



The Gavel

VOLUME 44

August 2006

Inside this issue:

New York

- Gibson & Behman Obtains Defense Verdict in New York Labor Law Claim, *page 1*

Rhode Island

- Gibson & Behman Wins Motion for Summary Judgment in Rhode Island, *page 1*

Massachusetts

- Commercial Landlord Has No Duty to Exercise Reasonable Care to Third Persons Unless Expressed by Agreement, *page 2*

Connecticut

- Collateral Source Reductions in Connecticut: A Consideration When Conducting Settlement Negotiations, *page 3*

Florida

- Florida Supreme Court Set to Resolve Conflict Over 'Battle of the Experts', *page 4*

New Hampshire

- New Hampshire Supreme Court Upholds Gibson & Behman Contract Rescission Verdict, *page 6*

Your Business

- Developing Your Professional Team, *page 7*

Gibson & Behman Obtains Defense Verdict in New York Labor Law Claim

Mark S. Grodberg, the Managing Director of Gibson & Behman's New York City office, obtained a defense verdict in a recent trial in the Supreme Court of Kings County, New York, in a case that involved a Labor Law claim based on absolute liability, pursuant to Labor Law section 240(1). Jury selection took several days and the liability portion of the trial continued for five additional days.

Originally, the Plaintiff's claims included negligence, Labor Law section 200 (the codification of common law negligence under the Labor Law) and Labor Law section 241(6) (alleged violations of the New York City Administrative Code). At trial, Mr. Grodberg successfully argued that each of the Plaintiff's claims, other than section 240(1), must be dismissed based on a lack of sufficient evidence to support a prima facie case. The

Court agreed, dismissed those claims, and limited the trial to the issues raised only by Labor Law section 240(1).

The Plaintiff, an employee of L&Z Restoration Corp. (the General Contractor), alleged that while working on scaffolding and repairing the brickwork on a building owned by Southgate Owners Corp. in April 2002, the scaffolding tipped and caused him to

(Continued on page 6)

Gibson & Behman Wins Motion for Summary Judgment in Rhode Island

Facts / Procedural History

This case arises out of a slip and fall accident which occurred on August 8, 1999, at Showcase Cinema in Warwick, Rhode Island. The Plaintiff walked into the Showcase Cinema to view a movie with her sister and their children. As the Plaintiff walked into the

theater, she noticed the floor was very slippery; in fact, she testified she almost slipped and fell on her initial entry into the movie theater. After the movie began, the Plaintiff got up from her seat to use the restroom. As she got up from her seat and began walking toward the aisle, she slipped on the theater floor, fell to the

ground and allegedly suffered personal injury to her head (including blurred vision, dizziness and nausea), right side of her face, neck and knees.

The Plaintiff made a demand of \$100,000.00 to settle this matter and refused to move off her demand.

(Continued on page 5)

M a s s a c h u s e t t s

Commercial Landlord Has No Duty to Exercise Reasonable Care to Third Persons Unless Expressed by Agreement

In the absence of an express agreement to keep rented premises in repair, a commercial landlord, unlike a residential landlord, does not have a duty to exercise reasonable care to assure that others legitimately on the leased premises are not subject to an unreasonable risk of harm.

The Massachusetts Supreme Judicial Court recently affirmed summary judgment in favor of a commercial landlord in the case of *Humphrey v. Byron*, in an action against a commercial landlord in which a commercial tenant's employee was injured in a fall while working in the building. The Plaintiff claimed that the commercial landlord had a duty to maintain the leased premises; that they knew or should have known that the stairs were defective and created an unreasonable danger of falling; and that they were negligent in maintaining the premises.

Robert Humphrey worked for Gateway Graphics and Awards, Inc. The company operated out of a building in Wareham, leased to it by the Defendants Florence Byron and Joanne Byron, sisters who occasionally operate as Byron & Byron. The principals of Gateway commenced its business operations on the purchase of Cape Cod Serigraphics in November, 1998. At

the time of the purchase, Serigraphics was located in the leased premises. Following its acquisition of Serigraphics, Gateway executed a new lease with the landlord. The lease was for a one-year term and consisted of a preprinted form with substantial handwritten modifications and additions. The lease provided that Gateway would have "exclusive control of the leased premises," which was the entire building, including the stairway where Humphrey's accident occurred, and had the obligation to maintain, at its own expense, "both outside and inside" of the building. The lease also provided that "additions, repairs, alterations, or structural changes" that the lessee wished to make could only be done with the lessor's approval, and the lessor could, at reasonable times, enter the premises and make "repairs and alterations compatible with the lessee's use of the premises." The leased premises included the basement and the stairs leading down to it from the first floor. The stairs had no railing, were wobbly, and had low ceiling clearance. It was on these stairs that Humphrey fell in January, 2000.

