

# LAW REPORTER

VOLUME 50, NUMBER 1

FEBRUARY 2007

## SPOTLIGHT

Successor company held liable for girl's death caused by runaway fire hose, 29

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~ ENDOWED BY SIDNEY GILREATH ~

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The endower, Sidney Gilreath, has no control over the placement of information or the editorial content of the *Law Reporter*.

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# LAW REPORTER

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# RECENT CASES

## ADMIRALTY

### **Oil rig worker falls down crew boat stairwell: Failure to properly inspect, maintain vessel: Herniated disks: Cauda equina syndrome: Settlement.**

*St. Cyr v. Aramark US Offshore Servs., Inc.*, Tex., Harris Co. 11th Jud. Dist., No. 2005-33083, Apr. 24, 2006.

St. Cyr, 56, was a maintenance worker on an offshore oil rig. When his shift ended, he boarded a crew boat returning to the mainland. As the boat approached the jetties, St. Cyr stood up. The boat made a sudden movement, causing St. Cyr to stumble and fall down a stairwell. He was initially diagnosed with minor bruising but returned to the hospital a week later, complaining of back, hip, and leg pain. St. Cyr's pain was treated conservatively for several months without success. He then underwent lumbar spine decompression surgery to treat herniated disks at L4-5. Complications from the surgery caused infection and weight loss, and St. Cyr was hospitalized for several months and underwent several more surgeries to treat the complications. St. Cyr was eventually diagnosed with cauda equina syndrome, a nerve injury, as a result of the complications. His past medical expenses were covered by his employer, and he claimed about \$2.1 million in future medical costs. St. Cyr, who had been earning about \$9.50 hourly, is unable to return to work. He claimed about \$245,000 in past and future lost wages.

St. Cyr sued his employer and an affiliated company, the owner of the rig where he had been working, and the owner of the boat on which he fell. Suit against his employer and its affiliate alleged they had a duty to provide a safe means of transportation to and from the work site, which included a duty to inspect the crew boat. Suit also claimed negligent failure to coordinate plaintiff's medical care and alleged plaintiff was entitled to maintenance and cure. Plaintiff's suit against the oil rig's owner alleged it had a nondelegable duty to ensure that third-party vessels transporting workers were safe and seaworthy. Suit against the crew boat's owner alleged it had a duty to provide safe passage. Plaintiff claimed the owner should have installed a chain or other guard in front of the stairwell where he fell.

Defendants claimed plaintiff fell while sleepwalking

or, alternately, that he was not looking where he was walking when he fell. The employer and affiliate claimed they had no duty to employees on third-party vessels. These defendants also argued plaintiff's doctors negligently treated him. The crew boat owner claimed the boat passed multiple inspections before plaintiff's fall. The rig owner denied involvement in the hiring of plaintiff or the crew boat and claimed it thus had no duties to plaintiff. Defendants also designated plaintiff's orthopedic surgeon as a "responsible third party" under state law.

The parties settled during pretrial mediation for about \$1.5 million. Defendants' contributions to the settlement are confidential.

Plaintiff's expert witnesses were Don Green, U.S. Coast Guard regulations, and Tom Mayor, economics, both of Houston, Tex.; Joe Grace, crew boat operations procedures, Sugar Land, Tex.; and Alex Willingham, life-care planning, and Dan Bagwell, life-care planning, both of San Antonio, Tex.

Defendants' expert witnesses in this case included Ronald L. Campana, manner and method of injury, New Orleans, La.; Edward G. Webster, marine engineering and naval architecture, Metairie, La.; and Robert Fulford, independent medical examination; Gerald Goodman, healthcare consulting and management; and Zvi Kalisky, physical medicine and rehabilitation, all of Houston, Tex.

*Plaintiff's Counsel*

**Brian Beckcom,**

**Vuk Steven Vujasinovic,** and

Charles Livingston, all of Houston, Tex.

Documents in this case are available through the Court Documents section in the back of this issue, courtesy of plaintiff's counsel.

## ATTORNEYS

### **Attorney who violated state ethics rule by practicing in state without bar admission may not be admitted to federal court *pro hac vice*.**

*Mar-Vel Intl., Inc. v. Milnes*, 2006 WL 2191462 (E.D. Pa. Aug. 1, 2006).

A federal district court in Pennsylvania denied an attorney's motion for admission *pro hac vice* where the attorney was violating a practice rule of that state.

Bold formatting of plaintiff's counsel indicates that the attorney is an AAJ member. To obtain additional information about a case report, contact counsel through your AAJ membership directory.

Here, Vogel, a member of the New York state bar, lives in Pennsylvania. He was listed as the “managing administrator” of a satellite office of a Philadelphia law firm. As part of his work with the firm, Vogel began work on a case in Pennsylvania federal court, and another attorney moved for his admission *pro hac vice* to the U.S. District Court for the Eastern District of Pennsylvania.

Denying the motion, the court found that Vogel had established a “systematic and continuous presence” for practicing law in Pennsylvania, in violation of the state rules of professional conduct. To allow Vogel admission before the federal courts in Pennsylvania would enable him to expand his unlicensed practice in the state and evade continuing education requirements. Because Vogel’s practice of law in the state violates a state ethics rule, the court said, “considerations of comity and respect for the mechanisms of the Pennsylvania Supreme Court make it inappropriate for this court to grant the pending application.”

## AUTOMOBILE ACCIDENTS

**Disabled vehicle rear-ended in gore area: Failure to keep proper lookout: Fractured vertebra, scapula: Brain injury: Settlement.**

*Prada-Camargo v. Minniefield*, Ga., settled before filing, Mar. 24, 2006.

Prada-Camargo, 63, was test-driving a vehicle on a highway when he experienced car trouble. He stopped the vehicle in the gore area—the area between continuing lanes of travel and a diverging or merging lane—where it was rear-ended by another vehicle that crossed the solid white lines separating the gore area from the travel lane. Prada-Camargo suffered a fracture at C-2, a fractured scapula, and a mild traumatic brain injury that caused memory loss. He incurred about \$14,900 in medical expenses. Prada-Camargo, who worked in technical support and earned \$34,000 annually, was out of work for five months. He did not claim lost income.

Prada-Camargo claimed that the driver of the other vehicle failed to keep a proper lookout in that he was looking over his shoulder instead of watching the road.

The parties settled before suit was filed for a confidential amount.

*Claimant’s Counsel*

**Adam Malone**, Atlanta, Ga.

**Michael V. Kaplen**, New York, N.Y.

*Comment:* In *Martin v. Daniel*, Ga., Fulton Co. Super., No. 2005CV107307, Feb. 1, 2006, Martin, 56, was stopped on

his motorcycle at a stop sign at the top of a highway exit ramp. He was struck from behind by a car driven by Daniel. Martin was thrown from his motorcycle and suffered a closed head injury and a broken right ankle that required insertion of a plate and pins, among other injuries. He incurred about \$80,000 in past medical costs, with an undetermined amount in future medical expenses. Martin had been a police officer but was forced to take early retirement following the collision. He did not claim lost income. Martin sued Daniel, alleging failure to keep a proper lookout and failure to stop at a stop sign. The parties settled before trial for a confidential amount. Martin was represented by Mr. Malone and **Edwin Marger**, Jasper, Ga.

In *Davis v. B&D Towing, Inc.*, Ga., Clayton Co. Super., No. 2005CV07484D, Feb. 3, 2006, Davis, 48, was driving when a tow truck crossed the centerline and struck her vehicle head-on. Davis, who had been an elder care provider earning minimum wage, was killed instantly. Her estate claimed about \$200,000 in lost income. Davis is survived by her husband, two adult children, two adult stepchildren, and three minor grandchildren. Davis’s husband sued the tow truck’s driver and the driver’s employer, the truck’s owner. Suit against the driver alleged he failed to maintain control of his vehicle. Suit against the truck’s owner alleged vicarious liability. Defendants denied that they had been negligent. The parties settled for \$1 million, defendants’ joint policy limits, before trial. Plaintiff in this case was represented by Mr. Malone and **Sheryl L. Burke**, Atlanta, Ga.

**Car pulls out in front of motorcycle: Failure to yield right-of-way: Negligent hiring, retention: Disk protrusion, desiccation: Settlement.**

*McIlroy v. Veber*, Cal., Los Angeles Co. Super., No. BC328659, May 25, 2006.

McIlroy, 33, was riding his motorcycle through an intersection when a car pulled out directly in front of him. He broadsided the car and was thrown from the motorcycle. McIlroy suffered broadbased lumbar disk protrusion at L5-S1, requiring a spinal fusion, and a bulge and disk desiccation at L4-5, which will require surgery in the future. He also sustained multiple contusions and chipped teeth. He incurred about \$197,200 in past medical expenses and lost wages, with an additional \$15,000 to \$20,000 in anticipated future medical costs. McIlroy, a graphic designer earning about \$50,000 annually, was out of work for a total of five weeks, with an additional four weeks of working only part-time.

McIlroy sued the driver of the car that struck him and the driver’s employers, who owned the vehicle. Suit

against the driver alleged failure to yield the right-of-way. Suit against the driver's employers alleged vicarious liability and negligent hiring and supervision.

Defendants claimed plaintiff was speeding and not keeping a proper lookout.

The parties reached a settlement before trial for about \$1.12 million. Of that amount, the vehicle's owners paid \$1.1 million, and the driver paid \$15,000.

Plaintiff's experts were Shawn Kimura, chiropractic care, Los Angeles, Cal.; Sam Bakshian, spinal surgery, Beverly Hills, Cal.; and Ed Cababa, accident reconstruction, Yorba Linda, Cal.

Defendants' expert was Arthur Kreitenberg, orthopedics, Los Angeles, Cal.

### *Plaintiff's Counsel*

**Brian J. Panish**, Los Angeles, Cal.

Jeffrey I. Pheffer, Los Angeles, Cal.

*Comment:* In *Doyle v. Mech. Analysis/Repair, Inc.*, Cal., Fresno Co. Super., No. 05 CE CG 01102 AMS, Oct. 14, 2005, Doyle, 76, was driving through an intersection when a truck ran a red light and collided with the driver's side of her vehicle. Doyle suffered a chest/lung effusion that required a thoracentesis, a closed head injury with right temporal hemorrhage, and multiple fractures. She also sustained an eye injury and has continuing problems with gait and lack of coordination. She incurred about \$122,400 in medical expenses and faces an unspecified amount in future medical costs. Her future life-care plan is estimated at about \$471,700. A retiree, Doyle did not claim lost income. She sued the truck's driver, alleging failure to stop at a red light, and the driver's employer, which owned the truck, alleging vicarious liability. The parties settled before trial for \$2.5 million, paid by defendants' insurance carriers. Plaintiff's experts included Randall C. Epperson, neuropsychology, Modesto, Cal.; Marianne Inouye, economics, Pasadena, Cal.; Sharon K. Kawai, physical medicine and rehabilitation, Fullerton, Cal.; Laura L. Liptai, biomedical engineering, Moraga, Cal.; and Jonathan Mueller, neuropsychiatry, San Francisco, Cal. Defendants' experts were John B. Edwards, rehabilitation and physical medicine, and Jim Flynn, accident reconstruction, both of Fresno, Cal.; Ralph Kieran, neuropsychology, Menlo Park, Cal.; and Linda D. Olzack, nursing, Merced, Cal. Plaintiff was represented by **Richard C. Watters**, Fresno, Cal.

In *Yee v. Dolgenercorp, Inc.*, Ga., Fulton Co. Super., No. 02VS041556E, Feb. 7, 2006, Yee, 32, was riding his motorcycle when he was struck head-on by a pickup truck making a left turn across his lane of travel. Yee suffered orbital facial fractures and a closed head injury that caused speech impairment and decreased vision in his left eye. Yee now has trouble moving his left arm and leg and cannot walk without assistance. He was hospitalized for six

months and is now cared for by his father, who had to quit his job to care for his son full-time. Yee incurred about \$500,000 in past medical expenses, and his future medical and life-care costs are estimated at between \$9 million and \$13.5 million. Yee had been a diesel mechanic earning about \$40,000 annually but is now unable to return to work. He claimed about \$1.5 million in lost earning capacity, plus \$500,000 in lost future fringe benefits. Yee's father, on his behalf, sued the driver of the pickup truck and her employer. Suit against the driver alleged failure to yield the right-of-way. Suit against her employer alleged vicarious liability. Defendants stipulated to liability shortly before trial but challenged plaintiff's estimated future medical costs. The parties settled before trial for \$15 million, which was paid into a qualified settlement fund. Plaintiff's experts included Herman A. Hill, accident reconstruction, Douglasville, Ga.; Carolyn W. Hidgon, life-care planning, Oxford, Miss.; Alan M. Harben, physical medicine, Roswell, Ga.; Francis W. Rushing, economics, Madison, Ga.; and Thomas E. Staats, neuropsychology, Shreveport, La. Defendants' experts included Joe W. Kent, accident reconstruction, Atlanta, Ga.; and Cathlin Vinett, life-care planning, Brentwood, Tenn. Plaintiff was represented by **Clark H. McGehee** and **William C. Lanham**, both of Atlanta, Ga.

### **Box truck turns in front of motorcycle: Failure to yield right-of-way: Vicarious liability: Wrongful death: Settlement.**

*Smith v. Taylor*, Ga., Cobb Co. Super., No. 04-A-8375-7, Feb. 1, 2006.

Smith, 36, was riding his motorcycle when a box truck turned in front of him. Smith collided with the truck and suffered internal injuries. He underwent emergency surgery but died of his injuries during the operation. His medical expenses and funeral costs totaled about \$82,600. Smith had been an assembly coordinator in charge of maintenance parts earning about \$40,300 annually, and his estate claimed about \$977,300 in future lost income. Smith is survived by his wife and 2-year-old daughter.

The driver of the box truck pleaded guilty to failure to yield the right-of-way.

Smith's wife, individually and on behalf of his estate, sued the driver of the box truck and its owner, the driver's employer. Suit alleged the driver failed to yield the right-of-way. Plaintiffs also claimed the driver was under the influence of marijuana at the time of the collision and attempted to conceal the presence of the drug in his system during a subsequent drug test. Suit against

the employer claimed it attempted to conceal the results of an initial drug test that was positive for marijuana in the driver's system. Suit also alleged vicarious liability and negligent hiring and retention.

Defendants claimed Smith was contributorily negligent in that he was speeding and did not have his headlight on at the time of the collision. The driver also claimed the marijuana in his system was due to his earlier exposure to secondhand smoke, not his use of the drug while driving the box truck.

The parties settled before trial for \$3 million.

Plaintiffs' expert witnesses were Vernon J. Henderson, emergency surgery, Atlanta, Ga.; Bill Kluge, accident reconstruction, Raleigh, N.C.; H. Horton McCurdy, toxicology, Conyers, Ga.; Francis W. Rushing, economics, Madison, Ga.; and John Brown, filaments, Marietta, Ga.

Defendants' experts were Bruce A. Goldberger, toxicology, Gainesville, Ga.; and David G. Brown, accident reconstruction, Atlanta, Ga.

*Plaintiffs' Counsel*

**Andrew C. Ausband**, Stockbridge, Ga.

**Tractor-trailer hits back of tow truck: Speeding: Failure to maintain control of vehicle: Negligent hiring, retention: Wrongful death: Settlement.**

*Baity v. Hungaro Transp., Inc.*, U.S. Dist. Ct., M.D.N.C., No. 1:05-cv-01025, May 9, 2006.

