Legal lingo

Ken Bresler studies the U.S. Supreme Court's end-of-term decisions, finding them notable for various reasons.

PAGE 32

Congrats, Hall of Famers!

Lawyers Weekly announces its inaugural class of Hall of Fame inductees: attorneys 60 and older or who have been practicing for 30 years or more. **A special section**.

MASSACHUSETTS Lawyers Weekly
MASSLAWYERSWEEKLY.COM

VOLUME 52 NUMBER 37 SEPTEMBER 11, 2023

IMPORTANT OPINIONS OF THE WEEK

Employment — Promotion

A university that denied a plaintiff a full professor position could not be held liable for discrimination or retaliation, as the plaintiff had not shown that she was qualified for the position or that the faculty committee that rejected her application knew she had previously filed a sexual harassment complaint, the 1st U.S. Circuit Court of Appeals determines.

PAGE 9

Arbitration — Medical malpractice

An arbitration agreement that a plaintiff signed before undergoing eye surgery was enforceable, since the defendant surgeon's failure to translate the agreement into Spanish did not amount to fraud in the inducement, the Appeals Court rules.

PAGE 28

Real property — Settlement

A settlement agreement calling for a boundary "alteration" between two non-conforming lots would produce an illegal zoning outcome and thus should not be enforced, a Land Court judge concludes.

PAGE 31

ALSO INSIDE

'Idle' equipment does not reduce mechanic's lien

But lienholders still face damages for 93A claim

By Eric T. Berkman
Lawyers Weekly Correspondent

The Appeals Court has found that a mechanic's lien stemming from a contractor's failure to pay fees for heavy equipment it rented from a subcontractor could not be reduced for time the equipment sat unused during idle periods at the jobsite.

TRAVERS
Defense lawyer: important ruling

The subcontractor, defendant Alliance Rental Group, recorded $697,000 in mechanic's liens after the contractor, co-defendant Ivester Construction Corp., did not pay for a loader and excavator that it rented from Alliance and which remained on the project site for the four-year duration of the project.

Plaintiff Michael Bruno, the project owner, challenged the liens.

Following a Superior Court bench trial, the judge reduced the amount owed to $180,000, finding that the equipment was not being "furnishe[d] ... in the ... improvement of real property" within the meaning of the mechanic's lien statute, G.L.c. 254, §4, during extensive periods of nonuse due to project delays.

Continued on page 14

NICOLE GOODHUE BOYD

Harvey A. Silverglate says he has been struck by the ferocity of some of the criticism he has received for agreeing to represent attorney John Eastman.

81-year-old Silverglate steels for battle on behalf of Trump lawyer

Sees Eastman matter as case of overreach

By Kris Olson
kolson@lawyersweekly.com

Word that Boston attorney Harvey A. Silverglate agreed to join the defense team of Trump attorney John Eastman has prompted the latest round of anonymous phone calls.

Eastman is one of 19 people charged by Fulton County District Attorney Fani Willis in an alleged conspiracy to subvert the will of Georgia voters and keep President Donald J. Trump in power. Eastman may yet face charges in Washington, D.C., stemming from the investigation by special counsel Jack Smith, as well.

But as anonymous critics go, Silverglate has heard worse.

"There are people who called up and said I should drop dead," Silverglate says. "I've had real death threats, and that's not a death threat. It's simply somebody wishing that I would disappear."

Those familiar with the 81-year-old Silverglate's client roster through the years, which has included infamous defendants such as Michael Milken and Leona Helmsley, might find unsurprising his ability to shrug off even passive ill wishes at this point.

Still, Silverglate could have just ignored the

Continued on page 13

Insurer's customer list deemed trade secret

Ex-agents denied notice, Chapter 93A remedies

By Pat Murphy
pmurphy@lawyersweekly.com

An insurance company was entitled to trade secret protection of spreadsheets containing customer information that Massachusetts agents allegedly failed to return and used after the termination of their relationship with the company, a panel of the 1st U.S. Circuit Court of Appeals has ruled in upholding injunctive relief.

The defendant agents, James Fougere and Sarah Brody-Isbill, argued that the disputed spreadsheets were not trade secrets because they contained customer information that was both public knowledge and compiled by the defendants themselves using public sources.

But a three-judge panel found that Allstate Insurance Co.'s spreadsheets satisfied the definition of trade secrets under the federal Defend Trade Secrets Act and Massachusetts common law.

"Even assuming Fougere retrieved some of this information from his claimed sources, it would be difficult, if not impossible, to develop the spreadsheets — which listed thousands of Allstate customers, along with their personal and policy information — solely through those means," Judge O. Rogeriee Thompson wrote for the unanimous panel. "As the district court pointed out, 'there is no question that the compilation of customers, addresses, premium rates, renewal dates and the like are not readily available to the public.'"

Moreover, the panel affirmed the lower court's granting of Allstate's motion for summary judgment regarding the defendants' counterclaims that they were "independent

DEPOSIT PHOTOS

agents" entitled to pursue remedies for unfair trade practices under Chapter 93A as well as 180 days' notice of termination of their agency relationship under G.L.c. 175, §163.

The panel concluded that pursuant to the terms of their contracts with Allstate, the defendants had been "exclusive agents"

Continued on page 15

News Briefs

Contact editorial@lawyersweekly.com

Land Court chief's reappointment eyed

Trial Court Chief Justice Jeffrey A. Locke is seeking input on the state of the Land Court ahead of the potential reappointment of Land Court Chief Justice Gordon H. Piper.

Piper's current term will expire on Oct. 29, and he has indicated that he will apply for a new five-year term, the Trial Court said in a Sept. 1 notice.

Piper, who was appointed to the court in 2002, succeeded retiring Chief Justice Judith C. Cutler in October 2018.

He is a past president of the Massachusetts Conveyancers Association (now known as the Real Estate Bar Association), and practiced real estate law at Goodwin Procter for 20 years, according to the Trial Court.

In deciding whether to appoint Piper to a new term, Locke said he was seeking comments "from judges, court employees, attorneys, and other interested persons on the condition and operations of the Land Court Department, its priorities and accomplishments, the future goals and direction of the court, and the role of the chief justice in leading the court in the future."

Nominations for the chief justice position also will be accepted, Locke said.

All correspondence should be sent to Locke's attention at Office of the Chief Justice of the Trial Court, John Adams Courthouse. One Pemberton Square, Suite 1M, Boston, MA, 02108, or emailed to cjappt@jud.state.ma.us by Sept. 30.

HOW TO CONTACT US

SUBSCRIPTION ISSUES/TECHNICAL ASSISTANCE
To subscribe, renew a subscription, report a change of address, or obtain technical assistance, including password issues, please contact Customer Service at 1-877-615-9536 or email service@bridgetowermedia.com.

DAMAGED, MISSING OR LATE NEWSPAPERS
Please contact Customer Service at 1-877-615-9536 or email service@bridgetowermedia.com. If your newspaper frequently arrives late, please contact your letter carrier or local postmaster.

WEBSITE ISSUES
To report a website problem or send website feedback, please email the digital editor at webeditor@lawyersweekly.com.

REPRINTS
To order reprints or plaques of newspaper articles, please contact BridgeTower@EnVeritasGroup.com.

BOOKS
To order books, please contact Susan Bocamazo at sbocamazo@lawyersweekly.com or 617-218-8191.

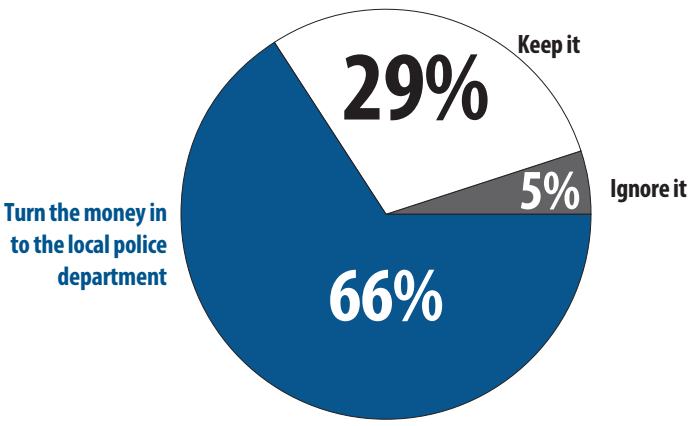
OPINION ORDERING
To order court opinions, please contact Matthew Cove at mcove@lawyersweekly.com or 617-218-8152.

STORY IDEAS
If you have a story idea or an item you would like the newspaper to report on, please contact Henriette Campagne at hcampagne@lawyersweekly.com or 617-218-8192.

ADVERTISING
For advertising questions, please contact Renee Baldwin at rbaldwin@lawyersweekly.com or 804-292-7412.

Lawyers Weekly Web Poll Results

Q. If you found a bag on the ground containing $5,000 cash, what would you do?



This poll is not scientific and reflects the opinions of only those Internet users who have chosen to participate.

This week's poll question:

Do you support police using drones to monitor gatherings in public spaces?

To vote, visit masslawyersweekly.com

Social worker tabbed for Parole Board seat

Gov. Maura T. Healey on Aug. 31 nominated a clinical social worker to fill one of several vacant seats on the Parole Board, whose members have been swamped by a heavy workload after a string of resignations.

Sarah Beth Coughlin currently is director of community engagement and partnerships at Mass General Brigham and also was described by Healey's office as a community organizer.

She spent eight years as director of the Charlestown Coalition, which focuses on social determinants of health, and works with the Committee for Public Counsel Services on evaluations, coordination of re-entry plans, and helping defendants secure treatment placement.

Her resume includes three years as a clinical social worker with the Boston Police Department/Youth Connect. Based out of the downtown Boston and Charlestown police station, she provided critical trauma services, home visits, response to high-risk youth and their families, and therapy "addressing issues including substance abuse, gang involvement and weapons carrying."

Coughlin also was an assistant house parent at Perkins School for the Blind from 1998 to 2007. She holds a bachelor's degree from Providence College and a master of social work degree from Boston College.

The nomination is now pending before the Governor's Council.

Healey has not yet nominated anyone to fill two other vacant seats on the Parole Board.

Gov recommends four be pardoned

Gov. Maura T. Healey on Aug. 31 recommended a new set of four pardons, including one for a man convicted of armed robbery seven years ago, giving support to all of the petitions that were on her desk in June after initial approval by the Parole Board.

The governor recommended forgiveness for Kenny Jean, convicted of armed robbery in 2016; Murphy Smith, convicted of assault in 1988; Evan Willey, convicted of operating under the influence in 2009; and Joanne Booth, convicted in 1979 of assault and battery on a police officer and in 1983 for "operating to endanger."

All four petitioners were unanimously supported by the Parole Board, which in clemency matters operates as the Advisory Board of Pardons. No members of the public testified or sent letters in opposition.

In Jean's case, the board recommended that Healey issue a "conditional" pardon that explicitly does not allow him to obtain a firearms license. He said he wanted the pardon so he can apply for a new green card or for citizenship in order to avoid potential deportation.

Jean robbed the Seekonk branch of BayCoast Bank in 2015 before his getaway car was stopped in East Providence.

His conviction is more recent, and more serious, than those affected by most of the pardons recommended in the last couple of years. He served prison time after his Bristol Superior Court conviction and was released in 2018, according to the Parole Board's report.

Supporters pointed to childhood abuse, mental health struggles for which he is now receiving treatment, and the looming possibility he could be deported to Haiti.

Jean came to the United States from Haiti at age 6, the board wrote, and was placed in custody of the Department of Children and Families at age 11 after being abused by family members. A memorandum from his attorney stated he has been "diagnosed over the years with PTSD, Reactive Attachment Disorder, ADHD, and significant cognitive limitations including a borderline IQ of ~70."

Jailed at age 18 in another case for which he was not convicted, the board wrote, Jean then found himself homeless and unsure "how to survive on his own."

"He explained that the robbery for which he is seeking a pardon was a desperate attempt to get money. He committed the offense with an older man he knew from the streets," the board wrote in its summary of the interview.

After his prison sentence for the Seekonk bank robbery, Jean was transferred to the custody of U.S. Immigration and Customs Enforcement, which reportedly told him he would be deported.

He was released by ICE in 2018 with the assistance of immigration attorney Susan Church. Church appeared before the Parole Board to testify in support of Jean's pardon request in April, telling board members that she believed Jean was at "high risk" for deportation and that only a pardon could allow him to remain in the U.S. In a separate letter to the board, Church opined that the Department of Children and Families was negligent when it did not apply for citizenship on Jean's behalf years earlier.

Church was hired by the Healey administration in May as chief operating officer for the state Office for Refugees and Immigrants.

The board also heard effusive words of support from Jodi Rosenbaum, CEO of More Than Words, where Jean has worked both before and after his robbery and incarceration. The nonprofit bookstore describes itself as a "social enterprise that empowers young adults who are in the foster

INSIDE THIS ISSUE

NEWS BRIEFS

editorial@lawyersweekly.com

care system, court-involved, homeless, or out of school."

Rep. Russell Holmes said in a letter to the board that he had known Jean for several years through More Than Words, and that it "would be unconscionable for the commonwealth to allow this young man to be deported after serving as his legal guardian for most of his childhood."

Governor's Councilor Marilyn M. Petitto Devaney, the district councilor for Jean's petition, told State House News Service on Aug. 31 that she planned to handle his case differently.

The Watertown Democrat said Jean would be "overwhelmed" if he had to attend an in-person interview at the State House "surrounded by people," so she planned to hold a hearing at which members of the public could speak but Jean himself would not be present. That hearing was scheduled for Sept. 6.

"These four individuals are deserving of pardons for offenses that they committed a long time ago, and they have since taken productive steps to improve their lives and give back to their communities. Our administration believes that clemency is a powerful tool to ensure that our criminal justice system is just and equitable," Healey wrote in a press release on Aug. 31.

The Governor's Council is not required to hold hearings on pardon cases before voting on whether to approve them, and no hearings other than Jean's had been placed on the calendar as of Aug. 31.

Coverup by ex-Transit Police sergeant alleged

A former Massachusetts Bay Transportation Authority police sergeant was arrested on Aug. 31 on federal charges that he filed false reports to try to obstruct an investigation into another officer's assault of a man at the Ashmont MBTA station.

David S. Finnerty, 47, of Rutland, was indicted on two counts of filing false reports, investigators said.

Finnerty was the officer in charge and the supervisor of a second officer identified by the initials "D.B." on July 27, 2018, when that officer illegally assaulted a man, according to the federal indictment.

Investigators allege that Finnerty falsified an arrest report, specifically by including false and misleading statements and by omitting other details of the incident.

The charge of filing false reports carries a sentence of up to 20 years in prison, up to three years of supervised release, and a fine of up to $250,000.

Finnerty's lawyer, R. Bradford Bailey, said his client pleaded not guilty and was released on minimal conditions. He said Finnerty was exonerated last October by the Suffolk County District Attorney's Office.

"He is innocent of these charges," Bailey said. "I have every confidence he will be cleared and exonerated again here, once all the truth comes out."

Man gets prison time over pandemic funds

A former pizzeria owner has been sentenced to two years in prison for using more than $660,000 in fraudulently obtained pandemic relief funds to buy an alpaca farm.

In 2020, Dana McIntyre, 59, of Grafton, Vermont, submitted a fraudulent application for a Paycheck Protection Program loan, prosecutors said. He inflated information about the pizzeria's employees and payroll expenses and falsified a tax form to try to qualify the business for a larger loan amount.

After receiving the loan, McIntyre, formerly of Massachusetts, sold his pizzeria and used nearly all of the money to buy an alpaca farm in Vermont and eight alpacas, the U.S. Attorney's Office in Boston said. He also paid for two vehicles and weekly airtime for a cryptocurrency-themed radio show that he hosted, prosecutors said.

He was arrested in 2021.

"Dana McIntyre capitalized on a national catastrophe and stole hundreds of thousands of dollars from a limited pool of money set aside to help struggling businesses, to buy a farm, stock it with alpacas, and make a fresh start for himself in Vermont," Jodi Cohen, special agent in charge of the FBI's Boston division, said in a statement.

During his sentencing on Aug. 30, McIntyre also was ordered to pay the money back. He pleaded guilty in April to four counts of wire fraud and three counts of money laundering.

His lawyers had asked for a one-year prison sentence.

In his sentencing memorandum, they said McIntyre was a single father of two children whose pizzeria was barely profitable before the pandemic, and that he became susceptible to the fear and uncertainty of the times.

Indictment: ex-deputy threatened courthouse

A former sheriff's deputy was indicted on Aug. 30 for allegedly threatening to blow up a courthouse and kill law enforcement officers.

Acting U.S. Attorney Joshua Levy said a federal grand jury indicted Joshua Ford, 42, of Kingston, on three counts of interstate transmission of a threatening communication. If convicted, Ford could be sentenced up to five years in prison, three years of supervised release, and a fine of up to $250,000 on each charge.

Ford, who is currently being held in state custody, is accused of sending a dozen emails to around 140 people, most of them Massachusetts law enforcement officers, in which he calls for their help in burning down the Plymouth County Courthouse, breaking the arms and legs of every court officer, and killing court security officers.

Ford also allegedly calls on law enforcement officers to come to the courthouse with gasoline, explosives, weapons and SWAT teams on March 14. Ford was arrested on March 13 after the emails were sent.

It is unclear what prompted Ford to send the emails. But the indictment references his belief that the justice system is corrupt. A phone number could not be found for Ford, and it is unclear if he has a lawyer.

Patriots' Jones gets probation

New England Patriots defensive back Jack Jones has agreed to serve one year of probation and 48 hours of community service in exchange for prosecutors dropping eight of the nine weapons charges he faced in connection with his June arrest at a security checkpoint at Boston's Logan International Airport for allegedly having two loaded guns in his carry-on bag.

The deal was reached during a hearing on Sept. 5 in Boston Municipal Court.

Jones, 25, was arrested in June after two firearms were found in what police identified as being his carry-on luggage. He was charged with two counts each of unlawful possession of a firearm, carrying a loaded firearm, possession of a large-capacity magazine, and possession of ammunition without a firearm identification card. He was also charged with an airport security violation.

A Sept. 5 court filing showed that the Suffolk County District Attorney's Office had dropped all the weapons charges. He received pre-trial probation for the security violation.

In a motion stating its decision not to continue to pursue the case further, the DA's Office said it had determined that it could not prove its case beyond a reasonable doubt "that Mr. Jones had knowledge that he possessed the firearms in his bag at the time of the incident."

Jones' attorney, Rosemary Scapicchio of Boston, told The Associated Press that her client was grateful to have the incident resolved.

Although Jones' legal case has been settled, it is yet to be determined whether he will face further discipline under the NFL's personal conduct policy.

Jones has spoken only briefly since his arrest, referring all questions on his case to his attorney.

DOL proposes rule raising OT threshold

The U.S. Department of Labor has proposed a rule that would guarantee overtime pay for most salaried workers earning less than $1,059 a week, or about $55,000 a year.

On Aug. 30, the DOL announced issuance of a notice of proposed rulemaking, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees."

According to the DOL, the proposed rule would restore or extend overtime protections to 3.6 million salaried workers.

If adopted, the rule would update and revise the regulations issued under Section 13(a)(1) of the Fair Labor Standards Act implementing the exemption from minimum wage and overtime pay requirements for executive, administrative and professional employees.

The proposed revisions include increasing the standard salary level and the highly compensated employee total annual compensation threshold, as well as providing an automatic updating mechanism that would regularly update all the thresholds to reflect current earnings data.

"For over 80 years, a cornerstone of workers' rights in this country is the right to a 40-hour workweek, the promise that you get to go home after 40 hours or you get higher pay for each extra hour that you spend laboring away from your loved ones," said Acting DOL Secretary Julie Su in announcing the proposed rule change. "I've heard from workers again and again about working long hours, for no extra pay, all while earning low salaries that don't come anywhere close to compensating them for their sacrifices."

According to the DOL, the proposal followed months of extensive outreach to employers, workers, unions and other stakeholders, which included the department holding 27 listening sessions with more than 2,000 participants.

"For too long, many low-paid salaried workers have been denied overtime pay, even though they often work long hours and perform much of the same work as their hourly counterparts," Principal Deputy Wage & Hour Division Administrator Jessica Looman said.

The DOL described the key features of the proposal as:

- Restoring and extending overtime protections to low-paid salaried workers. Many low-paid salaried employees work side by side with hourly employees, doing the same tasks and often working over 40 hours a week. But because of what the DOL called outdated and out-of-sync rules, the workers are not getting paid time and a half for hours worked over 40 in a week. The proposed salary level would help ensure that more of these low-paid salaried workers receive overtime protections traditionally provided by the department's rules.
- Giving workers who are not exempt executive, administrative or professional employees valuable time back. By better identifying which employees are executive, administrative or professional employees who should be overtime exempt, the proposed rule will better ensure that those who are not exempt will gain more time or receive additional compensation when working more than 40 hours a week.
- Preventing a future erosion of overtime protections and ensuring greater predictability. The rule proposes automatically updating the salary threshold every three years to reflect current earnings data.
- Restoring overtime protections for U.S. territories. From 2004 until 2019, the

Continued on page 12

Hearsay

hcampagne@lawyersweekly.com

Rooted in democracy

Before enrolling at Boston College Law School, **Choate, Hall & Stewart** associate **Matthew Victor** was a technology consultant. But he also had what he calls a "fatal attraction" to political campaign finance reform, which persists to this day.

VICTOR

In the summer of 2020 — before his second year of law school — Victor founded the Good Governance Project at BC. Initially, the project focused on campaign finance reform nationally but eventually refined its scope to democracy reform more broadly while also restricting its geographic lens to Massachusetts — "our backyard," Victor says.

Through a survey of professors, students, organizations and advocates, the Good Governance Project identified three issues to focus on: early voting, voting by mail, and publicly financed campaigns.

The grassroots organization Code for Boston, which pairs software developers, project managers and others looking to do something socially beneficial in their spare time, helped Victor and friends build a website. Visitors could speak their minds about three issues, and their locations would be geotagged so that decision-makers could see where those voices were coming from.

There was just one problem. They built it, but not enough people came.

"I thought we could build it and just send a tweet and that the internet would magically fix it for us and make it popular," Victor says. "Not the case."

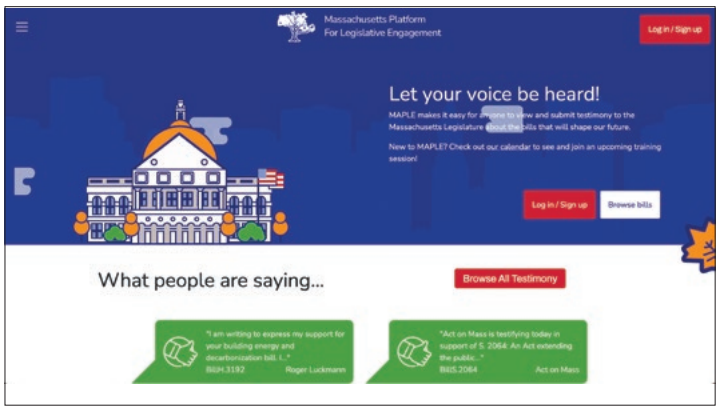
Victor has now brought that lesson in marketing — along with the technical experience he gained and the alliances he forged — to his new venture, the Massachusetts Platform for Legislative Engagement, or MAPLE for short.

MAPLE, found at mapletestimony.org, is a free public platform that allows visitors to submit or read testimony on bills pending in the Massachusetts Legislature.

The Legislature is not required to disclose the written testimony it has received, and it is rarely disclosed in practice, the MAPLE website notes.

"As one of, I think, three states where the legislature has exempted themselves from public records laws altogether, it's difficult to understand who our legislators are listening to when they're making decisions," Victor says.

MAPLE seeks to fill that void. For those wishing to offer testimony, MAPLE will help prepare the email, populating the "to" line with the addresses of the bill's sponsors, the chairs of the relevant



legislative committee, and the user's local representative or senator. The testimony is then published in a freely accessible online database, allowing other stakeholders to read the perspectives.

Victor co-founded MAPLE with Nathan Sanders, a data scientist affiliated with the Berkman Klein Center for Internet & Society at Harvard University.

The project was incubated at Northeastern University's NuLawLab, where Victor and Sanders continue to work closely with director Dan Jackson. Code for Boston is back in the mix as well.

While the site is already quite robust — visitors can browse and add to testimony throughout a comprehensive library of bills — Victor says it is still in "soft launch mode."

Enhancements to come include a newsfeed and a "social layer," which will allow people to follow organizations or bills and get email notifications when, say, the ACLU has shared testimony, or a bill has a hearing scheduled.

Users will be able to follow their favorite public figure, professor or a neighbor, "if you think your neighbor's really smart, or you don't like them — either way," Victor says.

Also crucial is the build-out of MAPLE's "moderation suite," enabling the site to enforce its code of conduct, Victor adds.

Other features are in the development pipeline as well. Victor and his partners have scraped the lobbying disclosures from the secretary of state's website. The plan is to display the information on each bill's page so that users can see what lobbyists' clients have taken positions on.

Meanwhile, MAPLE is partnering with computer engineering students at Boston University to add to the site searchable transcriptions of the video hearings on the Legislature's website.

MAPLE further plans to integrate ChatGPT or another large language model tool to summarize bills as well as testimony.

Victor says that accessibility is important to MAPLE team members, and they are planning to do manual translations for the website. Ultimately, they want to allow people to provide testimony in their native language, which would then be translated for legislators and the public alike.

Victor believes digital tech's ability to connect people to each other and to their legislators is "severely underutilized."

Platforms like X (the former Twitter), Instagram and Facebook "are not designed to carry political energy in an effective way," Victor believes.

"They're designed to sell advertisements," he says.

Because the First Amendment would restrict its ability to moderate or curate, the government is "substantially inhibited" from creating digital spaces where fruitful political conversations can happen, Victor adds.

"We need some nonprofits or alternative structures to create digital spaces designed specifically to create productive civic discourse and channel our political energies online to make better decisions for our state and local communities," he says.

The early adopters of MAPLE have tended to be activists and others who have long since dropped an inhibition about bending ears on Beacon Hill and having their thoughts put on public display.

"But we also hope that by standardizing and making [the process] more accessible that we have new people share their voices," Victor says.

Victor says that, as a lawyer, he feels a responsibility to "make sure that our process of making laws is excellent."

But he acknowledges that participating in state and local governance is something that very few people do.

"It requires people to flex some sort of dormant muscle," he says.

He notes that, for many, it feels very different to send a tweet, even if the process of submitting public testimony is very much the same.

On some level that makes sense, given that ideally testimony is not "entertainment" but designed to influence bills that will affect lives, Victor says.

But he hopes that MAPLE will help demystify the process and get people past this hesitation.

"If we're in a democracy and if we're not speaking, then we're not fulfilling our responsibility," he says.

— Kris Olson

Tough luck

A federal jury in February found State National Insurance Co. in breach of contract for denying coverage of a legal malpractice claim against a Mansfield real estate attorney, but a judge recently ruled that's all for naught when it comes to the injured client collecting her $1.1 million verdict as assignee of the policy.

In 2018, plaintiff Joan Stormo made her case in Bristol Superior Court that her former lawyer, **Peter T. Clark**, had botched the closing in her attempt to sell real estate to KGM Custom Homes nearly 20 years ago. A jury found Clark liable for legal malpractice, and Judge **Elaine M. Buckley** ruled Clark liable under Chapter 93A. The court entered a judgment against Clark on the plaintiff's malpractice claim for $1,243,417, and judgment on the plaintiff's Chapter 93A claim against the attorney in the amount of $3,769,628. Buckley further assigned to Stormo any claims that Clark had against his professional liability insurance carrier.

As assignee of Clark's policy, Stormo went to federal court where she obtained a jury award of $1,106,138 for State National's wrongful disclaimer of coverage of her legal malpractice claim.

But U.S. District Court Chief Judge **F. Dennis Saylor IV** on Aug. 25 decided that State National didn't have to pay up despite the jury finding the company had breached its insurance contract.

Saylor held that State National had rightfully disclaimed coverage because Clark had failed to promptly notify the insurer of Stormo's legal malpractice suit as required under the terms of its "claims made" policy.

"Unfortunately for plaintiff, Massachusetts law provides for strict enforcement of specific notice requirements in a 'claims made' policy," Saylor wrote in granting a defense motion for judgment notwithstanding the verdict. "That is true even if the insurer had actual notice of the claim; even if it suffered no prejudice from the late notice; and without regard to the possibility that strict enforcement might lead to an unfair result."

Saylor's most recent ruling in *Stormo v. State National Insurance Company* represents something of an about-face. When the trial was held back in February, the judge had denied a defense motion in limine and later a motion for a new trial in which the insurer asserted that the plaintiff could not argue Clark had satisfied all conditions precedent to coverage, because it was undisputed the attorney had waited 14 months after the end of the policy period before providing notice of the plaintiff's legal-mal claim.

So what changed the judge's thinking?

On Aug. 9, the 1st U.S. Circuit Court of Appeals issued its decision in *President and Fellows of Harvard College v. Zurich American Insurance Co.* In that case, the panel held that because of a three-year delay in providing formal notice of the claim, Harvard's excess insurance carrier had no obligation to cover $15 million in legals costs the school incurred in its failed bid to defend its race-based admissions policy.

In light of the *Harvard* panel's application of Massachusetts caselaw to uphold the strict enforcement of specific notice requirements in a "claims made" policy, Saylor said he couldn't see how the verdict in favor of Stormo could stand.

"Whether that is a sound policy is certainly open to question," Saylor wrote. "But as the same First Circuit opinion noted, any modification of the policy is a matter for the Supreme Judicial Court, not a federal court sitting in diversity. Accordingly — and with considerable sympathy for plaintiff and her family, who have suffered significant financial harm that may never be redressed — the Court will grant the motion for judgment notwithstanding the verdict."

The plaintiff is represented by **Zaheer E. Samee** of **Frisoli Associates** in Burlington.

Samee says his client's options for recovery are dwindling.

