rule only requires that plaintiffs actually consulted with independent counsel, which they did. The court rejected plaintiffs' argument that defendants specifically needed to advise them to have the independent counsel review the arbitration provision. The agreement was only several pages long, the provision was in all capital letters, and that a failure to read an agreement is no defense. In sum, the Court of Appeals held that there was no ethical violation and the arbitration provision was enforceable.

Tinsley v Yatooma, __ N.W.2d__ (August 13, 2020).

MINNESOTA

Claim of Malpractice in Pre-Petition Bankruptcy Advice Belongs to Trustee

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

This legal malpractice case arose out of an attorney's alleged negligence in advising his client that her recently inherited interest in the family farm would be protected in a Chapter 7 bankruptcy.

The plaintiff proceeded with the Chapter 7 petition as a result of her attorney's advice that the property would be protected with an exemption. The trustee objected to the exemption, and the objection was sustained. The client lost approximately $400,000 in interest in the property which would otherwise have been exempt from creditors under state law had she not filed for bankruptcy. The client brought an adversary proceeding against her attorney alleging malpractice. The trustee brought a motion for summary judgment, arguing that the malpractice claim was the property of the bankruptcy estate.

Whether the estate owned the malpractice claim turned on when the claim had accrued. A legal interest of the debtor as of the commencement of the case becomes property of the estate under 11 U.S.C. §541(a)(1). But if the claim had accrued subsequent to the filing of the petition, it would be the property of the debtor. The client argued that the claim had not accrued until the trustee had asserted the objection to her claimed exemption.

Minnesota applies the "some damage" rule of accrual, which is defined as "any compensable damage, whether specifically identified in the complaint or not." "Some damage" can involve concrete harm created by financial liability or by the loss of a legal right.

The bankruptcy court granted the trustee's motion for summary judgment, holding that the claim was the property of the estate. The debtor appealed the bankruptcy court's ruling to the U.S. District Court, District of Minnesota, which affirmed. The court held that "some damage" occurred at the moment the bankruptcy petition had been filed. At the time of filing, the debtor "passed the point of no return," in that she lost the legal right to prevent the trustee's objection. The malpractice claim was therefore the property of the estate, and could not be pursued by the debtor.

In Re Bruess, No. 19-2714 (JRT), 2020 WL 3642324, (D. Minn., July 6, 2020).

NEBRASKA

Affirming Summary Judgment for Attorney Because Plaintiffs' Claim was Time-Barred

Jacqueline M. DeLuca, **Mark Laughlin**, and **Jonathon H. Latka** | *Fraser Stryker, PC LLO*

Plaintiffs engaged the defendant attorneys to represent them in a personal-injury action stemming from an April 2012 accident. That action against was ultimately dismissed for failure to properly file a tort claim pursuant to the Nebraska Political Subdivision Claims Act. On May 18, 2018, plaintiffs filed a complaint alleging legal malpractice against the defendants for failure to properly file the claim. Plaintiffs asserted that the continuous-relationship exception allowed them to bring their claim within two years after the end of the attorney-client relationship. The defendants argued that the exception did not

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apply because plaintiffs discovered the alleged negligence during the pendency of the attorney-client relationship. According to the defendants, the court should instead apply a one-year limitations period that began after the plaintiffs' discovery of the alleged negligence. The district court agreed with defendants and granted summary judgment.

On appeal, the Nebraska Supreme Court held that the continuous-relationship exception did not apply. Plaintiffs argued that the exception should have saved their case. But the Court determined that if a client discovers an act or omission *before* the termination of the attorney's representation, the continuous-relationship exception does not apply. The key question in determining the correct limitations period was whether the plaintiffs discovered the failure before or after the end of the relationship. The plaintiffs' position was that the end of the relationship and the discovery of the failure both occurred "within 30 days after June 23, 2016." However, they never claimed that they learned of the failure *after* the end of the relationship. On the other hand, the defendants supplied an affidavit claiming that they informed the plaintiffs of the error before the end of the attorney-client relationship. Because the plaintiffs failed to dispute this fact, the Supreme Court upheld the district court's grant of summary judgment for the Defendants.

Dondlinger v. Nelson, 305 Neb. 894, 942 N.W.2d 772 (2020).

NEW YORK

Allocutions and Meeting the Prima Facie Burden of Standard of Care in Matrimonial Malpractice Actions

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

Plaintiffs typically face an uphill battle in matrimonial legal malpractice actions, especially when an in-court settlement agreement is reached between the spouses. Generally, New York courts hold that the allocution that typically accompanies an in-court settlement, serves to prevent any future malpractice claims against the attorneys when a plaintiff answers affirmatively to the Court's question of whether they are satisfied with the attorney's work. In *Blumencranz v Botter*, however, the court came to a contrary conclusion in the face of an allocution.

Citing the legal malpractice elements in New York, the court reiterated that in an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. Here, the Court ruled that defendant failed to meet his prima facie burden of demonstrating the absence of triable issues of fact as to whether his actions in advising the plaintiff with regard to the stipulation of settlement evidenced a failure on his part to exercise the requisite level of skill and knowledge, and whether those actions were a proximate cause of any damages incurred by the plaintiff. Since the defendant failed to meet his prima facie burden, the court affirmed the trial court's denial of his motion for summary judgement.

The Appellate Division decision leaves plenty to the imagination of what actions in advising the plaintiff the defendant here failed to exercise to the requisite level of skill and knowledge of an attorney in New York. However, looking to the court's prior ruling in denying defendant's motion to dismiss (*Blumencranz v Botter*, 2012 N.Y. Slip Op. 32089[U] [N.Y. Sup Ct, Nassau County 2012]) one can infer that the Appellate Court's decision stemmed from the plaintiff's allegations that defendant (1) failed to demand proof regarding plaintiff's then-husband's separate property claims concerning a substantial portion of the down payment on the marital home, (2) failed to demand proof for the value of fine art and antiques, and (3) failed to obtain independent appraisals to determine the value of marital assets rather than relying on her then-husband's statement regarding values. Further, plaintiff alleged that an expensive gun collection was not valued, expensive household furnishings were not valued, and defendant failed to include increased values of the marital estate as detailed in a prenuptial agreement.

In sum, the *Blumencranz v Botter* Appellate Court decision shows that the allocution shield, once a formidable defense to matrimonial malpractice actions, can be overcome by certain actions that fall below the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession.

Blumencranz v. Botter, 182 A.D.3d 568, 120 N.Y.S. 3d 829 (2d Dept. 2020).

