NCBA Past President
Christopher T. McGrath
to Receive 2020 NCBA
Distinguished Service Medallion

Each year, the Distinguished Service Medallion is awarded to an individual who has enhanced the reputation and dignity of the legal profession. This prestigious award is the highest honor one can receive from the Nassau County Bar Association and each year the recipient is carefully selected. Past recipients have included U.S. presidents, a vast array of judges of various courts, including the United States Supreme Court and the Court of Appeals, world-renowned philanthropists, various political leaders, including presidential advisors, governors, and county executives, as well as the top attorneys throughout our country.

This year, we are proud to announce that the seventy-seventh Distinguished Service Medal will be awarded to one of our very own NCBA Past Presidents, Christopher T. McGrath (2005-2006). We look forward to honoring him at our 121st Annual Dinner Dance Gala on May 9, 2020 at the Long Island Marriott.

McGrath is a Senior Partner and top trial attorney at Sullivan Papain Block McGrath & Cannavo P.C., a premiere personal injury firm in Garden City. He is also a long-standing adjunct professor at Hofstra School of Law, teaching NY Civil Practice, Trial Techniques, and Advanced Torts. McGrath has also been a sought-after lecturer at numerous seminars for both the NCBA and New York State Bar Association (NYSBA). Some of his most recent lectures have included Trial Techniques at the NYSBA Annual Convention and Labor Law Litigation Verdict Sheet and Charge at the NYS Judicial Institute.

In addition to his Bar presidency, McGrath has remained an integral member of the NCBA and legal community. Throughout the years, he has chaired many committees. For the second time, he currently serves as the Co-Chair of WE CARE, part of the Nassau Bar Foundation, the charitable arm of NCBA. WE CARE is comprised of NCBA members who strive to improve the quality of life for children, the elderly, and others throughout Nassau County through charitable grants and has raised millions of dollars through numerous fundraising events and generous donations. McGrath is a two-time past chair of both the Judiciary Committee and the Supreme Court Committee.

Since 2008, McGrath has been a member of the Committee on Character and Fitness for the Second, Tenth, Eleventh and Thirteenth Judicial Districts. He is also a member of multiple legal associations, including the New York State Bar Association, the New York State Trial Lawyers Association, and the Association of Trial Lawyers of America.

Acknowledged for his work and notable accomplishments within the legal field, McGrath is Board Certified by the National Board of Trial Advocates and has been named one of the Best Lawyers as the 2020 “Lawyer of the Year” in the practice of personal injury litigation. He has also been included on the American Board of Trial Advocates, American Board of Trial Advocates – New York, Million Dollar Advocates Forum, and the Million Dollar Advocates Forum – New York. McGrath has been recognized for his years of service to the legal profession. He has been named one of the Best Lawyers in America and has been recognized by New York Super Lawyers since its inception, among numerous other notable awards and recognitions. In 2012, McGrath received the Attorney Professionalism Award by the New York State Trial Attorneys, one of the highest awards to obtain as a legal professional. He was the second attorney from Long Island to ever receive this honor.

In addition to his impressive roster of accomplishments, McGrath has been featured as a legal television commentator on CourtTV and various news channels, including Live at Five on WNBC New York and At Issue on News 12, Long Island. He has also written articles for Nassau Lawyer, the New York State Bar Association’s New York Injury News, and New York Law Journal, among others.

McGrath received his B.A. from St. John’s University and his J.D. from the University of Dayton. For the past 37 years, McGrath is an active volunteer for Camp Anchor in Lido Beach at their annual Special Handicapped Field Day event, and is a two-time Past President and current board member of the Peninsula Kiwanis chapter where he heads numerous projects that help improve local communities and lives of people in need. In addition to his volunteer work, McGrath served as a volunteer Mock Trial Judge for the Nassau County Bar Association since 2008, a program that motivates and inspires high school students who wish to pursue a career in the legal profession.

When he is not in the courtroom, lecturing, or volunteering, McGrath enjoys spending time with his wife Monica, three daughters Kristin Seibert (Robert), Kelli, and Katelynn and his granddaughter, Madelyn. The Annual Dinner Dance Gala is the largest social event of the Nassau County Bar Association. It will be held on Saturday, May 9, 2020 at the Long Island Marriott. In addition to the Distinguished Service Medallion Honoree, NCBA Members who have been admitted to the Bar for fifty, sixty, and seventy years will also be honored that evening and recognized for their years of service to the legal profession. We hope you will join us to pay tribute all of the honorees.

Invitations to the Dinner Dance will be mailed in March. If you are interested in purchasing sponsorships or Journal ads, see the insert in this issue of the Nassau Lawyer. You may also contact Ann Burkowski in the NCBA Special Events Department at (516) 747-4071 or events@nassaubar.org.
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This past year saw several appellate decisions interpreting New York’s workers’ compensation laws. While none of these decisions revolutionized the regime by which workers receive compensation for work-related injuries, many of them applied established principles to novel circumstances. Those decisions offer an important reminder to all personal injury practitioners of the rules to follow when representing injured workers or their employers.

**Ferguson: Due Process Rights Exist in WC Hearings**

In Ferguson v. Eallonardo Construction Inc., the Third Department held that claimants have the right to cross-examine physicians in WCLJ hearings, even if they do not seek to call their own physician. After examination, a consultant for the carrier determined that the claimant had sustained a 40% schedule loss of use of his right arm. The claimant’s counsel received notice of this finding, and then had 60 days to submit a report on Form C-4.3. Instead, at the first permanency hearing, the claimant’s counsel made his request at the first permanency hearing, denying cross-examination here was an abuse of discretion.

**Peterec-Tolino: Limited Review of Board Findings**

In Peterec-Tolino v. Five Star Electric Corp., the Third Department affirmed a Board decision that a claimant had not been terminated for legitimate business reasons. The Board, however, found that the claimant was terminated for legitimate business reasons. The Third Department recognized that WCL § 120 prohibits an employer from discharging an employee for filing or attempting to file for benefits, but also that the employee bears the burden of proof. The court noted the evidence before the Board of layoffs due to a furlough replacement program, as well as complaints about the employee’s performance. While the timing of the firing was suspicious, the court concluded that “we have limited power to review the sufficiency of the evidence and lack[] the ability to weigh conflicting proof or substitute our judgment for the inference drawn by the Board.”

**Czechowski: Board May Resolve Conflicting Medical Evidence**

In Czechowski v. MCS Medical Services, the Third Department held that the Board has the authority to resolve conflicting medical evidence in determining whether surgery is justified under the Workers’ Compensation Medical Treatment Guidelines. The claimant had established a claim for work-related injuries to his left foot and lower back. He visited an orthopedic surgeon, who requested authorization from the carrier to perform surgery. The carrier denied the request, based on a report from another orthopedic surgeon that the need for surgery was not established under the Guidelines. After taking the claimant’s deposition, however, a WCLJ authorized the surgery. The carrier then issued an authorization, but also applied for Board review. The Board considered the opinions of both surgeons, and concluded that the surgery was improperly authorized.

On the claimant’s appeal, the Third Department affirmed the Board’s decision. The court noted at the outset that “[t]he Board has the authority to promulgate medical treatment guidelines defining the nature and scope of necessary treatment.” The court also noted that "’I’m humbled to be the only lawyer on long island given this honor. Medical malpractice is not for every lawyer but I’ve made it my life’s work due to the challenge and personal reward.’"
Winter Warmth at Domus

As we slog through the doldrums of the post-holiday season, Domus remains a refuge in the cold—a place where you can enjoy a hot bev- erage and the toasty warmth of camaraderie with friends. I find myself here most days of the week for committee meetings, Deans’ Hours, special events, discussions with staff, or just lunch with friends. Domus is buzzing with activity most days of the week, and I am grateful to see so many of you here regularly. I’m so very proud to be your president! This month, I thought I might highlight a few of the NCBA events and issues thus far in the new year, to give you an idea of what’s going on at your favorite bar association.

They say “the times they are a-changing,” and so may be the courts. We started the year with a joint meeting of the Boards of the Nassau County and Suffolk County Bar Associations. The meeting was attended by New York State Chief Administrative Judge Lawrence K. Marks, Nassau County District Administrative Judge Norman St. George, Suffolk County District Administrative Judge C. Randall Hinrichs, NYSSBA President Henry Greenberg, and NYSSBA President-Elect Scott Karson. Judge Marks and Judge Hinrichs, respectively, welcomed attendees to NYSSBA’s biannual judicial conference. The event was hosted by Judge Janet DiFiore’s vision of a revised court system which would replace the 11 separate trial courts with a simplified three-level structure. I have appointed a task force headed by NCBA Past President Marc Gann to explore the impact of the proposal on the legal community. I look forward to feedback from the task force. Also at the joint meeting, the two bars together adopted a resolution, drafted by NCBA’s Michael Markowitz and Suffolk Bar’s Vincent Messina, urging the New York State Board of Legal Examiners to identify and establish a site within Nassau and/or Suffolk Counties for applicants residing in these counties to take the New York State Bar Examination. A joint letter was drafted and sent to Judge DiFiore, signed by the presidents of both Long Island bar associations. We share many interests with our neighbor bar to the east, and it’s a pleasure working with them.

In honor of Martin Luther King Jr. Day, the NCBA Diversity & Inclusion Committee, Chaired by the Hon. Maximine Broderick, in collaboration with the Nassau County Office of Youth Services, sponsored a rally at Domus. It’s a presenta- tion at Domus of “The Amistad: A Retracement of a Landmark Decision.” The script was written by Kathy Hirata Chin, a partner at Cowell & Moring, and her husband Denny Chin, judge for the US Court of Appeals for the Second Circuit. The reenactment tells the story of the events that led to the 1841 Supreme Court decision United States v. Schooner Amistad. The case represents the first time the high court directly confronted the question of slavery. The matter stemmed from a rebellion by captives aboard the Spanish schooner La Amistad in 1839, in which the captives, who were to be sold as slaves, took control of the vessel and attempted to return to Africa. They were intercepted by the U.S. Coast Guard off the coast of Long Island and initially charged with piracy. The question of whether they were human beings or cargo was litigated in the federal courts. The Supreme Court ruled that the captives were free people who were illegal- ly held and transported as slaves, and that their rebellion was justified. The decision strengthened the resolve of abolitionists and helped build momentum for an end to slavery in America. The student-actors in the reenactment were wonderful, and the appreciative audience found it to be a fitting way to spend the morning on Martin Luther King Jr. Day. Rudy Carney, Vice-Chair of the Diversity and Inclusion Committee, did an amazing job as emcee! Bravo to everyone involved!