"Obviously, [Clark] is personally liable for the [legal malpractice and 93A] judgment," Samee says. "But I seriously doubt he has anything close to an amount that would satisfy the judgment, so this was really our best shot for my client to recoup her losses. This decision was crushing for her."

Samee says he and his client knew that there was an issue of untimely notice that could present an obstacle to recovering damages from State National.

"But we thought we could overcome it," Samee says.

While noting that Saylor felt compelled to rule against his client in light of the *Harvard* case, Samee maintains that the 1st Circuit's decision and the Massachusetts precedent it relied on are distinguishable.

"[*Harvard*] involved a different policy with different terms," Samee says. "There were two claims against Mr. Clark: one by [the disappointed buyer] KGM Custom Homes brought in 2010, and the second brought by my client in 2014. There is a provision in the [State National] policy that said a subsequent related claim is deemed or considered made at the same time as the earlier claim. So even though my client's claim was made in 2014, [under the terms of the policy] it is considered made in 2010."

The defendant insurance company is represented by **Sean P. Mahoney**. The Philadelphia attorney did not respond to a request for comment.

— Pat Murphy

This Week's Decisions

For full opinions, visit masslawyersweekly.com

1st U.S. CIRCUIT COURT OF APPEALS

Contract

Trade secrets – Spreadsheets

Where a plaintiff insurance company was awarded summary judgment under the Defend Trade Secrets Act (18 U.S.C. §1836), that judgment should be affirmed because the customer information spreadsheets at issue contained trade secrets under the DTSA as well as Massachusetts common law.

"This appeal arises from a dispute between Allstate Insurance Company ('Allstate') and two of its former agents — Appellants James Fougere and Sarah Brody-Isbill — as well as a third Appellant, A Better Insurance Agency, Inc. ('ABIA'). At the heart of this suit are spreadsheets which, according to Allstate, contain trade secrets misappropriated by Fougere and Brody-Isbill in breach of their contracts with it. A district court agreed and entered summary judgment favoring Allstate against all three Appellants. On appeal we are asked to review these findings. Also in the mix are two counterclaims brought by Appellants against Allstate, which the district court dismissed, and which Appellants seek to resuscitate on appeal. …

"… Allstate's operative pleading brought breach of contract and trade secret claims (alleging trade secret misappropriation under both common law and the Defend Trade Secrets Act (DTSA), 18 U.S.C. §1836) against Fougere and BrodyIsbill; DTSA and tortious interference with advantageous business relationship claims against ABIA; and claims against all three Appellants for unfair competition in violation of Mass. Gen. Laws ch. 93A.

"For their part, the three defendants denied wrongdoing, listed numerous affirmative defenses, and filed counterclaims of their own. They alleged that Allstate had breached Fougere's and Brody-Isbill's contracts, violated Mass. Gen. Laws ch. 175, §163 by failing to provide adequate notice before their terminations, violated Mass. Gen. Laws ch. 175, §162F by misappropriating information that belonged to them, wrongfully interfered with Fougere's contractual relations, and violated Mass. Gen. Laws ch. 93A by engaging in bad faith business practices. …

"Our analysis begins by reviewing Appellants' counterclaims under Mass. Gen. Laws ch. 175, §163, which entitles independent insurance agents to 180 days of notice before termination of their contracts, and Mass. Gen. Laws ch. 93A, §2, which prohibits '[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.' After concluding that neither apply to Fougere and Brody-Isbill due to their exclusive relationships with Allstate, we move on to the company's trade secret misappropriation claims against Appellants. Because we hold that the spreadsheets at issue contained trade secrets under the DTSA and Massachusetts common law, and that Appellants misappropriated them, we affirm the district court's summary judgment rulings in favor of Allstate across the board. …

"Given the exclusive nature of Fougere's and BrodyIsbill's relationships with Allstate, and, accordingly, the fact that neither owned the expirations from their former Allstate agencies, they do not qualify as 'independent agents' under the terms of §163. Therefore, we affirm the district court's summary judgment ruling dismissing the counterclaim. …

"We … agree with the district court's conclusion that Chapter 93A does not apply to Allstate's relationships with Fougere and Brody-Isbill, and that the company was entitled to summary judgment on this claim. …

"… Specifically, Appellants assert that the record is rife with genuinely disputed facts indicating that the spreadsheet information was publicly available and had no independent economic value, and that Allstate did not take reasonable steps to protect it. As they see it, the court committed legal error by finding to the contrary. …

"… The publicly accessible nature of certain portions of the spreadsheets certainly informs our trade secret analysis. … However, it is not dispositive, and does not defeat Allstate's trade secret claims. Rather, we affirm their grant after concluding that the inclusion of some information in compilations which could have been obtained from public sources does not mean the compilations were not trade secrets, and that trade secrets may be found, even as to that information, when it would have been immensely difficult to collect and compile it in the form in which it appeared in the compilation. …

"In our view, the undisputed facts support the district court's finding that the spreadsheets' contents had economic value. …

"Before moving on, we consider and reject an additional argument raised by Appellants, who contend that a finding of economic value here conflicts with Allstate's decision to dismiss its claims for actual damages (which are based on economic harms suffered by a prevailing party), because the choice amounted to a waiver of the right to claim the company suffered economic harm from Appellants' misappropriation of the information. We are unaware of any case law which suggests that Allstate's decision to forego tangible damages from Appellants for their misappropriation requires concluding that the information misappropriated had no economic value.

"Therefore, we affirm the district court's finding that the information contained in the spreadsheets had independent economic value. …

"All in all then, after evaluating the spreadsheets, we find the information contained therein was not readily accessible to the public, had economic value, and was reasonably protected from public disclosure. Accordingly, we affirm the court's conclusion that the information constituted trade secrets. …

"Satisfied that the spreadsheet information may be defined as trade secrets, we next consider the question Appellants squarely raise and contest in their brief: Who owns it? …

"Because the agreements established Allstate as the owner of the customer information included within the spreadsheets, we affirm the district court's finding to this effect. …

"Given our fresh assessment of Appellants' challenges, we affirm the district court's grant of summary judgment to Allstate on liability for its trade secret and contract claims against Appellants."

Allstate Insurance Company v. Fougere, et al. (Lawyers Weekly No. 01-173-23) (52 pages) (Thompson, J.) Appealed from a decision by Dein, U.S.M.J., in the U.S. District Court for the District of Massachusetts. Timothy K. Cutler, with whom Cutler & Wilensky was on brief, for the defendants-appellants; J. Scott Humphrey, with whom Benesch, Friedlander, Coplan & Aronoff was on brief, for the plaintiff-appellee (Docket No. 22-1258) (Aug. 29, 2023).

Criminal

Sentencing enhancement – Organizer

Where a defendant pleaded guilty to two drug charges, his 216-month sentence should be upheld despite the defendant's challenge to a four-level role-in-the-offense enhancement.

"In these consolidated sentencing appeals, defendant-appellant Robert Poliero claims that the district court erred by adopting a four-level role-in-the-offense enhancement when formulating his guideline sentencing range — an enhancement premised on the degree of organizational responsibility that he allegedly shouldered within the charged conspiracy. *See* USSG §3B1.1(a). Because we conclude that the record supports the factual findings underpinning the enhancement, we affirm the appellant's sentence. …

"In July of 2018, a new drug-trafficking organization (DTO) began operating in Maine. Joel Strother headed up the DTO. Strother took the lead in obtaining methamphetamine from suppliers, directing drug distribution, recruiting personnel to assist in the transportation and sale of drugs, managing the DTO's finances, and the like.

"Strother's leadership and control of the DTO was not to last. In April of 2019, Strother fled from the area for undisclosed reasons. Following his abrupt decampment, the appellant — who was already a member of the DTO — took on more responsibility for some of the tasks that Strother had previously handled. Notably, the appellant assumed responsibility for acquiring methamphetamine from suppliers. As a part of his acquisition activities, the appellant determined the monthly quantity of methamphetamine that the DTO would purchase. And once he acquired the methamphetamine, the appellant supplied members of the DTO with the drugs that they needed for further distribution and sale. …

"On June 12, 2019, a federal grand jury sitting in the District of Maine handed up an indictment charging the appellant with a single count of possession with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine. ... In a subsequent indictment, the appellant (along with sixteen other individuals) was charged with conspiracy to distribute and to possess with intent to distribute fifty grams or more of methamphetamine or

Continued on page 6

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

1ST U.S. CIRCUIT COURT OF APPEALS

Continued from page 5

500 grams or more of a mixture or substance containing methamphetamine. ... The appellant initially maintained his innocence but later changed course: on July 21, 2021, he entered guilty pleas to both charged counts. …

"These are rifle-shot appeals: the appellant challenges only the district court's application of the four-level enhancement for his role in the offense. …

"Viewed in its entirety, the record supports the district court's determination that the appellant acted as an organizer within the DTO. The record reveals multiple instances in which the appellant directed and coordinated the actions of others so as to carry out the DTO's illegal activities and achieve its unlawful objectives. For example, record evidence shows that the appellant instructed others regarding how and when to send, parcel out, and collect money in exchange for drugs. There is, moreover, evidence that the appellant recruited at least one other person to traffic drugs for the DTO. Given this body of evidence, we conclude that the district court did not commit clear error in finding that the appellant satisfied the status requirement. It follows, then, that the district court acted within the ambit of its discretion in imposing the four-level 'organizer' enhancement.

"The appellant resists this conclusion. He insists that certain pieces of evidence identified by the government are not, by themselves, sufficient to show that he acted as an organizer. Specifically, he contends that the fact that he was found in possession of a large quantity of methamphetamine is not enough to show that he was an organizer. But the appellant is setting up a straw man: there is nothing in the record suggesting that the district court imposed the role-in-the-offense enhancement based on the singular fact that the appellant possessed a large quantity of illegal drugs. The contrary is true. The court's imposition of the enhancement rested on a holistic appraisal of the facts in the record that showed, with conspicuous clarity, the appellant's exercise of control over other actors within the DTO."

United States v. Poliero (Lawyers Weekly No. 01-177-23) (11 pages) (Selya, J.) Appealed from the U.S. District Court for the District of Maine (Docket Nos. 22-1343 and 22-1344) (Aug. 30, 2023).

Criminal

Sentencing enhancement – Use of a minor

Where a defendant who pleaded guilty to one count of participation in a Racketeer Influenced and Corrupt Organizations Act conspiracy was sentenced to life imprisonment, that sentence should be upheld despite the defendant's argument that it was error to impose an enhancement for the use or attempted use of a minor in the commission of the offense.

"… On appeal, [defendant Henri] Salvador Gutierrez argues that the district court erred (1) in applying the enhancement based on the reasonably foreseeable use of minors by coconspirators; (2) in applying the enhancement based on Salvador Gutierrez's affirmative actions to use and involve minors in the commission of the offense; and (3) in creating an unwarranted sentencing disparity when it applied the minor-use enhancement to him. Because Salvador Gutierrez's argument relative to the first issue is foreclosed by the law of the circuit doctrine, he waived his argument relative to the second issue, and his remaining argument is without merit, we affirm the challenged sentence. …

"Salvador Gutierrez contends that his sentence must be vacated because the district court erred in applying a guideline enhancement under U.S.S.G. §3B1.4 for Salvador Gutierrez's use or attempted use of a minor. Salvador Gutierrez first argues that the district court erred in applying the minor-use enhancement based on his coconspirators' reasonably foreseeable use of minors to engage in violent crimes in furtherance of MS-13's activities. He also challenges the finding that directing a minor to 'move over' during the Rivas murder constituted 'use' of a minor. Lastly, Salvador Gutierrez contends that the district court's application of the minor-use enhancement was 'arbitrary and capricious,' thereby resulting in a disparity between his sentence and those of other MS-13 members. …

"Salvador Gutierrez contends that the minor-use enhancement should be read as 'an individual role-in-the-offense enhancement' that requires the defendant to take an affirmative act to involve a minor in the commission of criminal activity. In the same breath, however, Salvador Gutierrez acknowledges that reading the Guidelines as he invites us to would require us to overturn [*United States v. Patrick*, 248 F.3d 11 (1st Cir. 2001)]. *Patrick*'s holding that the minor-use enhancement may be applied based on coconspirators' reasonably foreseeable use of juveniles to further the conspiracy's activities is the law of this circuit. ... This circuit precedent thus forecloses Salvador Gutierrez's argument. …

"For the first time in his reply brief, Salvador Gutierrez argues that the district court erroneously found that telling a minor to 'move over' during the commission of the Rivas murder constitutes 'use' of a minor for purposes of U.S.S.G. §3B1.4. …

"… Any argument about whether telling a minor to move over during the commission of the Rivas murder qualifies as an affirmative action to involve minors in the offense was available to Salvador Gutierrez 'at the outset but raised for the first time in [his] reply brief.' *United States v. Tosi*, 897 F.3d 12, 15 (1st Cir. 2018). Because this issue was not properly preserved, we do not address it. …

"We end on Salvador Gutierrez's final claim, which is that the district court created an unwarranted sentencing disparity when it applied the minor-use enhancement to him. He argues that the minor-use enhancement is applied arbitrarily and capriciously across MS-13 defendants, often applied to one defendant but not another. In support, Salvador Gutierrez points to numerous MS-13 members who, apparently, did not have the minor-use enhancement applied against them.

"This sentencing-disparity claim fails from the outset because Salvador Gutierrez has failed to present appropriate comparators. …"

United States v. Salvador Gutierrez (Lawyers Weekly No. 01-172-23) (16 pages) (Montecalvo, J.) Appealed from a judgment entered by Wolf, J., in the U.S. District Court for the District of Massachusetts. Stephen Super, with whom George F. Gormley was on brief, for the defendant-appellant; Mark T. Quinlivan, with whom Joshua S. Levy was on brief, for the United States (Docket No. 22-1157) (Aug. 29, 2023).

Criminal

Sentencing enhancement – Use of a minor

Where a defendant was sentenced to 516 months after pleading guilty plea to one count of conspiracy to conduct enterprise affairs through a pattern of racketeering activity, that sentence should be upheld because it was substantively reasonable and a sentencing enhancement for the use or attempted use of a minor in the commission of the offense was properly applied.

"… The indictment alleged that [defendant Eliseo Vaquerano Canas] was a 'leader[], member[], or associate[] of MS-13,' a Salvadoran criminal organization. In furtherance of the RICO conspiracy, the indictment alleged that Vaquerano, with others, deliberately murdered Herson Rivas on July 30, 2018. In February 2021, Vaquerano pled guilty to the one-count indictment and, in so doing, admitted to murdering Rivas. …

"We begin with Vaquerano's claim of procedural error. This claim centers on the district court's imposition of a two-level minor-use enhancement under U.S.S.G. §3B1.4. Specifically, Vaquerano contends that Congress intended 'to enhance sentences only for defendants at least 21 years of age who use minors to commit federal offenses' and that 'the Sentencing Commission exceeded its authority by ... ignoring Congress's focus on age.' …

"Rejecting Vaquerano's contention that the Sentencing Commission exceeded its authority, we conclude that the Sentencing Commission properly invoked its general statutory powers to promulgate the minor-use enhancement without an age restriction. …

"… The minor-use enhancement is aimed at protecting minors by enhancing, when appropriate, a defendant's term of imprisonment when they use a minor to commit the offense, *see United States v. Corbett*, 870 F.3d 21, 33 (1st Cir. 2017), thus falling within the Sentencing Commission's enumerated powers. … Accordingly, it is clear to us that the Sentencing Commission properly promulgated the minor-use enhancement without the 21-year age restriction even though its authority to do so came not from the Congressional directive, but from the Sentencing Commission's general statutory powers. …

"We thus join many of our sister circuits in holding that the minor-use enhancement is valid as applied to defendants ages 18 to 21. … We uphold the district court's application of the enhancement to Vaquerano. …

"Vaquerano contends that the district court fashioned the 516-month sentence without due consideration of the fact that he 'was only 18 years old when he participated in the Rivas murder.' Specifically, Vaquerano complains that the district court focused too much on the 'gruesome nature of the Rivas murder' and did not give enough weight to 'what it means for an emerging adult to engage in such conduct, as distinguished from a typical offender.' In light of what Vaquerano perceives as the district court's failure 'to contend meaningfully with legal and scientific developments regarding adolescent offenders,' he says that the sentence is indefensible. …

"Here, the district court provided a plausible rationale for its sentencing decision. …

"It is clear to us that the district court's rationale is plausible. The district court expressly acknowledged Vaquerano's age, the factor that Vaquerano now attempts to persuade us the court failed to give due consideration to. Simply because the court did not weigh Vaquerano's age as he would have liked 'does not undermine the plausibility of th[e sentencing] rationale.' *United States v. Coombs*, 857 F.3d 439, 452 (1st Cir. 2017).

"The length of the sentence is also defensible. The district court thoroughly considered the §3553(a) factors and determined that, notwithstanding Vaquerano's youth, 'anything less than a 43-year sentence ... would not adequately serve' the purposes of sentencing. It is clear to us that 'the sentence in this case is responsive to the nature and circumstances of the offense, the characteristics of the offender, the importance of deterrence, and the need for [just] punishment.' …"

United States v. Vaquerano Canas (Lawyers Weekly No. 01-176-23) (19 pages) (Montecalvo, J.) Appealed from a judgment entered by Wolf, J., in the U.S. District Court for the District of Massachusetts. Jessica Hedges, with whom Hedges & Tumposky was on brief, for the defendant-appellant; Mark T. Quinlivan, with whom Joshua S. Levy was on brief, for the United States (Docket No. 22-1202) (Aug. 30, 2023).

Criminal

Upward variance – Synthetic cannabinoids

Where a statutory maximum 36-month sentence was imposed following a revocation of supervised release, the sentencing judge's failure to adequately justify the sentence was procedural error.

Vacated and remanded.

"In this appeal, Roberto Reyes-Correa ('Reyes') challenges a statutory maximum thirty-six-month sentence that the district court imposed following a revocation of supervised release. Reyes argues that the district court, in arriving at the sentence, improperly relied on ex parte communications with a probation officer, which Reyes claims constitutes reversible error. Reyes also contends that the district court's upwardly variant sentence was procedurally and substantively unreasonable. …

"The court revoked Reyes's supervised release term based on Reyes's use of illegal substances, his failure to notify Probation regarding his contact with law enforcement, and his failure to follow the instructions of the outpatient treatment program. The court explained that because the violations were Grade C, the applicable guidelines sentencing range was three to nine months' imprisonment. The court then sentenced Reyes to thirty-six months' imprisonment, the statutory maximum for Reyes's violation. … Upon doing so, the court recounted the facts of Reyes's case and noted that it had 'viewed the video' of Reyes under the effect of synthetic cannabinoids. …

"Reyes … contends that the district court erred by failing to adequately explain its 400% upwardly variant sentence. …

"Here, Reyes's objections were sufficiently specific to call the district court's attention to a perceived failure to explain the sentence length. … Thus, we will 'review the district court's justification for varying upward under the familiar abuse-of-discretion standard.' …

"Here, the court failed to justify its sentence. The court handed down a sentence that exceeded the top of the applicable guidelines range by a multiple of four, but it did not state its reasons for doing so. …

Continued on page 9

Verdicts & Settlements

Contact editorial@lawyersweekly.com

EDITOR'S NOTE: Barring unusual circumstances, Lawyers Weekly publishes all verdict and settlement reports submitted to the newspaper by both plaintiffs' lawyers and defense counsel. The information published here is taken directly from the submitting lawyer's summary.

Jury finds university discriminated against HR employee

$2.46 million verdict

The plaintiff was a vice president in human resources at Brandeis University.

HR conducted an investigation in 2017 into allegations that the white coach of the men's basketball team had made racial remarks to several Black student-athletes. HR found that the coach violated the university's non-discrimination policy and code of conduct policy.

The student affairs department rejected the discrimination finding, and the coach was retained. Months later, additional racial allegations surfaced. The coach was fired and media coverage ensued.

Brandeis hired an external law firm to conduct an investigation. The university then disciplined three women, including the plaintiff, for their roles in the earlier investigation. The plaintiff was demoted, her salary was cut, and she was publicly rebuked, causing her reputational harm. The plaintiff was then retaliated against after she filed a discrimination charge with the Massachusetts Commission Against Discrimination and later in Superior Court.

The plaintiff was ultimately terminated. She was out of work for a year.

At trial, the plaintiff argued that the defendants discriminated against her on the basis of race and gender in demoting her, in rejecting her internal appeal, in mistreating her, and in terminating her.

The plaintiff argued that there were men who could have been disciplined but were not, and that she was treated worse than her white counterpart, post-demotion.

Action: Employment

Injuries alleged: Race and gender discrimination, retaliation, lost wages, emotional distress

Case name: Nelson-Bailey v. Brandeis University, et. al.

Court/case no.: Middlesex Superior Court/No. 1981-CV-01430

Jury and/or judge: Jury/Judge Shannon Frison

Amount: $2.46 million

Special damages: $310,000, wages; $650,000, emotional distress; $1.5 million, punitives

Most helpful expert: Peter Glick, professor of social sciences and psychology, Wisconsin

High-low agreement: No

Date: Aug. 30, 2023

Attorneys: Matthew Fogelman and Jeffrey Simons, of Fogelman Law, Newton (for the plaintiff)

Hit-and-run leaves passenger with catastrophic injuries

$6.4 million default judgment

The plaintiff was a passenger in a car owned and operated by her daughter. They were traveling on Route 1 northbound in Peabody when their car was struck from behind by another vehicle that was owned by one defendant and operated by another defendant.

The plaintiff suffered catastrophic injuries in the crash, including brain swelling and bleeding; multiple broken ribs on both sides; a broken sternum; both lungs punctured from broken ribs; a broken thumb; both legs fractured; two spine fractures; swelling in the right arm; and seizures.

The defendants fled the scene of the crash.

A complaint was filed in Essex Superior Court for negligence on behalf of the driver, and negligence and negligent entrustment by the owner of the defendant car to the driver of the defendant car.

The owner defaulted on Nov. 17, 2022. The court entered judgment for the plaintiff and awarded damages in the amount of $6.4 million (totaling $7,771,115.60 with interest), after a hearing on damages.

Action: Motor vehicle negligence

Injuries alleged: Brain swelling and bleeding, multiple fractures, seizures

Case name: Sbiga, et al. v. Nault, et al.

Court/case no.: Essex Superior Court/No. 2177CV00098

Jury and/or judge: Judge Jeffrey T. Karp

Amount: $6.4 million

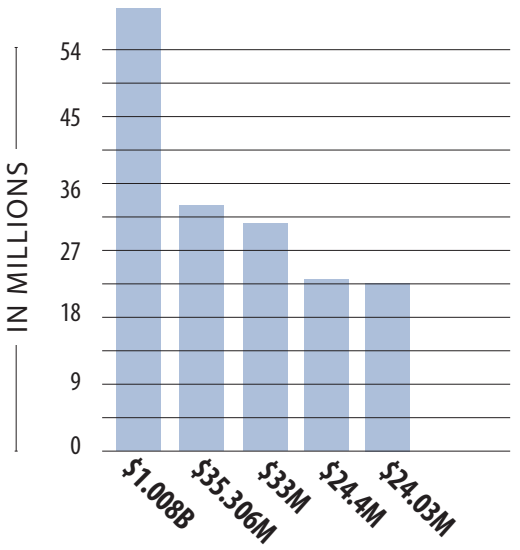
Date: Nov. 22, 2022

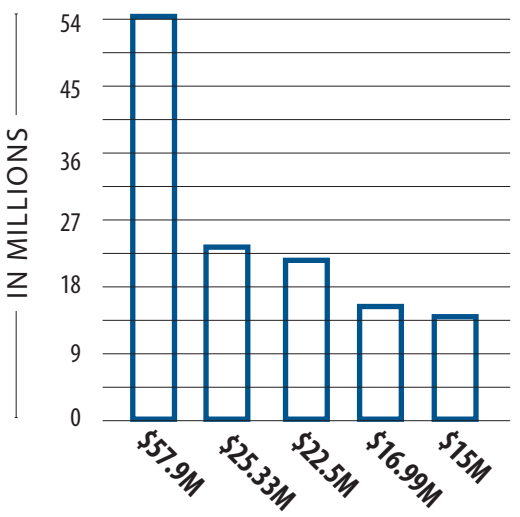
Attorneys: Marc A. Moccia and Walter A. Costello Jr., of Kazarosian Costello, Haverhill (for the plaintiff)

VERDICTS & SETTLEMENTS

editorial@lawyersweekly.com

TOP VERDICTS & SETTLEMENTS: SEPTEMBER 2022 – AUGUST 2023





VERDICTS AND AWARDS

$1.008B ***Fontaine v. Philip Morris;*** Jury returns verdict for family and estate of longtime smoker who dies of lung cancer; Andrew A. Rainer, Mark Gottlieb and Meredith K. Lever, of Public Health Advocacy Institute, Boston; Kevin Donovan of Westwood; Randy Rosenblum of Florida

$35.306M ***Cobble Hill Center, LLC v. Somerville Redevelopment Authority;*** City undervalues property taken for new public safety building; George A. McLaughlin III, Matthew E. Burke and Joel E. Faller, of The McLaughlin Brothers, Boston

$33M ***Weichel v. Commonwealth;*** Jury finds for man who spends 36 years in prison in wrongful conviction case; Mark Reyes and Quinn Rallins, of Chicago-based Loevy & Loevy; Howard Friedman of Boston

$24.4M ***Chime Media LLC v. Kosowsky;*** After resigning, COO disparages company, harms relationships; Lee E. Rajsich of Rajsich & Associates, Boston; Robert D. Cohan of Cohan, Rasnick, Plaut, Boston

$24.03M ***Menninger v. PPD Development, L.P.;*** Executive who discloses mental health disability sues employer for bias; Patrick J. Hannon of Hartley, Michon, Robb, Hannon, Boston

SETTLEMENTS

$57.9M ***Sniadach, et al. v. Walsh, et al.;*** COVID-19 outbreak at state-operated Holyoke Soldiers' Home takes lives of several dozen military veterans, infects 164 more; Michael E. Aleo and Thomas B. Lesser, of Lesser, Newman, Aleo & Nasser, Northampton

$25.33M ***Case named withheld;*** Tractor-trailer hits temporary barrier, slams into car; : Ben Zimmermann and David P. McCormack, of Sugarman & Sugarman, Boston

$22.5M ***Case name withheld;*** Barge rolls over, crushing mate's legs; above-knee amputations result; Carolyn M. Latti and David F. Anderson, of Latti & Anderson, Boston

$16.99M ***Case named withheld;*** ; Head-on collision results in permanent leg injury; plaintiff will always require use of cane; J. Tucker Merrigan, Peter M. Merrigan and Matthieu J. Parenteau, of Sweeney Merrigan Law, Boston

$15M ***Estate of Jackson Kekula v. Boston Children's Hospital;*** 6-month-old dies during sleep study; Andrew C. Meyer Jr. and Robert M. Higgins, of Lubin & Meyer, Boston

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

1st U.S. CIRCUIT COURT OF APPEALS

Continued from page 6

"… When a court supplies a 'mere listing of the facts …, without emphasis on any particular circumstance,' it becomes 'impossible to tell' why the court landed on a sentence that quadrupled the guidelines sentencing range. ... Here, the court merely recounted Reyes's technical Grade C violations that led to the revocation hearing. So, while the court's statement that Reyes had 'shown that he [was] unable to comply with the law or the conditions of supervision' explains why Reyes's supervised release was being revoked, it does not explain the sentencing rationale or justify the upward variance. A summary of the events that preceded the revocation hearing — without more — is an impermissible basis for a large upward variance. …

"… As illustrated by the guidelines sentencing range of three to nine months, there is nothing obvious in the record that demonstrates how Reyes's case differs from 'the mine-run of Grade C revocation cases.' ... To the extent there is some distinctive quality to Reyes's case, it is unclear why the government and Reyes's agreement on an above-guidelines sentence of twelve months — rejected by the court with no explanation or elaboration — was insufficient to address it. … Notably, 'by imposing the statutory maximum sentence, the court left no room for harsher sentences for those with higher criminal history categories and more serious violations.' ... Based on the record before us, we have no way of discerning why the court levied the harshest possible sentence for Reyes's Grade C violations.

"In sum, even if we adopted a strained reading of the court's comments, none of the rationales explain why Reyes's case was so distinct from the mine-run of Grade C revocation cases that he deserved a 400% increase over the guidelines sentencing range. This case is not one where 'the offense of conviction is obviously more horrific than the heartland offense falling within the applicable guideline,' and 'we can perhaps infer ... what sparked the perceived need for an upward variance.' ... Rather, this case is about a person who is living with a substance use disorder, which is hardly an unusual circumstance and certainly not one inherently deserving of additional punishment.

"We note, though, that we are not definitively stating that an upward variance is unwarranted in this case. Rather, it is that we cannot infer a reason for the upwardly variant sentence from the 'nature and circumstances of the offense.' ... If the court deemed the number of revocations, Reyes's behavior, or some other aspect of the record uniquely unacceptable, it should have so stated. … Given that the strength of the justification must increase proportionally with the length of an upwardly variant sentence, we will not contort ourselves to cobble together a speculative justification for a massive upward variance. Thus, the district court's failure to justify its sentence was an abuse of discretion. …

"For the foregoing reasons, we vacate Reyes's thirty-six-month sentence and remand for resentencing consistent with this opinion. The court may base its sentence on the existing record and any facts, to the extent they are offered and admissible, that occurred after the prior date of sentencing."

United States v. Reyes-Correa (Lawyers Weekly No. 01-178-23) (25 pages) (Montecalvo, J.) Appealed from the U.S. District Court for the District of Puerto Rico (Docket No. 21-1913) (Aug. 31, 2023).

Employment

Franchise arrangement – Misclassification

Where a putative class of franchisees who have been classified as independent contractors rather than employees brought suit for violations of Massachusetts wage laws, a question should be certified to the commonwealth's Supreme Judicial Court regarding the meaning of "performing any service" as that phrase is used in G.L.c. 149, §148B(a).

"Plaintiffs, who collectively comprise a putative class of franchisees, have been classified as independent contractors of their franchisor, Defendant 7-Eleven, Inc. ('7- Eleven'). Wishing instead to be classified as employees, Plaintiffs sued 7-Eleven for violations of Massachusetts wage laws.

