Tri-State Defense Lawyers Association

Vermont · New Hampshire · Maine

Winter 2015

Newsletter

A MESSAGE FROM THE CHAIR

Dear TDLA Members,

We are well on our way to another exciting and productive year for TDLA members. Our board is in the midst of planning a busy program year to meet your needs for networking and CLE. Our 9th annual meeting will be held in Portsmouth, New Hampshire, on September 17 & 18. Our Maine contingent is heading up another Spring Program and Social to be held on April 9 at the Mariner's Church Banquet Center in Portland. The New Hampshire chapter is scheduling a "Spring Fling at Bada Bing" with CLE, pizza and beverages for May. Stay tuned for more details about these events, Vermont's plans and our upcoming Webinars, as well as the potential for a collaborative event with our Canadian colleagues.

In mid-January, I, along with several TDLA board members, attended a joint leadership meeting in Chicago sponsored by DRI for all of the SLDO chairs, presidents, vice presidents, and executive directors. We met colleagues from across the U.S. and Canada and learned about all of the exciting initiatives that other SLDO's are undertaking. We will be processing all of these ideas at a strategic planning session this spring. We want to be sure that TDLA continues to be <u>your</u> organization, for networking and CLE's. If you have ideas, please don't hesitate to contact us.

I hope you to see you sometime this year!

Elizabeth L. Hurley

INSIDE

Caging the Reptile

5 Common Pitfalls for New Attorneys, and How to Avoid Them

Recent Decisions from the Maine Law Court

The Vermont Supreme Court's Latest Decision on Implied Indemnity: Exposing a Trap for the Unwary?

New Hampshire Case Law Summaries

Annual Meeting

Sponsors

Caging the Reptile

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Recently the plaintiff's bar has become enamored of a theory invented by Attorney Don Keenan and Jury Consultant David Ball in their book *Reptile: The Manual of the Plaintiff's Revolution*. That strategy, called "reptile" theory, has swept through the plaintiff's bar and become a key topic at seminars for plaintiff's lawyers.

"Reptile" theory is a pseudoscientific strategy attempting to capitalize on the need of the reptilian portion of the human brain to avoid "survival dangers". As Keenan and Ball wrote, "When the reptile sees the survival danger, even a small one, she protects her genes by impelling the jury to protect [itself] and the community." The scientific basis for the reptile theory is slim at best. Numerous scientists have debunked the claim that the human brain can be manipulated so easily as to be influenced by "safety rule plus danger equal reptile". However, as with many trial strategies, perception is reality and plaintiff's lawyers are using the reptile theory, allegedly with great success, in courtrooms all over the United States.

Many of you have probably seen or heard the reptile theory during deposition, opening or throughout a trial. The goal of the theory is simple. A plaintiff's lawyer, through witness examination and closing argument, tries to influence a juror's need to minimize survival dangers for herself and her loved ones. The "reptile" must be convinced that the defendant acted negligently but also that such conduct threatens the juror's community and the jurors, through their verdict, punish the conduct thereby protecting themselves and the community.

Essentially the theory states that engaging the reptilian part of a juror's brain allows a plaintiff to get a winning verdict even when logic or emotion might cause the jurors to find against the plaintiff, and to increase the size of the verdict, by asking jurors to think beyond the risk or harm suffered by the individual plaintiff to the safety of their community as a whole.

The method used to invoke the "reptile" is not revolutionary but is, somewhat, evolutionary. The plaintiff's lawyers invoke or establish broad "safety rules" which the defendant violated and which would have prevented the harm suffered by the plaintiff if they had not. Keenan and Ball offer six characteristics that each safety rule must possess in order to trigger a juror's reptile brain:

- The rule must prevent danger;
- the rule must protect people in a wide variety of situations, not just the plaintiff;
- the rule must be in clear English;
- the rule must explicitly state what a person must or must not do;
- the rule must be practical and simple for someone in defendant's position to have followed; and
- the rule must be one that a defendant will either agree with or seem careless or incredible if they do not agree.

So how does it work in the real world? The plaintiff's lawyer wants to start with the broadest "umbrella rule". Using doctors as an example, many lawyers start with the Hippocratic Oath: "First, do no harm". A reptile practitioner could use a similar oath or promise for a car maker, a pharmacy owner or any other person or group that interacts with the public when their safety might be involved.

