



# THE GAVEL STRIKES!



## DIGITAL ISSUE III

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PAT MADDEN  
SCOTT HAWORTH

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## MANAGING ATTORNEY MEMBER

**DAN SANTANIELLO** is the Founding and Managing Partner of Luks Santaniello, the vetted law firm Member of The Gavel for the entire state of Florida. Dan has more than 27 years of trial experience and over 100 published Florida jury verdicts. He is an expert in Civil Trial, and he is Board Certified by The Florida Bar. Martindale-Hubbel and his peers have rated him AV Preeminent. Dan formed the firm in 1995. Since that time, it has grown to more than 95+ corporate and insurance defense attorneys with more than 200 employees in 10 Florida offices: Miami, Fort Lauderdale, Boca Raton, Fort Meyers, Orlando, Tampa, Jacksonville, Stuart, Tallahassee, and Pensacola.



## ABOUT THE GAVEL STRIKES!

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## CONTACT US

We welcome your comments and suggestions. Please send letters, news, and story ideas to [info@thegavel.net](mailto:info@thegavel.net).



# VERDICT & NEWS BOARD

## OKLAHOMA



**Derrick DeWitt** graduated from Oklahoma State University. Since law school, he has devoted his practice to litigation. He has been selected for inclusion in Super Lawyers, and he and his partners have also been recognized by U.S. News and World Report on its list of "Best Law Firms". Derrick maintains an "AV" rating in Martindale Hubbell, which is the highest rating that can be given by his peers in the legal community. His areas of practice include personal injury, trucking accidents, oil and gas accidents and litigation, insurance bad faith, products liability, complex commercial litigation, and general civil litigation.

**Patrick Madden** graduated from the University of Texas School of Law in 1993, and then joined Macdonald Devin in 1996. His clients include individuals, small businesses, and Fortune 500 companies. Patrick has been named a Texas SuperLawyer by Texas Monthly every year since 2005. He is AV-Preeminent rated by Martindale-Hubbell and is a Fellow of the Litigation Counsel of America Trial Lawyer Honorary Society. Patrick is admitted to practice in all state and federal courts in Texas. He has tried cases to judgment in over eight county and several Federal Courts.

## TEXAS



## NEW YORK



**Scott Haworth**, the firm's Managing Partner, was previously an equity partner of a national litigation firm and prior to that, was an equity partner at a prestigious New York litigation firm. He has spent his career defending and trying matters involving product liability, construction and intentional torts, as well as complex catastrophic injury matters involving fire, transportation and other accident modes. Mr. Haworth has also resolved numerous matters involving environmental and toxic tort claims such as those involving asbestos, mold, lead, and various environmental hazards. His practice includes class actions, multi-district litigations, commercial and insurance-related matters.



# WELCOME TO THE GAVEL



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## MINNESOTA

- Stich Angell is a full-service civil litigation firm with extensive experience in a broad range of practice areas. Since 1971, lawyers at Stich, Angell have represented thousands of businesses, individuals, and organizations in all areas of civil litigation.
- Over its four decades, Stich Angell has firmly established a reputation as an exceptional civil litigation and insurance defense firm.

## OHIO



- Pelini, Campbell & Williams, LLC is comprised of eleven attorneys, seven paralegals and a full support staff. We are a litigation-centered insurance defense practice, devoted to providing aggressive, cost-effective, and skilled legal representation to our clients and their insured's throughout Northeastern Ohio.
- We strive to maintain the highest levels of integrity, preparedness, and zealous legal representation in all of our dealings with our clients, our colleagues, and the judiciary.

## ARKANSAS & KANSAS



- Trial Attorneys representing Insurance Carriers, Insureds, Self-Insured Entities, Third Party Administrators, Medical Institutions, Professionals, National and Local Long Term Care Providers and Individuals.
- We offer strong, aggressive and effective representation of our clients' interests which is enhanced by our tradition of working with clients, their legal departments, insurers and claims personnel to provide a cost-efficient representation with exceptional results

## NORTH CAROLINA

- Although we were founded as a practice specializing in civil litigation and appellate practice, our expertise has expanded to cover a broad range of litigation and administrative matters in healthcare, construction, products liability, commercial disputes, alternative dispute resolution and virtually every possible kind of tort claim.
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## NEW MEXICO

- YLAW, P.C. is an AV-rated civil litigation firm that provides legal representation to clients throughout New Mexico. At YLAW, P.C., we are dedicated to giving our clients personal attention and quality legal representation.
- The firm represents both large and small clients, individuals, businesses and governmental entities. Our combined litigation and commercial experience gives us the ability to handle nearly any case, no matter how large or complex.

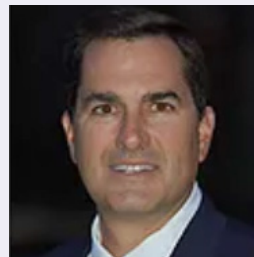
# ALABAMA



## ALABAMA COURT OF CIVIL APPEALS DENIES MANDAMUS RELIEF FOR OVER RESTRICTIVE HIPAA

**O**n February 23, 2018, the Alabama Court of Civil Appeals denied a Petition for Writ of Mandamus requested by Alabama Gas Corporation (Alagasco) where the Court entered an overly restrictive order depriving Alagasco of many rights it was provided by the Alabama Workers' Compensation Act. The HIPAA Order provided that medical records could only be obtained through a subpoena (this precluded the workers' compensation carrier from determining if medical care was reasonable, necessary, and related to the accident to process bills), that the medical provider was prohibited from disclosing any protected health information other than that which directly pertained to the alleged work-related injury, and that Alagasco's attorneys were prohibited from ex parte communication with the medical provider. Procedurally, Alagasco filed an objection to the HIPAA order and a hearing was set December 20, 2017. However, Alagasco filed its Petition for Writ of Mandamus on December 18, 2017. At the December 20, 2017 hearing, the trial court "I think, [the HIPAA order], to some degree, is due to be amended.... [T]here may be some revision that I acknowledge that needs [to] be made." The Court of Civil Appeals denied the petition stating "Alagasco has failed to demonstrate that the HIPAA order is reviewable under the categories our supreme court has recognized as warranting mandamus review of discovery orders." In his concurring opinion, Judge Terry Moore

expressed a very rational basis for the denial of the petition when he stated "I conclude that the trial court has not refused to act on the motion of the employer. Unless and until the trial court refuses to act, the petition for a writ of mandamus is, in my opinion, premature." We may not have seen the last of this issue.