"For the second time now, this case presents a novel question of Massachusetts law. To be specific, resolving the present appeal will require us to consider what is meant, in the context of a franchise arrangement, by 'performing any service' as that phrase is used in the Massachusetts Independent Contractor Law ('ICL'), Mass. Gen. Laws ch. 149, §148B(a) — an issue which the Massachusetts Supreme Judicial Court ('SJC') has not squarely addressed. …

"In light of the forgoing, we certify the following question to the Massachusetts SJC: '(1) Do Plaintiffs "perform[] any service" for 7-Eleven, within the meaning of Mass. Gen. Laws ch. 149, §148B, where, as here, they perform various contractual obligations under the Franchise Agreement and 7-Eleven receives a percentage of the franchise's gross profits?' We would welcome any further guidance from the SJC on any other relevant aspect of Massachusetts law that it believes would aid in the proper resolution of the issues presented here."

Patel v. 7-Eleven, Inc. (Lawyers Weekly No. 01-175-23) (11 pages) (Per curiam) Appealed from a decision by Gorton, J., in the U.S. District Court for the District of Massachusetts. Shannon Liss-Riordan, with whom Michelle Cassorla and Lichten & Liss-Riordan were on brief, for plaintiffs-appellants Dhananjay Patel, Safdar Hussain, Vatsal Chokshi, Dhaval Patel and Niral Patel; David C. Kravitz, with whom Douglas S. Martland, Peter N. Downing and Kate Watkins were on brief, for the commonwealth of Massachusetts, amicus curiae; Norman M. Leon, with whom Patricia C. Zapata, DLA Piper LLP, Matthew J. Iverson and Nelson Mullins Riley & Scarborough were on brief, for defendant-appellee 7-Eleven (Docket No. 23-1043) (Aug. 29, 2023).

Continued on page 10

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

1ST U.S. CIRCUIT COURT OF APPEALS

Continued from page 9

Employment

Promotion – Discrimination and retaliation

Where a plaintiff brought suit against the defendant university that denied her a full professor position, an award of summary judgment in favor of the defendant should be affirmed because (1) the plaintiff was not qualified for the position of professor, (2) the plaintiff has not shown the existence of a material fact to suggest that the employer's proffered reason for not promoting her was merely pretextual and that the actual reason was discriminatory, and (3) the adverse employment action was not causally linked to the plaintiff's protected conduct (filing a 2017 sexual harassment complaint).

"Melissa Ing sued her former employer, Tufts University ('Tufts'), alleging that Tufts denied her a full professor position on the basis of sex discrimination and/or retaliation for engaging in protected conduct in violation of federal and state antidiscrimination laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq.; and Mass. Gen. Laws ch. 151B, §4. …

"The dispute at hand centers around whether Ing showed that she was qualified for the position of professor. The [School of Dental Medicine (SDM)] Faculty Handbook specifically details what evidence will suffice to show accomplishment in the Educational Leadership area. This evidence may include serving as a dean, department chair, or division head; chairing a standing or management committee; serving as a course director; and/or actively participating in organizations related to education.

"Here, the record evidence shows that none of these requirements were met. …

"The reason for denying Ing a promotion was expounded upon by Tufts in subsequent communications, but each time highlighted the same general deficiencies: lack of academic and administrative leadership roles and 'deficiency in ... course directorship [because] a one-time 3-hour workshop does not compare to a 3, 6 or 9-month course. … These undisputed facts evidence a lack in qualification and make plain that Ing has not made a showing of a prima facie case of discrimination.

"… Ing contends that 'numerous procedural irregularities in the process by which' her 'promotion was denied' demonstrate pretext. As Ing tells it, the [Faculty, Appointments, Promotions, and Tenure Committee (FAPTC)] deviated from standard procedure by failing to keep minutes for the meetings at which her application was discussed.

"… However, Ing points to no evidence indicating that, at the time her application was before the FAPTC, the committee's standard practice was to keep meeting minutes. …

"Accordingly, we conclude that there is not even the slightest suggestion that Tufts's reason for not promoting Ing was pretextual. The district court correctly concluded that Ing's evidence was insufficient to create a material issue of fact and entered summary judgment in favor of Tufts on the discrimination claims. …

"To establish a prima facie case of retaliation under Title VII, Title IX, or Massachusetts state law, Ing must prove: '(1) she engaged in protected conduct; (2) she was subjected to an adverse employment action; and (3) the adverse employment action is causally linked to the protected conduct.' … The only element in dispute is whether Ing has shown a causal connection between her allegations of sexual harassment and Tufts's subsequent decision not to promote her. The district court found that Ing's protected activity 'could not have been a but-for cause of the FAPTC's decision to reject her application' because 'no member of the FAPTC knew of [] Ing's 2017 sexual harassment complaint.' This conclusion is supported by the record and uncontested by Ing on appeal. …

"… Thus, on this record, it cannot be plausibly inferred that the decision to deny Ing a promotion to full professor was tainted by retaliatory animus because Ing cannot establish a causal link between her protected activity and the adverse employment decision. The district court correctly entered summary judgment in favor of Tufts on the retaliation claims."

Ing v. Tufts University (Lawyers Weekly No. 01-174-23) (18 pages) (Montecalvo, J.) Appealed from a decision by Stearns, J., in the U.S. District Court for the District of Massachusetts. Mitchell J. Notis, with whom Law Office of Mitchell J. Notis was on brief, for the plaintiff-appellant; Jeremy M. Sternberg, with whom Miriam J. McKendall, Douglas R. Sweeney and Holland & Knight were on brief, for the defendant-appellee (Docket No. 23-1030) (Aug. 29, 2023).

U.S. DISTRICT COURT

Civil practice

Contention interrogatories – False Claims Act

Where the defendant in a *qui tam* action has moved to compel the relator to answer contention interrogatories, that motion should be denied because the interrogatories essentially ask the relator to lay out her entire case against the defendant.

"This is a *qui tam* action alleging that a pharmaceutical company unlawfully provided free business advisory services to physicians who prescribed its medications, in violation of the AntiKickback Statute, 42 U.S.C. §1320a-7b(b), and caused physicians to submit false claims for reimbursement to Medicare in violation of the False Claims Act, 31 U.S.C. §3729(a). Relator Julie Long alleges that Janssen Biotech, Inc., a company that manufactures and sells two infusible drugs, Remicade and Simponi ARIA, improperly employed teams of practice advisors, including relator, and hired outside consultants to provide services such as presentations, advice, and customized analyses to doctors to assist them in running profitable infusion businesses, called in-office infusion suites ('IOIs'). …

"Relator's answers are, obviously, very general. She objects to answering in any more detail because that would require her to 'identify every document, communication, act or omission and additional fact regarding' her claims, a task that would be unduly burdensome at this stage of the litigation. … Further, relator is still awaiting substantial discovery from Janssen and 'should not have to respond to Janssen's contention interrogatories before she received and has an opportunity to review the responsive materials produced by Janssen and can exhaustively identify all documents supporting her claims and contentions.' ... Because the questions are so broad, relator complains that she would be required to 'tip her hand' 'by giving Janssen a roadmap to her pretrial strategy.' ... Finally, answering would require relator to reveal attorney work product in the selection and compilation of documents in preparation for depositions. …

"Relator has the better of the argument. First, it is not the case that because the court has ordered one party to answer contention interrogatories, it is open season on contention interrogatories for both parties. The interrogatories that Janssen was asked to answer concerned only three of its thirty-eight affirmative defenses, all of which were asserted, as defenses often are, without support or explanation, *see* #83 at 51-55. The information sought was in Janssen's sole possession — Janssen did not have to receive discovery from relator and review it before being able to answer. Finally, the three contention interrogatories relator served on Janssen concerned a long-contested issue in this case that has been difficult to address in discovery, namely, Janssen's understanding regarding the lawfulness of the IOI support services. Relator has repeatedly demanded information from Janssen concerning its good faith belief defense and related defenses and has received limited discovery in response. Janssen has made clear that it is not relying on an advice of counsel defense. … Chief Judge Saylor previously weighed in on the subject, finding that Janssen's 'assertion that it acted in good faith by adhering to internal-compliance protocols, which included a legal review, does not necessarily implicate privileged communication to such a degree' that Janssen had waived privilege over requested documents. … This court reluctantly circumscribed the discovery that Janssen must produce from legal counsel in an effort to put reasonable limits on discovery at this phase of the case. ... In sum, the contention interrogatories that this court ordered Janssen to answer were narrowly tailored to address a critical issue in this case that Janssen had thus far largely avoided addressing and over which it controlled all relevant information. … That is not the case with the interrogatories posed by Janssen to relator, which essentially ask relator to lay out her entire case against Janssen while discovery remains ongoing and impose upon her unnecessarily arduous obligations to update as new information becomes available to her."

United States ex rel. Long v. Janssen Biotech, Inc. (Lawyers Weekly No. 02-243-23) (9 pages) (Kelley, U.S.M.J.) (Civil Action No. 16-12182-FDS) (June 1, 2023).

Civil practice

Discovery – Sanctions

Where two plaintiffs have failed to participate in discovery, they should be ordered to show cause as to why they should not be dismissed from the action for failing to participate.

"In response to Plaintiffs' failure to serve responses to Interrogatories and Requests for Production prior to the close of fact discovery, Defendant seeks an order prohibiting any introduction of information adverse to [defendant] FM Global's position with respect to four topics implicated in the unanswered discovery requests. …

"The court agrees with FM Global that Plaintiffs' failure to engage in timely discovery under the Federal Rules of Civil Procedure and the court's scheduling order resulted in additional resources expended and unnecessary delay, including the stay of the deadline to file dispositive motions. …

"The three Plaintiffs are not similarly situated. While [plaintiff Richard] Bonomo has responded belatedly, [plaintiffs Mona] Pires and [Michele] Hernandez have failed to participate in discovery entirely. The failure to participate altogether is the most severe of discovery violations, and Plaintiffs have provided no excuse for failing to comply. While Defendant has not sought their dismissal, the court sees no basis on this record to allow them to proceed with this action. Accordingly, Plaintiffs Pires and Hernandez shall show cause, no later than June 23, 2023, as to why they should not be dismissed from this action for failing to participate in discovery. Any claim that dismissal is not appropriate shall be supported by signed affidavit(s).

"Bonomo, in contrast, has participated, albeit with considerable delay. Nonetheless, in light of the considerations listed above, the court finds that the sanctions sought by FM Global as to Bonomo are too great where the information in his possession

Continued on page 11

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

that has not been disclosed in his initial disclosures is likely not material and, if it is, barring him from introducing it is a sufficient sanction. Accordingly, Bonomo is prohibited from introducing evidence not already disclosed under Plaintiffs' February 28, 2022, automatic discovery production and March 4, 2022, Rule 26 initial disclosures to FM Global (except as to any new evidence obtained from FM Global).

"… Plaintiffs have not shown that the failure was substantially justified. However, in light of the lengthy negotiations between parties, the representation to the court that the only substantial dispute was a singular core issue, namely, the scope of ERISA-based litigation discovery and not Plaintiffs' failure to participate in discovery, the other discovery sanctions the court is imposing, and the absence of any mention of attorney's fees among the sanctions that FM Global would be seeking in the Rule 7.1 letter, the court orders Plaintiffs to pay Defendant only nominal fees of $500."

Bonomo, et al. v. Factory Mutual Insurance Company (Lawyers Weekly No. 02-254-23) (18 pages) (Talwani, J.) (Civil Action No. 1:21-cv-11750-IT) (June 9, 2023).

Civil practice

Motion to amend – Futility

Where a plaintiff in a suit over trade secrets has moved to amend its complaint to add a limited liability company as a defendant, the motion should not be denied on futility grounds.

"In this trade secrets case, plaintiff Washington Trust Advisors, Inc. ('the plaintiff'), which provides wealth management and financial advisory services, filed suit against four former employees, defendants Susan K. Arnold, Ronald D. Halterman ('Halterman'), Brett C. Lonergan ('Lonergan'), and Nicholas T. Rossi (collectively 'the Individual Defendants') as well as Private Advisor Group, LLC ('PAG'). The plaintiff alleges, inter alia, that the Individual Defendants misappropriated the plaintiff's trade secrets, solicited its clients, and violated non-competition covenants by working for a competing business after their September 2022 resignations. The original complaint ('the complaint') also names Northward Financial Group ('NFG') as a defendant.

"On April 14, 2023, the court allowed the Individual Defendants' motion to strike a summons served on Northward Financial Group, LLC ('NFG LLC') because it was not in existence at the time the plaintiff filed suit on October 28, 2022. The court also rejected the references in the complaint to NFG as a misnomer for the purportedly intended defendant, NFG LLC. ... Relatedly, the plaintiff's opposition to the motion to strike contained a brief request to grant leave to amend the complaint. ... In lieu of allowing the request, the court instructed the plaintiff to 'file a motion for leave to amend with an attached proposed amended complaint naming NFG LLC.' …

"Pending before the court is a motion for leave to amend the complaint to add NFG LLC as a defendant, albeit without an attached proposed amended complaint. ... The Individual Defendants and PAG ('the defendants') argue in opposition that the motion does not comply with the court's April 14, 2023 Memorandum and Order ('the Memorandum and Order') (D. 78) and L.R. 15.1. They also oppose the motion based on futility. ... For the reasons that follow, the motion to amend is allowed. …

"… The defendants assert that the plaintiff violated L.R. 15.1(a) because it did not file the motion as soon as 'reasonably can be expected.' …

"Here, the circumstances justify exercising the court's discretion and rejecting L.R. 15.1 as a basis to deny the motion to amend to add NFG LLC. …

"Per the foregoing and exercising the court's discretion, L.R. 15.1 and the relatively benign violations of its requirements by the plaintiff do not merit the sanction of denying the motion to amend to add NFG LLC under the circumstances. …

"Given the nature of the violation of the court's order, it had no effect or impact on the court's review and adjudication of the motion. Accordingly, the court declines to deny the motion on the basis of the violation of the Memorandum and Order."

Washington Trust Advisors, Inc. v. Arnold, et al. (Lawyers Weekly No. 02-257-23) (19 pages) (Cabell, U.S.M.J.) (Docket No. 22-cv-11847-PBS) (July 12, 2023).

Civil rights

Qualified immunity – Duty to intervene

Where two defendants have moved to dismiss a count alleging that they failed to intercede on the plaintiff's behalf "to prevent her false arrest, malicious prosecution, false imprisonment, and deprivation of liberty without due process of law," that motion should be allowed because the plaintiff has failed to identify any case law establishing or even implying the existence of an affirmative duty to intervene with respect to constitutional violations occurring outside of the excessive force context.

Their motion to dismiss a malicious prosecution count should be denied, on the other hand, as a reasonable official would have known that fabricating evidence to further the prosecution of a criminal defendant was unlawful when the plaintiff was arrested in 2003.

"This action arises out the vacatur of the conviction of Frances Y. Choy for arson and the murder of her parents and the discontinuation of further prosecution. Choy now asserts that the City of Brockton, one of its detectives, and several officers in the Massachusetts State Police (MSP) violated her constitutional rights by, *inter alia*, fabricating inculpatory evidence and destroying exculpatory evidence. Defendants Richard Scott Warmington, John E. Drugan, Michael J. Crisp, and Frank Middleton, Jr., move to dismiss claims against them pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, the court will allow the motion in part and deny it in part. …

"Middleton moves to dismiss Count I, which alleges that he 'acted in bad faith to destroy exculpatory evidence' when he authorized Drugan to perform unnecessary destructive testing on Choy's sweatpants

Continued on page 12

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

Continued from page 11

'rather than opting for preserving a portion of the item,' as was required by existing investigatory standards. ... He contends that the Amended Complaint fails to plausibly establish that any constitutional violation occurred because, at the time he approved use of the test, 'he had no way of knowing whether [it] would yield inculpatory, exculpatory, or inconclusive evidence.' ... Alternatively, he maintains that, even if his conduct did violate Choy's constitutional rights, a reasonable official in his 'position would have no reason to believe conducting a [destructive] test would violate the constitution.' …

"The court finds these arguments unpersuasive. Uncertainty as to the exculpatory value of destroyed evidence only bars a claim where a plaintiff does not credibly allege bad faith. … Because the Amended Complaint indisputably *does* allege bad faith,and because Middleton does not dispute that the bad faith destruction of potentially useful evidence would clearly violate then-established law, a *Youngblood* [*v. Youngblood*, 488 U.S. 51, 58 (1988)] dismissal would be inappropriate at this stage of the proceeding. …

"Count II is a claim for malicious prosecution. It is premised on Drugan and Warmington having fabricated evidence to prosecute Choy. Sidestepping the first prong of the qualified immunity test, Drugan and Warmington seek dismissal on the ground that the 'constitutional right to be free from malicious prosecution was not clearly established until' nearly a decade after Choy's arrest and prosecution. …

"While at least two other cases from this district have credited defendants' argument, … the court declines to do so here. The proper inquiry under the second step of the test is whether the underlying *right* was clearly established at the time of the alleged violation, not the cause of action itself. … Drugan and Warmington cannot plausibly maintain that a reasonable official would not have known that fabricating evidence to further the prosecution of criminal defendant was unlawful in 2003, when Choy was arrested. That the First Circuit did not explicitly identify the vehicle through which to bring a malicious prosecution claim until 2013 does not change the decades of law establishing that the illegality of 'deliberately fabricating evidence and framing individuals for crimes they did not commit.' … The court accordingly denies the motion to dismiss Count II. …

"Count III is premised on Drugan's and Warmington's failure to intercede on Choy's behalf 'to prevent her false arrest, malicious prosecution, false imprisonment, and deprivation of liberty without due process of law.' ... As with Count II, Drugan and Warmington limit their challenge to the clearly established prong, arguing that, 'outside of the excessive force context, there was no 'clearly established' authority in 2003 imposing a duty on law enforcement officers to intercede if a constitutional violation occurs in their presence.' …

"In her opposition, Choy fails to identify any case law establishing or even implying the existence of an affirmative duty to intervene with respect to constitutional violations occurring outside of the excessive force context. At best, she merely notes that the First Circuit has sometimes 'described actionable failure to intervene claims in terms that encompass a broad range of constitutional rights.' ... But the fact that the First Circuit has used broad language that *could* be read to extend beyond the excessive force context is not enough to find a duty to intervene clearly established. ... The court accordingly allows the motion to dismiss Count III on qualified immunity grounds. …

"Count IV is premised on the existence of a civil conspiracy. Drugan and Warmington move to dismiss the claim as insufficiently pled.

"… Here, Choy alleges that both Drugan and Warmington fabricated evidence against her. She further alleges that, before Drugan fabricated his report, Warmington (or someone connected to him) discussed Choy's alleged confession and the accelerant-detecting dog's alert with Drugan. As Drugan's report is consistent with the information disclosed during this meeting despite the existence of contrary test results, the court can reasonably infer that the two engaged in concerted action to fabricate evidence. It accordingly denies the motion to dismiss this claim. …

"For the foregoing reasons, the motion to dismiss is allowed in part and denied in part. Count III is dismissed as to Drugan and Warmington. All other claims survive this motion and shall proceed to discovery."

Choy v. City of Brockton, et al. (Lawyers Weekly No. 02-236-23) (17 pages) (Stearns, J.) (Civil Action No. 23-10340-RGS) (May 24, 2023).

Civil practice

Third-party subpoena

Where a plaintiff has moved to compel compliance with a third-party subpoena, that motion should be allowed despite the defendants' argument that the discovery deadline has already expired.

"This lawsuit arises out of an arbitration award that defendant Rival Medical, LLC has refused to pay plaintiff NuVasive, Inc. NuVasive alleges that co-defendants Timothy Day ('Day'), Rival Medical's registered agent in Massachusetts, and Monique Day, Rival Medical's manager, abused the corporate form such that Rival Medical's liability should be imposed on them. NuVasive brings claims to pierce the corporate veil, impose alter ego liability, and for fraudulent transfer. …

"This court has issued two previous orders rejecting defendants' objections to third-party subpoenas served by NuVasive in support of its claims. ... In this order, the court rejects defendants' objection to the third-party subpoena to Alphatec Spine, Inc. (#65), and allows NuVasive's motion to compel compliance. …

"On March 15, 2023, NuVasive requested an extension of the summary judgment deadline 'in order to re-open and complete Mr. Day's deposition.' ... NuVasive represented that, on February 20, counsel for NuVasive in actions before Delaware and California courts notified counsel for NuVasive in this action about the production of discovery in the other actions indicating that Day used a cell phone number in 2018 and 2019 that had not been previously identified in discovery. The production included text messages between Day and Alphatec's Chief Executive Officer, Patrick Miles, in 2018 and 2019 ('the Day-Miles text messages'). …

"There is a relationship between Fed. R. Civ. P. 26 and 45 and a party generally should not be allowed to use a third-party subpoena after expiration of the discovery deadline. … An exception to the rule exists for discovery that could not have been requested before expiration; however, judges in the First Circuit have held that the exception does not excuse the party seeking discovery from first seeking leave of the court to serve the third-party subpoena. …

"Just as cause existed to extend the discovery deadline for purposes of re-opening Day's deposition, cause exists to extend the discovery deadline for purposes of serving the subpoena on Alphatec. Through no fault of its own, NuVasive did not learn of the newly-disclosed cell phone number and Day-Miles text messages until three weeks after expiration of the discovery deadline. …

"The court recognizes that defendants have already filed their summary judgment motion. They did so on March 17 (#48), with notice that NuVasive was seeking to re-open Day's deposition because of the newly-disclosed cell phone number and Day-Miles text messages. Most significantly, before the court, Alphatec does not press its claims that the subpoenaed documents are irrelevant or that the subpoena is vague and burdensome. ... Alphatec is willing to produce the documents immediately. Defendants' only argument is that the discovery deadline has already expired. In light of Day and defense counsel's conduct, that argument is disingenuous, at best."

NuVasive, Inc. v. Rival Medical, LLC, et al. (Lawyers Weekly No. 02-262-23) (8 pages) (Kelley, U.S.M.J.) (Civil Action No. 21-11644-DJC) (June 14, 2023).

Copyright

Discovery – IP address

Where a plaintiff producer of adult films (1) filed a complaint alleging that a John Doe defendant engaged in copyright infringement and (2) has requested leave to serve a third-party subpoena on the defendant's internet service provider in order to identify his name and address to effectuate service of process, that request should be granted based on the factors used in *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

"Plaintiff Strike 3 Holdings, LLC ('Strike 3'), a producer of adult films, alleges that a John Doe defendant ('John Doe') engaged in copyright infringement by downloading and distributing constituent elements of 36 Strike 3 copyrighted films using BitTorrent, a file distribution network. ... At present, Strike 3 only knows John Doe by an internet protocol ('IP') address. … In order to identify John Doe's name and address to effectuate service of process, Strike 3 requests leave to serve a third-party subpoena on John Doe's internet service provider ('ISP'), Verizon Fios, prior to a Fed. R. Civ. P. 26(f) conference. ... Strike 3 maintains the requested discovery seeking John Doe's name and address is appropriate under Fed. R. Civ. P. 26(d)(1) ('Rule 26(d)(1)'). For the reasons stated below, Strike 3 is correct, and the motion for leave is allowed. …

"Rule 26(d) allows a party to seek discovery before a Rule 26(f) conference 'by court order.' Fed. R. Civ. P. 26(d)(1). The First Circuit has yet to decide the applicable standard to engage in Rule 26(d) discovery prior to a Rule 26(f) conference to uncover the identity of an unknown John Doe defendant. … Courts in this district and elsewhere often require a showing of 'good cause' to order Rule 26(d) discovery. … Other courts adhere to the relevance and proportionality standard in Fed. R. Civ. P. 26(b)(1) applicable after the 2015 amendments to that rule. … While this court strongly favors and endorses the good cause standard using the *Sony Music* factors, it is not necessary to decide which standard applies because under either standard the discovery is undeniably appropriate. …

"… Strike 3 lacks 'access to relevant information,' Fed. R. Civ. P. 26(b)(1), consisting

Continued on page 18

NEWS BRIEFS

editorial@lawyersweekly.com

Continued from page 3

department's regulations provided that for U.S. territories where the federal minimum wage was applicable, so too was the overtime salary threshold. The department's proposed rule would return to that practice and make workers in the U.S. territories who are subject to the federal minimum wage have the same overtime protections as other U.S. workers.

Upon publication in the Federal Register, the notice of proposed rulemaking will be open for public comment for 60 days.

— Pat Murphy

Ancient Roman bust seized from museum

A bronze bust believed to depict the daughter of an ancient Roman emperor has been seized from the Worcester Art Museum by New York authorities investigating antiquities stolen from Turkey.

The seizure is the latest in an ongoing investigation into a smuggling network involving objects looted from Bubon in southwestern Turkey and trafficked through Manhattan. A spokesperson for Manhattan District Attorney Alvin Bragg did not provide further details of the investigation.

The bust known as "Portrait of a Lady" was acquired in 1966 by the Worcester Art Museum. The seizure came weeks after the Manhattan DA's Office seized a statue thought to portray the Roman emperor and philosopher Marcus Aurelius from a museum in Cleveland, Ohio.

Worcester Art Museum officials said in a statement that the bust taken from their possession dates from A.D. 160 to 180 and is believed to be a life-sized portrayal of a daughter of Marcus Aurelius or another Roman emperor, Septimius Severus.

Museum officials said they had "limited information" about the bust's history when they acquired it nearly six decades ago.

"We are very thankful for the new information provided to us," said Matthias Waschek, the museum's director. "The ethical standards applicable to museums are much changed since the 1960s, and the museum is committed to managing its collection consistent with modern ethical standards."

Material from The Associated Press and State House News Service was used to compile News Briefs.

Silverglate steels for battle on behalf of Trump lawyer

Continued from page 1

call from Eastman's lead attorney, Charles Burnham from Washington, D.C., who knew Silverglate was a kindred spirit from reading his book "Three Felonies a Day: How the Feds Target the Innocent." Burnham believes Eastman would be a candidate for the sequel, if there ever is one.

But to Silverglate, the representation of Eastman is consistent with his life's work.

"I do not have high regard — as you may know — for the Department of Justice," Silverglate says. "I have zero regard for the Federal Bureau of Investigation, which I believe should be abolished."

Throughout his career, Silverglate has linked up with lawyers with superior courtroom skills, whether it was former federal Judge Nancy Gertner or Boston attorney Norman S. Zalkind, with whose firm, Zalkind, Duncan & Bernstein, Silverglate is of counsel.

"I figure out how these cases can be won, and really talented jury trial lawyers carry out those strategies," he says.

In Eastman's case, the forming strategy is that Eastman, an academic, was just doing his job by offering "cutting-edge advice," in Silverglate's words.

"He thinks up things that ordinary, day-to-day lawyers might not think of," Silverglate says of his client. "I call it creative. The government, naturally, calls it fraud."

The short-term goal for Eastman is to get his case severed and behind him as soon as possible, according to Silverglate.

"We could try this case in three weeks and get a jury acquittal," he says. "If it's tried with all the others, we'll be on trial for 18 months."

Anyone hoping that Eastman might strike a deal and cooperate with the prosecution may not want to hold their breath. Silverglate calls never representing a turned witness one of the hallmarks of his career.

"I've never heard a turned witness who told the truth, the whole truth, and nothing but the truth," he says. "The government is very good at teaching witnesses not only how to sing, but how to compose."

After all these years, Silverglate bristles at the double standard inherent in the criminal justice system.

"If I rewarded a witness in the case, I would be indicted for bribery of a witness," he says. "When the assistant U.S. attorney does it or the FBI agent does it, it's lauded as good tactics for bringing down bad people."

Humble beginnings

Born in Brooklyn, Silverglate was pushed toward medical school by his parents.

"That was what young Jewish boys did back then," he says. "They went to medical school and became Jewish doctors.

But in the summer after his sophomore year at Princeton University, Silverglate was awarded a fellowship in Paris. Out of the country for the first time, Silverglate began to reassess his life's direction.

"I was more interested in the problems that people cause for people than that germs cause for people," he says.

Upon his return to campus, he switched to pre-law, "and the rest is sort of history," he says.

Zalkind and Silverglate first came together in a professional partnership after Silverglate used the pretext of wanting to talk about the "Chicago Seven" — a case in which Zalkind was not involved — to get through the door of his office, Zalkind recalls.

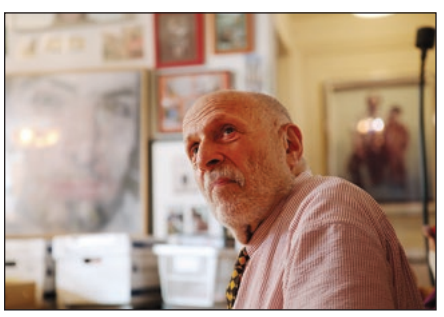
"I said, 'You don't want to talk about the Chicago Seven; you want to become my partner,'" Zalkind says.

"Yes, I do," Silverglate replied.

NICOLE GOODHUE BOYD

'He comes up with ideas no one else comes up with,' Norman S. Zalkind says of his former partner Harvey A. Silverglate (pictured above).

In one of their early successes, Silverglate, Zalkind and another lawyer represented 200 Harvard University students who were charged after an antiwar demonstration in Harvard Square in 1969 devolved into a riot.



NICOLE GOODHUE BOYD

'Open mindedness is in short supply,' Harvey A. Silverglate says.

The students wound up invading the administrative building to look at the files of professors who they thought were collaborating with the Department of Defense on Vietnam War policies. They even carried the dean of students out of his office in his chair and deposited him on the lawn, Silverglate recalls.

Harvard called the police, who in turn called in the National Guard. Some of the students were seriously injured.

The students were to be tried in batches in Cambridge District Court. Given the press photographs from the day, Silverglate says he did not like their chances. Yet, in a textbook example of jury nullification, the students were acquitted based on pervasive antiwar sentiment. The district attorney then dropped the charges against the remaining students.

"I thought the Vietnam War was a terrible mistake that our government made, and so did the citizens, and the citizens had real power," he says.

