Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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SAVE THE DATE

WE CARE CHILDREN'S FESTIVAL
WEDNESDAY, FEBRUARY 19, 2020
See pg. 16 for details

NAME THAT TUNE
WEDNESDAY, MARCH 4, 2020
See pg. 6 for details

NASSAU ACADEMY OF LAW
BRIDGE THE GAP WEEKEND
March 14 and 15, 2020
Contact Jennifer Groh at
(516) 747-4070
or jgroh@nassaubar.org.

WE CARE DRESSED TO A TEA
THURSDAY, MARCH 26, 2020
See pg. 16 for details

LAW DAY: YOUR VOTE, YOUR VOICE, OUR DEMOCRACY
WEDNESDAY, APRIL 29, 2020

121ST ANNUAL NCBA DINNER DANCE
SATURDAY, MAY 9, 2020
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OF NOTE

NCBA Member Benefit - I.D. Card Photo
Obtain your photo for Secure Pass Court ID cards at NCBA Tech Center
Only For New Applicants
Cost $10 • March 3, 4, and 5
9:00 AM—4:00 PM

UPCOMING PUBLICATIONS COMMITTEE MEETINGS AT THE BAR ASSOCIATION

Thursday, March 5, 2020 at 12:45 PM
Thursday, April 2, 2020 at 12:45 PM

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 Medallion 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 School, 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 Advocacy and has been named by *Best Lawyers* as the 2020 "Lawyer of the Year" in the practice of personal injury litigation. He has also been included on the American Institute of Personal Injury Attorneys 10 Best Attorneys list 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 Burkowsky in the NCBA Special Events Department at (516) 747-4071 or events@nassaubar.org.

Personal Injury/Workers' Compensation

Recent Appellate Decisions on Workers' Compensation

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.[1]

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 his own physician's report on Form C–4.3. Instead, at the first permanency hearing, the claimant's counsel asked to cross-examine the consultant, betting that he could undermine the consultant's determination and show a 50% schedule loss. The WCLJ, however, ruled that by not submitting Form C–4.3 the claimant had waived his right to cross-examine the consultant. The WCLJ gave the claimant additional time to submit the form, but the claimant instead reiterated his request for cross-examination. The WCLJ denied this, and on review the Board adopted the consultant's findings.

The appellate court held that though regulations do not provide the right of cross-examination, it "is permitted under tenets of due process."[2] While this right may be waived if not timely asserted, a "claimant's request for cross-examination is not invalidated by the failure to produce a C–4.3 [form]."[3] Since claimant's counsel made his request at the first permanency hearing, denying cross-examination here was an abuse of discretion.

Christopher J. DelliCarpini

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 by his employer in violation of the Worker's Compensation Law.[4]

The claimant had been injured on the job, but never sought medical treatment or missed time from work. Three weeks later, the Board notified the claimant that it had received a report of his incident on Form ADR–1, and that it would be administered under the Board's alternative dispute resolution program under WCL 25(2–c). Three days later, the employer terminated the claimant, and subsequently placed a "Do Not Return" letter in his file, indicating some sort of problem with the claimant's job performance. The claimant then brought a discrimination claim to the Board, alleging that he was dismissed for filing accident reports. 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.'"[5]

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.[6]

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."[7] The court also noted

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Winter Warmth at Domus

FROM THE PRESIDENT

Richard D. Collins

As we slog through the doldrums of the post-holiday winter season, Domus remains a refuge from the cold—a place where you can enjoy a hot beverage 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 gratified 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 a flavor of what's going on at your favorite bar association.

They say "the times they are a-changin," 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, NYSBA President Henry Greenberg, and NYSBA President-Elect Scott Karson. Judge Marks presented New York State Chief 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. Maxine Broderick, in collaboration with the Nassau County Office of Youth Services, supported Jack & Jill Nassau County in its presentation at Domus of "The Amistad: A Reenactment of a Landmark Decision." The script was written by Kathy Hirata Chin, a partner at Crowell & 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 tried 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 illegally 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 Carmenaty, 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, not only 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, aptly titled Purely Paralegal, which is geared towards 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-members, any fees paid for the lecture series will be credited 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 members 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 volunteer attorneys assist the homeowners by providing representation for their day in court or consulting with them at bi-monthly 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, the need for 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 residents 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 invitations to a variety of professional events, meetings and dinners, often from other bar associations or professional organizations. I do my best to attend as many as possible. In the coming weeks, I will attend the New York State Bar Association annual meetings in Manhattan and the American Bar Association mid-year 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!

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.

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Personal Injury/Workers' Compensation

Going, Going...Goniometer—What Constitutes "Objective" Evidence of Serious Physical Injury Under the Insurance Law?

Under New York's No-Fault Law1 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 of use of a body organ or member, and non-permanent disability for 90 days. It has been the judiciary's duty, in the first instance, to scrutinize the medical evidence and to bar claims which do not qualify. The Court of Appeals has required "objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold."[2]

The court's role in determining whether a "serious injury" is most pronounced during the summary judgment phase of litigation. In particular, courts must decide whether the evidence submitted by the parties' physicians constitutes "objective" proof to either meet their burden for entitlement to summary judgment or to otherwise raise a triable issue of fact sufficient to dismiss a summary judgment motion. Such evidence usually comes in the form of affidavits or affirmations of medical experts who examined the plaintiff, reviewing plaintiff's complete medical file, relying upon x-ray and MRI reports, as well as notes regarding the plaintiff's range of motion

For obvious reasons, proffering "objective" proof of many of the serious injuries listed in § 5102(d)—death, dismemberment, significant disfigurement, bone fracture, loss of a fetus, permanent loss of use of a body organ—is easily attainable. However, for other injuries, most notably, significant limitation and non-permanent disability, what constitutes "objective" proof is less easily 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. At particular issue is whether "objective" evidence of a plaintiff's lost range of motion requires readings from a medical device such as a goniometer or inclinometer, or, whether other diagnostic tests without such an instrument are sufficient.

Brian Gibbons

Conflicting Standards in the First and Second Departments

Two recent cases underscore this disagreement. In *De Los Santos v. Basilio*,[3] the court held that the defendant met its prima facie burden for summary judgment through an affirmed report of an emergency medicine physician. The physician opined that the shoulder and spine injuries claimed by the plaintiff during litigation were inconsistent with the injuries shown in the EMT and hospital emergency room records. However, the court held that plaintiff's opposition, which included plaintiff's physicians' affirmed medical reports, raised an issue of fact as to causation sufficient to deny defendants' motion for summary judgment. Specifically, the court found that the physicians' findings that the plaintiff's symptoms, which included "quantified range of motion restrictions," were "sufficient to demonstrate continuing limitations." In fact, the court relied on these reports, even though the doctors "did not specify the instrument used to measure range of motion."

In contrast, the Second Department in *Cho v. Demelo*[4] implicitly found that measurements taken via a goniometer were required to meet the "objective" proof of injury standard. There, the plaintiff's physician reported that range of motion was "objectively measured in the affected joints using a goniometer," whereas the defendant's expert stated that "ranges of motion are done visually and/or with the use of a hand-held goniometer."[5]

The court found that the defendant failed to meet its burden in the first instance where the "affirmed report of their orthopedic surgeon failed to identify the objective tests that were utilized to measure the plaintiff's ranges of motion, and thus, did not support the conclusion that the plaintiff suffered no limitations as a result of the accident."[6]

Split Interpretation of *Perl*

The disagreement between the First and Second Departments can seemingly be traced to courts' interpretations of the Court of Appeals' holding in *Perl v. Meher.*[7] In *Perl,* the plaintiff's physician examined the plaintiff shortly after the accident. This initial examination was subjective in nature insofar 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."[8] 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. In *Frias v. Son Tien Liu,*[9] the court ruled the defendant's physician's examination was sufficient to meet their burden for summary judgment, notwithstanding the fact that the doctor did not take range of motion

See GONIOMETER, Page 19

Personal Injury/Workers' Compensation

Castro v. Malia Realty and the Future of Bifurcated Trials in the Second Department


Ameer Benno

For decades, trial courts within 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.,*[1] 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.[2] Based on this, Castro moved for a unified trial, contending that it was necessary to rebut the defendants' 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 [S]econd [D]epartment 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."[3]

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."[4] 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 occurred.