**WILLIAM  
AUSTILL**



**RICHARD  
LEWIS**



**WILLIAM  
PIPKIN**



**JOSEPH  
STEWART**

**DEDICATED CONTACTS FOR ALABAMA**

# ARIZONA



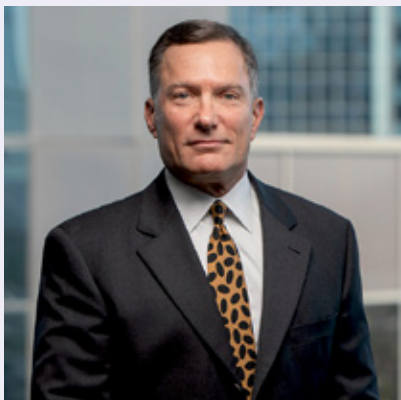
## JENNINGS STROUSS RANKED AMONG “TOP COMPANIES TO WORK FOR IN ARIZONA”

Jennings, Strouss & Salmon, P.L.C., a leading Phoenix-based law firm, is pleased to announce that the firm has earned the distinction of being named one of the 2019 azcentral.com “Top Companies to Work for in Arizona” for the third year in a row. Jennings Strouss is the only law firm ranked in the medium-sized company category of 100-999 employees.

Republic Media, The Arizona Republic, and azcentral.com partnered with Best Companies Group (BCG) and BestCompaniesAZ to produce the seventh annual azcentral.com “Top Companies to Work for in Arizona” program to measure engagement. The methodology for selecting the top companies included a confidential Employee Engagement and Satisfaction Survey that evalu-

ated company culture and individual employee's workplace experiences. An Employer Questionnaire was also used to collect information about company benefits, policies, practices, and other general information. The combined data was analyzed by Best Companies Group to determine the final list of the top 100 companies based on each company's strengths and challenges.

“We value the contributions of all Jennings Strouss personnel and work hard to provide a comfortable and enjoyable work environment,” stated John C. Norling, Managing Attorney. “Receiving feedback with high levels of employee engagement and satisfaction helps foster the firm's culture and enhance programs that promote a positive workplace.”



**JOHN BALITIS**

DEDICATED CONTACT FOR ARIZONA



# CALIFORNIA



## NO TRIPPING UP LAW FIRM MEMBER FROM SACRAMENTO

**G**raham M. Cridland and Gabriel R. Ullrich of the Firm's Sacramento office were retained to represent Josh Heckman Construction, Inc., a general contractor, in relation to an alleged trip and fall incident which is said to have occurred at Woodrow Wilson Manor, a senior housing apartment complex in Yolo County, California. Plaintiff Allure Nicholls previously filed suit against Eskaton, Inc. and Eskaton Properties, Inc., the management company for the apartment complex. In turn, Ms. Nicholls filed suit against Heckman Construction and promptly filed a motion for preferential trial setting, which the Court granted, drastically limiting the time for discovery and preparation by counsel for Heckman Construction.

Throughout discovery and during trial, Plaintiff alleged that Heckman Construction and the Eskaton parties had permitted a dangerous condition to exist at the property and that Heckman Construction was negligent in its construction of the parking lot, causing her to trip and fall. More specifically, plaintiff claimed that certain aspects of the as-built condition of the parking lot were contrary to the design obtained by the general contractor, Heckman Construction, and alleged

that those changes were a substantial factor in causing her harm.

A Motion for Summary Adjudication filed by Erickson Arbuthnot on behalf of Heckman Construction was successful in eliminating plaintiff's cause of action for premises liability.

At trial, plaintiff claimed various injuries secondary to the alleged trip and fall incident including fractures of her tibia, patella, and wrist, resulting in loss of independence, permanent disability, pain and suffering. She also claimed significant cognitive changes, memory loss, depression, anxiety, and changes to her activities of daily living as a result of the alleged trip and fall incident.

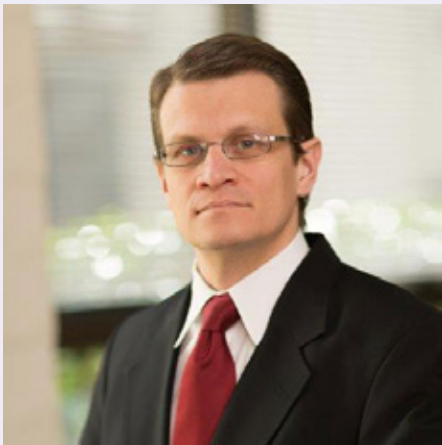
Plaintiff further contended that in January 2018, as a direct and proximate result of her June 2016 fall, she fell again, resulting in a compression fracture of her thoracic spine. This fracture, plaintiff contended, caused permanent disability and residual pain.

In defense of Heckman Construction, Mr. Cridland and Mr. Ullrich argued that the condition of the parking lot, though different from the plans and

specifications, was consistent with industry standards and not unsafe. Mr. Cridland and Mr. Ullrich also presented evidence of the detail pages of the plans, which assisted the jury in understanding the change orders and other decisions made by the contractor. Additionally, Mr. Cridland and Mr. Ullrich presented expert testimony explaining why the as-built condition of the parking lot did not cause, or contribute to, the subject trip and fall incident.

The trial of this matter began on April 2, 2019 and concluded with a defense verdict in favor of Heckman Construction on April 29, 2019.

Graham M. Cridland is a partner in the Firm's Sacramento office and Gabriel R. Ullrich is a senior associate in Sacramento.