As many of you know, I have prioritized efforts to increase membership among lawyers but also among the other categories of membership. I have reached out to local law school staff and students in an effort to better understand how best to connect with and recruit new members. I have met with the Chairs of the Paralegal Committee and the Law Office Administrator Committee, and hope to establish a schedule of regular meetings at Domus. Jen Groh, Director of the Nassau Academy of Law, our educational arm, has created a new lecture series, “Purely Paralegal,” which is geared toward enhancing the skill set of the paralegals and other non-attorney support staff in your offices. There are four programs scheduled for this spring, with more to be planned for fall 2020. Pricing is extremely affordable, and is free for current NCBA members of all categories. As an added incentive for non-mem- bers, any fees paid for the lecture series will be cred- ited toward the 2020-21 NCBA membership year if you sign up your paralegals by July 1, 2020.

The Bar has made a concerted effort to increase value to its members, and we hope that by extending the amazing offerings here under the roof of Domus to ALL of your law firm staff, you will understand more than ever why Domus is truly the home for the practice of law on Long Island.

I would like to thank those attorneys and mem- bers who volunteer to help those who need access to justice when facing the loss of their home. Over the past decade, our Mortgage Foreclosure Project has counseled more than 16,000 families. Our volun- teer attorneys assist the homeowners by providing representation for their day in court or consulting with them at bimonthly clinics. None of this would be possible without our volunteers! We can’t thank these individuals enough for their generosity of time and expertise (see page 18 for a list of those volunteers). When Superstorm Sandy struck, we were able to “hit the ground running,” consulting with those who needed it most. Unfortunately, for the need our help still exists and luckily our volunteers are still helping! Please volunteer if you have a few hours a month; it is truly rewarding.

We also hold Open Houses (previously fairs) to help all res- idents with any type of legal question they may need answered. In the past, we have recognized all our volunteers at a cocktail reception. This year’s Reception will be on July 22, 2020. Please save the date to support our volunteers. (Open House volunteers are not listed in the current advertisement as they are listed in the issue immediately after each Open House is held).

As NCBA President, it’s a tremendous honor to be extended the opportunity to address the open session of the legislative meeting in Austin, Texas. But when I’m not out and about, you’ll mostly find me at Domus. Don’t forget that there’s a Keurig machine and free coffee always available in the Great Hall. Stop by Domus for a hot cup on a cold day! I hope to see you there!

FROM THE PRESIDENT
Richard D. Collins

Nassau Lawyer welcomes articles written by members of the Nassau County Bar Association that are of substantive and procedural legal interest to our membership. Views expressed in published articles or letters are those of the authors alone and are not to be attributed to Nassau Lawyer, its editors, or NCBA, unless expressly so stated. Article/letter authors are responsible for the correctness of all information, citations and quotations.
Going, Going...Goniometer—What Constitutes “Objective” Evidence of Serious Physical Injury Under the Insurance Law?

Under New York’s No-Fault Law, a person injured in a motor vehicle accident can maintain a civil lawsuit only if their injuries surpass the “serious injury” threshold. Recent decisions in the First and Second Departments of the Appellate Division further highlight the split in authority regarding the level of proof necessary for litigants to demonstrate a prima facie “serious physical injury” to overcome the summary judgment “threshold.”

Section 5102(d) defines “serious injury” to include one or more of the following: death, dismemberment, significant disfigurement, bone fracture, loss of a fetus, permanent loss of use of a body organ, function, or member, significant limitation and non-permanent disability, what constitutes “objective” proof, and to bar claims which do not qualify. However, for other injuries, most notably, significant limitation and non-permanent disability, whether constitutes “objective” proof is less discernable. It is therefore not surprising that the First and Second Departments have recently diverged regarding what type of evidence is necessary to satisfy the “objective” standard in this context.

In particular, courts must decide whether the defendant met its prima facie burden for summary judgment, notwithstanding the fact that the defendant’s physician’s examination was “objective” measured in the affected joints using a goniometer, whereas the defendant’s expert stated that “ranges of motion were done visually and/or with the use of a hand-held goniometer.”

The court ruled that the defendant’s opposition, the “affirmed report of their orthopedic surgeon” failed to identify the objective tests that were utilized to measure the plaintiff’s range of motion, and thus, did not support the conclusion that the plaintiff suffered no limitations as a result of the accident.

The disagreement between the First and Second Departments can seemingly be traced to courts’ interpretations of the Court of Appeals’ holding in Perl v. Meier.

In Perl, the plaintiff’s physician examined the plaintiff shortly after the accident. The initial examination was subjective in nature, as the doctor did not quantify the range of motion he observed with numerical testing; however, the physician did conduct an examination years later, at which time he used “instruments to make specific, numerical range of motion measurements.” The Court of Appeals held that, while it was debatable whether the observations at the initial examinations met the “objective” standard, the later numerical observations were sufficient to create a triable issue of fact with respect to whether the injuries were “serious.”

Thus, after Perl, while numerical measurements certainly satisfied the “objective proof” standard, the question was left open as to whether non-numerical visual observations could meet this standard. Shortly after Perl, the First Department answered this question in the affirmative.

The NCBA Lawyer Assistance Program is directed by Beth Eckhardt, PhD, and the Lawyer Assistance Committee is chaired by Henry Kruman, Esq. This program is supported by grants from the WE CARE Fund, a part of the Nassau Bar Foundation, the charitable arm of the Nassau County Bar Association, and NYS Office of Court Administration.

See GONIOMETER, Page 19

Tax Defense & Litigation

Harold C. Seligman has been a member of the United States Tax Court since 1987. He has represented individual and corporate clients in hundreds of tax cases, both large and small, over the past 30 years against the IRS and New York State Department of Taxation and Finance.

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*Strict confidentiality protected by L 490 of the Judiciary Law.
For decades, trial courts with cases in the Second Department have required the bifurcation of personal injury trials, with a trial on the issue of liability preceding one on damages. While this practice was at one time codified in a Second Department rule, that rule was short-lived and was superseded long ago by a statewide rule that merely encouraged bifurcation as long as it promoted a fair resolution of the action.

Despite this, courts within the Second Department had routinely disregarded the statewide rule and had continued to strictly require bifurcation of the trial in personal injury cases. Recently, in Castro v. Malia Realty, Inc., the Second Department declared that the bifurcation of the trial in personal injury cases is not required. Instead, courts must determine on a case-by-case basis whether bifurcating the liability and damages issues at trial will help (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action. Only if both prongs are satisfied will bifurcation be appropriate.

**Facts of the Case**

On June 15, 2010, the plaintiff, Manuel Castro, was working at a construction site when the scaffold beneath him collapsed, causing him to fall approximately seven feet to the ground. He suffered brain, head, shoulder and spine injuries as a result of the fall. Castro thereafter brought an action against Malia Realty, LLC, the owner of the construction site, alleging negligence and violations of Labor Law §§ 200, 240(1) and 241(6). Malia then commenced a third-party action against Castro's employer, Target Contracting, LLC.

After discovery, Castro's attorney moved for summary judgment on liability. In opposition to the motion, both Malia and Target argued that factual questions existed regarding the cause of Castro's injuries. They maintained that Castro had not injured his neck and back in a fall, but as a result of lifting wooden planks—assertions that were based on entries in Castro's post-accident medical records. On that basis, the court denied Castro's motion for summary judgment and set the case over for trial.

Before trial, counsel for Target stated that, during the liability phase of the trial, it intended to introduce testimony from medical providers to whom Castro had allegedly made these damaging admissions. Based on this, Castro moved for a unified trial, contending that it was necessary to rebut the defendant's claims regarding the cause of his injuries. Although Malia did not oppose the motion, Target did.

The trial court denied Castro's motion, holding that a bifurcated trial was "required under the [Second Department] rules," but that it would allow Castro to cross-examine the treating physicians "as to whether Castro's injuries were consistent with a fall" as long as he did not go "into too much detail." At the liability trial, Castro testified that he had been instructed by his foreman to lower some wooden planks from a scaffold that was situated seven feet above the ground. When Castro asked for a harness, he was told that "there was only one on site and it was being used." As Castro was lowering a wooden plank, the scaffold plank on which he was standing shifted, and Castro fell to the ground, losing consciousness. Upon regaining consciousness, Castro got up, found his foreman and told him what had happened.

Castro's foreman corroborated most of these facts. Although he had not observed the accident itself, he acknowledged that the scaffold had not been properly secured, that it would "move," and that Castro had told him that he had fallen from it. Castro also called two of his treating physicians, who testified that Castro had "reported falling from a scaffold and sustaining head, neck, shoulder, arm, leg, and back injuries," and that Castro's injuries were consistent with a fall. Critically, however, the trial court prohibited Castro from eliciting testimony from his treating neurologist about the results of diagnostic testing of Castro's brain.

Target called another of Castro's treating physicians, who testified that Castro had complained only of neck, back and shoulder injuries, and was not at risk of any injury to his head or brain. According to this doctor, Castro had stated that his injuries resulted from lifting wooden planks. While this physician testified that Castro's injuries were consistent with lifting wooden planks, he conceded on cross-examination that the injuries also were consistent with a fall.

The jury rendered a defense verdict on liability, finding that Castro did not fall from the scaffold. Castro appealed to the Appellate Division, Second Department, arguing, among other things, that because the issues of liability and damages were intertwined, the trial court's refusal to unify the trial constituted reversible error.