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.[5]

Target called another of Castro's treating physicians, who testified that Castro had complained only of neck, back and shoulder injuries, but not 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"[6] or achieve an "unprejudiced disposition of the matters at issue."[7]

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 the issue of liability shall be tried first."[8] An exception could be made if a party could demonstrate to the trial judge's satisfaction "exceptional circumstances" and "good cause" for a unified trial.[9]

Over the years, a body of case law defining "exceptional circumstances" and "good cause" developed. Exceptional circumstances existed when the issues of liability and damages were "intertwined"[10] or where the "nature of the injuries ha[d] an important bearing on the issue of liability."[11]

In 1987, Section 202.42 of the Uniform Rules for the New York State Trial Courts went into effect, replacing the Second Department rule. Section 202.42 states that judges "are encouraged to order a bifurcated trial of the issues of liability and damages in any action for personal injury where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action."[12] Unlike the earlier Second Department rule which mandated bifurcation, Section 202.42 simply encourages

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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 injuries and treatment pre-dating the incident at issue in the litigation. The overarching goal of doing so is to identify alternative explanations for 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 waived her physician-patient privilege concerning prior knee injuries, even though she was not claiming injuries 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 alleged injuries to only her cervical spine, lumbar spine and left shoulder.[5] Although the claimed injuries were limited to those body parts, Ms. Brito also included a generalized claim for "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 high-heeled shoes.

Notably, Ms. Brito also testified that she injured both knees before the subject accident—her left knee 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.[7] 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 and contended that the records sought were not discoverable because they concerned unrelated medical treatment.[8] The First Department agreed with the plaintiff and found that neither the bill of particulars nor plaintiff's deposition testimony affirmatively placed her prior knee injuries in controversy, since her claims were limited to back and shoulder injuries.[9]

In an opinion rendered on September 10, 2019, the Court of Appeals found that by suing to recover damages for injuries impacting her ability to walk and stand, the plaintiff put her prior knee injuries at issue. Specifically, the Court reasoned that the plaintiff affirmatively placed the condition of her knees into controversy by alleging that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity.[10]

The Interpretation and Impact of *Brito*

The *Brito* decision will undoubtedly have a significant impact in discovery disputes between litigants contesting the disclosure of medical records concerning prior injuries and conditions that are not specifically claimed or mentioned in a plaintiff's bill of particulars. The Court of Appeals' decision in *Brito* clarifies that the fact that a bill of particulars which does not specifically 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, they are discoverable. But, equally significant is what the decision did not do: the Court of Appeals declined to more definitively resolve a split between the First and Second Departments concerning the scope of a plaintiff's waiver of the physician-patient privilege.

By way of brief background, the First and Second Departments have historically held slightly different views on how to define the scope of a plaintiff's waiver of his or her physician-patient privilege by virtue of the claims made in 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] preexisting medical condition" where a plaintiff has "affirmatively placed her entire medical condition in controversy through [ ] broad allegations of physical and mental injuries" and "claims of loss of enjoyment of life."[11]

The First Department addressed this distinction in its opinion in *Brito* and acknowledged that "unlike the Second Department, 'we do not regard generalized allegations of loss of enjoyment of life or of the ability to work as opening the door to a plaintiff's entire medical history.'"[12] When the case came before the Court of Appeals, the Court 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."[13] 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.[14]

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 was not completely resolved, the Court's holding provided a more liberal interpretation of discoverability than what had been applied in the First Department previously. In that sense, the decision is a victory for defendants.

Historically, the First Department has held that discovery of medical records of a prior injury or condition is appropriate only where the plaintiff has alleged an aggravation or exacerbation of that prior condition.[15] 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 for loss of enjoyment of 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 rule that a claim of exacerbation be made in order for a prior injury to be considered relevant to the claims.

Melissa A. Danowski

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 injury or condition is not part of the case in chief. If the items 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 commonplace, discovery dispute. While the existence or absence of prior injuries is bound to impact the monetary value of the case, time is also money, 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.

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1. *See Koump v. Smith*, 25 N.Y.2d 287, 293-294 (1969).
2. 33 N.Y.3d 1126 (2019).
3. *Id.*
4. *Brito v. Gomez,* 168 A.D.3d 1 (1st Dept. 2018).
5. *Id.* at 2-3.
6. *Id.* at 3.
7. *Id.* at 3.
8. *Id.* at 3.
9. *Id.* at 5.
10. *Brito,* 33 N.Y.3d at 1127.
11. *Bravo v. Vargas,* 113 A.D.3d 577, 578-579 (2d Dept. 2014).
12. *Brito,* 168 A.D.3d at 8.
13. *Brito,* 33 N.Y.3d at 1127.
14. *See Kakharrov v. Archer,* 166 A.D.3d 746 (2d Dept. 2018).
15. *McGlone v. Port Auth. of N.Y. and N.J.,* 90 A.D.3d 479, 480 (1st Dept. 2011); *Rega v Avon Prods., Inc.,* 49 A.D.3d 329 (1st Dept. 2008).

Personal Injury/Workers' Compensation

2019 Labor Law §240(1) Decisions: What Constitutes a Physically Significant Elevation Differential

Labor Law §240(1), commonly known as the "scaffold law," imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker. Whether a plaintiff is entitled to recovery under the statute requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies. The result often turns on whether a "physically significant elevation differential" is found to exist.

In 2019, several appellate decisions addressed circumstances where defendants disputed that plaintiffs' injuries arose from a "physically significant elevation differential," a critical term in Section 240(1) cases. In a field of law where claims arise under a broad variety of circumstances, any of these decisions may bear on cases in your own practice.

Runner: The Seminal "Scaffold Law" Decision

The Court of Appeals, in the seminal case of *Runner v New York Stock Exchange, Inc.,* by its own account addressed for the first time the applicability of Section 240(1) to a factual scenario that did not involve a worker injured either by falling or by being struck by a falling object that was being used in the work being undertaken, and stated that the statute was not limited to those two scenarios.[1] The task being undertaken in *Runner* was moving a large reel of wire weighing 800 pounds down a set of four stairs. The plaintiff was injured not by falling or by being struck by the reel, but rather when the jerry-rigged device being used to try to regulate and control the reel's descent caused injuries to his hands.

The court in *Runner* noted that the purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials. The relevant inquiry, said the court, is whether the harm flows directly from the application of the force of gravity upon the object. The *Runner* court emphasized that the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from "a physically significant elevation differential."

The defendants in *Runner* argued that the elevation differential was de minimis. The court rejected the argument, stating that the elevation differential involved cannot be viewed as de minimis given the weight of the reel and the amount of force it was capable of generating, even over the course of a relatively short descent.

The Court of Appeals also agreed with the trial court that the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. The court reasoned that the injury to plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path, a worker who would certainly be entitled to recover under Section 240(1).

Ira S. Slavit

Recent Decisions

The phrase, "a physically significant elevation differential," has spawned an abundance of decisional law during the ensuing years, with 2019 being no exception. In *Ali v Sloan-Kettering Inst. for Cancer Research,* plaintiff was injured when an air conditioning system coil that weighed at least 300 pounds that was being transported secured to two dollies fell on his leg as he and three coworkers unloaded it from a truck.[2] The court held that in view of the weight of the coil and the amount of force it was able to generate, even in falling a relatively short distance off of the dolly, plaintiff's injury resulted from a failure to provide protection required by Section 240(1) against a risk arising from a significant elevation differential.

In *Davies v Simon Property Group, Inc.,* the plaintiff alleged that he was injured while pushing a cart of concrete across a piece of plywood that had been laid by his employer on the ground from which a sidewalk had previously been removed.[3] The plywood "flexed," causing the plaintiff and the cart to fall into an adjacent hole. While the plaintiff testified at his deposition that the plywood bridged a three-foot wide and three-foot deep hole or trench that he fell into, two other witnesses testified at their depositions that there was no hole or trench underneath the plywood.

Defendants moved for summary judgment on the ground that the three-foot height differential of the sidewalk was not a significant elevation differential that the statute was designed to protect against. In answering *Runner's* single decisive question of whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential, the *Davies* court held that the conflicting deposition testimony raised an issue of fact regarding whether the plywood was, under the circumstances, the functional equivalent of a scaffold meant to prevent the plaintiff from falling into a three-foot-deep hole or trench. The grant of summary judgment was reversed.

The fact that a worker and the injury-causing instrumentality 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.[4] 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).[5]

An interesting decision in a "same level" case that applied an intensive quantitative analysis of the force of the 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.*[6] In moving for summary judgment, the defendants submitted an affidavit from an engineer who compared the height of the plaintiff to the height, weight and number of scaffolds that fell forward and struck him and from that calculated that 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 were involved in *Wilinski*, where a significant elevation differential was found to exist, and to the number of joules he calculated (185.90) were involved in an earlier case the Third Department had dismissed where scaffold frames fell on the plaintiff when he attempted to move them.

Defendants' engineer opined that the five-inch differential between the top of plaintiff's head and the maximum height of the frames did not significantly contribute to the "total" force at impact of the offending frame as it struck plaintiff. Although the plaintiff submitted an affidavit from an architect, the court, relying heavily upon the just five-inch elevation differential between the heights of the plaintiff and the scaffold, affirmed the dismissal plaintiff's complaint.