The SJC's opinion in *Humphrey* left intact the rule that "a lessor of commercial premises is liable in tort for personal injuries only if either (1) he contracted to make repairs and

made them negligently, or (2) the defect that caused the injury was in a 'common area,' or other area appurtenant to the leased area, over which the lessor had some control. The lease in *Humphrey* plainly showed that the parties to the lease agreed that Gateway would have this responsibility.

Despite the fact that the landlord reserved "various rights to make alterations and repairs and to approve [the tenant's] alterations and repairs," and specifically a requirement in a lease "that the landlord give its prior written consent to construction that the tenant proposes to undertake," the SJC stated that such does not render the landlord liable to the injured Plaintiff for an injury occurring on the leased premises. "These provisions do not alter the basic allocation of responsibilities that the parties have worked out in their detailed lease, namely, that the tenant is in control of and responsible for its leased space and that the landlord is not."

Accordingly, the SJC affirmed the motion judge's decision allowing summary judgment in favor of the commercial landlord.

C o n n e c t i c u t

Collateral Source Reductions in Connecticut: A Consideration When Conducting Settlement Negotiations

When considering the settlement value of a case it is important to consider the status of the Plaintiff's medical bills. That is, whether they have been paid and if so, by whom and what set-off will the Defendant ultimately be entitled to from a potential verdict pursuant to the Connecticut Collateral Source Statute. Doing so will help to determine the actual economic effect of any settlement upon the parties and potentially reduce the amount that has to be paid to settle the case.

Connecticut General Statute Section 52-225a, more commonly referred to as the Collateral Source Statute, provides for the reduction of economic damages by an amount equal to the total of amounts determined to have been paid as "collateral sources" for the benefit of the claimant as of the date the Court enters judgment. Collateral sources are defined as follows:

...any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health or sickness insurance, automobile accident insurance that provides health benefits and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others; or (2) any contract or agreement of any group, organization,

partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services. "Collateral sources" do not include amounts received by a claimant as a settlement.

Pursuant to the cited Statute, an award of economic damages is to be reduced by payments for medical treatment which were made pursuant to a health insurance policy which policy was either purchased by the Plaintiff or provided to the Plaintiff by others, provided that the payments were made without any right of subrogation. A payment is made with a right of subrogation when the health insurer has no lien against the proceeds and no right to reimbursement.

Therefore, when assessing the settlement value of a claim the medical damages should be reduced to take the collateral source into account.

The statute also provides that the collateral source reduction is itself to be reduced by "any amount which has been paid, contributed or forfeited, as of the date the court enters judgment; by, or on behalf of the claimant or members of his immediate family to secure his right to any collateral source benefits which he has received as a result of such injury or death." In practical terms,

the collateral source reduction may be lessened, or even eliminated in cases involving smaller amounts of medical expenses, by the amount of the premiums which were paid to secure the health insurance.

Whenever assessing the settlement value of a claim it is important to consider the ultimate economic effect of settlement upon the Plaintiff in order to determine the fair value of the case for settlement purposes. What is the Plaintiff's net gain from the settlement including not just settlement proceeds but also the economic benefit to him or her from the payment of their medical bills by another? Doing so allows the parties to more closely estimate the true economic impact of any monies to be offered in settlement of the Plaintiff's claim.

For the purpose of conducting negotiations when there is medical insurance, the recommended approach is to claim the full amount of the medical bills as a collateral source and let counsel raise any issues as to the amount of premiums paid to purchase the health coverage.

F l o r i d a

Florida Supreme Court Set to Resolve Conflict Over ‘Battle of the Experts’

Florida defense attorneys have long struggled with how best to challenge and prevent expert opinions that are based upon the doctrine of “pure opinion.” Notably, Florida courts have allowed experts to testify regarding conclusions of causation without requiring that the expert first establish that it has gained acceptance in the scientific or medical literature.

For example, the Second District Court of Appeals recently allowed a Plaintiff’s medical expert’s opinion linking fibromyalgia with a prior motor vehicle accident to be admitted over the objection of defense counsel. *State Farm v. Johnson*, 880 So. 2d 721 (Fla. 2nd DCA 2004). Defense counsel argued that the opinion lacked any support in the medical literature. The opinion was allowed based upon the expert’s “pure opinion” arising essen-

tially from his medical experience. In a contrary decision, the Fifth District Court of Appeals thereafter addressed a nearly identical situation and expressly rejected the admissibility of “pure opinion” expert testimony to link fibromyalgia with a Plaintiff’s prior motor vehicle accident. *Marsh v. Valyou*, 917 So.2d 313 (Fla. 5th DCA 2005). The Fifth District directly disagreed with the Second District and rejected expert testimony that lacked any credible scientific support in the medical literature.

