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Clausen Miller P.C.

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Defending A Claim For Attorney's Fees In Bad Faith Actions: Third Circuit Court Of Appeals Affirms Decision To Deny *Outrageously Excessive* Claim For Attorney's Fees

by ***Thomas J. Hennessey***

In a contested Bad Faith lawsuit brought by the named insureds against their insurance carrier, the United States Third Circuit Court of Appeals, in the case of *Clemens v. New York Central Mutual Fire Insurance Company*, 2018 U.S. App. LEXIS 25803 (3d Cir. Sept. 12, 2018), heard arguments as to whether the claimants were entitled to attorney's fees pursuant to Pennsylvania's Bad Faith Statute, 42 Pa. Cons. Stat. § 8371. In its analysis, the Third Circuit specifically adjudicated the issue of whether the District Court abused its discretion by denying, in full, the claimants' demand for attorney's fees upon a finding the amount sought for attorney's fees was "outrageously excessive." In a case of first impression before the Third Circuit, the Court formally endorsed a view already adopted by several other circuits, and affirmed the general rule that "where a fee-shifting statute provides a court discretion to award attorney's fees, such discretion includes the ability to deny a fee request altogether when, under the circumstances, the amount requested is 'outrageously excessive.'" *Id.*, citing *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980).

In the underlying action before the District Court for the Middle District of Pennsylvania, Bernie and Nicole Clemens filed suit against New York Central Mutual Fire Insurance Company ("NYCM") to pursue coverage under their underinsured motorist ("UIM") endorsement arising from personal injuries suffered as a result of a serious car accident. Additionally, Mr. and Mrs. Clemens sought damages under Pennsylvania's Bad Faith Statute arising from NYCM's handling of their claim. Prior to trial, the parties settled the UIM claim for $25,000.00. The remaining Bad Faith claim was the only issue adjudicated before the District Court. At the conclusion of a four day jury trial, the jury rendered a verdict in favor of Mr. and Mrs. Clemens, and awarded $100,000.00 in punitive damages. Following the jury verdict, Plaintiff's attorney made application for reimbursement of attorney's fees pursuant to 42 Pa. Cons. Stat. § 8371. According to Pennsylvania law: "In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions . . . assess court

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costs and attorney fees against the insurer." 42 Pa. Cons. Stat. § 8371.

Upon presentation to the presiding trial judge, Plaintiff's attorney sought reimbursement for $946,526.43 in attorney's fees and costs. In its holding, the District Court found the amount of fees sought as "outrageously excessive," and further found that pursuant to Pennsylvania Rules of Civil Procedure, the presiding trial judge has broad discretion to award attorney's fees in full, in part or to deny in totality. At the conclusion of the lower court's review of the alleged fees and costs, the court found 87% of the claimed fees to be vague, duplicative, unnecessary, or inadequately supported, and as a result, used its discretion to deny in full Plaintiff's request to be awarded attorney's fees. In response to the lower court's decision, Plaintiff appealed to the Third Circuit Court of Appeal to argue that the presiding District Court judge abused its discretion in denying Plaintiff's request for attorney's fees.

On appeal, the Third Circuit cited prevailing case law which acknowledges that courts "have a positive and affirmative function in the fee fixing process, not merely a passive role." *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). Further, the Third Circuit further referenced that "in calculating the hours reasonably expended, a court should review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are excessive, redundant, or otherwise unnecessary." *Id.* It is interesting to note that the Third Circuit then went on to set forth a calculated policy that gives great deference to the discretion of the presiding trial judge. The Third Circuit pronounced that "underlying these decisions is the idea that if courts did not possess this kind of discretion, 'claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such conduct would be reduction of their fee to what they should have asked for in the first place.'" *Clemens v. New York Central Mutual Fire Insurance Company*, 2018 U.S. App. LEXIS 25803 (3d Cir. Sept. 12, 2018), *quoting Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980). In summation, the Third Circuit explained that although a finding of bad faith allows the presiding trial judge to award attorney's fees pursuant to 42 Pa. Cons. Stat. § 8371, "when a party submits a fee petition, it is not the 'opening bid in the quest for an award.'" *Id.* citing *Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92, 97 (4th Cir. 1993).

The Third Circuit further explained that "the calculation of an attorney's fee award begins with the lodestar method: the multiplication of the actual number of hours spent in pursuing the claim by a reasonable rate." *Id.* When presenting a claim for attorney's fees pursuant to the lodestar method, "the party seeking attorney's fees has the burden to prove that its request . . . is reasonable." *Id.* citing *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). To carry its burden, the requesting party needs to "make a good faith effort to exclude . . . hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). When these principals were applied to the case at bar, the perplexing question was: How could the Plaintiff's attorney reasonably, ethically and accurately justify $946,526.43 for services rendered? In its review, the Third Circuit specifically discussed the presiding trial judge's review of the claim that 562 hours were billed for trial prep. As the presiding trial judge stated, "if counsel did nothing else for eight hours a day, every day, [562 hours] would mean that counsel spent approximately 70 days doing nothing but preparing for trial in this matter." App. 630. To further cast doubt on counsel's request for fees, the record demonstrated that the trial lasted only four days, and involved a total of only five witnesses for both sides.

Lastly, and potentially the most interesting part of the Third Circuit's affirmation of the District Court's discretion to deny in full Plaintiff's outrageously excessive claim for attorney's fees, is that the Third Circuit specifically referenced the practitioner's performance at trial to support its decision. The record on appeal was clear that Plaintiff's counsel had "to be repeatedly admonished for not being prepared because he was obviously unfamiliar with the Federal Rules of Evidence, the Federal Rules of Civil Procedure and the

rulings of the court." App. 630. The Third Circuit specifically referenced the practitioner's poor performance in support of the trial judge's discretionary findings that strongly doubted counselor's alleged 562 hours for trial prep. The Third Circuit held that "given counsel's subpar performance and the vagueness and excessiveness of the time entries, the District Court did not abuse its discretion." *Id.* The Third Circuit held that "District Courts have the discretion to deny a fee request in its entirety when the requested amount is 'outrageously excessive' under the circumstances." *Id.*

Leaning Point: Plaintiff's attorneys should be careful to properly document and classify time entries when seeking reimbursement from the defense. Defense attorneys should thoroughly review any claim for attorney's fees to argue against fees that may be vague, duplicative or excessive. ♦

