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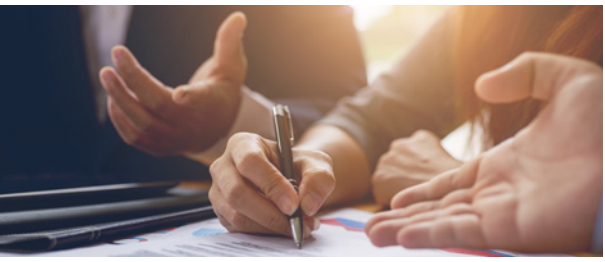
2021 | SIGNIFICANT CASES







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2021 | SIGNIFICANT CASES

SIGNIFICANT CASES
— BY FIRM —

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CLASS ACTION

COUNSEL: Juliane C. Miller, W. Benjamin Woody
FIRM: Harman Claytor Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

CLASS ACTION LITIGATION – PRODUCTS LIABILITY

Who is on the Hook for Putative Class Action for Allegedly Defective Mattress?

After an attempt to clean the exterior of a mattress allegedly resulted in the discharge of fiberglass particles throughout their home, Plaintiffs sued the retailer, the mattress's manufacturer and the fiberglass component's manufacturer in a 14-count complaint, alleging various theories including negligence-based and warranty-based products liability, fraud and violations of consumer protection acts. Plaintiffs sought damages for personal injuries, property damage and alternative living expenses they claim were caused by the release of fiberglass particles from the allegedly defective mattress. Plaintiffs also sought to certify a class of purchasers who bought similar mattresses and requested that the court order the defendants to organize and administer a settlement fund. Because the plaintiffs could not establish the existence of any facts that would support the retailer's involvement in the mattress's design or manufacture, nor the development of advertising copy, the Court dismissed all 14 counts against the retailer. ◆

RESULT: **Retailer's Motion to Dismiss Granted on All Counts.**

COUNSEL: Karen Stafford and Cassandra Meyer
FIRM: The Cavanagh Law Firm, P.A.
HEADQUARTERS: Phoenix, AZ

CLASS ACTION- TELEPHONE CONSUMER PROTECTION ACT ("TCPA")

Plaintiff files class action after receiving unsolicited text message

Plaintiff, on behalf of himself and the alleged class, filed suit against a real estate company alleging violations of the TCPA after receiving an unsolicited text message. While the case was pending, the United States Supreme Court agreed to accept review of a Ninth Circuit case that broadly defined an automatic telephone dialing system ("ATDS") to include any device that can store and dial numbers (including cell phones.) The Arizona District Court granted defense Motion to Stay the case pending the Supreme Court's decision in the Facebook case. The Supreme Court overruled the Ninth Circuit's decision and specifically narrowed the definition of an ATDS to include ONLY those devices that actually generate phone numbers, not those that can just store and dial numbers. This was the first Supreme Court decision to specifically address this definition and resolve what had become a split among the federal jurisdictions. Based on the Supreme Court's decision, defense filed a Motion to Dismiss, arguing that Plaintiff failed to allege the use of an ATDS, nor could he, based on the alleged facts. The Court agreed and granted Defendants' Motion to Dismiss, dismissing Plaintiff's claims with prejudice.

This was the first decision in Arizona to specifically apply the Supreme Court's newly-clarified definition of an ATDS and to expressly address a footnote in the Supreme Court's Facebook decision that Plaintiff argued left the question open as to whether an ATDS must have the ability to actually generate phone numbers, rather than just dial numbers from a pre-prepared list. The Arizona

COUNSEL: Karen Stafford and Cassandra Meyer
FIRM: The Cavanagh Law Firm, P.A.
HEADQUARTERS: Phoenix, AZ

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District Court rejected Plaintiff's argument and held that an ATDS must be able to generate phone numbers, and any device that does not generate phone numbers is not an ATDS under the TCPA. ◆

RESULT: Dismissed with prejudice.

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COMMERCIAL LITIGATION

COUNSEL: Bonnie Boryca and Cory Wilson
FIRM: Erickson Sederstrom, PC
HEADQUARTERS: Omaha, NE

BREACH OF CONTRACT, CIVIL PROCEDURE

Federal 'stop-the-clock' tolling of statute of limitations period

A federal appeal was successful, but the case thereafter was remanded to state court, when the federal district court declined to continue exercising supplemental jurisdiction over remaining state law breach of contract claim. Case was re-filed in state court as a result. State district court dismissed the case, finding sua sponte, that statute of limitations had run on stockholder's claim for breach of a stock purchase agreement. Nebraska Supreme Court reversed, relying on the United States Supreme Court's Artis holding, that limitations clock was fully stopped, while case had been pending in federal court and on appeal to the Eighth Circuit Court of Appeals. As a result of the tolling, the case had been timely brought in the state court under federal and Nebraska law and was allowed to proceed in the state district court. ◆

RESULT: Nebraska Supreme Court reversed dismissal by district court.

COUNSEL: Jack Crawford, Paul Murphy and Reed Nunnelee
FIRM: Butler Snow LLP
HEADQUARTERS: Ridgeland, MS

BANKRUPTCY CASE

Suit needed to secure $3.4MM in Chapter 11 case

Firm represented Origin Bank in the prosecution of its $3,678,417.43 secured claim arising from its loan agreement, promissory note, security agreement and deed of trust against Boots Smith Completion Services, LLC, which had filed Chapter 11 bankruptcy, and, in the prosecution of the Bank's claims under the same agreements against co-borrowers and/or guarantors Jason W. Smith, Boots Smith Oilfield Services, LLC, Boots Smith Pipeline Services, LLC, Sandersville Property Holdings, LLC and Boots Smith Energy Group, Inc. Defense was able to successfully lift the automatic stay over one half of Origin's collateral, and successfully opposed confirmation of the Chapter 11 plan, to achieve the necessary concessions by the Debtor (leading to the Court's ultimate confirmation of the plan). Thus, defense was able to secure a $3,241,259 judgment against the co-borrowers and guarantors after the private foreclosure of an office building. ◆

RESULT: Judgment for client.

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CIVIL RIGHTS

COUNSEL: David B. Owens and Paul Cividanes
FIRM: Molod, Spitz & DeSantis, PC
HEADQUARTERS: New York, NY

FALSE ARREST/DISCRIMINATION/ VIOLATION OF CONSTITUTIONAL RIGHTS

Pro-se Plaintiffs Bring Suit Following Fight that Leads to Arrest and Racial Discrimination Claims

The two plaintiffs were attacked by a group of individuals outside of their apartment building in the Bronx, which was owned and operated by Diego Beekman Mutual Housing. Plaintiffs alleged that a Diego Beekman's building manager observed the altercation on surveillance cameras and called the police. Two police officers, stationed nearby, in addition to receiving a radio report of the fight, also observed the fight as it spilled out onto the sidewalk. The officers immediately responded and observed one of the plaintiffs hitting a woman, which was supported by the captured surveillance footage. That plaintiff was arrested. Plaintiffs filed suit against Diego Beekman and the City of New York, along with two police officers, alleging that the group who attacked them should have been arrested and that the arrested plaintiff was racially discriminated against.

The Court liberally construed the pro-se plaintiffs' complaint as alleging claims against Diego Beekman for violating plaintiffs' constitutional rights under 42 U.S.C § 1983. The Court found that Diego Beekman is entitled to summary judgment on Plaintiffs' § 1983 claims because it is not a state actor, and therefore a claim for violation of a constitutional right cannot be brought against them. The Court further held that calling the police to report a crime is insufficient, standing alone, to establish state action. The Court further dismissed the action against the City finding that there was probable cause for plaintiff's arrest based upon the officer's

COUNSEL: David B. Owens and Paul Cividanes
FIRM: Molod, Spitz & DeSantis, PC
HEADQUARTERS: New York, NY

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observation of plaintiff hitting a woman, which was supported by the video footage submitted to the Court, and that there was no evidence of racial discrimination.

The Court declined to exercise supplemental jurisdiction over any state law claims that the complaint could be read to raise. Finally, the Court certified that, any appeal would not be taken in good faith and therefore denied "IFP" status, which would permit plaintiffs to appeal the decision without payment of the usual fees. ◆

RESULT: Summary Judgment Granted to Landlord.

COUNSEL: Carter Fairley and Spence Fricke
FIRM: Barber Law Firm PLLC
HEADQUARTERS: Little Rock, AR

CIVIL VIOLATION OF ARKANSAS HUMAN TRAFFICKING ACT

Plaintiff Demands Seven Figures in Civil Human Trafficking Complaint

A young adult female filed a civil complaint for violation of the Arkansas Human Trafficking Act as well as claims for civil conspiracy, outrage and other torts against an older multi-millionaire male and several related defendants including personal counsel for the wealthy defendant. The Arkansas Human Trafficking Act allows for civil claims to be filed against an alleged human trafficker as well as any person who allegedly "benefits financially or benefits by receiving anything of value from participation in a venture" that constitutes involuntary servitude among other things. The Court found as a matter of law that Plaintiff was not a victim of human trafficking and failed to plead sufficient facts that all Defendants, including personal counsel of the alleged trafficker, knowingly engaged in any prohibited acts under the statute. No appeal of the dismissal was taken by Plaintiff. ◆

RESULT: Case Dismissed.

COUNSEL: Anthony "Tony" Ellrod, Natalya Vasyuk, Edwin Sasaki
FIRM: Manning & Kass, Ellrod, Ramirez, Trester LLP
HEADQUARTERS: Los Angeles, CA

ENTERTAINMENT, ANTI-SLAPP

Prominent Public Figure Sues, 23 Counts from Misrepresentation to Defamation

Plaintiff Kimberly Moffatt Jones is a prominent public figure because of her high-profile divorce from luxury auto dealer Fletcher Jones Jr. She signed releases agreeing to appear on a national television show with celebrity real estate agent Aaron Kirman called "Listing Impossible." Plaintiff sued a number of parties involved in the program, asserting 23 causes of action ranging from misrepresentation to defamation. The defense brought an anti-SLAPP motion (Strategic Lawsuit Against Public Participation.) Anti-SLAPP laws are intended to prevent people from using courts, and potential threats of a lawsuit, to intimidate people who are exercising their First Amendment rights. The motion disposed of 21 of the 23 causes of action, and the defense was awarded $47,397.08 in fees and costs. ◆

RESULT: Disposed of 21 of 23 Causes of Action and Fees Awarded.

