



# The Gavel

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## Gibson & Behman's New York Office Wins Premises Liability Case

Attorney Sharon Portnof Russ of Gibson & Behman's New York Office recently obtained a defense verdict in a premises liability case in which the Plaintiff claimed that he slipped and fell as a result of the negligence of The Chalet Restaurant, in Roslyn, New York.

The Plaintiff alleged injuries which included a fracture to the left distal tibia with open reduction and internal fixation and spiral fractures to the distal tibia, mid-shaft of the fibula and the ankle. Plaintiff claimed over \$45,000.00 in medical expenses.

At the time of the incident, the Plaintiff was using a hand truck to deliver cases of beer to the defendant when he allegedly slipped on a wet floor located inside the establishment, within the restaurant's entry foyer and between the front

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## Dance Club Not Liable to Exotic Dancer in Negligent Security Case

Gibson & Behman, P.C. recently obtained a defense verdict after a jury trial in Middlesex Superior Court in a claim for personal injuries resulting from an assault that occurred in a Massachusetts tavern.

On a late Friday night in September 2001, the Plaintiff and her two companions arrived at Shooter's Sports Bar in Dracut, Massachusetts. On weekend nights Shooter's employed a disc jockey that provided a dance club-type atmos-

phere. The Plaintiff claimed that while on the dance floor she observed another female patron enter the establishment, who immediately began staring at the Plaintiff in an intimidating manner. The Plaintiff approached the woman and briefly exchanged words, ending with the patron spitting her gum at the Plaintiff. Approximately thirty minutes later, while dancing on the dance floor with her boyfriend, the Plaintiff incidentally bumped into another couple, one of which was the

woman the Plaintiff encountered earlier in the evening. Within seconds, the woman made a swiping motion with her hand across the Plaintiff's face and immediately exited the dance floor area. The Plaintiff and her companion quickly realized that she had been seriously cut on her cheek with a razor blade-type weapon. Security personnel quickly responded and escorted the Plaintiff outside. A detail police officer employed by Shooter's

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# R h o d e I s l a n d

## Rhode Island Jury Awards \$15 Million in Dram Shop Case

*Ernst v. King Wa Restaurant* is one of the largest verdicts in Washington County, Rhode Island, and is also one of a few verdicts entered against a bar or tavern in Rhode Island. This was a tavern keeper negligence action in which the Plaintiff contended, and the court affirmed, that the defendant tavern and its employees were negligent in continuing to serve an already visibly intoxicated patron in violation of Dram Shop laws. Plaintiff further contended that the tavern and its employees were negligent in allowing the patron to leave the tavern visibly intoxicated in violation of TIPS policies and procedures.

### FACTS

Thirty-one year old defendant driver, Beauregard, was on his way home from work at about noon when he stopped at Defendant's tavern/restaurant, Chen's. Testimony showed that the driver consumed two drinks, first a beer and then a mixed beverage containing rum, after which he left the tavern. He proceeded to a liquor store where he purchased beer and a bottle of Southern Comfort, which he consumed at his home. At approximately 6:00 pm. defendant driver returned to the defendant bar, Chen's, where he ordered and was served a Mai Tai and another beer, despite his visibly intoxicated condition. Moreover, these drinks were served to defendant driver by a server who knew that defendant driver was operating a motor vehi-

cle. After consuming these two drinks, driver left the tavern.

Within minutes of leaving Chen's, defendant driver struck Plaintiff, a sixty-two year old male veteran, as he was crossing the street while walking from his home to a concert in town. The reporting officer at the scene stated that defendant driver had watery, bloodshot eyes, with a distinct odor of alcohol on his breath, and that during a field sobriety test, the defendant driver stumbled over letters of the alphabet and swayed visibly. As a result of the accident, the Plaintiff is completely paralyzed in both legs and partially paralyzed in both arms. Plaintiff is wheelchair bound and now requires 24-hour around-the-clock home care.

### OUTCOME

The Plaintiff argued that the bartender serving the defendant driver had been given TIPS training and was required to intervene, either by calling a taxi or friend of the driver, by offering food, coffee or even calling 911 if necessary to prevent the Defendant from leaving the tavern while intoxicated and operating a vehicle. The Defendants presented testimony and video surveillance trying to show defendant was not visibly intoxicated; however, Plaintiff was able to prove that the defendant driver, despite appearances, had a lot to drink in a short period of time.