**Bifurcation in the Second Department**

The CPLR has long allowed for the bifurcation of liability and damages if doing so will help "avoid prejudice" or achieve an "unprejudiced disposition of the matters at issue." In 1979, the Appellate Division, Second Department adopted a rule which required that "[i]n all negligence actions to recover damages for personal injury, the issues of liability and damages shall be severed and separately tried." This rule was subsequently developed into the Second Department rule, which mandates bifurcation of the trial in personal injury cases to help (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action. The rule has been interpreted to require a bifurcated trial in cases where it appears that bifurcation will help to (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action. The rule is based on the principle that bifurcation is required in cases where it appears that bifurcation will help to (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action. The rule has been interpreted to require a bifurcated trial in cases where it appears that bifurcation will help to (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action. The rule has been interpreted to require a bifurcated trial in cases where it appears that bifurcation will help to (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action. The rule has been interpreted to require a bifurcated trial in cases where it appears that bifurcation will help to (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action.
Personal Injury/Workers’ Compensation

Discovery of Prior Injuries and Medical Treatment After Brito v. Gomez

When a plaintiff seeks compensation for an injury by bringing a personal injury action, the defendant invariably demands medical records concerning prior injuries and treatment—pre-dating the incident at issue in the litigation. The overarching goal of doing so is to identify the reasons for explaining the plaintiff’s pain and suffering, and to ensure that the plaintiff is not seeking compensation for an injury that was not caused, in whole or in part, by the defendant’s negligence.

Plaintiffs are generally (and understandably) reluctant to provide discovery concerning prior medical treatment and conditions that are believed to have little bearing on the litigated claim and could be of a personal or embarrassing nature. Battles over these competing concerns of discoverability and privacy are nearly as old as the physician-patient privilege itself, and are often hard fought.1 In Brito v. Gomez, one such dispute made its way to the New York State Court of Appeals for resolution.2

The Brito Decision

In Brito, the Court of Appeals held that a plaintiff’s claims of negligence were barred by the physician-patient privilege concerning prior knee injuries, even though she was not claiming injury to her knees in the pending lawsuit.3 The plaintiff, Benedicta Brito, claimed that she injured her neck and back when her driver’s vehicle collided with a school bus in May 2014.4 Her bill of particulars listed her medical condition for her cervical spine, lumbar spine and left shoulder.5 Although the claimed injuries were limited to those body parts, Ms. Brito also included a generally worded claim of “loss of enjoyment of life.”6 At her deposition, Ms. Brito testified that her neck and back injuries made it difficult for her to walk and prevented her from wearing her broad shoes.7 Notably, Ms. Brito also testified that she injured both knees before the subject accident—five years prior, and her right knee two years prior. As a result of these prior injuries, she required surgery on both knees and had to use a cane while she recovered.8 Following the plaintiff’s deposition, the defendant demanded discovery concerning treatment Ms. Brito received for her knees. The plaintiff’s counsel objected to the demand, retaining that the records sought were not discoverable because they concerned unrelated medical treatment.9 The First Department addressed this distinction in its opinion in Brito and acknowledged that “unlike the Second Department, and other departments before us that have regarded generalized allegations of loss of enjoyment of life or of the ability to work as opening the door to a plaintiff’s entire medical condition, the Court of Appeals has declined the opportunity to more definitively resolve the split, and qualified its ruling by noting that it was based on the particular circumstances of this case.”10 The short decision also did not address the Second Department’s long line of precedent that has consistently held that broad allegations of injury in a bill of particulars can serve as the basis of a waiver of the physician-patient privilege as to his or her entire medical condition.11 While the Court of Appeals did not reject or disavow the Second Department’s approach, it did not adopt its language either. Instead, it found that the plaintiff’s prior injuries were sufficiently related to the particular limitations claimed in the pending litigation. However, even though the split between the First and Second Departments of law was not completely resolved, the Court’s holding provided a more liberal interpretation of discoverability than what had been allowed in the First Department previously. In that sense, the decision is a victory for defendants. Historically, the First Department has held that a claim of exacerbation of a prior injury or condition is appropriate only where the plaintiff has alleged an aggravation or exacerbation of that prior condition.12 This restrictive approach had the potential to lead to inconsistent results in the trial courts where the outcome of a discovery dispute could depend on whether the plaintiff’s attorney drafting the bill of particulars was candid enough to include a claim of exacerbation of a prior injury. In cases where a claim of exacerbation was not made, it was difficult for a defendant to obtain records of a prior injury, even though that injury may have impacted a plaintiff’s quality of life, life-expectancy, employability, or other factors bearing on the damages claimed. Where artful drafting of a bill of particulars could dictate whether or not prior injuries were discoverable in the First Department, the Second Department would likely allow the discovery so long as a claim of exacerbation of existing life or similar broad claim was contained in the bill of particulars. The Court of Appeals’ ruling in Brito implicitly rejects the First Department’s deterministic rule that exacerbation be made in order for a prior injury to be considered relevant to the claims.

The Interpretation and Impact of Brito

The Brito decision will undoubtedly have a significant impact on discovery disputes between litigants contesting the disclosure of medical records concerning prior injuries and conditions that are not specifically claimed or mentioned in the plaintiff’s bill of particulars. The Court of Appeals’ decision in Brito clarifies that the fact that a bill of particulars which does not mention a particular body part or condition will not necessarily preclude discovery into that condition. As long as the materials relate to the claims or defenses that are reasonably likely to discover a split between the First and Second Departments concerning the scope of a plaintiff’s waiver or privilege. By way of brief background, the First and Second Departments have historically held that different views on how to define the scope of a plaintiff’s waiver of his or her physician-patient privilege are determinative of the claims on the bill of particulars. In the First Department, the case law on discoverability of medical records concerning prior injuries is more restrictive of discovery than the precedent from the Second Department. The Second Department has traditionally approached these disputes with a more expansive view, finding that defendants are entitled to discovery of “records pertaining to [a plaintiff’s] pre-existing medical condition” where a plaintiff “affirmatively placed her entire medical condition in controversy through [ ] broad allegations of physical and mental injuries” and “claims of loss of enjoyment of life.”13

The First Department addressed this distinction in its opinion in Brito and acknowledged that “unlike the Second Department, and other departments before us that have regarded generalized allegations of loss of enjoyment of life or of the ability to work as opening the door to a plaintiff’s entire medical condition, the Court of Appeals has declined the opportunity to more definitively resolve the split, and qualified its ruling by noting that it was based on the particular circumstances of this case.”14 This restrictive approach had the potential to lead to inconsistent results in the trial courts where the outcome of a discovery dispute could depend on whether the plaintiff’s attorney drafting the bill of particulars was candid enough to include a claim of exacerbation of a prior injury. In cases where a claim of exacerbation was not made, it was difficult for a defendant to obtain records of a prior injury, even though that injury may have impacted a plaintiff’s quality of life, life-expectancy, employability, or other factors bearing on the damages claimed. Where artful drafting of a bill of particulars could dictate whether or not prior injuries were discoverable in the First Department, the Second Department would likely allow the discovery so long as a claim of exacerbation of existing life or similar broad claim was contained in the bill of particulars. The Court of Appeals’ ruling in Brito implicitly rejects the First Department’s deterministic rule that exacerbation be made in order for a prior injury to be considered relevant to the claims.

Conclusion

The Court of Appeals decision in Brito reaffirms that discovery disputes should be resolved with a focus on that which is material and necessary, given the particular claims at issue. A key takeaway from Brito is that a plaintiff’s prior injuries can be relevant to the issues in dispute even where an aggravation of that prior injury is not claimed in the bill of particulars. So long as the injury bears some relation to the claims being made, whether in the bill of particulars or by a plaintiff at a deposition, the records should be deemed discoverable.

The Brito decision is significant for defendants seeking to defend against claims of injury that may have either pre-dated the accident or that were at least connected in some (even if tangential) way to a prior medical condition. If prior injuries and medical conditions are brought to light, they could have a significant impact on the monetary value of the case. For plaintiffs, while the claims made in the bill of particulars will traditionally define the scope of the waiver of privacy concerns and privilege, it is important to consider that discovery may not be limited just because the specific condition is not part of the case in chief. If the claims sought by a defendant are demonstrated as likely to reveal information that is relevant to the claims and defenses made, they are fair game.

It should also be noted that in Brito, the plaintiff’s accident occurred in May 2014, nearly five years before the Court of Appeals issued its ruling on this significant, yet commonspace, discovery dispute. While the existence or absence of prior injuries is bound to impact the monetary value of the case, time also matters, especially considering the time that it takes for an issue to be resolved by what can be a lengthy appellate process. At the end of a very long day, the facts, including the existence of pre-existing medical conditions and prior injuries, will come to light. It is for the jury to decide how much the case is worth and to what extent prior injuries actually matter.

Melissa A. Danowski is a senior associate at Mauro Lilling Napary LLP in Woodbury, where she is a member of the appellate practice and litigation strategy group. She can be reached at mdanowski@mlnappellos.com.

5. For example, a statement such as “prior injuries to the back” does not specifically mention a particular body part or condition.


7. Brito, 33 N.Y.3d at 1127.


12. See Kakkarvan v. Archer, 166 A.D.3d 746 (2d Dep’t 2018).


16. Brito, 33 N.Y.3d at 1127.


18. Id. at 2-5.

19. Id. at 3.

20. Id. at 3.

21. Id. at 3.

22. Id. at 3.

23. Id. at 3.

24. Id. at 3.

25. Id. at 5.


27. Brito, 168 A.D.3d at 1150.


The fact that a worker and the injury-causing instrumental-ity were both at the same level at the time the accident occurred does not necessarily preclude a finding that a significant elevation differential exists. In Encarnacion v 3361 Third Avenue Housing Development Fund Corp., plaintiff alleged that he was injured during the disassembly of a formwork structure used to construct a concrete wall. Brace frames attached to the formwork stood at least 12 feet tall and weighed approximately 1,500 pounds. While both the plaintiff and the brace frame were at ground level, the brace frame fell and struck him.

The court held that although plaintiff and the brace frame stood at the same level at the time of the accident, the work plaintiff was doing posed a substantial gravity-related risk, because the falling of the brace frame away from the formwork panel would have generated a significant amount of force. Citing the pre-eminent Court of Appeals decision regarding “same level” cases, Wilinski v. 334 E. 92nd Street Housing Development Fund Corp., Encarnacion concluded that the evidence established prima facie that the activity in which plaintiff was engaged was covered under Section 240(1). An interesting case in a “same level” case that applied an intensive quantitative analysis of the force of impact on the plaintiff in order to determine whether a physically significant elevation differential existed came from the Third Department in Wright v Ellsworth Partners, LLC. In moving for summary judgment, the defendants submitted an affidavit from an engineer who compared the kinetic energy at the time of impact as being 154.83 joules. The engineer compared that to the number of joules (700.95) he calculated was necessary to move the plaintiff.