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CONSTRUCTION

COUNSEL: Steven A. Bader and Daniel G. Katzenbach
FIRM: Cranfill Sumner LLP
HEADQUARTERS: Raleigh, NC

CONSTRUCTION LAW, APPELLATE PROCEDURE

Contractor Jumps to Appellate Court when Claims Dismissed

The plaintiff, a developer, sued the defendants for allegedly omitting certain costs from a development estimate. The plaintiff sued for (1) breach of contract, (2) negligence, (3) negligent misrepresentation, (4) a violation of the Unfair and Deceptive Trade Practices Act ("UDTPA"), (5) fraud, and (6) constructive fraud. The trial court granted the defendants motion for summary judgment, in part, and dismissed the claims for a violation of the UDTPA, fraud, and constructive fraud. The plaintiff sought immediate review at the NC Court of Appeals. The defendants moved to dismiss the appeal because the plaintiff had not shown a substantial right that would be lost absent immediate review. The plaintiff argued that the risk of an inconsistent verdict supported interlocutory review because common issues of fact permeated all six of its claims. The Court of Appeals, however, agreed with the defendants that the different claims required different elements of proof. Common fact issues, standing alone, did not show a risk of an inconsistent verdict. The Court of Appeals dismissed the appeal. ◆

RESULT: NC Court of Appeals Dismisses Interlocutory Appeal.

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DEFAMATION

COUNSEL: Anthony J. Ellrod and Steven J. Renick
FIRM: Manning & Kass, Ellrod, Ramirez, Trester LLP
HEADQUARTERS: Los Angeles, CA

DEFAMATION

King of Kong defeats anti-SLAPP motion

In a unanimous published opinion, on October 12, 2021, the US Court of Appeal affirmed the trial court's denial of an anti-SLAPP motion against Mitchell, ruling that online social media website Twin Galaxies, can't get out of a defamation lawsuit by Mitchell by mounting an anti-SLAPP (strategic lawsuit against public participation) defense. One of the greatest video game players of all time, the ruling allows Mitchell to continue his defamation lawsuit against Twin Galaxies. Twin Galaxies had stripped Mitchell of several of his Donkey Kong and Pac-Man world records after he was accused of using emulation devices to earn his scores instead of authentic arcade machines, as was required for these world record attempts. The Court of Appeal found sufficient evidence to support a finding that Mitchell did not cheat, and that the accusations of cheating were made with actual malice, citing evidence showing Twin Galaxies ignored an abundance of evidence verifying the scores, and instead relied upon questionable evidence from likely biased sources. ◆

RESULT: Motion to Dismiss Denied, Affirmed by 2nd Circuit Court of Appeal.

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EMPLOYMENT / DISCRIMINATION / DISABILITY / WORK COMP

COUNSEL: Kenneth Engerrand and Michael Williams
FIRM: Brown Sims, PC
HEADQUARTERS: Houston, TX

APPEAL OF ON-THE-JOB INJURY CASE

Employee Injured While Building Scaffolding in High Ocean Winds

Shell Pipeline contracted with BP to complete an expansion project on Shell's oil platform. BP then engaged Grand Isle to manage the construction, and Grand Isle contracted with Brand Energy to build scaffolding on the platform. Brand's employee Coleman waited for five days before the winds died down enough that Brand decided that the scaffolding work could be undertaken. Coleman was injured when a gust of wind "got up under" a scaffolding board he was carrying, causing an injury to his back. Coleman brought suit in state court in Texas against BP and Grand Isle, and the defendants removed the case to federal court and moved for summary judgment. Judge Brown granted summary judgment to both BP and Grand Isle, and Coleman appealed.

In support of his argument that BP and Grand Isle were vicariously liable for the negligence of Brand, Coleman argued that (1) Brand was not an independent contractor of BP and Grand Isle; (2) the defendants exercised operational control over Brand; and (3) the defendants authorized unsafe work practices.

Weighing the five factors to determine whether Brand qualified as an independent contractor, Judge Willett concluded that only one factor (Grand Isle owned the tools used by Brand to perform the work) weighed in favor of Coleman, and that was insufficient to create a fact issue. Coleman next argued that the defendants exercised operational control over Brand because Brand did not have complete or absolute freedom to perform the work as it deemed fit. Judge Willett disagreed with that formulation and stated

COUNSEL: Kenneth Engerrand and Michael Williams
FIRM: Brown Sims, PC
HEADQUARTERS: Houston, TX

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that operational control requires evidence of direct supervision by the principal "over the step-by-step process of accomplishing the work." Actions of the defendants, such a requiring compliance with safety rules, setting work priorities, providing tools, and having on-site supervisors did not equate to giving step-by step instructions on how to build the scaffolding. For the third theory for vicarious liability, that the defendants authorized unsafe work practices, Judge Willett noted that the authorization must be for the particular manner which rendered the work unsafe. The parties disagreed about what the unsafe work practice was, with Coleman arguing that the practice was performing scaffolding work in inclement weather. Judge Willett, however, held that the proper articulation of the unsafe practice was carrying scaffolding boards on an offshore platform in gusting winds. As it was Brand's decision to build the scaffolding in the high winds (even if the defendants influenced that decision and even if they stood by and did nothing to stop Brand), there was no liability for authorizing the unsafe work practice. Coleman's final argument was that there is an exception to the general rule (that parties owe no duty to independent contractors) when the principal either assumes a duty or creates a workplace hazard. Judge Willett concluded that the defendants did not assume a duty by enforcing safety rules (there was no safety rule governing the carrying of scaffold boards in gusting winds), and the presence of safety supervisors with respect to equipment to be used did not extend to supervising all hazards on the platform. Judge Willett also disagreed that the defendants created the hazard as it was not the transporting of Coleman to the platform that created the hazardous condition but, instead, the decision of Brand to start the scaffolding work in high winds. Judge Willett noted that everyone on the platform had the authority to stop work if conditions were unsafe. Although Coleman testified that he feared for his job if he

COUNSEL: Kenneth Engerrand and Michael Williams
FIRM: Brown Sims, PC
HEADQUARTERS: Houston, TX

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stopped work because of the high winds, there was no evidence that Brand believed that work could not be stopped. Concluding that Judge Brown "got it right," the Fifth Circuit affirmed the summary judgment. ◆

RESULT: Underlying Summary Judgment Affirmed by The United States Court of Appeals for the Fifth Circuit.

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ENVIRONMENTAL

COUNSEL: Phillip Sykes, Trudy Fisher, Lea Ann Smith and Amanda Tollison

FIRM: Butler Snow LLP

HEADQUARTERS: Ridgeland, MS

ENVIRONMENTAL CASE

Groundwater contamination case: motions and mediation

Mississippi sued EnPro for groundwater contamination related to operations of a former carburetor manufacturing plant in Mississippi. That groundwater contamination migrated beyond the plant campus. Areas affected included the county-owned hospital and nursing home; a neighborhood; other commercial buildings; and undeveloped land. Extensive discovery and motion practice followed. The parties took multiple depositions, exchanged several rounds of written discovery, produced tens of thousands of documents, and designated experts. In the interim, EnPro pursued a Petition for Interlocutory Appeal to the MS Supreme Court following the trial court's denial of its Motion to Dismiss, based upon, among other arguments, the State's Failure to Exhaust Administrative Remedies before the Commission on Environmental Quality and the Separation of Powers. The trial court ordered a mediation. After a two-day mediation, the parties settled the lawsuit on favorable terms to EnPro. ◆

RESULT: Favorable settlement reached.

COUNSEL: Leo Bearman, Kristine Roberts, and David Bearman
FIRM: Baker, Donelson, Bearman & Caldwell, PC
HEADQUARTERS: Memphis, TN

U.S. SUPREME COURT RULES ON AQUIFER WATER OWNERSHIP

MS sues TN, Memphis, and its water division seeking $615MM

In 2014, the state of MS, sued a number of TN governmental entities, including the state of TN, the city of Memphis and Memphis Light, Gas & Water Division. MS was seeking $615MM in damages arguing that Memphis was stealing its water from the Middle Claiborne Aquifer that straddled both MS and TN, among 6 other states. It was determined that Memphis' wells do not cross the border between the states. Nonetheless, MS argued, under sovereign ownership, that the utility's pumping caused water located beneath its territory to be pulled into TN estimating more than 400 billion gallons of groundwater were stolen since 1965.

The U.S. Supreme Court's Chief Justice John Roberts wrote that while some of the aquifer falls under Mississippi's jurisdiction, the water it contains is not owned exclusively by the state. Rather, the "flowing interstate waters" are subject to the equitable apportionment doctrine, which applies to the allocation of shared water resources between two or more states. The case marked the first time the Supreme Court has held that an interstate aquifer is subject to the doctrine as it has previously applied to cases involving surface water like rivers and streams. ◆

RESULT: U.S. Supreme Court dismisses case, defense win.

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INSURANCE / COVERAGE

COUNSEL: Thomas S. Garrett
FIRM: Harman, Claytor Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

UNINSURED MOTORIST COVERAGE

Big fight, $1.5 million awarded, driver then seeks uninsured motor vehicle coverage to pay

A dispute arose between the Plaintiff trucker and another trucker over Plaintiff's use of the gas pumps at a gas station. An altercation ensued. Plaintiff obtained a $1.5 million judgment against the other trucker. Plaintiff filed suit against his employer's auto insurer seeking uninsured motorist coverage for the underlying judgment.

The parties filed cross-motions for summary judgment concerning whether the injuries arose from the use of an uninsured motor vehicle. The district court held that the aggressor did not utilize the vehicle, or any component part of the vehicle, during the attack on Plaintiff such that the claim did satisfy the terms of the uninsured motorist coverage. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment in favor of the insurer. ◆

RESULT: Judgment in favor of insurer.