Fraud Incidental to Breach of Fiduciary Duty Does Not Toll Statute of Limitations

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

Co-plaintiffs, one a former head of trading at an energy company and the other a former general counsel for the same energy company, alleged entitlement to certain post-termination compensation. Defendants, the energy company, asserted counterclaims seeking recovery for breach of fiduciary duty, breach of contract and legal malpractice based on the general counsel's provision of legal advice to co-Plaintiff, the head of trading, that was allegedly averse to the energy company while co-plaintiff general counsel was still employed by the energy company.

The court undisputedly found that co-plaintiff general counsel's conduct giving rise to defendants' counterclaims occurred in 2011, so by 2015, when this action was commenced, the counterclaims were time-barred. The Court further found defendants' contentions that their counterclaims are grounded in fraud or that plaintiffs deceptively caused them to wait until after 2014 to assert such claims, to be baseless. The court established the limitations period for fiduciary duty claims involving fraud is six years plus two years from when a reasonable person knew or should have known about the fraud. The fraud, however, must not be *incidental* to the breach of fiduciary duty.

The court further ruled that a failure to disclose one's own alleged wrongdoing does not toll the statute of limitations. Here, the court held that the alleged fraud, the general counsel's "concealment of his disloyal dealings" was incidental to the alleged breach of fiduciary duty and as such there was no basis for any tolling of the statute of limitations. The court ultimately granted plaintiff's motion to dismiss the defendants' counterclaims for breach of fiduciary duty, breach of contract and legal malpractice, and otherwise denying the remainder of the motion.

Capone v. LDH Mgt. Holdings LLC, 2020 NY Slip Op 30013 (U) (Sup. Ct. N.Y. Co. Jan. 2, 2020).

Guy Walks into a Lawyer's Office and Leaves with a Malpractice Claim

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

The court in *Lago v Gucciardo Law Firm* reaffirmed that discussing a potential lawsuit with a prospective attorney does not necessarily establish an attorney-client relationship. Plaintiff brought causes of action against defendants for legal malpractice and breach of contract. Plaintiff alleged that he "retained" Defendants to represent him and advise him as to whether he had any legal claims to compensate him for an accident he had while working as a laborer for a subcontractor at a New York City-owned construction site.

In what would seem to be the end of the story, defendants advised him that there was no basis for filing a lawsuit and referred him to a Workers' Compensation attorney. Plaintiff, however, filed a complaint alleging that defendants failed to advise him of potential causes of action against the City for its failure to provide a safe place to work in violation of Labor Law§§ 200, 240, and 241(6), in that the City caused and permitted "the improper hoisting of construction materials, which resulted in a sewer pipe" striking the ladder on which he stood, causing him to fall some eight feet to the bottom of the trench in which the ladder had been placed, injuring him. "'But for' those failures, Plaintiff claims, he "would have had a viable and valuable personal injury action against The City of New York." Based on these allegations, plaintiff claims that defendants may be held liable for legal malpractice.

The court dismissed plaintiff's causes of action, as defendants were able to prove, based on plaintiff's deposition, that (1) there was no retainer agreement or contract with plaintiff, (2) that the firm performed no legal services for him and sent him no bills or invoices, and (3) that he did not believe that the firm was representing him. Thus, the court held that defendants demonstrated, prima facie, that there was no attorney-client relationship between them and plaintiff. Further, the court noted that plaintiff's opposition to defendants' summary judgement motion additionally asserted that at the consultation, a fiduciary duty arose. The evidence offered by defendants also reflects that plaintiff transmitted to the firm no confidences, that they had no history with him nor communications following the consul-

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tation apart from the alleged rejection letter, and that the firm had undertaken no task on plaintiff's behalf beyond referring him to the Workers' Compensation attorney. Thus, defendants demonstrate, prima facie, that no fiduciary relationship resulted from the consultation.

This decision serves as a reminder that a legal malpractice claim can arise even from the briefest encounters, and that taking the appropriate actions in declining to represent a plaintiff, such as issuing a rejection letter and keeping a copy on file, can one day be the saving grace when defending against a legal malpractice claim.

Lago v. Gucciardo Law Firm 2020 NY Slip Op 31716(U) (Sup Ct. N.Y. Co. June 3, 2020).

Importance of Monitoring Statute of Limitations, Despite Withdrawing from Case Prior to Expiration

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

In *Scott v. Leventhal*, the court determined that conclusory assertions regarding the underlying action lacking merit is insufficient to establish good cause to fail to file suit within the statute of limitations. The plaintiff, Patricia Scott, executrix of the estate of her son, Patrick Fleming, brought a suit against Jason Leventhal and the Leventhal Law Group, P.C. (collectively, the "Leventhal Law Group"). The Leventhal Law Group was retained by decedent after he was assaulted by a New York City Department of Correction officer while incarcerated. Defendant was retained to file a lawsuit on the decedent's behalf. Decedent alleged that as a result of the assault, his right testicle had to be amputated. However, medical imaging taken after the assault revealed right testicular cancer, which defendants allege was the real cause of the amputation. Without the amputation, the Leventhal Law Group claimed that Plaintiff's claims lacked merit. As a result, the Leventhal Law Group wrote to decedent and declined to bring a suit on his behalf. However, the defendants did not withdraw until two months after the expiration of the time to file a notice of claim. The executrix subsequently filed a legal malpractice action. The Leventhal Law Group moved for summary judgment and dismissal of the claims.

The court held that the plaintiff had raised a triable issue of fact that defeated summary judgment by putting forth proof in admissible form that defendants failed to file a timely notice of claim and thus allowed the statute of limitations on the assault and battery claim to expire and for failure to prosecute the underlying tort claim.

Further, when the expiration of a statute of limitations is close at hand and the possibility exists that another attorney may be retained to handle the case, the attorney must ensure that the client's rights are protected.

Scott v. Leventhal, 2020 NY Slip Op 33276(U) (Sup. Ct. N.Y. Co. Sep. 30, 2020).

Third-Party Action Permissible Against Seller in Real Estate Malpractice Case

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

In her decision in *Wiles v. JLC & Associates*, Judge Kathryn E. Freed determined that an attorney sued for malpractice during a real estate purchase is entitled to bring in the seller as a third-party defendant to the extent that the seller played a part in the Plaintiff's alleged injury.

In *Wiles*, the plaintiff alleged JLC & Associates (JLC) negligently failed to discover and disclose that the building was single-use occupancy and rent-stabilized. Further, plaintiff alleged that JLC failed to discover that there was an ongoing case in Housing Court with a rate stabilized tenant, there were several violations issued against the building by the New York City Department of Housing Preservation and Development, and that there was no proper Certificate of Occupancy prior to the closing. JLC subsequently brought in Murphy, the seller, as a third-party defendant and asserted a claim of contribution based on fraud and a claim of contribution based on negligent misrepresentation. JLC alleged that Murphy represented that there were no pending violations, no tenants pursuing a right to occupancy, and that she would deliver a valid Certificate of Occupancy. After being brought into the action, Murphy filed a motion to dismiss for failure to state a cause of action and contended that there was no right of contribution against adverse parties in a legal malpractice action.