The mere fact that a worker is injured by being struck by a falling object while engaged in an activity covered by Section 240(1) is not alone sufficient to afford the worker the protections of the statute. In Dymarc v City of New York, the plaintiff was injured because the pipe saddle that detached from an overhead ceiling pipe assembly and struck plaintiff was not an object that required securing for the purpose of the undertaking but was rather a permanent part of the structure.

Conclusion

Evaluations of what constitutes a physically significant elevation differential will no doubt continue to be the subject of court decisions in 2020 and beyond. If history is any guide, the results in this ever-evolving issue are not always predictable, making it important for practitioners to keep abreast of the latest developments in the often high-stakes Labor Law 240(1) litigation.

Ira S. Slavit is Chair of the NCBA Plaintiff’s Personal Injury Committee and serves on the NCBA Board of Directors, and is an attorney with Levine & Slavit, PLLC, with offices in Manhattan and Mineola, representing plaintiffs in personal injury cases. He can be reached at islavit@newyorkinjuries.com.

2. 176 A.D.4th 850 (2d Dept. 2019).
5. 154.83 joules.
8. 172 A.D.3d 1159 (2d Dept. 2019).
A vast majority of the commercial-type premises liability cases in this State result in landlords being shielded from liability as a result of the well-known out-of-possession landlord rule. Under this rule, landlords who have contracted out the responsibility for maintenance of their property to their tenants do not assume liability for breach of that duty. However, in recent months, the liability of out-of-possession landlords and owners has come before the Court of Appeals in two notable cases: Xiang Fu He v. Troom Management, Inc. and Henry v. Hamilton Equities Inc. These opinions are important not only for landlords and tenants but also for attorneys practicing landlord-tenant law, as well as personal injury.

**Xiang: Lessees Still Liable Under “Sidewalk Law”**

In Xiang, plaintiff alleged he slipped and fell from ice “that had accumulated due to defendant landlords’ negligent maintenance of the city-owned sidewalk abutting their property.”1 The case came before the Court of Appeals when an appeal was taken from a decision of the First Department, which reversed a Supreme Court order that denied summary judgment to defendants and dismissed the complaint.

The defendants originally moved for summary judgment claiming that they were not liable under New York Administrative Code § 7-210, since they were out-of-possession landlords. The Court of Appeals held that ‘Administrative Code § 7-210, which imposes a non-delegable duty on certain real property owners to maintain city sidewalks abutting their land in a reasonably safe condition, applies with full force notwithstanding an owner’s transfer of possession to a lessor or maintenance agreement with a non-owner.’2 Accordingly, the Court of Appeals held that “defendants were not entitled to summary judgment as a matter of law based solely on their out-of-possession status.”3

The Court, in a carefully detailed analysis, refused to extend the out-of-possession landlord rule to these defendants. In turning to the express language of Section 7-210, the Court highlighted that “it applies to every ‘owner of real property abutting any sidewalk’ § 7-210 (a)’ and makes no distinction for those owners who are out of possession, and the fact that it expressly excludes certain owner-occupied properties from its reach demonstrates that if the City Council meant to exclude a class of owners, it knew how to do so (§ 7-210 (b)).”4

The Court also reasoned that “a landowner’s duty under section 7-210 is an affirmative, nondelegable obligation which incentivizes owners to make decisions that optimize the safety and proper care of sidewalks, reducing harm to third parties and litigation costs.”5 The Court concluded that its interpretation of this section of the Code was in line with the City Council’s intent to place the duty to maintain sidewalks on landowners, who are in the best position to maintain the sidewalks.

Based on Xiang, it is now apparent that an owner of real property that falls within the ambit of Section 7-210 can contract out work to actually maintain the sidewalk in that it can hire or retain another to perform the actual work. However, it cannot shift the actual duty and avoid liability in the event the work is negligently performed, resulting in injuries. Although this case may be casted as a win for the plaintiff’s bar, it should not be ignored by defendants. It serves as an incentive for defendants to properly and carefully vet contractors to perform their work and to ensure that its property is maintained in a reasonably safe condition, whether it be through more detailed or more frequent inspections or some other means.

**Henry: Lessees Can Contractually Assume Liability**

The Court of Appeals in Henry did not impose liability on the defendant landowner, essentially because it was an out-of-possession landlord. In Henry, plaintiff alleged he sustained injuries after having slipped on water in a nursing home that came from a leaking roof. The original lease stated the duty to maintain the premises to the tenant in possession of the nursing home. Subsequent to entering into the lease, the defendant landowner entered into a regulatory agreement with the United States Department of Housing and Urban Development (HUD) “related to the facility’s construction requiring defendants to ‘maintain the mortgaged premises … in good repair and condition’.”6

The defendants landowners moved for summary judgment on the basis that they were an out-of-possession landowner with a lease agreement placing the onus on the tenant to maintain the premises in good repair and condition.7 The Court of Appeals explained that “a duty to remedy dangerous conditions is imposed on a landlord who has made a covenant to repair directly with the tenant.”8 The Court stated that even though the terms of the HUD regulatory agreement were superseded by other contradictory requirements, “the HUD regulatory agreement did not conflict with, or absolve the nursing home of, its responsibilities under the original lease.”9

As such, “the HUD regulatory agreement, as incorporated into the lease amendment, was not a covenant that could be said to displace the nursing home’s duties or alter the relationship between landlord and tenant.”10

Given the Henry decision, it is certainly important for plaintiffs’ counsel to review and consider all the agreements turned over to discovery in order to determine whether any of them contain clauses which displace the tenant’s duties or alter the relationship between landlord and tenant. By using the analysis in Henry, one could determine whether liability should be extended to an out-of-possession landlord that would otherwise be shielded from liability. In addition, such an analysis will help plaintiffs better evaluate their claims and how to litigate their case.

As for defense counsel, it is important to be mindful of the documents negotiated and agreements entered into as to whether a promise to make repairs will induce the tenant to forego repair efforts which it might otherwise have made. If ignorant to this issue, defendants may find themselves to be liable in circumstances where it typically would have been afforded the protection of the out-of-possession landlord rule.

Deanne M. Caputo is a partner with Sullivan Papain Block McGrath & Cannavo P.C. in Garden City, representing plaintiffs in personal injury cases. She can be reached at dcaputo@triallaw1.com. 1. 34 N.Y.3d 167 (2019). 2. 34 N.Y.3d 136 (2019). 3. Id. at 170. 4. Id. at 169. 5. Id. at 167. 6. Id. at 172. 7. Id. at 174. 8. Id. at 136. 9. Id. at 143. 10. Id. at 145. 11. Id.
A Theoretical Solution for Endometrial Cancer Claims to the VCF

On July 29, 2019, President Trump ratified the Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victims Compensation Fund (hereinafter, "VCF"). This law countered the financial deficit underlying the fifty to seventy percent reduction in the compensatory awards paid out on victim claims due to an insufficiency of funds. Under the statute the VCF may compensate for a list of conditions that have been established as certifiable conditions by the World Trade Center Health Program and the National Institute for Occupational Safety and Health ("NIOSH").

However, there are a group of 9/11 survivors that are being denied compensation under this statute and those are victims who have been diagnosed with endometrial cancer. On September 24, 2019, the WTC Health Program published their response to Petition 23, which requested to add endometrial cancer to the list of certifiable 9/11-related conditions. The petition was denied due to a finding of insufficient evidence that endometrial cancer was 9/11-related. Here we analyze a theoretical solution to the problem.

The Denial of Endometrial Cancer Claims

Petition 23 petitioned that endometrial cancer be added to the list of 9/11 conditions referencing a 2002 study by Lioy et al. and a 2017 study by McIntoy et al. These studies provided a scientific basis showing a causal link between toxic cadmium exposure and an increased risk of developing endometrial cancer; however, because neither study was a peer-reviewed, published, epidemiological study of endometrial cancer in a 9/11-exposed population, neither study was considered relevant or given further consideration.

The WTC Health Program, in their response to Petition 23, then conducted a search for relevant peer-reviewed case studies and in one such study, Report on Carcinogens published by the National Toxicology Program, cadmium was listed among 39 toxic agents present in World Trade Center toxic dust that were either known or reasonably anticipated to be human carcinogens. However, it was concluded that the link between these 39 carcinogenic substances and the causation of endometrial cancer was insufficient, primarily because there were not enough studies to show a consistent result of endometrial cancer development.

Consequently, 9/11 victims with endometrial cancer are often denied compensation by the VCF. Unfortunately, the process of filing a VCF claim includes a general waiver against any future lawsuits for 9/11 damages. Once the claim is filed, the general waiver operates as a trapdoor that prevents seeking a court remedy after the claim has been denied. This result is in direct contradiction to the overall purpose of the VCF statute which is to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001. The truth of the matter is that epidemiological studies are virtually ineffective when it comes to understanding the causes of conditions that fall on the outskirts of the standard deviation bell curve where data numbers tend to decrease. That is an approach that helps identify conditions that plague the vast majority of affected members, not the minority. The VCF however is still tasked with the duty of compensating all those individuals who were injured by 9/11 or its aftermath, not just the ones where the causal link is verifiable by large-scale studies.