COUNSEL: Thomas R. Maeglin
FIRM: Abrams, Gorelick, Friedman & Jacobson, LLP
HEADQUARTERS: New York, NY

INSURANCE COVERAGE (GENERAL LIABILITY – DUTY TO DEFEND)

Alleged damage 'outside' of the insurers' policy period not sufficient to terminate duty to defend

Insurer (NYM) initiated a declaratory judgment action against its insured, a construction contractor, and another of its insurers (MHIC), to avoid defending the insured in a third-party action commenced by the owner of a building who was sued by a commercial tenant. The tenant claimed that construction work at another space in the building led to property damage and business disruptions in its veterinary medicine practice over a lengthy period. The two insurers initially agreed to defend their mutual insured, as they provided coverage for successive one-year policy periods within the period of time when the alleged property damage occurred. Later the insurers made opposing motions for summary judgment on whether NYM had a duty to defend. The motion court held that NYM owed the contractor a duty to defend. NYM appealed. The Appellate Division unanimously affirmed. The Court found allegations of property damage, including loss of use, during the NYM policy period. The policy covering damage to property applies where the complaint alleges that the damage from the occurrence caused a constructive eviction and breach of quiet enjoyment that resulted in damages in addition to the physical losses; and 'property damage' in the policy is defined to include 'all resulting loss of the use' of the property.

The Court rejected NYM's argument that the underlying complaint's claims for constructive eviction/breach of quiet enjoyment do not seek any damages that arose during the NYM policy period

COUNSEL: Thomas R. Maeglin
FIRM: Abrams, Gorelick, Friedman & Jacobson, LLP
HEADQUARTERS: New York, NY

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based upon evidence of reimbursement for damages during the relevant time frame by another insurer. It found evidence that claims for damages within the NYM policy period, were asserted, and are being pursued, and that the insurance proceeds the tenant received covered only a certain part of the damages sought, leaving a reasonable possibility that some unreimbursed damages may be found to fall within the NYM policy. ◆

RESULT: Appellate Court affirms declaring duty to defend.

COUNSEL: Kile T. Turner
FIRM: Norman, Wood, Kendrick & Turner
HEADQUARTERS: Birmingham, AL

INSURANCE COVERAGE

Water damage, $900K judgement, goes after carrier to pay

Former presiding judge of the United States District Court for the Northern District of Alabama Sharon Blackburn issued a 35-page opinion that explained why the plaintiffs could not recover against Nationwide Insurance Company under Alabama's Direct-Action Statute which allows claimants to pursue recovery against a defendant's insurance company once it has obtained an unsatisfied judgment.

The Plaintiffs were homeowners that had experience significant water damage and other problems related to poor construction of their $700K home. They obtained a $900K judgment in Alabama state court against an insured general contractor who had gone out of business. Under the Alabama Direct Action Statute, once a party obtains a judgment against an insured policy holder, they become a judgment creditor under the policy and can bring a direct action against the insurance company to collect the judgment. However, the amount recoverable is limited to what is covered under the policy.

In this case, defense was able to show that despite the size of the judgment, none of the judgment was for damages that were insured. Therefore, the court returned a verdict 100% for the insurance company. Significantly, defense was able to use the Plaintiffs' own testimony to show that there should be no award for mental anguish, even though it is considered a "bodily injury" under Alabama law. Given the amount of time from when the state court

COUNSEL: Kile T. Turner
FIRM: Norman, Wood, Kendrick & Turner
HEADQUARTERS: Birmingham, AL

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judgment was entered, had there been coverage for the loss, the Plaintiffs would have been entitled to more than $1.3MM. ◆

RESULT: Defense verdict for carrier, no coverage for construction judgment.

COUNSEL: Elizabeth E.S. Skilling
FIRM: Harman, Claytor, Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

INSURANCE COVERAGE EXCLUSION: "BURIED VESSEL"

Vessel Roof Collapses, Nearly $850K Loss

The Plaintiff policyholder, the operator of a commercial dairy farm, sought first party property coverage following the collapse of the roof of its cow manure digester. The digester was part of a system used to extract methane from cow manure, which was then used to operate a generator. The generator produced electricity for the insured's dairy farm. Any electricity not used by the dairy farm was sold to the local power company. The collapse of the digester roof into the digester tank was caused by deterioration of the underside of the concrete roof of the digester due to the formation of sulfuric acid within the digester that ate away the concrete and steel reinforcement used in the roof structure. After the collapse, the insured notified its equipment breakdown insurer of the incident and claimed $735,000 in repair costs and $113,076.48 in loss of income. The insurer inspected the digester and denied coverage for the claim, based upon the buried vessel exclusion in the definition of covered equipment, among other reasons. The policy defined buried vessel as any "vessel buried or encased in the earth, concrete or other material, whether above or below grade, or in an enclosure which does not allow access for inspection and repair." The digester was sixteen feet tall. Fourteen feet of the digester was covered in spray foam and buried under the ground. Two feet of the digester sat above the ground but was also completely covered in a thick layer of spray foam insulation. The spray foam served to keep the digester at an appropriate temperature to allow the necessary chemical reactions to occur within the digester to release the methane. The digester was airtight and there were no ports or other means of access to allow for inspection of the interior of the

COUNSEL: Elizabeth E.S. Skilling
FIRM: Harman, Claytor, Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

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digester. The insured argued that because the foam covering was an integral part of the concrete digester, the exclusion did not apply because nothing encased or buried the spray foam that was located above grade. Although the court assumed without deciding that the digester initially met the definition of covered equipment under the policy because it generated electricity, the court refused to read the exclusion narrowly as proposed by the insured. Thus, the court ultimately determined that the exclusion under the definition of covered equipment for buried vessels was unambiguous and applied the plain language of the exclusion to exclude the digester from the definition of covered equipment because the digester was encased both in the earth and in spray foam. In addition, the court found that the digester met the second part of the buried vessel exclusion because the spray foam covering was also an enclosure which did not allow access for inspection or repair.

The Court granted the insurer's motion for summary judgment and dismissed the insured's claims with prejudice, including the insured's claim for bad faith. ◆

RESULT: "Buried Vessel" Exclusion Upheld.

COUNSEL: Steven Bader; Jennifer Welch
FIRM: Cranfill Sumner LLP
HEADQUARTERS: Raleigh, NC

COVERAGE FOR BUSINESS LOSSES RELATED TO COVID-19

Spa Owner Wants Business Interruption Coverage

Franchisee of spa and massage parlor sought coverage for business interruption and extra expense due to COVID-19 shutdown. Insurer's motion to dismiss granted because general outbreak of COVID-19 throughout the state did not trigger communicable disease coverage. ◆

RESULT: Insurer's Motion to Dismiss Granted, No Coverage.

COUNSEL: Brian P. Nally
FIRM: Reminger Co., LPA
HEADQUARTERS: Cleveland, OH

NEGLIGENT MISREPRESENTATION LAWSUIT AGAINST INSURANCE AGENT DISMISSED

Court Holds that Insurance Agent Cannot be Held Liable for Statements Made to Third Party

Plaintiffs filed a lawsuit against an insurance agent, alleging that he made various misrepresentations about the scope and application of insurance coverage. Defense successfully argued that the agent acted properly under applicable law and could not be held liable for the allegations advanced by the Plaintiffs, which hinged on the agent making alleged misstatements to the Plaintiffs' son, who was not a client. The court granted the motion for summary judgment on all claims, holding that an insurance agent cannot be held responsible under claims for fraudulent misrepresentation for statements made by an insurance agent to a non-client. ◆

RESULT: Motion for Summary Judgment Granted, Case Dismissed.

COUNSEL: Jennifer Welch; Ted Smyth
FIRM: Cranfill Sumner LLP
HEADQUARTERS: Raleigh, NC

BUSINESS INTERRUPTION LOSSES RELATED TO COVID-19

Virus Exclusion in Business Interruption Policy

Service and collision center sought business interruption coverage after employees contracted COVID-19 and centers experienced suspension of operations. Court held insurer's motion to dismiss granted because policy excluded direct or indirect loss or damage caused by a virus unless the virus was the result of a covered peril other than fire or lightning. ◆

RESULT: Insurer's Motion to Dismiss Granted.

COUNSEL: Jennifer Welch; Ted Smyth
FIRM: Cranfill Sumner LLP
HEADQUARTERS: Raleigh, NC

BUSINESS INTERRUPTION LOSSES RELATED TO COVID-19

Physical Loss Requirement

Restaurant franchisee sought coverage under policy for business interruption due to physical loss of the property and under interruption by civil or military authority provision. The court held insurer's motion for judgment on the pleadings granted because plaintiffs did not plausibly allege that COVID-19 caused tangible, physical harm to property or a tangible loss to property. ◆

RESULT: Motion for Summary Judgment Granted.

COUNSEL: Jennifer Welch
FIRM: Cranfill Sumner LLP
HEADQUARTERS: Raleigh, NC

UNDERINSURED MOTORIST CLAIM, ADVANCE NOTICE REQUIREMENTS

Insured Settles Claim, Then Wants Insurance Company to Pay

Insured settled claim against tortfeasor and then asserted a claim for underinsured motorist benefits. Underinsured motorist insurer sought declaratory judgment that insured was not entitled to underinsured motorist benefits based on insured's failure to provide underinsured motorist insurer advance written notice of settlement, as was required by the policy and statute. Insured counterclaimed for breach of contract, bad faith, wrongful interference with prospective contract, and unfair and deceptive trade practices. Insured argued the underinsured motorist insurer must prove it was materially prejudiced by the insured's failure to provide the required notice.

Court held insurer need not prove material prejudice to prevail on its motion for judgment on the pleadings, and insured's failure to adhere to statutory notice requirements barred his claim for underinsured motorist benefits as a matter of law. Insured's extra-contractual claims also failed as a matter of law. ◆

RESULT: Claims Barred.

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LEGAL MALPRACTICE

COUNSEL: Kyle Wu, Esq.
FIRM: Margolis Edelstein
HEADQUARTERS: Berkeley Heights, NJ

TRANSACTIONAL/LEGAL MALPRACTICE

Law Firm sued for malpractice, $4 Million and lost profits

Partner, Kyle Wu, obtained summary judgment in favor of defendants, an attorney and his firm on a complaint alleging legal malpractice in the handling of an asset purchase agreement ("APA"). Plaintiffs claimed that the defendants failed to ensure the inclusion of a provision that would have guaranteed the Plaintiffs $4 million dollars in the event of a subsequent sale within one year of the APA's effective date, failed to advise that the provision was removed by the other party to the transaction prior to the closing, and failed to file certain documents under the New Jersey Industrial Site Remediation Act ("ISRA"), leading to lost profits and extra costs to the Plaintiffs. After a little over two years of litigation, a motion for summary judgment on behalf of the law firm defendants was filed, arguing that Plaintiffs could not satisfy the elements of their various causes of action asserted and that there was no evidence in the record that could ever allow the Plaintiffs to establish proximate cause of damages.