## GRAHAM CRIDLAND

Graham is a shareholder who's practice focuses on professional liability defense, defense of serious personal injury cases and defense of employment cases, including wage and hour litigation and wrongful termination. In his professional liability practice he has defended lawyers, health care professionals, insurance brokers and agents, and real estate professionals with respect to a wide variety of claims.



## GABRIEL ULRICH

Gabriel Ulrich's experience includes insurance defense and general civil litigation, especially in the contexts of professional negligence, medical malpractice, products liability, motor vehicle collisions, real estate transactions, premises liability, public entity defense, employment law, elder abuse and defense of professional license prosecutions.



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# COLORADO



## JACKIE BOOKER PREVAILS ON EVIDENTIARY RULINGS IN HIGH EXPOSURE BAD FAITH CASE

**J**ackie Booker obtained an order limiting plaintiff's bad faith expert under Federal Rule of Evidence 702 and an order excluding reserves from trial evidence in United States District Court in a high exposure bad faith case. The case settled following the evidentiary rulings.



### JACKIE BOOKER

Jackie Booker has defended corporate and individual clients in personal injury and property damage cases her entire career.

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# FLORIDA



## DEFENSE VERDICT: TRIP AND FALL (BROWARD COUNTY)

**F**ort Lauderdale Managing Partner David Lipkin, Esq. and Senior Partner Dorsey Miller, Esq. obtained a defense verdict in the slip and fall matter styled Maria Cadette v. Defendant Store. Plaintiff, a then 57 year old woman alleged that she suffered a trip and fall injury at a Defendant store garden department caused by loose mulch which had spilled from ripped bags onto the floor. In support of her claim she offered

several photographs alleged to have been taken shortly after her fall showing mulch on the ground. Defendant Store denied it was negligent and noted that plaintiff's fall was not caused by the mulch on the ground, but by plaintiff simply attempting to lift an entire bag of mulch by herself without assistance as plaintiff admitted on cross examination that the fall occurred as she attempted to lift a bag of that was stacked on a pallet at nose level.



### DAVID LIPKIN

Attorney David Lipkin, Esq. is the Managing Partner of the Fort Lauderdale office and has 26 years of trial litigation experience



### DORSEY MILLER

Dorsey Miller is a Senior Partner and a member of the firm's BI Division in the Fort Lauderdale office.



# GEORGIA

Nall & Miller LLP

## BOB GOLDSTUCKER AND PATRICK ARNDT PREVAIL, ESTABLISH NEW LAW AT GEORGIA COURT OF APPEALS

Robert L. Goldstucker and Patrick N. Arndt obtained a defense verdict last year in a medical malpractice case which the plaintiff appealed. The Court of Appeals denied plaintiff's appeal and issued a ground-breaking opinion addressing the circumstances and conditions precedent required before a subsequent treating physician will be allowed to provide standard of care testimony. *Glover v. Atkinson-Sneed*.



### BOB GOLDSTUCKER

Bob Goldstucker is and has been Managing Partner at Nall & Miller for the past 14 years. Bob specializes in the defense of medical malpractice claims, legal malpractice claims, constitutional law claims, civil rights claims, other professional liability, insurance agent errors and omissions, tort claims, insurance coverage matters, professional licensing board proceedings, antitrust matters and securities.



### PATRICK ARNDT

Patrick Arndt is a Partner at Nall & Miller, practicing in the areas of Transportation & Trucking Litigation, Product Liability, Healthcare Law, Construction Litigation, and Governmental & Constitutional Litigation.

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# ILLINOIS

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## JEFF SIDERIUS OBTAINS SUMMARY JUDGEMENT

Jeff Siderius was recently successful in obtaining summary judgment against the City of Chicago in Cook County Circuit Court, Chancery Division in an insurance coverage dispute. The court ruled in favor of our insurance company client, finding it was not required to defend or indemnify the City as an additional insured. The case involved two serious truck-pedestrian accidents in which trucks were driven by the City's weed-cutting subcontractor; one of the accidents resulted in the death of a seven year old girl. The court agreed with our argument that the policy's described business limitation endorsement unambiguously applied to both the City and its weed-cutting subcontractor, based on admissions obtained in discovery. The City and its subcontractor elected not to appeal.



### JEFF SIDERIUS

Jeffrey A. Siderius is a partner who has handled coverage and defense matters at trial court and appellate levels in 18 state and federal jurisdictions, addressing a wide array of substantive issues



# WHY DO DAUBERT AND FRYE STANDARDS MATTER TO EXPERT WITNESSES?

A DISCUSSION BY ENVISTA FORENSICS  
SPECIALIST MEMBER OF THE GAVEL

Whether a jurisdiction applies Daubert, Frye, or another standard, the ultimate consideration is whether the expert's testimony will be admissible in court. A lack of familiarity with legal admissibility standards can be problematic. Good expert practice and Standard of Care should include having a general understanding of:

- The process and an overview of the standards
- Locations where each standard is applicable
- The difference between the two standards
- How the standards can impact expert opinions and testimony

EXPERTS ELEVATE THEIR PROFESSION AS A GROUP WHEN THEY  
PRIORITIZE POSSESSING  
APPROPRIATE QUALIFICATIONS AND EXPERTISE  
OVER SELF-INTEREST

## Background to the Standards

Daubert and Frye are standards that become relevant when a case proceeds through litigation when opposing counsel wants to further evaluate the expert opinion presented and/or examine the qualifications of the expert themselves.

## The Standards Defined

*The Daubert Standard* - Under the Daubert Standard, the factors that may be considered in determining whether the methodology is valid include:

- Whether the opinion or method used to develop such opinion can and has been tested

- Whether the methodology has been subjected to peer review and publication
- What the known or potential error rate is for such a methodology
- The existence, reliability, and conformance to standards relied upon by the expert in developing their opinion
- Whether the methodology used to develop such opinion has attracted universal acceptance within the relevant scientific community

*Which courts recognize Daubert? Case law*

relevant to this standard was established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) which was presented and affirmed in front of the United States Supreme Court. The Daubert Standard is currently used in the federal court system, 40 state courts (including Arizona, Colorado, and Texas), and in the District of Columbia.