Not every "same level" scenario resulted in the application of Section 240(1). In *Lombardi v City of New York,* the plaintiff allegedly was injured when a metal plate, which was used to cover an excavated trench located on the roadway, struck him as it was being removed from the roadway surface.[7] The court held that defendants established, prima facie, that the plaintiff's injury did not result from the type of elevation-related hazard contemplated by Section 240(1).

Similarly, in *Clark v FC Yonkers Assoc., LLC,* the plaintiff allegedly suffered a herniation in his neck as he, while standing on the ground, attempted to throw a 100–pound hose onto an area located 15 to 20 feet above him.[8] The court held that although the accident tangentially involved elevation, it was not caused by any elevation-related risk contemplated by the statute.

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 *Djuric v City of New York,* the statute was found to be inapplicable because the pipe saddle that detached from an overhead ceiling pipe assembly and struck plaintiff was not an object that required securing for the purposes of the undertaking but was rather a permanent part of the structure.[9]

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.

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1. 13 N.Y.3d 599 (2009).
2. 176 A.D.3d 561 (1st Dept. 2019).
3. 174 A.D.3d 850 (2d Dept. 2019).
4. 176 A.D.3d 627 (1st Dept 2019).
5. 18 N.Y.3d 1 (2011).
6. 173 A.D.3d 1409 (3d Dept. 2019).
7. 175 A.D.3d 1521 (2d Dept. 2019).
8. 172 A.D.3d 1159 (2d Dept. 2019).
9. 172 A.D.3d 456 (1st Dept. 2019).

Personal Injury/Workers' Compensation

Are Out-of-Possession Landowners Out of Liability?

A vast majority of the commercial-type premises liability cases in this State result in landowners being shielded from liability as a result of the well-known out-of-possession landlord rule. Under this rule, landowners 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. Troon Management, Inc.*[1] and *Henry v. Hamilton Equities, Inc.*[2] These opinions are important not only for landlords and tenants but also for attorneys practicing landlord-tenant law, as well as personal injury.

Xiang: Lessors 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[.]"[3] 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 lessee or maintenance agreement with a non-owner."[4] 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."[5]

The Court, in a carefully detailed analysis, refused to extend the out-of-possession landowner 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])."[6]

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."[7] 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 the owner of real property that falls within the ambit of Section 7-210 can contract out the 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 out 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 sustained injuries after having slipped on water in a nursing home that came from a leaking roof. The original lease shifted 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' … ."[8]

Deanne M. Caputo

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 property. The motion was granted, and was affirmed by the First Department. The plaintiff argued that the defendants should be liable, claiming that the subsequent HUD regulatory agreement altered the original lease with the nursing home placing the burden to maintain the premises in good repair on the landowners.

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."[9] The Court stated that even though the terms of the HUD regulatory agreement were to supersede all other contradictory requirements, "the HUD regulatory agreement did not conflict with, or absolve the nursing home of, its responsibilities under the original lease."[10] 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."[11]

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 landowner rule.

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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.*

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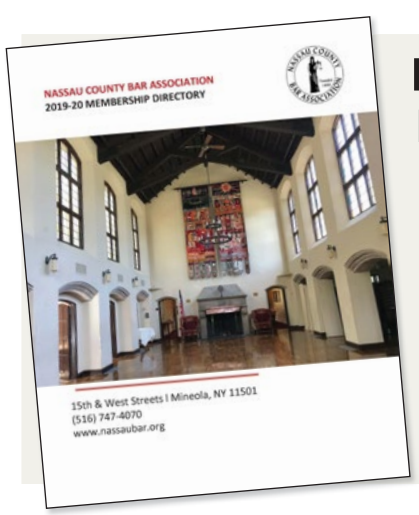

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Personal Injury/Workers' Compensation

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").[1] 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").[2]

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.[3] 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.[4] and a 2017 study by McElroy et al.[5] 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.[6]

Jaquay B. Felix

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*[7] 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.[8]

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.[9] 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 contravention 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."[10]

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.[11]

A similar problem was faced by the Veteran plaintiffs in *In re Agent Orange*.[12] 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.[13] 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.[14] 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."[15] 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.[16]

Similarly, here provisions for recovery should be made for plaintiffs that struggle with the factual impossibility of adequately proving causation. Minority victims suffering from endometrial cancer may not have the luxury of being able to benefit from an epidemiological decision in their favor years from now. They may have already passed away from their conditions. Even those that survive will continue to endure severe losses in other areas of their lives such as loss of gainful employment opportunities, friends, services or intimacy with a significant other, and general loss of quality of life well into their remaining years. Cancer is inherently life threatening, and it poses this lethal threat

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Nassau County Bar Association and Suffolk County Bar Association Joint Meeting

NYS Chief Administrative Judge Lawrence K. Marks addressed the Board of Directors of the Nassau County Bar Association and Suffolk County Bar Association at a joint meeting on January 14. Other dignitaries present included District Administrative Judges C. Randall Hinrichs and Norman St. George and NYSBA President Hank Greenberg. (L-R) Suffolk County District Administrative Judge C. Randall Hinrichs, SCBA President-Elect Hon. Derrick J. Robinsom, SCBA President Lynn Poster-Zimmerman, NYSBA President-Elect Scott Karson, NYSBA President Henry Greenberg, Chief Administrative Judge Lawrence K. Marks, NCBA President Rick Collins, NCBA President-Elect Dorian Glover, and Nassau County District Administrative Judge Norman St. George.

General Law

The Never-Ending Escrow

Whenever I speak at continuing legal education programs, particularly on the subjects of real estate or escrow, I am approached by attorneys seeking guidance on one of the more vexing nuisances 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 not 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 may not be large in amount, the consequences if the funds are mishandled are enormous, and, let's face it, nobody likes to be stuck in the middle with no upside or benefit to themselves.

The Lawyer's Fund as Repository

Fortunately, the Rules of Professional Conduct ("RPC")[1] provide a relatively simple solution for 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 Lawyers' 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 missing payees who are not clients.

The Lawyer's Fund website[2] provides samples of pleadings 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 based on a 2004 Erie County Bar Association Ethics Opinion.[3]

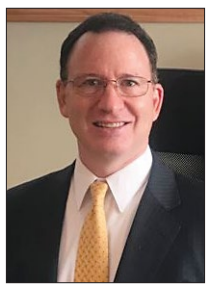
Caught In the Middle

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 help facilitate agreements between other parties. The permutations and scenarios under which attorneys obligate themselves to hold funds in escrow are endless. In all cases, however, the attorney is saddled with contractual and fiduciary duties to all parties to the escrow agreement and may dispose of the escrow funds only in strict accordance with the terms of the agreement.[4] Despite best intentions, escrow agents are frequently dragged into court as stakeholders or accused of bad faith and professional misconduct. This happens in the most routine and sophisticated circumstances.

Post-Closing Escrows

One of the most simplistic but frequent scenarios involves real estate practitioners who at the closing table agree to continue acting as escrow agent, "post-closing," to ensure their client or the other party satisfy a condition. Many of us have been at closing tables where one attorney quickly drafts an agreement, stating, in form and substance, as follows:

"The undersigned shall hold $2,000 in escrow to ensure that a CO is issued for the deck within 60 days from the date hereof. In the event said certificate is not issued within said 60 days the escrow shall be released to the purchaser to cover the cost of obtaining the CO."



Mitchell Borkowsky

The problem with such an agreement is that it is often so hastily and inartfully drafted that no one could possibly know what his or her obligations are, least of all the attorney who obligated himself or herself to hold the money.

If no CO is issued within the timeframe provided and the attorney remits a check to the purchaser's attorney, it would seem as if the conditions of the agreement have been complied with and the attorney's obligation satisfied. However, if the purchaser's attorney returns the check because his client feels it's insufficient and instructs the escrow agent to retain the funds until the dispute is resolved, the escrow agent has no choice but to preserve the funds indefinitely, pending his or her own commencement of an interpleader action or commencement of an action by one of the parties.[5]

Ironically, the attorney in our example strictly complied with the terms of the agreement but is still stuck because she cannot force the purchaser to negotiate the check. Moreover, no matter how much time passes or how little is done by either party to resolve the situation, the attorney cannot release the funds to her client, as Rule 1.15(c)(4) states that funds may only be released to a client or third party when "the client or third party is entitled to receive" them.

Potential Grievance Inquiry

Adding insult to injury, these cases frequently result in grievances being filed by one side or the other, usually the purchaser. In case you're wondering how a legal dispute between clients could result in a grievance investigation against an attorney, well… it really shouldn't. However, such complaints often include other assertions, such as that the escrow agent has failed to respond to repeated calls and letters from the purchaser's attorney, or there's a good faith belief that the escrow agent improperly released the funds. In those instances, the grievance committees are more likely to inquire and ask for records establishing that the funds have been preserved throughout the entire escrow period.