The Superior Court of New Jersey determined that no genuine issues of material fact existed and because the record did not contain any evidence to show the other party to the transaction would have acquiesced to Plaintiffs' demands or another buyer would have agreed to the terms that the Plaintiffs wanted, proximate cause of damages could not be established. The Court further found that Plaintiffs' claim regarding an alleged failure to comply with ISRA to obtain an exemption failed as a matter of law because the Environmental Site Assessment relied upon by the Plaintiffs had expired and a Licensed Site Remediation Professional ("LSRP") would have been needed to be hired and perform the work regardless of

COUNSEL: Kyle Wu, Esq.
FIRM: Margolis Edelstein
HEADQUARTERS: Berkeley Heights, NJ

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whether the General Information Notice ("GIN") had been timely filed. Thus, summary judgment was granted on all counts. ◆

RESULT: Summary Judgement, Dismissal of Plaintiff's Action.

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MEDICAL

COUNSEL: Catherine Steiner
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

Defense Verdict on Causation in Complex Rheumatology Case

Plaintiff alleged that there was a delay in recognition and response to an isolated elevated blood pressure in a patient with an evolving complex rheumatologic disease and that as a result, the patient developed acute renal failure leading to kidney transplant. The jury found that the actions of the defendant rheumatologist did not cause the acute renal failure and kidney transplant. ◆

RESULT: Defense Verdict on Causation.

COUNSEL: Catherine Steiner
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

Defense Verdict on Standard of Care in Pulmonary Embolism Death Case

Plaintiff alleged that the patient's primary care provider should have prescribed anti-coagulation for DVT prophylaxis following head and neck cancer by a surgeon based upon patient's prior DVT following knee surgery. The jury found that there was no breach of the standard of care by the primary care provider. ◆

RESULT: Defense Verdict on Standard of Care.

COUNSEL: First Chair, Natalie Magdeburger; Second Chair, Kimberly Longford
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

The Radiologist Did Not Miss Anything

Plaintiffs claimed that the defendant radiologist breached the standard of care by not reporting pneumatosis on an abdominal CT scan, causing Plaintiffs' decedent's death. Evidence was presented, including testimony from experts in radiology and pathology, that the patient did not have pneumatosis and that nothing was "missed" on imaging. The decedent was very sick with numerous co-morbidities and died due to her underlying conditions. The jury agreed and found no breach of the standard of care. ◆

RESULT: Defense Verdict.

COUNSEL: First Chair, Catherine Steiner; Second Chair – Gregory Kirby
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

MEDICAL MALPRACTICE DEFENSE

Defense Verdict and Dismissal Without Settlement Paid in Over 30 Multidistrict Contaminated Steroids Litigation

This is the only case out of over 30 separate alleged medical malpractice actions in a multidistrict litigation handled by Catherine Steiner and Greg Kirby that went to trial. All others were dismissed against the health care provider client with no settlement paid. The cases involved contaminated injectable steroids that caused severe illness in patients and resulted in death in a number of patients due to the actions of a third-party national pharmacy. The litigation resulted in hundreds of expert and fact witness depositions across the United States and was ongoing for more than 8 years. ◆

RESULT: Defense Verdict on Intervening/Superseding Cause.

COUNSEL: Catherine Steiner
FIRM: Pessin Katz Law, P.A.
HEADQUARTERS: Towson, MD

DENTAL MALPRACTICE DEFENSE

No Breach of Standard of Care by Dentist

Plaintiff underwent dental extractions of severely decayed teeth in preparation for dentures. Plaintiff alleged dental malpractice when she subsequently developed osteomyelitis requiring resection of part of the lower jaw. The jury found that the dentist did not breach the standard of care and returned a defense verdict. ◆

RESULT: Defense Verdict on Standard of Care.

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MOTOR VEHICLE / TRANSPORTATION

COUNSEL: Randy Moody, Jeff Leasendale
FIRM: Drew Eckl Farnham LLC
HEADQUARTERS: Atlanta, GA

BOBTAIL TRACTOR COLLISION

Victory in Clear Liability Case where plaintiff seeks $4MM

Defendant's employee-driver of a large tractor fell asleep at the wheel and struck the rear of the stopped bobtail tractor, operated by plaintiff. The defendant's in-cab video was dramatic evidence of the incident and significant impact. Plaintiff had shoulder surgery and claimed past medical expenses of over $180,000, unspecified future medical expenses, and millions of dollars of lost income, as plaintiff claimed the incident put his trucking company out of business. Plaintiff's lowest demand before trial/verdict was $850,000 and at trial plaintiff sought over $4 million. Pretrial offers of several hundred thousand dollars were rejected by plaintiff with unwillingness to reduce the demand. Defense kept the verdict non-nuclear by admitting liability and the injury. In addition, defense impeached plaintiff on a variety of points; but the jurors (trial occurred during the summertime spike of the Covid-19 Delta variant with all persons wearing masks) stated that due to the video, admitted liability, and admitted damages that they had to render a verdict for plaintiff; and the amount ended up being very near defendant's offer. The jurors reached a compromise/quotient verdict of $500,000 and defendant paid the judgment. ◆

RESULT: Plaintiff verdict was millions less than amount requested and $350,000 less than lowest pretrial demand.

COUNSEL: V. Christopher Potenza
FIRM: Hurwitz & Fine, P.C.
HEADQUARTERS: Buffalo, NY

TRUCKING ACCIDENT

Plaintiff driver ends up the defendant

The plaintiff husband was attempting to pass a tractor-trailer on the right after exiting a toll barrier. Riding with him was his wife, also a plaintiff in the case. At the same time, the tractor-trailer carrying livestock attempted to move into said right lane. After observing, and coming into contact with the plaintiffs' vehicle, the tractor-trailer continued to maneuver into the right lane, pinning the plaintiffs' vehicle and dragging it along the guard rail for a quarter of a mile before flipping the vehicle into an embankment. Both plaintiffs suffered neck and back injuries. The plaintiff husband had lumbar fusion surgery with complicated results. The plaintiff wife had cervical fusion surgery and was out of work for over three years. The husband and wife both filed suit against the tractor-trailer driver and owner. The owner then filed a third-party claim for contribution against the plaintiff husband for his driving actions.

During trial, the out-of-state tractor-trailer driver sought to give his trial testimony via video conference, or, have his deposition transcript read in lieu of live testimony claiming he was more than 100 miles from the place of hearing or trial and thus "unavailable" pursuant to FRCivP 32. Counsel for the now "third-party defendant" (the plaintiff husband) moved to preclude the tractor-trailer driver's testimony for failure to appear at trial as a necessary witness to prosecute his third-party claim. The trial judge precluded the tractor-trailer driver's testimony in its entirety, including not permitting his deposition testimony to be affirmatively read on his behalf, finding that he could not claim to be unavailable if he was the voluntary cause of being 100 miles outside the jurisdiction of the courthouse. Shortly thereafter, the seven figure policy limits of the tractor-trailer driver/owner were tendered to satisfy the claim

COUNSEL: V. Christopher Potenza
FIRM: Hurwitz & Fine, P.C.
HEADQUARTERS: Buffalo, NY

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of both plaintiffs. And as a result of counsel successfully convincing the court to exclude the primary defendant tractor-trailer driver's testimony at trial, the third-party action against the third-party defendant (the plaintiff husband) was discontinued with prejudice, on the merits, and with no contribution towards settlement. ◆

RESULT: Claim against plaintiff as an insured third-party defendant dismissed with prejudice during trial.

COUNSEL: Alice Spitz and Claire Lieber
FIRM: Molod Spitz & DeSantis, P.C.
HEADQUARTERS: New York, NY

RENTAL CAR VEHICLE ACCIDENT

Summary Judgment on Graves Amendment Granted, Plaintiff's Cross Motion to Amend the Pleadings Denied

Plaintiff alleged personal injuries resulting from an accident with a vehicle which allegedly left the scene. Defendant was in the business of renting vehicles and had no knowledge of the accident. Further, the renter denied that the vehicle was on the road at the time of the accident. A pre-discovery motion for summary judgment based on 49 U.S.C. § 30601, the Graves Amendment, was granted. The Graves Amendment virtually eliminates all vicarious liability claims against rental car companies for injuries caused by their customers unless it can be proven that the company's negligence or actions contributed to those injuries. The Judge also denied plaintiff's cross-motion to amend the pleadings based on the "relation-back doctrine" after the expiration of the Statute of Limitations, since the plaintiff failed to demonstrate the proposed defendants had knowledge of the claim or occurrence during the statutory period. Plaintiff's case dismissed. ◆

RESULT: Summary Judgment Granted, Case Dismissed. MSD recently obtained summary judgment in favor of a vehicle owner in a personal injury action prior to conducting discovery.

COUNSEL: Shawna M. Lydon and Nicole Brodie Jackson
FIRM: Betts, Patterson & Mines, P.S.
HEADQUARTERS: Seattle, WA

MVA WITH ALLEGED TBI CASE

$3.6 Million Demanded in Alleged Traumatic Brain Injury Case

Defense recently prevailed at trial in an alleged traumatic brain injury case. The trial was conducted via Zoom. Counsel, in cooperation with inhouse counsel, retained the Thursday preceding the Monday trial due to a conflict of interest.

The case involved a motor vehicle accident in which the defendant admitted to rear-ending plaintiff's vehicle while both parties were attempting to make a right turn at a red light. Plaintiff alleged that he suffered a traumatic brain injury in the collision, but the defense disputed that he had sustained such an injury. Plaintiff denied hitting his head in the collision, denied headache, denied loss of consciousness, and denied signs of any neurological deficits following the collision.

A few days following the collision, the plaintiff suffered from 2 syncopal episodes. In the second syncopal episode, plaintiff lost consciousness and did not recall whether he hit his head. A CT scan was performed in the hospital where it revealed an acute subarachnoid hemorrhage. However, further CT scans showed no subarachnoid hemorrhage. While in the hospital, multiple EKG's and an echocardiogram indicated that plaintiff was suffering from sinus pauses and bradycardias. Plaintiff was then diagnosed with sick sinus syndrome and had a pacemaker implanted. Sick sinus syndrome is a degenerative condition caused by aging. Plaintiff was 72 years old. Plaintiff's treatment providers in the hospital opined that the syncopal episodes were secondary to sick sinus syndrome. Plaintiff's counsel failed to call any of these treatment providers as witnesses in the trial and relied instead on the testimony of 5 forensic experts.