In a typical case where a VCF claimant has filed a claim seeking compensatory recovery for endometrial cancer, their case will be inevitably denied because the condition has not been deemed a certifiable 9/11 condition. The claimant will then be offered an opportunity to appeal the decision. At the appeal hearing, the claimant will be faced with the impossible task of trying to establish a causal link between their exposure to World Trade Center toxic dust and the development of their endometrial cancer. The VCF will have no other choice under the current policy but to maintain their denial of the claim until such time that the condition is deemed certifiable by NIOSH. A similar problem was faced by the Veteran plaintiffs in In re Agent Orange. In that matter, Veteran plaintiffs in a class action suit charged the U.S. Government and several chemical corporations with the injuries and deaths believed to be caused by exposure to the chemical compound "Agent Orange" used during the Vietnam War. The evidence put forth by the plaintiffs was regarded at best as inconclusive due in part to the weakness in proof of causal relationship as demonstrated in the epidemiological studies relied upon. The court reasoned that "it is likely that because of the epidemiological nature of much of the evidence, no individual plaintiff would be able to prove that his or her particular adverse health effects are due to Agent Orange exposure." While the court in this matter noted several obstacles to the plaintiff’s recovery, it ultimately held that the plaintiffs should recover under a reasonable settlement agreement.

Lower Cost Mediation and Arbitration

Through the Nassau County Bar Association

- Expedient, time-saving, and cost-effective solutions to resolve disputes that might otherwise be litigated in court
- Available to the public as well as to all legal professionals
- Reasonable fees that are less expensive than other alternative dispute resolution providers
- Mediators and arbitrators are highly skilled attorneys admitted to the New York Bar for a minimum of 10 years, as well as screened and approved by the NCBA Judiciary Committee.

NYS Chief Administrative Judge Lawrence K. Marks addressed the Board of Directors of the Nassau County Bar Association and Suffolk County Bar Association Joint Meeting.

Nassau Lawyer

FEbruary 2020

For rules, applications, and additional information, please call (516) 747-4070.
The Never-Ending Escrow

When I speak at continuing legal education programs, particularly on the subjects of real estate or escrow, I am approached by attorneys seeking guidance on the myriad vexing nuances afflicting the profession: what to do with funds sitting in an escrow account when the client or party entitled to the funds cannot be located or a dispute exists over the money and no resolution is in sight. Criminal defense practitioners deal with the same problem when restitution checks issued on behalf of their clients are negotiated and the victims are nowhere to be found. Indeed, just about every practitioner with an escrow account can relate to this problem.

Although the amounts at issue are often de minimis and the attorneys are generally not civilly or professionally at risk (provided they’ve acted in good faith and the funds have been preserved), the obligation gnaws on their psyche like a distant siren. Their anxiety is reasonable, however, because while the funds in escrow are in trust in all cases, the consequences if the funds are mishandled are enormous, and, let’s face it, nobody likes to be caught in the middle with no upside or benefit to themselves.

The Lawyer’s Fund as Repository

Fortunately, the Rules of Professional Conduct (RPC)3 provide a relatively simple solution in instances in which a client or other party entitled to funds cannot be located. Pursuant to RPC, Rule 1.15(f), if a lawyer cannot locate a client who is owed funds from a trust account, the lawyer is required to seek a judicial order fixing the lawyer’s fees and disbursements, and to deposit the missing client’s share with the Lawyer’s Fund for Client Protection (“Lawyer’s Fund”). While Rule 1.15(f) only refers to a missing “client,” when read together with Rule 1.15(g), which provides a mechanism for depositing funds held in a deceased lawyer’s escrow account with the Lawyer’s Fund, it is not unreasonable to envision Rule 1.15(f) as being elastic enough to cover missed payees who are not clients.

The Lawyer’s Fund website2 provides samples of plenty under a variety circumstances, including where the party in interest is not a “client,” and affirmatively states that it will accept funds of less than $1,000 without a court order. I also wrote on a 2004 Erie County Bar Association Ethics Opinion.4

Caught In The Middle

The more difficult situation arises where there is a dispute over entitlement to escrow funds and the escrow agent is caught in the middle. Acting as escrow agent is essentially a service provided by attorneys and others to facilitate agreements between other parties. It’s the most important task is to tighten up your escrow agreements. Among other things:

- Clearly define yourself as a stakeholder and provide yourself with indemnification for your actions.
- Include specific dates, notice requirements, and triggering events establishing the release of the escrow amount, and explicit enforcement of the agreement.
- Clearly define yourself as a stakeholder and provide yourself with indemnification for your actions.
- Reserve to yourself the options of continuing to hold the funds, releasing the funds pursuant to the terms of the agreement, or seeking a court order directing their deposit with the court and the payment of reasonable attorney’s fees.

The Never-Ending Escrow

Unlike the typical post-closing residential real estate escrow, the Schoolman case involved sophisticated clients, a non-attorney escrow agent, and significant amounts of money. Nevertheless, the lessons from that case are manifest.

Avoiding the Never-Ending Escrow

The “never-ending escrow” is the most important task is to tighten up your escrow agreements. Among other things:

- Include specific dates, notice requirements, and triggering events establishing the release of the escrow amount, and explicit enforcement of the agreement.
- Clearly define yourself as a stakeholder and provide yourself with indemnification for your actions.
- Reserve to yourself the options of continuing to hold the funds, releasing the funds pursuant to the terms of the agreement, or seeking a court order directing their deposit with the court and the payment of reasonable attorney’s fees.

Mindfulness Yoga Workshop

The NCBA Lawyer Assistance Program is pleased to invite members to participate in an eight-week yoga workshop.

Held Wednesday Evenings by Edith Jason, E-RYT 500

5:30 PM to 6:45 PM in the NCBA President’s Room

$120 workshop fee—open enrollment welcome for $15 per class, space permitting. Cash or check payable to Edith Jason.

SPRING TERM DATES

February 19, 26
March 4, 11, 18, 25
April 1, 8

Reduce stress, aid relaxation, facilitate health and well being. Mindfulness is for everybody, flexibility irrelevant.

ENROLLMENT IS LIMITED. ACT NOW!

For more information, contact Beth Eckhardt at eckhardt@nassaubar.org or (516) 747-4070, or Edith Jason at yoga5555@juno.com or (516) 935-8460.

Mitchell T. Borowsky provides representation to lawyers before state grievance committees and to disbursed or suspended attorneys seeking reinstatement. He can be reached at mitch@mytheclislawyer.com.
# PROGRAM CALENDAR

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<th>Date</th>
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<tr>
<td>February 4, 2020</td>
<td>Champion Office Suites Lecture Series Presents: Dean’s Hour: For Better or Worse—Ethical Pitfalls in Matrimonial Law</td>
<td>With the NCBA Matrimonial Law Committee</td>
<td>1 credit in ethics</td>
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<td></td>
<td>How Not to Get Hacked: Treading Carefully in Cyberspace</td>
<td>With the NCBA Community Relations and Public Education Committee</td>
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<td>February 5, 2020</td>
<td>Criminal-Immigration Review: Best Practices When Defending Non-Citizens</td>
<td>With the NCBA Immigration Law Committee and the Assigned Counsel Defenders Plan Inc. of Nassau County</td>
<td>1 credit in diversity, inclusion and elimination of bias</td>
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<tr>
<td>February 6, 2020</td>
<td>Dean’s Hour: Gerrymandering and Its Impact on Communities of Color</td>
<td>With the NCBA Diversity and Inclusion Committee</td>
<td>1 credit in diversity, inclusion and elimination of bias</td>
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<td>February 24, 2020</td>
<td>Dean’s Hour: Health Care Decision Making: Who, What, Where, When, Why and How?</td>
<td>With the NCBA Senior Lawyer and Hospital and Health Law Committees</td>
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<td>February 27, 2020</td>
<td>Champion Office Suites Lecture Series Presents: Dean’s Hour: Defensive Lawyering: Learn from Others’ Mistakes: Part 1</td>
<td>With the NCBA Ethics Committee</td>
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<tr>
<td>February 27, 2020</td>
<td>Microaggressions in the Workplace</td>
<td>With the NCBA Diversity and Inclusion Committee</td>
<td>1 credit in diversity, inclusion, and elimination of bias and 1 credit in ethics</td>
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<td>March 2, 2020</td>
<td>Forever Solutions to Forever Chemicals: Exploring Drinking Water Alternatives For Long Island</td>
<td>With the NCBA Environmental Law Committee and the NYSBA Environmental and Energy Law Section</td>
<td>2 credits in professional practice</td>
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<tr>
<td>March 3, 2020</td>
<td>Champion Office Suites Lecture Series Presents: Dean’s Hour: Practicing Law in the Cloud</td>
<td>With the NCBA Legal Administrators and General, Solo and Small Law Practice Committees</td>
<td>1 credit in professional practice or skills</td>
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<tr>
<td>March 4, 2020</td>
<td>Dean’s Hour: Debtor and Creditor Law Update: New York’s New Voidable Transactions Act</td>
<td>With the NCBA Bankruptcy Law Committee</td>
<td>1 credit in professional practice or skills</td>
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<td>March 6, 2020</td>
<td>Dean’s Hour: Holmes and the Crafting of American Constitutional Jurisprudence: The Ambiguous Legacies of Oliver Wendell Holmes, Jr.</td>
<td>With the NCBA LGBTQ and Labor and Employment Law Committees</td>
<td>1 credit in professional practice or skills</td>
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<td>March 12, 2020</td>
<td>Champion Office Suites Lecture Series Presents: Dean’s Hour: LGBTQ Issues in Employment Law</td>
<td>With the NCBA LGBTQ and Labor and Employment Law Committees</td>
<td>1 credit in diversity, inclusion and elimination of bias</td>
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<tr>
<td>March 14-15, 2020</td>
<td>Hon. Joseph Goldstein Bridge-the-Gap Weekend</td>
<td>Completely free to NCBA members. Sign-up for a class, a day, or the full weekend.</td>
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**PROGRAM CALENDAR**

Pre-registration is required for all Academy programs. Seating limited for those that do not pre-register. Call (516) 747-4464 for ease of registration or email academy@nassaubar.org. Please note that outside food is **not** permitted at Dean’s Hours. Lunch is provided. The Academy office is open 8:30 AM to 5:00 PM, Monday through Friday.