**The Frye Standard** - The Frye Standard is used to determine the admissibility of an expert's scientific testimony, established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and if its methodology is accepted by others in the field in which it belongs.

*Which courts recognize Frye?* Of note, the Frye Standard has been abandoned by many states and the federal courts in favor of the Daubert Standard. A total of 8 states apply the Frye Standard in lieu of the Daubert Standard or another standard, including California, Florida, New York, and Washington. Although there is a general acceptance of the Daubert and/or Frye Standards across the United States, three states don't explicitly apply either standard, with varying case law referenced instead, including: Nevada, North

Dakota and Virginia.

### Differences in the Standards

The main difference between Daubert and Frye is the expanded approach of Daubert. Frye principally focuses on a singular question: whether the expert's opinion is generally accepted by the relevant scientific community. This could be simply stated as, "John Smith is a civil engineer and Mr. Smith is providing testimony as a civil engineer; therefore, Mr. Smith would be qualified to provide a civil engineering opinion consistent with the practice of civil engineering."

Daubert offers a two-part approach, including qualifying the expert to opine on a specific subject first, and subsequently evaluating the expert's methodology utilized to arrive at such opinions (i.e. can the opinion be tested, peer review, error rates, etc.). For instance, "Mr. Smith is a civil engineer, but can other civil engineers duplicate his methodology and produce the same results and opinion?" The qualifying questions exist in both standards in an attempt to allow only qualified experts the ability to present expert testimony to the trier of fact.

IT CAN HAVE AN IMMEDIATE AND NEGATIVE EFFECT ON THE OUTCOME OF THE CASE  
WHEN A COURT DEEMS  
AN EXPERT'S TESTIMONY INADMISSABLE  
DUE TO INSUFFICIENT QUALIFICATIONS OR IMPROPER MEANS OF APPROACH

The effects can be exponentially more damaging if the dismissal of an expert occurs during trial. The opportunity for expert testimony on behalf of the retained party can effectively be squandered with the ability to present any sort of expert opinion now moot. More importantly, from the perspective of all interested parties, Daubert and Frye Standards are essentially used by the trier of fact to confirm

whether an expert actually is an "expert" on the retained topic.

### An Expert's Responsibility

Experts should ask themselves a number of questions in regards to their own background, qualifications, and expertise when presented with an opportunity for retention. Questions regarding education, training, and experi-

ence might check the boxes for retention but do not necessarily equate to qualifying as an expert. This evaluation can be the first line of defense in avoiding someone successfully challenging the admittance of expert opinions later. Questions can easily relate back to the expert's qualifications and pertinent details of the matter:

1. Does the expert have the proper education, training, and licensure?
2. Has the expert practiced in the field in question?
3. Has the expert performed similar investigations?
4. Has the expert provided testimony on the subject matter previously?

Asking crucial questions before the matter has begun, should be part of the vetting process.

## Conclusion

Viewing expert retention and qualification along the previously discussed thought process equates with the discussion of Standard of Care, from the expert point of view. Standard of Care can be defined for experts as providing services consistent with the professional skill and care ordinarily provided by experts practicing in the same or similar locality under the same or similar circumstances. The responsibility for providing expert opinions and testimony lies with one person: the expert.

Experts that garner the most respect and trustworthiness in their respective industry are those that recognize their strengths, weaknesses, and most importantly, are transparent to these attributes. These experts are the most effective as they stay within their 'box' elevating expert witnesses collectively as a group and as a profession.



## TERENCE KADLEC

Terence Kadlec, P.E. is Envista Forensics' Practice Leader of Construction and Construction Defect. Terence is a design engineer with a forensic engineering background, performing investigations following fires, explosions, vehicular impacts, weather/catastrophe events, building envelope deficiencies, structural failures, and civil/earthwork failures. He evaluates alleged civil or structural deficiencies and has provided testimony through sworn affidavits, deposition and trial as an expert witness.



## BRUCE BARNES

Bruce Barnes, MS, P.E. is Envista's VP of Civil/Structural with more than 25 years of engineering experience. He has investigated, tested, and analyzed failures ranging from catastrophic collapses to massive explosions. Bruce investigates cases involving foundation failures, fire-damaged buildings, roof damage, failed structural components, building collapse, architectural and engineering product failures, code compliance, standard-of-care, and construction site safety.



# IOWA

ENGLES | KETCHAM  
OLSON | KEITH P.C.

## TRIAL - DEFENSE VERDICT

**L**awsuit involved an accidental house fire, where plaintiff (landlord) claimed defendant (tenant) was responsible for causing the fire by either improper disposal of cigarettes or improper use of candles. Plaintiff sold house to defendant while the fire investiga-

tion was allegedly ongoing. Then, the defendant demolished the house to rebuild (prior to deed being signed over). Plaintiff claimed spoliation of the evidence at trial. Verdict returned in favor of defendant, saying plaintiff had not met burden of proof on liability.



PAIGE HALL



KAREN BAILLY

Trucking  
Product Liability  
Toxic Tort

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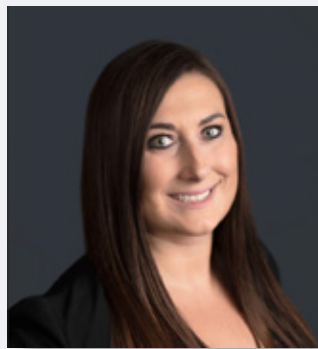
## SUMMARY JUDGEMENT OBTAINED IN PRODUCTS LIABILITY CASE

**W**HT attorneys Gregg Thornton, Jillian House and Alexandra DeMoss- Campbell obtained summary judgment on behalf of Regal Beloit in their case, *Leslie Edlin v. Regal Beloit and others*. Ms. Edlin was injured while working at a plant in Elizabethtown when her hand was caught in a moving conveyor belt. The lawsuit alleged Ms. Edlin suffered a severe degloving injury to her hand and arm as the result of a defective design of the conveyor. Specifically, she alleged that the conveyor had insufficient

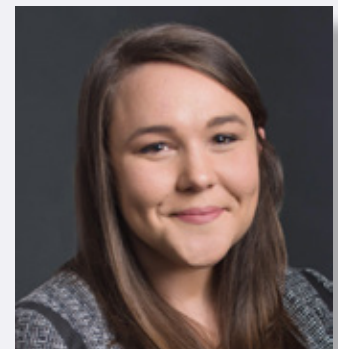
safety guards and inadequate emergency stops. Agreeing with Regal Beloit's argument that it was not the manufacturer or designer of the conveyor, the court found that Regal Beloit was not subject to strict liability. Further agreeing with Regal Beloit, the court found that Regal Beloit was a component part manufacturer and that the component part in no way contributed to the mechanism of injury claimed by the Plaintiff. The lawsuit against Regal Beloit was completely dismissed.