COUNSEL: Shawna M. Lydon and Nicole Brodie Jackson
FIRM: Betts, Patterson & Mines, P.S.
HEADQUARTERS: Seattle, WA

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Prior to trial, plaintiff was offered $300,000 in policy limits to resolve the case. An Offer of Judgment for $300,000 was also filed and rejected. Plaintiff's counsel offered defendant the opportunity to enter into an Agreed Judgment of $1,300,000 and Assignment of Claims in exchange for a Covenant Not to Execute. The defendant declined.

At trial, defense counsel successfully obtained a Directed Verdict on plaintiff's past and future medical special damages. Initially, plaintiff's counsel failed to make the proper motions to have his exhibits admitted into evidence. Although the Judge allowed plaintiff's counsel to reopen his case to have medical records admitted as exhibits, he failed to lay the proper foundation. When plaintiff rested, defense counsel moved for a directed verdict on past and future medical bills because plaintiff's counsel failed to elicit the required expert testimony as to the reasonableness and necessity of any of plaintiff's special damages. Plaintiff's past medical specials alone were approximately $90,000. This motion was granted so the jury was not given the opportunity to award special damages.

Plaintiff's counsel asked the jury to award $3,600,000 in general damages to plaintiff for his alleged pain and suffering and loss of enjoyment of life (since he was unable to claim special damages). After 6 days of trial and 1 day of deliberations, the jury returned a verdict of only $30,000. ◆

RESULT: Minuscule Award of $30K, Special Damages Deemed Inadmissible.

COUNSEL: Jack Jebo
FIRM: Harman Claytor Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

CAR/TRUCK ACCIDENT

Lane Change Accident Leads to Lumbar Burst Fracture

The plaintiff was attempting to pass a tractor trailer on a four-lane divided highway in rural Virginia. She claimed that as she moved alongside the tractor, the vehicle suddenly swerved into her lane and struck her car. She was forced into the median and struck a guardrail. The truck driver testified that he saw a bear on the side of the ride and moved to the left side of his lane. He saw the plaintiff passing his tractor trailer and watched as she drifted into his lane and hit his tractor. Complicating the defense, the only physical evidence on the road was a long skid mark from the tractor trailer's left tires that was partially in the plaintiff's lane.

Plaintiff sustained a lumbar burst fracture requiring an emergency spinal fusion and an extended hospital stay. The medical bills totaled over $130,000. She further claimed permanent activity restrictions and an inability to continue her work as a massage therapist. The loss of future earning claim was $250,000.

In pretrial motions, the defense was able to exclude much of the proposed testimony from Plaintiff's accident expert for lack of foundation. At trial, Plaintiff argued that the truck driver had swerved to the left to avoid the bear on the side of the road. She focused on the skid marks in her client's travel lane. The defendant argued that the skid marks were post-impact and that Plaintiff caused the accident for failing to maintain control. The jury returned a verdict in favor of the trucking company. ◆

RESULT: Defense Verdict.

COUNSEL: Jack Jebo and Josh Goodwin
FIRM: Harman Claytor Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

MOTOR VEHICLE REAR-END/ ALLEGED TRAUMATIC BRAIN INJURY

Plaintiff Receives Only 9% of Demand in Difficult Venue

A multinational corporation's truck rear-ended an elderly gentleman in one of Virginia's most plaintiff-friendly venues. To make matters worse, the plaintiff was the father of the town's popular mayor. Liability was admitted in the accident, and the pictures showed moderate damage to the plaintiff's vehicle. Plaintiff made early and frequent complaints of symptoms associated with mild traumatic brain injury (TBI). He was sent to a nationally known expert on brain injuries and put through a series of cognitive therapies.

At trial, Plaintiff's family (including the mayor), friends and next-door neighbor testified that before the accident, Plaintiff was a very active, hard-working gentlemen in his early 70s. He started his own business in the 1980s and continued to work 50-60 hours a week. His work was his life. Since the accident, he was often fatigued and had cognitive difficulties in maintaining his business. His witnesses testified that Plaintiff was not himself and seemed withdrawn and depressed. Several jurors wept during this testimony.

The defense focused on Plaintiff's pre-existing conditions and the lack of early signs of a mild TBI. Four defense medical experts were called who showed that Plaintiff had a long history of diabetes and high blood pressure that often went untreated. The experts also explained to the jury that Plaintiff's increasing symptoms in the months and years following the accident was inconsistent with a mild TBI, where the patient is "worst at first." The defense experts confirmed that there was no objective evidence of any TBI and that the alleged TBI symptoms could be explained by

COUNSEL: Jack Jebo and Josh Goodwin
FIRM: Harman Claytor Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

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Plaintiff's pre-existing conditions. In the closing statements, the defendant argued that it was natural for the family and friends to try to blame an accident as the cause of Plaintiff's problems, but the scientific evidence did not support that conclusion. The jury's verdict was less than 9% of what the Plaintiff's attorney demanded in his closing statement. They adopted the exact figure proposed in the defendant's closing statement as what would be a reasonable verdict. ◆

RESULT: Compromised Minor Award by Jury.

COUNSEL: Brian A. Homza
FIRM: Cook, Yancey, King & Galloway, APLC
HEADQUARTERS: Shreveport, LA

TRACTOR TRAILER COLLISION

Plaintiff Sues for $1.3 Million, Past Catches Up with Him

Defendant's employee semi-driver was distracted on the phone traveling 60 mph and struck the rear of plaintiff's stopped tractor. Defendant's dash-cam video showed the truck slowed from 61 to 60 and dramatic evidence of the incident. Plaintiff had two lumbar surgeries and hip replacement and claimed past medical expenses in excess of $150,000, future medical expenses of $210K, and lost past wages of $115K and future wages of $630K. Plaintiff's lowest demand before trial/verdict was $875K, and at trial, plaintiff sought over $1.3MM. Pretrial offers of several hundred thousand dollars were rejected by plaintiff with unwillingness to reduce the demand.

Defense stipulated liability. Defense was able to locate out-of-state VA historical medical records showing both back and hip treatments months before the accident and impeached plaintiff on pre-accident medical, work history, and non-disclosure criminal conviction for another jurisdiction. Jury awarded zero for pain and suffering. ◆

RESULT: Plaintiff Demanded $850K, Defendant had Offered $350K Before Trial, Verdict for $190K.

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MUNICIPAL LIABILITY

COUNSEL: Mae G. Alberto
FIRM: Manning & Kass, Ellrod, Ramirez, Trester LLP
HEADQUARTERS: Los Angeles, CA

GOVERNMENTAL ENTITY LIABILITY

Alberto Notches Another Win in a California Public Records Act Case

Los Angeles Senior Counsel Mae G. Alberto have won a defense verdict for the firm's newest Governmental Entity Liability Team client. The case, brought under the California Public Records Act (CPRA), was litigated by the firm's Pitchess & Police Records Advocacy, Instruction and Defense (RAID) Unit, which Ms. Alberto is a member of. ◆

RESULT: Defense Verdict.

COUNSEL: Rolf Kroll, Esq.
FIRM: Margolis Edelstein
HEADQUARTERS: Harrisburg, PA

POLICE PROFESSIONAL LIABILITY

High-Speed Police Chase

The plaintiff led several officers on a high-speed chase for over 12 miles with speeds in excess of 100 MPH, through rural and residential areas, resulting in a one-car accident, multiple, serious injuries necessitating a life-flight to a local hospital. The plaintiff, after being "brought back to life" on two occasions at the hospital, presented a claim alleging his 14th Amendment rights were violated due to the "outrageous" reaction of the Police by engaging in such a lengthy high-speed chase over a modest parole violation. Plaintiff further alleged a "state created danger" evolved when the Police in unmarked cars approached his vehicle in a dark parking lot. Additionally, the proximity of the chase amounted to a violation of the Plaintiff's Fourth Amendment seizure rights. In addition to generally negligent conduct on behalf of the Police the Plaintiff claimed his cause was actionable per 42 U.S.C. Section 1983.

In response, defense contended on behalf that the mere approach of police is insufficient to establish a Fourth Amendment seizure. The Court agreed and dismissed the Fourth Amendment claim in its entirety.

The defense further contended the 14th Amendment argument was irrelevant as the Plaintiff's parole violation was a sufficiently exigent circumstance to warrant a traditional substantive due process analysis and the Court noted in rejecting the Plaintiff's due process violation argument that the Defendant officers were forced to make "split-second decisions... in a hyper pressurized environment..." warranting the high-speed pursuit.

The Court noted nothing about the facts alleged in Plaintiff's Complaint "shocked" the Court's "conscience," and dismissed

COUNSEL: Rolf Kroll, Esq.
FIRM: Margolis Edelstein
HEADQUARTERS: Harrisburg, PA

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the "State Created Danger" theory, and finally, the Court agreed with defense's position, that the Police had immunity as provided within the Political Subdivision Tort Claims Act and dismissed the negligence claims. The Plaintiff's case has been dismissed and the appeal period has expired. ◆

RESULT: Dismissal of Plaintiff's Action.

COUNSEL: Andrea Schillaci and Anastasia McCarthy
FIRM: Hurwitz & Fine, P.C.
HEADQUARTERS: Buffalo, NY

NEGLIGENT SUPERVISION, SEXUAL ASSAULT

Plaintiff claims sexual assault should have been foreseeable by school district

Plaintiff, previously a high school student at the Defendant School District, alleged that she was sexually assaulted by another student in the high school's kiln room during the change of classes. The tortfeasor was a "super senior" with a lengthy disciplinary record consisting of infractions for back-talk, absenteeism, truancy, and suspected substance abuse. In moving for judgment as a matter of law in its favor, the District established that the students did not know one another before the assault and, more importantly, that the tortfeasor's prior disciplinary record did not contain any infractions for physically aggressive or sexually inappropriate behavior. The trial court denied the motion, but the Appellate Division reversed, holding that disciplinary infractions of insubordination, verbal outbursts, being under the influence of drugs or alcohol, and academic problems, although numerous, did not raise a trial issue of fact as to whether the District had sufficiently specific knowledge or notice of the injury-causing conduct such that it could have anticipated and prevented the assault. The Court also held that an inference drawn by the trial court (i.e., that the tortfeasor's disclosure to a school social worker that himself was a victim of sexual abuse, and history of substance abuse, could or should have allowed the District to anticipate the tortfeasor would commit a sexual assault at school) was impermissibly speculative and unsubstantiate. ◆

RESULT: Appellate Court overturned trial court's denial of School District's motion for summary judgment.