A Policyholder's Willful Misrepresentations And Failure To Cooperate Merits Dismissal Of Its Claim

by ***Michael W. Jacobson***

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A New York Federal Court granted summary judgment to an insurer following a fire loss based upon its finding that the insured breached the Policy's concealment or fraud condition by making willful and material misrepresentations with the intent to defraud the insurer regarding the deed and mortgage at the time the fire loss occurred. *D'Andrea v. Encompass Ins. Co. of Am.*, No. 15-CV-467-MJR, 2018 U.S. Dist. LEXIS 146446, 2018 WL 4095098 (W.D.N.Y. Aug. 28, 2018). The Court further held that the insured's willful and material misrepresentations also breached the Policy's cooperation condition. *Id.*

Encompass Insurance Company of America issued a Universal Security Deluxe Package policy of insurance to Dennis D'Andrea for a two-unit residence located in Lancaster, New York (the "Premises") for the period of February 19, 2013, to February 19, 2014. *Id.* at *1. The Policy provided insurance coverage for losses during the policy period that occurred due to fire. *Id.* at *1-2. The Policy included a Concealment or Fraud condition, which allowed the insurer to deny coverage if the insured "intentionally concealed or misrepresented any material fact or circumstance" or "engaged in fraudulent conduct" before or after the claimed loss occurred. *Id.* at *7. The Policy also had a standard cooperation condition which required the insured to cooperate with the insurer in the investigation or settlement of the claim.

On April 27, 2013, the Premises suffered a fire. In its investigation, the insurer requested sworn proofs of loss and other documents relating to the ownership, deed and mortgage of the Premises. The insured ultimately submitted three sworn proofs of loss, including a sworn proof of loss for the dwelling requesting $225,000 in damages and listing the insured as the owner of the Premises. *Id.* at *3.

After reviewing the sworn proofs of loss and other documents, the insured appeared for an examination under oath (EUO). At the EUO, the insured testified that he was the only owner of the Premises, that only his name appeared on the deed, that he did not transfer ownership to his son and that there was no mortgage on the Premises at the time of the fire. However, records obtained during the investigation showed that the insured's testimony was incorrect. Specifically, a warranty deed dated January 21, 2013, and recorded in county clerk's

office on January 23, 2013, showed that the insured granted tittle to the Premises to his son. *Id*. at *4.

Based upon the insured's misrepresentations during the EUO and in his sworn proof of loss, the insured's claim was denied and he brought suit against the insurer. *Id*. at 5. After discovery, the insurer moved for summary judgment based upon the insured's breach of the Policy's Concealment or Fraud condition and Cooperation condition in misrepresenting his ownership and financial interest in the Premises. *Id*. at *5-6.

New York law requires that an insurer seeking to void a policy under the concealment or fraud policy provision "must show by clear and convincing evidence that the insured (1) willfully made (2) a false and material statement under oath with the (3) intent to defraud the insurer. *Id*. at *7.

Regarding the insured's ownership and financial interest in the Premises, the Court found that the insured willfully misrepresented his ownership in the Premises in testifying during his EUO that he was the only owner and that there was no mortgage on the Premises. *Id*. at *10. The insured initially attempted to argue in opposition that the EUO questions on ownership were ambiguous and this was swiftly rejected by the Court. The insured ultimately conceded in its papers that he did, in fact, deed the Premises to his son prior to the loss. *Id*. at *10.

The Court next analyzed whether the insured's false statements on the deed and mortgage of the Premises were material. *Id*. at *10. The Court held that the statements were material as they go directly to whether the insured actually had an insurable interest in the Premises and were material as a matter of law. *Id*. Finally, regarding intent, the insured argued in opposition that he did not intend to defraud the insurer because he still viewed himself as the owner of the Premises because he said he controlled the Premises, despite deeding the Premises to his son. The Court rejected the insured's argument and pointed out that the insured falsely testified that there was no mortgage on the Premises and that he was the only individual named on the deed. Both of the statements were proven false by documentary evidence. The Court held that the "only reasonable conclusion to be drawn from the [insured's] actions and testimony is that he attempted to hide the truth about the deed and mortgage from [the insurer] in an attempt to receive coverage that he was not entitled to under the Policy." *Id*. at *13.

The Court also granted summary judgment based upon the Policy's cooperation condition which required the insured to cooperate with the insurer in the investigation or settlement of the claim. *Id*. at *17. To deny an insured's claim under this provision, the Court noted that an insurer must show that "(1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction." *Id*. at *17.

On the first two elements, the Court found that the insurer acted diligently to get the insured's cooperation in requesting proofs of loss and taking the insured's EUO, and that these efforts were reasonably calculated to get the insured's cooperation. *Id*. at *18. Finally, relying upon its analyses under the fraud or concealment provisions, the Court held that as a matter of law the insured's conduct in misrepresenting the truth about the names on the deed and whether there was a mortgage on the Premises in order to defraud the insurer was willful and avowed obstruction. *Id*. Thus, the Court granted the insurer's motion for summary judgment dismissing the Complaint under the Policy's Cooperation condition in addition to the Policy's Concealment or Fraud condition.

Learning Point: An insured's willful and material misrepresentations , and the subsequent failure to provide any reasonable or plausible explanation as to the misrepresentations, breached both the policy's concealment or fraud condition and a policy's cooperation condition. ♦

Twenty-Five Years Later, *Daubert* Finally Comes To New Jersey

by **Catherine P. O'Hern**

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On August 1, 2018, the New Jersey Supreme Court reconciled the State's standard under N.J.R.E. 702, and 703, with the *Daubert* standard adopted by the Federal Courts in 1993 and by many State Courts thereafter, with the exception of New Jersey and others in its decision, *In re Accutane Litigation*. Nos. A-25, 079958, 2018 N.J. LEXIS 988, at *101 (Aug. 1, 2018). The *Accutane* Court's decision makes clear that going forward, New Jersey trial courts are now directed to incorporate the *Daubert* "factors" into their analysis of expert testimony, in civil cases. *Id.*

In 1993, the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, entrusted trial courts with the role of gatekeeper to determine whether an expert witness's scientific testimony is based on scientifically valid reasoning, which can properly be applied to the facts at issue in the case at bar. *Daubert*, 509 U.S. 579, 595-97 (1993). In doing so, the Court abandoned the general acceptance standard found in *Frye*, as the sole test for assessing reliability of scientific expert testimony, in favor of the methodology-based approach found in *Daubert*. *Id.*; *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Daubert* set forth certain factors that the trial court may consider in determining whether the scientific methodology is valid, while directing that the focus of the inquiry must be "solely on principles and methodology, not on the conclusions that they generate." *Daubert* at 595. Those factors include: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community. *See Id.*, at 593-95. And now, twenty-five years later, the New Jersey Supreme Court now holds that civil trial courts shall incorporate these *Daubert* factors into their assessment of scientific testimony, in their role as "gatekeeper."