Baity, 51, was the operator of a vehicle towing service. After stopping on the side of an interstate to assist a disabled vehicle, Baity pulled his flatbed tow truck back onto the highway. As he drove down the interstate, his tow truck was rear-ended by a tractor-trailer allegedly going more than 75 m.p.h. Baity's tow truck was forced from the road, traveled up an embankment, and became airborne. Baity was thrown from the vehicle, which landed upside down on top of him, killing him instantly. He had been earning about \$29,000 annually. He is survived by his wife, one adult child, one minor child, and two stepchildren.

Baity's wife, on behalf of his estate, sued the driver of the tractor-trailer and its owner and lessor, for whom the driver was working at the time of the collision. Suit against the driver alleged speeding and failure to keep a proper lookout and maintain control of his vehicle, among other claims. Suit against the owner and the lessor of the tractor-trailer alleged respondeat superior and vicarious liability. Plaintiff also alleged negligent hiring and retention, arguing that defendants should have known, based on the driver's history of traffic violations, that he was unfit to drive tractor-trailers.

Defendants alleged Baity was contributorily negligent by driving too slowly on the interstate and failing to control his vehicle.

The parties settled during mediation for about \$3.63 million.

*Plaintiff's Counsel*

**W. Thompson Comerford Jr.**, Winston-Salem, N.C.

Alan R. Dickinson, Winston-Salem, N.C.

Daniel J. Park, Elkin, N.C.

*Comment:* In *Doe v. Texas Intl. Express, LLP*, U.S. Dist. Ct., E.D. Mo., confidential dkt. no., Apr. 18, 2006, Doe, 23, was stopped on a highway in rush hour traffic when his car was struck from behind by a tractor-trailer and pushed into the car ahead of him. Doe suffered severe head injuries from which he died 17 hours later. His predeath medical expenses totaled about \$75,100. Doe had recently graduated from college, and his family did not claim lost income. Doe is survived by his parents and one adult sister. Doe's parents sued the driver of the tractor-trailer and the driver's employer. Suit alleged speeding and failure to keep a proper lookout and avoid a collision. Plaintiffs claimed the driver had logged hours in excess of U.S. Department of Transportation regulations and altered his log books. Suit against the employer alleged vicarious liability and negligent training and supervision. The parties settled during pretrial mediation for about \$974,700. Defendants' joint insurance policy paid the entire amount. Plaintiffs' expert was Kenneth Thompson, log book violations, Louisburg, Kan. Plaintiffs were represented by **Steven P. Kuenzel**, Washington, Mo.

Documents in *Baity* and *Doe* are available through the Court Documents section in the back of this issue.

## AVIATION

**Airline is not liable under Warsaw Convention for failing to warn passenger of risk of deep vein thrombosis.**

*Camán v. Contl. Airlines, Inc.*, 455 F.3d 1087 (9th Cir. 2006).

An airline's failure to warn passengers of the risk of deep vein thrombosis on long-distance flights is not an "accident" under the Warsaw Convention, 49 U.S.C. § 40105, the Ninth Circuit Court of Appeals ruled.

Here, Camán developed deep vein thrombosis (DVT) while onboard a Continental Airlines flight from Los Angeles to Paris. He sued Continental under the Warsaw Convention, alleging defendant's failure to warn him of the danger of developing DVT on long flights constituted an "accident" under Article 17 of the

convention. The trial court granted defendant's motion for summary judgment, finding that it did not.

Affirming, the Ninth Circuit first looked to U.S. Supreme Court case law holding that an "accident" under the Warsaw Convention must be an "unexpected or unusual event or happening that is external to the passenger" and that caused the passenger's injury. Citing case law, the court here said developing DVT from air travel, without more, is not an accident under the convention because DVT is the passenger's internal reaction to normal aircraft operation.

The court next turned to plaintiff's assertion that defendant's failure to warn of the DVT risk was an Article 17 "event." Other circuits, the court noted, have declined to hold that failing to warn passengers about the risk of developing DVT satisfies the Court's definition of "accident," in part because there is no federal regulation requiring airlines to inform passengers of the risk. Consequently, the failure to provide such a warning is not "unexpected."

The court further differentiated between an accident under Article 17 and amelioratory action the airline could have taken to prevent passenger injury. Under Article 20(1) of the convention, a defendant can show it took all necessary measures to avoid injury as a defense to an Article 17 claim. Expanding the definition of an Article 17 accident to "include a failure to warn of a possible risk of flight would incorporate into Article 17 an inquiry that is properly left to analysis under Article 20(1) once it has been established that an accident has occurred," the court said. The operative consideration here is thus not whether defendant's failure to warn of the DVT risk was an accident under the convention, but whether it was an underlying, unexpected event that caused harm to plaintiff.

Because plaintiff has failed to show a qualifying event occurred to cause him harm, the court concluded, he has failed to show that an "accident" occurred under the convention and cannot state a claim under Article 17.

## CIVIL RIGHTS

### **Officers who handcuffed and pointed weapons at unarmed child during father's arrest are not entitled to qualified immunity.**

*Tekle v. United States*, 457 F.3d 1088 (9th Cir. 2006).

The Ninth Circuit Court of Appeals ruled that federal agents who pointed their guns at and handcuffed an 11-year-old boy while they were arresting his father are not entitled to qualified immunity.

Here, Tekle, 11, was taking out the trash at his house

when he was apprehended by 23 federal agents who had surrounded the house in preparation for arresting Tekle's father, for whom they had a warrant. The agents handcuffed Tekle and kept their weapons trained on him while his father was arrested inside the house. Tekle's mother, on his behalf, sued the United States and the agents involved, alleging violations of Tekle's Fourth Amendment rights, among other claims. The trial court granted defendants' motion for summary judgment, finding the officers were entitled to qualified immunity.

Reversing, the Ninth Circuit first looked to whether plaintiff's constitutional rights were violated. A determination of whether force was excessive under the Fourth Amendment, the court noted, requires that it balance the severity of the force employed against the need for the force. Citing case law holding that pointing a gun at a suspect can constitute excessive force even without resulting physical injury, the court held that here, the officers' training their weapons on an unarmed and cooperative 11-year-old child was an extreme use of force. Further, the court said, the use of such severe force was unnecessary in the circumstances, which required, at most, a minimal exertion of force to ensure the officers' safety. Thus, a reasonable jury could conclude that the force was excessive under these circumstances.

Turning to whether a reasonable officer would have known such force was excessive, the court noted that its own and other circuits' case law has established that the use of force is unconstitutionally excessive when employed against unarmed children. Consequently, the court held, a reasonable officer would have known that the actions here were unconstitutional, and defendants were thus not entitled to summary judgment on the basis of qualified immunity.

Finding similarly that the officers' use of handcuffs on Tekle, including picking him up from the ground using only the handcuffs' chain, was a clearly unreasonable detention in violation of Tekle's Fourth Amendment rights, the court remanded.

*Plaintiff's Counsel*

**A. Clifton Hodges**, Pasadena, Cal.

### **Girl taken from father's custody without warrant: Interference with parental relationship: Emotional distress: Verdict: Punitive damages.**

*Keller v. City of Stockton*, U.S. Dist. Ct., E.D. Cal., No. 2:04-cv-01325, Mar. 31, 2006.

Keller, 4, told her therapist that her mother had abused her. The therapist reported the suspected abuse to the police, who removed Keller from her mother's home

and placed her with her father. The officer allegedly instructed Keller's father to keep Keller despite the fact that the parents' custody order provided that Keller was to be with her mother that week. Four days later, a detective removed Keller from her father's custody without a warrant, taking her from the day care her father had arranged. Keller remained in foster care for over two years. Keller and her father both suffered emotional distress as a result of Keller's removal.

Keller's father, individually and on his daughter's behalf, filed suit in federal district court under 42 U.S.C. § 1983 against the city and the officers who removed Keller from her father's custody. Suit against the officers alleged violations of plaintiffs' Fourth and Fourteenth Amendment rights to be free from unreasonable interference with the family relationship. Plaintiffs argued the officers' seizure of Keller without a warrant was unconstitutional because the child was not in imminent danger of death or serious bodily harm. Plaintiffs asserted that the law governing the officers' actions was sufficiently clear that no reasonable officer could think removing a child without a warrant in the circumstances presented here would be legal. Suit against the city alleged it had a policy of not requiring police officers to secure a warrant before removing children from their homes, regardless of whether the children were in imminent danger. This policy, plaintiffs contended, was the driving force behind the officers' unconstitutional actions. The court ruled that the defendant officers were not protected by qualified immunity, holding that it was not available under the facts.

Defendants admitted the officers failed to obtain a warrant before removing Keller from her father's custody but argued they feared for her safety based on reports that her father was also abusive. Plaintiffs responded by establishing that Keller's parents were engaged in a lengthy custody battle in which both parties had made abuse accusations, which had been investigated and found to be unsubstantiated.

A jury awarded plaintiffs \$2.6 million, including \$1 million in punitive damages each to Keller and her father and compensatory damages of \$500,000 to Keller and \$100,000 to her father.

The trial court denied defendants' motions for a new trial and judgment as a matter of law. The court also denied defendants' motion for remittitur of the punitive damages award to Keller but granted the motion as to her father. His punitive damage award was thus reduced to \$100,000. Defendants' appeal is pending.

*Plaintiffs' Counsel*

David J. Beauvais, Oakland, Cal.

Documents in this case are available through the Court Documents section in the back of this issue.

## **Alien's Fourth Amendment claims of excessive force and unlawful arrest may go forward against border guard.**

*Martinez-Aguero v. Gonzalez*, \_\_\_ F.3d \_\_\_, 2006 WL 2242365 (5th Cir. Aug. 4, 2006).

The Fifth Circuit Court of Appeals held that an alien who was attempting to enter the United States may sue the border guard who detained her for false imprisonment and excessive force.

Here, Martinez-Aguero, a Mexican citizen, attempted to enter the United States to accompany her aunt to a government office. Her bus was stopped within the territorial United States but outside the port of entry, and a border guard refused Martinez-Aguero entry, claiming her visa had expired. When Martinez-Aguero requested to speak to someone in authority, the guard allegedly became belligerent and cursed at her. When she commented on his language to her aunt, the guard arrested her, in the process allegedly pushing her into a concrete barrier and striking her in the back. While detained, Martinez-Aguero suffered a seizure. She sued the border guard, alleging, among other claims, unlawful arrest and excessive force in violation of the Fourth and Fifth Amendments. The trial court denied defendant's motion for summary judgment, finding he was not protected by qualified immunity.

Affirming, the Fifth Circuit noted that because plaintiff is not a U.S. citizen, the first step in the qualified immunity analysis is to decide whether she is protected by the Constitution. Defendant's argument that plaintiff is not protected by U.S. laws because she was an alien attempting to enter the country illegally is unavailing, the court held, finding that the "entry fiction" doctrine denying aliens the protection of U.S. laws unless they have already crossed the U.S. border is applicable only in the immigration and deportation context, not for a claim of constitutional violations. Regardless of an alien's status, the court held, there are "no identifiable national interests that justify the wanton infliction of pain." Further, the court noted, case law instructs that claims of excessive force in the context of an arrest or other detention must be analyzed under the Fourth Amendment.

Turning to the question whether plaintiff has standing under the Fourth Amendment, the court employed the test set forth by the U.S. Supreme Court requiring aliens to have "substantial connections" with the United States to enjoy the protections of U.S. laws. Those connections, the court held, can be found in plaintiff's regular trips across the border to accompany her aunt and her "acquiescence in the U.S. system of immigration," which signals her voluntary acceptance of U.S. societal

obligations. Plaintiff is, therefore, eligible for the protection of the Fourth Amendment.

The court then analyzed defendant's claim of qualified immunity. Finding that plaintiff sufficiently alleged defendant's acts were a clear violation of her rights to be free from unlawful seizure and excessive force, the court also held that such rights have been clearly established, even as to aliens in disputes with border guards. Thus finding defendant ineligible for qualified immunity, the court remanded.

*Plaintiff's Counsel*

Jonathan Bridges, Dallas, Tex.

**Francisco X. Dominguez**, El Paso, Tex.

Suyash Agrawal, Houston, Tex.

Javier N. Maldonado, San Antonio, Tex.

**David Armendariz**, San Antonio, Tex.

## COMMERCIAL LITIGATION

**Directors pay themselves excessive amounts: Breach of fiduciary duty: Conspiracy: Lost income: Verdict.**

*Polsky v. Virnich*, Wis., Grant Co. Cir., No. 04 CV 285, Nov. 3, 2006.

Communications Products Corporation (CPC) was owned by Basic Products Corporation (BPC), which was owned by CePro, Incorporated. CePro was owned by companies created by Virnich, who was also CPC's vice president, chairman of the board, and a director at different times throughout CPC's history; and Moores, who was a director, treasurer, and assistant secretary of CPC at various times. During their tenures at CPC, Virnich and Moores, as managers of the company, allegedly arranged for CPC to pay them 3 percent of its net sales, regardless of the overhead. CePro also got paid management and directors fees.

Virnich and Moores also allegedly had CPC establish an "intercompany receivable" account that paid "dividends" from CPC to BPC above the capital contributions from BPC. This account was listed on CPC's balance sheet as an asset, even though Virnich and Moores allegedly did not intend to fully repay the amounts. In 2002, the intercompany receivable account paid about \$484,400 to BPC, which reduced CPC's assets by approximately \$500,000. In addition, Virnich and Moores allegedly established leasing trusts that leased equipment to CPC for amounts allegedly greater than market value. CPC paid the trusts about \$2.73 million for equipment when the underlying cost was allegedly only approximately \$695,500. From

1990 to 2003, Virnich and Moores allegedly misappropriated about \$10 million from CPC. CPC went into receivership in 2003, allegedly due in part to the actions of Virnich and Moores.

The receiver for CPC sued Virnich and Moores, alleging breach of the fiduciary duties of due care, loyalty, and good faith and waste of corporate assets. Plaintiff also alleged conspiracy.

Defendants contended they and the corporation were the same entity and thus their actions were proper. They also claimed they were entitled to the fees and payments because they provided valuable services to the company.

A jury awarded plaintiff \$6.5 million, including \$2.7 million for a finding that defendants conspired to harm the company.

Plaintiff's expert was Amy Seibel, accounting, Milwaukee, Wis.

*Plaintiff's Counsel*

**Robert J. Kasieta**, Madison, Wis.

A document in this case is available through the Court Documents section in the back of this issue, courtesy of Mr. Kasieta.

**Online fantasy baseball games do not violate major league players' rights of publicity.**

*C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Adv. Media, L.P.*, 443 F. Supp. 2d 1077 (E.D. Mo. 2006).

Ruling that major league baseball players do not have a right of publicity in their names and playing statistics, a U.S. district court in Missouri held a company may operate unlicensed online fantasy baseball games.

Here, C.B.C. Distribution and Marketing, Incorporated, requested a declaratory judgment that it has the right to use players' information to provide fantasy baseball games to the public, even though it does not have a license to do so. A rival company holding a license from the players' association to use players' names and statistics and the association counterclaimed, asserting that plaintiff is violating the players' right of publicity by exploiting their information. Both sides filed for summary judgment.

Granting plaintiff summary judgment, the court noted that Missouri recognizes the right of publicity, in which people's proprietary interests in their own endeavors are protected. To prove a violation of the right of publicity, a person must show that the accused commercially exploited the person's identity without consent to obtain a commercial advantage. The court first determined that plaintiff does not use the players' names with the intent of obtaining a commercial advan-

tage. Unlike cases in which a commercial advantage has been found, the court said, nothing about plaintiff's fantasy games suggests the players are associated with the games or endorse them. Further, plaintiff's use of the players' names and statistics is not designed to lure customers away from competitors because all fantasy-gaming sites provide the same information.