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PERSONAL INJURY

COUNSEL: Manuel "Manny" Sanchez
FIRM: Sanchez Daniels & Hoffman LLP
HEADQUARTERS: Chicago, IL

ASBESTOS TRIAL

Demand of $92.6MM in Lengthy Asbestos Trial

The estate of deceased plaintiff was represented by Tom Hart of South Carolina and by Bob Clifford's office of Chicago in an extended asbestos trial in Cook County, IL. The plaintiffs recommended an award of $92.6MM for the 56-year-old insulator, who died from mesothelioma, against the four defendants: Com Ed, ExxonMobil, BP Amoco and US Steel. The final demand was a global claim for each of the four defendants of $25MM. Prior to trial, plaintiff's counsel refused to discuss settlement with any of these 4 defendants.

The jury rendered a verdict of not guilty against firm's defendant, Com Ed, following the 6-week trial. The jury also rendered a not guilty verdict against defendant ExxonMobil but found BP Amoco liable for 62% and US Steel liable for 3% of a NET recoverable verdict of $3.584MM, reducing a gross verdict of $5.6MM, since plaintiff was found 36% contributorily negligent. ◆

RESULT: Judgment for Client.

COUNSEL: Stephen J. Bell
FIRM: Cranfill Sumner LLP
HEADQUARTERS: Raleigh, NC

PERSONAL INJURY CASE AGAINST CONCRETE PLANT DISMISSED BY TRIAL COURT

Cancer Victim Sues Concrete Plant, Alleges Dust Causation

Plaintiff sued a concrete plant and its principals for personal injuries and nuisance, claiming that dust allegedly emitted from the plant caused him to develop lung cancer. Plaintiff lived near the plant and alleged that the plant and its principals failed to conform to state environmental regulations and hazardous substance warnings/disclaimers, which caused Plaintiff to inhale known carcinogens. Plaintiff further alleged a nuisance-based claim, arguing that the plant failed to properly contain asphalt dust and sand. Plaintiff's complaint demanded $3MM in damages.

The Court found that Plaintiff failed to state a claim upon which relief could be granted. Plaintiff filed two separate motions to vacate, both of which were denied. Plaintiff then appealed, and the Court dismissed his appeal. ◆

RESULT: Concrete Plant not Liable; Complaint Dismissed; Two Motions to Vacate Dismissal Denied; Appeal Dismissed.

COUNSEL: Brian M. Webb, Esq.
FIRM: Hurwitz & Fine, P.C.
HEADQUARTERS: Buffalo, NY

MOTOR VEHICLE INJURY

Plaintiff wants carpal tunnel to satisfy "Serious Injury Threshold"

Plaintiff brought a lawsuit for damages arising out of a motor vehicle accident. His injuries included, among other items, alleged carpal tunnel syndrome that required surgical intervention. Under New York's "No-Fault" statute, plaintiffs in automobile cases can only recover non-economic damages (i.e.: pain and suffering) if their injuries qualify as a "serious injury" as defined. Despite plaintiff's surgical procedure being undoubtedly caused by the subject accident, the trial judge granted defendant's motion for summary judgment, finding that plaintiff's injuries do not qualify. In affirming that dismissal, the Appellate Division held that even though plaintiff underwent surgery for a casually related injury, the fact that plaintiff had no residual limitations as a result of the procedure, combined with the limited impact that the injuries had on his work and everyday life, meant that his injuries were not "more than minor" and dismissal of his claims for non-economic damages was appropriate. ◆

RESULT: Summary Judgment to defense and "Serious Injury Threshold" Affirmed.

COUNSEL: James Kimmel; Glenn Jacobson
FIRM: Abrams, Gorelick, Friedman & Jacobson, LLP
HEADQUARTERS: New York, NY

PLUMBER CLAIMED ASBESTOS EXPOSURE TO VARIOUS INDUSTRIAL FACILITIES HE WORKED AT IN THE 1960S-70S IN DELAWARE

Voluntary Dismissal Obtained for Client Following Completion of Plaintiff's Discovery Deposition

The plaintiff was a journeyman plumber in the Wilmington – Dover, Delaware, area for many years and alleged that he was exposed to asbestos in a variety of industrial settings prior to allegedly developing mesothelioma. Three Complaints alleging bodily injury as a result of asbestos exposure were filed (in Pennsylvania, New Jersey and New York) in an attempt to obtain personal jurisdiction over the maximum number of defendants. AGF&J's client was a diversified industrial conglomerate that, over the years, had acquired successor companies that allegedly owned two of the facilities where the plaintiff claims he encountered asbestos during the time period the exposure occurred. Both facilities were latex products production plants. Historical documents were obtained from the conglomerate's headquarters that demonstrated that the client never acquired any entity that had any ownership interest in one of the plants. With respect to the second facility, deposition testimony was elicited from the plaintiff establishing that he only worked at the other facility for a short time and installed a toilet, a water fountain and a vent pipe, which he did not associate with any exposure to asbestos. AGF&J engaged plaintiff's counsel in negotiations following the completion of the plaintiff's discovery

COUNSEL: James Kimmel; Glenn Jacobson
FIRM: Abrams, Gorelick, Friedman & Jacobson, LLP
HEADQUARTERS: New York, NY

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deposition and, after presenting counsel with the pertinent documents and testimony, obtained a voluntary dismissal from the case with zero settlement contribution. ◆

RESULT: Case Dismissed.

COUNSEL: Stephen Bryceland and Angus Gillies
FIRM: BTO Solicitors LLP
HEADQUARTERS: Glasgow, Scotland

SUCCESSFUL DEFENSE IN FRAUDULENT CAR ACCIDENT CASE

Avoidance of Fraudulent Exaggeration Claims

Multiple court actions were raised for five alleged occupants of a vehicle into the rear of which the insurance client's insured collided at a roundabout. The impact was at low velocity. The insured accepted that the driver and front seat passenger were present but uninjured. The three minors alleged to have been occupying the back seat of the vehicle were disputed. Significant fraud concerns were raised. After robust repudiation, the three minor claims were dropped. The adult driver and front seat passenger continued. The medical evidence was poor, and second orthopedic surgeon opinions were obtained by the claimants resulting in the claims being amended from 1 year injury to 1 month. The clear exaggeration and inconsistent presentation of the claims continued to underline fraud issues, and a strong repudiation line was maintained. The original medical expert for the claimants was cited as a witness for the defense. Eventually, as trial approached, the remaining adult claimants abandoned their claims and paid costs to the defenders. In the absence of a section 57 defense in Scotland, it can be difficult for fraud to be used as a complete defense in Scottish claims following a known incident that is thought to be tainted by fraudulent exaggeration (see Grubb v Finlay).

Skillful handling and creative use of inconsistent evidence undermined the claimants' positions on these claims to the extent that all five claimants were unable to proceed. The avoidance of fraudulent claims leakage is essential to all insurers, and the importance of capturing and repudiating those claims cannot be

COUNSEL: Stephen Bryceland and Angus Gillies
FIRM: BTO Solicitors LLP
HEADQUARTERS: Glasgow, Scotland

[CONTINUED]

underestimated. The recovery of costs meant that the insurance clients had these litigated claims handled at nominal expense. ◆

RESULT: Claimants' Positions Undermined, Avoidance of Fraudulent Claims Leakage and Recovery of Costs.

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PROFESSIONAL LIABILITY

COUNSEL: Brian P. Nally
FIRM: Reminger Co., LPA
HEADQUARTERS: Cleveland, OH

INTENTIONAL SPOLIATION LAWSUIT AGAINST SAFETY COMPLIANCE CONSULTANT DISMISSED

Court Dismisses Intentional Spoliation Lawsuit Against Safety Compliance Consultant

Plaintiffs filed a lawsuit against a safety compliance consultant alleging intentional spoliation of evidence in connection with a workplace injury and workers' compensation claim. Defense successfully argued that the court's prior holding that does not recognize a cause of action for "negligent spoilation" or "intentional spoliation." The trial court agreed and dismissed all claims against the defendant. This was a matter of first impression, as it is the first case to specifically to address the issue of a cause of action for "intentional spoliation." This decision now provides additional guidance that the court does not recognize an independent cause of action for spoliation, regardless of whether it is pleaded as "negligent" or "intentional." ◆

RESULT: Motion to Dismiss Granted.

COUNSEL: Brian P. Nally
FIRM: Reminger Co., LPA
HEADQUARTERS: Cleveland, OH

PROFESSIONAL LIABILITY

Vexatious Litigator Goes After Investment Professional

Plaintiff filed a lawsuit against an investment professional, alleging various claims arising out of a recommendation to purchase an annuity contract within his Individual Retirement Account. The defense successfully argued the claims were time-barred and further argued that the Plaintiff failed to state a claim under various existing criminal statutes. The District Court agreed and dismissed all claims against the professional. Additionally, the District Court agreed to deem the Plaintiff a vexatious litigator under Federal law and enjoined the plaintiff from filing any new actions unless he could satisfy in advance specific court established requirements. The 6th Circuit Court of Appeals affirmed. ◆

RESULT: Motion to Dismiss Granted, Affirmed by 6th Circuit Court of Appeals.

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PROPERTY / PREMISES LIABILITY

COUNSEL: Kenneth S. Kawabata
FIRM: Manning & Kass, Ellrod, Ramirez, Trester
HEADQUARTERS: Los Angeles, CA

PREMISES LIABILITY

Chase v. American Multi-Cinema, Inc.

Defense counsel represented a national movie theater chain in a premises liability suit arising from a slip and fall incident resulting in serious injury to the plaintiff. The plaintiff claimed the outdoor walkways of the theater complex constituted an unreasonably dangerous slip hazard in wet conditions. Plaintiff was exiting the theater and due to rain, the walkways were wet. Plaintiff, who was 73 years old at the time, slipped on the wet walkway and suffered a severely fractured hip resulting in hip surgery to repair the fracture and insert rods and pins to stabilize the fracture. Plaintiff contended that the coefficient of friction of the walkways were below standards for acceptable slip resistance. The case was tried before a jury and plaintiff presented expert testimony that the slip resistance of the walkways were below industry standards. The defendant contended it was not negligent in the use and maintenance of its property. Plaintiff claimed that her hip fracture resulted in her right leg becoming ½ inch shorter than her left leg and she will suffer continuing hip and leg pain and faced potential procedures to alleviate her continued pain. Plaintiff sought $1.8 million at trial. After a day and a half of deliberations, the jury found the defendant was not negligent and thus not liable for the plaintiff's injuries. This was an in-person trial with in-person jurors seated all around the attorneys. ◆

RESULT: Defense Verdict.