Fiduciary Duties and Contract Law

Sometimes, entitlement to the funds is not as clear as in the above example. Perhaps the purpose of the escrow is to ensure funds are available to satisfy an existing or anticipated tax lien or assessment against the property attributable to the seller. If funds are withheld from the seller at closing but the lien is not enforced or doesn't materialize after a few years, it would seem reasonable that the seller should be entitled to receive the balance of the sales proceeds at some point. However, if the purchaser instructs the escrow agent to continue to hold the funds, then… well, again… what does the agreement say? Clearly, these are legal issues that require not just an examination of fiduciary duties but also contract law.

The case of *Schoolman v. U.S. Bank National Association*[6] can be instructive. Schoolman involved an asset purchase agreement in which some of the assets sold by Schoolman were subject to a tax lien. The defendant bank, acting as escrow agent pursuant to a comprehensive escrow agreement, agreed to hold in escrow an amount significantly greater than the tax lien and to disburse the funds to Schoolman in two equal installments at delineated times, subject to the buyer's right to make claims against the funds by submitting Claims Notices and "Disbursement Letters" to the bank.

The buyer in Schoolman did not timely submit such documents to the bank; instead, days after the second installment was due, the buyer unilaterally notified the bank there was a dispute over the escrow and directed the bank to continue to hold an amount equal to the tax lien. On that basis, the bank failed to release the entire balance of the escrow to Schoolman. Schoolman sued.

The Court found that because the escrow agreement clearly and unambiguously delineated the procedures, manner, and timing of the release of the escrow amount, and explicitly stated that the funds "shall … [be] released from escrow by the Escrow Agent only in accordance with the terms and conditions of this Agreement," the bank had inappropriately withheld the funds from Schoolman.

Avoiding 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.

To avoid the "never-ending escrow," the most important task is to tighten up your escrow agreements. Among other things:

- include specific dates, notice requirements, and triggering events establishing parameters for the release of the escrow;
- clearly define yourself as a stakeholder and provide yourself with indemnification by the parties for actions taken in good faith and pursuant to the escrow agreement;
- include conditions and mechanisms regarding dispute resolution tailored to the specific purpose of the escrow;
- require an objecting party to commence an action within a specified and reasonable time-frame;
- 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.

Always remember, however, that because you may be dealing with less sophisticated clients, you might still be better served by continuing to hold the funds in escrow. But, by having a solid agreement and strictly complying with its terms, you will at least force the other side's hand, spur some action, and have some legal basis if you do choose to release the funds pursuant to the terms of the agreement.

Mitchell T. Borkowsky provides representation to lawyers before state grievance committees and to disbarred or suspended attorneys seeking reinstatement. He can be reached at mitch@myethicslawyer.com.

1. 22 NYCRR Part 1200.
2. www.nylawfund.org.
3. Erie Co. Ethics Opinion 04-01 (2004).
4. *Farago v. Burke*, 262 N.Y. 229 (1933).
5. Brooklyn Bar Ethics Opinion No. 1993-1.
6. 2012 NY Slip Op 32394(U) (Sup. Ct., Suffolk Co. Sept. 10, 2012).

PROGRAM CALENDAR

Pre-registration is required for all Academy ease of registration or email academy@nass available for purchase through in-house cat

February 4, 2020
Champion Office Suites Lecture Series Presents: Dean's Hour: For Better or Worse—Ethical Pitfalls in Matrimonial Law
Sponsored by NCBA Corporate Partners Champion Office Suites and MPI Valuation
With the NCBA Matrimonial Law Committee
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in ethics

February 4, 2020
How Not to Get Hacked: Treading Carefully in Cyberspace
With the NCBA Community Relations and Public Education Committee
Sign-in begins 5:00 PM; Program 5:30–7:30 PM
Credits offered: 2 credit in professional practice or skills

February 5, 2020
Criminal-Immigration Review: Best Practices When Defending Non-Citizens
With the NCBA Immigration Law Committee and the Assigned Counsel Defenders Plan Inc. of Nassau County
Sign-in begins 5:00 PM; Program 5:30–7:30 PM
Credits offered: 2 credits in professional practice or skills

February 6, 2020
Dean's Hour: Gerrymandering and Its Impact on Communities of Color
With the NCBA Diversity and Inclusion Committee
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in diversity, inclusion and elimination of bias

February 24, 2020
Dean's Hour: Health Care Decision Making: Who, What, Where, When, Why and How?
With the NCBA Senior Lawyer *and* Hospital and Health Law Committees
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in professional practice or skills

February 27, 2020
Champion Office Suites Lecture Series Presents: Dean's Hour: Defensive Lawyering: Learn from Others' Mistakes: Part 1
Sponsored by NCBA Corporate Partners Champion Office Suites
With the NCBA Ethics Committee
Sign-in begins at noon; Program 12:45–1:45 PM
Credits offered: 1 credit in ethics

February 27, 2020
Microaggressions in the Workplace
With the NCBA Diversity and Inclusion Committee
Sign-in begins 5:00 PM; Program 5:30–7:30 PM
Credits offered: 1 credit in diversity, inclusion, and elimination of bias and 1 credit in ethics

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
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y programs. Seating limited for those that do not pre-register. Call (516) 747-4464 for saubar.org. Please note that outside food is not permitted at Dean's Hours. Lunch is terer. The Academy office is open 8:30 AM to 5:00 PM, Monday through Friday.

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May 8, 2020
Topic TBD
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June 11, 2020
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General Law

The Hidden Cost of a New York Vacation Home

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, many fail to appreciate the second prong of the statutory residency test, the maintenance of a "permanent place of abode."

In order 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 that confuses taxpayers, is what exactly is required to have 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[.]"[1] 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.

Leo Gabovich

Karen Tenenbaum

For statutory residency purposes and the tolling of the day count rule, actual time spent at the permanent place of abode is not relevant. In *Matter of John J. & Laura Barker,* the taxpayers in the case had a vacation house in the Hamptons which they used infrequently.[2] 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.*[3] Gaied owned and operated an automotive repair business in Staten Island near which he purchased a multi-family apartment building. He did so as both 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*[4] 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.[5] 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.

Leo Gabovich is an associate attorney at Tenenbaum Law, P.C. Karen J. Tenenbaum is the founder of Tenenbaum Law, P.C. Leo and Karen focus on the resolution of federal and New York state tax controversies, including offers in compromise, installment agreements, liens, levies, and warrants. Leo can be reached at lgabovich@litaxattorney.com and Karen can be reached at ktenenbaum@litaxattorney.com or (631) 465-5000.

1. 20 CRR-NY 105.20(e)(1)
2. *Matter of John J. & Laura Barker*, DTA No. 822324
3. *Matter of Gaied v New York State Tax Appeals* Trib. 2014 NY Slip Op 01101
4. *Matter of Obus*, DTA 827736 (August 22, 2019)
5. S. 2254 — 115th Congress: Tax Cuts and Jobs Act

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 Diversity & Inclusion Committee Vice-Chair Rudy Carmenaty, NCBA Building Manager Hector Herrera, Nassau County Executive Laura Curran, NCBA President-Elect Dorian Glover.

General Law

The Cinematic Trials of Henry Fonda

"I know Henry Fonda as an actor, a devoted, hard-working, responsible one with an urge toward perfection.... Times pass; we change; the urgency departs, and this is called 'dating'.... Then a lean, stringy, dark-faced piece of electricity walked out on the screen, and he had me. I believed my own story again. It was fresh and happening and good.
Hank can do that."

—John Steinbeck

Henry Fonda was among the finest of American actors. In a long and distinguished career, he crafted a dramatic persona which presented the American experience in all its quiet dignity and decency. From farmers to presidents, cowboys to admirals, the men Fonda portrayed reflected the very best of our country and of ourselves.

Henry Fonda was an actor, not an attorney. Nevertheless, he made an indelible contribution to the way the law is perceived in the United States and how American justice is viewed from abroad. Whether he was playing a lawyer, a judge or a juror, he lent an aura of authenticity to every role he played. Courtroom advocates have often found themselves mimicking Fonda. Frankly, I must plead guilty on this particular count.

Fonda never took an acting lesson. In fact, he owed his career to the encouragement of family friend Dorothy Brando, mother of Marlon Brando. Naturalness was Fonda's touchstone: "My goal is that the audience never see the wheels go around, not see the work that goes into this. It must seem real and effortless."[1] By the time of his passing, Fonda was more than a celebrated performer. He had become a part of the tapestry of American culture.

"What's all this about you not wanting to play this picture? You think Lincoln's a great emancipator? He's a young jack-legged lawyer from Springfield, for God's sake!"