The court next evaluated whether plaintiff used the players' names as a "symbol of their identity." In this element, the court said, the significant inquiry is how the names were used. Here, the court found, plaintiff merely used the players' names and statistics without involving their characters or reputations. Thus, the court held counterclaimants have not proven the elements of a right of publicity violation.

Turning to whether plaintiff's use of the names and records contravenes the public policy considerations of the right of publicity, the court said plaintiff's actions do not interfere with the players' earning capabilities because they do not make a living from the publication of their statistics, which are readily available in the public domain. Finally, the court concluded that even had plaintiff's actions violated the players' rights to publicity, they would be protected by the First Amendment right to free expression.

*Plaintiff's Counsel*

Neil M. Richards,  
Rudolph A. Telscher Jr.,  
Douglas R. Wilner,  
Kara R. Yancey, and  
Molly B. Edwards, all of St. Louis, Mo.

## CONSUMER PROTECTION

### **Computer users unknowingly download spyware: Trespass to chattels: Deceptive trade practices: Computer damage: Settlement.**

*Sotelo v. DirectRevenue, LLC*, U.S. Dist. Ct., N.D. Ill., No. 1:05-cv-02562, June 19, 2006.

Software was downloaded onto Sotelo's computer that, unknown to him, allegedly contained "spyware" created by DirectRevenue, LLC, and distributed by a third party. The spyware allegedly tracked and reported Sotelo's Internet usage habits to DirectRevenue, which used the information to send unsolicited "pop-up" advertisements to Sotelo's computer. The spyware and related advertisements allegedly slowed Sotelo's computer and were extremely difficult to eradicate.

Sotelo, on behalf of a class of individuals in the state

who had downloaded DirectRevenue software, sued the company and its affiliate. Among other claims, suit alleged trespass to chattels, claiming that defendants' spyware programs intentionally interfered with and damaged plaintiffs' computers. Suit also claimed violations of the state consumer fraud act. Plaintiffs alleged that defendants' failure to disclose the presence or function of the spyware programs in the free software downloads constituted unfair and deceptive trade practices from which defendants profited.

Defendants contended in part that plaintiffs' claims were precluded because the presence and function of the software was disclosed in an end user agreement to which plaintiffs consented. The trial court denied defendants' motion to dismiss, holding that computer users could assert a claim for damage to their personal property. 384 F. Supp. 2d 1219 (N.D. Ill. 2005).

The parties reached a pretrial settlement in which defendants agreed not to collect personally identifiable information from computer users and to provide future users with a clear and detailed disclosure agreement that informs them of any software that may be contained within downloaded programs. Defendants also agreed to simplify the uninstall process and make customer service available to computer users having difficulty removing the programs. Plaintiffs also retained the right to sue defendants individually for monetary damages.

Plaintiffs' expert was Benjamin Edelman, computer spyware, Boston, Mass.

*Plaintiffs' Counsel*

**Shawn M. Collins**, Naperville, Ill.  
David J. Fish, Naperville, Ill.  
Norman B. Berger, Chicago, Ill.  
Michael D. Hayes, Chicago, Ill.

*Comment:* One member of the class has filed suit seeking monetary damages. That case is pending.

Documents in this case are available through the Court Documents section in the back of this issue.

### **Art dealer's statement about antique's period of origin creates express warranty.**

*Levin v. Dalva Bros., Inc.*, 459 F.3d 68 (1st Cir. 2006).

The First Circuit Court of Appeals ruled that a fine art merchant's statement to a nonmerchant that a piece is from a particular period is an express warranty under New York law.

Here, the Levins purchased several antiques from an antiques dealer. The dealer represented that the items were from particular periods. After learning that the antiques were worth much less than the value the deal-

er had assigned to them, the Levins sued the dealer, alleging, among other claims, breach of express warranty. A jury found for defendant.

Vacating the judgment in part, the First Circuit first found that a clock plaintiffs bought was “fine art” under the state cultural arts law, citing testimony that experts viewed it as such because of unusual decorative, painted panels that were a prominent feature of the piece. Case law suggests that nontraditional items such as vases and bowls can be construed as fine art under the statute, the court noted, finding that the artistic merit of the decorative panels elevated the clock to the status of fine art.

The court then turned to plaintiffs’ claim that the trial court erroneously instructed the jury that the breach of warranty claims should fail if defendant’s representation of the antiques’ periods of origin was merely opinion. Under state law, the court said, an art dealer’s representation to a layperson that a piece of fine art originated in a specific period creates an express warranty. The statute thus supplants the Uniform Commercial Code (UCC) in the area of fine arts, the court held, with the goal of protecting laypersons from misrepresentations by dealers who could otherwise avoid liability by claiming their statements about a piece’s value or origin were merely opinions, which are not actionable under the UCC. Here, the court found, defendant’s specific statements about the periods of origin of the antiques plaintiffs purchased are express warranties as a matter of law. The trial court’s instruction to the jury was therefore erroneous and did not constitute harmless error on the record available, the court concluded.

Accordingly, the court held that the judgment pertaining to plaintiffs’ express warranty claims must be retried.

### *Plaintiffs’ Counsel*

Anthony A. Scibelli,  
Brian E. Whiteley, and  
C. Alex Hahn, all of Boston, Mass.

## EMPLOYMENT LAW

### **No “narrow restraint” exception to California rule that noncompete agreements are void as against public policy.**

*Edwards v. Arthur Andersen LLP*, 47 Cal. Rptr. 3d 788 (Cal. App. 2d Dist. 2006).

There is no “narrow restraint” exception to California’s rule that noncompete agreements between employers and employees are generally void under state law, a California appellate court held.

Here, Edwards was required to sign a noncompete agreement when he was hired by the Los Angeles branch of Arthur Andersen LLC, an accounting firm. Andersen later went out of business and sold the Los Angeles branch to another company. As a condition of employment with the new company, Andersen required Edwards to sign a release of the previous noncompete agreement by executing a “Termination of Non-Compete Agreement” (TONC), which contained a broad release of any claims against Andersen. When Edwards refused to sign, Andersen fired him, and the new company rescinded its employment offer.

Edwards sued Andersen, alleging intentional interference with prospective economic advantage, among other claims. Defendant moved to sever the issue of whether the noncompete agreement and the TONC were enforceable. The trial court granted the motion to sever and ruled in favor of defendant, holding that the agreement fell within a “narrow restraint” exception to the general rule invalidating such agreements.

Reversing, the appellate court noted that many states allow noncompete agreements but said California courts have long cited Cal. Bus. & Prof. Code § 16600 as an expression that they are void as against public policy, with specific exceptions. Citing similar cases, the court found that the agreement here unlawfully restricted plaintiff’s ability to practice in his profession, even though it was limited in time and scope.

Turning to the trial court’s reliance on the “narrow restraint” exception—providing that a noncompete agreement does not violate § 16600 if it leaves a substantial portion of the market open to the employee—the court said the Ninth Circuit Court of Appeals misapplied California law when it developed the exception. If the legislature had intended § 16600 to apply to only unreasonable or overbroad restraints, the court found, it would have used specific language to that effect, as it did with the other exceptions. The employer has superior bargaining power over a potential or terminated employee, the court determined, and public policy and equity dictate that the employer should not be allowed to restrict employees’ future livelihoods. Further, the narrow restraint doctrine would force employees to guess whether the restrictions could be considered narrow or overbroad and might make potential employers hesitant to hire someone who has signed a questionable noncompete agreement, the court said.

Moreover, the court held that, for purposes of plaintiff’s claim, defendant’s demand that plaintiff sign the TONC as consideration for release of the noncompete agreement was an independent wrongful act. Defendant’s use of an unlawful noncompete agreement to coerce plaintiff into forfeiting his rights is the same as

firing an employee who refuses to sign the agreement, which violates public policy, the court concluded.

Accordingly, the court remanded.

*Plaintiff's Counsel*

Richard A. Love, Los Angeles, Cal.

Beth A. Shenfeld, Los Angeles, Cal.

### **Female workers subjected to abusive behavior: Gender discrimination, harassment: Constructive discharge: Emotional distress: Settlement.**

*EEOC v. Natl. Educ. Assn.*, U.S. Dist. Ct., D. Alaska, No. 3:01-cv-00225, May 15, 2006.

Christopher, 53; Chamara, 34; and Bhend, 46, worked for the National Education Association's Alaska affiliate (NEA-Alaska). During their tenure, Harvey, the interim assistant director of NEA-Alaska, allegedly verbally abused and exhibited physically threatening behavior toward the women. Christopher claimed that Harvey often stood over her while she worked and watched her for no apparent reason. Chamara testified that Harvey had made physically threatening gestures at her and caused her to see a therapist. Bhend testified that Harvey once lunged across a table at her and shook his fist. He also grabbed her shoulders during one incident. Male employees corroborated the women's claims about Harvey's physically threatening gestures. As a result of this harassment, Christopher and Chamara resigned from their jobs. Christopher's past lost earnings were \$77,000, and her future lost earnings are estimated at \$498,000. Chamara's past earnings were \$78,000, and she expects future lost earnings of \$544,000. Bhend did not claim lost income as she did not resign until after the employees filed suit.

The three women and the U.S. Equal Employment Opportunity Commission (EEOC) sued NEA-Alaska, alleging gender discrimination and harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Christopher and Chamara claimed that they had been constructively discharged based on Harvey's conduct. Plaintiffs later added the National Education Association (NEA) as a defendant when they discovered it had known prior to transferring Harvey to Alaska that he had engaged in abusive behavior toward women in previous NEA jobs. In fact, Harvey had been charged with physically assaulting one woman and had caused two more to file complaints against him for verbal abuse and physically threatening behavior.

The trial court dismissed plaintiffs' suit, ruling the "because of . . . sex" element in a Title VII sex discrimination claim requires that the behavior be sexual in nature.

The Ninth Circuit Court of Appeals reversed, holding the discrimination need not be motivated by "sexual animus." The relevant issue, the court said, is whether members of one sex were exposed to disadvantageous conditions to which members of the opposite sex were not exposed. Further, the court held, plaintiffs do not need to prove Harvey had a specific intent to discriminate against women, as long as they can show a pattern of abuse directed toward women. 422 F.3d 840 (9th Cir. 2005).

The parties settled for \$750,000, to be paid by both defendants on an undisclosed basis. The women will each get a confidential amount in a formula based on their years of work, potential loss of salary and emotional distress, and the severity of Harvey's actions toward them. Defendants also entered into a three-year consent decree with the EEOC, agreeing to provide annual antidiscrimination training to its employees, report to the EEOC on any new discrimination claims, and perform pre-hiring investigations to determine whether executive candidates have had complaints lodged against them.

Plaintiffs' expert was Louise Fitzgerald, psychology, Champaign, Ill.

*Employees' Counsel*

Terry Venneberg, Bremerton, Wash.

**Kenneth R. Friedman**, Bremerton, Wash.

*EEOC's Counsel*

Carmen Flores, Seattle, Wash.

## **EVIDENCE**

### **Employee injured at workplace may not sue employer for third-party spoliation of evidence.**

*Glotzbach v. Froman*, 854 N.E.2d 337 (Ind. 2006).

The Indiana Supreme Court held that an employee injured in a workplace accident to which workers' compensation applies may not sue the employer for third-party spoliation of evidence.

Here, Froman was killed in an explosion while under the supervision of Midwest Material Services. Midwest's owner picked up the debris from a supposedly "explosion-proof" pump. The state occupational safety and health administration told him not to destroy the debris. A few days later, however, he reported that everything had been thrown away. Froman's estate filed suit against Midwest, alleging, among other claims, negligent and intentional spoliation of evidence. The trial court denied defendant's motion to dismiss the spoliation claims, and an appellate court affirmed.

Reversing, the state high court noted that the state

does not recognize an independent cause of action for first-party spoliation of evidence but said it has never addressed whether there is a tort of third-party spoliation. Agreeing with an earlier appellate court decision, the court held injured employees eligible for workers' compensation remedies may not sue employers for third-party spoliation of evidence. The court rejected the lower court's finding that the employee and employer had a "special relationship" giving rise to a duty to preserve the evidence. It is not enough, the court said, that an employer is aware of an accident and can foresee harm to the employee resulting from spoliation. That would create a permanent duty on the part of employers to preserve evidence because they usually know about injuries that occur in the workplace. Further, the occupational health administration's instruction to maintain the evidence created a possible duty to the administration, not to plaintiff. Acknowledging that an employer should foresee that debris from an explosion may be relevant to a products liability claim, the court said awareness is not enough to establish a duty.

Turning to policy considerations, the court rejected plaintiff's argument that the tort should be created because existing evidentiary remedies for spoliation are not available when it is performed by third parties. Criminal sanctions and contempt citations are among the remedies that are available, the court said. Further, since employers may recover some of the workers' compensation payments if a products liability suit is successful, they will be more inclined to preserve the evidence. Moreover, proving damages in a spoliation of evidence claim against a third party would amount to "guesswork" by the jury. Thus, the court concluded, the problems inherent in employee third-party spoliation claims against an employer outweigh the benefits.

Accordingly, the court remanded for dismissal.

### FAMILY LAW

#### **Wife who was abused by husband may receive all marital assets in divorce distribution.**

*DeSilva v. DeSilva*, N.Y.L.J., Sept. 6, 2006, at 22 (New York Co. Sup. Aug. 29, 2006).

A wife who was verbally and physically abused during the marriage should get all of the marital assets and little of the debt in a divorce distribution, a New York trial court held.

Here, a husband abused his wife during their marriage by yelling profanities at her in front of their children, throwing things at her stomach while she was

pregnant, and throwing her to the ground at least once. He was also arrested several times for physical altercations with other people, including once with the wife's family, causing her to relocate, and once with a coworker. At the time of the wife's filing for divorce, she was earning more than double his salary.

In considering a division of the property, the court said New York domestic relations law requires that it look at 13 factors, including the duration of the marriage and the age and health of the parties. The court found that most of the factors were not relevant here but did consider the parties' future earning potential and other economic issues. Before making a determination based on those factors, however, the court looked to the law's allowance of any other factors that might be relevant, holding that the husband's pattern of physical and verbal abuse amounts to egregious fault.

The court cited its previous decision, which was subsequently upheld by an appellate court, in which it held the state's "no fault" rule does not bar a court's consideration of physical abuse in determining asset distribution. *Havell v. Islam*, 301 A.D.2d 339 (N.Y. App. Div. 1st Dept. 2002), 46 ATLA L. Rep. 87 (Apr. 2003). In that case, the appellate court held that the "any other factor" provision allows courts to distribute assets based on equity if one party committed egregious misconduct that shocked the court's conscience.

Finding the pattern of domestic abuse here warrants an unequal division of assets, the court awarded the wife all of the marital assets and held that the husband is responsible for all but one of the marital debts.

*Wife's Counsel*

Michael D. Stutman, New York, N.Y.

### GOVERNMENT LIABILITY

#### **Man biking through construction zone is thrown over barricade, landing in traffic: Negligent issuance of permit: Burns: Fractures: Verdict.**

*Harris v. City of Tucson*, Ariz., Pima Co. Super., No. C-2003-6864, Apr. 21, 2006.