Although the New Jersey Supreme Court never adopted the *Daubert* standard, it was in the vanguard of courts to be persuaded that adherence to the *Frye* general acceptance standard as the sole test for assessing reliability of scientific expert testimony was unsatisfactorily constricting for fairly assessing reliability in certain areas of novel or emerging fields of science. *In re Accutane*, *supra*, at *72-3. Thus, two years before the *Daubert* decision, New Jersey was among the courts to "shift from exclusive reliance on a "general acceptance" standard to a methodology-based approach. *See Landrigan v. Celotex Corp.*, 127 N.J. 404, 414, 605 A.2d 1079 (1992);

Rubanick v. Witco Chem. Corp., 125 N.J. 421, 447, 593 A.2d 733 (1991)." *In re Accutane*, at 18.

In arriving at its recent decision to incorporate the *Daubert* factors, the Court emphasized that "we expect the trial court to assess both the methodology used by the expert to arrive at an opinion and the underlying data used in the formation of the opinion." *In re Accutane* at *98. Similar to the reasoning in *Daubert*, the *Accutane* Court declared that "Methodology, in all its parts, is the focus of the reliability assessment, not outcome." *Id.*; *See Daubert*, at 595 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.")

The *Accutane* Court acknowledged that "both our civil standard and the federal standard moved in the same direction and towards the same common goal." *In re Accutane*, at *19. "We perceive little distinction between *Daubert*'s principles regarding expert testimony and our own, and believe that its factors for assessing the reliability of expert testimony will aid our trial courts in their role as the gatekeeper of scientific expert testimony in civil cases." *Id.* at *19-20. The *Daubert* factors "dovetail with the overall goals of our evidential standard and would provide a helpful—but not necessary or definitive—guide for our courts to consider when performing their gatekeeper role concerning the admission of expert testimony." *Id.* at *101.

Although the *Accutane* Court found the *Daubert* factors helpful and directed that "the factors identified originally in *Daubert* should be incorporated for use by our courts," the New Jersey Supreme Court fell short of declaring New Jersey, a "*Daubert* Jurisdiction" and hesitated to embrace the full body of *Daubert* case law, as applied by state and federal courts. *Id.* When assessing whether a trial court properly admitted or excluded expert scientific testimony in civil cases, *In re Accutane* reaffirmed the abuse of discretion standard as the appropriate standard for Appellate Courts. *Id.* at *20.

The *Accutane* Court intended its decision to bring greater consistency to the gate keeping function in civil cases and to provide much needed clarification. *Id.* at *88, 97-8. While it acknowledges this process is "complicated" and "difficult," the Court, nonetheless, maintains the trial court's function as gatekeeper and directs the trial court to incorporate the *Daubert* factors into its determination of which expert testimony is reliable enough to be admitted, which is to be excluded, and charges the trial court with the task of preventing "the jury's exposure to unsound science through the compelling voice of an expert." *Id.* *85-7(*internal citations omitted.*).

Learning Point: Litigants should recognize that while embracing the *Daubert* factors as "helpful," the *Accutane* decision strengthens the Court's commitment to a strict adherence on the part of the gatekeeper to those principles established in *Rubanek*, where, "the court must conduct a preliminary inquiry focusing on (1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence [will] overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case." *Rubanek* at 446. (*internal citations omitted*)

Under *Accutane*, the rigor of the gatekeeper function is reinforced to be stringent enough to determine whether admitting the scientific evidence will prevent the jury from accurately assessing its weight, but not so severe that the jury is prevented from ever assessing its weight. *See Id.* at 433, 449. (*internal citations omitted*). To get past the gatekeeper to the jury, litigants must now show a sound methodology, as well as, reliable data underlying the expert's opinion. ♦

New York Appellate Court Holds That Even Though There Was No Negligence, Broad Indemnification Clause Required Indemnification Of Defendant's Costs Related To The Defense Of The Action

by ***Marina O'Keeffe***

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In *Robinson v. Brooks Shopping Center, LLC, et. al.*, 2017 N.Y. App. Div. LEXIS 1929, 2017 NY Slip Op 01972, Plaintiff tripped and fell over an alleged defect in the sidewalk, which she described as an "uneven spot" which "wasn't as level as the other side" of a "little ridge" of concrete in the ground. The Appellate Division, First Department applied principles established by *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66 (2015) and found that the alleged defect, as described by Plaintiff, "without more," was trivial and nonactionable and dismissed the Complaint.

The Court then turned its attention to indemnification claims. First, the Court found that since the Complaint alleged that Defendants were liable based on their own wrongdoing in failing to maintain the premises, the third-party and second third-party claims for common law indemnification were properly dismissed by the lower court. The Court cited *Great Am. Ins. Cos. v. Bearcat Fin. Servs., Inc.*, 90 A.D.3d 533, which established that a party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification.

The Court also considered indemnification provisions in two contracts: 1) between Defendant and third-party defendant, and 2) between third-party defendant and second third-party defendant. In the first contract, the indemnification provision required a third-party defendant to indemnify Defendants for property damage, bodily injury, or death only arising out of or related to the third-party negligence. Because there was no defect in the sidewalk, third-party defendant was not negligent, and the Court concluded that Defendants were not entitled to contractual indemnification from it.

Contrary, the indemnification provision in the contract between third-party defendant and second third-party defendant was more broad and required the third-party to indemnify Defendants for liability, damage, etc., "resulting from, arising out of or occurring in connection with the execution of the work" [performed by second third-party

defendant], including attorneys' fees. The Court noted, that although there was no negligence, to the extent third-party defendant incurred costs related to second third-party defendant's performance of its work, which included constructing/ resurfacing roads and sidewalks at the subject shopping center, second third-party defendant was required to indemnify Defendants.

Learning Point: Although some indemnification provisions are hard to understand and interpret, the important question a party should ask itself is whether its obligation is limited to the claims arising out of its negligence. ♦

New Jersey Joins Growing Trend Of Mandatory Paid Sick Leave And Strengthens Anti-Discriminatory Pay Practice Laws

This year, New Jersey has taken additional steps to protect employees by bolstering measures to prevent discriminatory pay and ensuring paid leave to all employees. To that end, Governor Phil Murphy amended the New Jersey Law Against Discrimination ("LAD") to broaden its protection against discriminatory pay practices and adopted a state-wide paid sick leave law.