—John Ford

Fonda's first screen role as a lawyer was as Lincoln in 1939's *Young Mr. Lincoln*. Fonda revered the sixteenth president, noting that "Lincoln is a god to me."[2] One of his earliest professional acting stints was touring with George Billings, a renowned Lincoln impersonator.[3] When initially offered the part in the film, Fonda turned it down flat. Director John Ford had to literally brow-beat him into taking the role.

This film presents not the Lincoln of legend but rather the Lincoln of frontier court houses. This is a nascent Lincoln, grasping for learning, then establishing himself at the bar in Springfield. He is man with a modest education whose innate brilliance is masked by his home-spun wisdom. Fonda's performance beautifully brings "Honest Abe" to life during Lincoln's formative years.

The film's courtroom scenes revolve around Lincoln's defense of two brothers falsely accused of murder. He is everything an innocent man should have on his side as he cunningly exposes the actual killer on cross examination. More telling is when, through sheer force of personality, Abe prevents a lynch mob from storming the jail to string up his clients. Fonda, as a boy, had witnessed a lynching; it was a memory that never left him.[4]

Fonda vividly recreates Lincoln's warmth and courage, his strength and simplicity, and, most engagingly, his humble faith in the majesty of the law. From the moment that Lincoln first opens a law book to when the more accomplished Stephen A. Douglass congratulates him on his courtroom victory, the audience sees Lincoln come to maturity as both man and lawyer.

The poetry of *Young Mr. Lincoln* rests largely on Fonda's characterization, which foreshadows the virtues the audience would come to associate with Lincoln's presidency. Great credit belongs to John Ford. An extraordinary filmmaker, Ford, working with Fonda, would form one of the cinema's great partnerships, coming together for such film classics as *The Grapes of Wrath* and *My Darling Clementine*.

"[T]his is a fascinating movie, but more than that, it points up the fact which too many of us have not taken seriously, of what it means to serve on a jury when a man's life is at stake… it makes vivid what "reasonable doubt" means when a murder trial jury makes up its mind on circumstantial evidence."

—Eleanor Roosevelt

In real life, Fonda was a far more complicated figure than his all-American image let on. "I was a painfully self-conscious, shy young man and had very little to say… . Part of the whole attraction of acting was that it was therapy. I was wearing a mask. It was like hiding behind the character."[5] There was in Fonda an inner tension which often gave his performances an edge that belied any idea he was just a run-of-the-mill all-American boy.

After World War II, the advent of television altered the Hollywood landscape as studio glamour gave way to kitchen-sink realism. Television provided Fonda with the source material for the only film he would ever produce: Reginald Rose's *Twelve Angry Men*. Made for just $340,000 over a twenty-day shooting schedule, the film was an independent production directed by Sidney Lumet.[6]

Twelve Angry Men denotes the pain-staking deliberations of a New York jury. The drama concerns Fonda (Juror #8) methodically convincing his fellows that there is sufficient reasonable doubt in a capital murder case to garner an acquittal. Juror #8 is more than just the catalyst for the step-by-step conversion of the others. He is the moral conscience of the film.

Applying his keen intelligence to the facts raised at trial, Fonda prods each juror to reevaluate the evidence and themselves. The success of the film rests in the bravura performances of Fonda and the ensemble around him: Martin Balsam, John Fielder, Lee J. Cobb, E.G. Marshall, Jack Klugman, Edward Binns, Jack Warden, Joseph Sweeney, Ed Begley, George Voskovec, and Robert Webber.

The tension among the jurors is palpable. Some of them have less-than-honorable motives in voting to convict. Apathy, boredom, bigotry, condescension, even self-loathing all come to the fore. What was seemingly an open-and-shut case turns out to be much more ambiguous than originally thought.

The irony that gives the film its understated power is that none of the jurors, even Fonda's character, is 100% certain the accused is innocent. The thirteenth character in that jury room is the concept of "reasonable doubt" itself. *Twelve Angry Men*, in its dark and gritty way, is an affirmation that it is preferable that a guilty man go free than allow an innocent one to be falsely convicted.

Rudy Carmenaty

Set in Manhattan State Supreme Court, this landmark film provides a glimpse inside the inner-workings of the criminal justice system in the mid-twentieth century. It is in this murky world, that Fonda's Juror #8, like Lincoln in the prior film, stands out. Juror #8 is a paragon of moral clarity holding firm until a unanimous not guilty verdict is rendered.

"I shall not argue to you whether the defendants' ideas are right or wrong. I am not bound to believe them right in order to take their case, and you are not bound to believe them right in order to find them not guilty. But if this jury should make it harder for any man to be a rebel, you would be doing the most you could for the damnation of the human race."

—Fonda, in Clarence Darrow

Henry Fonda was one of the few movie actors who also maintained a substantial career in the theater. He appeared frequently on Broadway. Many of these productions dealt with legal themes. Notably, there was *The Caine Mutiny Court Martial*, a stage adaptation of Herman Wouk's novel, and *First Monday in October*, in which he played a liberal Supreme Court justice modeled after William O. Douglas.

But the crowning glory of these theatrical achievements was *Clarence Darrow*, by David W. Rintels.[7] A one-man play directed by John Houseman,[8] it presented the actor with the daunting challenge of holding an audience's attention all by himself. The production was recorded for airing on television, providing us with the consummate example of Fonda's work on the stage.

A passionate champion of social reform who defended unpopular people, the real-life Darrow was a courtroom litigator and a civil libertarian of epic dimensions. The ultimate "country lawyer," who behind the public facade is really a clever sophisticate, Darrow was a man of conviction laboring magnificently to keep his clients from being convicted.

Clarence Darrow was a tour-de-force for Henry Fonda. It was a perfect match of role and actor. Both men were mid-Westerners, both were committed liberals, and both spoke eloquently for causes they believed in. The cases depicted in the play actually happened, with much of the dialog being taken from court transcripts.

The performance opens with Darrow recalling his long life and his many trials. The avuncular Darrow speaks frankly and wryly about the law, both its promises and its deficiencies. Issues of individual conscience and free expression, of economic justice, of racial equality and the protections afforded the accused are touched upon with grace and biting wit.

Fonda vividly brings to life the Scopes Monkey trial, the Leopold and Loeb murder case, numerous efforts on behalf of organized labor, and, most movingly, the defense of Dr. Ossian Sweet. Sweet was an African-American charged with the murder of a white man when defending his home against a racist mob. Never one to back down, Darrow does not flinch in his advocacy of Sweet, exposing the insidious cancer that is racial prejudice.

"Law is a lot more than words you put in a book, or judges or lawyers or sheriffs you hire to carry it out. It's everything people ever have found out about justice and what's right and wrong. It's the very conscience of humanity. There can't be any such thing as civilization unless people have a conscience, because if people touch God anywhere, where is it except through their conscience."

—Fonda, in The Ox Bow Incident

The genius of Henry Fonda rested in his ability to embody American ideals with just about every breath he took on stage or screen. Nearly forty years after his passing, the beauty and the passion of his life's work remains undiminished. Fonda is remembered as a great actor.

Pablo Picasso once observed that "art is a lie that makes us realize the truth."[9] In the numerous fictions that Fonda brought to life, be it Lincoln or Juror #8 or Clarence Darrow or over a hundred other roles, Fonda managed to convey simple and eternal truths that continue to speak to every one of us. Art transcends all boundaries and the art of Henry Fonda was not only transcendent, it was inspired.

For those of us who toil in the vineyards of the law, Fonda's art is of inestimable value. Many of us were initially motivated to enter this realm by seeing Fonda in one incarnation or another. For others who aspire to "justice"—however one seeks to define the term—the vision of Henry Fonda is a clarion call captured on celluloid.

Fonda was a fictional attorney, a make-believe judge, a play-acting juror. Yet his performances shaped the way Americans see the law and contributed to the American people's conception of what is fair and just. That's a great deal more than many members of the bar have managed to do during their careers. That is why he is worth remembering and celebrating.

Rudy Carmenaty is a Deputy County Attorney and the Director of Legal Services for the Nassau County Department of Social Services.

1. Peter B. Flint, *Henry Fonda Dies on Coast at 77; Played 100 Stage and Screen Roles*, New York Times (Aug. 13, 1982).
2. Gerald Peary, *American Hero,* American Movie Classics Magazine (July 1995).
3. John Springer, *The Fondas,* 7, (1st ed. 1970).
4. Henry Fonda as told to Howard Teichmann, *Fonda My Life,* 24, (1st ed. 1981).
5. J.Y. Smith, *Actor Henry Fonda Dies at 77*, Washington Post (Aug. 13, 1982).
6. Springer, *supra* note 3, at 165.
7. The play is based on *Clarence Darrow for the Defense* by Irving Stone.
8. Houseman would win an Academy Award for the role of Professor Charles W. Kingsfield, Jr. in the film *The Paper Chase* (1973).
9. Pablo Picasso, *"Statement to Marius De Zayas"* 1923, https://bit.ly/37BLmGC.