Harris, 47, was riding a bicycle down a street with three southbound lanes. Because there was construction on the street, the far right lane, which contained a designated bike lane, was blocked off from the other lanes by vertical panels. There was a chain link fence on the right-hand side of the lane. When Harris arrived at the construction site, he was funneled to the right of the vertical panels. Harris's front tire hit a sandbag, throwing

Harris off the bike and over the panel. He landed in the middle southbound lane of traffic and was struck by a car. He sustained third- and fourth-degree burns to his left arm, requiring multiple surgeries to repair damage to the skin, muscles, and nerves. His left arm, which was his dominant arm, is now largely useless below the elbow. He also suffered a separated right shoulder, lumbar transverse process fractures at L1-4, and road rash and abrasions. Harris claimed about \$170,000 in past medical expenses. A home construction supervisor, Harris did not claim lost income.

Harris sued the general contractor of the construction site, the traffic-barricade contractor with which it had contracted to construct the vertical panels blocking off the right lane, and the city. The contractors settled before trial for confidential amounts. Suit against the city alleged the permit it issued the builder allowing it to close off the right lane did not require that it reroute the bike lane, in violation of city rules. Plaintiff argued defendant was grossly negligent in issuing a permit that failed to comply with its own rules. Plaintiff also claimed defendant failed to inspect the building site to ensure it was compliant with the relevant ordinances.

Defendant alleged the street was reasonably safe and the sandbag plaintiff struck was an open and obvious danger. Defendant also contended that the driver who struck plaintiff and the contractors were nonparties at fault and that it had qualified immunity.

A jury found for plaintiff and awarded \$1.36 million. It found the city 52 percent liable, the barricade contractor 22 percent at fault, the general contractor 3 percent responsible, and plaintiff 23 percent liable for his injuries. The award was accordingly reduced to \$707,200, to be recovered from the city.

Plaintiff's experts were J. David Gibeault, hand surgery, Tucson, Ariz.; and Harry J. Krueper Jr., traffic, San Bernardino, Cal.

Defendant's expert was Charles Zeeger, transportation and highway safety, Chapel Hill, N.C.

*Plaintiff's Counsel*

**Gregory G. Wasley**, Tucson, Ariz.

**Man drowns in county lake: Failure to supervise swimmers, respond to emergency: Wrongful death: Survival action: Settlement.**

*Wells v. Bergen Co.*, N.J., Bergen Co. Super., No. BER-L-5555-05, Apr. 6, 2006.

Wells, 19, was swimming in a lake at a county park when he went under water. His relatives allegedly asked a lifeguard for help but got no response until several minutes

later, when two other lifeguards arrived on the scene. Wells was pulled from the water but was unconscious. He died later that day. Wells had been a student, and his estate did not claim lost income. Wells is survived by his mother and two minor siblings.

Wells's mother, on behalf of his estate, sued the county. Suit alleged the lifeguards on duty failed to properly supervise the swimmers in the lake and failed to timely respond to Wells's relatives when they called for help.

Defendant contended that five lifeguards responded to the call and claimed Wells must have suffered from arrhythmia or another medical problem because he was a good swimmer.

The parties settled before trial for \$575,000.

*Plaintiff's Counsel*

**Eric G. Kahn**, Springfield, N.J.

## INSURANCE

**Non-assignment clause in excess liability policy is void after loss, which occurred at time of incident giving rise to insured's liability.**

*Egger v. Gulf Ins. Co.*, 903 A.2d 1219 (Pa. 2006).

The Pennsylvania Supreme Court held that an insured's assignment of rights after the occurrence leading to suit, but before the jury verdict, was valid, even without approval of the insurer as required by the policy.

Here, Egger was fatally injured while working at a power plant. The security company at the plant had an excess liability policy in addition to its general policy. When Egger's wife sued the company for not providing first aid, the parties agreed to a settlement prior to the jury verdict, with the company assigning its rights under the excess policy to Egger's wife. After the verdict, the excess insurer refused to pay, and Egger's wife, as assignee, sued for breach of contract and bad faith. The insurer argued the assignment was invalid because it was given without the insurer's consent as required by the policy. The trial court granted the assignee summary judgment, and an appellate court affirmed.

Affirming, the state high court noted that it has previously held that a policy's non-assignment clause is void as against public policy after the covered loss has occurred. Here, the question is when the loss occurred. The policy in this case is triggered when there is an "occurrence" leading to the insurer's obligation to pay a sum.

Agreeing with the assignee, the court held that the "occurrence" was Egger's accident. The court rejected the insurer's argument that the policy's provision that it

will pay sums “by reason of liability imposed by law” requires a jury verdict before coverage begins. The clause is ambiguous, the court said, and it was the insurer’s responsibility to explicitly state that its obligation began only after a verdict. Further, other provisions in the policy required the insured to inform the insurer of any “occurrence” that may turn into a claim. Thus, the loss was the accident, and under the court’s previous holding, any assignment of rights after that did not require the insurer’s approval.

Noting that non-assignment clauses are designed to prevent an increased risk of loss to the insurer without its consent, the court rejected the insurer’s argument that because this was an excess liability policy rather than a life insurance policy, its risk was increased after the insured assigned its rights to the assignee. The court said the insurer offers no evidence of its assertion and is confusing loss with the subsequent fixing of damages for that loss.

*Assignee’s Counsel*

**Thomas Wayne Hall**, Lancaster, Pa.

### **Insurer refuses to settle claim against insured: Failure to pay covered occurrences: Lost profits: Declaratory judgment.**

*Wausau Underwriters Ins. Co. v. United Plastics Group, Inc.*, U.S. Dist. Ct., N.D. Ill., No. 1:04-cv-06543, Sept. 11, 2006.

Microtherm, Incorporated, sells a tankless water heater. It contracted with United Plastics Group (UPG) for UPG to manufacture molded plastic chamber parts. The parts were supposed to be molded at specific temperatures, but UPG allegedly molded them at lower temperatures. This allegedly caused the water heaters to break prematurely and corroded other electrical parts in the heaters. As a result of customer complaints, Microtherm lost a substantial portion of its customer base and valuable opportunities with other companies. Microtherm sued UPG, and the jury found in Microtherm’s favor. In postverdict mediation, UPG and all but one of its insurers settled for an undisclosed amount. UPG then assigned Microtherm its rights against the last insurer, with which it had a \$25 million excess policy.

The insurer, Ohio Casualty Insurance Company, then requested a declaratory judgment against UPG, and Microtherm intervened. The insurer argued that UPG’s knowing conduct, breach of warranty, and misrepresentations were not “occurrences” as required by the policy. It also argued that Microtherm’s lost profits and other consequential damages did not constitute

“property damage” and that certain policy exclusions bar coverage under the policy.

After allowing Microtherm to present evidence outside of the record from the underlying jury trial to prove coverage, the court held that (1) “knowing conduct” is an occurrence in the absence of evidence that the insured intended the harm, (2) breach of warranty and misrepresentation are occurrences under the policy’s “products-completed operations” provisions, and (3) consequential damages that flow from “property damage” are covered. The court entered judgment in favor of Microtherm, awarding it the full policy limits of \$25 million, plus prejudgment interest. The insurer’s appeal is pending.

*Microtherm’s Counsel*

**Steve A. Bryant**,

**Denman Heard**, and

Justin Goodman, all of Houston, Tex.

**Myron M. Cherry**, Chicago, Ill.

*Comment:* Microtherm also sued another water chamber manufacturer and a temperature sensor manufacturer. The jury awarded plaintiff \$78.5 million, including \$26.52 million from UPG, \$36.08 million from the other chamber manufacturer, and \$43.62 million from the temperature sensor manufacturer. *Microtherm, Inc. v. Triquest-Puget Plastics, L.L.C.*, 48 ATLA L. Rep. 116 (May 2005).

Documents in *Wausau Underwriters* are available through the Court Documents section in the back of this issue.

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## INTENTIONAL TORTS

### Homeowners' association asserts unfounded liens on condominium to thwart sale: Slander of title: Fraud: Verdict: Punitive damages.

*Agee v. Raintree Ests. I, Inc.*, Okla., Tulsa Co. Dist., No. CJ-2004-00650, Nov. 21, 2006.

Agee and Duncan were interested in purchasing a condominium in a complex. Before the purchase, they confirmed with the president of the board for the homeowners' association that they would be able to erect a partition wall in the garage and move the laundry facilities to a different floor of the condo. The president allegedly gave them verbal approval, and they bought the property and made the changes. Later, Agee and Duncan began to feel that the homeowners' association was not accounting for claimed expenditures and requested to examine the association's accounting books. When the association subsequently asked them for a power of attorney over their property, they refused.

Agee and Duncan subsequently decided to move out of the property and sell it to McIntosh, an African American woman. The association's board told them they would have to restore the garage to its original condition and issued demands it said were needed to conform to the association's bylaws, even though other homeowners had not been required to meet those standards. The president of the association then told the loan agent for the sale that the structure was "falling off the land." The board eventually claimed two liens on the property, one for work the board never actually performed and another for a complex-wide re-siding of the property, which was funded by a homeowners' assessment. As a result of the association's actions, the sale to McIntosh fell through. Agee and Duncan suffered lost sale of the home and an impaired vendibility of the home, while McIntosh incurred lost equity in the amount of the \$36,000 she had to pay in rental fees rather than mortgage payments.

Agee, Duncan, and McIntosh sued the homeowners' association, the board's president, the association's president, and others, alleging slander of title by filing for the liens, tortious interference with contract, and fraud. Plaintiffs alleged defendants wrongfully claimed liens in an intentional and malicious attempt to thwart the sale of the house to McIntosh.

The homeowners' association contended there was no cause of action for slander of title because the liens were privileged publications under the umbrella of "judicial proceedings." The trial court rejected this argument both when the association requested summary judgment and when it asked for a directed verdict.

A jury awarded plaintiffs about \$445,700. Agee and Duncan will receive about \$420,700, including \$84,000 in punitive damages, and McIntosh will receive \$25,000, including \$5,000 in punitive damages.

*Plaintiffs' Counsel*

**Christopher Lincoln Camp,**

Rebecca R. Hert, and

Andrew T. Harrison, all of Tulsa, Okla.

Documents in this case are available through the Court Documents section in the back of this issue, courtesy of Mr. Camp.

### Doctor's statements made in medical report prepared during personal injury lawsuit are entitled to absolute immunity.

*Kaisman v. Carter*, N.Y.L.J., Sept. 29, 2006 (New York Co. Sup. Sept. 6, 2006).

A doctor's statements about another doctor written in an independent medical examination report prepared during a personal injury lawsuit are entitled to absolute immunity, a New York trial court held.

Here, a woman was suing another person for injuries sustained during a trip and fall. In preparation for litigation, the defendant in that suit obtained an independent medical examination of the woman from Carter. In his examination report, Carter noted that he thought Kaisman, an anesthesiologist, had performed an unnecessary lumbar disectomy on the woman. He also wrote that it was inappropriate and immoral for Kaisman to do the procedure and that he had seen other of Kaisman's patients who had been treated unsuccessfully. Kaisman sued Carter and his practice, alleging defamation. Defendants moved for summary judgment, arguing the statements are privileged under absolute immunity.

Granting defendants' motion, the trial court noted case law holding that statements made by witnesses in the course of judicial proceedings are absolutely privileged, regardless of the speaker's motive, if they are pertinent to the proceedings. The term "pertinent" is broadly construed, the court said, and includes statements that might become relevant in the future. Rejecting plaintiff's argument that the report is not pertinent because it will not be admitted at trial, the court said Carter's statements are pertinent to the personal injury defendant's evaluation of his defense and the merits of the action.

The court also rejected plaintiff's contention that absolute privilege is limited to statements made in open court, noting it has been previously applied to out-of-court statements made in documents submitted to the court and during preliminary investigations.

## MEDICAL NEGLIGENCE

AAJ's Professional Negligence Law Reporter includes a broad range of medical negligence cases. Here are examples of the kinds of cases appearing in each issue of PNLR.

### Failure to timely diagnose breast cancer

Settlement for a woman who was diagnosed as having breast cancer six months after being referred for a mammogram and ultrasound by a nurse practitioner. She sued the nurse practitioner and the radiologist who reviewed the ultrasound, alleging failure to timely diagnose the cancer. **James W. Gustafson Jr.**, Tallahassee, Fla.; and **Earl L. Denney Jr.**, West Palm Beach, Fla., represented plaintiff.

*Doe v. Roe Nurse Pract.*, Fla., confidential ct. and dkt. no., Aug. 2006.

### Improper handling of shoulder dystocia

Verdict for a child who suffered a brachial plexus injury during her delivery. She and her mother sued the employer of the treating obstetrician, alleging failure to

perform a cesarean section and excessive use of traction. **Lewis T. Stoneburner** and **Wallace B. Wason Jr.**, both of Richmond, Va., represented plaintiffs.

*Johnson v. Gynecology Assocs.*, Va., Norfolk City Cir., No. L05-1362, July 14, 2006.

*Comment:* For another shoulder dystocia case, see *Minton v. Savage*, 48 ATLA L. Rep. 18 (Feb. 2005). **Spencer G. Markle**, Bellaire, Tex., represented plaintiffs. Documents in *Minton* are available through the Court Documents section in the back of this issue, courtesy of Mr. Markle.

### Dialysis center owed duty to drivers injured by patient shortly after leaving treatment

The South Carolina Supreme Court held that a kidney dialysis center had a duty to reasonably foreseeable third parties to warn its patient of the possible dangers of driving following medical treatment. **John D. Hudson**, Myrtle Beach, S.C., represented plaintiffs. Documents in this case are available through the Court Documents section in the back of this issue, courtesy of Mr Hudson.

*Hardee v. Bio-Medical Applications of S.C., Inc.*, \_\_\_ S.E.2d \_\_\_, 2006 WL 3007748 (S.C. Oct. 23, 2006).

### Failure to diagnose fungal infection

Postverdict settlement on behalf of a woman who died after suffering systemic complications and kidney failure that necessitated a second kidney transplant. Her mother, on behalf of her estate and next of kin, sued a pathologist and his employer, alleging failure to diagnose histoplasmosis—a fungal infection—by conducting special stains of tissue samples taken from a mass removed from the woman's armpit. **William R. Tapella**, Mattoon, Ill., represented plaintiffs. Documents in this case are available through the Court Documents section in the back of this issue, courtesy of Mr. Tapella.

*Potter v. Schenk*, Ill., Cook Co. Cir., No. 2003-L-166, July 18, 2006.

### Failure to properly treat choledochal cyst

Settlement and verdict on behalf of a child who died after being diagnosed as having a choledochal cyst and liver failure and undergoing a liver transplant at four months. Her mother, individually and on behalf of her estate, and her father sued an obstetrician's practice, a hospital, and a pediatric group, alleging improper treatment of the cyst, which was evident on a prenatal ultrasound. **Thomas W. Malone** and **Adam Malone**, both of Atlanta, Ga., represented plaintiffs. A document in this case is available through the Court Documents section in the back of this issue, courtesy of Mr. Thomas Malone.

*Yamada v. Northside Hosp., Inc.*, Ga., Fulton Co. St., No. 2005VS076354G, Aug. 17, 2006.



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### **Failure to properly place pedicle screw**

Verdict for a man who suffers from chronic pain and foot drop after undergoing spinal fusion surgery. He sued an orthopedic spinal surgeon, alleging the doctor misplaced a pedicle screw at L4 and failed to diagnose the error in light of plaintiff's postoperative symptoms. **Fred Paoli Jr.**, Livingston, Mont.; and **James H. Guest**, Denver, Colo., represented plaintiff.