### March 2, 2020

**Forever Solutions to Forever Chemicals: Exploring Drinking Water Alternatives For Long Island**

With the NCBA Environmental Law Committee and the NYSBA Environmental and Energy Law Section

Sign-in begins 5:30 PM; Program 6:30—8:30 PM

Credits offered: 2 credits in professional practice

### March 3, 2020

**Champion Office Suites Lecture Series Presents: Dean's Hour: Practicing Law in the Cloud**

Sponsored by NCBA Corporate Partners Champion Office Suites

With the NCBA Legal Administrators and General, Solo and Small Law Practice Committees

Sign-in begins at noon; Program 12:45—1:45 PM

Credits offered: 1 credit in professional practice or skills

### March 4, 2020

**Dean's Hour: Debtor and Creditor Law Update: New York’s New Voidable Transactions Act**

With the NCBA Bankruptcy Law Committee

Sign-in begins at noon; Program 12:45—1:45 PM

Credits offered: 1 credit in professional practice or skills

### March 6, 2020

**Dean's Hour: Holmes and the Crafting of American Constitutional Jurisprudence: The Ambiguous Legacies of Oliver Wendell Holmes, Jr.**

Sign-in begins at noon; Program 12:45—1:45 PM

Credits offered: 1 credit in professional practice

### March 12, 2020

**Champion Office Suites Lecture Series Presents: Dean's Hour: LGBTQ Issues in Employment Law**

Sponsored by NCBA Corporate Partners Champion Office Suites

With the NCBA LGBTQ and Labor and Employment Law Committees

Sign-in begins at noon; Program 12:45—1:45 PM

Credits offered: 1 credit in diversity, inclusion and elimination of bias

### March 12, 2020

**Aging in the Legal Profession: Be Aware and Be Prepared**

With the NCBA Lawyer Assistance Program

Sign-in begins 5:00 PM; Program 5:30—7:30 PM

Credits offered: 2 credits in ethics

### March 14-15, 2020

**Hon. Joseph Goldstein Bridge-the-Gap Weekend**

Completely free to NCBA members. Sign-up for a class, a day, or the full weekend.

### Purely Paralegal: Skills Classes Designed for Paralegals

The Nassau County Bar Association and the Nassau Academy of Law are pleased to offer a new educational series to help paralegals develop a foundation in the practical skills that are essential to the practice of law.

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<td><strong>E-Filing in Nassau County</strong></td>
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<td><strong>Topic TBD</strong></td>
<td><strong>Matrimonial Primer</strong></td>
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<tr>
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**PRICING:**

*Courses are free for current NCBA Paralegal members.

Non-members: $20 each session or $50/series**

**Fees paid will be credited toward 2020-21 NCBA membership if you sign up by July 1, 2020.

To register, please call 516-747-4464.
In 2011, Nelson Obus purchased a vacation home in the village of Northville in upstate New York. He envisioned his family spending summers at the Saratoga Racetrack and winters engaging in cross-country skiing. What Obus did not expect was to receive a tax bill from New York State for $527,000, including interest and penalties. This figure was more than double the $290,000 purchase price of the property in question. Obus is a hedge fund manager who resides in New Jersey and commutes daily from his home to his office in Manhattan. The Northville property was a good two-hundred miles away from New York City, too far for any reasonable commute. Nevertheless, he found himself being taxed as a New York State resident on his entire income. The reason for his situation lies in New York State’s statutory residency rules.

Taxpayers living outside New York who commute to work in-state are unaware of all of the ramifications surrounding statutory residency. Most people know the general rule, “don’t spend more than one-hundred and eighty-three days in the state.” However, this is distinguishable from being deemed a permanent place of abode.

To qualify for statutory residency in New York, one must spend more than 183 days in the state and maintain a residence for “substantially all of the tax year.” The New York State Tax Department has defined this term to mean more than 11 months of the year. The crux of the Obus case, and the issue at hand, is determining if a taxpayer has a property deemed as a permanent place of abode.

The tax law defines a permanent place of abode as “a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer.” It goes on to say, “a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode.” To be considered a permanent place of abode, the dwelling needs to have cooking and bathing facilities and be suitable for year-round use. Additionally, the taxpayer must have unfettered access to the property.

For example, a small cottage in the mountains which has no heat or running water would not be considered a permanent place of abode. Likewise, if a taxpayer is renovating a home to the point that it is uninhabitable for at least a few months of the given tax year, it may not be considered a permanent place of abode for tax purposes.

However, this is distinguishable from winterizing a home. The voluntarily closing up of a vacation home for the winter, so long as it’s equipped for year-round use, will not prevent the property from being deemed a permanent place of abode by New York State.

For statutory residency purposes and the purpose of the day count rule, actual time spent at the permanent place of abode is not relevant. In Matter of John J. v. Laura Barker, the taxpayers in the case had a vacation house in the Hamptons which they used infrequently. Despite having spent about 15 days a year there, the premises were suitable for year-round use. As well, the taxpayers had spent more than 183 days in New York City again on account of their employment. The judge determined that the Barkers clearly fell under the statutory residency requirements despite the fact they actually used the vacation house quite sparingly.

New York State residency law was further qualified in 2014 by the decision in Matter of Gaied v. New York State Appeals Trib. Gaied owned and operated an automotive repair business in Staten Island near which he purchased a multi-family apartment building. He did not own an investment property and as a place for his elderly parents to live. Gaied himself lived in New Jersey and would return there every night after work. About once a month, his parents would ask him to spend the night to aid in some tasks and errands. He had no bedroom or even a bed, sleeping on the couch. He neither kept personal belongings in nor had his own key to the apartment.

Prior to the case reaching the Court of Appeals, one would think that Gaied clearly fell within the statutory residency requirements. He spent more than 183 days in New York. He also owned a property that was habitable year-round for which he had unfettered access to as the landlord. Not surprisingly, he lost his initial case and his subsequent appeals until reaching the state’s highest court.

However, the Court of Appeals decided that in order for a dwelling to qualify as a permanent place of abode the taxpayer must have a residential interest in the property. Therefore, it is not just the habitability of a dwelling that is at issue, but the nature of the taxpayer’s use of the dwelling as well. In Gaied, the court determined that the taxpayer did not have a residential interest in the property since he did not carry a key, did not have his own bed or bedroom and had no belongings in the apartment. As such, he could not have actually resided there.

Returning to Obus, he argued that his fact pattern was similar to the one in Gaied. His upstate vacation home is a five-bedroom, three-bathroom house. Obviously, it is more than a camp or cottage. But the nature of his use of the residence was for vacations only a few weeks out of the year and he rented an apartment to a tenant year-round. That argument unfortunately fell flat as the Administrative Law Judge decided against him.

In the Administrative Law Judge’s estimation, the property met the requirements of a permanent place of abode. It was habitable year-round, and the taxpayer had unfettered access to it. Additionally, unlike in Gaied, the taxpayer very clearly had dedicated space and belongings in the property.

While determinations by an Administrative Law Judge are not precedential, the fact pattern in Obus lends itself more readily to the proposition that a vacation home qualifies the taxpayer as a statutory resident. Furthermore, the Tax Appeals Tribunal has already ruled on a fact pattern very similar to the one in Barker. As the law currently stands, it appears likely that Obus could lose on appeal if he chose to pursue one.

The legislature in Albany and the courts need to reconsider the nature of use aspect in residency cases. New York is purportedly losing residents due to high taxes and reduced state and local tax deductions stemming from the recently enacted Tax Cuts and Jobs Act of 2017. Does the state really want to scare off high-net worth individuals who would purchase vacation homes to spend their summers or winters in New York?

New York state tax residency is a highly involved and complex calculation that requires a comprehensive understanding of the law and the rules which are applicable. If one is planning a change of residency or if confronted with a residency audit, it is strongly advisable to speak to a qualified tax attorney to gauge and/or limit any unanticipated tax liability.


NCBA Hector Herrera Receives Citation from Nassau County Executive Laura Curran

As part of the NCBA Martin Luther King celebration, Nassau County Executive Laura Curran presented a Citation to longtime NCBA building manager Hector Herrera for his service to the Bar and the County.

(L-R) NCBA President Richard D. Collins, NCBA Diversity & Inclusion Committee Chair Hon. Maxine Broderick, NCBA President-Elect Dorian Glover.
Henry Fonda was one of the few movie actors who also maintained a substantial career in the theater. He appeared in the Broadway production of "Twelve Angry Men," which was based on play by Reginald Rose. Fonda's performance was so strong that it earned him a Tony Award for Best Featured Actor in a Play. The production was directed by Sidney Lumet and starred a cast of well-known actors, including Edward Albee, Patricia Neal, and Hal Holbrook. The play was about the trial of a man accused of murder, and Fonda played the role of Juror #8, who ultimately voted for acquittal. The play was a huge success and ran for several months, and Fonda's performance was praised by critics and audiences alike. The role of Juror #8 allowed Fonda to explore the inner workings of the American justice system and the importance of individual responsibility in a legal setting. The film adaptation of "Twelve Angry Men," released in 1957, also starred Fonda and continued to draw audiences to the theater and movie screens. The film was directed by Sidney Lumet, who had directed the Broadway production, and it became a classic of its time. Fonda's performance in the film earned him an Academy Award nomination for Best Actor, and the film was praised for its realistic portrayal of the trial and the importance of individual responsibility in a legal setting. Fonda's reputation as an actor continued to grow, and he remained active in the theater and film industry throughout his career. Fonda's work in "Twelve Angry Men" and other plays and films continued to showcase his talent and dedication to the craft, and he is remembered as one of the greatest actors of his generation.
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*The WE CARE Golf and Tennis Classic was founded by Stephen W. Schlissel in 1996.
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BY SUSAN BILLER

**Pro Bono Attorney of the Month**

Byron Divins, Jr.

During his active duty career, Divins prosecuted and defended sailors and marines accused of crimes against the Uniformed Code of Military Justice. During his years of service as a Legal Assistance Officer, he gained significant experience dealing with issues of divorce, custody, orders of protection, child support and visitation. He is admitted to the New York and New Jersey State Bars. Additionally, Mr. Divins also earned an MBA from Florida State University in 2006.

Understandably, Divins takes great pride in his deeply rooted belief in service to his community. In fact, it was the concept of service to his fellow citizens that initially inspired him to seek out pro bono work. When he first joined the VLP in 2012, Divins volunteered with the Landlord Tenant Attorney of the Day Program, which he found to be an excellent training experience. When he learned of the great need for matrimonial pro bono attorneys, he committed to using his expertise in that area.