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Contributions may be made by mail:
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SAVE THE DATE

CELEBRATING ITS 25TH ANNIVERSARY

MONDAY, JULY 27, 2020

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Pro Bono Attorney of the Month

Byron Divins, Jr.

BY SUSAN BILLER

It is with great pleasure that Nassau/Suffolk Law Services' Volunteer Lawyers Project (VLP) and the Nassau County Bar Association (NCBA) recognize Byron Divins, Jr. as our most recent Pro Bono Attorney of the Month. This month's award honors an attorney who has demonstrated tremendous dedication assisting low-income Nassau County residents in matrimonial matters, especially those with complex child support and custody issues.

Since first joining the VLP panel in 2012, Divins and his firm has represented twenty-three clients, including nine contested divorce proceedings. He is a member of the Garden City firm of Divins & Divins, P.C., which he founded in 2010 with his wife and partner, Phyllis. He concentrates his practice on family and criminal law, representing clients in Nassau, Suffolk, New York, Kings, and Queens Counties on issues varying from orders of protection, divorce, custody, visitation, child support, and modification. His firm-wide commitment to pro bono means that each attorney there has graciously agreed to represent at least one matrimonial VLP client at any given time.

Divins graduated from SUNY Albany in 1993 and Touro Law School in 1996. Upon earning his J.D., he joined the U.S. Navy, where he spent thirteen years on active duty serving as a prosecutor, defense counsel, and advisor to commanding officers throughout the world. He served in Japan on board the aircraft carriers *USS Kitty Hawk* and *USS Theodore Roosevelt*, with shore tours in Bahrain, Florida, Connecticut, and Virginia.

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 contentiously contested matters. He brings his enthusiasm and passion for achieving justice to 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!

Bernadette M. Arnold
Michael Jay Aronowsky
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
Adam D'Antonio
Alexander DeMarchena
Janet Nina Esagoff
Michael Fishman
George P. Frooks
Stuart P. Gelberg
Gerald Goldstein
Amanda Rose Green
Robert Jacovetti
Stanford Kaplan
Nelson Kong
Joseph A. Lauri
David Lazer
Genevieve LoPresti
Kathleen Maher
Maryjo Marchisello
Audrey Mars
Andrew Meaney
Oscar Michelen
Douglas D. Moyal
Stacey Ramis Nigro
Chandra Mary Ortiz
Nirav Patel
Maryanne Pedersen
Robert Plosky
Jonathan S. Press
Jon Michael Probstein
Edmund G. Rakowski
Anne Rosenbach
Seth M. Rosner
Anthony W. Russo
Thomas A. Schweitzer
Heather Siegelman
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APPELLATE DECISIONS ...

Continued From Page 3

that the opinion of the surgeon who found surgery not necessary was consistent with that of a third surgeon, who performed an "independent medical examination" while the request for authorization was pending. The court conceded that there was a conflict among the physicians' opinions, but recognized that "the Board is vested with authority to resolve conflicting medical evidence."[8]

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.[9]

The plaintiff alleged that he had been hired by Bright Star and then assigned to work for another defendant, and was injured on the premises of that other defendant's client. Worker's Compensation Law § 11 precludes suits against employers for work-related injuries, so Bright Star moved for summary judgment. However, Bright Star's evidence in support of its motion showed that the plaintiff's 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 Messenger." The court noted, however, "a party cannot sustain 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 universally applicable. Counsel in workers' compensation claims, however, should bear in mind that the records submitted to the Board are evidence of the claimant's employer, and any discrepancies must be accounted for.

Cerobski: Defenses Untimely Raised Are Waived

In *Cerobksi v. Structural Preservation Systems*, the Third Department held an employer was precluded from raising any defenses that it did not raise before the prehearing conference.[11]

The employee filed a claim, but his employer and the carrier failed to file the required prehearing conference statement,[12] and at the subsequent hearing raised only the issue of causation. Two WCLJ decisions held that the carrier was precluded from offering any defenses because it failed to file the prehearing conference statement. The carrier applied for review, for the first time accusing the claimant of fraud. The Board affirmed both decisions, declining to consider the fraud defense but noting that "[t]he carrier remains free to request litigation of this issue and provide good cause as to why it failed to produce this allegation in a timely manner."[13]

At a later hearing, the carrier raised the fraud issue again, which the employee objected to as an attempt to relitigate issues of accident and notice. This time, however, a WCLJ judge found that the employee had made false statements in violation of WCL § 114–a(1) and disqualified him from future benefits. The Board reversed on review, finding that its previous decision had finally determined accident and notice, and that the carrier offered no excuse for not timely raising the fraud defense.

The appellate court affirmed, noting that WCL § 25(2–a)(d) requires a prehearing conference statement that lists the specific issues in dispute, as well as "an offer of proof for each defense raised."[14] Furthermore, "Failure by the insurance carrier to timely serve upon all other parties and file with the Board the pre-hearing conference statement . . . shall result in a waiver of defenses to the claim."[15] Since the carrier never filed a prehearing conference statement, or explained why it could not have offered earlier the evidence that it offered at the later hearing, it was precluded from asserting the fraud claim. Furthermore, the issues of accident and notice were settled under the doctrine of collateral estoppel.

Eshonkulov: Summary Judgment Requires Prima Facie Proof, Even on Cross-Claims

In *Eshonkulov v. Rafiqul*, the Second Department denied an employer summary judgment on an indemnification claim for failure to prove "grave injury."[16]

The plaintiff was injured while working on a home renovation, and sued the contractor who employed him, a member of the contractor, and the homeowners, who cross-claimed against the contractor and member. The defendants all moved for summary judgment, and the contractor and member prevailed against the plaintiff: "In general, workers' compensation benefits are the sole and exclusive remedy of an employee against an employer or co-employee for injuries sustained in the course of employment."[17] They were denied summary judgment, however, as to the cross-claims. WCL § 11 does allow indemnification claims where the employee suffered a "grave injury" or the parties contractually agreed to indemnification, but the court held that the contractor and member failed to prove either fact prima facie.

But how could the contractor and member have failed to meet their burden of proof as to the cross-claims? It appears that they never tried. Though their notice of motion sought to dismiss "the Complaint and any and all associated claims,"[18] the contractor and member argued exclusively on the plaintiff's claims,[19] and in reply to the homeowners' opposition merely asserted that "where a court directs dismissal of the complaint in favor of a defendant, any and all associated claims, including cross-claims, should also be dismissed."[20] To obtain summary judgment, however, defendants cannot rely on the transitive property, and must affirmatively meet their burden as to each claim.

Presida: Form RB–89 Must Be "Filled Out Completely"

In *Presida v. Health Quest Systems*, the Third Department held that a Worker's Compensation Board decision to deny an employer and carrier's application for review was neither arbitrary nor capricious.[21]

The claimant had an established claim for an injury to her right knee, and a Worker's Compensation Law Judge (WCLJ) then amended the claim to include injuries to the claimant's lower back and to authorize a total knee replacement. The employer and carrier filed an application for Board review of the WCLJ's decision, using Form RB–89. Where the form requests a list of the primary documents on which the application is based, however, the carrier merely referred to the electronic case file and documents attached to the form. The Board denied the application, finding it defective because it was not properly completed.

The Third Department held that the Board did not abuse its discretion. The Board has advised that RB–89 must be "filled out completely," meaning that "each section or item… is completed in its entirety pursuant to the instructions on each form."[22] Merely referring to the case file and whatever was attached to the form did not suffice. The Board has also made clear that "any application … that is not filled out completely will be denied."[23]

The Third Department reached a similar holding last year in *Perry v. Main Bros Oil Co.*,[24] which suggests that some counsel are either not getting the message or are unwilling to constrain their arguments to the cramped confines of Form RB–89. A condensed argument, however, is better than none at all.

Conclusion

These cases illustrate the broad authority the Board has to resolve worker's compensation claims, but also the limits on that authority. Where the Board has authority to set rules, the courts will not excuse failure to follow those rules. Where the Board has discretion to resolve fact issues, the courts will not intervene absent abuse of discretion. Counsel should litigate before WCLJ's and the Board with the expectation that the outcome there will be the final determination.

Christopher J. DelliCarpini is a Co-Chair of the NCBA Publications Committee and an attorney with Sullivan Papain Block McGrath & Cannavo P.C. in Garden City, representing plaintiffs in personal injury actions. He can be reached at cdellicarpini@triallaw1.com.