The jury was given the opportunity to choose between common law negligence and Dram Shop liability as well as between negligence and recklessness under the Dram Shop statute. The jury also determined the apportionment of damages between the Defendants as each filed cross claims against the other. Ultimately, the jury found in favor of the Plaintiff and against both Defendants, determining that the driver was 75% liable to the plaintiff and the tavern was 25% liable. With prejudgment interest, the jury's total award amounted to \$15,247,000.

### ANALYSIS

*Ernst v. King Wa Restaurant* is a pivotal case in the State of Rhode Island, as the jury not only found that a properly trained bartender was negligent in continuing to serve an intoxicated patron, but was also negligent for not preventing that patron from driving a motor vehicle. The bartender was also found negligent in failing to call a cab for the patron, failing to serve him coffee or food, and failing to call the police, in spite of his relevant TIPS (Training for Intervention Procedures) training.

Rhode Island's former law concerning the liability of licensed furnishers of alcoholic beverages for those injuries caused by intoxicated persons, G.L. 1956 (1976 Reenactment) § 3-11-1, was repealed on

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# C o n n e c t i c u t

## Connecticut Plaintiffs Face Difficult Task of Proving that Bad Faith Failure to Settle Constitutes a General Business Practice

Unfair claim settlement practices and bad faith insurance litigation in Connecticut are governed by two statutes: CUTPA, C.G.S. §§ 42-110a *et seq.*, and CUIPA, C.G.S. §§ 38-815 *et seq.*

CUTPA provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." C.G.S. § 42-110b(a).

CUIPA, on the other hand, provides that "[n]o person shall engage in this state in any trade or practice which is defined in section 38a-816 as, or determined pursuant to sections 38a-817 and 38a-818 to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance . . . ." defined to include any legal entity engaged in the business of insurance, including agents, brokers and adjusters. *Id.* CUIPA defines unfair claim settlement practices as "committing or performing with such frequency as to indicate a general business practice." *Id.*

Unlike CUTPA, CUIPA does not expressly create a private right of action. Rather it is a regulatory statute granting certain powers to the insurance commissioner. While the Connecticut Supreme Court has held that a violation of CUIPA may be actionable as an unfair trade practice, it has expressly declined to rule on whether an individual may

maintain a private cause of action for damages under CUIPA alone. See *Lees v. Middlesex Insurance Co.*, 229 Conn. 842, 847 n.4 (1994); *Mead v. Burns*, 199 Conn. 651, 653, 657 n.5 (1986). Nevertheless, it is well settled that a plaintiff may bring a cause of action under CUTPA for a violation of CUIPA. *Id.* However, a plaintiff may not bring a cause of action under CUTPA that does not allege a violation of CUIPA where the alleged misconduct is related to the insurance industry

In *Mead v. Burns*, 199 Conn. 651 (1986), the Connecticut Supreme Court concluded that a CUTPA claim based on an alleged unfair claim settlement practice prohibited by the statute required proof, as under CUIPA, that the unfair settlement practice had been committed or performed by the defendant with such frequency as to indicate a general business practice. In so holding, the *Mead* Court observed that a CUTPA claim based on the public policy embodied in CUIPA must be consistent with the regulatory principles established therein.

Therefore, an alleged violation of CUIPA requires the plaintiff prove that the defendants committed the alleged acts with such frequency as to indicate a "general business practice." *Mead v. Burns*, 199 Conn. 651, 660 (1986). However, the plaintiff is required to prove that the unfair claim settlement practices by the insurer occurred in the handling

of other claims besides its own. *Lees v. Middlesex Insurance Co.*, 229 Conn. 842, 849 n.9 (1994). Multiple acts of misconduct in the handling of a single insurance claim are insufficient to constitute an unfair settlement practice under CUIPA. See e.g., *Lees v. Middlesex Insurance Co.*, 229 Conn. 842, 847-49 (1994). The Connecticut Supreme Court in *Lees* concluded that the Connecticut Legislature clearly intended to exempt from coverage under CUIPA isolated instances of insurer misconduct. *Id.* at 849 n.9; *Quimby v. Kimberly Clark Corp.*, 28 Conn. App. 660, 671-72 (1992).