One particularly rewarding matrimonial matter involved a defendant wife, a recent immigrant who was brought to this country by her husband. She and her children lived with her spouse in his parents’ house, where she was subjected to verbal abuse and treated like an indentured servant. When she resisted this treatment, her husband served her with divorce papers. Divins helped her to secure a satisfactory settlement, child support, and custody arrangements. Due to his assistance, she was able to secure sufficient resources to move out and forward in her life, establish a career, and care for her children.

Divins emphasizes that the greatest reward associated with providing pro bono service is the unique opportunity to help marginalized members of the community gain access to justice. “My commitment to assisting at least one marginalized member of the community at all times allows me to do my part to increase access to justice for low-income Nassau County residents,” states Divins. “After all, the secret to living is giving.”

According to Susan Biller, Pro Bono Coordinator of the VLP, Divins “is one of those rare volunteers who can be counted on to take on the most challenged clients and contentious matters. He brings his enthusiasm and passion for achieving justice for every case he handles. We are incredibly fortunate to be able to rely on him to assist our most needy clients.”

Divins lives with his wife and two sons in Roslyn. In his free time, he enjoys coaching Little League, and volunteers teaching karate. For his inspirational efforts and dedication to helping needy Long Island residents obtain access to legal services, we are proud to honor Byron Divins, Jr. as Pro Bono Attorney of the Month.

The Volunteer Lawyers Project is a joint effort of Nassau Suffolk Law Services and the Nassau County Bar Association, who, for many years, have joined resources toward the goal of providing free legal assistance to Nassau County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a nonprofit civil legal services agency, receiving federal, state and local funding to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial guardianship or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Susan Biller at (516) 292-8100, ext. 3136, or sbiller@nsls.legal.
Thank You to Our 2019 Pro Bono Volunteers

The NCBA would like to recognize those individuals who have given of their time to the Mortgage Foreclosure Project.

Last month, we recognized those who donated to this worthy project, which at the time of its inception in 2009 we thought would not last this long. Nevertheless, we have been kept busy helping those in need and keeping Nassau County Residents from losing their homes. This month, we wanted to thank those individuals who during 2019 constantly gave of their time at either clinics or in court, or both.

In past years, volunteers have been recognized at our Recognition Cocktail Reception which this year will be held on July 22, 2020. With funding yet again in jeopardy, we want our volunteers to know how appreciated and needed they are to this program.

If anyone is interested in joining these wonderful caring volunteers, please contact Gale Berg at (516) 747-4070 ext. 1202 or gberg@nassaubar.org.

Volunteering not only helps those in need but gives instant gratification to those who are able to volunteer. Donate your time for a couple of hours per month, it will definitely be rewarding!

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Matthew Baldassano
Michael A. Barcham
John P. Bermingham
Steven Bernstein
Patrick Binakis
Lisa A. Biondo
Adam L. Browser
Dennis Buchanan
Terese A. Cavanaugh
Sheryl A. Channer
Patrick T. Collins
Janet Connolly
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Janet Nina Esagoff
Michael Fishman
George P. Frooks
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Gerald Goldstein
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Robert Jacovetti
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LAW STUDENTS
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Goniometer ... Continued From Page 3

that the opinion of the surgeon who found surgical causation was consistent with that of a third surgeon, who performed an "independent medical examination" while the request for authorization was pending. The court noted that the record did not support the physicians' opinions, but recognized that "the Board is vested with authority to resolve conflicting medical evidence."  

Matthews: Board Records Raise Question of Fact on Employer Status

In Matthews v. Bright Star Messenger Center, the Second Department held that the defendant failed to make a prima facie case for summary judgment on the grounds that it was the employer of the plaintiff, an injured worker.7

The plaintiff alleged that he had been hired by Bright Star and then assigned to work for another defendant, and was insured on that defendant's policy.8 Worker's Compensation Law § 11 precludes suits against employers for work-related injuries when the worker is insured by another party.9

However, Bright Star's evidence in support of its motion showed that the plaintiff's claim for benefits listed her employer as Bright Star. In reply, Bright Star submitted an affidavit explaining that it had changed its name from "Bright Star Courier" to "Bright Star Messengers." The court noted, however, "a party cannot survive its prima facie burden by relying on evidence submitted for the first time in its reply papers."10

The inadmissibility of evidence submitted in reply is a largely undisputed exception. Counsel in workers' compensation claims, however, should bear in mind that the records submitted to the Board from the defendant Bright Star moved for summary judgment, and any discrepancies must be accounted for.

Cerobski: Defenses Untimely Raised Are Waived

In Cerobski v. Structural Preservation Systems, the Third Department held that an employer was precluded from raising any defenses not raised before the pre-hearing conference.11

The employee filed a claim, but his employer did not file the required prehearing conference statement,12 and at the subsequent hearing the employer did not request an examiner.13 GONIOMETER should bear in mind that the records submit

"tiffs claim for benefits listed her employer as Bright Star Courier. In reply, Bright Star submitted an affidavit explaining that it had changed its name from "Bright Star Courier" to "Bright Star Messengers." The court noted, however, "a party cannot survive its prima facie burden by relying on evidence submitted for the first time in its reply papers."10

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NCBA Committee Meeting Calendar
Feb. 3, 2020—March 5, 2020

Questions? Contact Stephanie Pagano at (516) 747-4070 or spagano@nassaubar.org. Please Note: Committee meetings are for NCBA Members. Dates and times are subject to change. Check www.nassaubar.org for updated information.

ETHICS
Monday, February 3
6:00 p.m. Matthew K. Flanagan

PARALEGAL
Tuesday, February 4
5:30 p.m. Maureen Dougherty/Cheryl Cardona

GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT
Wednesday, February 5
12:30 p.m. Scott J. Limmer

HOSPITAL & HEALTH LAW
Thursday, February 6
8:30 a.m. Leonard M. Rosenberg

PUBLICATIONS
Thursday, February 6
12:45 p.m. Christopher J. Dell’Carpini/Andrea M. DiGregorio

COMMUNITY RELATIONS & PUBLIC EDUCATION
Thursday, February 6
12:45 p.m. Joshua D. Brookstein

WORKER’S COMPENSATION
Tuesday, February 11
8:00 a.m. Adam L. Rosen

PLAINTIFF’S PERSONAL INJURY
Tuesday, February 11
12:30 p.m. Ira S. Slavit

LABOR & EMPLOYMENT
Tuesday, February 11
12:30 p.m. Paul F. Millus

CRIMINAL COURT LAW & PROCEDURE
Thursday, February 13
12:30 p.m. Dennis P. O’Brien

FAMILY COURT LAW & PROCEDURE
Thursday, February 13
1:00 p.m. Ellen Pollack

MATRIMONIAL LAW
Thursday, February 13
5:30 p.m. Samuel J. Ferrara

ANIMAL LAW
Tuesday, February 18
6:00 p.m. Matthew A. Miller/Kristi L. DiPaolo

DIVERSITY & INCLUSION
Tuesday, February 18
6:00 p.m. Hon. Maxine S. Broderick

NEW LAWYERS
Tuesday, February 18
6:30 p.m. Glenn R. Jersey, III/Steven V. Dalton

DIVERSITY & INCLUSION
Wednesday, February 19
6:00 p.m. Hon. Maxine S. Broderick

ALTERNATIVE DISPUTE RESOLUTION
Thursday, February 20
5:30 p.m. Marilyn K. Genoa/Jess Bunshaft

DISTRICT COURT
Friday, February 21
12:30 p.m. Roberta D. Scoll/S. Robert Kroll

MEDICAL-LEGAL
Monday, February 24
12:30 p.m. Susan W. Darlington/Mary Anne Walling

DEFENDANT’S PERSONAL INJURY
Monday, February 24
6:00 p.m. Matthew A. Lampert

DIVERSITY & INCLUSION
Monday, February 24
6:00 p.m. Hon. Maxine S. Broderick

LGBT
Tuesday, February 25
8:30 a.m. Joseph G. Milizio/Barrie E. Bazarsky

ELDER LAW, SOCIAL SERVICES, HEALTH ADVOCACY
Tuesday, February 25
12:30 p.m. Katie A. Barbieri/Patricia A. Craig

WOMEN IN THE LAW/BUSINESS LAW, TAX AND ACCOUNTING
Wednesday, February 26
12:30 p.m. Jennifer L. Koo/Christie R. Jacobson-
Women in the Law, Jennifer L. Koo/Scott L. Kestenbaum-
Business Law, Tax and Accounting

COMMERCIAL LITIGATION
Wednesday, February 26
12:30 p.m. Matthew F. Didora

VETERANS & MILITARY LAW
Thursday, February 27
12:30 p.m. Gary Port

REAL PROPERTY LAW
Thursday, February 27
5:30 p.m. Mark S. Barten/Anthony W. Russo

ETHICS
Monday, March 2
6:30 p.m. Matthew K. Flanagan

GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT
Wednesday, March 4
12:30 p.m. Scott J. Limmer

HOSPITAL & HEALTH LAW
Thursday, March 5
8:30 a.m. Leonard M. Rosenberg

CIVIL RIGHTS
Thursday, March 5
12:30 p.m. Robert L. Schonfeld

PUBLICATIONS
Thursday, March 5
12:45 p.m. Christopher J. Dell’Carpini/Andrea M. DiGregorio

COMMUNITY RELATIONS & PUBLIC EDUCATION
Thursday, March 5
12:45 p.m. Joshua D. Brookstein

Medical Legal Committee
Meeting Date: 12/13/19
Chairs: Mary Anne Walling and Susan Darlington

Speaker W. Russell Corker delivered a presentation on the practical application of electronic medical records in medical malpractice litigation. Future meeting topics were discussed for consideration, which included nursing home litigation, hospitalists care in the hospital setting, and authorizations.

The next meeting is scheduled for February 24, 2020, at which time a presentation will be made on social media issues and relevant case law.

Plaintiff’s Personal Injury
Meeting Date: 1/14/20
Chair: Ira Slavit

Guest presenter Kyle Schadio delivered a presentation about how attorneys can use event data recorders (commonly known as “black boxes”) to track information about collisions for use in motor vehicle accident litigation.