The Court relied upon CPLR § 1401 and held that defendant attorneys in a legal malpractice were entitled to seek contribution from parties whose fraud they had allegedly failed to discover during their representation of Plaintiff in connection with a business. Because JLC alleged that the breach of duty by Murphy had a part in causing or worsening the injury for which contribution was being sought, they were entitled to contribution and the Court denied Murphy's motion.

Wiles v. JLC & Ass., 2020 NY Slip Op 33096 (U) (Sup. Ct. N.Y. Co. Sep. 22, 2020).

Ultimate Outcome Not Considered in Deciding Legal Malpractice Claim

Andrew R. Jones* | *Furman Kornfeld & Brennan LLP*

It is unavoidable that a legal action may not go the way you intended it to. However, that does not mean the attorneys representing you committed malpractice. In *Wormser, Kiely, Galef & Jacobs LLP*, Judge Paul A. Goetz ruled on the appropriate standard to evaluate an attorney's conduct for purposes of malpractice claims.

The underlying dispute originated in litigation, where Wormser, Keily Galef & Jacobs, ("Wormser") represented Mr. Frumkin in a dispute with his business partners related to their real estate development company. Eventually, the business dispute was referred to binding arbitration, where Mr. Frumkin's claims of bad faith were rejected. Wormser commenced the instant action against Mr. Frumkin in order to recover unpaid legal fees. Mr. Frumkin alleged a counter-claim of legal malpractice.

Wormser moved for summary judgment, seeking dismissal of Mr. Frumkin's claims of legal malpractice. They argued that their conduct was not actionable because it concerned reasonable strategic choices. Mr. Frumkin argued that Wormser deviated from the professional standard of care, most significantly, by failing to submit the relevant Department of Building records and elicit relevant testimony into the record at arbitration.

The court determined that Mr. Frumkin incorrectly relied upon the conclusions drawn by the arbitrators in their decision, which was not the appropriate standard for evaluating an attorney's conduct for purposes of a malpractice claim. Instead, the attorney's conduct must be evaluated in the context in which it is made—that is, reasonable skill and knowledge commonly possessed by similar attorneys, and *without* knowledge of how the arbitrators ultimately ruled. The withholding of specific evidence was considered by the court to be a reasonable strategic decision given the significant possibility that it would have been rebutted and potentially placed blame on the client.

Wormser, Keily, Galef & Jacobs LLP v. Frumkin, 2020 NY Slip Op 33172(U) (Sup. Ct. N.Y. Co. Sep. 28, 2020).

PENNSYLVANIA

Pennsylvania Supreme Court Limits Scope of Actionable Claims Under the Dragonetti Act

Andrew P. Carroll | *Goldberg Segalla, LLP*

The Pennsylvania Supreme Court recently addressed the boundaries of what constitutes "actionable 'civil proceedings'" under the Dragonetti Act, Pennsylvania's statutory version of a wrongful use of civil proceedings claim. In *Raynor*, the plaintiff was a defense attorney in a medical malpractice action ("Raynor") who brought suit against the underlying plaintiff's counsel ("D'Annunzio") following the reversal of a post-trial motion granting D'Annunzio sanctions of over $1 million dollars. While Raynor's appeal of the sanctions motion was pending, D'Annunzio enforced the sanctions order against Raynor, including the freezing of her business and personal bank accounts. After Raynor successfully reversed the sanctions order, she alleged that D'Annunzio's actions were for the improper purpose of destroying her personally and professionally in violation of the Dragonetti Act.

The Court held "that intra-case filings, such as the subject post-trial motion for contempt and/or sanctions—do not constitute the 'procurement, initiation or continuation of civil proceedings' as contemplated under the Dragonetti Act." After finding inconsistencies within different statutes regarding the definitions of "matter", "proceedings" and "action", the Court returned to the legislative purpose of the statute and other procedural methods for holding attorneys accountable for

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frivolous filings. Specifically, the Court highlighted "the fact that a separate civil rule specifically authorizes sanctions for pleadings, written motions, and other papers directed to the court that are presented for an improper purpose". The Court therefore concluded that the subject post-trial motion constituted an intra-case filing that cannot form the basis of a claim under the Dragonetti Act.

Justice David N. Wecht authored a concurring opinion providing a more specific description of what **does** qualify as an actionable claim under the Dragonetti Act:

A bright line is available, ensuring that the phrase 'civil proceedings' in Section 8351 of the Dragonetti Act is not transformed into a catch-all for every conceivable act to which litigants might resort in a given case. Such 'proceedings' are properly limited to claims (complaints, petitions for injunctive relief, and the like) and counterclaims—*i.e.*, actions that invoke the jurisdiction of a court.

Justice Wecht therefore provided additional guidance as to what qualifies as a "civil proceeding" under the Dragonetti Act, albeit within his concurring opinion.

Raynor v. D'Annunzio, 2020 Pa. LEXIS 6438 (Pa. Dec. 22, 2020).

TEXAS

Asserting Civil Claims After *Gray v. Skelton*: The Evolving Interplay Between *Hughes* Tolling and *Peeler* Exoneration

Stephen J. Huschka | *Kessler Collins PC*

In *Gray v. Skelton*, the Texas Supreme Court provided much-needed guidance on the interplay between *Hughes* tolling and *Peeler* exoneration. While not intrinsically related, these two doctrines commonly overlap. *Hughes* tolling provides that the statute of limitations for legal malpractice claims is "tolled until all appeals on the underlying claim[s] are exhausted or [ ] litigation is otherwise finally concluded." *See Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 119 (Tex. 2001). *Peeler* exoneration, on the other hand, bars a client from suing its criminal-defense attorney for malpractice "so long as [the client] stands convicted of the underlying crime."

The Texas Supreme Court addressed two key questions concerning the interplay between *Hughes* tolling and *Peeler* exoneration. There, Patricia Skelton was charged and convicted of a crime in 2007. In 2014, an appellate court vacated Ms. Skelton's conviction. In so doing, however, the court "did not consider whether [Ms.] Skelton was actually innocent," but instead held that reversal was required because she received ineffective assistance of counsel. In 2015, Ms. Skelton sued her criminal-defense attorney for malpractice—thus raising the question: is the mere vacating of a criminal conviction sufficient to satisfy *Peeler*?

The Texas Supreme Court answered this question with a resounding "no." The Supreme Court reasoned that "[h]aving counsel that falls below minimum Sixth Amendment standards . . . suggests nothing about the criminal defendant's innocence[—i]t merely says that a conviction cannot stand in the face of a constitutionally deficient trial." Accordingly, the Supreme Court held that any individual whose conviction is vacated "on grounds other than actual innocence" must obtain an affirmative "finding of their innocence as a predicate to the submission of their legal malpractice claim."

