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NEWSLETTER

New Hampshire, Massachusetts, Maine & Vermont

March 2019 Edition

Dear Michael,

This newsletter discusses updates and changes in the law. Should you have questions, please contact Larry Getman at lgetman@gssp-lawyers.com or (603) 634-4300 x 703. Larry Getman's V-Card

MASSACHUSETTS SUPREME COURT

UNINSURED MOTORIST COVERAGE HOUSEHOLD MEMBER

Oliveira v. The Commerce Insurance Company

(October 23, 2018)

The plaintiff sustained severe injuries in a motor vehicle accident while a passenger in a vehicle owned and operated by a third party. The plaintiff settled with the driver for her policy limits of $100,000.

At the time of the accident the plaintiff had been living with his long-term partner, along with her mother and step-father, for approximately two years. The plaintiff was not married to his partner, but they had a minor child together. The plaintiff sought underinsured motorist (UIM) coverage under a policy issued by Commerce to his partner's mother and step-father. That policy provided UIM coverage for any "household member" defined as anyone living in the named insured's household who is related by blood, marriage or adoption, including wards, stepchildren or foster children. The plaintiff was listed as an operator on the policy.

Commerce denied coverage because the plaintiff was not a "household member." The plaintiff argued that he was related by blood to the policyholder through his biological son and, therefore,

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qualified as a "household member". The trial court granted summary judgment in favor of Commerce and the plaintiff appealed.

The Supreme Judicial Court affirmed the decision. The Court noted that in its usual and ordinary sense the phrase "related by blood" denotes a genetic relationship between the two persons asserted to be related. Here there was no genetic relationship between the plaintiff and the policyholders. Under the plaintiff's theory, any two persons with a common blood relative would themselves be related by blood. The specific inclusion of wards, stepchildren and foster children shows that "related by blood" was not intended to be interpreted so expansively. Applying the usual and ordinary meaning of the words, the Court held that because the plaintiff was not genetically related to either policyholder he was not "related by blood" and, therefore, not entitled to UIM coverage under the policy.

HOMEOWNERS NOT LIABLE FOR DEATH OF INDEPENDENT CONTRACTOR

Almeida v. Pinto

(December 6, 2018)

The plaintiff's decedent, Ildemaro Viera, fell and sustained fatal injuries while repairing vinyl siding on a three-story house owned by Giovanni and Chelsea Pinto. The estate filed suit against the homeowners based on: (1) failure to provide safety equipment; (2) hiring at a price so low they should have realized the work would not be done safely; (3) failure to obtain a building permit; and (4) violation of OSHA regulations.

Some of the vinyl siding on the Pinto's house had been blown off during Hurricane Sandy and Giovanni's father, Victor, recommended that the siding be repaired before winter. Victor asked his landscaper if he knew of anyone who "did vinyl" and the landscaper suggested his brother, Ildemaro. Although Ildemaro had

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occasionally done siding projects, he had never done one higher than the first story of a house on his own and did not have a contractor's or home improvement license. The Pinto's agreed to hire Ildemaro to do the work for his asking price of $200. They did not obtain a building permit for the work. Ildemaro borrowed his brother's ladder for the job and, as he was repairing the vinyl siding without using any safety equipment, the ladder shifted causing him to fall and sustain severe injuries resulting in his death.

The defendants moved for summary judgment based on absence of a legal duty, no breach of any duty and lack of causation. The trial court entered summary judgment in favor of the defendants and the estate appealed.

The Supreme Judicial Court affirmed the decision on appeal. The Court made the following rulings relative to legal duty: (1) the defendants were entitled to assume that Ildemaro would provide the equipment needed to perform the work and, therefore, were under no obligation to provide him with safety equipment; (2) the defendants had no reason to believe that the work would not be performed safely based solely on the $200 price sought by Ildemaro; (3) while building permits are not typically required for "ordinary repairs", there was some evidence that a city ordinance may require permits for work involving over 100 square feet of siding, therefore there was at least an issue of material fact as to whether a permit should have been obtained by the homeowners; and (4) OSHA regulations do not apply to homeowners who hire independent contractors such as the decedent.