Next, once the umbrella rule is established, plaintiff's attorney will slowly bring it down to the more specific alleged safety issue in the subject case. From the umbrella of the Hippocratic Oath, a "reptile" lawyer might ask a neurologist about a choice between two treatment alternatives, claiming he is negligent unless he elects the safest choice. The reptile advocate states that if a doctor picks any alternative that is not the absolute safest, he is needlessly endangering the public. The point is to drill down to a safety rule that might apply to the case that is being tried. Once they tie the "big" rule to the "small" rule then the "reptile" safety imperative is enabled.

Again, these ideas are not particularly revolutionary. Many plaintiffs' lawyers have tried, over the years, to invoke the "conscience of the community" or the "golden rule" to convince jurors to do what the law and the facts do not allow. One must always remember the jurors are there to find facts. They are then given the law by the court and asked to apply the law, as given by the court, to the facts they have found. That law will not include reptile theory, will never talk about the conscience of the community and does not allow the jurors to stand in the shoes of the plaintiff. In Maine, a safety statute (or in some cases a rule) may be evidence of negligence but it is not negligence per se. The reptile theory does not deal with a legal standard of care but a "safety rule" that may be part of the law, or not part of the law, but is surely not meant to allow the jurors to do what they swore, under oath, to do. They swore to follow the law as given to them by the Judge and the court.

So how does one defend against the "reptile" in the courtroom? Continuing with the medical analogy, though this analogy can be used in personal injury and products cases as well, one must refute the reptile at the beginning. The "umbrella rule", which is the foundation of the safety analysis, must be disengaged. The real rules of medical treatment are not black and white. The Hippocratic Oath, though easy to cite, is not always applicable. If it were, many cancer treatments, surgeries and other treatments would be prohibited as they cure disease by inflicting other harm. Allowing the "reptile lawyer" to direct a juror's attention to a general standard of "safety", and not to the particular plaintiff's treatment by a particular physician, allows the "reptile" to flourish.

Using the six rules cited above, defending against the "reptile" theory is important and straightforward. First, "the safety rule must prevent danger" is easy to confront. Jurors may want to believe that physicians, property owners, or manufacturers can guarantee safety. However, no such guarantee exists and the jurors will be instructed that the defendant is NOT a guarantor of safety. There are myriad factors that affect safety, many lifesaving medical treatments have side effects that necessarily are not safe. Preventing one problem may present another. Jurors must be reminded that the world is not black and white but has many problems, and "drilling" down to simplistic safety rules is unrealistic.

The second rule that "safety must protect people in a wide variety of situations" is also simplistic. Most safety situations are not broadly interchangeable and there are no hard and fast rules that apply to each and every person. That is especially true in medical situations where a doctor has the job of treating that patient not some broad group of people not involved in the case. Wanting "the safety rule to be in clear English" is fine, but simplicity is not the nature of real life. It is important to remind jurors that realistic complexity, based on individual situations, is crucial for everyone and everything. The "reptile" lawyer wants to establish rules that explicitly state what a person "must, or must not," do. This sort of linear decision making is not realistic. Obviously no one wants to hear a witness talk about probabilities or possibilities but putting together and explaining all of the factors in making a decision rules out the "but for" thinking upon which "reptile" theory thrives.

The fifth tenet is that the safety rule "must be practical and easy . . . to have been followed". In retrospect, many things are easy. In a medical situation, tests could have been ordered or a patient transferred and everyone would be protected but it is never whether it would have been better to do something, in retrospect, it is whether appropriate care was delivered based on what was known at the time. Many things can be seen retrospectively once the pressure of the moment in a situation has been relieved. But, did the defendant act appropriately given the situation presented to him?

Finally, "reptile's" best friend is that their safety rule "was so easy to follow that the defendant who does not follow it has to be unthinking, careless and/or dishonest in disagreeing." A jury, however, needs to be educated as to what actually happened, warts and all. Reality is difficult. Bad things happen to good people and situational decisions sometimes look careless. Educating a jury on what actually happened, in real time, and that it was done by careful, thoughtful members of their community will cage the reptile.