COUNSEL: Peter Dunne and Sarah Boyce
FIRM: Pitzer Snodgrass, P.C.
HEADQUARTERS: St. Louis, MO

HOTEL GUEST LOBBY FALL

Plaintiff sues for $11MM, acts egregiously in pursuing claim, Court NOT happy

After checking out at the front desk of a hotel lobby, Plaintiff hotel guest fell over a milk crate that a contractor had just placed behind her on the floor near the front desk in the hotel lobby. Plaintiff was taken by ambulance to the emergency room and diagnosed with a shoulder contusion and neck strain. She eventually had three surgeries, including cervical disc replacement surgery, and incurred medical expenses of over $800,000.00 In Plaintiff's initial discovery responses, she disclosed the eye witnesses to her fall, but failed to identify any expert medical witnesses. Although Plaintiff's initial attorney retired and was never replaced, and Plaintiff later filed pro se discovery responses attempting to comply with the Rules of Discovery for disclosure of opinion and expert witnesses. After extensive argument at pre-trial motions hearings, the Court agreed that Plaintiff's failure to fully and strictly comply with the discovery rules warranted the extreme sanction of dismissal with prejudice and granted Defendant's Motion to Dismiss. Plaintiff had demanded $11,000,000 to settle. Insurer was willing to pay $100,000. Result: Case dismissed with prejudice. ◆

RESULT: Case Dismissed with Prejudice.

COUNSEL: Alice Spitz and Mary B. Dolan Roche
FIRM: Molod, Spitz & DeSantis, P.C.
HEADQUARTERS: New York, NY

EASTERN DISTRICT GRANTS MOTION FOR SUMMARY JUDGMENT IN SLIP AND FALL CASE

Eastern District of New York Finds Store Owner Not Liable for Slip and Fall on Tiled Floor & Precludes Architect from Testifying as to Slip-Resistance

Plaintiff claimed she slipped and fell on the tiled floor of the defendant's store during the holiday season but she was unable to identify the cause of her fall. Since plaintiff observed an employee spraying a display case with glass cleaner, she speculated that her shoes might have tracked the glass cleaner on her shoes through nearly 10 feet of carpeting and on to the tiled floor. Plaintiff also retained an architect as an expert to provide an opinion regarding whether the floors were excessively slippery. After three visits, two sets of tests, the expert was only able to conclude that the condition of the floor changed on any given day.

Four employees of the defendant were on site within one minute of plaintiffs fall and none observed any condition on the floor. The ambulance call report indicated that the floor was free from hazards. Defense located the responding EMTs, who testified that they looked, but did not observe, any hazard on the floor.

The Judge granted the defendant's motion for summary judgment and found that the plaintiff offered nothing but speculation as to the cause of her fall. Therefore, she failed to meet her burden to show that the defendant created a condition, or had notice of a condition, causing the fall. The Judge also held that he would have to exclude plaintiff's expert on the grounds that as an architect his

COUNSEL: Alice Spitz and Mary B. Dolan Roche
FIRM: Molod, Spitz & DeSantis, P.C.
HEADQUARTERS: New York, NY

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report and testimony offered nothing to aid the jury, and further, that he was not qualified to opine as to the slip-resistance of the floor. ◆

RESULT: Case Dismissed.

COUNSEL: Elizabeth E.S. Skilling
FIRM: Harman, Claytor, Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

PROPERTY, APPORTIONMENT OF RIPARIAN RIGHTS

Neighbors Settle Property Interests but Fail to Join all Interested Parties

The Plaintiffs were holders of an easement across the land of "Neighbor A," whose property was located along the shoreline. The easement gave the Plaintiffs a right of ingress and egress across Neighbor A's property and the right to construct and maintain a pier in the adjacent waters. The easement was six feet wide, and the deed specified its location on the edge of Neighbor A's property bordering "Neighbor B's" property, which was also located along the waterway. The easement also specified that the pier "be confined to an extension in a straight line of said six-foot easement." Plaintiffs obtained a permit to construct a pier in accordance with the terms of the easement and constructed a pier. Neighbor B then filed a lawsuit in the circuit court against Neighbor A requesting a riparian apportionment. Plaintiffs were not named as parties in that lawsuit. Just weeks after Neighbor B's apportionment lawsuit was filed, and without any adversarial proceedings, Neighbor B and Neighbor A submitted an agreed final order to the court providing for an apportionment of the riparian area between their two parcels. The court signed the agreed order as submitted, entered final judgment and dismissed the apportionment action. The apportionment provided for in the order located a large portion of Plaintiffs' pier within Neighbor B's riparian area. The Plaintiffs learned of the final judgment when Neighbor B sent them a letter notifying them that their pier was located within Neighbor B's riparian area and threatening them with a trespass action. Plaintiffs then filed a lawsuit against Neighbor A and Neighbor B asking the court to set aside the final judgment in Neighbor B's apportionment lawsuit.

COUNSEL: Elizabeth E.S. Skilling
FIRM: Harman, Claytor, Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

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Plaintiffs claimed that the final judgment in the apportionment lawsuit deprived them of their property rights without due process and asserted that they were necessary parties to Neighbor B's apportionment lawsuit. The court sustained the demurrers filed by Neighbor A and Neighbor B on the basis that Plaintiffs were not fee simple owners, and, therefore, they lacked standing to challenge the final judgment in Neighbor B's apportionment lawsuit. The Plaintiffs then filed an appeal to the Supreme Court of Virginia asking the Court to reverse the trial court's dismissal of their challenge to the final order in Neighbor B's apportionment lawsuit. The Supreme Court of Virginia held that Plaintiffs were necessary parties to the prior apportionment lawsuit because their interests were likely to be defeated or diminished in the apportionment lawsuit. Therefore, the Court reversed and remanded the Plaintiffs' case for further proceedings. ◆

RESULT: Supreme Court Reverses and Remands, Holding that Plaintiffs had a Right to Participate in the Apportionment Action and Protect their Interests.

COUNSEL: Karen Liao and Jeffrey Y. Tsao
FIRM: Manning & Kass, Ellrod, Ramirez, Trester LLP
HEADQUARTERS: Los Angeles, CA

PREMISES LIABILITY

Alleged Injuries During Boot Camp Exercise Class

Plaintiff claims she sustained injuries when she fell during a boot camp exercise class held at Crunch Fitness (Crunch) and subsequently alleged a cause of action for premises liability. The Court granted a motion for summary judgment dismissing the suit. ◆

RESULT: Summary Judgment Granted.

COUNSEL: Kelton Busby
FIRM: The Cavanagh Law Firm
HEADQUARTERS: Phoenix, AZ

TENANT SUES LANDLORD AND PROPERTY MANAGEMENT COMPANY FOR TUMBLE DOWN STAIRS

Tenant Falls, Missteps at Trial

A tenant sustained injuries when the back porch stairs at her rental property collapsed and she fell. She sued the landlord and management company, alleging that they had notice of an unsafe condition but failed to make repairs. The defense successfully demonstrated to the jury that the stairs were thoroughly inspected prior to Plaintiff taking possession and that Plaintiff did not give defendants adequate notice of any subsequent problems with the stairs. The defense also presented evidence that Plaintiff's lawsuit was vengeful in nature and that Plaintiff attempted to "set up" the defendants in order to break her lease early. This was the first jury trial held in the county since the beginning of the COVID 19 pandemic. ◆

RESULT: Defense Verdict.

COUNSEL: Daniel A. Webb and Laken N. Davis
FIRM: Beahm & Green
HEADQUARTERS: New Orleans, LA

FIRST-PARTY PROPERTY COVERAGE AND BAD FAITH

Plaintiff demands more than $200K in property case

Trial was set for December 13, 2021 and as of November 24, 2021, Plaintiff had not taken the deposition of defendant's witnesses. The deadline for filing motions to compel had lapsed. Defense counsel commenced issuing subpoenas to Plaintiff's witnesses to appear for depositions. One witness had to be served at the airport after defense learned the witness would be returning to the city by plane. With the lack of deposition evidence on the part of the Plaintiff, and faced with further depositions by the defense, Plaintiff reduced the settlement demand to $15K, and later accepted $12K. ◆

RESULT: Settled for $12K.

COUNSEL: G. Randall Moody and Patrick J. Ewing
FIRM: Drew, Eckl, and Farnham, LLP
HEADQUARTERS: Atlanta, GA

PREMISES LIABILITY (SLIP AND FALL)

Fall causes alleged spine/TBI, but evidence FALLS short, court awards attorneys' fees and costs to the defense

After dining at a popular Atlanta restaurant, the plaintiff exited the restaurant and slipped and fell on an exterior surface on a rainy day allegedly due to grease on an exterior surface. The plaintiff alleged spine injuries and TBI. The defense argued that there was no substance on the exterior surface other than rainwater. After the close of discovery, the plaintiff attempted to designate an expert who claimed that the area of the fall did not comply with the applicable building codes. The defendant made a statutory offer of settlement to the plaintiff, which was rejected. The court struck the testimony of the plaintiff's proffered expert on both procedural grounds (late and improper disclosure) as well as substantive grounds (opinions not supported by a sufficient factual basis) and entered summary judgment in favor of the defendant. ◆

RESULT: Summary judgment in favor of defendant.

COUNSEL: G. Randall Moody and Patrick J. Ewing
FIRM: Drew, Eckl, and Farnham, LLP
HEADQUARTERS: Atlanta, GA

PREMISES LIABILITY (SLIP AND FALL)

Plaintiff sues for $750K, slip & fall, broken ankle, claims something on the floor

The plaintiff slipped and fell on a stair located inside a popular Atlanta area restaurant and sustained a broken ankle that required surgery. The plaintiff alleged that a liquid or other foreign substance caused her to fall. Affidavits from restaurant employees stated that there was no substance on the floor minutes before the fall. The lowest demand of the plaintiff was $750,000.00. The plaintiff initially filed a complaint in state court and then dismissed the complaint without prejudice after the defense filed a motion for summary judgment. The plaintiff re-filed the complaint in state court as a matter of right and the defense removed the case to federal court. The defense moved for summary judgment, which the court granted. ◆

RESULT: Defense removes re-filed slip and fall to federal court and obtains summary judgment.