The lesson for Silverglate was, "Democracy works. The jury system works."

That success led to an "incredible number" of cases challenging the military draft, in which they amassed a strong track record of success, Zalkind says, calling Silverglate a "genius."

"He's just smarter than other people," he says, noting how many hours Silverglate continues to devote to reading every day.

"He comes up with ideas no one else comes up with," Zalkind says.

Silverglate values a good disagreement, but as argumentative as Silverglate might be, he is also a "good human being" with a deep well of sympathy for people, Zalkind says.

"When he fights for a client, he is there 24-7," Zalkind says, remembering how little Silverglate tended to sleep in his younger years.

New alliance

After about four years as Zalkind's partner, Silverglate joined forces with Gertner. He recounts one of their memorable successes in an essay on his website titled, "The Lying Witness, the Dank Cellar and the Dingy Coffee Shop."

Silverglate and Gertner represented Theodore "Teddy" Anzalone, a confidant of Boston Mayor Kevin White, believed to be the U.S. Attorney's Office's real target.

The government built its case against Anzalone around a Boston Redevelopment Authority bureaucrat named George Collatos, who had cut a deal with prosecutors after being caught in a sting attempting to extort $45,000 from a contractor.

Collatos would eventually make Anzalone an indecent proposal — either he would testify truthfully and take Anzalone off the hook if paid $200,000, or he would continue to bolster the government's case.

Realizing that they could not memorialize a conversation Collatos was proposing to have with Anzalone at a café without running afoul of the state's wiretap law, Silverglate and Gertner hatched a plan. The coffee shop had a trap door, which led to a cellar, where a research assistant, investigator and court stenographer could be stashed to eavesdrop and take notes.

At trial, Gertner expertly deployed their secret weapon while cross-examining Collatos.

Though the prosecutors were apoplectic that the defense had ripped a page from their playbook, using a "sting" to gather evidence, there was little they could do about it, Silverglate recalls. It took the jury only minutes to acquit.

Of Silverglate, Gertner says, "I credit him with my career," noting that Silverglate took a big chance on a 20-something lawyer new to Boston who had never set foot in a courtroom.

"I wouldn't have made me partner," Gertner says.

But with no hesitation, Silverglate extended the offer. When they were shopping for furniture for their first office, they decided that they should both lay on thick New York accents as Gertner posed as Silverglate's wife. The improvisation caused them to collapse in laughter on a couch in Jordan Marsh, Gertner says.

Silverglate insisted Gertner take on her first high-profile case representing Susan Saxe, an antiwar activist accused of robbery and murder, even though it would be a supreme financial challenge for their fledgling firm. Gertner vividly recalls Silverglate telling her "do what you love" while he kept the firm afloat.

Over the years, their politics diverged, Gertner says.

"Harvey's ideas were challenging to the discrimination cases I was doing," she says.

In one notable example, the two found themselves on opposite sides of the case involving a restaurant that wanted to operate under the name "Sambo's," with which Silverglate, the free-speech absolutist, had no problem. The two also wound up seeing Title IX very differently.

After 24 years, they ultimately decided it was more important to remain friends than business partners, she says.

Free speech champion

In addition to representing unpopular criminal defendants, Silverglate has also championed the cause of free speech. Twenty-five years ago, his book "The Shadow University: The Betrayal of Liberty on America's Campuses" was published. A sequel with co-author Samuel Abrams, a professor at Sarah Lawrence College, is in the works.

Asked whether the campus environment has gotten better or worse for free speech in the quarter-century since, Silverglate quickly responds: "worse … proving the futility of writing books," he adds with a laugh.

Silverglate has also been on an unsuccessful quest for a seat on the Harvard Board of Overseers, running on a platform of free speech and academic freedom. In his initial bid, Silverglate lost the vote of Harvard alumni and other stakeholders by a narrow margin. Harvard then made it harder to get on the ballot, which forced Silverglate to wage a doomed write-in campaign earlier this year.

Silverglate hoped to use the platform as a push to rid the campus of every speech restriction and also fire 95 percent of the administrators. The proliferation of disciplinary hearings on campuses stem from "so many deans who have nothing to do," he insists.

Much of the business before what he calls "kangaroo courts" on college campuses stems from allegations of sexual harassment or assault under Title IX, which he believes is unnecessary.

"People have been regulating their sexual and intimate relationships for eons," he says.

College deans should not be part of the equation, he insists.

"The best way to get them out of it is to fire them," he says.

Silverglate says he has been struck by the ferocity of some of the criticism he has received for agreeing to represent Eastman, noting that it is louder than he received for representing murderers or participants in destructive riots.

"The last time I can remember when there was this kind of division in society was over the Vietnam War," he says.

Silverglate, who has maintained a parallel career as not only an author but newspaper columnist, believes media has a role to play in pulling the country out of its current era of extreme partisan polarization. But he continues to be disheartened by much of what he reads in the New York Times and Boston Globe, believing they have become too infected with progressive politics.

In the media and beyond, "open mindedness is in short supply," he says. MLW

Unused equipment does not reduce mechanic's lien

Continued from page 1

The Appeals Court reversed.

"We conclude that there is no provision in G.L.c. 254, §4, that allows a judge to reduce the amount of a mechanic's lien from the amount due under an undisputed contract," Judge Andrew M. D'Angelo wrote for the court's panel. "To reduce the recoverable amount here to the fair rental value for the period of actual use would be a large expansion of the existing law without legislative authority, which we decline to do."

Still, much of the lien may ultimately be offset by a Chapter 93A judgment in Bruno's favor — affirmed by the Appeals Court — based on his claim that Alliance and Ivester's respective principals had a pre-existing personal relationship; that Ivester's principal owed Alliance's principal hundreds of thousands of dollars they both knew he could not repay; and that the mechanic's liens were part a scheme to make Bruno responsible for the debt by extracting money from him well beyond any commercially justifiable amount.

The 28-page decision is *Bruno, et al. v. Alliance Rental Group, LLC*, Lawyers Weekly No. 11-090-23. The full text of the ruling can be found at masslawyersweekly.com.

Bruno, et al. v. Alliance Rental Group, LLC

THE ISSUE Could a mechanic's lien stemming from a contractor's failure to pay for heavy equipment it rented from a subcontractor be reduced for time the equipment sat unused during idle periods at the jobsite?

DECISION No (Appeals Court)

LAWYERS Christian W. Habersaat and Joshua W. Looney, of Goulston & Storrs, Boston (plaintiffs)
David H. Travers of Strang, Scott, Giroux & Young, Boston (defense)

Important holding

Alliance's attorney, David H. Travers of Boston, said that while the ruling directly addresses only those mechanic's liens involving equipment rental, it is potentially important to anyone who uses the mechanic's lien statute, whether the lien secures the lienholder's labor, materials or equipment.

To illustrate, he described a contractor that provides a site with laborers. Those laborers are entitled by law to take breaks. While on break, they are not improving real property.

While *Bruno* does not directly address labor supply, its reasoning suggests that a full day's labor may be protected by the lien statute as well, since it appears to uphold the principle that a lien's value is the cost to the contractor of providing the labor, materials or rental equipment, he said

"The same is true if you are a materials supplier and you drop off a pallet of lumber to frame a house," Travers continued. "Some of that will end up in the dumpster because you're cutting it to fit the house. So how much is the lien for? The lumber you dropped off or the lumber actually put into the building? This decision suggests it's for what you provided to the job as a supplier."

Travers also emphasized that his client disputes the allegations in the Chapter 93A claim and that the Appeals Court did not disturb the trial court's finding that there was not a knowing violation, since Alliance sought payment for equipment actually provided at rates actually agreed upon.

Bruno's attorney, Christian W. Habersaat of Boston, declined to comment, citing ongoing litigation in the case.

Boston construction attorney Leah A. Rochwarg, who was not involved in the case, said the decision reinforces the importance of developing well-drafted contracts and, as a project proceeds, ensuring that contracts are properly administered by people with knowledge of the project itself and legal requirements such as the mechanic's lien statute.

In particular, Rochwarg noted that the statute allows owners and contractors to require information from subcontractors that might prevent or reveal schemes, like the one in *Bruno*, to extract money from a project owner well beyond any commercially justifiable amount.

"Had Bruno required Ivester to provide monthly statements from each of its subcontractors eligible to file a lien, as permitted by Section 32 of the statute, setting forth the amounts due or paid to them, [he] would have known long before the liens were filed that Ivester hadn't made a single payment to Alliance," she said.

East Boston attorney Michael W. Ford said that while he admired the trial judge's desire to correct some of the "sting" from the contractor and subcontractor's equipment rental scheme, the statute "says what it says."

"The Appeals Court made up the hurt of that ruling by noting, in the end, that [the trial court] was free to assess whether or not any part of the extortionate rental fees were recoverable as part of Bruno's 93A damages," Ford said. "This leaves the judge free to offset Alliance's lien amount with Bruno's 93A damages."

Bradley L. Croft of Boston said the case shows just how strictly Massachusetts courts construe the lien statute.

"Courts should not vary from Chapter 254's requirements, even where equitable considerations or notions of fairness would otherwise justify such a departure," he said.

However, Boston attorney Joseph A. Barra said that while the decision may comply with all the technical requirements of the lien law, it misses the bigger picture.

The decision explicitly states that Chapter 93A created new substantive rights by making conduct unlawful that was not unlawful under common law or prior statutory law, Barra noted.

"If that is the case, then this court should have used its plenary authority to invalidate the lien in its entirety, as it was apparently procured under false pretenses," he said, pointing out that the court described the scheme as "immoral, unethical, oppressive and unscrupulous."

"It seems silly that in the ordinary case, a legitimate claimant who misses a lien deadline or makes a technical mistake in its lien filing can lose all lien rights under the statute, but a lien scheme that has been judicially declared to be unfair or deceptive can nevertheless survive," Barra said.

> It seems silly that in the ordinary case, a legitimate claimant who misses a lien deadline or makes a technical mistake in its lien filing can lose all lien rights under the statute, but a lien scheme that has been judicially declared to be unfair or deceptive can nevertheless survive.
>
> — Joseph A. Barra, Boston

Idle time

In March 2013, Bruno agreed to pay Ivester, a general contractor, $300,000 to perform subdivision improvements on property he owned in North Reading.

Ivester, in turn, rented an excavator and loader at a rate of $6,000 a month plus tax and repair costs. The excavator rental began on Jan. 1, 2015, and the loader rental began a year later. There was no specified end date.

The equipment was last used on Oct. 4, 2018, though the excavator remained on the project site until March 18, 2019, and the loader remained until May 18, 2019.

Alliance invoiced a total balance of $697,470 in rental charges and repairs, but those went unpaid.

During that time, there were extensive "down time" periods when the equipment was not used. Additionally, both pieces of equipment were removed for repairs at various times.

Despite being required by the rental agreements, Ivester did not maintain daily logs to track the use of the equipment, though the trial judge, Douglas Wilkins, later determined that based on industry practice, the equipment was furnished for improvements for a total of 15 months each.

Alliance's owner, Kevin Matthews, had apparently known Ivester's owner, Kenneth Ivester, for more than a decade, and, at the time of the rental agreement, Ivester owed Matthews $400,000 in personal loans.

The subcontractor recorded mechanic's liens for the unpaid rental fees in 2019.

That May, Bruno brought an action in Superior Court challenging the validity of the liens and alleging Chapter 93A violations stemming from Matthews and Ivester's alleged scheme.

After a bench trial, Wilkins ruled the liens were valid but that Bruno owed only $180,000 based on the fair market value of the actual use of each piece of equipment. Wilkins also ruled for Bruno on the Chapter 93A claim, awarding $100,000 in damages based on his attorneys' fees and expenses defending against the alleged scheme.

Both parties appealed.

No reduction

Reviewing Wilkins' decision de novo, the Appeals Court panel found he erred in reducing the amount of the liens.

First, the panel noted, several other states' lien statutes specifically limit liens for rental equipment to periods of actual use.

However, D'Angelo wrote, "where the Massachusetts Legislature has not included such limiting language in G. L. c. 254, § 2, we should not read it into the statute."

The court also distinguished the two earlier Appeals Court decisions that Bruno cited in support of his argument that equipment is only "furnished in the improvement of real property" during periods of actual use.

D'Angelo pointed out that the first case, *Mammoet USA, Inc. v. Entergy Nuclear Generation Co.* (2005), involved a piece of equipment that was never meant to be and was never used in connection with the actual construction at hand.

The second case, *John Marini Mgt. Co. v. Butler* (2007), unlike *Bruno*, did not involve the lien being reduced to fair rental value of equipment for the time it was used; rather, it excluded compensation for equipment damage from the recoverable lien amount, D'Angelo continued.

"Accordingly, we agree with Alliance that the judge erred in reducing the amount of the liens for periods of nonuse," he said.

The court went on to affirm the Chapter 93A finding, remanding the case for further damages assessment. MLW

Insurance co.'s customer list deemed trade secret

Continued from page 1

rather than independent agents entitled to the protection of Section 163's notice provision.

The panel further concluded that as exclusive agents they were not entitled to the protections of Chapter 93A.

"Given that their work was solely on behalf of Allstate, for which they had contracted to seek out customers, they were not selling their professional services to the public," Thompson wrote. "Therefore, they were not engaged in 'trade or commerce' and Chapter 93A has no application here."

The 52-page decision is *Allstate Insurance Company v. Fougere, et al.*, Lawyers Weekly No. 01-173-23. The full text of the ruling can be found at masslawyersweekly.com.

Allstate Insurance Company v. Fougere, et al.

THE ISSUE	Was an insurance company entitled to trade secret protection of spreadsheets containing customer information that Massachusetts agents allegedly failed to return and used in their own agencies after the termination of their relationship with the company?
DECISION	Yes (1st U.S. Circuit Court of Appeals)
LAWYERS	J. Scott Humphrey of Benesch, Friedlander, Coplan & Aronoff, Chicago (plaintiff) Timothy K. Cutler of Cutler & Wilensky, Wellesley (defense)

> Now the 1st Circuit has ripped away this statutory right, confirmed by the Massachusetts Supreme Judicial Court, of all these agents who have entered into these exclusive agency agreements with Allstate and perhaps other insurance companies.
>
> — Timothy K. Cutler, Wellesley

Creating trade secrets by contract?

In its most basic terms, the case presented the question of whether trade secrets can be "created by contract," said Wellesley attorney Timothy K. Cutler, who represented the defendants in the case.

That issue typically is presented in employment contracts, Cutler said. In his clients' case, the issue arose from the language of their agency agreements.

"What the court said is, whatever you write in that contract is a trade secret automatically becomes a trade secret. That's circular reasoning," Cutler said. "The problem with that is that a trade secret is not a relationship between two parties; it's a relationship to the world."

According to Cutler, the decision goes astray by essentially treating customer lists as trade secrets as a matter of black-letter law. That goes against the weight of precedent recognizing that customer lists must meet specific criteria in order to trigger trade secret protection, he said.

"In order for a [customer] list to be a trade secret, you have to: (1) create the list; and (2) put financial resources into the list so that it has commercial value," Cutler said. "The court ignored that concept and simply said, 'Lists are valuable.' Well, in our case, Allstate did not create the lists. We created the lists. The court ignored that point."

Cutler added that the ruling runs contrary to a 2020 decision from the 1st Circuit, *TLS Management and Marketing Services, LLC v. Rodríguez-Toledo, et al.*

In *TLS*, a tax consultant had been found liable for misappropriating trade secrets after he used his ex-employer's allegedly proprietary "tax arbitrage" strategy in providing services to its former clients. The *TLS* panel reversed a judgment in the plaintiff's favor on misappropriation claims, concluding the plaintiff failed to satisfy its burden to prove the existence of trade secrets.

With respect to his clients' counterclaims, Cutler said the 1st Circuit panel in *Allstate* ignored decisions of the Supreme Judicial Court in deciding his clients were not entitled to notice of termination of their agency relationship under G.L.c. 175, §163.

"So, now, the 1st Circuit has ripped away this statutory right, confirmed by the Massachusetts Supreme Judicial Court, of all these agents who have entered into these exclusive agency agreements with Allstate and perhaps other insurance companies," Cutler said.

Counsel for Allstate did not respond to a request for comment.

Emily E. Smith-Lee, a business litigator in Sharon, said she was not surprised by the court's conclusion that Allstate's customer lists were trade secrets. She added that she thought the defendants' reliance on *TLS Management* was misplaced because that case was distinguishable on its facts.

What did surprise Smith-Lee was that the panel's decision affirmed a lower court granting a trade secret plaintiff's motion for summary judgment.

"If you are defending against a trade secret claim, you are going to be arguing that there are disputed facts about how much information was within public knowledge, was it kept confidential — all of the factors," Smith-Lee said. "The implications of a plaintiff's summary judgment [in *Allstate*] suggests that there are some categories of customer lists that may be protectable as a matter of law."

Russell Beck, a business and trade secrets litigator in Boston, said the 1st Circuit panel got it right in concluding that Allstate's customer spreadsheets were protected.

"The court stepped away from the notion that because information is out in the public it can't be protected as a trade secret. That [notion is] just wrong. That is and always has been clear in our law," Beck said.

According to Beck, *Allstate* provides an important "data point" for companies that seek to protect customer lists that contain publicly available information.

"The takeaway is the more detailed the customer list is, the more information in the customer list, the more likely it's going to be protected as a trade secret," Beck said.

He added that *Allstate* is important because it clarifies the court's holding in *TLS Management*.

"It makes clear that *TLS* was really about the failing of the plaintiff's proof as opposed to the alleged underlying trade secret itself," Beck said.

Severed ties

According to court records, defendant Fougere managed co-defendant A Better Insurance Agency — or ABIA — before opening an Allstate agency in Framingham in February 2013. Fougere later hired defendant Brody-Isbill, who in April 2014 left Fougere's agency to open her own Allstate agency in Auburn.

Both Fougere and Brody-Isbill entered into exclusive agency agreements to sell Allstate's auto and casualty insurance products in Massachusetts. As part of those agreements, Fougere and Brody-Isbill agreed to: (1) maintain information identified by Allstate as confidential; (2) not misuse or improperly disclose such information; and (3) return confidential files upon termination of their agency.

Following disputes over certain practices at the Fougere and Brody-Isbill agencies, Allstate terminated Fougere's exclusive agency agreement in November 2014 and Brody-Isbill's agreement in October 2015.

In August 2016, Allstate filed a complaint against Fougere and Brody-Isbill in federal court, asserting claims for breach of contract and trade secret misappropriation in violation of Massachusetts common law and the federal Defend Trade Secrets Act. Allstate later added Fougere's ABIA agency as a defendant.

Allstate alleged that defendants Fougere and Brody-Isbill had failed to return customer spreadsheets as required by their exclusive agency agreements and that confidential information was being used to solicit Allstate customers.

Fougere and Brody-Isbill filed counterclaims that Allstate had violated the notice provisions of G.L.c. 175, §163, and engaged in bad-faith business practices in violation of Chapter 93A.

At the conclusion of discovery, U.S. Magistrate Judge Judith G. Dein granted Allstate's partial motions for summary judgment and denied partial motions for summary judgment filed by the defendants.

Allstate requested and received nominal damages in the amount of $2 for contract claims in addition to an award of attorneys' fees. Dein further converted a preliminary injunction into a permanent injunction prohibiting the defendants from using or having Allstate's confidential information.

Injunctive relief stands

In affirming the lower court's dismissal of the defendants' counterclaims and grant of summary judgment on Allstate's claims, the 1st Circuit panel concluded that the Allstate customer spreadsheets were trade secrets under both federal and state law.

Under 18 U.S.C. §1839(3), the Defend Trade Secrets Act defines a trade secret as encompassing all forms and types of business and financial records to the extent the owner "has taken reasonable measures to keep [the] information secret" and to the extent "the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information."

Judge Thompson wrote that Massachusetts courts have similarly defined the term trade secret as including compilations of information that are used in one's business that provide the user the opportunity to obtain an advantage over competitors who do not know or use that information.

Thompson wrote the Allstate customer spreadsheets fell within either definition of trade secret, specifically rejecting the defendants' contention that the spreadsheets contained publicly available information not entitled to protection.

"The publicly accessible nature of certain portions of the spreadsheets certainly informs our trade secret analysis," the judge wrote. "However, it is not dispositive, and does not defeat Allstate's trade secret claims. Rather, we affirm their grant after concluding that the inclusion of some information in compilations which could have been obtained from public sources does not mean the compilations were not trade secrets, and that trade secrets may be found, even as to that information, when it would have been immensely difficult to collect and compile it in the form in which it appeared in the compilation."

Thompson further wrote that the contested spreadsheets had economic value.

"[The exclusive agency] agreements went as far as expressly providing a way for terminated agents to sell their 'economic interest' in their Allstate books of business to an Allstate-approved buyer, expressly signaling the value to the company of maintaining the information," Thompson wrote. "This is hardly surprising — … '[policy] expirations,' like the data included in the spreadsheets, are so valuable in the industry that there is an entire system of rules to protect agents with exclusive rights to them." MLW

ALTERNATIVE DISPUTE RESOLUTION

Angela Sharr at asharr@lawyersweekly.com or at 504-565-7343

ALTERNATIVE DISPUTE RESOLUTION

Angela Sharr at asharr@lawyersweekly.com or at 504-565-7343

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

Continued from page 12

of the name and address of the individual linked to the IP address. Moreover, the information is critical to 'resolving the issues,' Fed. R. Civ. P. 26(b)(1), because the case cannot proceed without it. The early discovery is therefore relevant to the copyright infringement claim and proportional to the needs of this case. Here, the Rule 26(b)(1) standard yields the same result as the good cause standard employing the *Sony Music* factors, namely, allowing Strike 3 to serve the subpoena on Verizon Fios seeking the subscriber's name and address together with the notice. At this juncture, there is also no indication that the subpoena, which seeks limited information of a subscriber's name and address, imposes an undue burden on Verizon Fios under Fed. R. Civ. P. 45(d)(3). …"

Strike 3 Holdings, Inc. v. Doe (Lawyers Weekly No. 02-259-23) (13 pages) (Cabell, U.S.M.J.) (Docket No. 23-cv-10942-DLC) (June 12, 2023).

Education

First Amendment – Dress code

Where a plaintiff middle school student has moved for a preliminary injunction to allow him to wear a t-shirt to school bearing the words "THERE ARE ONLY TWO GENDERS," that request should be denied because the defendants' enforcement of the school's dress code was undertaken to protect the invasion of the rights of other students to a safe and secure educational environment.

"Plaintiff L.M., a minor, by and through his father and stepmother, alleges violations of his First and Fourteenth Amendment rights by Defendants Town of Middleborough, the Middleborough School Committee (the 'School Committee'), and two school administrators. …

"Nichols Middle School ('Nichols') is a public middle school in Middleborough, Massachusetts. ... Defendant Carolyn Lyons is the Superintendent of Middleborough Public Schools, and Defendant Heather Tucker is the acting Principal of Nichols. …

"Each year, students and their families are provided with the Nichols Jr. Middle School Student & Family Handbook (the 'Handbook'). ... The Handbook includes a Code of Conduct with a dress code (the 'Dress Code'). …

"L.M. is a twelve-year old student at Nichols. …

"On March 21, 2023, L.M. attended school at Nichols in a t-shirt with the message 'THERE ARE ONLY TWO GENDERS' (the 'Shirt'). …

"On May 11, 2023, Plaintiff filed the instant action bringing claims under 42 U.S.C. 1983 for violation of the First and Fourteenth Amendments. …

"One can certainly argue (particularly with hindsight) that the actions taken by the Defendants were not in the best interest of the students Defendants were seeking to protect. Had Defendants permitted L.M. to wear the Shirt, perhaps he would have listened to and heard other students' explanation as to why they viewed his message as hostile. Perhaps he would have learned from those students that they do not use the word 'gender' to refer to chromosome pairs or anatomy but to identity. As a seventh-grader — a time when students are beginning to consider views of the world that differ from those of their parents — he may have been more open to that understanding if the discussion occurred in school and was not drowned out by the megaphone of the media and the adult protesters outside the school. And in that event, perhaps LM. would have chosen voluntarily to cease wearing the Shirt and the students Defendants were seeking to protect would not have had to enter the school past protesters amplifying L.M.'s words. But whether Plaintiff can show a likelihood of success does not depend on whether the Defendants could have handled the issue differently but whether the Constitution limits them from taking the action they took. …

"Plaintiff has not established a likelihood of success on the merits where he is unable to counter Defendants' showing that enforcement of the Dress Code was undertaken to protect the invasion of the rights of other students to a safe and secure educational environment. …

"Here, the School's rational for prohibiting the Shirt is not that LM is bullying a specific student, but that a group of potentially vulnerable students will not feel safe. A broader view directed at students' safety has been acknowledged by other courts. …

"Accordingly, Plaintiff has not shown a substantial likelihood of success on his claim that Defendants violated his constitutional rights in requiring him to remove the Shirt at school. …

"L.M. has likewise not established a potential for irreparable harm absent a preliminary injunction. L.M. contends that any deprivation of his First Amendment freedoms constitutes irreparable injury, and that, where he has made a strong showing of a likelihood of success on the merits, 'the irreparable injury component of the preliminary injunction analysis is satisfied as well.' ... However, where the court has concluded that Plaintiff has not demonstrated a likelihood of success on the merits, and Plaintiff offers no other arguments as to the potential for irreparable harm, Plaintiff has failed to establish this prong of the preliminary injunction analysis. …

"The balance of relative hardships cuts against the requested relief. While Plaintiff may experience some limited restriction in his ability to convey a specific message during the school day absent injunctive relief, were an injunction to issue, the court credits Defendants' contention that other students' rights to be 'secure and to be let alone' during the school day would be infringed upon, as would Defendants'

Continued on page 19

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

ability to enforce policies required under state law and regulations. Accordingly, this prong weighs against Plaintiff's requested relief. …

"Finally, the court must consider the preliminary injunction's effect on the public interest. Plaintiff asserts that enjoining unconstitutional acts is always in the public interest. ... However, as discussed supra, Plaintiff has not established a likelihood of success on his claim that an unconstitutional act occurred or is threatened, and therefore, has not established an injunction is in the public interest. By contrast, Defendants point to statutes passed by the Massachusetts Legislature prohibiting discrimination, bullying, or harassment in schools based on gender identity or expression, as well as directives from the Massachusetts Department of Elementary and Secondary Education requiring that schools provide a safe environment to progress academically and developmentally regardless of gender identity. …

"For the foregoing reasons, all four preliminary injunction factors weigh against the relief requested, and accordingly, Plaintiff's Motion for Preliminary Injunction [Doc. No. 12] is denied."

L.M. v. Town of Middleborough, et al. (Lawyers Weekly No. 02-271-23) (17 pages) (Talwani, J.) (Civil Action No. 1:23-cv-11111-IT) (June 16, 2023).

Employment

Disability discrimination – Statute of limitations

Where a jury returned a verdict in favor of a plaintiff employee who alleged that the defendant Springfield Public Schools unlawfully discriminated against her on the basis of disability when it refused to transfer her to an open position at a non-alternative school as a reasonable accommodation after she experienced disabling situational anxiety while teaching at one of the defendant's alternative schools, the defendant's motion for a new trial should be allowed because of insufficient evidence supporting the jury's finding that there was actionable conduct within the required period.

"A group of teachers formerly employed by Defendant, Springfield Public Schools ('SPS'), commenced this action in 2017 to challenge Defendant's policy of not offering transfer to an open position at another school as a reasonable accommodation to teachers who become disabled and unable to continue working at their assigned schools. This decision addresses only the claims by Plaintiff, Deryl Blanks, that Defendant unlawfully discriminated against her on the basis of disability when it refused to transfer her to an open position at a non-alternative school as a reasonable accommodation after she experienced disabling situational anxiety while teaching at one of SPS's alternative schools. The jury entered a verdict in her favor, and Defendant filed a Renewed Motion for Judgment as a Matter of Law After Trial and/or, in the Alternative, Motion for New Trial and/or Remittitur. ... For the reasons that follow, the court denies Defendant's request for entry of judgment as a matter of law on all grounds, grants the motion for new trial based on the limited trial evidence supporting the jury's finding that there was actionable conduct within the required period, and denies the request for remittitur because the grant of a new trial renders it moot. …

"Before bringing a civil action under the ADA, a plaintiff must first file a timely administrative complaint. *Brader v. Biogen Inc.*, 983 F.3d 39, 60 (1st Cir. 2020). An administrative complaint filed with MCAD is timely only as to actionable conduct that occurred during the 300 days before the complaint was filed. ... In this case, the limitations period required Plaintiff to demonstrate that actionable conduct occurred on or after November 26, 2016 and the court incorporated that date into each of the questions on the special verdict form used to determine Defendant's liability. Since the only actionable conduct alleged by Plaintiff was that she requested a reasonable accommodation, transfer to an actual vacant position at a non-alternative school, and Defendant failed to provide her with any reasonable accommodation, she was required to prove that both occurred on or after November 26, 2016. …

"With the benefit of hindsight, it is clear that there were gaps in Plaintiff's trial evidence on this important issue. …

"Plaintiff failed to provide the jury with evidence that she had requested a reasonable accommodation on November 29, 2016 and a finding that one or more of the November 2016 openings remained open in February 2017 went against the weight of the evidence. … In the end, Plaintiff bore the burden of proof on this issue and, in independently weighing the evidence, the court finds it would be unjust to permit the verdict to stand under Rule 59 on this record. ... For this reason, the court will grant Defendant's alternative request for a new trial, absent a finding that Defendant is entitled to judgment as a matter of law on the basis of one of its other arguments."

Blanks v. Springfield Public Schools (Lawyers Weekly No. 02-241-23) (20 pages) (Mastroianni, J.) (Civil Action No. 17-30158-MGM) (May 30, 2023).

Employment

Individual liability – Wage Act

Where a plaintiff has filed a complaint alleging late and unpaid wages and retaliatory discharge, a motion to dismiss the complaint should be (1) allowed as to an individual defendant who is not alleged to have controlled the management of the defendant employer and (2) otherwise denied.