5 Common Pitfalls for New Attorneys, and How to Avoid Them

Matthew T. Dubois, *Tucker Law Group*, Bangor, Maine

Shortly after I agreed to write this article, I began to have second thoughts. As someone who has been in practice for a shorter time than even most other new attorneys reading this article, who am I to give advice? On the other hand, many of these lessons are especially fresh in my mind. So while many of us may have mastered these practice tips, perhaps the following pointers will help a few new attorneys avoid some common pitfalls:

1. Avoid "legalese."

One thing I noticed early on is that the longer an attorney has been practicing, the shorter and simpler his or her communications to clients can be without sacrificing needed information. Part of this is a product of experience, but even less experienced attorneys can achieve the same result by thinking through what the client needs to know and stating it in plain language. If you can't clearly and concisely explain the issues so a layperson can understand them, you need to think them through until you can. Most clients will appreciate that you are saving them time and money with short, concise, and accurate communications.

2. Do not neglect to learn about the business side of law practice.

Too few law schools teach new lawyers that law is a business like any other. Fresh out of a world of hornbooks and legal research and writing courses, it is easy for new lawyers to lose sight of this fact. The sooner you understand your firm's mission and philosophy and how to practice with them in mind, the sooner you will be seen as a sound investment for the firm. If you don't know what this entails, ask. Your superiors will be impressed you took the initiative.

3. Do not let any work product – no matter how trivial – leave your hands with typographical, grammatical, or factual errors.

Often as a new attorney, you will feel pressured to provide work product to clients and assigning attorneys quickly. And indeed you should be quick and responsive – but never at the cost of accuracy or attention to detail. A typographical error may seem insignificant, but it causes a client or assigning attorney reading your work to wonder what other mistakes you might be making. So always proofread your work – from simple emails to major briefs – and carefully. As the managing partner at my firm likes to say, in the words of Coach John Wooden, "Be quick, but don't hurry."

4. Do not be afraid to ask questions – as long as you have thought it through.

Often new attorneys avoid approaching their more experienced colleagues with questions. Perhaps they see it as a sign of weakness, or are afraid they will be seen as unintelligent. News flash: You are not expected to know everything. Most experienced attorneys recognize that the first few years of practice are a steep learning curve. They have been through it, and they will be happy to help. Use their experience. An important caveat: Try to find the answer for yourself first. While a more experienced attorney will be happy to answer most questions, he or she will be less than thrilled to provide a solution you could easily have reached yourself with a little effort.

5. Do not forget you are an advocate first and foremost!

Many new attorneys have a bad habit left over from their law school days: A tendency to sit on the fence. Trained more to identify the strengths and weaknesses of a case than to leverage those strengths against those weaknesses, new attorneys often fail to advocate as strongly as they can and should for their client. The appearance of "neutrality" that results may leave an assigning attorney – or worse, a client – asking, "Whose side are you on?" So while you should always point out the weaknesses in a case and counsel accordingly, always remember who you represent and make the most of the facts and the law to push for the best possible result for your client.

Recent Decisions from the Maine Law Court

Matthew T. Mehalic, *Norman, Hanson & DeTroy, LLC,* Portland, Maine

No Tolling Of Statute Of Limitations Where Defendant Amendable To Service

In *Christine S. Angell v. Renald C. Hallee*, 2014 ME 72 (May 29, 2014), the Law Court addressed whether the statute of limitations was tolled during the time the defendant resided in Massachusetts. The Court held that the limitations period was not tolled. Russell B. Pierce of Norman, Hanson & DeTroy successfully represented the defendant in the matter.

The case arose from alleged sexual assaults that took place in the 1970s by the defendant while he was a priest. The claims derived from intentional torts, and therefore, the applicable limitations period was two years. The plaintiff filed suit approximately thirty years after her eighteenth birthday. The limitations period was tolled until the plaintiff reached her eighteenth birthday. There is a current statute that now provides that there is no time limitation on actions based on sexual acts toward minors, but that statue did not take effect until 2000. Therefore, it was inapplicable to resolution of the issues in the matter.

The Court looked at whether the law authorized service on the defendant as an out-of-state defendant pursuant to 14 M.R.S.A. § 704-A (Maine's long-arm statute) and whether the plaintiff through reasonable effort was able to find and serve the defendant by any means other than publication. The Court answered both questions in the affirmative.