Anti-Discriminatory Pay Practice Amendment

Effective as of July 1, 2018, it is an unlawful employment practice under LAD to pay any employee who is a member of a protected class less than the rate paid to other employees who are not members of that protected class for "substantially similar work when viewed as a composite of skill, effort and responsibility." The amendment does, however, carve out limited exceptions concerning when an employer may pay a different rate of compensation to members of the protected class, including if the pay differential is due to a seniority or merit based system. An employer may also pay different rates to individuals if they can demonstrate each of the following: 1. The differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production; 2. The factors are not based on, and do not perpetuate differential in compensation based on sex or any other characteristic of members of a protected class; 3. Each of the factors is applied reasonably; 4. One or more of the factors account for the entire wage differential; and 5. The factors are job-related with respect to the position in question and based on a legitimate business necessity.

Notably, the law also prohibits retaliation against an employee who inquires about pay information with other employees. The amendment goes even farther in prohibiting waivers of such inquiries as a condition of employment.

Until regulations are promulgated and case law is developed, it remains unclear how New Jersey courts will interpret the bill's ambiguous "substantially similar work" standard. The corresponding federal counterpart, the Federal Equal Pay Act ("EPA"), similarly prohibits pay discrimination on the basis of sex for wages paid for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions. . . ." 29 U.S.C. § 206. Federal regulations provide that "[i]t should be kept in mind that

"equal" does not mean "identical." Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality as between the jobs justifying differences in pay." 29 C.F.R. § 1620.14.

The New Jersey law differs from the EPA in the scope of its application and its damages provisions. While the EPA only applies to sex-based discrimination, New Jersey's law applies to all protected classes under LAD (for example, gender, race, national origin, age, etc.). In addition, the New Jersey amendment provides a lookback period for 'unequal' back pay of 6 years, and "if a jury determines that an employer is guilty of an unlawful employment practice . . . the judge shall award three times any monetary damages to the person or persons aggrieved by the violation."

Mandatory Paid Sick Leave Law

Effective October 29, 2018, New Jersey became the tenth State to enact a mandatory paid sick leave law. The law requires all New Jersey employers—regardless of size—to provide up to 40 hours of paid sick leave per year to their employees, whether full- or part-time. Employees accrue one hour of earned sick leave for every 30 hours worked up to a required minimum of 40 hours. Employers may, of course, choose to exceed this amount. Employers are not required to allow employees to accrue more than 40 hours of leave per year, or carry unused leave that exceeds 40 hours forward to the next year. Leave begins to accrue for existing employees on Oct. 29, 2018, unless they accrued such leave previously. Employees hired after Oct. 29, 2018, start to accrue leave the day their employment begins. Leave may be used 120 days after the employee starts work, and thereafter as it is accrued.

An employee can use accrued sick time for the following reasons: 1. an employee's own mental or physical illness, including preventive medical care, and 2. a covered family member's mental or physical illness, including preventive medical care. Notably, the paid sick leave law also requires employers to pay "sick" leave to employees absent from work due to: 1. circumstances related to an employee's or his/her family member's status as a victim of domestic or sexual violence; 2. closure of an employee's workplace or of a child's school because of a public official's order; or, 3. time to attend a meeting required by school staff to discuss a child's health.

As with the LAD and other statutes, employers may not retaliate against employees who exercise their rights under this law. In addition, if an employee files a complaint alleging a violation of this statute and the employer takes "adverse action" against that employee within 90 days of that filing, a rebuttable presumption arises that the employer took the adverse action with retaliatory intent. Employers who violate the law are subject to the same penalties and remedies available under the New Jersey State Wage and Hour Law, which provide for both monetary penalties and even potential jail time. Affected employees may pursue their own civil action to recover paid leave they claim was denied, together with costs and attorney's fees in the court's discretion. Employees may also recover actual damages the employee suffered "plus an equal amount of liquidated damages."

Learning Points: With this LAD amendment, New Jersey's equal pay law will be among the nation's most expansive law of its kind and will carry severe penalties for employers who run afoul of its mandates. Employers should carefully examine their policies, handbooks, and compensation practices, and take steps to comply with the ever-increasing trend of federal, state, and local laws governing employee compensation. Employers, particularly those in so-called "white-collar" professional services industries where the bases for such compensation decisions are more amorphous, should consult with counsel to scrutinize their discretionary compensation practices to determine whether they can withstand the likely onslaught of new claims.

Under the new paid sick leave law, current employees will begin accruing sick time on October 29, 2018, so employers will need to review their leave policies soon. Many employers who already provide paid time off for personal days, vacation days, and sick days may already be in compliance with the statute, provided the leave accrues at a rate equal to or greater than the law provides. Such employers should review their PTO policies to ensure they meet the minimum standards under the new law. All employers, moreover, must inform their employees about the new law and be mindful of the five-year record-keeping requirements. ♦

Pennsylvania Supreme Court Applies Vehicle Liability Exception To Governmental Immunity When Driver Outside Vehicle

by ***Melissa Cloonan***

In *Balentine v. Chester Water Authority*, 2018 Pa. LEXIS 4299 (Aug. 21, 2018), the Supreme Court of Pennsylvania, Middle District eliminated over 30 years of case law precedent on the vehicle liability exception to governmental immunity.

On August 15, 2012, Edwin Omar Medina-Flores, a contractor for Metra Industries ("Metra") was working on cleaning and lining water mains for the Chester Water Authority ("CWA") water distribution system at 1200 block of Kerlin Street, Chester, PA. Kerlin Street is a two-lane road that runs north to south, with no parking lanes on either lane of travel. Mr. Medina-Flores was inside a 4x4 ditch on a grassy strip between the sidewalk and the curb. Charles Mathues, an inspector for CWA, parked his CWA vehicle, with the engine running 10 to 15 feet from the ditch. There was a question of fact as to how far into the roadway the CWA vehicle was parked. Mr. Mathues exited the vehicle and laid blueprints on the hood. Approximately five minutes later, another vehicle struck the rear of the CWA vehicle, causing it to move forward. The vehicle then struck Mr. Medina-Flores as he stood in the ditch. The undercarriage dragged him out of the ditch, pinning him underneath the vehicle when it came to a stop. Mr. Medina-Flores died from his injuries.

The question on appeal was whether the voluntary or involuntary movement of a vehicle constitutes operation for the purposes of the vehicle liability exception to governmental immunity. Plaintiff argued that because the vehicle was illegally parked on the roadway with the engine running, and the vehicle's movement caused the injury, the vehicle liability exception applies. The government argued that the vehicle was in park and therefore not in operation so governmental immunity applies.