"The plaintiff Tamarah Norton has

Continued on page 20

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

Continued from page 19

brought several claims against her employer Archetype Consulting, Inc. and three of its senior executives. Against all defendants, she claims late and unpaid wages under the Massachusetts Wage Act (Count I) and retaliatory discharge under the same provision (Count II). Against Archetype alone, she claims breach of the covenant of good faith and fair dealing (Count III), unjust enrichment/quantum meruit (Count IV), and promissory estoppel (Count V). The defendants have moved to dismiss the complaint. For the reasons set forth below, the motion is granted as to individual defendant Max Gomez but is otherwise denied. …

"Norton alleges that she was entitled to certain commissions under Archetype's bonus plan, which the defendants have attached to their Motion to Dismiss. She alleges that Archetype paid the commissions she earned, 'in the vast majority (if not all) situations, ... late.' … She also alleges that Archetype told her she had earned bonuses in 2018-2020, repeatedly promised to pay them, but never did. Those allegations are sufficient to state a claim under the Wage Act. …

"Norton's complaint states a claim for retaliation. She alleges that she continually complained to Archetype management about the 'constant payment issues' concerning her commissions and bonuses. … Archetype terminated her shortly after she made her statutory complaint, an allegation that permits an 'inference of causation based on temporal proximity.' …

"Norton's Wage Act claims fail, however, with respect to defendant Gomez. Individual liability under the Wage Act attaches to '[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation.' Mass. Gen. Laws ch. 149, §148. Courts have defined a person 'having the management of such corporation' as one who 'controls, directs, and participates to a substantial degree in formulating and determining policy of a corporation.' *Wiedmann v. Bradford Grp., Inc.*, 831 N.E.2d 304, 314 (Mass. 2005). Norton alleges that Gomez 'routinely participated' in management. … But '[s]ome management responsibility is not the same as 'the' management of the corporation.' *Segal v. Genitrix, LLC*, 87 N.E.3d 560, 568 (Mass. 2017). According to Norton's amended complaint, defendant Jason Webster is Archetype's President, Treasurer, and Registered Agent, and is thus properly alleged to be a proper defendant. ... The complaint also alleges that defendant Andy Schlosberg was 'the Senior Vice President ... [who] oversaw, among other things, [Archetype]'s payroll function.' … That allegation is sufficient to state a claim against him as well. Similar allegations are not made as to Gomez.

"Norton's other claims against Archetype — for breach of the covenant of good faith and fair dealing, unjust enrichment/quantum meruit, and promissory estoppel — all survive dismissal for reasons similar to those discussed above. Norton deserves 'some latitude' to attempt to prove her claims through discovery — particularly where 'some of the information needed may be in control of the defendants.' …"

Norton v. Archetype Consulting, Inc., et al. (Lawyers Weekly No. 02-252-23) (4 pages) (O'Toole, J.) (Civil Action No. 20-11299-GAO) (June 8, 2023).

Employment

MCRA – At-will status

Where a plaintiff has asserted a count under the Massachusetts Civil Rights Act alleging that the defendant employer interfered with his exercise of his First Amendment rights by threatening to terminate him for expressing his political views, the employer's motion to dismiss that count should be denied because it is not clear from the face of the complaint that the plaintiff was an at-will employee.

"Plaintiff George Rodrique II brought this lawsuit against defendants Hearst Communications, Inc., and Hearst Stations, Inc. (collectively, Hearst) for the alleged wrongful termination of his employment. …

"Count IV arises under the MCRA, which provides a cause of action for any person whose 'exercise or enjoyment of rights secured by' the Constitution, federal law, or state law have been interfered with 'by threats, intimidation, or coercion.' ... Rodrique asserts that Hearst Stations

Continued on page 21

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

interfered with his exercise of his First Amendment rights by threatening to terminate him for expressing his political views. Hearst moves to dismiss this claim, arguing that the First Amended Complaint fails to sufficiently plead (1) threats, intimidation, or coercion or (2) interference with any recognized protected interest. …

"As to the first argument, Hearst maintains that, because the only threat, intimidation, or coercion alleged in the First Amended Complaint is the threat of termination, and because the Massachusetts Supreme Judicial Court has established as a matter of law that termination of an at-will employee is not coercive in the relevant sense, Rodrique fails to state a claim. The problem is this: It is not clear from the face of the complaint that Rodrique was an at-will employee. The First Amended Complaint alleges only that Rodrique's employment was governed by a series of CBAs and that those agreements limited the circumstances under which he could be discharged. It is silent as to whether the CBAs similarly limited Hearst's right to terminate its employees. And while the court could reasonably infer from that silence that there are no limitations on Hearst's right in this regard, the court may also reasonably infer the opposite, namely, that Hearst did not have free reign to fire employees protected by the terms of a CBA. A dismissal for failure to properly allege 'threats, intimidation, or coercion' would at this point be premature.

"As to the second argument, Hearst contends that, because case law establishes that an employer does not interfere with the right to free speech when it terminates an at-will employee based on his speech, Rodrique has failed to allege any cognizable interference with a protected interest. But, as noted above, the First Amended Complaint does not establish that Rodrique was an at-will employee. It would thus be inappropriate to dismiss the claim at this stage. The court accordingly denies defendants' Motion to Dismiss Count IV against Hearst Stations."

Rodrique v. Hearst Communications, Inc., et al. (Lawyers Weekly No. 02-258-23) (8 pages) (Stearns, J.) (Civil Action No. 22-12152-RGS) (June 12, 2023).

Employment

Misclassification – Delivery drivers

Where (1) plaintiffs brought suit alleging that the defendant misclassified them as independent contractors and unlawfully deducted wages from their pay in violation of the Massachusetts Wage Act and (2) a class consisting of contractors who worked for the defendant "full-time in Massachusetts" has been certified, class notice should be sent to any individual who reported to a facility in Massachusetts more often than to a facility in any other state for at least four weeks during the class period or who made at least 60 percent of their deliveries in Massachusetts for at least four weeks during the class period.

"Plaintiffs Justin Muniz, Mohammed Belaabd, Jose Dilone, and Victor Amora bring this action, on behalf of themselves and all others similarly situated, against defendant RXO Last Mile, Inc. ('RXO'). The plaintiffs are delivery drivers who contracted with RXO, a federally authorized freight forwarder, to deliver appliances and other large consumers goods for RXO's retail clients. The plaintiffs allege that RXO misclassified them as independent contractors and unlawfully deducted wages from their pay in violation of the Massachusetts Wage Act, M.G.L.c. 149, §§148 and 150. This Court previously granted the plaintiffs' motion to certify the class. …

"The class is limited, among other things, to contractors who worked for RXO 'full-time in Massachusetts.' The parties agree that at least some of the class members delivered some portion of the goods and/or originated some portion of their days outside of Massachusetts. The plaintiffs contend that class notice should be sent to everyone on the list RXO created during discovery in response to an interrogatory from plaintiffs which included the modifier 'in Massachusetts.' Defendant contends that the term 'in Massachusetts' must be interpreted narrowly in light of choice of law concerns and have articulated such a definition, discussed below, and refuse to send the information of anyone on the list who it deems outside of the class. Plaintiffs object to the interpretation on two grounds: first, they argue that class notice should be sent to everyone on the list, and that individual member's recovery can be determined later, second, they argue that defendant's choice of law concerns are overblown. …

"The defendant takes the position that 'in Massachusetts' qualifies 'full-time.' … Defendant defines any day where a delivery originated from or ended up in Massachusetts as a 'Massachusetts day.' …

"A more natural reading is that the full-time work must occur 'in Massachusetts,' which is defined separately from the criteria defining 'full-time.' In light of the plaintiffs' submissions, common sense, and the choice of law issues, this Court finds that 'in Massachusetts' means: 'An individual who reported to a facility in Massachusetts more often than to a facility in any other state for at least four weeks during the class period OR who made at least 60% of their deliveries in Massachusetts for at least four weeks during the class period.' …"

Muniz, et al. v. RXO Last Mile, Inc. (Lawyers Weekly No. 02-251-23) (8 pages) (Hillman, Sr. D.J.) (Civil Action No. 4:18-11905-TSH) (June 7, 2023).

Employment

Retaliation – OSH Act

Where a jury found that a defendant employer violated the Occupational Safety and Health Act by retaliating against an employee after he suffered a workplace injury, that verdict should not be overturned despite the employer's argument that (1) there is insufficient evidence to establish that the employee engaged in protected conduct, (2) the verdict resulted from prejudicial errors in the jury instructions, and (3) the exclusion of certain evidence relating to the employee's arrest record was prejudicial.

"On June 21, 2022, a jury found that Defendants Tara Construction, Inc. ('Tara'), and Pedro Pirez ('Pirez') violated Section 11(c) of the Occupational Safety and Health Act of 1970 (the 'OSH Act'), 29 U.S.C. §660(c), when they retaliated against their employee, Martin Paz ('Paz') after he suffered a workplace injury. ... Defendants now seek to overturn this verdict, renewing their motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) and, in the alternative, moving for a new trial pursuant to Federal Rule of Civil Procedure 59. ... Plaintiff Martin J. Walsh, the Secretary of Labor for the United States Department of Labor (the 'Secretary'), opposes such action. ... For the following reasons, Defendants' renewed motion for judgment as a matter of law and, in the alternative, motion for a new trial [Dkt. 285] is denied. …

"Defendants present three reasons for overturning the jury's verdict. First, Defendants argue that there is insufficient evidence to support the conclusion that Defendants engaged in unlawful retaliation in violation of Section 11(c) of the OSH Act. ... Second, Defendants contend that the jury's verdict resulted from prejudicial errors in the instructions the Court gave the jury. ... Third, Defendants claim that the Court's exclusion of certain evidence relating to Paz's arrest record was prejudicial. …

"Defendants argue that the evidence presented at trial failed to establish that Paz engaged in protected conduct and that Defendants retaliated against Paz because of any protected conduct. ... The Secretary counters that the evidence supports the conclusion that Paz engaged in protected activity by causing an OSHA investigation and by reporting a workplace injury and that, at minimum, the evidence supports the reasonable inference that such conduct caused Defendants' adverse action against Paz. …

"… The Secretary presented ample evidence at trial to show Paz engaged in protected activity by causing an OSHA proceeding to be instituted. …

"… A jury could easily conclude that Paz's injury and his communications regarding that injury set into motion events that led to OSHA's investigation into Tara and was therefore protected conduct under federal law. …

"Paz's comments about his injury in the immediate aftermath, while still at the worksite, could also be construed as a report of a workplace injury. …

"Defendants also argue that the Secretary failed to provide evidence that Defendants took adverse action against Paz because of his protected conduct, focusing in isolation on the timing of each individual report of Paz's injury and Defendants' behavior immediately following those reports. These conversations, however, cannot be viewed in a vacuum, and there was sufficient evidence presented at trial for the jury to find that the Defendants were aware of Paz's protected activity prior to taking adverse action against him. …

"… The jury heard and considered both parties' explanations of the events and decided that the Secretary's version of events was more likely the truth. Even if the Court were to reweigh the evidence, Defendants have not presented sufficient grounds for granting a new trial, as the Secretary presented credible evidence in support of its claim that Defendants retaliated against Paz in violation of Section 11(c) of the OSH Act. …

"Defendants seek a new trial under Federal Rule of Civil Procedure 59 based on the Court's exclusion of certain details related to Paz's prior arrests. …

"A party must show 'a substantial and injurious effect or influence upon the jury's verdict' to obtain a new trial based on a challenge to an evidentiary ruling. *Clukey v. Town of Camden*, 894 F.3d 25, 34-35 (1st Cir. 2018). Defendants have not established such injury here. The Court already explained, in a sealed decision, why it would not allow all of the evidence Defendants sought to admit; while the Court would not allow particular details of prior arrests into evidence for a variety of reasons, it did allow general references to Paz's arrest record. ... That logic still applies. Defendants maintain that the 'nature of the arrests ... was *why* law enforcement needed so badly to detain Paz,' and therefore its exclusion was prejudicial. ... But the motivation behind law enforcement's actions were not at issue at trial — Defendants' was. Moreover, while Defendants cursorily suggest that the excluded evidence was relevant to 'why Pedro Pirez did what he did,' Defendants elicited no such testimony from Pirez even when they had the opportunity to do so during trial. Pirez was free to testify that Paz's arrest record affected his decision to facilitate Paz's May 2017 arrest. He did not."

Walsh v. Tara Construction, Inc., et al. (Lawyers Weekly No. 02-263-23) (14 pages) (Kelley, J.) (Docket No. 19-CV-10369-AK) (June 14, 2023).

Environmental

Offshore wind project – OCSLA

Where plaintiffs have requested a preliminary injunction to postpone an offshore wind energy development project, that request should be denied, as the plaintiffs have not shown a likelihood of success under the National Environmental Policy Act or the Outer Continental Shelf Lands Act.

"Plaintiffs claim that their ability to generate revenue from fishing activity will be harmed by the Project. Where Plaintiffs have not demonstrated that their anticipated harms are more than purely economic, they have not established standing to bring their NEPA claims. Accordingly, Plaintiffs have not shown a likelihood of success as to their NEPA claims. …

"Plaintiffs also bring numerous APA claims alleging that various actions taken by Defendants in connection with wind leasing and the Vineyard Wind Project violate Section 8(p)(4) of OCLSA, 43 U.S.C. §1337(p)(4). …

"Based on a review of the Administrative Record, Plaintiffs have not demonstrated a substantial likelihood of success on their claims that the Defendants acted arbitrarily, capriciously, otherwise not in accordance with law, or otherwise failed to comply with their obligations under Section 1337(p)(4). …

"As to the second factor under both Rule 65 and 5 U.S.C. §705, Plaintiffs must demonstrate that, absent an injunction, irreparable harm is likely. …

"Plaintiffs fail to carry their burden as to this factor as well. Plaintiffs' substantial delay in seeking preliminary relief is fatal to their claim of irreparable harm. Even if it were not, Plaintiffs have not carried their burden of proof as to irreparable harm, where the only injuries they have put forth are purely economic injuries compensable by money damages, they have not shown the compensation funds available would be insufficient to address their claimed economic injuries pending a decision on the parties' cross-motions for summary judgment, and finally, they have not shown preliminary relief will address the alleged irreparable harm of which they complain. …

"As to the third factor for either a preliminary injunction or a stay, the court considers the balance of equities between the parties. …

"… In sum, on the record before the court, the balance of the equities cuts towards Vineyard Wind and against enjoining the Project, even briefly."

Seafreeze Shoreside, Inc., et al. v. The United States Department of the Interior, et al. (Lawyers Weekly No. 02-237-23) (15 pages) (Talwani, J.) (Docket No. 1:22-cv-11091-IT) (May 25, 2023).

Continued on page 22

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

Continued from page 21

Insurance

Boating accident – Homeowners policy

Where a plaintiff injured in a boating accident sought coverage under a homeowners policy, the insurer acted permissibly by denying coverage, as the boat is excluded from coverage under the policy.

The defendant's motion for judgment on the pleadings is allowed.

"Plaintiff Daniel LePorin ('LePorin' or 'plaintiff') requests a declaratory judgment with respect to the personal liability coverage available under a specific homeowners policy issued by defendant Preferred Mutual Insurance Company ('Preferred' or 'defendant'). …

"According to the complaint, on August 9, 2020, LePorin was a guest at the New Hampshire home of Greg Parzych ('Parzych' or 'insured'), the individual insured by Preferred. LePorin was wakeboarding on Lake Sunapee while being towed by a boat owned by the insured and operated by Melissa Parzych, the insured's daughter. The boat was a 2020 Mastercraft XT21, which was powered by a 373 horsepower inboard motor. While wakeboarding, LePorin sustained severe personal injuries, including the traumatic amputation of four fingers which removed half of his right hand. …

"At the time of the accident, Preferred insured Parzych under a homeowners policy ('the policy'). Parzych assigned his rights, claims and causes of action against Preferred to plaintiff. …

"Defendant asserts that judgment on the pleadings is warranted because the 2020 Mastercraft XT21 boat is excluded from coverage under its homeowners policy. Plaintiff contends, to the contrary, that Sections 1.c.2 and 6.b both provide coverage for the August 9, 2020 accident. …

"First, plaintiff asserts that Section 1.c.2 is ambiguous in that it does not qualify the specific 'Watercraft Coverage' that applies to Preferred's statement that it does pay 'if coverage is provided by an Incidental Motorized Vehicle or Watercraft Coverage.' LePorin suggests that because Progressive Insurance acknowledges coverage under a Boat and Personal Watercraft Policy for the accident, the Preferred policy should also be found to provide coverage under Section 1.c.2.

"Preferred rejoins that such an argument is 'grasping at straws' and Parzych's purchase of a watercraft policy from Progressive Insurance supports the notion that he recognized the need to obtain independent insurance for his new boat.

"The Court agrees. Reading the insurance policy as a whole, there is a specific provision on 'Incidental Liability Coverages' for 'Motorized Vehicle' and 'Watercraft,' which is identical to wording used in Section 1.c.2. …

"A court is to construe policy provisions so as to 'give a reasonable meaning' to the entire insurance policy. ... This Court understands the 'Incidental Motorized Vehicle or Watercraft Coverage' in Section 1.c.2 to refer to the 'Incidental Liability Coverages' discussed in Section 6 of the Preferred policy. Any 'Watercraft' coverage afforded by the Preferred policy is 'incidental' to the 'principal' coverage in that homeowners policy. In contrast, the Progressive Boat and Personal Watercraft Policy is not 'incidental' coverage because it is exclusively a boat insurance policy.

"'Thus, Section 1.c.2 does not provide coverage for the August 9, 2020 accident. …

"Next, LePorin submits that Section 6.b of the Incidental Liability Coverages section can be read to cover inboard motors, such as the one that powers Parzych's 2020 Mastercraft XT21. … LePorin suggests that because the word 'motor' is not modified by 'outboard' in the quoted language above, the policy language could be read to apply to inboard motors. …

"Alternatively, defendant proffers the 'series-qualifier canon' to support its interpretation of Section 6.b. That canon presumes that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series. … Thus, the prepositive word 'outboard' applies to the entire parallel construction 'engines or motors.'

"The Court agrees and adopts the latter construction because it gives reasonable meaning to the watercraft provision. ... Defendant offers an extreme example in its pleadings in which an insured purchases a 1,000 horsepower cigarette boat with an inboard engine during the policy period. Under plaintiff's proposed construction, the homeowners policy would cover that boat for the remainder of the policy period without the payment of any additional premium or the disclosure of the purchase of that boat. Such an outcome would be entirely unreasonable. …"

LePorin v. Preferred Mutual Insurance Company (Lawyers Weekly No. 02-256-23) (10 pages) (Gorton, J.) (Civil Action No. 22-12096-NMG) (June 9, 2023).

Insurance

Reinstatement – Insurability

Where plaintiffs have alleged that the defendant insurance company breached a life insurance policy by refusing to approve their reinstatement application, the defendant should be denied summary judgment on a breach of contract claim, as a factual issue exists regarding whether the plaintiffs met the condition precedent of submitting satisfactory evidence of insurability.

"Plaintiffs Phyllis Eisenstock ('Phyllis') and Marc Eisenstock ('Marc') (collectively, 'Plaintiffs') have filed this lawsuit against Talcott Resolution Life, Inc. ('Talcott') relating to a life insurance policy issued by Talcott to Plaintiffs' parents. ... Specifically, Plaintiffs asserts four claims for a declaratory judgment (Count I), breach of contract (Count II), negligence (Count III), and violations of Mass. Gen. L. c. 176D, §3 and Mass. Gen. L. c. 93A, §2 (Count IV). ... Talcott has now moved for judgment on the pleadings. ... For the foregoing reasons, the Court allows Talcott's motion for judgment on the pleadings as to Count I for a declaratory judgment, Count III for negligence,1 and Count IV for violations of Mass. Gen. L. c. 176D, §3 and Mass. Gen. L. c. 93A, §2, but denies the motion as to Count II for breach of contract. …

"Talcott, through its predecessor Hartford Life Insurance Company, originally issued life insurance policies to Plaintiffs' parents, Mildred ('Mildred') and James ('James') Eisenstock, in 1993. …

"… In Count II, Plaintiffs allege Talcott breached the Policy by refusing to approve their Reinstatement Application, in violation of the Policy's reinstatement provision. ... According to Plaintiffs, the Reinstatement Application satisfied the conditions precedent for reinstatement of the Policy. "Talcott argues that, because the Policy lapsed due to the nonpayment of premiums, no enforceable contract exists unless Plaintiffs satisfied the conditions precedent to reinstatement. ... Talcott further argues that Plaintiffs specifically did not meet the condition precedent for reinstatement of submitting 'satisfactory evidence of insurability.' ... Viewing this record in the light most favorable to Plaintiffs, however, the Court cannot conclusively determine whether 'satisfactory evidence of insurability [was] submitted' such that Talcott did not breach the Policy by failing to reinstate same. …

"Ultimately, if Plaintiffs satisfied the conditions precedent to reinstatement, Talcott's obligations under the Policy should have resumed and it breached same by failing to do so, which caused Plaintiffs damages — thereby plausibly alleging the elements of a breach of contract claim. … As to Count I, therefore, judgment on the pleadings in favor of Talcott is not warranted."

Other counts

"In Count I, Plaintiffs seek a declaratory judgment stating that (1) they 'included satisfactory evidence of insurability, within the meaning of the Policy's reinstatement provision;' (2) Talcott's 'refusal to reinstate the Policy because Mildred Eisenstock allegedly 'was not eligible for reinstatement at the same rate class in which she was originally approved' was improper and unsupported by the Policy's plain terms;' and (3) Talcott 'is required to reinstate the Policy' pursuant to 'the plain terms of the Policy.' ... Judgment on the pleadings in favor of Talcott is warranted as to Count II because the requested declaratory judgment would be duplicative of Plaintiffs' breach of contract claim, Count I. …

"… Here, the complaint is devoid of any factual allegations that would give Plaintiffs' garden-variety breach of contract claim 'an extortionate quality' or 'rancid flavor of unfairness.' To be sure, the allegations specifically referring to the Chapter 93A claim are merely conclusory statements with no factual support. … At bottom, Plaintiffs' complaint alleges Talcott breached the Policy by failing to reinstate same, but 'contains no sufficiently pled allegations regarding any additional services or advantages [Talcott] sought to obtain' and 'no allegations that [Talcott] strung out the process. ... [Plaintiffs'] well-pled facts suggest nothing more than a mere breach of contract, even if it is a knowing or intentional breach.' … Without any such allegations, Plaintiffs' Chapter 93A necessarily fails."

Eisenstock, et al. v. Talcott Resolution Life, Inc. (Lawyers Weekly No. 02-247-23) (13 pages) (Casper, J.) (Docket No. 22-cv-12023-DJC) (June 5, 2023).

Insurance

Watercraft exclusion – Inboard motor

Where a defendant insurance company that issued a homeowners policy denied coverage for a boating accident, the insurer acted permissibly in light of the policy's watercraft exclusion.

Dismissed.

"Plaintiff Daniel LePorin ('LePorin' or 'plaintiff') requests a declaratory judgment with respect to the personal liability coverage available under a specific homeowners policy issued by defendant Concord General Mutual Insurance Company ('Concord' or 'defendant'). Pending before the Court is defendant's motion to dismiss. For the following reasons, the motion to dismiss will be allowed. …

"According to the complaint, on August 9, 2020, LePorin was a guest at the New Hampshire home of Greg Parzych ('Parzych' or 'insured'), the individual insured by Concord. LePorin was wakeboarding on Lake Sunapee while being towed by a boat owned by the insured and operated by Melissa Parzych, the insured's daughter. The boat was a 2020 Mastercraft XT21, which was powered by a 373 horsepower inboard motor. While wakeboarding, LePorin sustained severe personal injuries, including the traumatic amputation of four fingers which removed half of his right hand. …

"At the time of the accident, Concord insured Parzych under a homeowners policy ('the policy'). Parzych requested coverage with respect to the August 9, 2020 boating incident. …

"Concord denied coverage because the boat in question was owned by the insured and powered by a 373 horsepower inboard motor, which was in excess of the policy limitations described in Section II.B(2)(c)(1). Concord alleges that Section II.B(2)(c)(1) applies to inboard engines or motors and Section II.B(2)(c)(2) applies to outboard engines or motors.

"LePorin argues to the contrary that because 'motor' is not modified by the word 'outboard' in Section II.B(2)(c)(2) ('outboard engines or motors'), a 'watercraft' with an inboard motor of more than 25 horsepower, acquired by the insured during the policy period, is covered.

"Reading the language of the policy as a whole, the Court agrees with defendant that Section II.B(2)(c)(1) governs the dispute and Parzych's 2020 Mastercraft XT21 is not covered by the homeowners policy. … Section II.B(2)(c) includes two exemptions, each of which is a common device to power a watercraft: 1) 'an inboard or inboard-outdrive engine or motor' and 2) 'one or more outboard engines or motors.' Reading the text of Section II.B(2)(c) as a whole provides context that the separate provisions apply to different kinds of engines/motors: inboard and outboard. ... The Court concludes that Section II.B(2)(c)(1) applies to watercraft powered by inboard engines or motors and alternatively, Section II.B(2)(c)(2) applies to watercraft powered by outboard engines or motors.

"Because plaintiff's complaint describes the 2020 Mastercraft XT21 as a 373 horsepower vessel with an inboard motor, Section II.B(2)(c)(1) is applicable to this case. Accordingly, because Parzych, the insured, owned the boat with an inbound motor with more than 50 horsepower, the August 9, 2020 boating accident is not covered by Concord's homeowners policy."

LePorin v. Concord General Mutual Insurance Company (Lawyers Weekly No. 02-255-23) (8 pages) (Gorton, J.) (Civil Action No. 22-11858-NMG) (June 9, 2023).

Jurisdiction

Diversity – Class Action Fairness Act

Where a plaintiff has filed a complaint alleging that the defendants violated G.L.c. 93A by charging users of its mobile application undisclosed fees on remote purchases, the complaint must be dismissed without prejudice for lack of subject matter jurisdiction, as the complaint fails to meet the minimal diversity requirement.

"[Plaintiff Martin] Kelledy asserts jurisdiction pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. §1332(d), which 'provides district courts with jurisdiction over 'class action[s]' in which the

Continued on page 26

SUPERIOR COURT JUDGES' ASSIGNMENTS: SEPTEMBER

COUNTY / ROOM	JUDGE	9/4	9/11	9/18	9/25
Suffolk County					
704 Crim. 1	Ham	X	X	X	X
806 Crim. 2	Rayburn	X	X	X	X
808 Crim. 3	Krupp	X	X	X	X
815 Crim. 4	Ames	X	X	X	X
817 Crim. 5	Doolin	X	X	X	X
906 Crim. 6	Ullmann	X	X	X	X
907 Crim. 7	Cowin	X	X	X	X
914 Unified Session SDP	Campbell	X	X	X	X
713 Crim. Motions	Cloutier	X	X	X	X
304 Civ. A	TBA				
306 Civ. B	Budreau	X	X	X	X
313 Civ. C	Squires-Lee	X	X	X	X
314 Civ. D	Connolly	X	X	X	X
916 Civ. E	TBA				
1006 Civ. F	TBA				
1008 Civ. G	Campo	X	X	X	X
1015 Civ. H	Belezos	X	X	X	X
1309 Business Litigation I	Kazanjian	X	X	X	X
1017 Business Litigation II	Ricciuti	X	X	X	X
Barnstable County					
1 Civ./Courtroom Main	Gildea	X	X	X	X
2 Civ./Courtroom 2	Callan	X	X	X	X
Berkshire County					
1 Crim./Civ.	Hogan	X	X		
Bristol County					
9 Fall River Crim. 1	Yarashus	X	X	X	X
7 Fall River Crim. 2	Sullivan, S.	X	X	X	X
6 Fall River Crim. 3	Perrino	X	X	X	X
8 Fall River Crim. 4	Donatelle	X	X	X	X
Main Taunton Civ./Crim.	Buckley	X	X	X	X
Lower New Bed. Civ. A	Yessayan	X	X	X	X
Upper New Bed. Civ. B	Dupuis	X	X	X	X
Dukes County					
Main Civ./Crim.	No sessions				
Essex County					
K Salem Crim. 1	Drechsler	X	X	X	X
J Salem Crim. 2	Lang	X	X	X	X
I Salem Crim. 3	Dunigan	X	X	X	X
H Salem Civ. A	Buxton	X	X	X	X
2 Lawrence Civ. C	Howe	X	X	X	X
1 Lawrence Civ. D	TBA				
4 Lawrence Crim.	McCarthy	X	X	X	X
3 Lawrence Civ./Crim.	Barrett	X	X	X	X
1 Newburyport Civ. B	Karp	X	X	X	X
Franklin County					
Courtroom 1	McDonough	X	X	X	X
Hampden County					
1 Crim. 1	Mulqueen	X	X	X	X
3 Crim. 2	TBA				
8 Crim. 3	TBA				
2 Crim. 4	Hodge	X	X	X	X
5 Crim. 5	Manitsas	X	X	X	X
7 Crim. 6	Bucci	X	X	X	X
4 Civ. A	TBA				
6 Civ. B	Mason	X	X	X	X
Hampshire County					
1 Crim./Civ.	Flannery	X	X	X	X
Middlesex County					
430 Woburn Crim. 1	Ellis	X	X	X	X
530 Woburn Crim. 2	Deakin	X	X	X	X
540 Woburn Crim. 3	Bloomer	X	X	X	X
630 Woburn Crim. Mtns. 4	Pappas	X	X	X	X
640 Woburn Crim. 5	Haggan	X	X	X	X
730 Woburn Crim. 6	Pierce	X	X	X	X
720 Woburn Civ. B	Tabit	X	X	X	X
740 Woburn Civ. C	Rooney			X	X
620 Woburn Civ. D	Tingle	X	X	X	X
710 Woburn Civ. H	Barry-Smith	X	X	X	X
520 Woburn Civ. J	Frison	X	X	X	
15 Lowell CV1	Wall	X	X	X	X
16 Lowell CV2	TBA				
17 Lowell Crim.	Salinger	X	X	X	X
Nantucket County					
Courtroom 1	Hogan			X	X
Norfolk County					
Main Crim. 1	O'Shea	X	X	X	X
25 Crim. 2	Leighton	X	X	X	X
10 Civ. A	Davis	X	X	X	X
3 Civ. B	Hallal	X	X	X	X
20 Civ. C	Cannone	X	X	X	X
8 Civ. D	Cahillane	X	X	X	X
Plymouth County					
1 Brockton Crim. 1	White	X	X	X	X
3 Brockton Crim. 2	Gordon	X	X	X	X
A Plymouth Crim. 3	Pasquale	X	X	X	X
Main Plymouth Crim. 4	Freniere	X	X	X	X
5 Brockton Civ. A	McGuire	X	X	X	X
4 Brockton Civ. B	Glenny	X	X	X	X
2 Brockton Civ. C	Sullivan, W.	X	X	X	X
Worcester County					
18 Crim. 1	Reardon	X	X	X	X
10 Crim. 2	Ritter	X	X	X	X
17 Crim. 3	Wrenn	X	X	X	X
20 Civ. A	Kenton-Walker	X	X	X	X
19 Civ. B	TBA				
26 Civ. C	Bell	X	X	X	X
25 Civ. D	Goodwin	X	X	X	X

((Editor's Note: The Appeals Court and SJC assignments are now available online at https://ma-appellatecourts.org/. The site lists which judge or panel is sitting for each case by docket number and case name. Log on to the website to check for any updates or changes in assignments.)