COUNSEL: G. Randall Moody and Patrick J. Ewing
FIRM: Drew, Eckl, and Farnham, LLP
HEADQUARTERS: Atlanta, GA

PREMISES LIABILITY (ALLEGED WORKPLACE ASSAULT)

Work place assaults? Fight is lacking.

The plaintiff filed a lawsuit in federal court and alleged injuries from claimed incidents of assault at work involving defendant's employees. The defense moved to dismiss and for summary judgment. After giving the plaintiff the opportunity to amend pleadings, the court dismissed the case and awarded costs to the defense. ◆

RESULT: Court awards costs to defense and dismisses case alleging workplace assault for lack of jurisdiction.

COUNSEL: Eugene J. Egan, Jeffrey Y. Tsao
FIRM: Manning & Kass, Ellrod, Ramirez, Trester LLP
HEADQUARTERS: Los Angeles, CA

PREMISES LIABILITY

Manning & Kass Team Granted Summary Judgement for Target

The plaintiff brought suit against Target after tripping and falling in June of 2018 near the entrance. The plaintiff tripped when her foot caught a minor misalignment between the concrete walkway and a bright yellow metal slab designed to alert pedestrians that they were about to walk into the parking garage. The plaintiff claimed that the minor misalignment was a dangerous condition that Target was liable for, and further claimed that lighting conditions in the area made it difficult to see. ◆

RESULT: Summary Judgment.

COUNSEL: Sharon Jeffrey
FIRM: Manning & Kass, Ellrod, Ramirez, Trester LLP
HEADQUARTERS: Los Angeles, CA

LANDLORD/TENANT/ HABITABILITY

Sharon Jeffrey Wins Defense Verdict for AMC Theatres

Congratulations to Manning & Kass Partner Sharon Jeffrey for winning a defense verdict for her client AMC Theaters in a recent slip and fall case. The Plaintiff accused the theater of negligence after she slipped and fell on a large puddle of water in the restroom. Next to the puddle was a large tipped-over bottle of water, though Plaintiff's witness claimed she believed the toilet was overflowing. ◆

RESULT: Defense Verdict.

COUNSEL: Erin N. Collins
FIRM: Manning & Kass, Ellrod, Ramirez, Trester LLP
HEADQUARTERS: Los Angeles, CA

REAL ESTATE

Manning and Kass Attorney Erin N. Collins Steps in at the Eleventh Hour

San Francisco Associate Erin N. Collins recently reached a settlement agreement for her client, a property owner in notoriously tenant-friendly San Francisco. The client purchased a residential property in serious disrepair with a twenty-year tenant residing there who had not paid rent for a year. After the tenant plaintiff repeatedly refused the client entry into the property to conduct inspections and repairs mandated by the city due to complaints made by the tenant, the client filed an unlawful detainer action. Immediately after settling the unlawful detainer action, the tenant plaintiff sued the client for habitability and wrongful eviction, alleging serious upper respiratory illness as a result of exposure to toxic mold, among other complaints. The prior owner was also brought into the suit because the evidence showed that damage and uninhabitable conditions to the home existed long before the client purchased the property. ◆

RESULT: Settlement.

COUNSEL: Jeffrey M. Lenkov, Robert P. Wargo, Tanya Prouty
FIRM: Manning & Kass, Ellrod, Ramirez, Trester LLP
HEADQUARTERS: Los Angeles, CA

PROFESSIONAL SPORTS LAW

Los Angeles Rams and USC sued for seven figures follow fight in the stands

Plaintiff attended a Los Angeles Rams home game with his family at the Los Angeles Memorial Coliseum and was involved in a verbal altercation with some attendees seated in the Rams' family section. This quickly escalated into a physical altercation. Plaintiff filed a complaint against the defendant, and others, stating claims for negligence; premises liability; negligent hiring, retention, and supervision; and negligent infliction of emotional distress. Settlement demand was seven figures. Defense prevailed on motions for summary judgment in favor of Los Angeles Rams and the University of Southern California. ◆

RESULT: Summary Judgment.

THE HARMONIE GROUP®

WRONGFUL DEATH

COUNSEL: Julie E. Molod
FIRM: Molod, Spitz & DeSantis, PC
HEADQUARTERS: New York, NY

WRONGFUL DEATH ACTION

Electrocution Prompts Wrongful Death Action

Decedent plaintiff was electrocuted while working on a residential renovation project. Defendant, an electrical contractor, had only pulled permits for the premises where the accident occurred, but did not perform any work on the project. Prior to discovery, the defense filed a motion for summary judgment based on the above facts. The court granted the motion, holding that the defense established that the contractor was not involved in the project but merely pulled the permits. Opposing parties were unable to show any triable issue of fact reasonably expected to be probative if discovery were to continue. Plaintiff's case and all cross claims dismissed. ◆

RESULT: Summary Judgment Granted Prior to Discovery.

COUNSEL: Julie S. Palmer
FIRM: Harman, Claytor, Corrigan & Wellman, P.C.
HEADQUARTERS: Richmond, VA

WRONGFUL DEATH CASE AGAINST JAIL PHYSICIAN

Plaintiff sues City and Jail Physician for $24 Million

Plaintiff filed suit against the City, City employees who operated a minimum-security municipal jail, and a physician employed by the City to provide medical care to inmates at the jail, after the decedent collapsed in his jail cell and ultimately died. Plaintiff contended that the decedent had a number of pre-existing health conditions that were not properly treated during his six-month incarceration at the jail, and that the jail physician had not properly monitored these conditions following a brief hospitalization of the inmate within weeks of his arrival at the jail.

The court granted the physician's plea of sovereign immunity and dismissed Plaintiff's claims of ordinary negligence, finding after an evidentiary hearing, argument, and supplemental briefing that (1) the operation of the municipal jail was a government function; (2) the City had a significant interest and involvement in the function performed by the physician; (3) the City exercised control and discretion over the physician; and (4) the allegedly negligent treatment provided by the physician involved the exercise of judgment and discretion.

Plaintiff's Complaint also asserted a claim of gross negligence, which was not barred by sovereign immunity. The court granted the physician's motion to dismiss the claims of gross negligence, finding that the facts asserted by the Plaintiff in the Complaint did not, even if ultimately proven, support a finding of gross negligence as that term is defined under Virginia law. Accordingly, the court dismissed the case in its entirety, with prejudice. Plaintiff has appealed the ruling to the Supreme Court of Virginia. ◆

RESULT: Case Dismissed.

COUNSEL: N/A – Conducted by Clare Bone, Criminal Solicitor Advocate
FIRM: BTO Solicitors LLP
HEADQUARTERS: Glasgow, Scotland

HEALTH & SAFETY, REGULATORY AND CRIMINAL DEFENSE

High-Profile Explosion Case Could Lead to £1.6MM in Fines

BTO was instructed by Enviraz (Scotland) Limited and Enviraz Surveys Limited the day after a workplace gas explosion which resulted in the death of one of the client's employees and another being left with life-changing injuries. The team assisted the client at all stages in the large-scale joint investigation by Police Scotland and the Health and Safety Executive in which charges of corporate homicide were considered. This included advising and representing one of the company Directors at an interview under caution. Expert input on the cause of the explosion was obtained from a Chartered Engineer. Crown Disclosure was vast, comprising 106 Crown Productions (some with as many as 118 sub-productions) and over 80 Crown Witness Statements. The Crown initially intended to prosecute the client for a breach of Section 2 of the Health and Safety at Work (etc) Act 1974 for H&S breaches in respect of 31 jobs over a period of almost three years, including causal breaches. However, after conducting extensive investigations, the Defense persuaded the Crown to limit the Charge to a one-day causal breach of Section 2 relating only to failings in respect of the job on which the incident occurred. Counsel represented the client in court throughout, avoiding the cost of instructing external Counsel. Under the relevant English Sentencing Guideline, the Court would have been entitled to impose a fine of up to £1.6 million. However, by using her advocacy skills and by obtaining input from a Health and Safety Expert in the Construction Industry, counsel persuaded the Court to limit the fine and in July 2021, and the client was fined £150,000. Throughout the instruction, the team also assisted

COUNSEL: N/A – Conducted by Clare Bone, Criminal Solicitor Advocate
FIRM: BTO Solicitors LLP
HEADQUARTERS: Glasgow, Scotland

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the company Directors in managing their other employees and corresponding with the families of the two employees who were injured/killed to ensure they did not prejudice their position going forward. The incident was widely reported in the Scottish press, and the defense team advised the client on managing the press interest to ensure they did not prejudice their position in respect of the criminal or associated civil proceedings. ◆

RESULT: Fine was Reduced to £150K.

ADDITIONAL IMPORTANT CASES

COUNSEL: Orlando R. Richmond, Jack Crawford, Ryan Beckett, La'Toyia Slay and Chad Byrd

FIRM: Butler Snow LLP

HEADQUARTERS: Ridgeland, MS

PHARMACEUTICAL CASE

State goes after multiple pharmaceuticals

In defense of Teva Pharmaceuticals USA, Inc., Watson Laboratories, Inc. and Teva Pharmaceutical Industries, Ltd. in a Mississippi Consumer Protection Act and Mississippi Antitrust Act suit, plaintiffs allege defendants engaged in an unlawful anticompetitive reverse payment agreement related to the market for Lidoderm pain patches. The Attorney General brought both direct claims on behalf of the State, and "indirect purchaser" claims acting as parens patriae on behalf of Mississippi consumers (acting essentially as a class representative). The claims sought various forms of relief, including civil penalties and punitive damages. The defense moved to dismiss for lack of personal jurisdiction and all three Defendants moved to dismiss for failure to state a claim under Rule 12(b)(6). On January 11, 2021, Orlando Richmond argued the personal jurisdiction motion, and Jack Crawford argued the Rule 12(b)(6) motion relying in part on the April 30, 2020 Yazaki decision that the firm argued and won. The Chancellor granted both motions in favor of Defendants on all grounds. Based on the impact of the decision, defense was able to negotiate with the State of Mississippi to dismiss this lawsuit and a separate national price fixing lawsuit against the Defendants for a small fraction of the demands of the State of Mississippi in both cases. This was a tremendous victory for the Defendants. ◆

RESULT: Victory for the defense.