Sect. 8541 of the Tort Claims Act states: "Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa.C.S § 8541. One exception for liability to be imposed on a local agency or any of its employees is during "[t] he operation of any motor vehicle in the possession or control of the local agency." 42 Pa.C.S § 8542 (b) (1). It further states that "motor vehicle" means any vehicle which

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is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air." *Id.*

In its opinion, the Court took a long look at case precedent, specifically at its expansion and interpretation of what it means to be "in motion," and what it means for a vehicle to be "in operation." Specifically in *Love v. City of Philadelphia*, 543 A.2d 531 (Pa. 1988) the Court said, "to operate something" is "to actually put it into motion." *Id.* at 533.

In the present matter, the Court found that in taking the plain meaning of the statute, the vehicle liability exception refers only to "operation" and not to "motion." The Court concluded that for 30 years, the definition constructed by the Court through case law "impeded the development of consistent and logical case law." *Balentine* at 12. The Court stated that by changing the construction of the text in previous case law, they have created a rule contrary to the intentions of the General Assembly. Sect. 8542 does not require the vehicle to be in motion to impose liability, and therefore the Court "should not add, by interpretation, a requirement not included by the General Assembly." *Balentine* at 15 (quoting *Commonwealth v. Giulian*, 141 A.3d 1262, 1268 (Pa. 2016)). Because *Love* and its progeny led to inconsistent and illogical decisions, the Court determined that it was wrong in principle and therefore properly abandoned in favor of an interpretation of Sect. 8542(b)(1) that does not limit "operation" of a vehicle to one that is in "motion." The General Assembly did not intend for the government to avoid liability simply because a vehicle was not "in motion" at the time of injury, even when Plaintiff established that his injury was caused by an illegally parked government vehicle. *Balentine* at 16.

The Court concluded that because Plaintiff pled sufficient facts to establish a *prima facie* cause of action in negligence based on acts that constitute the operation of a vehicle, specifically a CWA employee operated a CWA vehicle and parked it in the roadway, the vehicle liability exception to governmental immunity applies. *Balentine* at 17.

Learning Point: When a government entity is determined to be the cause of a loss or incident, this is often times viewed as an immediate roadblock to recovery. Governmental immunity statutes insulate government entities and officials sometimes entirely from liability. In order to prevail against a government entity in suit, several requirements or exceptions usually need to be met, which sometimes means not deciding to proceed against the government entity at all. By removing over 30 years of construction of the meaning of the vehicle liability exception and returning to the plain meaning of the statute, the Pennsylvania Supreme Court, Middle District shows its willingness to create more avenues for recovery against government entities and thus breaks down the hurdles and requirements for suing a government entity. ♦

Res Ipsa Loquitur Inference Permitted Against Condominium Association And Property Management Company For Malfunctioning Elevator Door

by **Marisa G. Michaelsen**

The Supreme Court of New Jersey recently held that a plaintiff can utilize *res ipsa loquitur*, an equitable doctrine that allows a permissive inference of negligence, in suit against a condominium association, the condominium's property management company, and an elevator-maintenance provider. *McDaid v. Aztec West Condominium Association*, 234 N.J. 130 (2018). Plaintiff was seriously injured when elevator doors unexpectedly and repeatedly closed on her while she was exiting the elevator. Plaintiff brought a negligence action against the Condominium complex, the property management company, and the elevator-maintenance provider. Plaintiff asserted the *res ipsa loquitur* doctrine, on the theory that a malfunctioning elevator door is an occurrence that ordinarily bespeaks negligence. The trial court rejected this argument, and granted summary judgment to Defendants, which the Appellate Division affirmed. However, the Supreme Court held that the *res ipsa* inference of negligence is applicable because common experience instructs that elevator doors should not strike a person in the absence of negligence.

Res ipsa loquitur, Latin for 'the thing speaks for itself', is an equitable doctrine typically invoked by plaintiffs when the injury-causing occurrence ordinarily would not happen in the absence of negligence, and the party in control of the instrumentality is in the best position to explain what went wrong and why. *Res ipsa* allows the plaintiff to make a *prima facie* case in certain circumstances. Additionally, a plaintiff utilizing *res ipsa* does not need to exclude other alternative possible causes for the accident, which generally allows a plaintiff to survive a motion to dismiss at the summary judgment stage. The Trial Court in *McDaid* specifically found that Plaintiff did not provide affirmative evidence that excluded other causes for the malfunctioning elevator, and rejected the application of *res ipsa*, and the Appellate Division upheld the Trial Court's decision for substantially the same reasons as addressed by the Trial Court.

Under the New Jersey Condominium Act, N.J.S.A. 46:8B-1 to -38, condominium associations are generally responsible for management

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of the condominium and property, and one such duty is to ensure elevator doors, safety devices, and operating mechanisms are maintained in good and working order. The duty includes a duty of reasonable care to protect against any dangerous conditions relating to the doors that the association either knows of or should have known about.

The New Jersey Supreme Court notably held in *McDaid* that *res ipsa* is applicable in negligent-maintenance actions against premises' owners and others who exercise exclusive control, even when a complex instrumentality is involved. Malfunctioning elevator doors that close on passengers implies negligence, and Plaintiff did not have to present expert testimony pinpointing the cause of the malfunction, nor was she required to exclude other possible causes of her injuries or prove Defendants were on notice of a malfunction to trigger the *res ipsa* inference.

Learning Point: This is a significant holding for property managers and premises owners. An inference of negligence without requiring plaintiffs to negate other possible causes of injury makes it very difficult to dismiss the action early in discovery on motion. This holding is noteworthy because the *res ipsa* inference was applied to a complex instrumentality, which usually requires some expert reports or testimony detailing with specificity as to what malfunctioned to cause the injury. While Defendants will still be able to present defenses against any negligence claims, it will be up to the jury to accept or reject the *res ipsa* inference. ♦

DEFENSE GROUP'S SUCCESS CONTINUES

Clausen Miller Scores Big Win In Kings County

After a two week liability trial during which previously precluded witnesses were allowed to testify for our adversary and a critical subpoenaed document disappeared from the court room, CM Partner **Christopher Scanlon**, with the able and enthusiastic support of Senior Associate **Djordje Caran**, won a unanimous jury verdict in favor of our Defendant client in heavily plaintiff friendly Kings County.

If you have questions regarding liability or trial, please feel free to email Chris (**cscanlon@clausen.com**) or Djorde (**dcaran@clausen.com**) or call them (212-805-3900).