The extended period between Ms. Skelton's conviction (2007) and her malpractice lawsuit (2015) also raised questions concerning the proper application of *Hughes* tolling. The Supreme Court acknowledged that criminal convictions (unlike civil judgments) may be subject to long appellate windows. Thus, strict application of *Hughes* tolling could result in indefinite liability for criminal-defense attorneys. To address this concern, the Court held that *Hughes* tolling preserves the statute of limitations "during both direct appeals and post-conviction proceedings," but may not be applied "when neither a direct appeal nor a post-conviction proceeding is pending."

In sum, *Gray* makes clear that a former convict must seek an affirmative finding of innocence before asserting legal malpractice claim(s) against his/her criminal-defense attorney. That said, the statute of limitations on any malpractice claims will be tolled while he/she is actively seeking such a finding.

Gray v. Skelton, 595 S.W.3d 633 (Tex. 2020).

VIRGINIA

Cause of Action for Tortious Interference with Parental Rights Did Not Lie Against an Attorney Serving as Guardian ad litem

Jeffrey H. Geiger | *Sands Anderson PC*

The mother of three children involved in custody and visitation proceedings alleged that various professionals, including an attorney serving as a guardian ad litem, conspired, lied and acted maliciously to deprive her of the rightful custody of her children and, thereby, tortiously interfered with her parental rights. Specifically, she alleged that the guardian ad litem (1) acted maliciously and in bad faith, colluding with the co-defendants; (2) made false statements about her to mental health professionals and police officers; (3) suppressed evidence of her former husband's physical abuse; (4) exceeded the scope of his appointment as guardian ad litem and breached the standards for guardians ad litem promulgated by the Virginia State Bar; and (5) made false statements about her in and out of court, among other things.

The trial court sustained demurrers to the complaint and the mother appealed to the Virginia Supreme Court. On appeal, the Supreme Court confined application of the tort of interference with parental rights to those situations in which "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent." Rest. (2nd) of Torts, § 700 (1997).

In affirming the trial court, the Supreme Court noted that the facts "do not resemble an abduction or anything comparable." Further, it reasoned that "Divorce and custody cases inherently involve enough frustration, heartache, stress, and expense. We decline to expand the scope of the tort of interference with parental rights by opening a new front for disappointed, angry, frustrated, or vindictive parents to renew battle."

Previously, the Supreme Court affirmed a trial court's dismissal of a lawyer, who assisted with the adoption of a child, finding that liability arises only when the tortfeasor has interfered with parental rights "with knowledge that the parent does not consent." *Coward v. Wellmont Health System*, 295 Va. 351, 361 (2018). Expressing concern that "dragging mental health professionals and guardians ad litem into court for their role in a custody and visitation case would be highly detrimental to the process," the Supreme Court ruled that no cause of action for tortious interference with a parental relationship may be maintained against a guardian ad litem based upon her participation in a child custody and visitation proceeding.

Padula-Wilson v. Landry, 841 S.E.2d 864 (Va. 2020).

Homeowner's Claims Against Bank and Substitute Trustee Fail Absent Allegations of Harm Resulting from Alleged Breach of Deed of Trust

Jeffrey H. Geiger | *Sands Anderson PC*

In facts common to many foreclosure scenarios, the borrower fell behind in her payments, and the lender appointed a substitute trustee (which is often an attorney) to conduct the foreclosure sale. The deed of trust required the bank to provide her with a notice of the right to cure, which it did not do. Notwithstanding the lender's failure to provide the required notice, the trustee proceeded to foreclose on the property, selling it to a third-party.

The day before the foreclosure sale, the borrower sued the lender and the trustee, seeking rescission of the future sale and a declaration that they had no right to foreclose because of the lender's failure to provide the required notice. Among other things, the lender filed a demurrer to the complaint because the borrower failed to allege she incurred an injury or damages by reason of the breach of the deed of trust. The trial court sustained the demurrer and the borrower filed an amended complaint, seeking equitable rescission of the sale, and a claim for breach of fiduciary duty as to the trustee for conducting the foreclosure after being advised of (1) the pending litigation, and (2) the lender's failure to provide to her with the notice required under the deed of trust. The trial court sustained the demurrers with prejudice and the appeal followed.

As to the claim for equitable rescission, the Supreme Court of Virginia noted that courts will generally not rescind a sale absent cases involving fraud, collusion with the purchaser or a

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foreclosure sales price of such gross inadequacy that its shocks the conscience. Further, "a material breach of a deed of trust could, in certain circumstances constitute sufficient grounds to warrant the remedy." However, "[t]his Court . . . has never held that equitable rescission is available in cases where a plaintiff fails to plead that he or she incurred any damages or suffered any harm caused by an alleged breach of a deed of trust." Here, the borrower requested the notice of cure. She did not, however, allege that she had the ability to cure the default. Without an allegation that she could have cured the default, the lender's failure to send to her notice related to her right to cure did not cause her to sustain any injury or incur any damages. Accordingly, the Supreme Court affirmed the dismissal of her "drastic remedy for equitable rescission," because she failed to plead facts to support her claim.

Similarly, with respect to the borrower's breach of fiduciary duty claim, she failed to allege how the trustee's breach caused her damage because she did not state that, had she received the required notice, she could have (and would have) cured her payment default. Thus, even with notice of the lender's failure to provide the borrower with the required notice, the Supreme Court affirmed the dismissal of the breach of fiduciary duty claim against the trustee.

Young-Allen v. Bank of America, N.A., 838 S.E.2d 897 (Va. 2020).

Discipline of Attorney Not Unconstitutional and Disciplinary Board Applied Correct Standard of Review

Jeffrey H. Geiger | *Sands Anderson PC*

A self-described general practitioner with forty years of experience, the attorney agreed to provide legal advice to a widow related to a trust and to deal with her stepchildren's counsel, who sought certain property and an accounting. She paid him a $7,500 flat fee that was, per their agreement, "nonrefundable" and "earned upon the acceptance of representation." In the event that the case went to court, she was required to pay an additional $15,000 advanced fee.

The attorney testified that he performed ten to twelve hours of legal research on the weekend following the initial consultation, but kept no notes, made no copies of any research and did not maintain time records. In addition, he contacted opposing counsel to discuss the trust, faxed over the trust agreement (which his client did not want him to do) and exchanged emails to coordinate the pickup of certain items. A year later, his client emailed him (1) letting him know that the stepchildren had picked up the property, (2) terminating the representation, and (3) requesting a statement for the services provided. The attorney did not advise his client that the accounting issue had not been resolved.