The next meeting is scheduled for Tuesday, February 11, 2020 at 12:30 PM at which time Nassau County Supreme Court Justice Randy Sue Marber and her Principal Law Clerk, Mili Makhijani will deliver a CLE optional lecture regarding landlord/tenant changes. The presentation on January 24 and the next two sessions will be interactive, with attendees requested to air their thoughts and ask their questions.

H. Scott Fairgrave was the first speaker and the subject was what notices are required in order to begin a summary proceeding. In the next two sessions, the Committee will delve into other landlord-tenant issues.

District Court Committee
Meeting Date: 1/24/20
Co-Chairs: S. Robert Kroll and Roberta D. Scoll

With the introduction of the HSTPA of 2019 (landlord-tenant law revisions), there are far too many questions and interpretations surrounding the Act. Since there are so many questions, that the District Court Committee decided to have a three part discussion over a three month period of time in order to review the many statutes relating to landlord/tenant changes.

The presentation on January 24 and the next two sessions will be interactive, with attendees requested to air their thoughts and ask their questions.

Hon. Scott Fairgrave was the first speaker and the subject was what notices are required in order to begin a summary proceeding.

In the next two sessions, the Committee will delve into other landlord-tenant issues.

Legal Administrators Committee
Meeting Date: 1/29/20
Chairs: Dede S. Unger and Virginia A. Kawochka

On January 29, 2020, the first meeting of the Legal Administrators Committee was held. The meeting was well attended by administrators representing law firms of various sizes. Topics discussed included benefits of membership and the mission of the committee, which is to allow free exchange of ideas and sharing of information, in addition to encouraging greater understanding of the role of administrators within the legal community.

Topics of upcoming meetings include our first committee-sponsored CLE program on March 3, “Practicing Law in the Cloud.” We welcome new administrator members.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Mr. Langer is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Mr. Langer’s practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.
THEORETICAL ... Continued From Page 10

regardless of where it develops. Even when cancer appears to be gone, victims remain in fear of a possible recurrence.

A Theoretical Solution

There is however a theoretical solution to the dilemma. Yes, theoretical in the sense that this theory has not yet been fully tested with favorable results in the VCF arena but has the potential for working nonetheless. Many courts rely on the erroneous hold that “that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong of the Rule 702 inquiry, if differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated.”

Generally, the reliability of the differential diagnosis stems from the due diligence demonstrated by a testifying expert in eliminating the alternative causes of a condition. The diagnosis must be “conducted with intellectual rigor.”10 Its underlying integrity requires professional thoroughness, and it must approach a proper account of other potential causes.11 A medical expert’s opinion based upon differential diagnosis normally should not be excluded because the expert has failed to rule out every possible alternative cause of a plaintiff’s illness. In such cases, the alternative causes suggested by a defendant normally affect the weight that the jury should give the expert’s testimony and not the admissibility of that testimony. Furthermore, depending on the circumstances, a temporal relationship between exposure to a substance and the onset of a disease or a worsening of a disease or a worsening of relationship between exposure to a substance and an onset of a disease should give the expert’s testimony and not the alternative causes suggested by a defendant.12

The endometrial cancer issue at hand is a fitting circumstance where “differential diagnosis” should be applied. Under this method, a medical expert testifying as an aperture witness on behalf of a defendant claimed would be to have the burden of proving the following: (a) the所谓 proposal to satisfy a relative differential diagnosis: (a) a thorough physical examination; (b) review of patient’s complete medical history; (c) review of the results of any clinical or laboratory testing; (d) did the doctor consider other facts regarding exposure, duration, etc.; (e) did the doctor consider all other causes; (f) did the doctor sufficiently explain which of the other causes should be ruled out.13

In the situation where a claimant were able to establish that they were in good health prior to 9/11, with no genetic predisposition to cancer, no signs of developing cancer in their medical history, then it stands to reason that cancer would not ordinarily develop in such an individual and the cancer would not develop to their health. If endometrial cancer has developed and there is no other major toxic exposure that can be identified other than 9/11’s toxic exposure, then a reliable differential diagnosis should be regarded as sufficient proof of causation that 9/11 was the likely cause of that cancer.

Conclusion

Any claimant that has had their claim denied should be advised to retain a medical expert to help them at their appeal hearing and do their best to argue differential diagnosis. It cannot be emphasized enough that this is purely a theoretical solution to the problem, and it is still possible that the VCF will maintain their denial. The VCF demonstrated a clear preference to enforce bright line rules. However, it has been demonstrated to work in the courtroom. The call to action here is to argue differential diagnosis in a VCF appeal hearing using the same format that was used in these court cases. This is the best argument that can be made under the circumstances.

BIFURCATED TRIALS ... Continued From Page 6

it. The statewide rule also expanded the categories of cases that fall within its compass; while the Second Department rule only applied to negligence, even though evidence of the gravity of the plaintiff’s injuries may engender sympathy for the plaintiff and thereby pose a risk of prejudice to the defendant;14 the Second Department, citing the Court of Appeals’ decision in Castro v. New York City Authority,15 declared that a limiting instruction to the jury suffices to dispel this potential prejudice.

One of the critical differences between the old rule and the new rule is that under the new rule, bifurcation is no longer the default position. Nevertheless, despite the fact that the statewide rule did not contain the presumption in favor of bifurcation that was the hallmark of the former Second Department rule, courts within the Second Department have continued to presume that and “affirmatively” required bifurcation in nearly all cases.16

Overturning Precedent

The Castro Court recognized that the advantage of bifurcation is “that if the liability issue is determined in the defendant’s favor, there is no prejudice, which can involve expensive witnesses and other proof.”17 However, the court noted that if the same expert would have to give testimony on both liability and damages, bifurcation would result in expensive experts having to testify twice, thereby undercutting the cost-savings that bifurcation is supposed to encourage.18 And that is the underlying gravity of the plaintiff’s injuries may engender sympathy for the plaintiff and thereby pose a risk of prejudice to the defendant;19 the Second Department, citing the Court of Appeals’ decision in Castro v. New York City Authority,20 declared that a limiting instruction to the jury suffices to dispel this potential prejudice.

In fact, the Castro Court noted that bifurcation can serve to prejudice the plaintiffs’ case. Since a verdict in favor of the defendant on liability means that jury service will end earlier, the court recognized that knowledge of that fact “might improperly incentivize at least some jurors” to find for the defense on liability only.21

The Second Department also emphasized that its trial courts’ “strict[] [i]nflexibilit[y]”22 “rule in favor of bifurcation”23 contrasts with the approach adopted by the other departments and with the standard set forth in Section 202.42.24 In light of this, the Castro Court directed that the trial courts must abandon their prior rigid approach, and, guided by the standard set forth in the statewide rule, exercise discretion in determining whether a trial should be unified or bifurcated.25

Bifurcation, said the Court, is “not an abso- lute,”26 and “it is the responsibility of the trial court to exercise discretion in determining whether bifurcation is appropriate in light of all [the] relevant facts and circumstances.”27

Applying the New Rule

Applying this standard, the Second Department held that the trial court had failed to “exercise its available discretion”28 when it denied Castro’s motion for a unified trial due to its rigid insistence that “a bifurcated trial is no longer the ‘default’ position. Trial courts in the Second Department now must consider all of the relevant facts and circumstances to determine whether bifurcation (1) clearly is necessary, or (2) achieve a fair and more expeditious resolution of the action. Only if both prongs are established will bifurcation be appropriate.29

A deeper current also runs through the decision. Castro serves as a clarion call to lawyers, judges and practitioners based on a county’s past customary practice rather than on careful adherence to the specific dictates of CPLR and the Uniform Rules can constitute irreparable error. Both aspects will significantly affect the landscape of personal injury trial practice in the years ahead. Ameer Benno is an attorney with the law firm of Block, O’Toole & Murphy, LLP; where he represents plaintiffs in personal injury and civil rights matters. He can be contacted at benno@blockomp.com.30

1. 177 A.D. 5th 51 (2d Dept. 2019).
2. Id. at 61.
3. Id.
4. Id. at 62.
5. Id. at 63.
6. CPLR 603.
7. CPLR 4011.
8. 22 NYCRR § 202.42.
9. Id.
12. 22 NYCRR § 202.42.
16. Id. at 61.
17. Id. at 62.
18. Id. at 63.
19. Id. at 64.
22. id. at 64.
23. Id. at 65.
24. Id. at 66.
25. Id. at 67.
26. Id. at 68.
27. Id. at 69.
28. Id. at 70.
29. Id. at 71.
30. Ameer Benno is an attorney with the law firm of Block, O’Toole & Murphy, LLP; where he represents plaintiffs in personal injury and civil rights matters. He can be contacted at benno@blockomp.com.
The NCBA is grateful for these individuals who strongly value the NCBA’s mission and its contributions to the legal profession.

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Lee Rosenberg, managing partner of Saltzman Chetok & Rosenberg LLP, was sworn in to serve a three-year term as a second Vice President of the prestigious American Academy of Matrimonial Lawyers. Partner Allard D. Burger now serves as Treasurer of the Nassau County Women’s Bar Association. The firm has also been selected for inclusion in Best Lawyers in America in Family Law and is proud to have Asia Scarlett-Jones appointed as Senior Associate. Ms. Scarlett-Jones was formerly Principal Law Assistant to Hon. Ayesha K. Brantley in Nassau County Family Court.

The law firm of Moritt Hock & Hamroff has welcomed the following new members to its construction and litigation practice groups as a Partner.

Lee Romero, a tax attorney, Hana Boruchov, and Leo Gabovich will host an IRS & NYS Tax Collection webinar for the American Academy of Attorney-CPAs. Ms. Tenenbaum will also be interviewed for the Small Business Spotlight of WCBS News Radio 880.

Markotis & Lieberman, P.C., a general practice firm located in Hicksville, has hired Vassilios F. Proussalis as an associate who will be handling litigation and landlord/tenant matters, real estate transactions, and wills, trusts, and estates for the firm.

Feather Law Firm, P.C., a Garden City boutique law firm focused exclusively in the areas of employment and labor law, as well as commercial litigation, is proud to announce that David S. Feather has been selected to the 2019 New York Metro Super Lawyer’s List.

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm Labate Balkan Colavita & Contini, LLP where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

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