The Florida Supreme Court has weighed in on the dispute and has agreed to accept appellate argument later this year in the *Marsh v. Valyou* appeal to determine whether expert testimony in Florida may be based solely upon the “pure opinion” of an expert purportedly arising from his personal experience

without requiring some underlying acceptance in the scientific or medical literature. Gibson & Behman will be closely monitoring the outcome of this very interesting dispute with significant repercussions on how personal injury claims are tried in Florida.

New Additions to the Firm

Gibson & Behman, P.C. is pleased to announce that the following associates have joined the firm:

Christie J. Burnett, Esq., Burlington office

Daniel J. Gibson, Esq., Boston office

They are great additions to the firm and we are extremely pleased to have them on board.

R h o d e I s l a n d

Gibson & Behman Wins Motion for Summary Judgment in Rhode Island, continued

(Continued from page 1)

Gibson & Behman moved for Summary Judgment on the basis that the Plaintiff has set forth no evidence of when the floor became slippery and no evidence that the Showcase knew of this condition or should have known of this slippery condition. Gibson & Behman also brought this Motion based on evidence that the Plaintiff had previously walked over the slippery floor appreciating its danger, then subsequently assumed the risk that she would fall by voluntarily walking over the slippery area for a second time.

Analysis

Under Rhode Island law, a landowner must exercise care for the safety of individuals reasonably expected to be on the premises, provided the landowner knows of, or by the exercise of reasonable care would have discovered the condition. *Cutroneo v. F.W. Woolworth Co.*, 315 A.2d 56 (R.I.1974). In this case, Gibson & Behman argued that there has been no evidence set forth that the Showcase knew that the floor was slippery, no evidence as to the nature of substance on the floor and no evidence as to how

long the floor had been in its alleged slippery condition.

Gibson & Behman further argued that if the Plaintiff voluntarily proceeds in a course of conduct knowing and appreciating the danger, then the Plaintiff has assumed the risk of injury. *Rickey v. Boden*, 421 A.2d 539 (R.I.1980). In this case, since the Plaintiff recognized that the floor was slippery as she entered the theater and then subsequently, voluntarily, walked through the slippery area for a second time (despite there being a separate entrance/exit), she knew of the risk and appreciated the fact that the area was slippery and therefore, assumed the risk that she could fall and sustain injury.

Court's Decision

The Court found that the Plaintiff has set forth no evidence of when the floor became slippery, no evidence of what caused the floor to become slippery and no evidence that the Showcase knew of this condition or that the condition ex-

isted for such a period of time that the Showcase should have known of the slippery condition. The Court further found that there existed no issues of material fact and that the Showcase was entitled to judgment as a matter of law and granted Gibson & Behman's Motion For Summary Judgment. The Court did not comment on the assumption of risk argument.



New Hampshire

New Hampshire Supreme Court Upholds Gibson & Behman Contract Rescission Verdict

In late 2004, Gibson & Behman successfully represented a purchaser in a complex transaction for the purchase and sale of a gasoline retail business with attendant commercial leases in allegations of wrongdoing by the seller/lessor. The trial court granted the petition for rescission of the purchase and sale agreement and the related promissory note and long-term commercial leases, and also ordered a refund of essentially all the purchase price. An immediate appeal was filed with the New Hampshire

Supreme Court and the seller maintained that the purchaser failed to establish his legal entitlement to rescission or a refund of any of the purchase price. Oral arguments were presented in the spring of 2006.

On July 10, 2006, the New Hampshire Supreme Court issued its decision upholding the successful verdict in its entirety. In so doing, the Supreme Court expressly rejected the assertion that the Plaintiff had failed to sufficiently support its

claims for rescission and refund. It also held that the trial court properly exercised its discretion in determining that the essence of the bargain was frustrated by the seller. The New Hampshire office of Gibson & Behman and their client are delighted by the successful outcome and subsequent satisfaction of the underlying final judgment. Should you have any further questions, please feel free to contact our New Hampshire office at (603) 624-5548.