*Brown v. Lowe*, Colo., Denver Co. Dist., No. 2004CV6836, Nov. 17, 2006.

### **Negligent administration of interscalene block**

Settlements for a woman who suffered partial paralysis after undergoing surgery. She and her husband sued an anesthesiologist and his practice, alleging the physician negligently injected plaintiff's spinal cord with an anesthetic. Suit also alleged a surgical center was liable under an apparent agency theory. **Edmund J. Scanlan**, Chicago, Ill., represented plaintiffs. A document in this case is available through the Court Documents section in the back of this issue, courtesy of Mr. Scanlan.

*Marquardt v. Dragisic*, Ill., Cook Co. Cir., No. 02 L 8738, Sept. 25, 2006.

## **NEGLIGENCE**

### **Bicyclist crushed by boom lift driving on street: Failure to have lookout: Defective lack of audible warning: Wrongful death: Settlement.**

*Michler v. Schlager Auto Body & Repair*, Mass., Suffolk Co. Super., confidential dkt. no., Feb. 3, 2006.

Michler, 33, was straddling her bicycle at an intersection crosswalk, waiting for the light to allow her to cross the street. An articulating boom lift, a 17-ton construction vehicle, was driving down the road. The operator of the boom lift was in a basket 36 feet behind the front of the lift and had a blind zone of about the same distance. As the lift was making a right turn behind Michler, its front tire rolled over her. She later died of her injuries. Her funeral and past medical expenses were \$17,000. Michler had been an associate mathematics professor earning \$65,000 annually. She is survived by her parents and sister.

Michler's father, on behalf of her estate, sued the operator of the boom lift; the towing company that employed the operator and provided a tow truck to move the boom lift; the owner of the boom lift, which plaintiff alleged was also a co-employer of the operator; and the manufacturer of the boom lift. Suit against the operator alleged he

was grossly negligent in driving on a public street without a lookout and that he disobeyed traffic rules. Suit against the towing company and the owner of the boom lift alleged respondeat superior liability. Suit against the boom lift manufacturer alleged failure to have standard audible beeper alarms to warn people of its approach, failure to provide appropriate warnings on the machine telling operators to keep a lookout, and that the machine was defective in that it did not operate at the safe speed listed in the operator's manual.

Defendants contended the vehicle was not subject to state motor vehicle laws. Additionally, each claimed the others were responsible for the incident.

The parties settled on the first day of trial for \$4.03 million. Each defendant's contribution to the settlement is confidential.

Plaintiff's experts were Gerard D. Murphy, accident reconstruction, Shrewsbury, Mass.; Frank Berg, safety, Woodstock, Ill.; and Philip Saunders, economics, Weston, Mass.

*Plaintiff's Counsel*

**Burton A. Nadler**, Boston, Mass.

**Jeffrey Petrucelly**, Boston, Mass.

### **Chains spark fire that spreads to houses: Failure to properly attach tractors to gondolas: Trespass: Nuisance: Property losses: Settlement.**

*Pastor v. Bath & Mahil Farms, Inc.*, Cal., Fresno Co. Super., No. 05 CE CG 00268 DSB, Mar. 28, 2006.

A farm was transporting several grape gondolas, each pulled by a tractor, along the edge of a country road. The gondolas were attached to the tractors using safety chains, some of which were allegedly left dragging on the roadway. Sparks from the dragging chains caused several small wildfires, which then quickly spread to the Pastor residence. The Pastors and their son were in the house and escaped just before the home was destroyed, including garage structures, personal property, and the family pets. The fire then spread to the Arslan property, destroying their refurbishing business and personal property. The Pastors claimed about \$2.4 million in damages.

The Pastors, the Arslans, and the Arslans' business filed suit against the farm and its owners, alleging negligent failure to wrap the safety chains to keep them from dragging. The Pastors alleged that because they were raising livestock on their property, they were also entitled to attorney fees under state law, and that they were entitled to general damages, in addition to lost property damages, because the fire constituted a trespass and nuisance under state case law.

The parties settled during mediation before trial for \$3 million, including \$1.9 million to the Pastors and \$1.1 million to the Arslans.

Plaintiffs' experts were Donald J. Perkins, fire cause analysis, Point Richmond, Cal.; Joseph A. Ranciato, personal property appraisal, El Dorado Hills, Cal.; Kerry Wolf, building contracting, Clovis, Cal.; and Richard D. Nordstrom, loss of business profits, and Allan G. Hedberg, psychology, both of Fresno, Cal.

Defendants' experts in this case were Harold L. Seymour, psychology, and Kurt Neupert, property appraisal, both of Fresno, Cal.; Joshua Ashby, construction, Modesto, Cal.; H. Denis Neuman, property appraisal, Redwood, Cal.; and Mark Cohen, loss of business income, Lafayette, Cal.

*Plaintiffs' Counsel*

Michael Marderosian, Fresno, Cal.

William Terrence, Fresno, Cal.

### **Bull rider thrown from bull: Horns not sufficiently blunted: Professional association rule violation: Loss of eye: Verdict.**

*Gambino v. All Am. Rodeo Co.*, N.J., Salem Co. Super., No. SAL-L-223-01, Mar. 3, 2006.

Gambino, 23, was a professional bull rider. At a Professional Rodeo Cowboys Association bull-riding event, the bull Gambino was riding threw him down and speared him with his horn. He suffered the loss of his left eye. His past medical expenses were about \$25,000, which were paid by the association's insurer. Gambino had been earning \$30,000 annually as a bull rider and was out of work for about six weeks after the incident. He now works full-time as a home improvement contractor and did not claim lost income.

Gambino sued the company that provided the bull, alleging the bull was not in compliance with association regulations, which require that a bull's horns be blunted to at least the diameter of a half-dollar.

Defendant countered that plaintiff knew the risks of bull riding when he joined the event. Plaintiff acknowledged the risks but argued he did not assume the additional risk posed by an improperly prepared bull.

A jury awarded plaintiff \$1.45 million. The award was reduced to \$870,000 plus prejudgment interest to reflect the jury's finding that plaintiff was 40 percent at fault.

*Plaintiff's Counsel*

Angelo J. Falciani, Woodbury, N.J.

*Comment:* An abstract set on animal attack cases is available in the back of this issue.

## PRACTICE & PROCEDURE

### **RICO allows nationwide service of process only where ends of justice require it and court has personal jurisdiction over one defendant.**

*Cory v. Aztec Steel Bldg., Inc.*, 2006 WL 3222302 (10th Cir. Nov. 8, 2006).

The Tenth Circuit Court of Appeals ruled that the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 to 1968, allows for nationwide service of process only where a court has personal jurisdiction over at least one defendant and "the ends of justice" require joining the other parties.

Here, Cory purchased pre-engineered buildings in Kansas that were manufactured and distributed in Pennsylvania. After two of the buildings collapsed in high winds, Cory sued various manufacturers and distributors under RICO and state laws. Several defendants moved to dismiss, arguing the court lacked personal jurisdiction over them because they were located out of the forum state, and the trial court granted the motion.

Affirming, the Tenth Circuit first noted that nationwide service of process, when authorized by Congress, confers personal jurisdiction over all defendants so served, providing the service meets due process requirements. The court then turned to the text of RICO's service of process provision to determine whether it authorizes nationwide service. Noting the circuit split as to whether RICO broadly allows nationwide service of process under 18 U.S.C. § 1965(d) or, more narrowly, only when "the ends of justice require" nationwide service on defendants outside the venue under § 1965(b), the court held that the more restrictive subsection (b) is the proper jurisdictional provision.

This conclusion comports with congressional intent in creating RICO, the court said, noting statements in a congressional report saying that subsection (b) provides nationwide service of process. Further, the court pointed to statements that RICO's jurisdictional provision is modeled on antitrust legislation, which also allows for nationwide service of process only when the ends of justice require it. Consequently, the court held that where personal jurisdiction exists over at least one defendant, nationwide service of process is allowed under RICO where the ends of justice require it. This standard, the court said, should be interpreted liberally to achieve RICO's stated goal of routing organized crime; the fact that many defendants live in a single district apart from where suit was filed does not control in an analysis of what the ends of justice require.

In this case, however, plaintiff failed to adequately show that the ends of justice required nationwide service, the court held. Accordingly, it affirmed the lower court's dismissal.

## PREMISES

**Man thrown to floor when elevator handrail detaches: Failure to properly maintain premises: Back injury: Surgeries: Settlement.**

*Doe v. Roe*, Cal., Ventura Co. Super., confidential dkt. no., Mar. 2006.

As Doe, 30, was riding in an elevator, he held on to the interior handrail and performed a knee bend. As he rose from the bend, the handrail came loose, and Doe was thrown to the floor of the elevator.

Doe required a posterior lumbar fusion at L4-5 and L5-S1 and will require future surgery to correct the L5-S1 fusion, which did not heal properly. Doe also suffers chronic low back and neck pain. He incurred about \$27,000 in past medical expenses and anticipates about \$200,000 in future medical expenses. A U.S. Navy petty officer earning about \$3,000 monthly, Doe was medically discharged from the Navy following the injury and is now able to perform only light, sedentary work. He claimed \$23,000 in past lost wages and about \$320,000, in present cash value, in future lost income and benefits.

Doe sued the owner of the building, alleging defendant failed to properly maintain the elevator's interior handrails despite knowledge that the handrails had repeatedly become detached.

Defendant claimed that plaintiff had a history of back pain resulting from an earlier injury. Defendant also contended that plaintiff was comparatively negligent for performing a gymnastic exercise while riding in the elevator.

The parties settled before trial for \$850,000. Additionally, the Navy agreed to reduce its medical lien to \$5,000.

Plaintiff's experts included Richard D. Kahmann, orthopedic surgery, and Edward L. Bennett, rehabilitation, both of Santa Barbara, Cal.; William Josephs, psychology, Sherman Oaks, Cal.; C. Steven Carr, elevator safety, Palo Alto, Cal.; and Martin M. Balaban, engineering and safety analysis, Encino, Cal.

Defendant's experts included David Frecker, neurology, and Allan P. Moelleken, orthopedic surgery, both of Santa Barbara, Cal.; Ted Vavoulis, forensic economics,

and Gene Bruno, vocational rehabilitation, both of Los Angeles, Cal.; and Kenneth Solomon, risk and safety analysis, Woodland Hills, Cal.

*Plaintiff's Counsel*

**Irwin R. Miller**, Oxnard, Cal.

**Children exposed to lead-based paint in apartment: Failure to abate: Lead poisoning: ADHD: Cognitive deficits: Learning disabilities: Verdict.**

*Peguero v. 601 Realty Corp.*, N.Y., New York Co. Sup., No. 118078/02, Feb. 21, 2006.

Peguero, now 12, and his brother, now 10, lived in an apartment building built prior to the 1960s. The apartment's old, lead-based paint was in a peeling, flaking, and deteriorated condition while the Pegueros lived there. After tests revealed that Peguero and his brother had elevated levels of lead in their blood, the city issued an order to the owner of the apartment building to abate the lead paint nuisance. Four years later, the city issued a second abatement order. While Peguero and his brother lived in the apartment, they were exposed to and ingested lead-based paint and dust. As a result, they suffered lead poisoning that caused attention-deficit hyperactivity disorder (ADHD) and other behavioral problems. They also suffer from cognitive defects and learning disabilities that were allegedly caused by their exposure to the lead in the paint. Peguero and his brother claimed they will be unable to finish high school as a result of the lead poisoning, decreasing their life-long earning capacity. Peguero claimed about \$802,400 in future lost earnings, and his brother claimed about \$1.34 million.

Peguero's mother, individually and on behalf of her two sons, sued the owners and manager of the apartment building. Plaintiffs alleged defendants negligently failed to ameliorate the lead hazard in contravention of city ordinances requiring building owners to abate lead-based paint hazards in apartments where children under 7 years old reside. Plaintiffs claimed Peguero's mother repeatedly notified defendants that the paint in her apartment was in a peeling, chipping, and defective condition, but defendants failed to address the problem.

Defendants contended that they had taken all proper action and had acted reasonably with regard to the lead paint hazard in the apartment. They also argued that Peguero's mother signed a form indicating there was no chipping paint in the apartment when she moved in. Finally, defendants challenged plaintiffs' claim that the boys' future earning capacity was diminished by their exposure to lead.

## RECENT CASES

A jury awarded plaintiffs \$6.9 million, finding the corporate owner 75 percent liable and the individual owner 25 percent responsible. Defendants then moved to set aside the verdict or for remittitur. The court reduced the total verdict to \$4.1 million. Of this total, Peguero will receive \$2.55 million, and his brother will receive \$1.55 million.

Plaintiffs' expert witnesses were William Bithoney, pediatrics, and Edward Hoffman, psychology and counseling, both of New York, N.Y.; and Les Seplaki, economics, Fort Lee, N.J.

Defendants' experts were Barbara Baer, neuropsychiatry, White Plains, N.Y.; and Chandra Sharma, neurology, New York, N.Y.

*Plaintiffs' Counsel*

**Alan J. Konigsberg**, New York, N.Y.

**Daniel J. Woodard**, New York, N.Y.

*Comment:* For a case in which the District of Columbia Court of Appeals ruled that landlords may be liable for lead paint poisoning suffered by child tenants regardless of whether they had actual knowledge of the dangerous condition, see *Childs v. Purll*, 882 A.2d 227 (D.C. 2005).

## PRODUCTS LIABILITY

AAJ's Products Liability Law Reporter includes a broad range of products liability cases. Here are examples of the kinds of cases appearing in each issue of PLLR.

### Inadequate instructions on scissors lift

Postverdict structured settlement for a man who suffered leg and ankle fractures after he inadvertently stepped on the foot pedal of the scissors lift at which he was working, and the loaded lift table lowered onto his right leg. He sued the manufacturer of the lift, alleging it was unreasonably dangerous in that it lacked adequate instructions warning against placing the foot pedal underneath the lift table. **Edmund J. Scanlan**, Chicago, Ill., represented plaintiff.

*Lombardi v. Am. Lifts*, Ill., Cook Co. Cir., No. 02 L 7241, July 18, 2006.

### Failure to recall defendant's name or product did not shift burden to plaintiff to show causation fact question

A California appellate court held in a lawsuit against an asbestos product manufacturer that plaintiff's deposition testimony that he could not recall the manufacturer's name or whether he had ever worked with its products did not shift the burden on defendant's summary judgment motion to plaintiff to show that a material fact question existed on causation. **Philip A. Harley** and Deborah R. Rosenthal, both of Berkeley, Cal., represented plaintiffs.

*Weber v. John Crane, Inc.*, 50 Cal. Rptr. 3d 71 (Cal. App. 1st Dist. 2006).

### Lack of barrier guard, emergency stop switches on foundry turntable

Settlement for the estate of a man who suffered fatal crush injuries after he tried to free an object that was stuck underneath a foundry turntable and became trapped in the pinch point between the table and the machine's support beams when the turntable rotated without warning. His wife, on behalf of his estate, sued the manufacturer of the turntable, alleging it was defectively designed in that it lacked a "safety skirt" barrier guard around its base and had limited emergency stop switches. **Alan M. Feldman**, Daniel J. Mann, and Edward S. Goldis, all of Philadelphia, Pa., represented plaintiff.

*Michael v. Hunter Automated Mach. Corp.*, U.S. Dist. Ct., E.D. Pa., No. 2:05-cv-02020, Nov. 2, 2006.