Supreme Judicial Court

The following full court sessions will be held at the John Adams Courthouse, 1 Pemberton Square, Boston.

Full court: Sept. 11, 13, 15

The following single-justice sessions will be held at the John Adams Courthouse, 1 Pemberton Square, Boston.

Sept. 13: Lowy

Sept. 20: Georges

Appeals Court

Full court sessions:

Sept. 11: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Milkey, Blake, Sacks

Sept. 12: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Vuono, Singh, Englander; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Massing, Henry, Brennan

Sept. 13: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Green, Desmond, Hodgens; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Rubin, Neyman, Walsh

Sept. 14: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Meade, Hershfang, D'Angelo; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Wolohojian, Shin, Ditkoff

Sept. 15: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Massing, Henry, Grant

Sept. 18: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Green, Hand, Hodgens; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Milkey, Blake, SacksSept. 19: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Vuono, Singh, Englander; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Rubin, Neyman, Walsh

Classifieds

www.legallylinked.com classifieds.malawyersweekly.com

Employment
- lawyer
- paralegal
- employment desired
- legal administrator
- law clerk

Real Estate
- office space
- distinctive properties
- vacation homes

Litigation Support
- forensic
- medical
- technology
- expert witness

Directories
- litigation support
- ADR providers
- lawyer-to-lawyer referrals

To place an ad call 800.444.5297 x8119 or email efarquhar@lawyersweekly.com.

EMPLOYMENT

LAWYER

NOTICE OF JOB OPENING
CITY OF LYNN

Department: City Solicitor's Office

Department:	Law Department
Job Title:	Third Assistant City Solicitor
Appointing Authority:	Mayor Jared C. Nicholson
Salary:	$119,723.16+ plus benefits *(Years of service in the Commonwealth of Massachusetts or Massachusetts municipal retirement systems may be factored into compensation.)*
Posting Date:	Tuesday, August 29, 2023
Closing Date:	Open Until Filled (A review of applications will begin the week of September 24th)

For information on duties, qualifications, and minimum requirements, please visit the Personnel Department's page at www.lynnma.gov.

Application and resume must be submitted to the Personnel Office, Room 307 in Lynn City Hall. If submitting via e-mail, please include "Third Assistant City Solicitor" in the subject line.

The City of Lynn is an Equal Opportunity Employer

DEPUTY GENERAL COUNSEL / CLERK OF CIVIL SERVICE COMMISSION

The Deputy General Counsel and Clerk of the Commission will assist with and/or conduct investigations; assist with or potentially conduct certain hearings; serve as the Commission's Records Access Officer; conduct legal research; prepare and/or review proposed decisions for Full Commission disposition; serve as a resource to external parties by assisting them with all aspects of compliance with Commission rules, procedural orders, and protocols necessary for the pursuit of appeals and preparation for evidentiary hearings; manage the video-conferencing and digital recording system used for certain hearings; help manage the agency's website; prepare Commission members for bi-weekly Executive Sessions; maintain Commission statistics; and assist with other mission-critical projects such as helping to prepare or update operational manuals.

For more information and to apply: http://tinyurl.com/jwv3zn6t

CITY OF NEWTON
SENIOR ASSISTANT CITY SOLICITOR FOR LABOR AND EMPLOYMENT

The City of Newton Law Department is seeking a Senior Assistant City Solicitor for Labor and Employment who will serve as the chief of the Law Department's Labor and Employment practice group. The Labor and Employment group is responsible for providing legal advice, risk management and compliance strategy to City departments in all matters related to public sector employment matters, workplace initiatives, problem-solving, and planning. This includes negotiating, interpreting, and enforcing collective bargaining agreements. The Senior Assistant City Solicitor will oversee, manage and lead a practice group of 2-3 attorneys and serve as a lead negotiator and representative with the City's nine (9) collective bargaining units. The ideal candidate will have approximately five to seven (5-7) years of experience as a lawyer in a governmental legal office, private in-house counsel, or law firm setting; litigation experience in federal and/or state court; licensed to practice in the Commonwealth of Massachusetts with no disciplinary record.

Salary range: $119,680 - $128,929 per year

Please submit cover letter, resume and completed application found in the Human Resources section of the City website at **https://jobs.keldair.com/cityofnewton/jobs/59748**

The City of Newton Is an Equal Employment/Affirmative Action Employer

REAL ESTATE

OFFICE SPACE

3 MONTHS FREE RENT*
92 State Street
Windowed Law Offices.
Furnished/Unfurnished Single Offices Available, ranging from $450 to $1000/month. Best views of State St. Full conference and Reception Area. (*Call for Details.)
617-723-7700

CAMBRIDGE

875 MASSACHUSETTS AVENUE

Offices to rent or share from $250.00 per month. Includes internet, phone system, mail sorting, conference room, law library, copier, fax. Ideal for sole practitioners, bar advocates, nonprofits, satellite, and attorneys working remotely.

Call 617-913-7463

WELLESLEY OFFICE SPACE

Windowed office space available for rent at conveniently located Wellesley Hills law firm. Furnished or unfurnished 12 x 14 office. Includes receptionist, use of conference rooms, kitchen. Secure bldg. w/ample parking at Rt 9, near 128/Mass. Pike.

Contact Donna at 781-328-2401

OFFICE SPACE
Call Edwin "Buzz" Farquhar at (617) 218-8119

EMPLOYMENT

LAWYER

McLANE MIDDLETON

Experienced Trusts and Estates Attorney

McLane Middleton, Professional Association, is seeking a Trusts and Estates Attorney to join our active and expanding Private Client practice. This is a unique opportunity to work alongside some of New England's most highly skilled Trusts and Estates attorneys.

Ideal candidates should possess a strong academic record and excellent written and oral communication skills, with 7 - 10 years of experience in estate planning, tax planning, and trust and estate administration. Experience in asset protection planning and charitable giving is a plus. Ideally, the candidate would have prior experience working directly with high net-worth individuals and families and their advisors on tax-efficient wealth transfer strategies, including transfer of closely-held business interests. Equally important is the ability to manage a preexisting volume practice while working alongside a team of skilled professionals. This position could be based out of any of our five offices with meaningful flexibility for remote work.

McLane Middleton has a strong tradition over its 100 year history of deep involvement in the communities where its colleagues work and live, and supports numerous charitable and professional associations. The firm helps create a long-term career path to assist professionals in their pursuit of personal and professional achievement. We offer a collegial team environment, professional development and personal satisfaction in a fast-paced and motivating work environment. Competitive compensation and benefits package offered.

Qualified candidates should send cover letter and resume.
Jessica.boisvert@mclane.com

AP&S ADLER POLLOCK & SHEEHAN P.C.

LITIGATION ASSOCIATE PROVIDENCE, RI

Adler Pollock & Sheehan P.C. seeks a mid-level associate to join its litigation practice group in its Providence office. Our sophisticated litigation practice includes complex trial and appellate matters in the areas of commercial law, products liability, intellectual property, and matters of public interest. We offer a competitive compensation package and a long-term career path within a collegial practice that is committed to excellence. The ideal candidate will possess superior academic credentials, relevant law firm experience, and excellent verbal and written communication skills. RI Bar admission is required, CT and/or MA is a plus. Qualified candidates are invited to apply directly by email and to send a resume, letter of interest and writing sample to Jeffrey K. Techentin at jtechentin@apslaw.com.

Adler Pollock & Sheehan P.C. is an Equal Opportunity Employer Committed to Diversity

EMPLOYMENT

Edwin "Buzz" Farquhar at efarquhar@lawyersweekly.com or at 617-218-8119

LAWYER

EQUITY AND INCLUSION INVESTIGATOR

The City of Cambridge is looking for a committed Equity and Inclusion Investigator to help ensure that all employees and stakeholders are treated with respect and dignity. As an Equity and Inclusion Investigator, you will be responsible for investigating complaints related to discrimination, harassment, retaliation, and other violations of the City's policies related to equity, diversity, and inclusion. You will work closely with the Chief of Equity and Inclusion and other departments to ensure that our workplace is inclusive, equitable, and free from discrimination. Bachelor's degree in a related field, such as human resources, social justice,

Three years of experience investigating complaints related to equity, diversity, and inclusion, preferably in a government setting. Strong knowledge of applicable laws and regulations related to equity, diversity, and inclusion, including but not limited to Title VII, Title IX, and the Americans with Disabilities Act. Ability to handle confidential information with discretion and sensitivity.

Excellent written and verbal communication skills, including the ability to present relevant information to various stakeholders. $87,520-$103,343 annually + excellent benefits.

Submit your resume and cover letter by 10/02/23 to our career center (link below). We are an AA/EEO Employer. **http://tinyurl.com/3hy24nce**

SUPREME JUDICIAL COURT
Reporter of Decisions

The Justices of the Massachusetts Supreme Judicial Court (SJC) seek an individual with excellent legal editing and writing skills, as well as personnel and project management experience, to serve as the next Reporter of Decisions. The Reporter is responsible for overseeing the preparation and publication of decisions of the SJC and the Appeals Court to form a published body of state decisional law.

A full job posting including application requirements can be found at

https://www.mass.gov/info-details/supreme-judicial-court-job-opportunity-reporter-of-decisions

Applications accepted until the position is filled, but candidate assessment will begin on September 12, 2023.

An affirmative action/equal opportunity employer

Regnante Sterio LLP
Wakefield, MA

PARTNER/SENIOR ASSOCIATE

Seeks new partner(s) or senior associate(s) for commercial real estate, real estate litigation, and/or environmental practices. Opportunities to continue long-established practice areas of retired and retiring partners. Excellent academics, portable billings, and at least 10 years of relevant experience required. Nature of arrangement negotiable.

ASSOCIATE

Seeks associate for land use and real estate litigation practice, with emphasis on affordable housing. Excellent academics and at least 3 years of relevant experience required.

Class A office space and full benefits.

Email: hiringpartner@regnante.com

SEEKING DOMESTIC RELATIONS ATTORNEYS

Roberts & Associates LLC (Burlington, MA), a boutique family law firm, is seeking Probate & Family Law attorneys to join our firm. The firm has a dynamic team of professionals who enjoy a collegial atmosphere. At present, there are multiple positions available for both junior and senior level attorneys, including at the partner level. To be considered you must have at least 2 years of experience. Compensation and title are negotiable and based on experience. Portable book preferred but not required. Our competitive benefits package includes health, dental, vision, life insurance, AD&D, LTD and 401k, match as well as holiday and vacation time. Part-time and remote work may be considered for the right candidate(s).

For more information and to apply: **cdesiderio@robertsassoc.com**

ESTATE PLANNING OPPORTUNITY
DEDHAM LAW FIRM
OFFICE SPACE AVAILABLE
RENT FREE FOR SIX MONTHS

- Member of the Wealth Counsel, LLC, a National Estate Planning Organization
- Highly sophisticated software and support available for attorneys willing to learn and expand their own individual practice in Estate Planning
- Referral work available
- Possible opportunity to assume or purchase current law practice
- Longstanding practice with significant client base
- Private offices available in a well-maintained office condominium
- Includes utilities, internet, and phone services

Email: lynne@massestatelaw.com Website: www.massestatelaw.com

SR COUNSEL, REGULATORY

MAPFRE INSURANCE

In this role, you will be responsible for providing legal advice, assistance, and counsel to the company on a wide range of legal issues relating to product initiatives, regulatory issues and compliance matters on an enterprise-wide basis. Responsibilities of the position involve legal research and analysis to monitor and analyze new, existing and pending regulatory developments pertinent to the company's business, and that make necessary changes to policy forms, rules and system tables as needed for various rate, rule and forms filings.

- Juris doctorate degree required and must be licensed and in good standing in at least one jurisdiction.
- Experience with Regulatory compliance helpful
- Strong written and oral communication skills, excellent analytical and organizational skills and proficiency in personal computer skills including online legal research.

MAPFRE is committed to recognizing our employees as our most valuable resource. We know our employees are the foundation for our accomplishments. That's why we offer so many opportunities to share in the success they help us achieve.

To apply: https://www.mapfreinsurance.com/careers/

Staff Attorneys and Support Specialists – Court Service Centers

The Court Services and Law Libraries Department, of the Massachusetts Trial Court's Office of Court Management is expanding at all Court Service Center locations throughout the Commonwealth, to achieve its mission of providing equal access to justice to the Massachusetts Court System. We are seeking public service oriented staff attorneys and support specialists to provide legal information and forms assistance to self-represented court users, and other members of the public. Bilingual candidates are strongly encouraged to apply. To view more information about the positions that will be posted on a rolling basis throughout the summer, and to apply, please visit: https://trialcourtjobs.mass.gov/jobs/search?page=1

SENIOR LEGAL COUNSEL

Metropolitan Area Planning Council (MAPC) is seeking a Senior Legal Counsel who enjoys working in a fast-paced environment on wide-ranging municipal public sector legal issues. This management level position requires the ability to provide staff strategic counsel and engage in innovative legal problem solving and risk mitigation in numerous areas of practice.

Apply here: https://tinyurl.com/3fe25au8

DEPUTY DIRECTOR

South Coastal Counties Legal Services, Inc. (SCCLS), the primary provider of free civil legal aid to low-income residents of Southeastern Massachusetts, Cape Cod & the Islands, seeks an experienced and detail-oriented Deputy Director, with strong communication, leadership, and supervisory skills to execute and enhance the objectives of the agency and communities it serves.

See https://sccls.org/work-with-us/ Submit application to: LThelin@sccls.org reference: Deputy Director

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

Continued from page 22

matter in controversy exceeds $5,000,000 and at least one class member is a citizen of a State different from the defendant.' … The latter requirement, minimal diversity, forms the basis of the court's decision today. …

"Kelledy, the only plaintiff named in the Complaint, is a resident of Dorchester, Massachusetts. Dunkin's principal place of business is in Canton, Massachusetts. Because both parties are citizens of Massachusetts, the Complaint fails to meet the minimal diversity requirement. The court accordingly lacks subject matter jurisdiction, and the Complaint must be dismissed."

Kelledy v. Dunkin' Brands, Inc., et al. (Lawyers Weekly No. 02-270-23) (4 pages) (Stearns, J.) (Civil Action No. 23-10626-RGS) (June 16, 2023).

Jurisdiction

Quantum meruit

Where a plaintiff has asserted claims of breach of contract and quantum meruit, the quantum meruit claim "takes shelter under the same jurisdictional umbrella as the contract claim," so the defendant's motion to dismiss the quantum meruit count for lack of personal jurisdiction should be denied.

"Plaintiff Harmony Healthcare International, Inc. (HHI) brought this lawsuit against defendant TLC of the Bay Area, Inc., d/b/a Valley House Rehabilitation Center (TLC) for its alleged failure to pay HHI for consulting services provided between April 1, 2022, and December 27, 2022. The Amended Complaint asserts claims for breach of contract (Count I) and quantum meruit (Count II). …

"TLC asserts Count II should be dismissed under 12(b)(2) for lack of personal jurisdiction over the quantum meruit claim. As plaintiff, HHI bears the burden of persuading the court that personal jurisdiction exists over TLC. … HHI cites a provision of the Agreement that states 'the Client and the Facility submit to the personal jurisdiction of the courts of the Commonwealth of Massachusetts.' ... By signing the Agreement TLC submitted to personal jurisdiction in this court. … However, TLC contends that personal jurisdiction does not extend to the quantum meruit claim; because 'quantum meruit is a quasi-contractual remedy that is only available *where there is no contract*.' …

"Personal jurisdiction is an individual right that can be waived as TLC concedes is the case with respect to the breach of contract claim. *Lechoslaw v. Bank of Am., N.A.*, 618 F.3d 49, 55 (1st Cir. 2010). It is true that, while a party may waive lack of personal jurisdiction, it is beyond the power of the parties to stipulate to subject matter jurisdiction. *Macera v. Mortg. Elec. Reg. Sys., Inc.*, 719 F.3d 46, 48-49 (1st Cir. 2013). This may be the proposition that TLC has in mind in resisting the court's jurisdiction over the quantum meruit claim. Under Massachusetts law, quantum meruit 'is a claim independent of an assertion for damages under the contract, although both claims have as a common basis the contract itself.' *J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 793 (1986). It is an obligation that arises under quasi contract theory in which an obligation is 'created by law 'for reasons of justice, without any expression of an assent and sometimes even against a clear expression of dissent." … And under Massachusetts law, there is no obligation that a party make an election between its legal and equitable remedies before a court opine on the viability of its complaint. This rule has special force in Massachusetts which merges law and equity under the general jurisdiction of the Superior Court. In other words, the claim at equity takes shelter under the same jurisdictional umbrella as the contract claim — hence there is no lack of subject matter jurisdiction, at least at this stage of the pleadings."

Harmony Healthcare International, Inc. v. TLC of the Bay Area, Inc. (Lawyers Weekly No. 02-244-23) (8 pages) (Stearns, J.) (Civil Action No. 23-10346-RGS) (June 1, 2023).

Municipal

Retaliation – Title VII

Where a plaintiff has filed a 42 U.S.C. §1983 complaint relating to his employment with the Winthrop police, a motion to dismiss that claim should be denied with respect to the defendant police chief and the codefendant town manager in their individual capacities, as the plaintiff has plausibly alleged retaliation in violation of Title VII, which can serve as the predicate federal rights violation for §1983 liability.

"Plaintiff Ferruccio A. Romeo ('Romeo') has filed this lawsuit against Defendants Town of Winthrop (the 'Town'), Terence M. Delehanty ('Delehanty'), and Austin Faison ('Faison') (collectively, 'Defendants') alleging a variety of federal and state law claims relating to his employment as a Winthrop Police Sergeant. ... Defendants have moved for dismissal only as to Counts I–III, D. 23, which allege 42 U.S.C. §1983 liability for violating Romeo's federal rights (Count I), violations of the Americans With Disabilities Act ('ADA') (Count II), and violations of the Family and Medical Leave Act ('FMLA') (Count III) against all Defendants, D. 22. For the reasons stated below, the Court allows Defendants' partial motion to dismiss as to Count I, but only as to the claims against the Town, and Delehanty and Faison in their official capacities; Count II; and Count III. ... The Court otherwise denies Defendants' partial motion to dismiss, … and the case will proceed on the remainder of Count I and the other remaining claims, Counts IV–IX. …

"Here, there is no plausible allegation that the Town has a formal or express policy instructing officials to retaliate against officers who advocate for the equal rights of female police officers. Romeo contends, however, that he can establish an unlawful policy or custom in the three following ways: (1) a person with final policymaking authority caused the deprivation; (2) failure to train or supervise; and (3) the existence of a custom of tolerance or acquiescence to federal rights violations. ... None prove availing. …

"Romeo also asserts Count I against Delehanty and Faison in their official capacities. ... A lawsuit against a municipal officer in their official capacity is a suit against the municipality itself, *see, e.g., Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citation omitted); *Surprenant v. Rivas*, 424 F.3d 5, 19 (1st Cir. 2005) (citing cases), so this claim fails for the same reasons. …

"Romeo also asserts Count I against Delehanty and Faison in their individual capacities. ... To prevail on a §1983 claim, a plaintiff must show that (1) the alleged conduct was committed under color of state law, and (2) the conduct deprived the plaintiff of rights secured by the Constitution or federal law. *Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001) (citation omitted). There is no real dispute that Delehanty and Faison acted under of color state law. Defendants argue in their opposition that Romeo has not plead facts showing that Delehanty and Faison had any 'personal involvement' with the alleged violations of federal law. ... Throughout second amended complaint, however, Romeo alleges conduct that Delehanty and Faison were personally involved with, including, among other things, the deduction of accrued vacation hours, the denial and review of his grievances, and the refusal to award Time Due. …

"As to the second element, Romeo alleges that Defendants 'abused their power and authority and acted in concert by aiding and abetting discrimination and Retaliation [sic] on the basis of Plaintiff's longstanding and ongoing and continuing advocating [sic] for women Police Offices for the Town of Winthrop for discrimination based upon sex.' ... He fails to identify which federal statute Defendants violated in his description of Count I. ... It is not necessary for the Court to analyze every potential violation of federal law, because Romeo alleged elsewhere in the second amended complaint retaliation in violation of Title VII of the Civil Rights Act of 1964. ... He, at least, has plausibly alleged retaliation in violation of Title VII, which can serve as the predicate federal rights violation for §1983 liability. …

"Romeo alleges Defendants retaliated against him in the following ways: (1) they terminated his employment; (2) they deducted accrued vacation hours to offset hours owed and did not give another opportunity to offset the hours owed; (3) they denied his Time Due requests; (4) they denied his grievances; (5) they denied him promotions to Provisional Sergeant and Provisional Lieutenant; and (6) they delayed notification of the approval of his intermittent FMLA leave request. ... The First Circuit has concluded that several of these alleged employment actions are materially adverse, … and, therefore, Romeo has plausibly pled that he suffered an adverse employment action. …

"Given that Romeo's *prima facie* burden 'is not an onerous one,' … and that this Court is required to construe the facts in the light most favorable to Romeo, he has sufficiently stated a claim of Title VII retaliation. … As such, he has also stated a claim against Delehanty and Faison for §1983 liability in their individual capacities."

Other counts

"In Count II of Romeo's second amended complaint, he alleges that Defendants retaliated against him as a person with a disability in violation of the ADA. ... 'A retaliation claim under the ADA is analyzed under the familiar burden-shifting framework drawn from cases arising under Title VII.' … 'To make out a prima facie retaliation claim, the plaintiff must show that: (1) she engaged in protected conduct; (2) she experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action.' ... Romeo's claim stumbles at each step. …

"In Count III of Romeo's second amended complaint, he alleges that Defendants interfered with the benefits to which he is entitled to under the FMLA. …

"Romeo's FMLA interference claim based upon Defendants' alleged refusal to afford him an additional opportunity to make up the hours owed warrants dismissal. Even assuming the FMLA requires employers to give their employees on FMLA leave additional opportunities to make up hours owed, Romeo cannot demonstrate prejudice. …

"'This same reasoning defeats Romeo's claim based upon the denial of Time Due. …

"On January 24, 2022, Romeo submitted a request for intermittent FMLA leave to Defendants, but it was approved after pending for eighty-one days. ... He has sufficiently plead a technical violation of his rights under the FMLA, because regulation requires employers to notify their employees of their eligibility to take FMLA leave after five business days. … Dismissal is, nevertheless, warranted because he has not satisfied the prejudice element. …"

Romeo v. Town of Winthrop, et al. (Lawyers Weekly No. 02-235-23) (18 pages) (Casper, J.) (Docket No. 22-cv-10573-DJC) (May 23, 2023).

Municipal

Trustee process – Garnishment

Where (1) a plaintiff brought a 42 U.S.C. §1983 action alleging constitutional claims against various defendants stemming from his conviction and 16-year incarceration for armed burglary, (2) a jury found two of those defendants liable for violations of the plaintiff's civil rights and awarded compensatory and punitive damages, (3) the plaintiff was also awarded counsel fees and costs, and (4) the defendants have not taken steps to pay the judgment, nor have they declared bankruptcy, the plaintiff's motion to appoint a process server should be granted, but his motion to issue a writ of garnishment and his motion to institute trustee process should be denied without prejudice.

"The practice in Massachusetts courts, if the trustee process is instituted after a suit has been brought, is to require an amended complaint, though not a separate action. … This practice comports with the text of Mass. R. Civ. Proc. Rule 4.2(c), which requires 'filing the complaint with the court, together with a motion for approval of attachment on trustee process' and 'affidavit or affidavits meeting the requirements set forth in Rule 4.1(h).' In the interest of judicial efficiency, this amended complaint must name all the trustees against whom the plaintiff seeks to institute trustee process. The plaintiff argues that no complaint is necessary in post-judgment proceedings, but this Court is unpersuaded by that distinction. …

"In his reply, plaintiff clarifies that he wishes to institute trustee process against the City to garnish the defendants' wages. This was not clear in his initial filing and plaintiff has not followed the appropriate procedure; he must include the City in his amended complaint, make a motion for trustee process, and file an affidavit as he did with regard to the financial institutions. His motion is denied without prejudice. …

"Plaintiff has generally followed the appropriate procedure for instituting the 'attachment' phase of the process against the financial institutions allegedly holding the defendants' savings accounts. Defendants misstate the order of the process, arguing that a 'final determination' must be made before the 'attachment' phase can begin; that objection is unfounded. Defendants also argue that the plaintiff has not filed a separate complaint. The First Circuit has been clear that state procedures must be scrupulously followed in post-judgment proceedings. ... As such, the plaintiff must include the trustees in their amended complaint naming the financial institutions they wish to institute trustee process against. The motion is denied without prejudice."

Continued on page 27

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

Sovereign immunity issue

"In addition to their procedural objections, defendants argue that collection proceedings are barred against them due to sovereign immunity and public policy. Defendants argue that sovereign immunity bars garnishment of their wages on two theories: that municipalities are protected by sovereign immunity and that garnishing a public officer's wages is a transfer of money from the state treasury not authorized by statute.

"Under 'federal' sovereign immunity, only the state and 'arms of the state' are protected. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989). Municipalities are not. *Id*. (citing *Monell v. Dep't of Soc. Serv*., 436 U.S. 658, 690 n. 54 (1978)). Nor does sovereign immunity protect public money that is transferred to municipalities. Such a theory, for which the defendants cite no relevant case law, would swallow the rule announced in *Will* and prevent municipalities from paying judgments against them because it would apply with as much force to judgments as it would to garnishment proceedings.

"In contrast, Massachusetts' 'internal' sovereign immunity does include municipalities. … The general rule is that the Commonwealth 'cannot be impleaded into its own courts except with its consent,' including in attachment proceedings. *Randall v. Haddad*, 468 Mass. 347, 354, 10 N.E.3d 1099, 1105 (2014). However, that internal sovereign immunity has no effect on suits based on federal law, because internal sovereign immunity is no more than state common law. … Nor does Fed. R. Civ. Proc. Rule 69(a) import Massachusetts' internal sovereign immunity, as it only requires the procedure of state enforcement proceedings to be followed, not substantive rules such as immunities. … Similar to the problem above, under either of defendants' theories the City could be successfully sued under a *Monell*-type claim under §1983, refuse to pay, then argue supplemental collection procedures are unavailable due to Rule 69(a)'s alleged importation of Massachusetts's internal sovereign immunity, leaving the judgment-creditor without a remedy. Therefore, this Court need not consider whether Massachusetts' internal sovereign immunity would protect the City from this type of collection."

Public policy issue

"Defendants also argue that it is 'well-established' that garnishing public officers' wages is against public policy, citing mostly out-of-state cases, almost none decided in the last century. Insofar as these limitations are imported by Rule 69(a), the case law in Massachusetts does not establish a rule that municipalities cannot be subject to trustee attachment. … Recent case law suggests garnishing of public officers' wages is commonplace in Massachusetts. … The other cases the defendants cite turn on interpretations of long-repealed statutes, not policy considerations. …

"Defendants repeat their arguments regarding sovereign immunity and public policy in opposing trustee process against the financial institutions. These arguments fail not only for the reasons above, but border on nonsensical where the attachment is not even nominally directed at a public entity. Defendants take the position that money originating in the treasury is forever shielded by sovereign immunity. In other words, *any* public employee who owes money for *any* reason may block *any* attempts to collect *any* property or funds that they acquired with wages from the treasury. Such an argument is extremely close to being sanctionable under Fed. R. Civ. Proc. Rule 11(b)(2). … Indeed, all of the case law defendants cite concerns plaintiffs who attempted to directly attach the salaries of public employees. This Court rejects defendants' arguments."

Cosenza v. City of Worcester, et al. (Lawyers Weekly No. 02-250-23) (9 pages) (Hillman, Sr. D.J.) (Civil Action No. 4:18-10936-TSH) (June 7, 2023).

Negligence

Railroad – FELA

Where a plaintiff has brought suit under the Federal Employers' Liability Act seeking compensation for an injury he sustained while working as a conductor for the defendant, a motion for summary judgment filed by the defendant should be denied, as a reasonable jury could conclude both that the defendant was negligent and that the defendant's negligence played at least a slight part in causing the plaintiff's injuries.