SUBROGATION GROUP'S SUCCESS CONTINUES

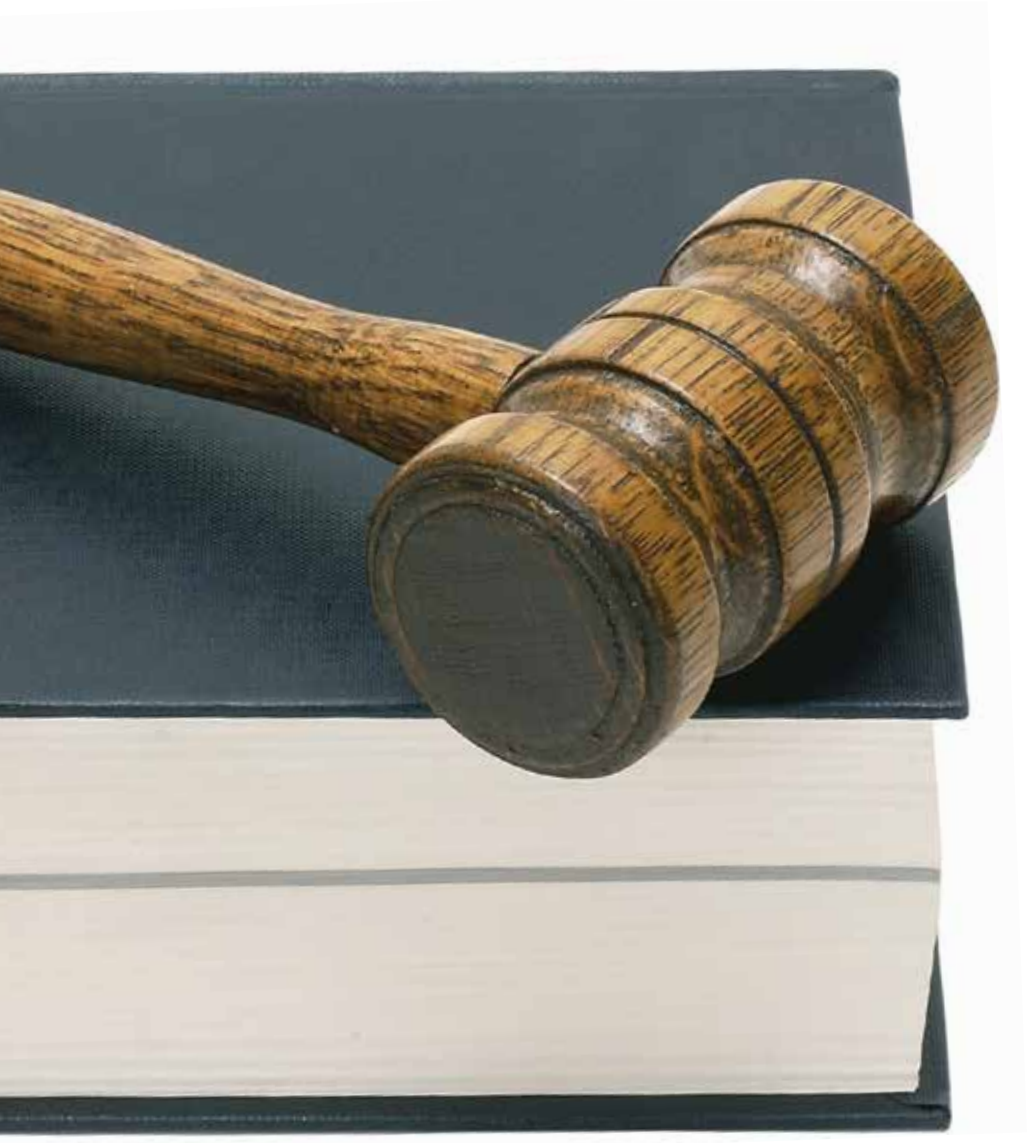
Settlement During Trial, Triple Co-plaintiff's Deal

CM Partner **Robert A. Stern** (New York/New Jersey) was retained to investigate and handle subrogation following a fire at the Insured's Premises. Our Insured was a tenant in the commercial building; and, the fire started within the Insured's leased space. The Fire Marshal concluded that the fire started in or near cardboard boxes stored by the Insured. The Landlord's experts concluded that the fire started at one of the Insured's burners and spread to the boxes. Our client's expert concluded that an overhead light "may have" failed and the hot falling embers ignited the boxes.

CM Associate **Catherine O'Hern** (New York/New Jersey) handled discovery and oppositions to Defendant's motions. The Judge knew defense counsel and they were on a first name basis. The Judge made it clear during pre-trial rulings that he was favoring Defendant. After a failed mediation, Ms. O'Hern prepared the case for trial, including pre-trial motions.

On the first day of trial, prior to the arguments of motions *in limine*, Defendant offered $15,000.00 on this six figure case. Mr. Stern rejected the offer and was unwilling to move off his six figure demand. After the Court denied all of Defendant's

motions *in limine* (including a motion to stop us from calling the liability claim representative to testify) and granted some of our motions *in limine*, the offer increased to $35,000.00. Mr. Stern rejected that offer and was unwilling to move off his six figure demand.



On the next trial day, when it became clear that the Judge was seriously considering excluding a key piece of evidence from Defendant's case, Defendant accepted Mr. Stern's demand. There was another Plaintiff represented by another law firm. Our settlement with Defendant was more than 3 times the percentage that the other law firm acquired for its client.

If you have questions regarding subrogation, trial and/or negotiations, please feel free to email Robert (**rstern@clausen.com**) or Catherine (**cohern@clausen.com**), or call them (212-805-3900).

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Appellate and Trial Protocols for Resolving Coverage, Casualty and Recovery Issues Facing the Insurance Claims Professional

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BREACH OF CONTRACT

CLEARLY ERRONEOUS FACTUAL FINDING REQUIRED NEW TRIAL

Christine Downing v. Emmanuel Dragone et al., AC 39942 (Conn. App.)

Plaintiff professional auctioneer sought damages for breach of contract from Defendant automobile retail company and its operator. The parties disagreed as to compensation for auction work Plaintiff performed. At trial, Defendant testified that Plaintiff should receive her standard auction fee, plus expenses. Plaintiff testified that Defendant owed her a certain percentage of the gross auction proceeds pursuant to an unsigned, written agreement she had drafted. The trial court found that the alleged agreement was an implied in fact contract and that the individual Defendant was charged with knowledge of its contents because Defendant testified that the contract sat unread on his desk for four months. ***Held:*** Reversed. Contrary to the trial court's statements, there was no evidence that Defendant had the written contract on his desk and did not read it until four months after the auction. Since the trial court's decision rested on a clearly erroneous factual finding unsupported by any evidence in the record, a new trial was necessary.