### Defective design using unrecessed toggle power window switch in SUV

Settlement for the parents and estate of a child who was strangled after she inadvertently activated the power window of the SUV in which she was a passenger and

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her head became trapped in the window. Her father, individually and on behalf of her estate, and her mother sued the manufacturer of the vehicle, alleging that the unrecessed, toggle-type power window switch was defective and unreasonably dangerous in that minimal pressure released deadly energy. **Robert M.N. Palmer** and Scott A. Smith, both of Springfield, Mo.; and **David W. Little**, Oklahoma City, Okla., represented plaintiffs.

*Michael v. Ford Motor Co.*, Ariz., Maricopa Co. Super., No. CV2005-051546, Sept. 7, 2006.

### **Defective cruise control system**

Verdict for the estate of a woman who died and for a minor who suffered a spinal fracture resulting in incomplete quadriplegia after their SUV, with its cruise control activated, suddenly accelerated out of control and crashed. The woman's husband, on behalf of her estate, and the minor sued the manufacturer of the SUV, alleging the cruise control system was defective. **J. Edward Bell III**, Georgetown, S.C.; **James W. Fayssoux Jr.**, Greenville, S.C.; and **Kevin R. Dean**, Mount Pleasant, S.C., represented plaintiffs.

*Watson v. Ford Motor Co.*, S.C., Greenville Co. Cir., No. 2002-CP-23-8147, Aug. 6, 2006.

### **Common law claims alleging injuries from diabetes drug Rezulin are not preempted**

The Second Circuit Court of Appeals held that federal law does not preempt a statutory fraud exception to a Michigan state law that immunizes drug manufacturers from liability where the FDA has approved a drug. David B. Rodes, Pittsburgh, Pa.; **Vincent J. Carter**, Los Angeles, Cal.; **David R. Parker**, Detroit, Mich.; and Jerome D. Goldberg, Southfield, Mich., represented plaintiffs.

*Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006).

## **PROFESSIONAL NEGLIGENCE**

AAJ's Professional Negligence Law Reporter includes a broad range of professional liability cases. Here are examples of the kinds of cases appearing in each issue of PNLR.

### **CLERGY**

#### **Sexual abuse by priest**

Settlement for a teenager who suffered emotional distress after being sexually abused by a priest in a car. He sued the church, alleging breach of fiduciary duty and negligent failure to warn him and other parishioners of the risk of clergy abuse. **David M. Ring** and **Robert R.**

**Clayton**, both of Los Angeles, Cal., represented plaintiff.

*Doe v. Roe Church*, Cal., Los Angeles Co. Super., confidential dkt. no., Feb. 23, 2006.

*Comment:* For other cases alleging sexual abuse, see *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213 (Miss. 2005), 20 PNLR 123 (Sept. 2005); *Doe v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22 (Tenn. 2005), 48 ATLA L. Rep. 96 (Apr. 2005), 49 ATLA L. Rep. 60 (Mar. 2006); *Doe v. Diocese of Palm Beach, Inc.*, 19 PNLR 128 (Sept. 2004); and *Leary v. Geoghan*, 45 ATLA L. Rep. 367 (Dec. 2002).

Documents in the *Morrison*, *Nashville*, *Palm Beach*, and *Leary* cases are available through the Court Documents section in the back of this issue, courtesy of plaintiffs' counsel.

### **Provision eliminating limitations statute for sexual abuse claims does not revive time-barred suits**

The Alaska Supreme Court held that Alaska Stat. § 09.10.065, which eliminates the statute of limitations for sexual abuse claims, does not revive suits that were already time-barred at the time of the law's October 2001 enactment.

*Catholic Bishop of N. Alaska v. Does*, 141 P.3d 719 (Alaska 2006).

### **DENTISTRY**

#### **Negligent wisdom tooth extraction**

Arbitration award for a man who required hospitalization and now suffers temporomandibular and posttraumatic stress disorders after suffering an air embolism during a wisdom tooth extraction. He claimed the dental practice was liable for the actions of its assistant, who negligently blew air into the extraction socket to control plaintiff's bleeding. **Edwin J. Zinman**, San Francisco, Cal., represented claimant.

*Venturini v. W. Dental Servs.*, Cal., San Francisco Co. Super., No. CGC-03-423971, July 2006.

*Comment:* In *Tice v. Heald*, Mich., Washtenaw Co. Cir., No. 04-563-NH, Apr. 27, 2006, Tice, 66, alleged that her family dentist's failure to diagnose advancing periodontitis necessitated multiple tooth extractions and an upper denture. Before trial, Tice received an arbitration award of \$300,000, the dentist's policy limits. **Robert Gitelman**, Southfield, Mich., represented claimant.

### **GROUP HOME**

#### **Failure to prevent sexual molestation of minors**

Verdict for two women who were sexually abused by two adult men while living at a group home during their childhood. Suit against the group home alleged failure

to prevent the abuse despite knowledge of its existence. **David N. Bigelow** and **Graham B. LippSmith**, both of Los Angeles, Cal., represented plaintiffs.

*Doe v. Masonic Homes of Cal.*, Cal., Los Angeles Co. Super., No. BC306444, Oct. 6, 2006.

### LAW

#### **Attorney is not liable to third-party beneficiaries for failing to make client's will invulnerable to will contest**

The Oregon Supreme Court held that an attorney who drafted a will that was later contested after the client's death was not liable to several third-party beneficiaries who claimed that the attorney breached a duty to make the will uncontestable.

*Caba v. Barker*, \_\_\_ P.3d \_\_\_, 2006 WL 2975962 (Or. Oct. 19, 2006).

*Comment:* For a case holding that a negligence suit against an attorney who drafted a complicated estate plan was not time-barred, see *Watkins v. Hedman, Hileman & LaCosta*, 92 P.3d 620 (Mont. 2004), 47 ATLA L. Rep. 276 (Oct. 2004). **Lee C. Henning** and Kathy M. Burch, both of Kalispell, Mont., represented plaintiff.

Documents in *Watkins* are available through the Court Documents section in the back of this issue, courtesy of Mr. Henning.

#### **Falsification of amount owed by alleged debtor**

Settlement and verdict for a businessman and his family, who were named in a debt collection suit filed by an attorney. Plaintiffs alleged that the attorney falsified the amount of the alleged debt, committed abuse of process, and was liable for intentional and negligent infliction of emotional distress. William P. Gibbons, Daniel Ryan, and Joseph Shucofsky, all of Cleveland, Ohio, represented plaintiffs.

*Plechaty v. Weltman*, Ohio, Cuyahoga Co. Com. Pleas, No. CV04-518537, June 14, 2006.

### PSYCHOTHERAPY

#### **Psychiatrist who performed independent medical examination for city was not liable to examinee**

A Utah appellate court held that a psychiatrist performing an independent medical examination (IME) of a former police officer who was being considered for permanent reinstatement by a city did not owe a duty of care to the former officer.

*Joseph v. McCann*, \_\_\_ P.3d \_\_\_, 2006 WL 3316684 (Utah App. Nov. 16, 2006).

*Comment:* For a case holding that a psychologist performing an IME during litigation owed a limited legal duty to a plaintiff-examinee, see *Harris v. Kreutzer*, 624

S.E.2d 24 (Va. 2006), 49 ATLA L. Rep. 97 (Apr. 2006). **Stephen M. Smith**, Hampton, Va., represented plaintiff.

Documents in *Harris* are available through the Court Documents section in the back of this issue, courtesy of Mr. Smith.

### RAILROADS

#### **Conductor falls when brake step gives way: FELA, Safety Appliance Act liability: Connective tissue injuries: Elbow, knee injuries: Verdict.**

*King v. Norfolk S. Ry. Co.*, Va., Roanoke City Cir., No. CL05-170, July 20, 2006.

King, a 40-year-old railroad conductor, was performing a terminal brake test when he noticed an air leak that required him to cross over to the other side of the train. King walked to a flat car to use its brake step to get over. The brake step broke, and King fell about four feet, landing on the ties and ballast below. An inspection later that day determined that a support bracket broke and gave way.

King was initially treated for a concussion and connective tissue neck and back injuries, requiring physical therapy. After seven months of his not being able to work, the railroad required him to have a medical examination, which showed he had not yet recovered. King's employer ordered him to undergo a "work hardening" program to get back in shape. During this therapy, King began suffering pain in his right elbow and left knee. His doctor removed a fractured bone spur from his elbow and a portion of the bursa—a sac of fluid that grows between tendon and bone—that had grown on his elbow since the fall. The doctor also discovered two cartilage "flap tears" on his knee, requiring surgery. He continues to suffer arthritis in his knee.

King's medical expenses were covered by his employer's health coverage. King was able to return to the railroad after 19 months. He had been earning \$55,000 annually as a conductor but was able to work primarily as an engineer after his return, earning about \$80,000 annually. An orthopedist determined, however, that King's arthritis will probably force him to retire from railroad service within 10 years. His maximum earning capacity is estimated at \$32,000 annually once he leaves the railroad. His past lost wages were about \$110,000, and his future lost wages and benefits are expected to be approximately \$600,000.

King sued the railroad, alleging violations of the Federal Employers' Liability Act (FELA), 45 U.S.C.

§§ 51 *et seq.*, and its subset, the Safety Appliance Act, 49 U.S.C. §§ 20301 *et seq.* Plaintiff alleged that the broken brake step is a “safety appliance,” and that defendant is strictly liable for its rail car containing a defective safety appliance.

Defendant contended plaintiff was solely responsible for failing to inspect the brake step. Defendant also argued plaintiff’s elbow and knee injuries were degenerative rather than caused by the fall.

A jury awarded plaintiff \$630,000. Defendant’s motion to set aside the verdict is pending.

Plaintiff’s experts were Walter Rockey, federal railroad administration regulations and Safety Appliance Act, Hanover, Pa.; Arthur Wardell, orthopedic surgery, Suffolk, Va.; Norman Hankins, vocational rehabilitation, Jonesborough, Tenn.; and William Cobb, economics, Charleston, W. Va.

Defendant’s expert was Richard Widmeyer, orthopedics, Roanoke, Va.

*Plaintiff’s Counsel*

Michael R. Davis, Portsmouth, Va.

**Willard J. Moody Jr.**, Portsmouth, Va.

## SCHOOLS

### **Charitable immunity law does not bar former student’s sexual abuse lawsuit against private boarding school, employees.**

*Hardwicke v. Am. Boychoir Sch.*, 902 A.2d 900 (N.J. 2006).

The New Jersey Supreme Court ruled that the state’s charitable immunity law does not bar a suit brought by a former student against the private boarding school where he was allegedly abused by the music director.

Here, Hardwicke sued a boarding school he had attended, its music director, and several school officials. Suit alleged violations of the state Child Sexual Abuse Act (CSAA), N.J. Stat. Ann. § 2A:61B-1, as well as common law claims of negligent hiring and retention, among others. A trial court granted the school’s motion for summary judgment as to the CSAA claim and dismissed plaintiff’s other claims as barred by the state Charitable Immunity Act (CIA), N.J. Stat. Ann. §§ 2A:53-7 to 11. An appellate court reversed in part, finding plaintiff’s CSAA claim viable and holding that the CIA does not bar claims of intentional conduct, only claims of negligence.

Affirming, the state high court first examined whether the school can be held liable under the CSAA. The court noted that in addition to imposing liability for

inflicting abuse, the CSAA says someone who fails to protect a child from abuse may be liable. To find a “passive abuser” liable, plaintiff must show that the party is (1) a person (2) acting *in loco parentis* (3) within the household. Here, defendant’s claim that it cannot be considered a person under the statute because it is an institution is unavailing, the court held. The court cited case law to establish that corporate entities may be considered persons under state law. Because the purpose of the CSAA is to protect children from sexual abuse and should therefore be construed liberally, the court found that defendant is a person under the CSAA.

Turning to the second prong, the court held that defendant acted *in loco parentis* at the time of plaintiff’s abuse. Citing the school’s own catalog using the phrase to describe its role, the court noted defendant was responsible for all aspects of students’ daily life and thus assumed the role of parent for its students. Finally, the court held that the qualities and characteristics of defendant’s relationship with its boarding students, including plaintiff, was sufficient to establish it as a household under the statute. Plaintiff’s claims under the CSAA may therefore proceed, the court held.

The court also found defendant is not immune from liability under the CIA, looking to the text of the statute in holding that it protects charitable organizations against only claims of negligence, not claims of intentional acts or “other forms of aggravated wrongful conduct.” Additionally, the court noted a 2006 amendment to the CIA abrogating immunity for negligent hiring, supervision, and retention of employees who abuse children. Consequently, the court held, plaintiff’s claims survive against the school for both willful and wanton wrongful conduct and negligent hiring, supervision, and retention of the music director.

Accordingly, the court remanded.

*Plaintiff’s Counsel*

Lawrence Lessig, Stanford, Cal.

Keith E. Smith, Philadelphia, Pa.

Robert A. Assuncao, Edison, N.J.

### **Title IX does not preempt § 1983 suit for equal protection violations based on gender discrimination in high school sports.**

*Communities for Eq. v. Mich. High Sch. Athletic Assn.*, 459 F.3d 676 (6th Cir. 2006).

The Sixth Circuit Court of Appeals ruled that Title IX of the Education Amendments to the Civil Rights Act, 20 U.S.C. §§ 1681 to 1688, does not preempt a 42 U.S.C. § 1983 suit against a high school athletic association

alleging that its scheduling of girls' sports during seasons in which the sports are not normally played violates the Equal Protection Clause.

The court first acknowledged that the U.S. Supreme Court held in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), that plaintiffs may not sue under § 1983 when the statute at issue provides for a more restrictive private judicial remedy, because allowing a § 1983 suit would be an end run around Congress's intent to provide appropriate remedies for violations. In this case, however, plaintiff invoked § 1983 as a means to seek a remedy not for a statutory violation, but for a violation of the Equal Protection Clause of the Fourteenth Amendment, the court said. The question is thus whether Congress intended to preempt plaintiff's rights under the Fourteenth Amendment by enacting Title IX.

To answer this question, the court identified as relevant factors whether plaintiff's Title IX claims are "virtually identical" to its constitutional claims and whether the remedies set forth in Title IX "indicate that Congress intended to preclude reliance on § 1983." Citing its own precedent, the court concluded that Title IX does not provide a remedy comprehensive enough to be considered exclusive. Specifically, the court noted, Title IX provides no explicit private judicial remedy and only limited public remedies for violations. Consequently, the court held, its remedies are insufficient to be considered exclusive and thus do not preempt plaintiff's private § 1983 claim.

Turning to plaintiff's equal protection claim, the court first held that defendant is a state actor because its membership is composed primarily of public schools, and the majority of its leaders are public school employees. The court then found defendant's scheduling of girls' sports seasons at nontraditional times was not substantially related to important government objectives, rendering it a violation of the female athletes' equal protection rights. Defendant's argument that the scheduling maximizes girls' opportunities to participate in sports is unavailing, the court held, noting that defendant could just as easily have chosen to schedule boys' sports in the off seasons. Scheduling only girls to play at disadvantageous times is unequal and disparate treatment that violates equal protection, the court held.

Similarly, the court found that defendant violated Title IX. In a case such as this, where disparate treatment is based on facially gender-based classifications, the court said it need not find proof of a discriminatory motive. The fact that female athletes have been denied equal opportunities because of their gender is sufficient to find a violation.

*Plaintiff's Counsel*

Kristen Galles, Alexandria, Va.

### **Student steps into uncovered manhole: Negligent maintenance: Creation of dangerous condition: Deep vein thrombosis: Verdict.**

*Nolan v. Union College Trust of Schenectady*, N.Y., Rensselaer Co. Sup., No. 208292/05, Mar. 15, 2006.