"Plaintiff Jon Rucinski brought this single-count action under the Federal Employers' Liability Act (FELA) against his former employer, Defendant CSX Transportation, Inc. (CSXT). ... Rucinski seeks compensation for an injury he sustained while working as a conductor for CSXT, allegedly as a result of CSXT's negligence. Id. CSXT now moves this Court to enter summary judgment in its favor. ... For the reasons explained below, CSXT's Motion is denied. …

"CSXT seeks summary judgment on the basis that 'Plaintiff cannot establish that CSXT was negligent or that CSXT's negligence caused, in whole or in part, Plaintiff's injury.' ... Applying the familiar summary judgment standard, drawing all reasonable inferences in Rucinski's (the nonmovant's) favor, … a reasonable jury could conclude on the evidence before the Court both that CSXT was negligent and that CSXT's negligence played at least a slight part in causing Rucinski's injuries. …

"… From the foregoing, a reasonable jury drawing reasonable inferences in Rucinski's favor could conclude that CSXT was negligent in its creation and/or maintenance of the walking area adjacent to the train tracks at issue. Such a jury could further conclude, as to causation, that CSXT's negligence in failing to properly create or maintain the walking area played at least a small part in causing Rucinski to sustain injuries climbing over an icy railroad car. … In other words, a reasonable jury could conclude here that 'employer negligence played' at least 'the slightest' part 'in producing the injury ... for which damages are sought.' ... There are other possible conclusions that a reasonable jury could come to, such as that CSXT was not negligent at all, or that the entire cause of Rucinski's injuries was his own negligence in choosing to cross the train car or in the manner in which he crossed the car. However, such alternative possibilities are insufficient to support a grant of summary judgment for CSXT given that Rucinski has put forth sufficient evidence to support a reasonable jury ruling in his favor under the applicable legal standard, as described above. CSXT's Motion for Summary Judgment (Doc. No. 51) is denied. …"

Rucinski v. CSX Transportation, Inc. (Lawyers Weekly No. 02-248-23) (4 pages) (Sorokin, J.) (Civil No. 20-10222-LTS) (June 6, 2023).

Search and seizure

Drug deal – Probable cause

Where a defendant was arrested by Lawrence police officers after detectives witnessed him participate in what they believed to be a drug deal, the defendant's motion to suppress evidence stemming from that arrest should be denied because the officers had probable cause to believe a crime was being committed when they seized him.

"On February 27, 2020, Defendant Stephen Skeirik was arrested by Lawrence, Massachusetts police officers after detectives witnessed Skeirik participate in what they believed to be a drug deal. A firearm, drugs, and cash were discovered incident to Skeirik's arrest. A search of Skeirik's home conducted the same day pursuant to a search warrant led to the discovery of a second firearm, ammunition, and drugs.

"Skeirik filed a Motion to Suppress 'all evidence' stemming from his February 27, 2020 arrest and the subsequent search of his house. ... In essence, Skeirik alleges that: (1) the police officers lacked probable cause when they seized him outside of his home; and (2) the search warrant for his home was invalid because there was not probable cause to believe that evidence of a crime would be found there. … For the reasons described below, both arguments are unmeritorious. Therefore, the Motion to Suppress is being denied. …

"The officers had probable cause to believe a crime was being committed when they seized Skeirik. Therefore, the seizure was lawful and the motion to suppress the evidence resulting from it is not meritorious. …

"When Skeirik was tackled and seized, probable cause to arrest him existed. …

"The Lawrence police applied for a warrant to search for illegal narcotics and firearms at 36A Norris Street. …

"Skeirik challenges the 'nexus' requirement. The affidavit in support of the application for a search warrant informed the magistrate that there was probable cause to arrest Skeirik for illegal possession of drugs when he came out of 36A Norris Street. More specifically, the affidavit informed the magistrate that Skeirik left 36A Norris Street with a firearm and a fanny pack. ... Detectives had found bundles of currency totaling $4,205 in Skeirik's pockets and drugs in the fanny pack. … A CJIS query had revealed that Skeirik had multiple outstanding warrants, including for drug trafficking, and that he lived at 36A Norris Street. … The affidavit also stated that drug traffickers often keep weapons at locations where large amounts of drugs and money are being stored. … There was, therefore, probable cause to believe that drugs and/or firearms would be found in 36A Norris Street. …

"Moreover, when there was not an intentional or reckless omission of material information in the application for a search warrant, and 'the affidavit was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,"' suppression is not justified. … This is, at a minimum, such a case."

United States v. Skeirik (Lawyers Weekly No. 02-239-23) (19 pages) (Wolf, J.) (Cr. No. 20-10148-MLW) (May 26, 2023).

Social services

Fees – Social Security Act

Where a plaintiff has filed a motion requesting a fee award under the Social Security Act, that motion should be granted because the requested sum of $22,394 is reasonable.

"Plaintiff is requesting an attorney's fee award of $22,394.00, representing twenty-five percent of his $89,000 past-due benefits. …

"The court agrees that the sum of $22,394.00 is reasonable. Review of the docket reveals that Plaintiff's counsel's representation of Plaintiff was thorough and professional and, no doubt, instrumental in Plaintiff's ultimate receipt of benefits. Nor is there any suggestion that Plaintiff's counsel's conduct was dilatory or otherwise improper. Moreover, Plaintiff's counsel expended 37.3 hours on behalf of Plaintiff, amounting to an effective hourly rate of $600.37. This figure does not represent a windfall to Plaintiff's counsel. …"

Angel C. v. Kijakazi (Lawyers Weekly No. 02-226-23) (5 pages) (Robertson, U.S.M.J.) (Docket No. 3:21-cv-11447-KAR) (May 19, 2023).

Social services

RFC – Medical opinions

Where a plaintiff's application for Supplemental Security Income was denied by an administrative law judge, the matter must be remanded for further administrative proceedings because the ALJ's residual functional capacity conclusion that the plaintiff had no restrictions in his ability to sit and stand or walk and no need to periodically change positions was not supported by substantial evidence.

"James F. ('Plaintiff') brings this action pursuant to 42 U.S.C. §405(g) seeking review of a final decision of the Commissioner denying his application for Supplemental Security Income ('SSI'). Plaintiff seeks remand based on his contention that the ALJ erred in his evaluation of the medical opinion from one of his medical treatment providers. …

"On appeal, Plaintiff questions only the ALJ's treatment of Dr. [Michael] Woods' opinion as reflected on the two forms regarding Plaintiff's ability to do work-related activities. In substance, Plaintiff's challenge is that because the ALJ failed to properly evaluate Dr. Woods' medical opinions, the RFC is not supported by substantial evidence. After careful review of the parties' submissions and the record, the court finds that Plaintiff's challenge to the RFC assessment is meritorious.

"In his decision, the ALJ explained that he found the overall assessments from Dr. Woods to be unpersuasive (A.R. 67). …

"This treatment of Dr. Woods' opinions by the ALJ is in partial compliance with the regulations. …

"While the ALJ at least partially followed the articulation procedure under the new regulations when evaluating Dr. Woods' opinion, his resulting findings are not supported by substantial evidence. The ALJ found Dr. Woods' opinion on Plaintiff's limited ability to sit and stand or walk unsupported by Plaintiff's cervical pain and daily headaches and inconsistent with Plaintiff's normal gait without the need for an assistive device for ambulation. By resting his findings entirely on the lack of evidence of lower extremity issues, the ALJ ignored the effect that pain, including head pain, can have on a person's ability to sit and stand or walk for prolonged periods. … Thus, the ALJ's supportability and consistency findings relative to Dr. Woods' opinion on Plaintiff's limited ability to sit and stand or walk are not supported by substantial evidence.

"In addition, in declining to assess any

Continued on page 28

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

Continued from page 27

sitting and standing or walking limitations in Plaintiff's RFC, the ALJ rejected not only Dr. Woods' opinion, but also the opinions of the two state agency doctors who opined that Plaintiff was limited to standing or walking for four hours and to sitting for six hours in an eight-hour workday and would need to be able to change position every hour for five minutes to relieve discomfort. By rejecting all three medical opinions in the record reflecting limitations in Plaintiff's ability to sit and stand or walk and the need for Plaintiff to periodically change positions, the ALJ violated the proscription on substituting his own views for uncontroverted medical opinion. … While the ALJ was not required to accept the more restrictive opinions of Dr. Woods, he was not at liberty to reject that Plaintiff had any limitation with respect to these physical exertional demands where every medical opinion in the record found that Plaintiff had limitations in these areas. … Thus, the ALJ's RFC conclusion that Plaintiff had no restrictions in his ability to sit and stand or walk and no need to periodically change positions was not supported by substantial evidence. …

"Finally, the reason offered by the ALJ to reject Dr. Woods' opinion on Plaintiff's likely absenteeism is also inadequately supported. … Thus, the ALJ's finding that Dr. Woods' opinion on Plaintiff's projected absenteeism is inconsistent with the record similarly is not predicated on substantial evidence."

James F. v. Kijakazi (Lawyers Weekly No. 02-249-23) (23 pages) (Robertson, U.S.M.J.) (Docket No. 3:22-cv-30087-KAR) (June 6, 2023).

SUPREME JUDICIAL COURT

Attorneys

Discipline – Farak drug lab scandal

Where the Board of Bar Overseers imposed a three-month suspension on an assistant attorney general who was involved in the prosecution of a chemist at the State Laboratory Institute in Amherst, a public reprimand is appropriate because the attorney reasonably relied in good faith on a colleague's misrepresentations that she had turned over exculpatory information.

The BBO's recommendations that another AAG be suspended for one year and one day and that another be disbarred should be adopted.

"The consolidated bar disciplinary proceedings arise from the respondents' involvement in the withholding of exculpatory evidence during the prosecution of a chemist in the State Laboratory Institute in Amherst (Amherst lab or drug lab), Sonja Farak, by the Attorney General's office (AGO). …

"In the wake of the Farak drug lab scandal, bar counsel filed petitions for discipline with the board charging [Anne K.] Kaczmarek, [Kris C.] Foster, and John C. Verner with various violations of the Massachusetts rules of professional conduct. The matter was heard by a special hearing officer (SHO). The board adopted in full the extensive factual findings of the SHO. The board recommended that Verner, who supervised the Farak prosecution, be suspended for three months for neglecting his supervisory duties. The board further recommended that Foster, who was responsible for the AGO's response to subpoenas and discovery motions filed by defense counsel, be suspended for one year and one day for her violations that, for the most part, amounted to 'gross incompetence' and 'reckless lawyering.' In so holding, the board rejected bar counsel's argument that Foster engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Mass. R. Prof. C. 8.4 (c), 426 Mass. 1429 (1998). Finally, the board recommended disbarment for Kaczmarek, who, as lead prosecutor in the Farak case, '[bore] the greatest responsibility' and 'the greatest culpability.' A single justice reserved and reported the matter to the full court.

"We adopt, in part, the board's recommendations. The record supports a finding that the prosecutors failed in their collective duty to disclose potentially exculpatory information that was known to the AGO. We also conclude, however, that in certain circumstances, reasonable and good faith reliance on another attorney's representations may be a special mitigating factor. Because Verner reasonably relied in good faith on Kaczmarek's misrepresentations that she had turned over exculpatory information, and his liability is limited to failing to follow up with her as to whether she had disclosed all such information, we differ with the board and conclude that anything more severe than a public reprimand would be inappropriate. Because Foster was reckless in her representations about what the AGO had disclosed, and otherwise exhibited incompetence in her response to the subpoena and discovery motions, we accept the board's recommendation that she receive a suspension of one year and one day. Finally, because Kaczmarek was most culpable for the AGO's failure to turn over all exculpatory information, and because she displayed a lack of candor and remorse at the disciplinary hearing, we accept the board's recommendation that she be disbarred. The matter is remanded to the county court for entry of final judgment. …

"For the reasons stated, we adopt the board's recommendations of a suspension of one year and one day for Foster and disbarment for Kaczmarek. For Verner, we conclude that a public reprimand is appropriate. We remand to the county court where a judgment consistent with this decision shall enter."

In the Matter of Foster, Kris C., et al. (Lawyers Weekly No. 10-101-23) (83 pages) (Gaziano, J.) The case was reported by Lowy, J., sitting as single justice. Joseph M. Makalusky, Assistant Bar Counsel; Allen N. David (Kristyn K. St. George also present) for Kris C. Foster; Patrick Hanley (Thomas J. Butters also present) for John C. Verner; Thomas R. Kiley (Meredith G. Fierro also present) for Anne K. Kaczmarek (Docket No. SJC-13360) (Aug. 31, 2023).

APPEALS COURT

Arbitration

Medical malpractice – Translation

Where a plaintiff filed a medical malpractice complaint, the defendant surgeon's motion to compel arbitration should have been allowed, as (1) the parties formed a valid arbitration agreement and (2) the plaintiff's lack of facility with the English language does not require a different result.

"Wanting vision correction, the plaintiff, Carlos E. Lopez Rivera (Lopez), engaged the services of the defendant eye surgeon, Steven W. Stetson. Prior to surgery, Lopez signed a form agreeing to submit any disputes regarding the surgery to arbitration. Dissatisfied with the surgery, Lopez filed a medical malpractice complaint in the Superior Court, and Stetson moved to dismiss and to compel arbitration pursuant to the signed agreement. A Superior Court judge denied the motion concluding that Stetson's 'failure to translate' the arbitration agreement into Spanish amounted to 'fraud in the inducement' and rendered the agreement invalid and unenforceable. …

"On the morning scheduled for his elective surgery, Lopez signed and initialed four forms, printed in English, and provided by Stetson: (1) a patient arbitration agreement; (2) a patient consent for surgery and receipt of medical information; (3) a patient consent for laser vision correction; and (4) a lifetime assurance plan. …

"… The record shows that Lopez had reasonable notice of the arbitration agreement, and that he manifested his assent to the agreement. …

"Lopez's lack of facility with the English language does not require a different result. …

"We also discern no evidence of fraud by Stetson or anyone in his office. …

"For similar reasons, we conclude that the arbitration agreement was not invalid on the ground of unconscionability. … Unconscionability, both procedural and substantive, is evaluated 'on a case by case basis,' giving particular attention to 'unfair surprise' and 'oppressive' terms. *Zapatha v. Dairy Mart, Inc*., 381 Mass. 284, 293 (1980). Here, we discern neither unfair surprise nor oppressive terms. …

"Finally, the record lacks any evidence of duress showing that Stetson caused Lopez to enter into the arbitration agreement 'under the influence of such fear' that precluded the exercise of 'free will and judgment' (citation omitted). *Avallone v. Elizabeth Arden Sales Corp*., 344 Mass. 556, 561 (1962). Rather than duress, the record shows an exercise of free will: Lopez had time to review all documentation; he had access to a Spanish-speaking interpreter at Stetson's office; he had the opportunity to speak with Stetson in a group setting or in private; he knew he could decline to sign; and he signed the arbitration agreement. …

"The Superior Court judge's order denying Stetson's motion to compel arbitration is reversed, and the case is remanded for the entry of an order compelling arbitration and dismissing the complaint as to Stetson."

Lopez Rivera v. Stetson (Lawyers Weekly No. 11-091-23) (11 pages) (Hodgens, J.) A motion to compel arbitration was heard by Valerie A. Yarashus, J., in Superior Court. Andrew D. Black (Barbara H. Buell also present) for the defendant; Robert A. Scott for the plaintiff (Docket No. 22-P-904) (Aug. 31, 2023).

Landlord and tenant

Summary process – Water use statute

Where a judgment was entered in favor of a plaintiff in a summary process action, that judgment must be vacated because the tenant's counterclaim (under G.L.c. 239, §8A) effectively was dismissed prematurely on mootness grounds.

"In this no-fault summary process action, the question on appeal is whether the landlord's tender of damages to the tenant for the landlord's violation of G.L.c. 186, §22 (water use statute), after the landlord commenced summary process proceedings, precluded the tenant from asserting G.L.c. 239, §8A (§8A), as a defense to possession (as set forth in the tenant's counterclaim). A judge of the Housing Court answered the question 'yes,' reasoning that the landlord's tender was 'knowingly accepted by the tenant without any reservation of rights.' He entered judgment awarding Cassandra Ferreira (landlord) possession of the leased premises. Tenant Laural Charland (tenant) appeals, arguing that the landlord's tender of damages did not settle her counterclaim and that the judge misinterpreted §8A. We conclude that a landlord's violation of the water use statute gives the tenant a potential defense to possession under §8A. We also conclude that a landlord's tender of money damages to the tenant, after the landlord commenced summary process proceedings, does not moot the tenant's claim to possession, unless the tenant has clearly released the claim, because money damages are but one of two available remedies — the other being the tenant's ability to remain in the property (possession) upon proof of a valid counterclaim or defense under §8A. Here, because the tenant's §8A counterclaim effectively was dismissed prematurely on grounds of mootness, the tenant did not have the opportunity to prove her counterclaim at trial. We therefore vacate the judgment, and remand for further proceedings consistent with this opinion. …

"This appeal presents issues of statutory construction, which we review de novo. ... More specifically, we must consider the interplay between two statutes in the context of a no-fault eviction: the water use statute and §8A, the latter of which provides tenants with a time-limited defense against no-fault evictions in circumstances where the tenant proves that a landlord did not meet the landlord's legal obligations. Here, the tenant has not claimed a breach of the warranty of habitability as a defense to the eviction, and she did not withhold rent; she claims only a violation of the water use statute as a defense to a no-fault eviction. …

"We conclude, and the parties agree, that the water use statute relates to a tenancy within the meaning of §8A, as a landlord is required to supply sufficient water for the ordinary needs of the tenant. …

"We also conclude, and the parties agree, that a violation of the water use statute is a violation of 'any other law' within the meaning of §8A. …

"… The judge could not, on this record, make the necessary findings regarding the amount of the tenant's damages resulting from the water use statute violation or the relationship of that amount to the amount tendered by the landlord. It therefore follows that he could not determine whether the amount owed by the landlord equaled or exceeded the amount owed by the tenant (although everyone agreed the amount owed by the tenant was zero). Furthermore, the record did not permit the judge to determine whether the tenant intended to release or waive her counterclaim in its entirety by accepting the landlord's tender. This is particularly important because a settlement agreement must include all material terms and reflect the parties' mutual intent to be bound by it. … Finally, there was no evidence to help the judge determine whether, as the landlord claimed (and continues to claim), the tenant cashed the checks or, as the tenant now claims, she merely held them in a safe.

"The judge apparently concluded that

Continued on page 29

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

APPEALS COURT

such findings were not necessary because, given counsel's representation that the tenant had been 'made whole,' the tenant's counterclaim was moot. This was error because the judge failed to recognize that the tenant's counterclaim carried two potential forms of relief at the time it was asserted: money damages and a defense to possession under §8A. …

"The landlord's tender therefore did not preclude the tenant from asserting a §8A defense to possession based on the landlord's water use statute violation. The tenant should have been given the opportunity to prove her defense. The relevant measure of her damages then would have been what she was owed on the counterclaim as proven, either through evidence adduced at trial or by stipulation. …

"To be clear, we are not suggesting that the landlord here acted with bad intent, as opposed to making (and then trying to cure) an honest mistake. But §8A's mandate applies to all landlords, including those less scrupulous than the landlord here appears to have been. …

"To sum up, in future proceedings involving no-fault evictions or evictions for nonpayment of rent, if a tenant raises a defense or counterclaim within the meaning of §8A, the judge must first determine whether the landlord is liable on the defense or counterclaim. If the judge so finds, or the landlord concedes liability, the judge must then determine the respective amounts due to each party. A landlord's tender of damages after commencement of a summary process action will not moot the tenant's claim for possession, absent a clear release or waiver of that claim by the tenant. Once the judge determines the amount that each party is owed, the judge shall then perform the accounting contemplated by §8A, fifth par. If the tenant proves her defense or counterclaim and is owed more than the amount determined to be owed to the landlord (or the amount she is owed equals what is owed to the landlord), the tenant is entitled to retain possession. If the tenant proves her defense or counterclaim but is owed less than the amount determined to be owed to the landlord, the tenant will have seven days from receipt of written notice thereof to pay the balance to the clerk (cure) and if she does cure, the tenant is entitled to retain possession; if the tenant does not cure, the landlord is entitled to possession. If the tenant retains possession under §8A, the landlord may bring a subsequent summary process action, although if the landlord has not yet remedied the violation underlying the tenant's successful defense or counterclaim, the tenant may again raise that violation through a defense or counterclaim in the subsequent action. …

"Accordingly, we vacate the judgment. Where a case has been resolved prematurely on procedural grounds, we typically remand for further proceedings. Here, on the tenant's claim for money damages, a remand is necessary to allow the judge to enter factual findings on the amount of those damages, as the trial record (and the appellate record) is bereft of the necessary evidence on that question. And, because the landlord claims that the tenant cashed the checks and the tenant claims that the checks are in a safe, the judge must determine whether or not the tenant was in fact compensated for her damages.

"On the tenant's claim for possession, under the unusual circumstances presented where the tenant, who was entitled only to a time-limited remedy of possession, has in fact retained possession during the time this appeal was pending, the judge may immediately on remand, with the landlord's agreement, issue a partial judgment in the tenant's favor for possession, and nothing herein shall preclude the judge from dissolving the stay of the second summary process case so that the second action may proceed as soon as judgment for possession is entered in this case. ... This approach is consistent with the Uniform Summary Process Rules which intend for these proceedings to be 'just, speedy, and inexpensive.' … The judge shall also endeavor to make the findings described above expeditiously, and thereafter shall enter a new judgment on damages consistent with this opinion."

Ferreira v. Charland (Lawyers Weekly No. 11-092-23) (50 pages) (Blake, J.) (Meade, J., with whom Neyman, Ditkoff, Singh, Englander, Walsh, Brennan and Hodgens, JJ., join, dissenting) (Ditkoff, J., with whom Meade, Neyman, Singh, Englander, Walsh, Brennan and Hodgens, JJ., join, dissenting) (Englander, J., with whom Meade, Neyman, Singh, Ditkoff, Walsh, Brennan and Hodgens, JJ., join, dissenting) The case was heard by Robert G. Fields, J., in Housing Court. Gabriel L. Fonseca for the defendant; Lawrence J. Farber for the plaintiff; Andrea Joy Campbell, Alda Chan and Sean P. Attwood submitted a brief for the Attorney General, amicus curiae; Richard M.W. Bauer, Ilana B. Gelfman, Susan Hegel, Daniel Ordorica and Joshua M. Daniels submitted a brief for Volunteer Lawyers Project, amicus curiae (Docket No. 22-P-300) (Sept. 5, 2023).

APPEALS COURT (UNPUBLISHED)

Following are the summaries of decisions issued by the Appeals Court pursuant to Rule 23.0 (formerly known as Rule 1:28). In reporting these unpublished decisions, Massachusetts Lawyers Weekly reminds readers that the decisions may be cited for their persuasive value but not as binding precedent. The full text of these decisions can be found on Lawyers Weekly's website, masslawyersweekly.com.

Prisons

PES – Sex offender management policy

Where a plaintiff filed a complaint contending that the Department of Correction's sex offender management policy and "Program Engagement Strategy" (PES) constitute regulations that must be promulgated or amended pursuant to G.L.c. 30A, a dismissal judgment must be vacated in part based on *Haas v. Commissioner of Correction*, 103 Mass. App. Ct. 1 (2023).

"On December 13, 2019, plaintiff Rashad Rasheed, an inmate in the custody of the Department of Correction (department) and housed at the Massachusetts Correctional Institution at Concord, filed a complaint seeking declaratory, equitable, and monetary relief, stemming from the consequences imposed on him pursuant to the department's 'Program Engagement Strategy' (PES). …

"… Here, there is no dispute that the sex offender management policy and PES both fall within the definition of 'regulation.' The dispute concerns whether they fall into the internal management exemption, G.L.c. 30A, §1(5) (b), which exempts from the general definition any 'regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not substantially affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities.'

"After the briefs in this case were submitted to the panel, this court issued *Haas v. Commissioner of Correction*, 103 Mass. App. Ct. 1 (2023). In *Haas, supra* at 2-3, we concluded that an inmate complaint alleging that a standard operating procedure (SOP) of the DOC was a regulation concerned more than the internal management or discipline of DOC and stated a claim sufficient to survive a motion to dismiss. …

"Here, as in *Haas*, the question is whether both the sex offender management policy and PES may fall under the internal management exemption. DOC inmates 'are certainly a portion of the public affected by the agency's activities' (quotation omitted). *Haas*, 103 Mass. App. Ct. at 15, quoting G.L.c. 30A, §1(5)(b). In addition, the plaintiff, by claiming that he is subject to the loss of job, housing, and seniority privileges, and that he has had possessions taken away, has alleged sufficient facts to support an inference that the policies substantially affect 'the rights of or the procedures available' to inmates. G.L.c. 30A, §1(5)(b). We therefore conclude that portions of counts one, two, and five of the verified complaint state a claim, sufficient to survive a motion to dismiss, that the sex offender management policy and PES are regulations, and not having been promulgated as such through G.L.c. 30A procedures, are unenforceable. …

"So much of the judgment as dismissed the portions of counts one, two, and five claiming that the sex offender management policy and PES are invalid because they were not promulgated as regulations under G.L.c. 30A is vacated, and those aspects of counts one, two and five are remanded for further proceedings. In all other respects, the judgment is affirmed."

Rasheed v. Commissioner of Correction, et al. (Lawyers Weekly No. 81-075-23) (8 pages) (Docket No. 21-P-1015) (Aug. 31, 2023).

SUPERIOR COURT/ BLS

Arbitration

Waiver – Employment dispute

Where (1) a plaintiff filed a complaint against the defendant, a former employee, (2) proceedings were stayed pending arbitration, and (3) the defendant has moved to lift the stay so that he may bring a counterclaim and third-party complaint under the Wage Act, that motion should be allowed because the plaintiff waived its right to arbitration.

"Here, despite the agreement to arbitrate, which included a right to seek preliminary relief from the arbitrator and to pursue discovery, [plaintiff] Jet Edge filed this action in Superior Court, and sought preliminary relief and expedited discovery from the court. For almost a year, Jet Edge failed to pursue the arbitration despite having initiated it at JAMS. It ignored nine inquiries from JAMS regarding payment. Jet Edge's failure to pursue the arbitration has caused substantial delay in [defendant Darryn] Mackenzie's ability to pursue his claims. …

"Accordingly, the court finds that Jet Edge's failure to pay the arbitration fee and to otherwise pursue arbitration, constitutes a waiver of its right to arbitrate. …"

Western Air Charter, Inc. v. Mackenzie, et al. (Lawyers Weekly No. 09-105-23) (6 pages) (Kazanjian, J.) (Suffolk Superior Court) (Civil Action No. 2284CV01603-BLS-1) (Aug. 28, 2023).

DISTRICT COURT/ BMC APPELLATE DIVISION

Commercial

UCC – Negotiable instrument

Where a plaintiff assignee brought an action for breach of contract and money had and received on a commercial loan, a judgment in favor of the plaintiff should be affirmed despite the defendants' contention that the trial judge erred by failing to determine the plaintiff's status as a holder in due course and its use of an affidavit of lost note.

"The defendants appeal a ruling by the trial judge on behalf of the plaintiff in its action for breach of contract and money had and received on a commercial loan. The complaint alleged that the defendants had failed to pay money due the plaintiff on a promissory note executed by defendant Dennis Corbett ('Corbett'), on behalf of both his codefendant, Olde Salem Group ('Olde Salem'), and himself individually. The plaintiff, Origen Capital Investments II, LLC ('Origen'), was assigned the note by Citizens Bank, N.A., which had originally contracted with the defendants. We affirm.

"Defendants argued that the action was governed by the Uniform Commercial Code ('UCC') — specifically, G.L.c. 106, §3-301 et seq. — and that Origen should be considered a holder in due course subject to all relevant defenses. In particular, defendants argued that since the note was already in default at the time of its assignment, the holder Origen did not have the rights of a holder in due course. G.L.c. 106, §3-305(c). Defendants also argued that the documents relied on by Origen — the business credit application (exhibit 1), the welcome letter (exhibit 3), and the business credit line agreement (exhibit 4) — did not collectively constitute a negotiable instrument under the UCC.

"Origen argued that the holder in due course issue had been waived because it was raised for the first time on the day of trial. Origen claimed that the issue had not been raised by the answer as a defense or in the pretrial conference report, and denied opening the door by referring to other sections of the UCC.

"The trial judge did not make a formal ruling on the defendants' motion as to the UCC issue (G.L.c. 106, §3-301), but essentially excluded testimony on this issue during the two days of trial. The trial judge did not consider the holder in due course argument in her rulings of law, but rather considered breach of contract, money had and received, quantum meruit, and promissory note.

"The defendants raise two issues on appeal. First, they contend the trial judge erred by failing to consider G.L.c. 106, §3-305(c) to determine both the plaintiff's status as a holder in due course and its use of an affidavit of lost note. Second, they raise the issue whether exhibit 1 (the application) was valid as a negotiable instrument pursuant to G.L.c. 106, §§3-104 and 3-106.

"In the instant case, the plaintiff brought suit under common law contract and money had and received theories. Although the basis for the suit was the defendants' failure to repay a commercial loan (albeit one signed in both an individual and corporate capacity), there was evidently no prayer for relief under the UCC. Similarly, there is nothing in the record before this Appellate Division indicating that the UCC defenses were raised in the defendants' answer or in the pretrial

Continued on page 30

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

DISTRICT COURT/ BMC APPELLATE DIVISION

Continued from page 29

conference report. Defendants did not include the complaint, answer, or pretrial conference report in the record appendix. Nor did the defendants claim at trial (or in their appellate brief) that they raised the UCC in their pleadings. As such, this Division accepts Origen's contention that it was not raised. … We determine that Origen was entitled to rely on common law theories of recovery and that the defendants were required to raise any relevant UCC provisions as a defense. …

"Defendants also argue that exhibits 1, 3, and 4 do not collectively constitute a negotiable instrument pursuant to the UCC and that the trial judge's findings of fact on this issue were erroneous. The crux of the defendants' position is that these documents amounted to a conditional promise to pay as defined by G.L.c. 106, §3-106. Defendants submit that the application signed by Corbett was subject to additional (unsigned) documents affecting its terms and conditions.

"Defendants' reliance on G.L.c. 106, §3-106 is misplaced. …

"Corbett signed the business credit application (exhibit 1) both individually and as the president of codefendant Olde Salem. Exhibit 1, the application, made specific reference to exhibit 3, the welcome letter, and exhibit 4, the business credit line agreement. Exhibit 1 and paragraph 3(a) of exhibit 4 make the instrument payable to the bearer. Paragraph 6 of exhibit 4 makes it payable on demand. … Lastly, it does not require the borrower to do anything in addition to paying for the advances taken (exhibit 4, paragraph 3[a]). As such, the three exhibits do collectively constitute a negotiable instrument pursuant to G.L.c. 106, §3-104."