DAMAGES

DEFENSE ENTITLED TO OFFSET ACCIDENT DISABILITY BENEFITS

Andino v. Mills, 31 N.Y.3d 553 (2018)

Retired police officer injured on duty in car accident received injury verdict from jury. Defendants moved to offset award, arguing that Plaintiff's accident disability retirement ("ADR") benefits entitled them to an offset. Trial court concluded Defendants failed to establish a sufficient nexus between Plaintiff's lost earnings and pension and her projected ADR benefits. ***Held:*** Since ADR benefits replace earnings and pension, it is a collateral source within the meaning of the applicable statute that a court must set off against any earnings or pension award.

INSURANCE AGENTS/BROKERS

BROKER OWED NO DUTY TO INSURED TO SECURE ADEQUATE COVERAGE

Perreault v. AIS Affinity Ins. Agency of New Eng., Inc., 2018 Mass. App. LEXIS 99

Following malpractice settlement, attorney assigned his claim against broker for failure to obtain adequate insurance. ***Held:*** Absent a special relationship, insurance agent lacks a duty to ensure that coverage is adequate for insured's needs. Factors creating special relationship include: (1) prolonged business relationship, (2) complexity and comprehensiveness of coverages, (3) frequency of customer-agent contacts, and (4) extent of customer's reliance on broker given complexity of policies. None applied to the attorney/broker relationship.

LEGAL MALPRACTICE

ATTORNEY-CLIENT RELATIONSHIP CONSULTATION REQUIREMENT CAN BE MET THROUGH AGENTS

JBJ Inv. of South Fla., Inc. v. Southern Title Grp., Inc., 2018 Fla. App. LEXIS 9652

Plaintiff sued former attorney arguing that the attorney prepared a mortgage containing incorrect legal descriptions of properties securing a loan. Law firm argued that it did not directly consult or meet with Plaintiff and that an attorney-client relationship was not established. The trial court ruled that because Plaintiff's title agent contacted and retained the law firm to prepare the note and mortgage, which the attorney prepared and was paid for, a consultation occurred. ***Held:*** Consultation requirement can be met when a client's agent consults with an attorney on behalf of the client.

LACK OF VIABLE UNDERLYING CLAIM THWARTS MALPRACTICE ACTION

Blair v. Loduca, 2018 NY Slip Op 05744 (N.Y. App. Div. 2d Dep't)

Plaintiff sued her former attorneys claiming malpractice in their representation of her in seeking damages for injuries sustained when she slipped and fell near a building she worked at as a security guard. Trial court denied summary judgment to Defendant firm, finding issues of fact on the underlying claim that was the subject of the malpractice allegations. ***Held:*** The malpractice claim should have been dismissed. The storm was in progress at the time of Plaintiff's accident, there was no preexisting ice on the ground, and there was no evidence the owner created or exacerbated any allegedly dangerous condition.

LIABILITY INSURANCE COVERAGE

INSURER MUST INDEMNIFY AFTER FOUR-MONTH DISCLAIMER DELAY

Robinson v. Global Liberty Ins. Co. of New York, 2018 NY Slip Op 06128 (N.Y. App. Div. 2d Dep't)

Plaintiffs sought declaration that insurer owed indemnification regarding underlying vehicle accident. Trial court granted insurer summary judgment based on insurer's prior disclaimer of coverage based on lack of cooperation. ***Held:*** Reversed. The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer and must occur as soon as reasonably possible. Here, insurer took too long to disclaim since it had sufficient information to support its disclaimer four months before it disclaimed coverage. Insurer owed indemnification.

LIMITATIONS OF ACTIONS

EQUITABLE SUBROGATION LIMITATIONS PERIOD DIFFERS FROM UNDERLYING TORT CLAIM

Gov't. Employees Ins. Co. v. Arly Barros et al., AC 40315 (Conn. App.)

Plaintiff insurance company brought equitable subrogation action, seeking uninsured motorist benefits it had paid its insured for motor vehicle accident injuries allegedly caused by Defendants. Defendants asserted Plaintiff's claim was barred by statutes of limitations applicable to the underlying claims of negligent operation of a motor vehicle. The trial court ruled in favor of Plaintiff. ***Held:*** Affirmed. Plaintiff's equitable subrogation claim, as plead, sounded in equity only and, therefore, the claim was not subject to any statute of limitations and the proper inquiry was whether Plaintiff's claim was precluded under the doctrine of laches.

STATUTE OF REPOSE BARRED FRAUD ACTION

Garofalo v. Proskauer Rose LLP, 2018 Fla. App. LEXIS 10846

Plaintiff appealed dismissal of its complaint against Defendant law firm that prepared a 2002 opinion letter on the validity of an investment strategy. Plaintiff claimed a tax loss based on the law firm's statement that this was a legitimate strategy. The IRS subsequently concluded that the strategy was an abusive tax shelter. Law firm filed motion to dismiss arguing that the complaint was barred by the fraud statute of repose as they had no contact with Plaintiff in approximately 14 years. ***Held:*** Trial court properly concluded that the time limitation for Plaintiff to commence action expired under the fraud statute of repose, which is constitutional.

SAVING STATUTE INAPPLICABLE WHERE FIRST SUIT FILED IN ANOTHER STATE

Portee v. Cleveland Clinic Found., 2018 Ohio LEXIS 2052

After Plaintiff's negligence suit in Indiana was dismissed for lack of jurisdiction, Plaintiff refiled in Ohio. ***Held in a split decision***: Ohio's saving statute is inapplicable if the first action was brought in a state or federal court outside Ohio. Timely filing an action in one state does not toll another state's limitation period. Ohio's procedural rules pertain to suits filed in Ohio and limit the applicability of the saving statute. The dissent contended that the language of the saving statute permitted a broader reading.

MEDICAL MALPRACTICE

TRIAL COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW

Shands Jacksonville Med. Ctr., Inc. v. Pusha, 2018 Fla. App. LEXIS 12138

Hospital moved for certiorari relief from the denial of its motion to dismiss Plaintiff's medical malpractice complaint for failing to comply with pre-suit statutory requirements. Trial court held that Hospital waived its entitlement to an expert opinion by failing to produce patient's requested medical records. Hospital had requested additional information in order to ensure the individual seeking confidential medical records was legally authorized to receive them. ***Held:*** Reversed. Hospital was not required to produce the medical records as no valid authorization for their release was received from Plaintiff. As Hospital did not refuse to provide the records, Plaintiff was required to obtain a medical expert opinion corroborating the claim before filing suit. Plaintiff did not obtain the opinion and the statute of limitations expired, meriting dismissal.