In light of the above holdings, plaintiffs may bring a cause of action under CUTPA for a violation of CUIPA. However, they are required to allege and prove the requirements established pursuant to CUIPA, that an insurer's alleged unfair claims settlement practices constituted a "general business practice." As CUTPA claims grounded on unfair settlement practices cannot survive the failure of a CUIPA claim, as defense counsel, we seek to test the adequacy of the plaintiff's CUIPA claim at all stages of litigation, including motions to strike and motions for summary judgment.

# New Hampshire & Florida

## New Hampshire Supreme Court Adopts “Pure Apportionment” in Multi-Party Tort Cases

The New Hampshire Supreme Court recently decided in *DeBenedetto v. CLD Consulting Engineering, Inc.* (2006) to liberally construe the NH statute pertaining to the apportionment of damages, RSA 507:7-e, to provide for liability for damages being pro rated based solely upon the fault of a party under all the circumstances. The statute requires that fault be apportioned between “parties” in a lawsuit and plaintiffs have insisted that the term be strictly construed to mean actual parties, and that a jury should not be allowed to consider the fault of parties that were absent, immune, un-named

or who had settled before judgment. The NH Supreme Court disagreed.

The *DeBenedetto* court ruled that for apportionment purposes under RSA 507:7-e, the word “party” refers not only to actual parties to an action, including settling parties, but to *all* parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court. This same broad rule had been adopted in Florida, where absent parties, phantom vehicles and immune parties (such as employers and governmental entities) are considered in apportioning

fault in a verdict.

As the result of this landmark ruling in New Hampshire, plaintiffs will need to sue all potentially responsible parties and not simply target a few “deep pocket” parties when seeking to recover where there may be several potential defendants. Also, plaintiffs will now bear the loss when a potentially responsible party is either immune or unavailable at trial.

Should you have any further questions, please feel free to contact Kevin O’Neill, Esquire of our New Hampshire office at (603) 624-5548.

## Gibson & Behman Florida Team Overcomes the “Common [Building] Code” in Negligence Trial

In a recent case that went to verdict, a morbidly obese woman alleged that she fell down a two-step area in an insured’s restaurant during a weekly backgammon tournament. Plaintiff alleged that the step-down area was unsafe, defective and violated several local building and fire code provisions. She and her husband had also testified extensively regarding her problematic right femur multiple fracture injury, difficult course of recovery and ultimate wheelchair bound limited lifestyles. While there was no denying a serious leg injury from her fall, Gibson & Behman defended

by adamantly maintaining that the stair area was safe, that Plaintiff’s comparative fault in encountering an open and obvious condition caused her to fall, that her clearly deficient compliance with rehabilitation protocols by not losing significant weight caused her complications and that the insured restaurant was simply not responsible for her wheelchair bound outcome. Plaintiff had demanded damages of \$969,000, including \$56,000 for past medical bills, \$60,000 for future medical bills, \$100,000 for loss of consortium and approximately \$753,000 for pain and suffering.

After considering all the evidence, the jury determined that plaintiff was only entitled to damages totaling \$156,000 and then entered a finding that Plaintiff was 98% comparatively negligent for falling down the steps. As such, despite a formal Demand for Judgment of \$750,000 and their final settlement demand at mediation before trial of \$350,000, Plaintiffs recovered a judgment of \$3,120 and court costs.

Should you have any further questions, please feel free to contact our Florida office at (305) 347-5147.

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

## Dance Club Not Liable to Exotic Dancer in Negligent Security Case, continued

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quickly called dispatch for rescue personnel. The Plaintiff was taken by ambulance to a nearby hospital where she was attended to by an on-call plastic surgeon.