**GREGG THORNTON**



**JILLIAN HOUSE**



**ALEXANDRA  
DeMOSS-CAMPBELL**

# MASSACHUSETTS

MICHIEENZIE & SAWIN LLC  
ATTORNEYS AT LAW  
BOSTON, MA

## MASSACHUSETTS PREVAILS WITH MSJ

### Temporary Employer Has Workers Compensation Immunity

**T**he question of whether an employee of a staffing agency can pursue a civil tort claim against his temporary employer, for an injury that occurred while working as a temporary employee, was recently decided in Massachusetts against the temporary employee. The Massachusetts Court held that an Alternate Employer Endorsement to a Workers Compensation Policy held by the staffing agency from whom the temporary employee was borrowed provided workers compensation immunity to the temporary/special employer and limited the temporary employee to pursuing his negligence claims in workers compensation proceedings.

In reaching this conclusion, the court found first that Plaintiff, a temporary worker hired by an industrial staffing agency and assigned to the temporary employer to conduct work related to the production of filtration membrane systems, had two employers: the staffing agency (i.e. his general employer) and the temporary employer (i.e. his special employer). The staffing agency was his general employer by virtue of the fact that it had hired him and paid his wages, among other things. The temporary employer was his special

employer by virtue of the fact that it directed and controlled the tasks that he was to perform.

The Court next found that, under the authority of *Molina v. State Garden, Inc.*, 88 Mass. App. Ct. 173 (2015), an Alternate Employer Endorsement to the staffing agency's workers compensation policy covered the temporary employer. Plaintiff attempted to persuade the Court that the Alternate Employer Endorsement was ineffective because it did not specifically identify or name the temporary employer as an alternate employer of the staffing agency's employees, and because the temporary employer had not paid for the workers compensation policy at issue. However, the Court rejected these arguments. In doing so, it noted that the staffing agency was contractually obligated to provide workers compensation coverage to the temporary employer as an alternate employer via an alternate employer endorsement, and that the Alternate Employer Endorsement, even in blanket (as opposed to scheduled) form, was recognized by the highest court in Massachusetts – the Supreme Judicial Court – in *Molina* as extending workers compensation immunity to a temporary employee's special employer.



### PAUL MICHIEENZIE

Mr. Michienzie is a founding partner of Michienzie & Sawin. The focus of Mr. Michienzie's practice is insurance defense and commercial litigation.

# MINNESOTA



## STICH ANGELL CONGRATULATES ITS LAWYERS NAMED TO THE 2019 SUPER LAWYERS® LIST, AND TOP 100

**S**tich Angell congratulates its lawyers named to the 2019 Super Lawyers® list: Pat Biren, Mike Kreidler, Tim Murphy, Stacey Sever and Garth Unke. Also, we are very proud to congratulate attorney Garth Unke for being named a Top 100 Super Lawyer for the State of Minnesota.

The listing is based on a rigorous, multi-phase process. Each year, no more than five percent of the lawyers are selected by the research team

at Super Lawyers to receive this amazing honor. Super Lawyers, a Thomson Reuters business, is a rating service of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates and peer reviews by practice area. The result is a credible, comprehensive and diverse listing of exceptional attorneys.



**PAT BIREN**



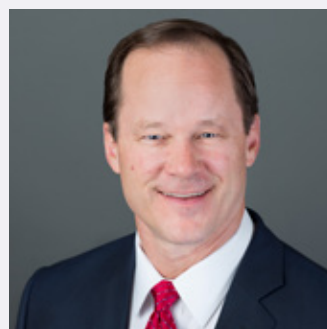
**MIKE KREIDLER**



**TIM MURPHY**



**STACEY SEVER**



**GARTH UNKE**

# MISSISSIPPI



## TORTS - COMMERCIAL TRUCKING

Dunbar Monroe represented a motor carrier and poultry processor/supplier in a case in which plaintiff alleged that the poultry company/motor carrier was liable for the actions of an independent contractor-driver who was hauling poultry. The trial court granted the poultry company's motion for sum-

mary judgment on direct negligence and punitive damages, ruling that the poultry company cannot be liable for the acts of employees of independent contractors. Following the trial in June 2015, all of the plaintiff's claims against the poultry company were dismissed with prejudice.



### CLARK MONROE

DEDICATED CONTACT FOR MISSISSIPPI



# NEBRASKA

ENGLES | KETCHAM  
OLSON | KEITH P.C.

## TRIAL - DEFENSE VERDICT

**R**obert Keith recently obtained a defense verdict in a food borne illness case in which the Plaintiff claimed he had suffered acute kidney failure after eating a meal at a local Red Lobster. The jury had the case for less than an hour after ruling unanimously in favor of Red Lobster. The jury relied heavily on expert testimony from Red Lobster's infectious disease specialist related the incubation period of Plaintiff's claimed viral gastroenteritis that led to his hospitalization.



### ROBERT KEITH

Chair of the firm's government entity defense group, Robert Keith represents property owners and managers, political subdivisions and municipalities in a wide variety of cases and various Constitutional claims. He also represents transportation companies, veterinarians, large retail stores, restaurants and insurance companies in auto, product liability and premises liability actions.