Section 704-A authorized service on the defendant while he lived in Massachusetts. The section permits service of process on an individual residing in another state if the complaint arose from the individual's commission of a tortious act in Maine.

In regards to the second question, the Court held that the plaintiff despite making no effort to find the defendant could have obtained information about the defendant's whereabouts through reasonable effort. The defendant was living an open life in Massachusetts and there were sources available within the state of Maine that knew defendant's whereabouts in Massachusetts. The Court held that reasonable effort would have included filing suit against the Diocese and obtaining discovery in that lawsuit on the whereabouts of the defendant for purposes of service of process directly on the defendant.

The importance of this decision is that even if a claimant does not know the whereabouts of a defendant, reasonable effort must be made to locate and effectuate service of process on that individual. That reasonable effort may include filing suit against someone who ultimately may not be liable in order to obtain discoverable information on the whereabouts of the tortfeasor.

Redacted Letter Admissible In Medical Malpractice Jury Trial Despite Contentions of Author

In *Wendell Strout, Jr. v. Central Maine Medical Center,* 2014 ME 77 (June 10, 2014), CMMC appealed a judgment on a jury verdict in favor of Strout in a medical malpractice lawsuit. The issue on appeal was whether it was improper for the Superior Court to allow into evidence a redacted version of a letter from CMMC to Strout that read, in its entirety: "That being said, he realizes now that prior to sharing his clinical impressions with you, he needed to wait for the results of the biopsy to confirm what the cancer was." The portions of the letter that were redacted included statements of apology and "writing off" portions of Strout's medical bills.

CMMC argued (1) that the redacted letter should not have been admitted by the trial court under 24 M.R.S. § 2907(2), (2) that the statement was part of an offer to compromise, and (3) that the statement's probative value was substantially outweighed by the danger of unfair prejudice under M.R.Evid. 403. The Law Court affirmed the judgment, rejecting CMMC's contentions on appeal.

Title 24 M.R.S. § 2907(2) is referred to as the sympathy or apology statute. It prevents from admission at trial

Continued on next page

statements made by a healthcare provider expressing sympathy, apology or condolences to an alleged victim or a relative of an alleged victim. However, the statute distinguishes between statements of apology and statements admitting fault or liability. The latter are admissible at trial. The Law Court held that the redacted letter's admission was proper because although contained in a statement of apology, the statement was an admission of fault. The Court concluded that statements of fault are admissible, even when coupled with other statements that may be inadmissible.

M.R.Evid. 408(a) excludes from evidence offering to compromise a claim in order to prove liability. CMMC argued that because the letter included a statement offering to write-off some of the medical bills incurred by Strout that the entire letter should have been excluded from evidence. The Law Court rejected this argument holding, at the time the letter was sent to Strout by CMMC, no dispute or claim existed. Rather, Strout had complained to CMMC about his treatment. Strout did not file his notice of claim against CMMC until after the letter was received. Therefore, the Court concluded that the statements contained in the letter were not made as part of a settlement negotiation or mediation.

Finally, the Court rejected the argument that M.R.Evid. 403 should have prevented the admission of the redacted statement. CMMC argued that the statement in isolation was out of context and resulted in unfair prejudice and was misleading. However, because there was only a transcript of a pretrial conference in chambers and not the trial itself, the Court was unable to assess the extent to which the letter may have been used improperly to influence the jury, if at all. Therefore, the last contention by CMMC was also rejected.

Differing Opinions On Whether A Settlement Agreement Has Been Reached

In *Estate of Harold Forest Snow*, 2014 ME 105 (Aug. 14, 2014), the Law Court looked at whether a binding settlement agreement existed between parties, and if so, how to enforce the settlement agreement. The case arose from the death of an individual who left behind four daughters. During the decedent's lifetime he had transferred real property to one of his daughters. The real estate gifted during the decedent's lifetime was supposed to be counted as part of the one daughter's allocation of the estate assets. Another of the decedent's daughters was named personal representative of the estate. It was this daughter that filed suit seeking the return to the estate of the real property gifted.