Origen Capital Investments II, LLC v. Olde Salem Group, Inc., et al. (Lawyers Weekly No. 13-032-23) (6 pages) (McGrath, J.) (Northern District) Appealed from a decision by McCabe, J., in Salem District Court. Raymond C. Pelote, of Wynn & Wynn, for the plaintiff; Paul L. Lees for the defendants (App. Div. No. 21-ADCV-101NO) (Aug. 24, 2023).

Contract

Nursing home charges – Resulting trust

Where a plaintiff filed a complaint alleging unpaid nursing home charges, a judge's decision to dismiss Count 5 of the complaint, which sought to reach and apply real property held in a trust, should be upheld because the transfer of the real property into the trust 22 years before the debt was incurred was a gift to the family member beneficiaries.

"Berkshire Healthcare Systems, Inc., d/b/a Hillcrest Commons Nursing and Rehabilitation Center ('Hillcrest'), brought a civil action against Karen Hagley, Philip Hiser, Jr., Frank Hiser, and Albert Hiser (the 'beneficiaries') as beneficiaries of the Hiser Realty Trust ('Hiser Trust') for unpaid nursing home charges due from Philip Hiser, Sr., the father of the beneficiaries and the trustor/settlor of the Hiser Trust. The beneficiaries moved to dismiss count 5 of the complaint, which sought to reach and apply assets held in the Hiser Trust, based on failure to state a claim upon which relief can be granted under Mass. R. Civ. P. 12(b)(6). A District Court judge allowed the motion to dismiss, and Hillcrest appeals that decision. We affirm the judge's allowance of the motion to dismiss.

"Hillcrest contends the beneficiaries are indebted to it in the amount of $45,662.48 for unpaid services rendered to Philip Hiser, Sr., when he was a resident at Hillcrest between July 1, 2019 and October 8, 2019. Among other claims, Hillcrest seeks to reach and apply assets held by the Hiser Trust, specifically the real property located at 66 Mill Street in Lee, Massachusetts. Hillcrest contends the court should impose a 'resulting trust' on the Hiser property, which would allow Hillcrest as creditor to recover against that property. The beneficiaries contend that no resulting trust could exist because the property transfer was a gift to the family member beneficiaries. …

"Here, Hillcrest seeks to reach and apply real estate that was transferred into the Hiser Trust more than twenty-two years before the debt at issue was incurred. …

"According to Hillcrest's complaint, two of the beneficiaries live at the house in Lee. Living in the home shows present beneficial use. Hillcrest's claim that Philip Hiser, Sr. lived at the property between 1996 and the time of his death in 2019 is belied by the fact that Hillcrest seeks in this lawsuit money for nursing home services to Philip Hiser, Sr. that commenced in 2016. Further, even if Philip and Lillian Hiser paid the property taxes for the 66 Mill Street property, and even if they lived at the property for some period of time after gifting it to their children, that is not inconsistent with them acting as trustees of a nominee trust for the benefit of the beneficiaries. ... Hillcrest claims the Hiser Trust was a misbegotten estate planning device, but 'it is a perfectly usual employment of the trust devise to place property in a safe harbor against the possibility of future rough financial seas.' *Shamrock Inc. v. Federal Deposit Ins. Corp.*, 36 Mass. App. Ct. 162, 167 (1994).

"There are no facts alleged to support Hillcrest's claim that Philip Hiser, Sr. and Lillian Mae Hiser did not intend to gift the 66 Mill Street property to the beneficiaries, their four children, twenty-two years before the debt at issue was incurred. There are no facts alleged that the transfer of the property into the Trust twenty-two years before the debt was incurred was an attempt to avoid a debt to a creditor. Therefore, having found no resulting trust existed, the trial judge properly allowed the motion to dismiss Hillcrest's reach and apply claim."

Berkshire Healthcare Systems, Inc. v. Hagley, et al. (Lawyers Weekly No. 13-031-23) (5 pages) (Ginsburg, P.J.) (Western District) Appealed from a decision by Pasquariello, J., in Pittsfield District Court. Douglas J. Rose for the plaintiff; Jeremia A. Pollard, of Hannon Lerner, P.C., for the defendants (App. Div. No. 22-ADCV-08WE) (Aug. 22, 2023).

Negligence

Motor vehicle accident – Damages

Where a defendant driver was awarded summary judgment in a negligence suit over a traffic accident, that judgment must be vacated in part, as the issue of damages remains in dispute.

"This case involves the plaintiff's appeal from the allowance of the defendant's motion for summary judgment. The plaintiff's complaint was initially filed on June 18, 2019, alleging negligence by the defendant when the defendant struck the plaintiff's car from behind on July 3, 2018, in Boston. …

"The nub of the plaintiff's underlying claim is that her car was struck from behind by the defendant while she was driving on Storrow Drive in Boston. As a result, she asserts that her car suffered $6,526.21 in damages. She states that her insurance company, Geico, paid her $5,526.21 for the damages but not for her policy-based deductible of $1,000. When the defendant's insurance company, Progressive Direct Insurance Company, refused to pay the plaintiff's deductible, she filed suit, seeking the full amount of her damages as well as the loss of a 'good driver credit' from her insurance company. …

"The plaintiff claims that the motion judge improperly allowed the defendant's motion for summary judgment because the judge concluded that the plaintiff would be unable to prove the essential element of damages at trial. … She asserts that, as to the unpaid deductible, it remained unpaid as of the hearing on the motion for summary judgment. Regarding the loss of the good driver credit, she maintains that the motion judge was wrong to conclude that evidence showed that that loss was speculative at best. …

"The parties agree that the question of who bears liability for the automobile accident in this case remains a live issue. There is also no dispute that the plaintiff was not paid the full measure of damages to her automobile by her insurer. Thus, the focus of the dispute here is whether the plaintiff can prove damages at trial. A review of the pleadings and filings in this case shows that the issue of damages remains in dispute. Simply put, the plaintiff has produced evidence that shows she has yet to be made whole. The fact that the defendant offered the plaintiff to pay her deductible (and even tendered the disputed amount to her attorney) did not resolve the issue of damages. The defendant cites no law, and this Division is aware of no case law, that requires a party to accept an offer of settlement. … Thus, a genuine issue of material fact remains present. …

"Because the motion judge here allowed the defendant's motion for summary judgment conditionally, this Division must go on to consider the viability of that as a legal alternative. The defendant has not provided, and we are unaware of, any case in this or any other jurisdiction either permitting or prohibiting a 'conditional' summary judgment. The only case potentially relevant to that issue is *Morgan v. Evans*, 39 Mass. App. Ct. 465 (1995). There, in connection with a property line dispute, the trial court judge had ordered the case be dismissed on report from the parties that they had reached a settlement. The judge specified that the dismissal would be vacated upon filing by the parties of an agreement for judgment within sixty days. No agreement was ever filed. … On a subsequent appeal, the defendant argued that the earlier dismissal was with prejudice. However, the Appeals Court ruled that because there was never an adjudication on the merits of the case, the dismissal was without prejudice. ... By its nature, a

Continued on page 31

MASSACHUSETTS Lawyers Weekly ESTABLISHED 1972 STATEWIDE GENERAL CIRCULATION

617-451-7300 masslawyersweekly.com

PUBLISHER / EDITOR-IN-CHIEF
Susan A. Bocamazo, Esq. Ext. 8191
sbocamazo@lawyersweekly.com

EDITOR
Henriette Campagne, Ext. 8192
hcampagne@lawyersweekly.com

NEWS REPORTERS
Patrick Murphy, Esq.
pmurphy@lawyersweekly.com

Kristopher R. Olson, Esq. Ext. 8188
kolson@lawyersweekly.com

DIGITAL EDITOR
Matthew Cove, Ext. 8152
mcove@lawyersweekly.com

ADVERTISING DIRECTOR
Renee Baldwin
804-292-7412
rbaldwin@lawyersweekly.com

BUSINESS DEVELOPMENT CONSULTANT - CLASSIFIED
Buzz Farquhar, Ext. 8119
efarquhar@lawyersweekly.com

SENIOR MULTI MEDIA SALES EXECUTIVE
Elaine Fanning, Ext. 8222
efanning@lawyersweekly.com

MULTI MEDIA SALES EXECUTIVE
Yasmin Nasrullah, Ext. 8121
ynasrullah@lawyersweekly.com

REPRINTS
BridgeTower@EnVeritasGroup.com

CIRCULATION
1-877-615-9536
service@bridgetowermedia.com

Designated as an authorized source for the publication of all rules of court and other notices by the:
- Supreme Judicial Court,
- Appeals Court of Massachusetts,
- Superior Court Department,
- Probate and Family Court Department,
- Boston Municipal Court Department,
- District Court Department, and
- Land Court Department.

Designated by the Board of Bar Overseers as an authorized source for the publication of all rules and official notices of the board.

POSTMASTER: Electronic ACS Service Requested
Send address changes to:
Subscription Services
P.O. Box 1051
Williamsport PA 17703-9940
Periodical Postage Paid at Boston, MA.

Member of New England Newspaper & Press Association.
Massachusetts Lawyers Weekly, 40 Court St 5th Fl, Boston MA 02108 (ISSN 01967509) USPS (Permit #950-640) Boston MA is published weekly (Monday).
Editorial/Advertising: 617-451-7300 | Editorial Fax: 617-249-0708 | Advertising Fax: 617-249-0708 | Circulation: 1-877-615-9536 | service@bridgetowermedia.com
For a new subscription go to: https://masslawyersweekly.com/subscribe/. To renew your subscription, change your address, manage your account go to: https://masslawyersweekly.com/manage-account-fc/. For all circulation matters, you can also call 877-615-9536 or email us at service@bridgetowermedia.com, or by mail Subscription Services, PO Box 1051, Williamsport, PA 17703-9940.

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

DISTRICT COURT/ BMC APPELLATE DIVISION

summary judgment decision is one on the merits. Thus, *Morgan* does not support the proposition that a summary judgment motion may be allowed conditionally.

"Finally, as to the motion judge's decision to allow summary judgment on the plaintiff's claim of damages for the loss of her good driver credit, the judge was correct. The plaintiff's deposition showed that damages flowing from the claim of loss of a good driver credit was speculative at best. Her testimony (that the amount of the credit and stated reason for the loss of it were due to the July, 2018 accident) was admittedly an assumption on her part and based upon hearsay. Such evidence is insufficient to show that she was damaged by the defendant (as opposed to something else) and the extent of the damages, if any. …

"Based upon the foregoing, the conditional summary judgment as to the damages to the plaintiff's vehicle is vacated. Summary judgment as to the issue of the good driver credit is affirmed. This matter is returned to the trial court for further action consistent with this opinion."

Safi v. Moran, et al. (Lawyers Weekly No. 13-033-23) (6 pages) (Fabbri, J.) (Northern District) Appealed from a decision by Gaffney, J., in Lawrence District Court. Walter H. Jacobs and Alexandria A. Jacobs for the plaintiff; Clarence V. LaBonte III for defendant Hector J. Moran (App. Div. 21-ADCV-103NO) (Aug. 21, 2023).

LAND COURT

Real property

Easement – Fences

Where a plaintiff owns a lot located along Elmwood Avenue in Oak Bluffs, chain link and wooden stockade fences have been in place long enough to extinguish the plaintiff's easement to pass over Elmwood Avenue.

"A large portion of the East Chop section of the town of Oak Bluffs, on Martha's Vineyard, was at one time owned by the Vineyard Grove Company (VGC). VGC recorded a series of plans, starting in 1871, that divided this area into more than 2,000 lots, with accompanying roads and park areas. These plans, known colloquially as the 'Highlands plans,' form the basis for most of the house lots in this area. The problem for the property owners, surveyors, title examiners, and this court is that the Highlands plans were, to put it charitably, not precisely surveyed. As a result, over time there are disputes over the boundaries of the current lots and roads in the areas. …

"This is one such dispute. The parties here all own homes along Elmwood Avenue, a street shown on the Highlands plans. Their properties all derive from lots shown on the Highlands plans. The plaintiff Patricia Egan objects to a stone wall that defendants Barbara J. Seidman and Kimberly Fuson constructed at the edge of their property across Elmwood Avenue from Ms. Egan, maintaining that the stone wall encroaches into the layout of Elmwood Avenue. Ms. Egan also objects to certain fences and objects constructed or placed by defendants Reginald A. Nunnallly, and Kathlean Nunnally (together, the Nunnallys) that she also maintains encroach on Elmwood Avenue. The defendants respond that the wall, fence, and other objects lie within their properties, not Elmwood Avenue. This dispute requires determining just what the boundaries of Elmwood Avenue are, and where it lies. After trial, I find that the eastern bound of Elmwood Avenue is as claimed by Ms. Egan. The western bound, however, presents a more difficult challenge. I find that it is on a line parallel to the eastern bound running through a point five feet west of the utility pole near the stone wall. This means that Ms. Seidman and Ms. Fuson must relocate their stone wall to the west of that line, and the Nunnallys must remove the stone obstacles lying within Elmwood Avenue. I further find that the Nunnallys' chain link and wooden stockade fences have been in place long enough to extinguish Ms. Egan's easement to pass over Elmwood Avenue where they lie. …

"There is no genuine factual dispute over whether the Egan property benefits from an easement over Elmwood Avenue. The remaining question is the extent of that easement. There is sufficient evidence to support a finding that the Egan property benefits from an implied easement over the entirety of Elmwood Avenue through common scheme. …

"Based on the deeds in the Egan chain of title and the Highlands plans, Ms. Egan has satisfied her burden of proving that VGC intended for the Egan property to benefit from an easement over Elmwood Avenue. …

"As to scope, the Egan property benefits from a general right of way to pass and repass over Elmwood Avenue in both directions, on foot or by vehicle, as necessary for the full enjoyment of the Egan property. …

"Almost all of the Seidman-Fuson stone wall (the stone wall) is located within the layout of Elmwood Avenue, and directly abuts the existing traveled way. The stone wall constitutes an obstruction to Ms. Egan's easement rights to pass and repass Elmwood Avenue. Therefore, the stone wall must be removed or relocated. If relocated, all portions of the stone wall must fall to the west of the westerly bound of Elmwood Avenue, i.e., five feet west of the 'Utility Pole' nearest to the Seidman-Fuson property as shown on the Silva plan. …

"Although they are not displayed on the Silva plan — they were placed after the plan was created — based on the evidence it appears that the Nunnally boulders lie within the layout of Elmwood Avenue. The Nunnally boulders constitute an obstruction to Ms. Egan's easement over Elmwood Avenue and they must be removed or relocated. If relocated, all portions of the boulders must lie west of the westerly bound of Elmwood Avenue, outside of the layout of Elmwood Avenue. …

"Like the preceding obstructions, the Nunnally chain link fence is located within the layout of Elmwood Avenue. However, by maintaining the chain link fence in place for more than twenty years, Mr. Nunnally has extinguished whatever easements once existed over the area enclosed by the chain link fence. …

"The Nunnally chain link fence has been in place since at least 1966, and it does not bar passage completely. However, it is inconsistent with the use of the easement, including walking and driving. There is no evidence of a gate in the portion of the chain link fence that lies within the layout of Elmwood Avenue. Therefore, since the Nunnally chain link fence has existed in its present state for well over the twenty year prescriptive period and has excluded all others from using that portion of the layout of Elmwood Avenue for the entire time, all easements are extinguished for use of the area of the Elmwood Avenue layout over the area enclosed within the Nunnally chain link fence. The Nunnally chain link fence may remain in place. …

"Some of the Nunnally stockade fence is located within the layout of Elmwood Avenue. The portions of the Nunnally stockade fence that lie within the layout of Elmwood Avenue would constitute an obstruction to Ms. Egan's easement over Elmwood Avenue, unless, like the chain link fence, they were in place for twenty years without objection. I find that the Nunnally stockade fence was built in 1997, and was in place for 20 years before this action was filed in the Superior Court on November 8, 2017. No other objection to the fence was made before the filing of the complaint. The Nunnally stockade fence may remain in place. …

"For the foregoing reasons, judgment shall enter declaring that (a) the eastern boundary of Elwood Avenue is as shown Silva plan, (b) the western boundary of Elmwood Avenue is parallel to the eastern boundary of Elmwood Avenue, set back five feet west of the utility pole adjacent to the Seidman-Fuson property, (c) Ms. Egan has an easement to pass and repass over Elmwood Avenue, (d) Ms. Egan's easement to pass and repass over the portions of Elmwood Avenue enclosed by the Nunnally chain link fence and the Nunnally stockade fence have been extinguished, and ordering that (e) Ms. Seidman and Ms. Fuson remove or relocate their retaining wall from the layout of Elmwood Avenue and (f) the Nunnallys remove or relocate the stone boulders from the layout of Elmwood Avenue. …"

Egan v. Seidman, et al. (Lawyers Weekly No. 14-089-23) (24 pages) (Foster, J.) (Dukes Land Court) (Docket No. 18 MISC 000564) (Aug. 31, 2023).

Real property

Settlement – Mutual mistake

Where a plaintiff has brought an action to enforce a settlement agreement regarding a neighboring driveway in Malden, the plaintiff is not entitled to specific performance, as the settlement agreement is invalid because it calls for a boundary "alteration" between two non-conforming lots that would produce an illegal zoning outcome.

"In 2012, plaintiff Lydia M. Keane sued her then-neighbors, Dim Villarson and defendant Alexandra Jean Baptiste in this Court, in a case this decision will call *Keane I*. (Ms. Jean Baptiste is now known as Alexandra Senat; hereafter, this decision will refer to her by her current name.) In *Keane I,* Ms. Keane contended she'd acquired by prescription a driveway easement over Villarson and Senat's property at 1239 Salem Street in Malden, Massachusetts. Keane alleged the easement began near the front of her property at 1233 Salem Street, curved its way through 1239 Salem Street, and re-entered the backyard of 1233 Salem Street. Both properties are residential. Keane also claimed that in 2011, Villarson and Senat had built a fence (the 'First Fence') on the boundary between 1233 and 1239 Salem Street, blocking the driveway; Keane wanted the fence gone.

"In April 2013, the parties mediated their dispute. Mediation produced a written settlement agreement (the 'Settlement'), but curiously, *Keane I* wasn't dismissed until July 2016. (In the meantime, Mr. Villarson and Ms. Senat divorced, and Senat became the sole owner of 1239 Salem Street.) Nearly three years after dismissal of *Keane I*, Ms. Keane brought this action, in which she seeks to enforce the Settlement. …

"… Having considered what it saw on the view, having heard the parties' witnesses, having reviewed the exhibits admitted into evidence, having accepted the parties' stipulations of fact, and having heard the arguments of their counsel, the Court holds that Ms. Keane isn't entitled to specific performance of the Settlement, as the Settlement failed on account of mutual mistake in the summer of 2013. The parties' boundaries thus remain as their record title shows. Senat and Sanon are entitled to keep their fences, but no one's entitled to payment under the Settlement, and no one's entitled to injunctions against the other. …

"Defendants Senat and Sanon argued at trial that Ms. Keane isn't entitled to specific performance of the Settlement because it called on the parties 'to alter their property lines between their two homes,' and didn't require them (as Keane now requests) to grant Keane an easement. The Court agrees that Keane doesn't deserve specific performance, but for a slightly different reason: Senat and Sanon are entitled to void the Settlement on grounds of mutual mistake. The Court also agrees with Senat and Sanon that the neither the Settlement nor the parties' discussions in the summer of 2013 resulted in something that has enough particulars to lend itself to a court order of specific performance.

"Courts have refused to enforce contracts involving conveyances of real estate (including settlement agreements calling for such conveyances, see *Shue v. Broadhurst*, 31 LCR 342, 343 (2023) (Vhay, J.)) under the doctrine of mutual mistake when all contracting parties are ignorant of a zoning restriction that 'goes to the nature of the property.' …

"This case presents the same problem as in *Shue*. Like the *Shue* settlement, the Settlement here has three chief purposes: to (1) resolve *Keane I* in a mutually satisfactory manner; (2) convey land from the *Keane I* defendants to Ms. Keane, in exchange for stated consideration; and thereafter (3) allow the parties to use their land (or newly acquired lands) for all lawful purposes. The *Keane I* parties didn't realize until long after signing the Settlement that the City of Malden's zoning laws prevented the parties from accomplishing the third aim of the Settlement if they tried to achieve the second. While the parties (to their credit) tried for years to salvage the Settlement, they didn't. Since the Settlement's call for a boundary 'alteration' between two non-conforming lots still would produce an illegal zoning outcome, Senat and Sanon have the right to have the Settlement declared void.

"If that were not enough, the Settlement lacks detail about the width or location of the land the parties promised to convey. …

"The trial record lacks sufficient evidence for the Court to identify what the parties intended to grant pursuant to the Settlement. Important details have been lost in the decade that's passed since the Settlement. By the time of trial in this case, Mr. Keane no longer owned what the Settlement calls 'his pickup truck.' There's no proof in the trial record of its dimensions, or what sort of path that vehicle would have needed in 2013 to traverse safely the slope from Salem Street to the Rear Gap. There's also no evidence in the record of where the surveyor spray-painted lines in the summer of 2013 or where he later placed stakes.

"The Court will thus enter judgment in favor of defendants Senat and Sanon, and against Ms. Keane, on both counts of Keane's complaint. …

"Judgment will enter in accordance with this decision. The parties may choose, of course, to resume negotiations over their uses of the Driveway, the future of 1239 Salem Street's encroaching walkway, and any other issues that concern them. This decision holds only that they are free of the Settlement and its terms. What they decide to do with their properties now, consistent with the City's zoning laws, is up to them."

Keane v. Senat, et al. (Lawyers Weekly No. 14-090-23) (12 pages) (Vhay, J.) (Middlesex Land Court) (Docket No. 19 MISC 000182) (Aug. 31, 2023).

Opinion

End-of-term Supreme Court cases include new legal term, car metaphors and pictures

By Ken Bresler

The Commerce Clause is right there in the U.S. Constitution, authorizing Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The dormant Commerce Clause does not appear in the Constitution but is implied. And now Justice Neil M. Gorsuch has devised the phrase "the (wakeful) Commerce Clause," by which he means — the Commerce Clause.

The phrase appears for the first time in a reported decision, in a case issued toward the end of the Supreme Court's 2022-2023 term.

Justice Gorsuch used the phrase in *National Pork Producers Council v. Ross*, which let stand a California law that bars in-state sales of pork from pigs that had been confined in a cruel manner. The major issue: Did the law affect interstate commerce in violation of the Commerce Clause?

The majority opinion discussed "what has come to be called the dormant Commerce Clause. Reading between the Constitution's lines … this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also contain[s] a further, negative command, one effectively forbidding the enforcement of certain state [economic regulations] even when Congress has failed to legislate on the subject."

In that context, Justice Gorsuch distinguished between the Commerce Clause and the dormant Commerce Clause by writing: "Under the (wakeful) Commerce Clause, that body [Congress] enjoys the power to adopt federal legislation that may preempt conflicting state laws."

And the point in creating the phrase is what? Has anyone had trouble distinguishing between the Commerce Clause and the dormant Commerce Clause?

Justice Elena Kagan continues to be the breeziest writer on the high bench, but I'm not sure if her catchphrases will become dated — and hard to understand in years to come.

In her dissent to *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, Justice Kagan used "m.o." without explaining that it stands for "modus operandi." In *Biden v. Nebraska*, the student loan forgiveness case, Kagan dissented: "Today's decision … moves the goalposts … ."

In the same dissent, Justice Kagan used "tell" as a noun, as in a poker player's change in behavior or demeanor to reveal the player's assessment of the strength of a hand. (Think of a "telltale sign.") Justice Kagan wrote: "The tell comes in the last part of the majority's opinion." It may be the first use in a Supreme Court opinion or any reported case of "tell" as a noun. But it's hard to, well, tell because even searching for "the tell" or "a tell" retrieves uses of "tell" as a verb.

Justice Kagan immediately continued on to another metaphor: "When a court is confident in its interpretation of a statute's text, it spells out its reading and hits the send button." In two successive sentences, Justice Kagan evoked poker and email.

What else did Justice Kagan say about the court's majority? "It blows through a constitutional guardrail intended to keep courts acting like courts." Four pages later, she objected that the court did not "stay in its lane."

Justice Amy Comey Barrett, in her concurrence in the same loan forgiveness case, also used motor vehicle metaphors. She wrote, "We have also pumped the brakes" on decisions by administrative agencies.

Well, not exactly. Pumping the brakes is what a driver does. The Supreme Court, sitting in the passenger's seat or even in another vehicle, reached its legs across the legs of the administrative agency in the driver's seat and pumped the brakes for it. Barrett also used "greenlight" as a synonym for "approve."

"Greenlight" is new in Supreme Court opinions; Justice Kagan used it in dissents in 2021 (*Whole Women's Health v. Jackson*) and 2022 (*Federal Election Commission v. Cruz*). Justice Stephen Breyer also used it in a 2022 dissent (*Dobbs v. Jackson Women's Health Organization*).

So far, "greenlight" as a synonym for "approve" carries a whiff of disapproval in Supreme Court decisions; it hints at danger at what greenlighting will bring.

In the student loan forgiveness case, Justice Kagan seemed to initiate a round of conversation using the word "wheelhouse," meaning the locus of one's skills or authority. (She used "wheelhouse" twice in her dissent in *West Virginia v. EPA* in 2022.) In her 2023 dissent, she wrote: "Student loans are in the Secretary [of Education]'s wheelhouse." Justice Barrett wrote in concurrence that "[a] nother telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse."

Bresler's Legal LINGO

The majority opinion, rebutting Justice Kagan's argument and putting "wheelhouse" in quotation marks, wrote that "it would seem more accurate to describe the [student loan forgiveness] program as being in the 'wheelhouse' of the House and Senate Committees on Appropriations."

> Justice Elena Kagan continues to be the breeziest writer on the high bench, but I'm not sure if her catchphrases will become dated — and hard to understand in years to come.

The end-of-term decisions also seemed to be a conversation among justices using the phrase "straw man" and variations on it. What's a straw man argument? Distorting the argument of one's opponent so that it is weak or extreme and as easy to knock down as an effigy made of straw. The action connected with a straw man that I'm familiar with is "knock down": One sets up a straw man for the purpose of knocking it down.

In the 2023 affirmative action case, *Students for Fair Admissions v. President & Fellows of Harvard College*, Justice Sonia Sotomayor used a different verb. She wrote in her dissent that the majority opinion "attacks a straw man."

Justice Ketanji Brown Jackson used still a different verb in her dissent. She wrote that Justice Clarence Thomas "ignites too many more straw men to list, or fully extinguish." (Justice Thomas wrote a concurrence.) Did Justice Brown Jackson expand the idiom on purpose? I don't know.

"Strawman" is a verb, too. Justice Thomas, in his dissent in a different case, had this to say: "After thus straw-manning Alabama's arguments at the outset, the majority muddles its own response." That was in *Allen v. Milligan*, the electoral redistricting case at the end of the court's term.

Is it one word or two? "Straw man" and "straw men"? Or "strawman" and "strawmen"? Is it hyphenated? "Straw-man" and "straw-men"? In 2023, the expression was two words in Justice Sotomayor's dissent in the affirmative action case. In 2022, it was one word in her dissent to *Kennedy v. Bremerton School District*, the case of the praying high school football coach. It is hyphenated in Justice Thomas' dissent in the 2023 redistricting case.

Are these the justices' personal preferences to which the court's Reporter of Decisions is deferring? Is the Reporter of Decisions changing its institutional mind from case to case, or not paying attention? I don't know.

The Supreme Court's end-of-term decisions were notable for things that are not words: bullet points and graphics. In the affirmative action case, Justice Brett M. Kavanaugh used five bullet points in his concurrence. They've appeared before in Supreme Court decisions, but they're rarer than they should be in legal writing.

The majority opinion about Vanity Fair's use of an Andy Warhol portrait of the late singer Prince included 11 images, including the photograph by the photographer-respondent, Warhol's purple silkscreen portrait as it ran in Vanity Fair, and a Campbell's soup can by Warhol. The appendix had 16 images of Prince. Justice Kagan's dissent contained eight images, including three reclining female nudes, one each by Giorgione, Titian and Edouard Manet. Most of the images in the case's various opinions were in color.

Another intellectual property case, *Jack Daniel's Properties v. VIP Products*, had four photographs. Justice Gorsuch's plurality opinion in *Mallory v. Norfolk Southern Railway Co.* had a color graphic detailing the railway's operations. The appendix to Justice Thomas' dissent in *Allen v. Michigan* had 11 electoral district maps. "A picture (or two) … is worth a thousand words," wrote Justice Kagan in her dissent in the Warhol case.

An Andy Warhol portrait of the singer Prince that made it into a Supreme Court decision

When I first learned legal writing decades ago, writers who were aware of the power of language to include or exclude made an effort to use "his or her" instead of "his." It was a significant development in legal and other writing.

With the fairly recent realization (at least by some people) that not every person fits into the binary categories of he or she, the word "they" became the genderless singular pronoun, at least for some. Thus, writing came to mimic colloquial speech in using "they" and its variations to designate an unspecified or generic person.

I'm not saying that the Supreme Court used the singular "they" for the first time in its affirmative action opinion (I don't read every Supreme Court case), but it is the first time I've noticed it. The last substantive paragraph of the opinion states that universities "have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin." An individual is a "they."

Justice Sotomayer also used "they" in the singular. Her dissenting opinion said that the majority opinion "does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred." "Any student" is a "they" whose possessive pronoun is "their."

The court majority and some people who laud the opinion see it as an advance, a way to implement a colorblind society. The dissenters and people who decry the opinion see it as a retreat from inclusion. But the subtle language in the majority and a dissenting opinion (whether or not the writers used it on purpose) incrementally advanced inclusion. MLW

Ken Bresler writes about legal and other writing at ClearWriting.com.