Thereafter, the attorney produced a statement of "Professional Services Rendered," indicating that he had (1) read a 179 page trust document, (2) contacted various parties "as needed," (3) guaranteed his availability to her (as opposed to the other party), (4) prepared the matter for litigation, and (5) closed her filed. The widow hired then another attorney, who testified that the trust agreement was 38 pages and there was no obligation to provide an accounting per the trust. After asking for the file twice, the new attorney received only the correspondence sent to the other side and four pages of notes. When the client requested a partial refund, the attorney refused.

A bar complaint followed. The attorney was offered private discipline, which he refused. After, the matter proceeded to a contested evidentiary hearing, the District Committee imposed a public admonition with terms, including the return of $5,000 to the former client. The attorney appealed the decision to the Virginia State Bar's Disciplinary Board, which affirmed the Committee's decision.

The attorney appealed to the Virginia Supreme Court, which likewise found no error. First, the Board applied the correct standard of review in determining that "substantial evidence" supported the Committee's decision. It properly considered the entire record and not simply the written findings of fact contained in the Committee's determination.

Second, the Supreme Court rejected the claim that the lack of availability of private discipline at certain stages of the disciplinary process violates an attorney's constitutional rights to due process, i.e., that attorneys are coerced into foregoing a hearing on the merits in order to receive a private reprimand (and to, thus, avoid the potential for public discipline). Instead, "[a] proceeding to discipline an attorney is a civil proceeding," with the "primary purpose . . . to protect the public, not punish the attorney." As such, an attorney is entitled to notice of the charges and an opportunity to defend himself. He does not "have

any further constitutional due process rights that entitled him to receive private discipline."

Third, following a thorough examination of the record, the Supreme Court concluded that "substantial evidence" established that the attorney violated Rules 1.2 (Client Objectives), 1.4 (Communication), and 1.5 (Fees) of the Virginia Rules of Professional Conduct

Baumann v. Virginia State Bar, 845 S.E.2d 528 (Va. 2020).

WISCONSIN

Wisconsin Court of Appeals Recognizes "Split Innocence" Rule

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

This legal malpractice case arose out of an attorney's alleged negligence in the representation at trial of a criminal defendant facing multiple charges.

The jury found the client guilty of four felonies: second-degree sexual assault, third-degree sexual assault, and two charges of burglary, as well as one misdemeanor theft charge. The client had not contested the misdemeanor theft, but had maintained his innocence as to the felonies. The client later hired new counsel and filed a post-conviction motion based upon ineffective assistance of counsel. The court granted the motion finding that the trial attorney had made multiple intentional errors. The state then moved to dismiss all the charges except a misdemeanor theft charge, and added a new misdemeanor charge of resisting or obstructing an officer. The client then pleaded guilty to the two misdemeanors. The client was sentenced to nine months, but since he had already served two and a half years on the convictions which had been vacated, he was released.

The client sued the attorney for malpractice, claiming as damages the additional prison time he served, having to report to the sex offender registry, and having to maintain absolute sobriety and undergo an alcohol and drug assessment. The attorney moved to dismiss arguing that the plaintiff could not prove actual innocence, as he had pled guilty to the misdemeanor theft charge, which charge had been a part of the original trial of the case. The circuit court granted the motion, and the client appealed.

The plaintiff argued that he was only asserting a claim of malpractice as to representation in the felony charges, and therefore only had to prove actual innocence of those charges. The Wisconsin Court of Appeals agreed with the plaintiff, holding that a plaintiff in a legal malpractice case arising out of criminal representation need only prove actual innocence as to those charges in which they claim the representation was negligent. This "split innocence" situation, the court held, was within the actual innocence rule of the recently issued *Skindzelewski v. Smith*, 944 N.W.2d 575 (Wis. 2020). A petition for review is pending.

Jama v. Gonzalez, 2020 WL 7251091 (Wis. Ct. App., Dec. 10, 2020) (final publication pending).

Wisconsin Supreme Court Declines to Recognize Exception to Actual Innocence Rule

Corinne G. Ivanca | *Geraghty, O'Loughlin & Kenney, P.A.*

This legal malpractice case arose out of the attorney's representation of the client in defending a charge of theft by contractor, a misdemeanor. The attorney failed to recognize that the three-year statute of limitations in Wis. Stat. § 939.74(1) applied to bar prosecution of the case. The plaintiff entered a guilty plea and was sentenced to eight months in jail.

The plaintiff moved for post-conviction relief and the appointed post-conviction attorney realized that the statute of limitations applied. He moved to vacate the conviction on that basis. The court granted the motion and plaintiff was released from jail. He had spent four months in jail as a result of the conviction.

The plaintiff sued the attorney for legal malpractice and the defendant attorney moved for summary judgment, arguing that under *Hicks v. Nunnery*, 643 N.W.2d 809 (Wis. Ct. App. 2002), the plaintiff was required to demonstrate his actual innocence of

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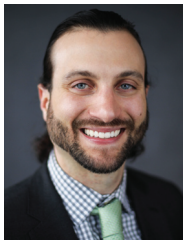
the criminal charge, which he could not do because he did not dispute that he committed the theft. The circuit court granted the motion for summary judgment. The plaintiff appealed, arguing that an exception to the actual innocence rule should be recognized in the case where an attorney fails to recognize the statute of limitations as a bar to the charge. The court of appeals affirmed in an unpublished opinion. On review, the Wisconsin Supreme Court affirmed, declining to create an exception to the actual innocence rule. The court noted that the plaintiff's remedy was his liberty which he was awarded after his post-conviction motion was granted. To give the admitted criminal an additional monetary remedy against his negligent lawyer would, quoting *Hicks*, "shock the public conscience, engender disrespect for courts and generally discredit the administration of justice."

Skindzelewski v. Smith, 944 N.W.2d 575 (Wis. 2020).

About the Authors



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MASSACHUSETTS

Right to Reject Payment Requisitions Waived if Prompt Pay Act Mandates Not Strictly Observed

Christopher K. Sweeney | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

For many years, parties to private construction contracts in Massachusetts had generally been free to negotiate any payment terms they wanted. This laissez-faire approach worked well for large owners and design professionals with the bargaining power to dictate terms to business partners. But for smaller subconsultants at the other end of the bargaining table—many of whom relied on regular payments to make ends meet—the system proved unworkable.

To address this power imbalance, in 2010, the Massachusetts legislature passed the Prompt Payment Act, G.L. c. 149, § 29E. The Act, which applies to most projects with a prime contract worth more than $3 million, sets protocols for submitting and responding to periodic payment applications. The Act requires that: (1) pay applications be submitted on a cycle of no more than 30 days; (2) applications be approved or rejected, in whole or in part, within 15 days of submission; and (3) payments be made within 45 days of approval. To properly reject a pay application, the Act requires a written notice of the "factual and contractual" reasons for the rejection, along with a certification that rejection has been made in good faith. If no such rejection is supplied within the prescribed time, the pay application is "deemed to be approved."