## LEGALNET RELEASES FIRM COMPETATIVE ANALYSIS TOOL, EXCLUSIVE FOR THE LAW FIRM MEMBERS OF THE GAVEL

BY: JACKELYN HO

**B**ig data is taking over our industry, but LegalNet has always been ahead of the game, helping companies understand their legal data trends for over twenty years. For the first time ever, we are excited to announce that we are expanding our product offerings.

Using the same state-of-the-art software and online platform that we provide to our current clients, we are modernizing a new version so that firms can grab hold of their own cost and performance data trends.

### The Competitive Analysis Tool

This tool aggregates data based on your firm's billing invoices. From there, we create unique performance metrics reports that can help you effectively market yourself, gain new clients, and prove to existing ones how efficient you and your team are. Reports include, but are not limited to:

- Attorney costs
- Average cost and hours per client
- Difference between amounts billed and actual paid

How can these reports help you and your firm?

- Establish ultimate profitability
- Benchmark attorney averages
- Predict client income
- Stabilize budget

### Why Does Data Matter?

For decades, clients and billing companies have been monitoring cost-related data on firms, but rarely do these parties share it with the firms. We believe that firms should have access to and understanding of their own metrics.

In a recent survey sent out to The Gavel members, a few tell-tale statistics were released:

- 95% of respondents said they wanted to know who is the most profitable and efficient at their firm
- 95% of respondents said they wanted to know how their rates compare to average rates in the industry
- 100% of respondents wanted to know their

annual cost trend

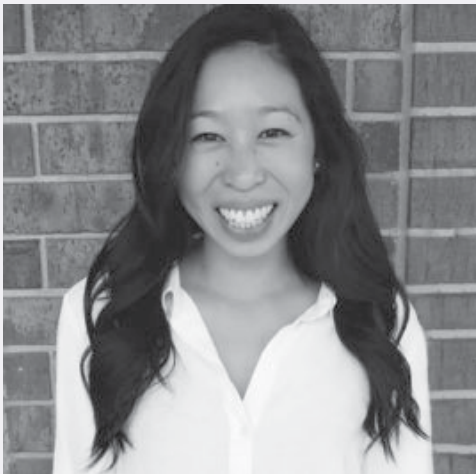
- 100% of respondents said it was important to be able to identify their costs, at any given time, to defend a claim

These results show that many, if not all, firms are reaching towards metric-centered operations. Externally, it can help you market yourself more accurately and efficiently. Internally, it can help you point out star attorneys, forecast precise budgets, and clearly see profit-

ability on a client-by-client basis.

## Be Part of a Product Development

**The Competitive Analysis Tool is only available to The Gavel Members.** It is an exclusive opportunity to be a founding user and provide feedback to help build your dream solution. If you are interested in being part of this pilot program, please reach out to **jackelyn.ho@legalnetinc.com** or **rory.haynie@legalnet-inc.com**.



## JACKELYN HO

### MARKETING MANAGER

LegalNet Inc has been helping companies understand their legal expense metrics and make data-driven decisions for over two decades. LEO Reports™, our self-developed legal metrics software program, specializes in helping companies and firms monitor, contain and predict the costs of legal claims. We provide unique and personalized reports including, but not limited to: legal costs, litigated claims, cases, attorneys, jurisdictions, and client/ law firm. We pride ourselves in providing the most extensive metrics and our years of success prove its value.

# NEW HAMPSHIRE AND MAINE MEMBER

**Drummond**Woodsum

ATTORNEYS AT LAW

## ATTORNEYS KASIA PARK AND ED BENJAMIN OBTAIN DISMISSAL OF DOUBLE FATALITY POLICE SHOOTING CASE

**O**n May 5, 2019, Judge Lance Walker of the U.S. District Court for the District of Maine granted the Motion to Dismiss filed by Drummond Woodsum Attorneys Kasia Park and Ed Benjamin on behalf of Vassalboro Chief of Police Mark Brown in a case arising out of the deaths of Ambrosia Fagre and her boyfriend Kadhar Bailey in Vassalboro on February 10, 2017. The incident began when Maine State Police Lt. Scott Ireland was investigating a report he had received about a Dodge Durango that was parked on his neighbor's property. Lt. Ireland found the vehicle on a camp road with a female occupant who was seemingly unconscious inside. Once awakened, the female, later identified as Ambrosia Fagre, told Lt. Ireland that she was waiting for her boyfriend, later identified as Kadhar Bailey, to return to the vehicle. Lt. Ireland noted that Ms. Fagre was "lethargic" and seemed "out of it."

Lt. Ireland was joined at the scene by Kennebec County Sheriff's Office Deputy Sgt. Galen Estes, who told Ireland that he was investigating a report of a burglary in the area. After noticing footprints in the snow leading from the vehicle toward a nearby home, Lt. Ireland attempted to contact the homeowner by phone, without success. Lt. Ireland reached a relative of the homeowner, who advised

that the homeowner had been tied up at gunpoint and his home had been ransacked. Lt. Ireland went to the home to investigate, asking Sgt. Estes to stay at the Durango with Ms. Fagre. At the home, Lt. Ireland learned that, after tying up the homeowner at gunpoint and ransacking the house, the perpetrator had stolen the homeowner's pickup truck and left the scene.