Immediately prior to a deposition of the daughter who received the gifted real property, the attorneys reached a settlement agreement. The daughter was not deposed. Instead, the attorneys proceeded to put the terms of the settlement on the record. A professional court reporter transcribed the terms of the settlement. After several weeks of exchanging proposed settlement agreement language, a motion to enforce the settlement was filed. The Probate Court granted the motion to enforce finding that the record contained unequivocal stipulation by the parties' attorneys that the matter was settled and the material terms of the agreement were clearly defined in the transcript. The decision on the motion to enforce was appealed.

The Law Court affirmed the Probate Court's decision. It found that the record contained ample evidence that the parties intended to enter into an enforceable settlement agreement to be subsequently memorialized in writing, that the parties did in fact assent to the terms set forth on the record before the court reporter, and that the terms placed on the record reflected all of the material terms of the contract. The mere existence of some evidence that the parties' recitation of the terms of the settlement was merely an outline, and that certain details of the agreement remained to be negotiated did not render the Probate Court's decision clearly erroneous.

The appellant also sought reversal on the grounds that the Probate Court erred or abused its discretion in granting the motion to enforce the settlement agreement without holding a trial or an evidentiary hearing, or converting the motion to one for summary judgment. The Court rejected the appellant's contentions holding that it had previously endorsed filing motions to enforce without the need for a summary judgment record and that whether to have a hearing was discretionary, pursuant to M.R.Civ.P. 7(b) and M.R.Prob.P. 7(b). Because the record submitted to the Probate Court contained no ambiguity of the settlement language, no evidentiary hearing was required. Therefore, the Order enforcing the settlement was affirmed.

The Vermont Supreme Court's Latest Decision on Implied Indemnity: Exposing a Trap for the Unwary?

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On January 9, 2015, the Vermont Supreme Court issued a decision in the case of Heco v. Foster Motors, 2015 VT 3, available at http://info.libraries.vermont.gov/supct/current/op2013-323.html. This decision, which concerns an indemnification cross-claim between two defendants, reminds us to tread carefully when settling underlying personal injury cases when there are third-party indemnity issues looming in the background.

In 2007, Dzemila Heco was injured when her 2000 Dodge Neon was rear-ended by another car. Ms. Heco alleged that upon impact her seatback collapsed and that the seat, seatbelt, and other components of the car failed to restrain her adequately, thereby resulting in spinal cord injuries. She sued the seat manufacturer (JCI), the seatbelt manufacturer (Autoliv), the vehicle manufacturer (Chrysler), and the dealer (Midstate Dodge). After settling with Autoliv, Ms. Heco filed an amended complaint alleging strict liability, negligence, and breach of warranty against JCI and Midstate. Midstate, in turn, cross-claimed against JCI for indemnification.

Ms. Heco settled with Midstate (and also Chrysler) soon thereafter. In the settlement agreement, which did not disclose the monetary compensation being paid, Midstate obtained a broad release (as would normally be expected and desirable) from "any and all claims, demands, damages and causes of action under any state or federal law whatever the nature, which are known or unknown, foreseeable or unforeseeable, past, present or future, arising directly or indirectly out of the Vehicle, the Incident or the Lawsuit." The agreement also expressly stated Ms. Heco's intention to continue pursuing her claims against JCI in order to recover the "full value" of her injuries.

Seizing on this settlement language, JCI moved for summary judgment on Midstate's indemnification claim. JCI first contended, based on the Restatement (Third) of Torts § 22(a), that an indemnitee seeking equitable indemnity under common law (Midstate) must first completely extinguish the indemnitor's (JCI's) liability, which had not occurred through the settlement. JCI argued in the alternative that it could not be compelled to indemnify Midstate because the settlement agreement discharged Midstate for vicarious liability not only for JCI's conduct but also for other parties' (e.g., Chrysler's) conduct. Relying on the former rationale, the trial court granted JCI's motion.