While the Prompt Pay Act is applauded for leveling the playing field in the design and construction industry, questions have lingered about whether the Act is punitive enough to accomplish its purposes. That is, where the Act lacks any specific language addressing the penalty for violations, should parties feel free to disregard its mandates? According to at least one Massachusetts trial court judge, who addressed the issue in *Tocci Bldg. Corp. v. IRIV Partners, LLC*, the answer is an emphatic "no."

The project involved the construction of a building in Boston's Seaport district. Over the second half of 2018, the contractor submitted seven pay requisitions for its work. In response to each of those requisitions, the owner sent the contractor only a perfunctory email explaining in vague terms why it was partially rejecting the requisition. The contractor sued the owner, arguing that because the owner had not strictly followed the Act's protocol in rejecting the requisitions, the requisitions were deemed to be approved, and the owner had to pay them in full.

The court agreed with the contractor. Strictly construing the Act, it held that because the owner's emails neither stated the factual and contractual basis for rejecting the requisitions nor incorporated the required certificate of good faith, the owner waived the right to challenge the contractor's requisitions. The court reasoned that because the Act reflects an important public-policy decision to ensure prompt payment of contractors, its terms must be given the teeth needed to compel compliance. Accordingly, the owner was required to pay the contractor's payment requisitions in full.

Tocci Bldg. Corp. v. IRIV Partners, LLC, No. SUCV2019000405, 2020 WL 8182898 (Mass. Super. Ct. Nov. 20, 2020).

Death of Property Owner Terminated Broker's Exclusive Listing Agreement

Christopher K. Sweeney | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In *Newton Centre Realty, Inc. v. Jaffe*, the son of a deceased real estate owner, as personal representative of the seller's estate, sold three residential properties owned by the seller. Before her death, Shirley Jaffe entered into an exclusive right-to-sell agreement with plaintiff Newton Centre Realty, Inc. ("Newton") to sell three separate residential properties. Under the agreements Newton was entitled to a four percent commission under any of the three following conditions: (1) if Newton procured a ready, willing, and able buyer on terms acceptable to the seller; (2) if the property were sold through anyone's efforts, including the seller; or (3) if the property was sold to anyone Newton introduced to the seller within 90 days of the expiration of the exclusivity agreement. The agreements ran through August 31, 2018.

Following Shirley Jaffe's death, her son David Jaffe, as the personal representative of his mother's estate, independently

sold all three properties before the expiration of any of the exclusivity agreements. Newton responded by bringing suit against David in Superior Court on counts of breach of contract and unjust enrichment seeking damages in the amount of the four percent commission. David moved to dismiss, claiming that there was no breach of contract because the agency relationship between Shirley Jaffe and Newton terminated upon her death, and claiming that there was no unjust enrichment because Newton did not allege that it conferred any benefit in connection with the sale of any of the three properties. A Superior Court judge granted the motion to dismiss, and Newton appealed the dismissal of the breach of contract claim only.

The Appeals Court looked to the established principle that the death of a principal automatically terminates the actual and apparent authority of an agent "because it negates the existence of the person on whose behalf the agent acts." An exception to this rule is when the agency is coupled with an interest in the property. The Appeals Court held that the brokerage agreement did not create an interest in property, and therefore the agreement did not survive Shirley's death.

Newton Centre Realty, Inc. v. Jaffe, 150 N.E.3d 811 (Mass. App. Ct. 2020).

Each Building in Phased-Development Projects Constitutes Distinct "Improvement" for Purposes of Statute of Repose

Christopher K. Sweeney | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

Imagine the following: A developer consults with an architect in 2020 about a six-building condominium project. The architect promptly produces a set of plans, which are stamped by an engineer. Over the next three years, the developer secures the necessary permitting from a notoriously stingy local planning board. The developer finally breaks ground in 2024. He completes buildings 1-3 in 2026. Then a recession hits and the developer suspends construction for three years. When the market recovers, the developer resumes construction and completes buildings 4-6 in 2031. Four years later, in 2035, the owner of building 2—the son of an oil baron—sues the developer, the architect, and the engineer alleging that a defective flooring tile caused his Pomeranian to slip and break a nail. May the owner recover for Fido's mishap? Or are his claims barred by Massachusetts' six-year statute of repose? It depends on whether the statute began to run when building 2 was completed in 2026, or alternatively, when the entire project was completed in 2031.

The Massachusetts Supreme Judicial Court addressed this issue in *D'Allessandro v. Lennar Hingham Holdings, LLC*. There, the trustees of a condominium trust sued the condo's developer seeking damages for design and construction defects in the condo's common areas. The developer moved for partial summary judgment, arguing that the statute of repose barred the trustees' claims as to condo buildings that were substantially completed more than six years earlier. The trustees countered that where a single developer completes a multi-building project in phases, the statute of repose is triggered only when the project is finished, not separately on the completion of each building. Recognizing a lack of relevant authority, a Massachusetts federal district court judge certified the following question to the Supreme Judicial Court:

> Where the factual record supports the conclusion that a builder or developer was engaged in the continuous construction of a single condominium development comprising multiple buildings or phases, when does the six-year period for an action of tort relating to the construction of the condominium's common or limited common elements start running?

The court concluded that in phased development projects like the one at issue, the statute of repose is triggered each time an individual building opens for use or is deemed substantially complete. That is, for purposes of the statute of repose, each building must be considered as a standalone unit. Potential plaintiffs must bring all design and construction defect claims within six of years of that particular building being completed, regardless of whether construction remains ongoing on other buildings.

D'Allessandro v. Lennar Hingham Holdings, LLC, 156 N.E.3d 197 (Mass. 2020).

— Continued on next page

Prevailing Defendant Entitled to Appellate Attorneys' Fees on Special Motion to Dismiss Memorandum of Lis Pendens

Christopher K. Sweeney | *Conn Kavanaugh Rosenthal Peisch & Ford, LLP*

In cases involving an alleged interest in real property, the Massachusetts lis pendens statute, M.G.L. c. 184, § 15, allows the defendant to file a special motion to dismiss frivolous claims. If the trial court allows the motion, it must award the successful defendant the attorneys' fees and costs incurred in defending the case. But what happens if the plaintiff appeals? If the judgment is affirmed, does the defendant get its appellate attorney's fees too? According to a recent decision of the Massachusetts Supreme Judicial Court, the answer is yes.

In *DeCicco v. 180 Grant Street, LLC*, the plaintiff buyers offered to purchase real estate from the defendant seller. The parties executed a written offer to purchase, but negotiations ultimately broke down before the parties could agree to terms on a purchase and sale agreement. The buyers sued the seller alleging that the parties had, in fact, reached a fully formed sales contract. The buyers also sought and obtained a memorandum of lis pendens, effectively depriving the seller of the opportunity to negotiate with other prospective purchasers until the litigation was resolved.