Back at the Durango, Vassalboro Chief of Police Mark Brown had joined Sgt. Estes, and was asked by Estes to stay there with Ms. Fagre while Estes continued his burglary investigation. Lt. Ireland began to search the area, eventually finding the homeowner's pickup truck parked nearby on a snowmobile trail. Tracks from the pickup led back toward the area where the Durango was parked. Lt. Ireland advised Chief Brown of the armed home invasion and his belief that the suspect (Bailey) was then heading toward Brown's location at the parked Durango. At that point, Chief Brown saw Bailey approaching with a handgun. Chief Brown drew his weapon and ordered Bailey to stop. Despite Chief Brown's commands to stop, Bailey continued to approach him. Chief Brown took cover on the driver's side of the Durango, while Ms. Fagre remained seated in the front passenger seat. Chief Brown fired once at the approach-



**KASIA PARK**

Maine State Trooper Jeffrey Parks was arriving in the area at that time and heard the gunfire of Chief Brown and Bailey. Trooper Parks stopped his cruiser in the center of the road to block it off, then got out of the vehicle. As Bailey drove the Durango toward Trooper Parks' cruiser, Parks sought cover behind a nearby snowbank. Trooper Parks fired several times at the Durango as it approached, and then crashed, into his cruiser. At the time Trooper Parks fired, Ms. Fagre had ducked down in the Durango's front seat. Trooper Parks later told investigators that he was not aware there was a passenger in the vehicle because Ms. Fagre couldn't be seen from his vantage point. One of Trooper Parks' bullets passed through the engine compartment and dashboard of the Durango, striking Ms. Fagre in the head and killing her. After the Durango crashed into Trooper Parks' cruiser, Lt. Ireland, who had returned to the area, approached it from the rear on the driver's side. When he saw Bailey reaching for something in the vehicle, Lt. Ireland fired, killing Bailey. Bailey's handgun was later found between the seats. Ballistic testing proved that the bullet that had struck Ms. Fagre was fired by Trooper Parks.

Ms. Fagre's mother, as her personal representative, filed a lawsuit against Chief Brown, Lt. Ireland, and Trooper Parks, claiming that they had jointly violated her daughter's right to be free from the use of unreasonable force under

ing Bailey, and then sought cover behind a snowbank. Bailey returned fire, before jumping into the Durango and began to flee the scene. Chief Brown fired once more at Bailey as he drove away.

the 4th Amendment, and were also liable under the 14th Amendment for depriving her of her life without due process by failing to protect her. Attorneys Park and Benjamin filed a Motion to Dismiss on behalf of Chief Brown, claiming that, on the facts asserted in Plaintiff's Complaint, he could not be liable, as a matter of law. The court accepted the argument of Attorneys Park and Benjamin that Chief Brown was entitled to a dismissal of the 4th Amendment claims because he had not subjected Ms. Fagre to any force or otherwise "seized" her, and that he could not be held legally liable for Trooper Parks' use of deadly force.

Regarding the claim that Chief Brown was liable for failing to protect Ms. Fagre, the court ruled that Chief Brown could not be held responsible for failing to protect Ms. Fagre under the so-called "state created danger" doctrine that was being asserted by Plaintiff. The court ruled that Chief Brown had left Ms. Fagre undisturbed, and in no worse a position with respect to Bailey than she was when Chief Brown first arrived on the scene. The court ruled that it was not conduct on the part of Chief Brown, as a "state actor," that had created the danger to Ms. Fagre, it was the conduct of her boyfriend, Bailey. The court further accepted the position of Attorneys Park and Benjamin that, even if the facts asserted in the Complaint could somehow be regarded as supporting such a due process/failure to protect claim, Chief Brown was entitled to qualified immunity in any event, because he had committed no violation of clearly established law.



**ED BENJAMIN**



# NEW JERSEY



## JEMI GOULIAN LUCEY INSTALLED AS PRESIDENT-ELECT OF NEW JERSEY WOMEN LAWYERS ASSOCIATION

**G**reenbaum, Rowe, Smith & Davis LLP is pleased to announce that Jemi Goulian Lucey, Counsel in the firm's Litigation Department, has been installed as President-Elect of the New Jersey Women Lawyers Association (NJWLA) for the 2019-2020 term, effective July 1, 2019.

The NJWLA is an independent association whose mission is to advance and retain women in the legal profession through education and activism, to promote qualified women to the highest levels of law firm, government, academic, community and corporate positions and to endorse qualified female attorneys for appointments to the state and federal judiciary.

As an active member of the NJWLA, Ms. Lucey most recently served as the organization's Vice President, and in previous leadership roles as Co-Chief Financial Officer, Co-Chief Operating Officer and Co-Secretary. She is also a former Co-Chair of the Judicial Outreach and Programming Committees.

Ms. Lucey concentrates her practice on employment litigation, higher education law, professional negligence defense and the productive use of litigation technology to reduce litigation costs and increase efficiency. She represents mid-market companies, institutions of higher learning, and public entities in federal and state civil litigation matters concerning employment discrimination and retaliation

claims, professional negligence defense, Higher Education and Title IX alleged violations, business torts, and commercial contract disputes. She is Co-Chair of the firm's Higher Education Practice Group and is a member of the Employment Law and Cannabis Industry Practice Groups.



**JEMI GOULIAN**

Ms. Lucey concentrates her practice on employment litigation, higher education law, professional negligence defense and the productive use of litigation technology to reduce litigation costs and increase efficiency.

# NEW YORK



## PEDESTRIAN V. RETAIL STORE NEW YORK STATE SUPREME COURT EARLY SUMMARY JUDGEMENT GRANTED

**O**n April 25, 2019, Scott Haworth obtained summary judgment dismissing plaintiff's complaint in this fall down matter involving an accident in front of HBG's client's retail store on the Upper West Side of Manhattan, New York. Significantly, Mr. Haworth filed the motion before any depositions had been taken and after only minimal paper discovery had been completed, in a successful effort to save our client from the expense of prolonged discovery in this multi-party matter. In support of the motion, Mr. Haworth relied upon our client's Lease, which addressed responsibility for all aspects of the sidewalk adjacent to the store as well as the

condominium's Bylaws. An Affidavit from our client's representative established that the law regarding "special use" was inapplicable as the sidewalk was not used for that purpose. In granting the motion, Judge Freed of the New York County Supreme Court noted that, our client owed no duty to the plaintiff, did not violate any of the myriad codes and regulations asserted by the plaintiff to have been violated and as urged by our client, had not made special use of the sidewalk or created the alleged dangerous condition. The court flatly rejected the opposition of multiple parties arguing that the motion was premature due to a lack of discovery.