The Vermont Supreme Court affirmed, but did so on the alternative grounds raised by JCI, which the Court saw as "resting on well-settled and universally recognized common-law principles." The Court observed that "[i]t is axiomatic that a party seeking implied equitable indemnity may recover only where its potential liability is vicariously derivative of the acts of the indemnitor and it is not independently culpable," and that "[s]uch independent culpability need not arise exclusively from the primary negligence of the indemnitee." That is, it also could arise, for example, from the indemnitee's vicarious liability from a third party's acts. The Court therefore reasoned that Midstate could not seek indemnification from JCI for the undisclosed settlement amount because the settlement discharged Midstate's potential vicarious liability not only for JCI's conduct but also for Chrysler's conduct.

There are two takeaways from the Heco decision. First, the "independent culpability" that serves to eliminate an indemnity obligation is not limited to the active negligence of the indemnitee – vicarious liability for a third party's acts also counts. This could be viewed as a departure from earlier case law in Vermont stating generally that "indemnification accrues to a party who, without active fault, has been compelled by some legal obligation, such as a finding of vicarious liability, to pay damages occasioned by the negligence of another." Plus, in stating the rule that independent culpability need not arise from the primary negligence of the indemnitee, the Vermont Supreme Court cited to a Texas case that seems distinguishable.

Second, be careful when settling a case involving multiple defendants where your client intends to pursue an implied indemnity claim down the road, as your client could be left holding a bag it never expected to. What could Midstate have done differently to avoid this result? Could it have structured its settlement with Ms. Heco in such a way that its indemnity claim against JCI could still survive? It seems as if Midstate would have needed to limit the settlement only to claims arising from the acts of JCI, and then prove at trial that it had no active fault and that Chrysler had no liability for which Midstate could be held vicariously. But faced with that burden, why would Midstate settle at all?

New Hampshire Case Law Summaries

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NH SUPREME COURT

Amica Mutual Insurance Company v. Mutrie
(November 13, 2014)

Mutrie was a defendant in a civil lawsuit brought by four police officers, members of a drug task force, who were injured while executing a search warrant at a property at which Mutrie's son, a suspected drug dealer, lived. The property was owned by a trust, of which Mutrie was a trustee. Mutrie's son shot the officers as they attempted to execute the search warrant. The officers filed a lawsuit against Mutrie alleging that she "recklessly" and "wantonly" allowed criminal activity to take place on her property and otherwise facilitated and supported her son's criminal activity.

Mutrie was insured under a homeowner's and umbrella policy issued by Amica. Amica filed a petition for declaratory judgment seeking a ruling that it did not owe a duty to defend or indemnify Mutrie because the "reckless and wanton misconduct" did not constitute an "occurrence" under the policies, and the police officers intervened. The trial court granted summary judgment in favor of Amica.

The Supreme Court affirmed the decision and ruled that Amica had no obligation to defend or indemnify Mutrie against the intervenors' claims because the Amica policy defined "occurrence" as "an accident". The Court ruled that a reasonable person in Mutrie's position would know that some harm would result from her alleged knowing, reckless and wanton support of her son's criminal drug activity and, therefore, her conduct did not constitute an "occurrence" under the policies.

White v. Vermont Mutual Insurance Company
(November 21, 2014)

The plaintiff was injured as the result of an accident caused by a dog owned by Matthews. The incident occurred while Matthews was staying with friends at a Moultonborough home owned by his mother and insured under a policy issued by Vermont Mutual. That policy defined "insured" as including "residents of your household who are ... your relatives." The plaintiff filed a declaratory judgment action seeking a determination that Matthews qualified as an insured under the policy.

Matthews's mother also owns a home in Florida where she lives approximately half the year and uses as her primary residence. Matthews had resided at the Moultonborough home during his teenage years. After graduating from college, Matthews began living and working in Massachusetts full-time. He bought a condominium in Somerville where he lived 80% of the year, tells people that he lives in Massachusetts and uses his Somerville address on his tax returns and resume. At the time of the incident, however, he was unemployed, receives financial support from his mother, has a New Hampshire driver's license, registers his vehicle in New Hampshire, and is registered to vote in Moultonborough. He considered the Moultonborough house to be his mother's home and only goes to visit occasionally. He has a key to the house, uses the room he occupied while growing up and keeps some of his belongings there.