1. 173 A.D.2d 1592 (3d Dept. 2019).
2. *Id*. at 1594 (quoting *Employer, Queens Medallion Leasing, Inc.,* Case No. G025 6616, Carrier ID No. W106884, 2015 WL 1388387 (N.Y.Work.Comp.Bd. Mar. 19, 2015)).
3. *Id*. (quoting *Employer: Medhal Salam Architert,* Case No. 0072 8502, Carrier ID No. 022 CB CBW0482 E W194005, 2017 WL 3208729 (N.Y.Work.Comp.Bd. July 19, 2017).
4. ___ A.D.3d ___, 2019 NY Slip Op 08899 (3d Dept. Dec. 12, 2019).
5. *Id.* at *2 (quoting *Matter of Coscia v. Association for the Advancement of Blind & Retarded,* 273 A.D.2d 719 (3d Dept. 2000)).
6. 175 A.D.3d 1759 (3d Dept. 2019). The Guidelines are available at https://on.ny.gov/2ZS5WzS.
7. *Id.* at 1760 (quoting *Matter of Gasparro v. Hospice of Dutchess Co.,* 166 A.D.3d 1271, 1272 (3d Dep't 2018)).
8. *Id.* at 1761.
9. 173 A.D.3d 732 (2d Dept. 2019).
10. *Id.* at 734.
11. 168 A.D.3d 1249 (3d Dept. 2019).
12. *See* 12 NYCRR § 300.38(f)(4).
13. *Id.* at 1249.
14. *See* 12 NYCRR § 300.38(f)(2)(iii).
15. *See* 12 NYCRR § 300.38(f)(4).
16. 176 A.D.3d 780 (2d Dept. 2019).
17. *Id.* at 679.
18. *Eshonkulov v. Rafiqul,* Index No. 505688/2016 (Sup. Ct., Kings Co.), NYSCEF Doc No. 13.
19. *Id.* at NYSCEF Doc. No. 14.
20. *Id.* at NYSCEF Doc. No. 30 (citing *Hoenig v. Royal Park Owners*, 260 A.D.2d 250 (1st Dept. 1999)).
21. 174 A.D.3d 1196 (3d Dept. 2019).
22. *Id.* at 1197 (quoting WCB Release Subject No. 046–940).
23. *Id.*
24. 174 A.D.3d 1257 (3d Dept. 2019)

GONIOMETER ...

Continued From Page 5

measurements with an instrument. Without citing *Perl,* the court held:

> Defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting the affirmed reports of an orthopedic surgeon who examined the alleged injured body parts, listed the tests he performed and recorded range of motion measurements, expressed in numerical degrees and the corresponding normal values, and found no limitations. The surgeon's examination was sufficient, even though he did not use an instrument to measure the ranges of motion.[10]

Notably, *Frias* and its progeny do not stand for the proposition that no objective testing whatsoever is required in the First Department. Indeed, the First Department has consistently found that "the defendant cannot satisfy [its summary judgment] burden if it presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts but does not specify the objective tests performed to arrive at that conclusion." *Linton v. Nawaz.*[11] Such examples of "objective tests" may include orthopedic diagnostic tests, such as palpation, impingement sign, and straight leg raising tests.[12]

Rather, as the subsequent trial court holdings make clear, the law in the First Department is simply that doctors need not utilize a particular instrument in measuring the plaintiff's range of motion.[13]

The Future of "Threshold" Motion Practice

When recommending whether to move for summary judgment on "threshold" grounds, based on the likelihood of success of the motion, we view *Pomelis v. Perez*,[14] as the guiding case. There, the Court of Appeals recognized that "even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a preexisting condition—summary judgment of the complaint may be appropriate."[15] But, absent a gap in treatment, intervening injury, or pre-existing medical condition, the "threshold" waters remain murky.

To date, the Third and Fourth Departments have not weighed in on this specific issue, instead reiterating the standard that "objective" testing is required without reaching the issue of whether a specific instrument is necessary.[16] Those appellate courts may be awaiting further guidance from the Court of Appeals, in terms of whether objective testing is necessary to defeat a "threshold" motion.

Unless and until the Court of Appeals rectifies this split in authority, the outcome for litigants in "serious injury" threshold cases may turn on what venue plaintiff opts for, in filing suit. To that end, Albany is therefore presented with Catch-22, in terms of reducing trial court backlogs: either (a) limit the grounds to move for summary judgment on "threshold" grounds, thereby increasing the number of cases on the trial calendars throughout the state, or (b) expand "threshold" summary judgment motion practice, which would likely reduce trial calendars, but in the process, would increase the volume of "threshold" motions to be decided at the Supreme Court level. Time will tell.

Brian Gibbons is a partner at Wade Clark Mulcahy LLP's New York City and Long Island offices. Brian tries cases and argues appeals in New York State and Federal Courts, including claims involving the Labor Law, premises liability, automobile claims, and other areas of property and casualty defense. Doug Giombarrese is an associate in the WCM New York City office, where he advises insurers on coverage matters involving commercial general liability, professional liability, environmental liability, builder's risk insurance policies, fine art and specie, and jeweler's block.

1. Insurance Law §§ 5102, *et seq.*
2. *Toure v. Avis Rent A Car Systems, Inc* 98 N.Y.2d 345, 350 (2002).
3. 176 A.D.3d 544 (1st Dept. 2019).
4. 175 A.D.3d 1235 (2d Dept. 2019).
5. *Id* at 1236.
6. *Id.* at 1237; *see also Fiorucci-Melosevich v. Harris* 166 A.D.3d 581, 581-82 (2d Dept. 2018) (holding that plaintiff's opposition failed to raise triable issue of fact where defendants' expert measured range of motion using a goniometer but plaintiff's physician "did not specify the objective test he used to measure the plaintiff's range of motion").
7. 18 N.Y.3d 208 (2011).
8. *Id.* at 217.
9. 107 A.D.3d 589 (1st Dept. 2013).
10. *Id.* at 590.
11. 62 A.D.3d 434 (1st Dept. 2009).
12. *See, e.g., Lopez v. Abdul–Wahab,* 67 A.D.3d 598 (1st Dept. 2009).
13. *See Munoz v. JBM Trucking, LLC,* No. 0027715/2016, 2019 WL 3252860, at *2 (Sup. Ct. N.Y. Co. May 17, 2019) ("Contrary to Defendants' contention, Dr. Cabatu was not required to use an instrument to measure range of motion."); *Celestin v. Jean,* No. 305204/2015, 2019 WL 2395358, at 2 (Sup. Ct., N.Y. Co. Apr. 2, 2019) ("Contrary to Defendants' contention, Dr. Reyfman did not need to specify which instrument he used to measure Plaintiffs lumbar spine range of motion limitations.").
14. 4 N.Y. 3d 566, 572 (2005).
15. *Id.*
16. *See Cohen v. Bayer,* 167 A.D.3d 1397 (3d Dept. 2018); *Goodwin v. Walter,* 165 A.D.3d 1596 (4th Dept. 2018).

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. DelliCarpini/ 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

LGBTQ
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
Wednseday, 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. Borten/ Bonnie Link/Anthony W. Russo

ETHICS
Monday, March 2
6:00 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. DelliCarpini/ Andrea M. DiGregorio

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

Committee Reports

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 Schiedo 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 important pre-trial practice issues and tips that all attorneys should know. Members of the NCBA Defendant's Personal Injury, Medical Legal, and Supreme Court Committees are invited and encouraged to attend.

Michael J. Langer

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 Fairgrieve 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 relevant 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 problem. 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 of appeals have held 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."[17] "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."[18]

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 vigor."[19] "Its underlying integrity requires professional thoroughness, and it must at least take serious account of other potential causes."[20] "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 symptoms can provide compelling evidence of causation."[21]

The Second Circuit, in *Zuchowicz v. United States,* reasoned that "causation may be proved by circumstantial evidence, and that the causal relation between an injury and its later physical effects may be established by a physician's opinion."[22] In that case, the United States appealed from a decision where they were held liable for overprescribing danocrine to a woman who later developed a rare lung condition and died. The Court of Appeals reaffirmed the lower courts decision holding that while the defendant's negligence may not be established as the "but for" cause, under a preponderance standard the differential diagnosis from an expert witness was sufficient.[23]

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 appeal witness on behalf of a denied claimant would have the burden of proving the following indicia to support a reliable 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 why each of the other causes should be ruled out.[24]

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 absent a major insult to their health. If endometrial cancer has developed and there is no other major toxic exposure that can be identified other than 9/11 toxic dust exposure, then that 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 has 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 at the VCF appeal hearings using the same format that was used in these court cases. This is the best argument that can be made under the circumstances.