THRESHOLD STATUTORY REQUIREMENTS MUST BE SATISFIED FOR MEDICAL MALPRACTICE CASE TO PROCEED

Manzaro v. HCA, Inc., 2018 Fla. App. LEXIS 10007

Plaintiff appealed orders dismissing medical malpractice and wrongful death complaint with prejudice due to Plaintiff's failure to comply with statutory pre-suit requirements. ***Held:*** Affirmed. Trial court properly concluded Plaintiff failed to comply with the statutory pre-suit requirements for investigation, corroboration, and written notice.

MUNICIPAL LIABILITY

SOVEREIGN IMMUNITY INAPPLICABLE WHEN ACTING AS AN AGENT OF TOWN AND NOT STATE

Estate of Bartlomiej F. Palosz v. Town of Greenwich, AC 40315 (Conn. App. 2018)

Plaintiffs sought damages from municipal Defendants for the wrongful death of decedent, who committed suicide after being subjected to severe and continual bullying from his classmates while he was enrolled in the town's public school system. The board of education filed a motion to strike the Complaint based on sovereign immunity, arguing it was acting as an agent of the state when it allegedly failed to carry out its statutory state mandated duties. The trial court denied the motion, concluding the board was acting on behalf of the town, not the state, when it allegedly failed to comply with the policy. ***Held:*** Affirmed. The board of education was acting as an agent of the town when the alleged failures occurred.

CITY IMMUNE FOR FAILURE TO REMOVE FOLIAGE NEAR STOP SIGN

Pelletier v. City of Campbell, 2018 Ohio LEXIS 1444

Driver who ran a stop sign claimed that city negligently failed to remove foliage in front of it. ***Held in a split decision***: City was immune from liability. The stop sign was not deteriorated or disassembled. The foliage was not an obstruction in the public road or on the sign. The legislature did not impose a duty to remove vegetation above or alongside a roadway that might hinder view of approaching traffic. Dissent argues that foliage need not touch a sign to obstruct it.

NEGLIGENCE

PSYCH PATIENT'S INJURY WHILE BEING RESTRAINED SOUNDS IN ORDINARY NEGLIGENCE

National Deaf Acad., LLC v. Townes, 242 So. 3d 303 (Fla. 2018)

Agitated patient was injured while residential treatment facility staff was restraining her. ***Held:*** Patient's claim was governed by ordinary negligence principles, not the more onerous medical malpractice statute. A malpractice claim requires evidence that conduct breached a professional standard of care and must relate to medical care requiring professional judgment or skill. Patient's injury resulted from a restraint that could have been be performed by non-medical personnel.

HOSPITAL OWED NO DUTY TO WOMAN KILLED BY FORMER PATIENT

Williams v. Steward Healthcare Sys. LLC, 2018 Mass. LEXIS 554

Three weeks after release from involuntary hospital confinement, psychiatric patient killed his neighbor. ***Held:*** Hospital did not owe a duty of care to victim or her family. A mental health professional believed that patient did not pose a threat of serious harm. Once a court approved patient's release, hospital had no right to confine him. Though an involuntary commitment creates a special relationship giving rise to a duty, the duty ends when a court orders patient's release.

PREMISES LIABILITY

40 SECOND TIME PERIOD BETWEEN CREATION OF DEFECT AND ACCIDENT WAS INSUFFICIENT TO ESTABLISH ACTUAL OR CONSTRUCTIVE NOTICE

Rebecca Bisson v. Wal-Mart Stores, Inc., AC 39965 (Conn. App. 2018)

Plaintiff sought damages for injuries sustained when she allegedly slipped and fell on an accumulation of water while walking in the main aisle of Defendant's store. Defendant obtained summary judgment on the ground there was no factual basis on which a reasonable jury could find Defendant had actual or constructive notice of the alleged defect. ***Held:*** Affirmed. Defendant's evidence established a forty-second maximum time-period between the creation of the defect and Plaintiff's fall. Defendant did not have sufficient time to discover and remedy the alleged defect.

SQUARE WHERE PLAINTIFF TRIPPED HELD NOT A DANGEROUS CONDITION

TruGreen Landcare, LLC v. LaCapra, 2018 Fla. App. LEXIS 12403

Plaintiff alleged he tripped and was injured while cutting across a palm tree planter square in front of a movie theatre. Plaintiff sued Defendant for negligent maintenance, landscaping and inspection of the planter square. ***Held:*** Defendant did not owe Plaintiff a duty to keep the area in a safe condition or warn of a dangerous condition as landscaped areas are not generally dangerous as a matter of law and any change in surface level was open and obvious. Furthermore, there is no duty to make areas not designed for walking reasonably safe for that purpose or to warn that they are not safe for walking.

TORTS

PAWNBROKER LIABLE FOR RESELLING STOLEN JEWELRY

Danopulos v. Am. Trading II, LLC, 2018 Ohio App. LEXIS 2851

After unknowingly purchasing stolen jewelry, pawnbroker disassembled and sold it for scrap. ***Held:*** Even if pawnbroker lawfully possessed jewelry by substantially complying with statute, it was still liable for conversion. Pawnbroker could not obtain good title from a thief. It could not return possession to rightful owner because without title or permission it intentionally disassembled and sold the jewelry.

TRIAL PRACTICE

JURY INSTRUCTION PROPERLY NOT GIVEN WHEN UNSUPPORTED BY EVIDENCE

Ellen Farmer-Lanctot v. Matthew Shand, AC 39488 (Conn. App. 2018)

Plaintiff sought damages for injuries sustained when, upon seeing the headlights of Defendant's motor vehicle, she jumped out of the road and into the grassy center island of the exit road, believing that Defendant was going to hit her. Jury verdict for Defendant. Plaintiff appealed claiming her request for a jury charge on the sudden emergency doctrine, the pedestrian roadway standard of care and Defendant's duty to yield to pedestrians when making a right turn had been wrongly rejected. ***Held:*** Affirmed. The trial court properly declined to instruct the jury because there was no evidence to suggest that Plaintiff was at or near a regular crossing, a crossing at an intersection of roads, or a crossing regulated by traffic signals. The instruction sought by Plaintiff could have misled the jury because there were no facts in the record to support a finding that Plaintiff was at or near a regular crossing or that Defendant was turning into a different street.

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