The seller filed a special motion to dismiss the case under the lis pendens statute, arguing that the buyers' claims were wholly unsupported by fact or law. The trial court allowed the motion and awarded the seller its attorneys' fees, as required under the statute. The buyers appealed.

Analogizing the lis pendens statute to the Massachusetts Anti-SLAPP statute, the Massachusetts Supreme Judicial Court held that where the special motion to dismiss protocol was broadly meant to protect defendants against groundless litigation, the only fair result was to award a successful defendant *all* of its attorneys' fees, not just those incurred in the trial court. Accordingly, the court awarded the seller its appellate attorneys' fees, in addition to the fees the seller already had been awarded by the trial court.

DeCicco v. 180 Grant Street, LLC, 144 N.E.3d 281 (Mass. 2020).

MICHIGAN

Professional Relationship Required to Maintain Architectural-Malpractice Claim

James J. Hunter | *Collins Einhorn Farrell PC*

The Michigan Court of Appeals highlighted the general rule that damages for professional negligence are not recoverable in the absence of a professional relationship. In *Rochester Endoscopy and Surgery Center, et al v DesRosier Architects, PC*, plaintiffs hired a general contractor to build a new surgical facility. The general contractor then hired the defendant-architects to design the facility. During construction, plaintiffs realized that the design did not comply with building codes. Plaintiffs sued the defendant architectural firm for professional negligence. Plaintiffs also filed a separate lawsuit against the general contractor.

The court held that plaintiffs' lawsuit against the architectural firm suffered a fatal flaw: there was no professional relationship between plaintiffs and defendant. Plaintiffs only claimed that the architects negligently performed duties under their contract with *the general contractor*. Plaintiffs failed to allege a professional relationship with the defendant. Nor did plaintiffs allege any of the very limited circumstances in which a third party can sue for professional negligence (e.g., an attorney drafting a will may owe a limited to duty to beneficiaries named in the will).

Despite the absence of a professional relationship, the court assessed whether there existed a general duty on the part of the defendant to plaintiffs, the breach of which could result in tort liability. The court held that the common-law duty to use ordinary care did not extend to economic loss, such as the damages claimed by plaintiffs. In sum, absent special circumstances, a professional relationship is required to sustain a professional-negligence claim.

Rochester Endoscopy and Surgery Center, LLC and Jaro Company, LLC v DesRosiers Architects, PC, No. 349952, 2020 WL 6231823 (Mich. Ct. App. Oct. 22, 2020).

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ADDENDUM

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MONTANA

Mailed Letter Considered Delivered Based Upon Preponderance Standard; No Due Process Violation

Hannah Stone | ***Milodragovich, Dale & Steinbrenner, PC***

Sean West, a wildland firefighter, worked for Griz One for several weeks before quitting abruptly. While the parties had agreed to compensate West $350 a day for his work, Griz One unilaterally reduced West's final pay to $25/hour. West timely filed a wage claim with the Montana Department of Labor and Industry ("DOLI") for unpaid wages of $1,700. Griz One failed to respond to the DOLI's notice of the claim and initial determination that it owed West the full amount requested. Griz One further failed to respond when DOLI issued a finding awarding West his wages plus a 110% penalty. Only after the final determination did Griz One request a redetermination, which DOLI denied.

Griz One appealed the administrative adjudication to the District Court. Griz One argued the DOLI had violated its due process rights by failing to notify it of the potential 110% penalty for unpaid wages, and that the DOLI had applied the wrong burden of proof in deciding it had received the initial letter and notice. The District Court disagreed, and awarded West his full wages, 110% penalty, interest and attorney fees despite being represented pro bono.

On appeal the Montana Supreme Court found that the DOLI applied the wrong burden in refuting the statutory presumption that "a letter duly directed and mailed was received. . ." Mont. Code Ann. § 26-1-602(24). The DOLI applied a "clear and convincing" as opposed to "preponderance of evidence" standard in evaluating Giz One's claim it did not receive the letters prior to the determination. Despite this, the Montana Supreme Court upheld the lower court's decision that Griz One had not refuted the lower burden of proof, either.

Griz One also argued that the DOLI violated its due process rights by failing to prominently display the 110% potential penalty the DOLI can assess against an employer for unpaid wages. The Court again affirmed the lower court's finding that there was no due process violation in notifying employer of penalty by standard mail. The case was remanded with an order to award West his fees claimed on appeal.

Griz One Firefighting v. State, 475 P.3d 739 (Mont. 2020).

Legal Malpractice

ARIZONA

Prosecutor Disciplined for Conduct Prejudicial to the Administration of Justice

Donald Wilson, Jr.* | *Broening Oberg Woods + Wilson*

Arizona Ethics Rule 8.4(d) provides that an attorney in the State shall not "engage in conduct that is prejudicial to the administration of justice." The Rule was recently used to discipline a prosecutor for comments made during closing arguments in multiple capital murder trials. In *Matter of Martinez*, 462 P.3d 36 (Ariz. 2020), the Supreme Court of Arizona partially reversed the finding of a disciplinary hearing panel's determination that the prosecutor, Juan M. Martinez, did not violate Rule 8.4(d) through certain comments made during closing arguments.

The Supreme Court held that in three separate closing arguments Martinez violated ER 8.4(d) through arguments made during his closing. The Court held that during his close in *State of Arizona v. Morris*, Martinez singled out certain jurors based upon their general appearance and looks and questioned whether they would volunteer to allow the defendant to sit on their chest and grab their hair. The Court determined that Mar-

tinez also violated ER 8.4(d) during his closing argument in the penalty phase in *State v. Gallardo* when he argued that the victim's father would not be able to speak to his murdered son and persisted with an argument concerning a defense witness' alleged bias despite the trial court repeatedly sustaining defense counsel's objection. Finally, the Court held that in *State v. Lynch*, Martinez violated ER 8.4(d) by again inviting jurors to place themselves in the shoes of the victim by suggesting that none of the jurors could know what it was like to be manhandled by the knife-wielding defendant.

The Supreme Court of Arizona appeared to take particular offense to the arguments due to Martinez's position as a prosecutor and rejected the disciplinary hearing panel's view that his job was to "seek executions." Rather, the Court noted that a prosecutor's role is to ensure that justice is done, not to win a case. Interestingly, none of the underlying convictions and sentences (which were all appealed) were overturned because of alleged prosecutorial misconduct based on the same comments found to have violated ER 8.4(d). The Court rejected the State Bar's assertion that all prosecutorial misconduct equated to ethical misconduct and adopted the American Bar Association's Recommendation 100B (2010) differentiating between prosecutorial error and ethical misconduct.