The trial court ruled that Matthews was not a resident relative of his mother's household and denied the petition and the Supreme Court affirmed. The Court's focus was on the policy, which defined "residence" as "the place where an individual physically dwells, while regarding it as his principal place of abode" and "household" as "a group of people dwelling as a family under one head and under one roof." The Court ruled that although Matthews had "some residual ties" to his mother's Moultonborough home, the objective facts together with Matthews's own subjective understanding indicated that his residence was in Massachusetts. The Court also ruled that Matthews would only be entitled to coverage if he was a resident of his mother's household - her primary residence in Florida - and he was not.

U.S. DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE

Bourget d/b/a Bourget Amusement Co. v. Hillsborough County 4H Foundation, Inc.
(October 24, 2014)

Bourget, a carnival operator, rented space in a building owned by the 4H Foundation for the storage of equipment and carnival rides. The Foundation is a nonprofit organization which owns fairgrounds where it hosts various agricultural events and related activities. The building's roof collapsed due to the weight of accumulated snow damaging some of the rides and rendering them unusable for the approaching season. Bourget filed negligence and breach of contract claims against the Foundation alleging that it negligently failed to keep the building in a reasonably safe condition.

The Foundation moved for partial summary judgment asserting that if it is found liable to Bourget any recovery would be capped at $250,000 under RSA 508:17, II which provides a cap for liability of a nonprofit organization for damages caused by an organization volunteer. Bourget argued that the cap did not apply because he had alleged that the Foundation itself was negligent and did not allege negligence on the part of any individual volunteer. The Court rejected this argument, ruling that since a corporate entity can only act through its agents, employees or volunteers, Bourget's claims necessarily rest on the implicit assertion that one or more of the Foundation's volunteers was negligent.

FIRST CIRCUIT COURT OF APPEALS

EEOC v. Kohl's Department Stores
(December 19, 2014)

The plaintiff, a full-time sales associate at Kohl's, suffers from Type I diabetes. Due to a nationwide restructuring of Kohl's staffing system, the plaintiff was required to work various shifts at different times of the day, however, working erratic shifts aggravated the plaintiff's diabetes. The plaintiff provided her supervisor with a letter from her endocrinologist stating that she needed to work a predictable day shift in order to better manage her stress, glucose level and insulin therapy. The supervisor consulted with the Human Resources department and was told that because the plaintiff was full-time she would have to work some night shifts, but that they would avoid giving her swing shifts and would ensure that she took her breaks. After being informed that she could not be given a consistently steady nine-to-five schedule, the plaintiff stated that she had no choice but to quit and stormed out of the meeting. Her supervisor asked the plaintiff to reconsider her resignation and consider other accommodations. The plaintiff refused.

The district court granted summary judgment in favor of Kohl's on the ADA claim and the First Circuit Court affirmed. The Court noted that an employee's request for accommodation under the ADA requires that both the employer and the employee engage in an interactive process. Both parties have a duty to engage in good faith and, when the employee fails to cooperate in the process the employer cannot be held liable. The Court found that Kohl's refusal to give the plaintiff the specific requested accommodation does not necessarily amount to bad faith as long as it made an earnest effort to discuss other potential reasonable accommodations. Kohl's attempted to do so and the plaintiff's refusal to participate in further discussions was not a good-faith effort on her part. The Court also found that because the plaintiff actively disregarded her employer's efforts to resolve the situation, she had resigned prematurely and could not prevail on her constructive discharge claim.

Kerin v. Titeflex Corp.
(November 4, 2014)

The plaintiff owns a home which has Gastite CSST installed to provide gas for his outdoor firepit. CSST has been used in homes and commercial structures since 1980. It has been discovered that CSST may fail when exposed to electrical insult, such as lightning strikes. Despite these known risks, Gastite CSST continues to meet code requirements and is still used in buildings throughout the country.

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The plaintiff filed a product liability class action against Titeflex, the manufacturer of Gastite, based on the product's vulnerability to lightning strikes. Although the plaintiff had not sustained any actual harm, he sought damages based on alleged overpayment for a defective product and the cost of remedying the safety issue.

The trial court dismissed the claims based on lack of standing, ruling that the plaintiff could not establish "injury in fact" due to the conjectural nature of the claim, which required both a lightning strike and a resulting puncture in the CSST. The dismissal was affirmed on appeal. The Court ruled that although the risk at issue could result in severe harm if it in fact materialized, whether a risk is too speculative also depends on the chance that the risked harm will occur. It concluded that the alleged risk was too speculative to give rise to a case or controversy.