Nolan, 21, was walking across the campus of her college when she stepped into an uncovered manhole. Her right foot went into the hole up to her hip, and Nolan fell back on her left leg, triggering a recurrence of deep vein thrombosis (DVT), which Nolan had suffered several years before the incident. Three weeks later, Nolan was hospitalized for clotting in her lower extremities due to the DVT. Nolan incurred \$39,000 in past medical expenses and must inject herself daily with anticoagulant to prevent clotting. Nolan also suffers from circulation problems, pain, and swelling when she walks, stands, or sits. Her medication will cost about \$5,000 monthly for the rest of her life. A student at the time of the incident, Nolan did not claim lost income.

Nolan sued the operator of the university, alleging negligent maintenance and creation of a dangerous condition. Plaintiff claimed defendant's agents knew the manhole cover had been missing for more than a month but merely placed an unsecured sheet of plywood over the hole, creating a danger.

Defendant conceded liability but claimed plaintiff's stepping into the manhole did not cause her DVT.

A jury awarded plaintiff about \$15.84 million.

Plaintiff's experts were Ram Agrawal, endocrinology, and Peter Lamparello, hematology, both of Albany, N.Y.

*Plaintiff's Counsel*

**Peter J. Moschetti Jr.**, Latham, N.Y.

## TOXIC TORTS

### **Coal company contaminates property meant for pasture: State coal mining act violations: Trespass: Economic harm: Postverdict settlement.**

*Crown Indus. v. Arch Coal, Inc.*, W. Va., Mingo Co. Cir., No. 03-C-336, Apr. 13, 2006.

Crown Industries purchased a tract of land and made an agreement that a coal company would surface mine the property before reclaiming it for use as pastureland by Crown. Eleven years later, and three years after the reclamation was supposed to be completed, Crown was notified that the coal company's subsidiary was using the

land as a dump site. On investigation, Crown allegedly found dangerous levels of oil and diesel fuel. Because Crown could not determine the extent of the pollution, it was unable to estimate the cost of decontamination.

Crown filed suit against the coal company, alleging violations of the West Virginia Surface Coal Mining and Reclamation Act, W. Va. Code §§ 22-3-1 *et seq.*, as well as trespass. Suit alleged defendant permitted its subsidiaries to use plaintiff's property as a dump site, leaking oil and abandoning heavy machinery and engine parts on the land. The coal company then filed a third-party claim against a subcontractor for indemnification, claiming the subcontractor was liable for any pollution on the property.

Defendant contended that plaintiff should have expected the land to have been left in such a condition due to the nature of the mining industry and asserted that the contamination was not at a dangerous level. Defendant also claimed that plaintiff's land was properly characterized as a "brownfield"—a tract of industrially developed and polluted land that has been abandoned—and should be evaluated using the federal Environmental Protection Agency standards for brownfields.

Plaintiff countered that its land was not a brownfield, nor had it ever agreed to its use as one. Plaintiff also claimed that even if the land were a brownfield, the contamination levels were higher than allowed by relevant federal regulations.

A jury awarded plaintiff \$2.5 million. The jury also found for the coal company on its third-party indemnification claim and awarded it \$1.25 million.

The parties settled after trial for a confidential amount.

Plaintiff's experts were Scott Simonton, environmental engineering, Charleston, W. Va.; and David Hower-ton, appraisal, Logan, W. Va.

Defendant's expert was Ron Mullenex, mining, Bluefield, Va.

*Plaintiff's Counsel*

Mark Lazenby, Princeton, W. Va.

Kevin Thompson, Charleston, W. Va.

### **Company that voluntarily remediated contamination may recover cleanup costs under § 107 of CERCLA.**

*A. Research Corp. v. U.S.*, 459 F.3d 827 (8th Cir. 2006).

The Eighth Circuit Court of Appeals ruled that a company that voluntarily cleaned up contamination from its operations may seek reimbursement for cleanup costs

under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 to 9675.

Here, Atlantic Research Corporation contracted with the United States to retrofit rocket motors. The work caused contamination, for which Atlantic was partially responsible. Atlantic voluntarily cleaned up the contamination and then sought recovery from the federal government for part of the costs under CERCLA. A federal trial court granted defendant's motion to dismiss.

Reversing, the Eighth Circuit noted that courts initially interpreted CERCLA's provisions to permit only "innocent" plaintiffs—parties with a defense to liability—to recover cleanup costs under § 107; those liable for the contamination could seek remedy only under § 113. A recent U.S. Supreme Court case, however, established that under § 113, parties can seek contribution for cleanup costs only during or following a civil action brought under § 106 or § 107 of CERCLA. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004). This ruling, the court here said, rendered plaintiff unable to assert a claim under § 113, because it was partially responsible for the original pollution and no action has been brought against it. The question before the court, then, is whether a party liable for contamination can sue under § 107 for costs incurred in a voluntary cleanup.

The court looked to precedent from another circuit to answer in the affirmative, finding the text of § 107 does not limit its remedy only to parties that have a defense to liability. Citing its own case law, however, the court said liable parties' recovery under § 107 should be limited to their fair share of reimbursement, reasoning that if such parties were to recover the entire costs of cleanup, they would effectively escape liability. Similarly, the court held, liable parties retain the right to contribution under § 107. To hold otherwise, the court said, would punish parties that voluntarily undertook to clean up the contamination they caused and would allow the government to avoid responsibility for its share of the pollution by declining to bring an action against other parties.

*Plaintiff's Counsel*

Thomas Armstrong, Milwaukee, Wis.

**Floyd M. Thomas Jr.**, El Dorado, Ark.

*Comment:* Similarly, in *Schaefer v. Town of Victor*, 457 F.3d 188 (2d Cir. 2006), the Second Circuit Court of Appeals ruled that a landfill operator, as a liable party, was entitled to sue under § 107 of CERCLA for recovery of the cost of voluntarily remediating contamination caused by the landfill. Finding, however, that the claim, while valid, was time-barred, the court affirmed the trial court's grant of summary judgment to defendant.

## WORKPLACE SAFETY

### **Silo wall falls on worker during demolition: OSHA violations: Failure to perform inspection, engineering survey: Wrongful death: Settlement.**

*Auchter v. Ciminelli Servs. Corp.*, Ill., St. Clair Co. Cir., No. 01L44, Apr. 12, 2006.

Auchter, 22, was working for a demolition company at an excavating site. The workers were demolishing silos by punching holes in them and pushing dynamite through. Auchter was standing next to one of the silos when a heavy machinery operator hit a seam in the silo's outside shell, causing a portion of the silo that weighed up to 70 tons to fall down on Auchter. He was killed instantly. Formerly a laborer and culinary student earning \$28,600 annually, he is survived by his parents and three half-siblings.

Auchter's father, on behalf of his son's estate, sued the general contractor of the site and the excavation company that employed the operator and hired Auchter's employer for the job, alleging violations of U.S. Occupational Health and Safety Administration (OSHA) regulations. Plaintiff alleged defendants failed to provide a competent person to perform inspections as the work progressed and conduct an engineering survey to locate possible dangers at the site prior to demolition. Plaintiff also alleged OSHA violations in allowing Auchter to work where there were existing hazards. Plaintiff argued that the survey, which is required by OSHA, is standard practice and that had the survey been completed, the danger of the silo wall collapsing would have been discovered, and precautions would have been taken. Plaintiff's safety expert testified it was the general contractor's duty to perform the survey, but the excavation subcontractor should have realized the survey was not completed and done one independently.

Defendants blamed each other, disagreeing on whose duty it was to perform the inspections and the survey.

The parties reached a \$2.3 million settlement before trial. The general contractor contributed \$2 million, and the excavation subcontractor contributed \$300,000.

Plaintiff's expert was Eugene P. Holland, construction safety, Schaumburg, Ill.

The general contractor's expert was Peter Cucuz, construction safety, Chicago, Ill.

*Plaintiff's Counsel*

**Philip Harnett Corboy Jr.**, Chicago, Ill.

**Edward G. Willer**, Chicago, Ill.

### **Employee injured when coworkers restrained him during seizure is entitled to workers' compensation.**

*Blakeslee v. Platt Bros. & Co.*, 902 A.2d 620 (Conn. 2006).

The Connecticut Supreme Court held that an employee was entitled to workers' compensation benefits for injuries sustained when coworkers held him down while he was having a seizure.

Here, a workers' compensation commissioner and review board denied the employee's benefits request, finding the injuries did not arise out of his employment.

Reversing, the court said the commissioner and the board both erroneously started with the proposition that because plaintiff's seizure was noncompensable, any injuries causally connected to it must be noncompensable. Workers' compensation law has long held that an injury sustained while working does not cease to be one arising out of the employment merely because an infirmity originally set in action the events that led to the proximate cause of the injury, the court noted. Further, the court found, compensability may not be denied because plaintiff could have been similarly injured by attempts to aid him had the seizure occurred outside of work. An injury is compensable if it is a condition of the employment, regardless of the type of hazard.

Noting that normal reactions of other coworkers are a factor in determining whether the injury is a condition of the employment, the court said it "seriously cannot be questioned" that there is a risk in the workplace of employees rendering aid to a coworker who has fallen to the ground. In emergent situations, the court said, the injuries are compensable because the employer has a duty to aid its employees, and the other employees are discharging that duty. It is clear, the court determined, that had the coworkers injured themselves while restraining plaintiff, the injuries would have been compensable. It would be anomalous to hold that the coworkers were acting in the course of their employment when they caused plaintiff's injuries but that his injuries did not arise from the employment, especially here where the commissioner found that plaintiff's coworkers acted to prevent injury to other workers as well. The "only reasonable inference," the court determined, is that the coworkers' actions benefited the employer as well as plaintiff. Because plaintiff's injuries were thus sustained in the course of his employment, they can also be found to have arisen out of that employment, the court concluded.

Accordingly, the court remanded.

*Plaintiff's Counsel*

James P. Brennan, Waterbury, Conn.

## Successor company held liable for girl's death caused by runaway fire hose

*Schmidt v. Coraopolis Vol. Fire Dept.*, Pa., Allegheny Co. Com. Pleas, No. G.D. 05-7191, Sept. 14, 2006.

When a fire truck rushes through a neighborhood, it is usually a reminder that help is on its way and that people will be protected and kept safe. But on a summer day in 2004, that assurance proved horribly wrong. Erin Schmidt and Joeylynn Jeffress, 10-year-old best friends, were near Erin's house while their sisters played across the street. They heard a fire engine's sirens and stopped to watch for the truck. Erin's mother heard the fire truck too and told the girls to move back from the curb so they would not get hit.

Unfortunately, the fire truck roof did not have side barriers on its hose compartment to hold its hose in. As the truck turned onto the street, the hose flew off the truck, and the heavy nozzle dragged on the street until it became stuck under a car. When the nozzle broke free of the car, it propelled through the air like a slingshot, smashing into a birdbath on its way. The hurtling nozzle then struck Joeylynn on the right side of her face and went on to strike Erin squarely in her face. Joeylynn suffered several facial fractures, including to her right eye socket. Erin's injuries were more severe—she had a gaping wound in her head and multiple facial fractures. Erin's mother, who was slightly injured when the nozzle grazed her, rushed to Erin and cradled her in her arms, but Erin never regained consciousness and died the next day. Erin is survived by her mother and sister. Her medical expenses and funeral costs totaled about \$80,000.

Joeylynn required several surgeries and plates around her eye socket and cheekbone, which may affect the growth of her facial bones. She also suffered retina damage, causing vision problems that restrict her activities and place her at greater risk for developing glaucoma. She has significant scarring. Her medical expenses totaled about \$58,000. In addition, Joeylynn, her sister, and Erin's mother and sister continue to suffer from posttraumatic stress disorder and severe emotional distress.

A fire department investigation concluded the firefighters packed the hose in the same manner it had been packed for the last nine years. Surprisingly, fire trucks are not required to have a device on the roof to hold the hose in place. The solution to the problem became glaringly obvious right after this incident: The fire chief went to K-Mart and purchased a \$14 cargo net, which held the hose in place but allowed firefighters

easy access once they got to the scene.

The Schmidt family hired AAJ member Alan H. Perer, of Pittsburgh, and the Jeffresses hired AAJ member John P. Gismondi, who worked across the street from Perer. Both attorneys felt compelled to take the case. "What struck me immediately was the tragedy," says Gismondi. "Here you have two young girls, best friends, standing in front of their house, in the ultimate position of safety."

They quickly discovered that having a hose fall off a fire truck was not as unique as they had thought. Past reported incidents involved mostly property damage, but Perer points out that most of the time, the hose falls but does not strike anything and thus the fire department does not have to file a report. The firefighters, however, talk about the incidents in blogs. After learning this danger was not unique to their case, the attorneys knew the truck manufacturer had to be held responsible for what happened to their clients.

Erin's mother, individually and on behalf of Erin's estate and her other daughter, and Joeylynn's parents, on both daughters' behalf, sued the fire department and the company that purchased the original truck manufacturer's product line and, significantly, the right to its name. They settled with the fire department for \$500,000, the maximum a municipality is required to pay under state law. The case proceeded against the manufacturer's corporate successor. From the start, the attorneys faced big hurdles.

Their strategy for proving the defect claim was straightforward. "It doesn't take much imagination to see that if the road's bumpy, maybe you should enclose the hose on all sides," says Gismondi. But first they had to show that the company that bought the original manufacturer was the correct defendant. Generally, successors are not liable for the actions of the predecessor company. The product line exception, however, allows liability where the acquisition played a role in destroying the plaintiff's remedies and the company acquired the goodwill and name of the predecessor and made representations that it is the same company.

Such was the case here. The successor company, Sinor Manufacturing Company, Incorporated—later bought by Freightliner Specialty Vehicles, Incorporated—bought Boardman Company, the fire truck's manufacturer, during its liquidation. When Perer "basically crawled around in [Sinor/Freightliner's] attic," he discovered advertisements the company had run identifying itself as Boardman and claiming it had been around for 65 years. Although it did not manufacture any new fire engines, the attorneys say Sinor/Freightliner traded

heavily on the Boardman name to sell other emergency vehicles. At trial, they called one of the company's executives to the stand and got him to admit that Sinor/Freightliner held itself out as Boardman to have a competitive advantage over other manufacturers because it was a small, unknown company. They also had the advertisements enlarged and displayed for the jury.

"We had never seen any successor case where the company actually held itself out as being the original company and called itself that company," says Perer. "That was our smoking gun evidence."

For Perer, another complication was deciding how to present a claim for the emotional distress suffered by Erin's mother. "I had to figure out how to get across to the jury how it feels to watch your child get hit and hold her head in your arms and pretty much have her die in your arms," he recalls. Her mother was also suffering from immense survivor's guilt because Erin was hit by the nozzle in the location where her mother told her to stand. At trial, he relied on the mother's testimony and the testimony of psychologist Sandra Faulkner and psychiatrist Christine Martone, both of Pittsburgh, who had both talked to Erin's mother. He also called neighbors to talk about Erin, who "was the spirit of the neighborhood. Everybody loved her."

Their strategies succeeded. The jury awarded the

Schmidt family \$3.35 million, including \$2.1 million to Erin's estate, \$1 million to her mother, and \$250,000 to her sister. The Jeffress family was awarded about \$1.66 million, including \$1.5 million to Joeylynn, \$100,000 to her sister, and \$58,000 to her parents. The jury found the fire department 50 percent liable, based on the successor's argument that the hose was not correctly packed. However, the successor company is jointly and severally liable for the entire award, as reduced by the earlier \$500,000 settlement with the department. Sinor/Freightliner's appeal is pending.