While the Court held that Martinez violated ER 8.4(d), it affirmed the disciplinary hearing panel's finding that he did not violate Rule 41(g) of the Arizona Supreme Court (prohibiting members of the Bar from engaging in "unprofessional conduct"), based *inter alia* on the conduct described above. The Court remanded the matter to the disciplinary panel with instructions to reprimand Martinez.

Matter of Martinez, 462 P.3d 36 (Ariz. 2020).

PENNSYLVANIA

Pennsylvania Superior Court Allows Discovery of Financial Information and Upholds "Attorneys Eyes Only" Designation

James G. Schu, Jr. | *Kane, Pugh, Knoell, Troy & Kramer, LLP*

In a case alleging wrongful use of civil proceedings against lawyer defendants, plaintiffs demanded punitive damages and, accordingly, sought discovery of the personal wealth of the defendants, as permitted under Pennsylvania law. The lawyer defendants objected on the basis that the discovery interfered with their privacy rights. The trial court entered an order compelling the discovery—including production of their tax returns, bank records, and other documents relating to their net worth—but subject to an "attorneys' eyes only" confidentiality requirement.

On appeal, the lawyer defendants argued that the trial court's order violated not only their own privacy rights, but also the rights of their spouses and law partners. The Superior Court noted that defendants had waived the issue by not raising it before the trial court. Yet the Superior Court addressed the merits of the argument, holding that the lawyer defendants "lack[ed] standing to assert the alleged deprivation of another's rights" —in this case, their spouses and law partners. If those persons wanted to protect their privacy rights, they would have to move to intervene in the case, and the lawyer defendants could not act as their "litigation proxies."

The Superior Court then turned to the privacy rights of the lawyer defendants themselves. It acknowledged that the lawyer defendants had a privacy interest in their personal financial information, but that "[t]he right to privacy, however, is not an unqualified one; it must be balanced against weighty competing private and state interests" (internal quotation omitted). However, it upheld the trial court's order compelling the requested discovery, finding that the trial court's discovery order adequately balanced those competing interests. On the one hand, the plaintiffs had a right to seek punitive damages in their claim for wrongful use of civil proceedings, and Pennsylvania law explicitly permits discovery of a defendant's wealth

— Continued on next page

in cases where the plaintiff makes a prima facie showing that punitive damages are warranted. On the other hand, the trial court's discovery order accommodated the lawyer defendants' privacy rights by requiring that the discovery be designated for "attorneys eyes only," prohibiting the plaintiffs themselves from viewing the lawyer defendants' private financial information, and requiring plaintiffs' counsel to destroy the documents at the conclusion of the litigation.

Cabot Oil & Gas Corp. v. Speer, 2020 Pa. Super. 258, 241 A.3d 1191 (2020).

Pennsylvania Supreme Court Declines to Adopt "Continuous Representation Rule" for Legal Malpractice Actions

Jonathan B. Skowron | *Schnader Harrison Segal & Lewis LLP*

On December 22, 2020, the Pennsylvania Supreme Court declined to adopt what has been referred to as the "continuous representation rule": a doctrine that tolls the limitations period for legal-malpractice claims until an attorney ceases representing a client. *Clark v. Stover*, No. 2 MAP 2020, 2020 Pa. LEXIS 6489 (Dec. 22, 2020). Although many other states have adopted the doctrine in one form or another, Pennsylvania's highest court held that adopting it in the state was the prerogative of the legislature, not the courts, and also hinted that the rule was unnecessary due to other tolling provisions for undiscovered injuries or fraud (such as the "discovery rule" and the "doctrine of fraudulent concealment"). The Court also stated that it saw no reason to treat attorneys differently than other professionals who are not subject to a similar doctrine, which can permit claims to be brought years after the standard limitations period has passed.

In some ways, *Clark v. Stover* only affirms what had already been assumed to be the law in Pennsylvania since lower appellate courts had previously rejected the doctrine. But a ruling from an intermediate court is always subject to reversal by the Supreme Court, so now that the Pennsylvania Supreme Court has ruled, attorneys in Pennsylvania can finally rest assured that they will be subject to the same statutory limitations periods as other professionals, at least in malpractice actions governed by Pennsylvania law. Lawyers can also now more confidently and patiently work through any client concerns and attempt to correct any mistakes or errors (real or perceived) knowing that they are not thereby postponing the running of a limitations period.

Clark v. Stover, No. 2 MAP 2020, 2020 Pa. LEXIS 6489 (Dec. 22, 2020).

Real Estate & Design Professionals

NEW JERSEY

The New Business Rule is Alive and Well in New Jersey

Andrew C. Sayles | *Connell Foley, LLP*

The New Business Rule is a judicially-created restriction on the ability of a business entity to prove that it has suffered lost profits in a business transaction. In order to recover lost profits and related damages, a party must demonstrate prior experience in that particular field or industry. It often arises as a significant "case within the case" issue in legal malpractice, real estate, and commercial disputes, and has a significant impact on damages.

Under the New Business Rule, lost profits are available as a measure of compensatory damages that may be recoverable as long as they are capable of being established to a reasonable degree of certainty. Anticipated profits that are too remote, uncertain, or speculative are not recoverable. That a plaintiff may not be able to fix its lost profits with precision will not preclude recovery of damages, but courts require a reasonably accurate and fair basis for the computation of alleged lost profits. Thus, when the plaintiff is an ongoing business, its past experience and success will provide a reasonable basis for the computation of lost profits.

On November 6, 2020, the New Jersey Superior Court Appellate Division ruled in *Schwartz v. NJ 332* and affirmed that the New Business Rule remained applicable within New Jersey, notwithstanding a growing trend within other jurisdictions to abandon the "anachronistic rule." In *Schwartz*, the Plaintiff, who had limited experience in residential real estate rehabilitations, asserted claims for malpractice against his prior attorneys concerning multiple mixed-use real estate development projects in which he was an investor. Plaintiff testified that he purchased and rehabilitated several homes but was unable to point to any large-scale development experience. Plaintiff's expert reports identified substantive lost future profits based on similar completed mixed-use developments. Defendants argued that because Plaintiff did not have the requisite prior experience in other large-scale projects, the New Business Rule barred his lost profits claims. The Appellate Division agreed.

Although the Court applied the New Business Rule under applicable jurisprudence, the Appellate Division's ruling welcomed higher court intervention: "Therefore, 'whether or not the time has come for our State to join the majority of jurisdictions that have abandoned this anachronistic rule', we, like our predecessors, are constrained to conclude that "until the Supreme Court says otherwise, the new business rule remains the law in this State."

Schwartz v. NJ 332, Docket No. A-3187-18T3, A-4292-18T2, 2020

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