The Court went on to rule that assuming a permit should have been obtained, there was no causal relationship between the failure to obtain a permit and the accident because: (1) even if a registered design professional had reviewed a site plan for the work, there was no evidence that such a review would include the manner in which the work was to be performed; (2) there was no evidence that a license was required for the type of work being performed and, therefore, no evidence that a permit application would have been rejected due to Ildemaro's lack of experience; (3) there was no evidence that the permit would have been denied based on the low contract price; and (4) whether a building inspector would have stopped the work or even visited the site before the accident was speculative. Since there was insufficient evidence to support a jury inference that failure to apply for a permit was a cause in fact of Ildemaro's death the defendants were entitled to summary judgment

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in their favor.

TRANSIENT JURISDICTION

Roch v. Mollica

(January 4, 2019)

The defendants were New Hampshire residents who rented a house with a swimming pool in Florida. Their daughter was the head coach of a college softball team in Massachusetts. The team visited the defendants' rental home while on a spring training trip to Florida. During an initiation ritual, upperclassmen members of the team pushed freshman team members into the pool without warning. The plaintiff, a New Jersey resident, injured her shoulder while being pushed into the pool.

While the defendants were attending a softball game in Massachusetts they were served with in-hand process by a deputy sheriff. The defendants moved to dismiss the Massachusetts lawsuit based on lack of personal jurisdiction. The trial court granted the motion, ruling that personal jurisdiction was improper because the case had no connection to Massachusetts and personal service alone did not confer jurisdiction.

The Supreme Judicial Court reversed the decision on appeal. The Court held that as a matter of both State common law and due process, Massachusetts courts have personal jurisdiction over nonresident individuals who are personally served with process while intentionally, knowingly and voluntarily present in Massachusetts. Under the common law rule of transient jurisdiction, the exercise of personal jurisdiction over a nonresident defendant personally served with process within the state does not violate constitutional due process requirements because a visiting nonresident reaps benefits provided by the State. The Court pointed out, however, that the trial court has discretion to dismiss the case based on the doctrine of forum non conveniens. The Court also noted that its decision extends only to individuals and that it was not deciding whether personal jurisdiction would be conferred

over corporations under similar circumstances.

MASSACHUSETTS APPEALS COURT

WORKERS' COMPENSATION
RETALIATORY TERMINATION

Bermudez v. Dielectrics, Inc.

(November 16, 2018)

Career Group Staffing Services, a temporary staffing agency, hired Bermudez and placed her at one of Dielectrics, Inc.'s manufacturing facilities. Bermudez was injured when a Dielectric employee negligently operated a forklift, causing large metal sheets to fall on her foot.

Bermudez filed a workers' compensation claim naming Career Group as her employer and collected benefits from Career Group's insurer for medical bills and lost wages. She returned to work at Dielectrics several months after the accident.

Approximately two years later, Bermudez filed a third-party action against Dielectrics and the forklift operator. In response, Dielectrics fired Bermudez informing her that by filing suit against it after being compensation for her injury by workers' compensation she was not acting in the best interest of the company.

Bermudez then filed suit against Dielectrics for retaliatory termination in violation of G.L. c. 152, § 75B(2), which provides that no employer "shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by" the workers' compensation act. The trial court granted Dielectrics' motion to dismiss, ruling that since Dielectrics was not an "employer" under the workers' compensation statute it could not be sued for retaliatory termination. Dielectrics eventually conceded that it was an "employer" as defined in G.L. c. 152, § 1(5) and, therefore, the only issue on appeal was whether the third-party action against Dielectrics was a right "afforded by" the workers' compensation

statute.

The Court noted that prior to 1971 an employee suffering a work-related injury had to choose between filing for benefits under the act or filing a third party action. However, in 1971 G.L. c. 152, § 15 eliminated the election requirement and expressly authorized the filing of third party claims by an employee who receives workers' compensation benefits. Although the general right to sue a third party in tort exists at common law and was not created by the statute, the statute does authorize the filing of such claims in addition to receiving workers' compensation benefits by eliminating the election of remedies requirement. In that sense, the right to pursue a third-party claim is a right "afforded by" the statute. The Court noted that it would be unfair to allow the filing of third-party claims by workers' compensation recipients but not provide a remedy against employers who terminate employees when they exercise that right.

The Court concluded that Bermudez exercised a right afforded by the workers' compensation statute when she filed her third-party action against Dielectrics. Therefore, Bermudez properly alleged a retaliatory termination claim under G.L. c. 152, § 75B(2).