Hunt v. Massi, et al
(December 10, 2014)

The plaintiff brought a civil rights action against two police officers after they refused to accede to his request to be handcuffed with his hands in front of him during an arrest. The plaintiff informed the officers that he had recently undergone abdominal surgery and could not be handcuffed with his hands behind his back. After viewing the plaintiff's abdomen the officers determined that no injury would result from handcuffing the plaintiff with his hands behind his back, in accordance with standard police procedures. At that point the plaintiff resisted arrest and a scuffle ensued which resulted in the plaintiff being taken to the floor and kneed in the back while being handcuffed. The plaintiff complained of pain and was taken to a hospital where it was determined that he was not physically injured. He was charged with resisting arrest and assault and battery on a police officer, but was found not guilty following a trial.

The plaintiff's lawsuit against the officers alleged violations of 42 U.S.C. §1983 based on excessive force and malicious prosecution, together with several state law claims. The Massachusetts federal district court denied the officers' motion for summary judgment, ruling that the officers had potentially used excessive force and were not entitled to qualified immunity.

The First Circuit Court reversed the decision in part, ruling that the district court erred in denying qualified immunity to the officers on the excessive force claim. The Court held that the plaintiff did not have a clearly established right to have his hands cuffed in front of him due to an alleged injury. An officer's decision to handcuff an arrestee according to standard police practice is a judgment call that must be analyzed based on the totality of the circumstances. In this case, the officers were aware that the plaintiff had a serious and recent criminal history, they encountered resistance from him, and they looked at the site of the surgery and determined that no new injury or exacerbation would result from the standard handcuffing technique. Under those circumstances, no reasonable officer would have believed that the decision to handcuff the plaintiff according to standard practice violated the constitutional prohibition against use of excessive force, therefore the officers were entitled to qualified immunity and, therefore, were entitled to summary judgment. However, the Court ruled that it did not have appellate jurisdiction over the malicious prosecution claims since, regardless of whether the officers had probable cause to charge the plaintiff with resisting arrest, there were disputed issues of fact as to whether the officers had probable cause to charge the plaintiff with assault and battery on a police officer and it remanded those claims for further proceedings.

SAVE THE DATE

Annual Maine TDLA Spring Program & Social

April 9, 2015
Mariner's Church Banquet Center
368 Fore Street, Portland

4:00pm-5:00pm
Depositions: Something for Everyone
5:00pm-6:00pm
Social with Cash Bar

2015 ANNUAL MEETING - SAVE THE DATE

September 17 & 18, 2015

Residence Inn Marriott—Downtown Portsmouth, New Hampshire
A block of rooms has been reserved under the name of TDLA. The rate is $195.00 plus tax.
Call 1-603-422-9200 to make a reservation.

8th Annual TDLA Meeting
Held on September 18 & 19, 2014
Residence Inn Marriott—Downtown Portsmouth,

Patricia Orr, DRI 's Northeast Region Director, presented outgoing TDLA Chair Tom McKeon, with DRI's Exceptional Performance Award.

During the Thursday night dinner, guests were treated to a special presentation by Shapleigh Smith, Jr., Speaker of Vermont's House of Representatives.

R. Matthew Cairns, *Gallagher, Callahan & Gartrell, P.C.*, (Concord, NH) presented a session on Ethical Leadership.

DRI speaker James R. Courie, *McAngus Goudelock & Courie, LLC* (Columbia, SC), presented a session on Metrics: How to Make Your Numbers Look Good.

Tom McKeon moderated a panel discussion on What Lawyers can do to Help Experts. From left to right: Keith T. Kallberg, P.E., *Roaring Brook Consultants* (South Berwick, ME); Mark G. Filler, CPA/ABV, *Filler & Associates* (Portland, ME); Michael T. Tracey, M.S.C.E., P.E., *CED Investigative Technologies*; Timothy L. Morse, Ph.D., P.E., CFEI, *Exponent* (Natick, MA); and Thomas R. McKeon, *Richardson, Whitman, Large and Badger* (Portland, ME).

The annual meeting is a great opportunity for networking!

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