As a direct result of this case, the National Fire Protection Association began requiring manufacturers to equip all new fire engines with a hose-restraining device. While this is of some comfort to Erin's mother, she plans to lobby Congress so that all fire engines, including those manufactured before the new regulations, are required to have a restraining device.

Perer and Gismondi feel gratified by the results. "It's really raised everybody's awareness about the dangers fire hoses present," says Gismondi. Perer agrees. "One of the reasons I became a lawyer is that I really want to make the world a little bit better place, a little safer place," he says. "If we save someone else from going through this ordeal, then maybe some good can come out of this."

COURTNEY L. DAVENPORT

## ARTICLES

*The Law Reporter is unable to supply copies of articles. It does provide addresses of publications that may not be available at your local library.*

### **Advising clients on money management**

Attorneys should keep certain ethical considerations in mind when offering advice to clients on how to manage large sums received from a settlement or verdict. Jill Schachner Chanen, *Mo' Money, Mo' Problems*, ABA J., Sept. 2006, at 16.

### **Brain scans of patient in vegetative state show responses to verbal commands**

In a recent study, researchers used functional magnetic resonance imaging to observe the brain function of a patient in a vegetative state, and the scans showed brain activity in the same areas as healthy volunteers when given verbal commands. Adrian M. Owen et al., *Detecting Awareness in the Vegetative State*, 313 Science 1402 (2006).

### **Confirming that exposure to dust from World Trade Center collapse caused illnesses**

As thousands of people seek compensation for becoming sick from exposure to dust from the collapse of the World

Trade Center, scientifically proving that a link between the dust and diseases exists is still years away. Anthony DePalma, *Medical Views of 9/11's Dust Show Big Gaps*, N.Y. Times, Oct. 24, 2006, available at [www.nytimes.com](http://www.nytimes.com).

### **Examination of credit cards as defective products**

An analysis of the liability of credit card issuers under a defective design theory discusses how the defective products are not the cards themselves but the cardholder agreements, and courts recognizing credit cards as defective products could potentially protect consumers and address credit card debt issues. Adam Goldstein, Student Author, *Why "It Pays" to "Leave Home without It": Examining the Legal Culpability of Credit Card Issuers under Tort Principles of Products Liability*, 2006 U. Ill. L. Rev. 827 (2006).

### **Fair housing group says home valuation Web site misleads consumers**

The National Community Reinvestment Coalition, a fair housing advocacy group, has filed a complaint with the Federal Trade Commission saying that the home-valuation Web site Zillow.com provides inaccurate information that helps predatory lenders and others take advantage of consumers.

Annette Haddad, *Home-Valuation Site Said to Mislead Consumers*, Newsday, Oct. 30, 2006, available at [www.newsday.com](http://www.newsday.com).

### Federal Aviation Administration needs new staffing model for safety inspectors

According to a recent report, the Federal Aviation Administration should develop a new staffing model to determine how many aviation safety inspectors the agency's Flight Standards Service needs because the current method does not account for changes in the aviation industry, such as advances in technology and manufacturing techniques. Committee on Federal Aviation Administration Aviation Safety Inspector Staffing Standards, *Staffing Standards for Aviation Safety Inspectors*, Natl. Res. Council Rep., available at [www.nap.edu](http://www.nap.edu).

### Growing use of blogs as evidence

As more attorneys use blogs as evidence in legal proceedings, bloggers should be more cautious of what they write and post online because, unlike e-mail, blogs are public and can be found easily through search engines. Sacha Pfeiffer, *In Court, Blogs Can Come Back to Dog the Writers*, Boston Globe, Sept. 28, 2006, available at [www.boston.com](http://www.boston.com).

### Presenting demonstrative evidence during mediation

Attorneys should use demonstrative evidence during mediation because the advantages of disclosing critical information outweigh the disadvantages, and an effective presentation to the decision makers improves the chances of a fair settlement. Steven H. Krus & Monty A. McIntyre, *Using Technology to Effectively Tell Your Story and Get Best Settlement during Mediations*, Trial Bar News, Aug./Sept. 2006, at 27.

### Recent litigation involving ministerial exception

For more than a century, courts have applied the ministerial exception, or church autonomy doctrine, to dismiss lawsuits against religious employers, reasoning that congregations cannot exercise religious freedom with government interference, but recent litigation involving benefits, discrimination, and unionization raises questions about the fairness of the ministerial exception. Diana B. Henriques, *Where Faith Abides, Employees Have Few Rights*, N.Y. Times, Oct. 9, 2006, available at [www.nytimes.com](http://www.nytimes.com).

### Serious eye injuries from thrown eggs

Researchers in the United Kingdom warn in this study that throwing raw eggs at people, a popular prank at Halloween, can result in serious eye injuries, including severe bruising to the retina and optic nerve damage. R.M.K. Stewart et al., "Here's Egg in Your Eye": *A Prospective Study of Blunt Ocular Trauma Resulting from Thrown Eggs*, 23 Emerg. Med. J. 756 (2006).

### What attorneys should know about posttraumatic stress disorder

Attorneys representing clients who suffer from posttraumatic stress disorder (PTSD) should be familiar with the symptoms, myths, and treatments associated with PTSD and know that the severity of PTSD is determined not by the situation but by the client's interpretation of the events that occurred. Gordon Cochrane, *Posttraumatic Stress Disorder (PTSD): An Update for Personal Injury Lawyers*, Litigator, Winter 2006, at 51. Contact the Ontario Trial Lawyers Association, 4 Hughson St. S., Ste. 301, Hamilton, Ont. CAN L8N 3Z1.

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## UPDATES

### DEVELOPMENTS

**AUTOMOBILE ACCIDENTS:** *Doe v. Sani-Can Serv., Inc.*, 48 ATLA L. Rep. 77 (Apr. 2005): *settled*, Apr. 24, 2006. In this case in which Doe, 32, was killed when a commercial truck drove into an intersection and struck Doe's car from the side, ejecting her, Doe's brother, on behalf of her estate, reached a settlement with the trucking company, its owners, and two closely related family businesses. Plaintiff had retained the right in the initial settlement with the company's liability carrier to pursue claims against the company's assets and, upon learning that the company allegedly failed to follow corporate formalities and commingled funds, plaintiff refiled, seeking to pierce the corporate veil. The parties reached a settlement with the individual defendants for \$750,000 after the policy limits were exhausted in the initial settlement. Plaintiff was represented by **W. Thompson Comerford Jr.** and **Kevin J. Williams**, both of Winston-Salem, N.C.

**COMMERCIAL LITIGATION:** *Peterson v. BASF Corp.*, 711 N.W.2d 470 (Minn. 2006) (en banc), 49 ATLA L. Rep. 175 (June 2006): *cert. denied*, 127 S. Ct. 579 (2006). The U.S. Supreme Court denied certiorari in this case holding that the Federal Insecticide, Fungicide, and Rodenticide Act does not preempt plaintiffs' state law claim that defendant fraudulently marketed a more costly version of an herbicide to growers of "minor-use" crops and affirming an award of

\$45 million to a class of farmers. Plaintiffs in *Peterson* were represented by Hugh V. Plunkett III, Scottsdale, Ariz.; and J. Michael Schwartz and Douglas J. Nill, both of Minneapolis, Minn.

**INTENTIONAL TORTS:** *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416 (Cal. App. 1st Dist. 2003), 47 ATLA L. Rep. 89 (Apr. 2004): *rev'd*, 146 P.3d 510 (Cal. 2006). The California Supreme Court reversed an appellate court's ruling that the Communications Decency Act does not provide immunity to a distributor who knowingly posted a third party's defamatory statement on several online news-groups. The state high court held that both distributors and publishers have immunity under the statute. The court further held that individual "users" of interactive computer services are also immune, regardless of whether they are active or passive users.

**TOXIC TORTS:** *In re: The Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004), 47 ATLA L. Rep. 134 (May 2004): *vacated*, \_\_\_ F.3d \_\_\_, 2006 WL 3755189 (9th Cir. Dec. 22, 2006). The Ninth Circuit Court of Appeals ruled that a \$4.5 billion dollar punitive damages award in litigation relating to the *Exxon Valdez* oil spill was unconstitutionally excessive. Looking to U.S. Supreme Court precedent, the court vacated the lower court's award and directed it to enter an award of \$2.5 billion in punitive damages, a 5-to-1 ratio of punitive to compensatory damages resulting from the spill.

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## DOCUMENTS \$50

**DOE V. DIOCESE OF PALM BEACH, INC.**, p. 23 (plaintiff's complaint in a case alleging negligent hiring, retention, and supervision of a priest). No. PN702.

**DOE V. TEX. INTL. EXPRESS, LLP**, p. 7 (plaintiffs' amended complaint in a case alleging speeding and failure to keep a proper lookout where a tractor-trailer rear-ended a car stopped in traffic). No. LR4316.

**MARQUARDT V. DRAGISIC**, p. 19 (deposition of plaintiffs' anesthesiology expert in a case alleging negligent administration of an interscalene block). No. LR4317.

**POLSKY V. VIRNICH**, p. 10 (plaintiff's amended complaint in a case alleging breach of fiduciary duty where directors paid themselves excessive amounts). No. LR4318.

**YAMADA V. NORTHSIDE HOSP., INC.**, p. 18 (deposition transcript of plaintiffs' obstetrics expert in a case alleging improper treatment of a choledochal cyst). No. LR4319.

## DOCUMENT SETS \$95

**AGEE V. RAIN TREE ESTS. I, INC.**, p. 17 (plaintiffs' motion for partial summary judgment and response to defendants' motion for summary judgment in a case alleging a homeowners' association asserted unfounded liens on a condominium to thwart its sale). No. LR4320.

**BAITY V. HUNGARO TRANSP., INC.**, p. 7 (plaintiff's complaint and defendants' answer in a case alleging failure to maintain control of a vehicle and negligent hiring and retention where a tractor-trailer rear-ended a tow truck). No. LR4321.

**DOE V. ROMAN CATHOLIC DIOCESE OF NASHVILLE**, p. 23 (plaintiffs' Rule 11 supplemental and reply briefs in a case holding a claim of reckless infliction of emotional distress need not be premised upon conduct directed at a specific person or occurring in a plaintiff's presence). No. LR4110.

**HARDEE V. BIO-MEDICAL APPLICATIONS OF S.C., INC.**, p. 18 (plaintiffs' appellate briefs in a case holding that a dialysis center owed a duty to drivers injured by a patient shortly after leaving treatment). No. LR4322.

**HARRIS V. KREUTZER**, p. 24 (the parties' appellate briefs in a case holding that a psychologist performing an inde-

pendent medical examination of a plaintiff in a civil lawsuit is liable to her for medical negligence). No. LR4227.

**KELLER V. CITY OF STOCKTON**, p. 8 (plaintiffs' amended complaint, defendants' answer, the parties' trial briefs, and the jury instructions in a case alleging interference with the parental relationship where a child was taken from her father's custody without a warrant). No. LR4323.

**LEARY V. GEOGHAN**, p. 23 (plaintiffs' complaint and first amendment to it in a case alleging sexual abuse by a Roman Catholic priest). No. PN667.

**MINTON V. SAVAGE**, p. 18 (depositions of plaintiffs' and defendants' obstetrics experts in a case alleging improper use of a vacuum extractor and negligent handling of shoulder dystocia). No. LR4081.

**POTTER V. SCHENK**, p. 18 (depositions of experts and defendant in a case alleging failure to timely diagnose a fungal infection). No. LR4324.

**ROMAN CATHOLIC DIOCESE OF JACKSON V. MORRISON**, p. 23 (plaintiffs' appellate brief and an amicus curiae brief on behalf of the Survivors Network of Those Abused by Priests in a case holding that enforcing the duty to protect children from molestation does not excessively entangle the judiciary in religious matters). No. PN734.

**SOTELO V. DIRECTREVENUE, LLC**, p. 11 (plaintiffs' amended complaint, defendants' answers, the parties' settlement agreement, and the court's order approving the settlement in a case alleging trespass to chattel where a computer user unknowingly downloaded spyware). No. LR4325.

**ST. CYR V. ARAMARK US OFFSHORE SERVS., INC.**, p. 4 (plaintiff's fourth amended petition, defendants' answers, the parties' discovery requests and responses, and plaintiff's expert reports in a case alleging failure to properly inspect and maintain a vessel where an oil rig worker fell down a crew boat stairwell). No. LR4326.

**WATKINS V. HEDMAN, HILEMAN & LACOSTA**, p. 24 (plaintiff's opening brief and reply brief in a case holding that a legal negligence suit against an attorney who drafted a complex estate plan was not time-barred under the applicable three-year limitations period for such claims). No. LR4035.

**WAUSAU UNDERWRITERS INS. CO. V. UNITED PLASTICS GROUP, INC.**, p. 16 (insurer's motion to dismiss and company's response, the parties' trial briefs, and the court's opinion and order in favor of the company in a case alleging that an insurer refused to pay an excess policy in a claim against its insured). No. LR4327.

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**DAVIS v. NORMAN**, 48 ATLA L. Rep. 234 (Sept. 2005) (the court's findings of fact and conclusions of law in a case alleging strict liability where a pit bull attacked a man). No. LR4149.

**PIPPIN v. FINK**, 45 ATLA L. Rep. 222 (Aug. 2002) (plaintiffs' appellate brief in a case in which the court held that the domestic partner of a dog's registered owner can be held liable under New Jersey's dog bite statute for injuries the dog caused). No. LR3862.

### DOCUMENT SETS \$95

**BOHAN v. RITZO**, 39 ATLA L. Rep. 406 (Dec. 1996) (the parties' appellate briefs in a case holding that a dog owner was strictly liable for injuries that were caused by the dog's vicious or mischievous acts, despite absence of physical contact). No. LR2885.

**CASARES v. ROSALINA GOBERT HOM TRUST**, 40 ATLA L. Rep. 141 (May 1997) (plaintiff's and defendant's summary judgment memoranda in a case alleging failure to control a dog). No. LR2974.

**FLEMING v. INTL. POLAR EXPEDITIONS, INC.**, 37 ATLA L. Rep. 350 (Nov. 1994) (plaintiffs' complaint and summary judgment motion and the parties' briefs on the motion in a case alleging failure to adequately confine a dog). No. LR2205.

**MATTHEWS v. AMBERWOOD ASSOCS. LTD. PARTN., INC.**, 42 ATLA L. Rep. 23 (Feb. 1999) (the parties' appellate briefs in a case holding a landlord owed a duty to a guest killed by a tenant's pit bull). No. LR3352.

**REUTTER v. REUTTER**, 40 ATLA L. Rep. 221 (Aug. 1997) (complaint and answer and plaintiffs' motion for summary judgment and supporting memorandum in a case alleging strict liability where a dog attacked a child). No. LR3033.

**ROLAND v. LeBLANC**, 39 ATLA L. Rep. 409 (Dec. 1996) (plaintiff's complaint and the parties' briefs on defendants' summary judgment motion in a case alleging that a dog constituted a dangerous condition at an apartment building). No. LR2901.

**SMITH v. ACIERNO**, 37 ATLA L. Rep. 104 (Apr. 1994) (plaintiff's response to defendants' motion for summary judgment, plaintiff's proposed jury instruction regarding the issue of negligence, and the trial court's ruling on defendants' posttrial motions in a case alleging that a landlord and apartment complex owners negligently failed to control their tenant's dog). No. LR1999.

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