At the time of the incident the Plaintiff was employed as an exotic dancer, earning approximately \$2,000 per week, paid entirely in cash tips. The Plaintiff claimed that as a result of her facial injury, subsequent scarring, and lack of confidence, she was unable to work for approximately seven months and upon her return, could only work a part-time schedule of three days a week. The Plaintiff calculated her lost income, including periods of total and partial incapacity, at approximately \$350,000. The Plaintiff also claimed that at the time of the incident she had a job offer to go to Florida for a photo shoot with Penthouse Magazine, but was never able to attend due to the scarring. The Plaintiff claimed that an appearance in Penthouse would have increased her potential earnings by as much as five times, for the rest of her professional life, for an alleged loss of earning capacity exceeding \$6,000,000.

The Plaintiff claimed that Shooter's was negligent in failing to provide reasonable security measures to protect her from the assault by one of its patrons. The Plaintiff retained a security consultant who testified at trial that Shooter's failed to properly instruct and train its security per-

sonnel. He testified that Shooter's should have hired a private consulting firm to properly train its manager and staff in proper tavern/night club security. He testified that Shooter's failed to provide written instructions to its employees and that it lacked a security action plan. He also testified that Shooter's security personnel should have worn brightly colored attire to be plainly visible to patrons, providing a deterrence to potential altercations inside the establishment. During cross-examination, defense counsel highlighted the fact that the security consultant had no experience in managing a restaurant or tavern, and failed to provide the names of any area establishments that hired private security consulting firms or provided more security measures than Shooter's did on the night of the incident.

Trial counsel Scott R. Behman, assisted by Attorney Daniel J. Shanahan, both of Gibson & Behman, P.C., represented Dracut Lounge, Inc., d/b/a Shooter's Sports Bar. The defense asserted that Shooter's took reasonable steps and precautions to protect its patrons from the criminal acts of other patrons, and that its security measures on the night of the incident were more than adequate. The defense pointed to the fact that on the night of the incident, Shooter's employed six security personnel equipped with two-way radios, two of which were always positioned around the dance floor area, and a detail police officer. Shooter's management instructed

its bartenders and the disc jockey to turn on all house lights and request security assistance if any behavior or conduct was observed that may lead to an altercation, acting as a second tier of security within the club. Shooter's also had a security camera and infrared/bar code ID scanner at the main entrance. Shooter's also positioned two security personnel at the main door, checking identification and employing a "wand" to screen possible weapons as patrons entered the establishment. Shooter's provided evidence that Plaintiff failed to notify any of Shooter's security personnel of the earlier encounter with her eventual assailant, and that the assault on the dance floor occurred without any warning, in a matter of seconds. The defense provided evidence that the Plaintiff's scar was well healed and did not require any further treatment. It also provided evidence that the Plaintiff never filed income taxes and failed to provide any evidence to corroborate her lost income claim.

The case was tried before a jury over three days in Middlesex Superior Court, Lowell, Massachusetts, beginning on November 29, 2006. At the final pretrial conference, the Plaintiff lowered her demand to \$500,000. The demand was \$100,000 at the commencement of trial. After approximately one hour of deliberation, the jury returned with a defense verdict, finding that Shooter's was not negligent.

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

## Gibson & Behman Obtains Order Prohibiting Trash Collection Fee in Springfield, MA

Attorneys Brandon H. Moss and Thomas J. Holloway of Gibson & Behman's Burlington Office won a huge victory as they obtained a preliminary injunction from the Hampden Superior Court preventing the City of Springfield, MA and the Springfield Finance Control Board from further collecting or attempting to collect the so-called \$90 per container trash fee against property owners.

Ten taxpayers, including State Representative Cheryl Coakley-Rivera, filed suit on October 30th claiming that this measure, designed to raise \$4.5 million, was an improper tax and not a fee. The first installment of the bills for this so-called \$90 per container trash fee was mailed on November 1. At issue is a June 27, 2006, Executive Order issued by the Board establishing a \$90 annual fee for each city-provided automated trash container, with limited exemptions and discounts for this so-called trash fee. The Board was originally established to assist the City with balancing its budget. The distinction between a tax and a fee is significant because cities and towns in the Commonwealth of Massachusetts do not have the power to levy, assess or collect taxes such as the trash fee.

In part, the attorneys argued that the so-called trash fee did not meet the standard set forth by the Supreme Judicial Court that:

[F]ees share common traits that distinguish them from taxes: [1] they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; [2] they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; and [3] the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. *Emerson College v. City of Boston*, 391 Mass. 415, 424-425 (1984).