The Amistad Case: A Reenactment of the Landmark Case

The Diversity & Inclusion Committee of the Nassau County Bar Association and the Nassau County Office of Youth Services joined forces to support the youth of Jack & Jill Nassau County in their presentation of *The Amistad Case: A Reenactment of the Landmark Case.* This is the second time that DOMUS has hosted a reenactment of a civil rights case with Jack & Jill in honor of Dr. Martin Luther King, Jr. on the King National Holiday. Photo by Hector Herrera

Jaquay B. Felix is an associate in the Mass Tort Litigation Department at Napoli Shkolnik, PLLC and specializes in maximizing the recovery of those who have been devastated by the aftermath of the World Trade Center disaster.

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9. 28 C.F.R §104.61(a).
10. Air Transp. Safety and System Stab. Act, Pub.L. 112–10 (Apr. 15, 2011) § 403; 49 U.S.C. § 40101.
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12. In re "*Agent Orange*" Prod. Liab. Litig., 597 F. Supp. 740. (1984).
13. *Id.* at 746.
14. *Id.* at 747.
15. *Id.*
16. *Id.* at 861.
17. *Kennedy v. Collagen Corp.,* 161 F.3d 1226 (9th Cir. 1998).
18. *Westberry v. Gislaved Gummi AB,* 178 F.3d 257, 262–63 (4th Cir. 1999).
19. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999).
20. *Fitzgerald v. Smith & Nephew,* 11 Fed. Appx. 335, 340 (4th Cir. 2001)(citing *Westberry,* 178 F.3d at 265).
21. *Doe v. Northwestern Mut. Life Ins. Co.*, 2012 U.S. Dist. LEXIS 60441, *1, 2012 WL 1533104.
22. *Zuchowicz v. United States,* 140 F.3d 381, 383 (1998).
23. *Id.* at 392.
24. *Westberry,* 178 F.3d at 262.

BIFURCATED TRIALS ...

Continued From Page 6

it. The statewide rule also expanded the categories of cases that fell within its compass; while the Second Department rule only applied to negligence actions, the statewide rule applies to "any action for personal injury."

One of the critical differences between the old rule and the new one 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 apply that presumption and have "inflexibly" required bifurcation in nearly all cases.[13]

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 need to try damages, which can involve expensive expert witnesses and other proof."[14] However, the court noted that if the same experts 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.[15]

And, 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,"[16] the Second Department, citing the Court of Appeals' decision in *Bennetti v. New York City Transit Authority,*[17] declared that a limiting instruction to the jury suffices to dispel this potential prejudice.[18]

In fact, the *Castro* Court noted that bifurcation can serve to prejudice the *plaintiff's* 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 the issue of liability.[19]

The Second Department also emphasized that its trial courts' "strict[ ] and inflexibl[e]" rule in favor of bifurcation[20] contrasts with the approach adopted by the other departments and with the standard set forth in Section 202.42.[21]

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.[22]

Bifurcation, said the Court, is "not an absolute given," and "it is the responsibility of the trial judge to exercise discretion in determining whether bifurcation is appropriate in light of all [the] relevant facts and circumstances."[23]

Applying the New Rule

Applying this standard, the Second Department held that the trial court had failed to "exercise its available discretion" when it denied Castro's motion for a unified trial due to its rigid insistence that "a bifurcated trial was strictly required by the Second Department's rules."[24]

Here, the issues of liability and Castro's injuries were intertwined, and by prohibiting Castro's treating neurologist from testifying about the results of diagnostic testing of his brain, the trial court prevented the expert from explaining how the nature and extent of Castro's brain injuries supported the opinion that Castro had sustained his injuries from a fall and not by lifting wooden planks.[25] Bifurcation in this instance did not bring about "a fair resolution of the action," as required by Section 202.42, but instead deprived Castro of a fair trial.

Accordingly, the *Castro* Court reversed the judgment of the lower court, set aside the verdict, granted Castro's motion for a unified trial, and remanded the case for a new trial.

Conclusion

Castro eliminates any question as to whether the presumption of bifurcation contained in the former Second Department rule still exists. It does not, and a bifurcated trial in personal injury actions in the Second Department 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 will (1) clarify or simplify the issues, and (2) achieve a fair and more expeditious resolution of the action. Only if both prongs are established will bifurcation be appropriate.

A deeper current also runs through the decision. *Castro* serves as a clarion call to trial courts that knee-jerk rulings 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 reversible 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 abenno@blockotoole.com.

1. 177 A.D.3d 58 (2d Dept. 2019).
2. *Id.* at 61.
3. *Id.*
4. *Id.* at 62.
5. *Id.*
6. CPLR 603.
7. CPLR 4011.
8. 22 NYCRR § 699.14(a) (repealed and superseded by 22 NYCRR § 202.42).
9. *Id.*
10. *Curry v. Moser,* 89 A.D.2d 1, 9 (2d Dept. 1982).
11. *Schwartz v. Binder,* 91 A.D.2d 660, 660 (2d Dept. 1980).
12. 22 NYCRR § 202.42.
13. *Castro,* 177 A.D.3d at 65.
14. *Id.* at 64 (citing *Siegel & Connors, New York Practice* § 130 (6th ed. 2019 Update)).
15. *Id.*
16. *Id.* (*citing Patino v. County of Nassau,* 124 A.D.3d 738, 740 (2d Dept. 2015)).
17. 22 N.Y.2d 743 (1968).
18. *Castro,* 177 A.D.3d at 64.
19. *Id.*
20. *Id.* at 60.
21. *Id.* at 65.
22. *Id.*
23. *Id.* at 66.
24. *Id.* (internal quotation marks omitted).
25. *Id.*

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In Brief

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Lee Rosenberg, managing partner of Saltzman Chetkof & 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 **Allyson D. Burger** now serves as Treasurer of the Nassau County Women's Bar Association. The firm has also been selected again for inclusion in *Best Lawyers in America in Family Law* and is proud to have **I'Asia Scarlett-Jones** as its 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 announced that **Theresa A. Driscoll, Rachel A. Fernbach** and **Dylan Saperman,** formerly counsel of the firm, have been elevated to partner, and that **Julia Gavrilov, Jacquelyn J. Moran,** and **Kelly D. Schneid,** formerly associates at the firm, have been each elevated to counsel. **Marc L. Hamroff,** the firm's managing partner, has been appointed to a three-year term on the Equipment Leasing & Finance Association Legal Committee.

Forchelli Deegan Terrana LLP is pleased to welcome **Anthony P. DeCapua** to its construction and litigation practice groups as a Partner.

Ronald Fatoullah of Ronald Fatoullah & Associates participated in a legal panel presentation for the New York City Chapter of Orion Resource Group, discussing different scenarios and the advantages of both revocable and irrevocable trusts in long-term care planning and asset preservation. In addition, Mr. Fatoullah and additional attorneys from the firm presented a CLE event at the New York City Bar Association on January 27. In partnership with the New York Chapter of the Aging Life Care Association, the firm provided attorneys, case managers, and social workers with 2020 updates on Medicaid and changes with Managed Long-Term Care. The firm also sponsored the fall Alzheimer's Association Long Island Chapter Caregivers Conference.

Edward J. LoBello, Chair of the Bankruptcy & Business Reorganization Law practice at Meyer, Suozzi, English & Klein, P.C., has announced that **Jordan D. Weiss** has joined the firm as an Associate in the Bankruptcy & Business Reorganization Law group located in Garden City, focuses on advising clients in the area of bankruptcy and creditors' rights, with significant experience in representing debtors, creditors and trustees in chapter 7 and chapter 11 bankruptcy cases.

Adam Silvers, managing partner of Ruskin Moscou Faltischek P.C., announced the firm has expanded its commercial legal services with the creation of an insurance & insurance litigation practice group, which will be chaired by Partner **Michael D. Brown,** a natural expansion since bringing on the insurance practice group of Ohrenstein & Brown, LLP. Under Brown's leadership, the practice group consists of **Adam. L. Browser, Matthew Bryant, Nicole E. Della Ragione, Neil P. Diskin, Ross J. Kartez, Brian Passarelle, Michael A.H. Schoenberg** and **Elizabeth Sy.**

Karen Tenenbaum, 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.*

Markotsis & 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.

Lisa R. Valente, a Law Clerk at Makofsky Law Group, P.C. awaiting admission to the bar, was selected as the winner of the 2019 *Elder and Special Needs Law Journal* Writing Competition and her article titled "Constitutional Challenges to Article 17-A Guardianships" was published in the most recent edition of the New York State Bar Association's *Elder and Special Needs Law Journal.* Lisa intends to practice in the areas of elder law, estate and disability planning, guardianships, probate, and estate administration.

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 L'Abbate 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.

Please email your submissions to nassaulawyer@nassaubar.org with subject line: IN BRIEF

The *Nassau Lawyer* welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

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