Gibson & Behman Obtains Defense Verdict in New York Labor Law Claim, continued

(Continued from page 1)

dangle, suspended by a rope, for approximately one hour until the Fire Department rescued him from the 15th floor. This matter received significant media attention as the event was photographed and an article was published by the New York Post at the time of the accident.

The statutory and case law that addresses the protection of laborers on scaffolding or other elevation-related safety devices in New York is often extremely difficult to overcome because of the legislature's intent, based on public policy, to extend liability to the employer and/or owner rather than the employee.

In that regard, Labor Law §240 imposes absolute liability on owners, contractors and agents for their failure to provide workers with safety devices that properly protect against elevation-related special hazards. Breach of the statutory duty must be the proximate cause of the injury. This section specifically applies to scaffolding which is to be so constructed, placed and operated as to give proper protection to a person employed.

The defense contended that Southgate, through its contractor, L&Z Restoration Corp., had provided all the proper equipment to the Plaintiff prior to the incident and that the accident was caused by human error and not as a result of any negli-

gence on the part of Southgate. Plaintiff's counsel argued that Plaintiff need not prove negligence on the part of Southgate, as Labor Law section 240(1) is based on absolute liability. Rather, Plaintiff argued that he was required only to prove that Defendant Southgate violated the statute as a result of L&Z's employee's human error.

After only 45 minutes of deliberation, the jury returned a verdict finding that Southgate had satisfied its duty to provide the proper safety equipment and, therefore, had not violated the statute.

Zdzislaw Rebacz v. Southgate Owners Corp. Index no. 28116/03

Y o u r B u s i n e s s

Developing Your Professional Team

At some point in the life of most companies, a decision is made to grow the company by seeking capital from outside sources. Often this decision comes in a company's infancy when management consists of an entrepreneur with a great idea, relatively few staff and perhaps a product. Most entrepreneurs realize the necessity of a business plan and the absolute importance of a quality management team and board of directors. Indeed, a quality management team is generally the single most important factor that outside capital sources consider, especially in the absence of a real revenue stream.

Perhaps not as obvious, another important step to take prior to seeking outside capital is hiring the right professional team. Entrepreneurs, though, usually try to go it alone for one reason or another – often for financial reasons. Developing the right professional team, however, is often critical to the success of a company's fundraising efforts.

Your professional team should be in place prior to seeking outside capital and should consist of three essential members: an experienced lawyer, an accountant and a financial advisor.

Experienced Lawyer

If your company's plan is to seek funds from outside capital sources, an experienced lawyer is essential. Ideally, your lawyer should have contacts in the capital sources you are targeting. Your lawyer should have prior experience in negotiating and structuring deals with these targeted capital sources. Finally, your lawyer should have relevant experience in securities law. A lawyer with securities law expertise and contacts in a venture fund community or with angel investors to introduce your company to can be a valuable resource.

Accountant

Your accountant is another important member of your professional team. As a later-stage business, audited financial statements are very important to outside capital sources, and the retention of a prestigious accounting firm can provide great comfort to your would-be investors. Even a start-up stage company can benefit from the right accounting firm, though. For example, a prestigious accounting firm may lend credibility to your company and increase the potential sources of capital available for referral to your company. It also helps demonstrate your company's commitment to use professionals who can stay with the company through an IPO or a sale. A strong regional firm may also have strong con-

tacts in the community that will help your business develop.

Financial Advisor

If neither the entrepreneur or your company's chief financial officer or treasurer has prior experience in raising capital, hiring a financial advisor is a wise decision. This third member of the professional team can help in three areas. Your financial advisor can assist in preparing your company's business plan. Your financial advisor can also open doors to potential sources of outside capital and can help negotiate the terms and conditions with capital sources. It is important, though, that your financial advisor have hands-on prior experience in negotiating with your targeted outside capital sources. References are important, and typically your lawyer and accountant can assist your company in this process.

GIBSON & BEHMAN, P.C.
Attorneys at Law
One Mountain Road
Burlington, MA 01803
Phone: 1-800-372-1443
Fax: 781-229-2368
Website: www.gibsonbehman.com



A tradition of excellence in legal representation.

Gibson & Behman, P.C.
1-800-372-1443

Visit us at www.gibsonbehman.com

About our law firm

Established in 1987, Gibson & Behman, P.C. is a full-service law firm committed to providing excellent representation to every one of its clients, from the individual to insurance companies to major corporations.

About our newsletter

The Gavel is a publication of Gibson & Behman, P.C. Articles are written by the firm's attorneys and are not intended as a substitute for professional consultation or legal advice on a particular case. If you would like to be on our mailing list to receive future issues of *The Gavel*, please contact us at 1-800-372-1443.