Although the Court found that the so-called fee met the first *Emerson* factor, it felt that the taxpayers were given very little choice and that the purpose of raising related revenue was not to compensate the City for trash pick-up.

In granting the preliminary injunction, the Court found that the plaintiffs demonstrated a reasonable likelihood of success on the merits and that failure to prevent the City from pursuing collection of the illegal tax would adversely

affect the public and would substantially erode the public interest.

Associate Justice Constance M. Sweeney wrote, "I find that the plaintiffs proved that the city's trash collection fee is substantially a tax rather than a fee." The opinion further states, "Is the \$90 trash fee an illegal tax? For Fiscal Year 2007 there is no question that it is a tax." The injunction: (1) prohibits the city from collecting or attempting to collect the trash fee; (2) requires the Board notify all individuals and entities charged the trash fee that the Executive Order is suspended and not to make payment unless a future court order is issued to the contrary; (3) preliminarily enjoins the City from placing a lien on any property for failure to pay the trash fee; (4) requires the City to segregate and deposit any payments made thus far from the fee into an interest-bearing account; and (5) requires the City Auditor to account for any payments received thus far from the trash fee and to provide a written accounting of the same to the court by December 5, 2006.

To date, the City of Springfield has not taken any action to appeal the Court's preliminary injunction.

## *Season's Greetings* from Gibson & Behman, P.C.



### **Gibson & Behman's New York Office Wins Premises Liability Case, continued**

*(Continued from page 1)*

door and second door entrance to the premises. Plaintiff claimed that the Defendant's employee removed a weather floor mat from the area and mopped the area immediately prior to Plaintiff's fall, and failed to place any warning signs in the area.

The Defendant's employee testified that it was his general practice to

mop and sweep the restaurant between 1:00 pm and 2:00 pm. He further testified that on the day in question, he finished cleaning the restaurant at about 2:00 pm. Significantly, Ms. Russ convinced the jury, through the testimony of the employee and the restaurant owner, that the weather mat was in place and that the incident did not occur as the Plaintiff alleged.

The case was tried in the Supreme Court of New York, County of Nassau. The jury deliberated for less than thirty minutes before returning a verdict in favor of Salata Rest. Corp. d/b/a The Chalet Restaurant and Tap Room, with a finding that the Plaintiff failed to prove that the Defendant was negligent.

### **Rhode Island Jury Awards \$15 Million in Dram Shop Case, continued**

*(Continued from page 2)*

June 25, 1986 and replaced by the Rhode Island Liquor Liability Act G.L. 1956 (1987 Reenactment) chapter 14 of title 3. Unlike R.I. Gen. Laws § 3-11-1, the Liquor Liability Act explicitly imposes liability on "[a] defendant . . . who negligently serves liquor to a visibly intoxicated individual" if the defendant knows or if a reasonably "prudent person in similar circumstances" would know that the person being served is visibly intoxicated. R.I. Gen. Laws § 3-14-6 (2), (3); see also *Embrey v. Ortiz*, 538 A.2d 1002, 1005 (R.I. 1988). This Act lays out general standards for

responsible serving practices, including "(1) defendant's and defendant's employees' attendance at a server education training course; and (2) defendant's implementation, at the time of service, of responsible management policies, procedures, and actions." R.I. Gen. Laws § 3-14-12.

The importance of *Ernst v. King Wa Restaurant* is that the jury enforced § 3-14-12 (2) because they found that defendant tavern, through its employee, failed to *implement* the proper TIPS policies and procedures, despite the appropriate training. If the bartender were to have

followed TIPS procedures, he would have stopped serving defendant driver and not allowed driver to operate a motor vehicle through whatever means necessary. The primary purpose of Rhode Island's Liquor Liability Act is to "prevent intoxication-related injuries, deaths and other damages" by "encouraging all servers of alcohol to exercise responsible serving practices." R.I. Gen. Laws 3-14-2 (1987). Ultimately, the jury in *Ernst* is doing just that, encouraging "servers of alcohol to exercise responsible serving practices." *Id.*

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