### SCOTT HAWORTH

Scott Haworth, the firm's Managing Partner was previously an equity partner of a national litigation firm and prior to that, was an equity partner at a prestigious New York litigation firm. He has spent his career defending and trying matters involving product liability, construction and intentional torts, as well as complex catastrophic injury matters involving fire, transportation and other accident modes.

# NEW YORK



## NO-CAUSE IN A MOTOR VEHICLE ACCIDENT

**A**ndrew Kowalewski obtained a defense verdict in a motor vehicle accident where plaintiff and the defendant driver each claimed that they had the green light at an intersection. Both plaintiff and defendant driver failed to see each other as they approached the intersection. Mr. Kowalewski presented evidence that plaintiff never saw the light as being red before the accident and that her green light would have been near the end of the light cycle when she saw it, which was consistent with defendant driver's testimony that defendant's light changed from red to green as she approached the intersection. Mr. Kowalewski

also presented evidence that plaintiff could have been distracted as she approached the intersection by an electric sign next to the road indicating that the road would be closed, which plaintiff knew was for the filming of a Teenage Mutant Ninja Turtles movie. Trial proof lasted two days and consisted of plaintiff's testimony, the defendant driver's testimony, and the testimony of a non-party pedestrian witness who saw that defendant driver had a green light when he observed the light after the sound of the collision. After trial proof, the jury deliberated for less than one hour and found that the defendant was not negligent in the happening of the accident.



### ANDREW KOWALEWSKI

Andrew J. Kowalewski is a Western New York native. After graduating from St. Francis High School, he attended Canisius College in Buffalo, New York, where he was a member of the Canisius College Honors Program and Phi Sigma Alpha Honor Society, and graduated cum laude with degrees in Political Science and European Studies.



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# NORTH CAROLINA



## JOHN HONEYCUTT SECURES NO NEGLIGENCE DEFENSE VERDICT

**P**laintiff, a truck driver in his 50's, sought to recover for a lower leg fracture he suffered in a collision on the interstate. Plaintiff's vehicle overturned in the crash. Plaintiff alleged that defendant had rear-ended him in the left lane at highway speed, sending plaintiff's truck out of control and causing the accident. Defendant and his passenger contended that, as defendant's vehicle was passing plaintiff's truck on the interstate, plaintiff swerved into defendant's lane and spun out defendant, and in the pro-

cess, caused plaintiff's own truck to go out of control. Defendant and his passenger had prior, but unrelated, felony convictions which were admitted into evidence. The investigating trooper cited defendant in the accident and testified that paint from the front of defendant's car had transferred to the rear of plaintiff's truck, supporting plaintiff's account. After two hours of deliberation, the jury returned a no negligence verdict in favor of defendant.



### JOHN HONEYCUTT

John T. Honeycutt defends businesses, professionals, and individuals in personal injury and wrongful death claims of all types, including motor vehicle negligence claims, product liability claims, premises liability and inadequate security claims, and toxic tort claims. He also represents contractors and subcontractors in construction defect actions.



# NORTH CAROLINA



## DAN McLAMB AND RYAN SHUIRMAN SUCCESSFULLY DEFEND GENERAL SURGEON

**D**an McLamb and Ryan Shuirman successfully defended a general surgeon during a nearly two week medical malpractice trial. The plaintiff was a woman in her mid-40s who had acute gall bladder disease and was admitted to the hospital by the defendant surgeon for a laparoscopic gall bladder removal procedure. The plaintiff's ductal anatomy caused the surgeon to mistakenly identify her cystic duct and he ultimately cut the wrong struc-

tures. The plaintiff contended that the surgeon breached the standard of care by incorrectly cutting the wrong ducts, whereas the defense team contended that bile duct injuries in gall bladder procedures are surprisingly common and that the surgeon took all appropriate steps to reduce the risk of a bile duct injury which, in this case, could not be eliminated. The jury found that the surgeon was not negligent and awarded no damages to the plaintiff.



### DAN McLAMB

Mr. McLamb's practice is focused on commercial litigation and professional liability defense. He represents businesses, physicians, hospitals, and attorneys throughout North Carolina and has spoken at numerous litigation and professionalism seminars, as well as to health care providers on medical/legal issues.



### RYAN SHUIRMAN

Mr. Shuirman's practice includes defending medical malpractice cases and has represented physicians in emergency medicine, neurosurgery, obstetrics and gynecology, neurology, anesthesiology, General Surgery, Orthopedics, Internal Medicine, Radiology, Pathology, Hematology/Oncology, Thoracic Surgery and pediatrics specialties, in addition to representing hospitals throughout the state.

# OKLAHOMA



## UNANIMOUS VERDICT IN FAVOR OF DEFENSE

**D**errick DeWitt and Andre Farinha recently received a unanimous 12-0 verdict in favor of their client, a municipality, in a property damage case filed in state court. Plaintiff sought both negligence and nuisance damages arising from an injury to Plaintiff's home in the amount of \$450,000.00. The jury returned a verdict for the municipality, and given it was a property damage claim, the municipality was entitled to attorney fees for the defense of the suit.



### **DERRICK DeWITT**

Derrick DeWitt has been selected for inclusion in Super Lawyers, and he and his partners have also been recognized by U.S. News and World Report on its list of "Best Law Firms." His areas of practice include personal injury, trucking accidents, oil and gas accidents and litigation, insurance bad faith, products liability, complex commercial litigation and general civil litigation.



### **ANDRE FARINHA**

Mr. Farinha's primary areas of practice are Insurance Defense and Coverage, Construction Law, Personal Injury, General Liability, and Civil Litigation. Mr. Farinha also has extensive experience working with general contractor and builders in drafting contracts and assisting with risk management strategies.

# OKLAHOMA



## SUMMARY JUDGEMENT IN PREMISES LIABILITY CASE

Justin Meek and Carolyn Smith recently received Summary Judgment in a premises liability case in Southeast Oklahoma. Plaintiff and her brother owned adjoining tracts of acreage. In between Plaintiff's land and her brother's land was a tract of land jointly owned by Plaintiff and her siblings, including her brother. A large stone retaining wall separated the brother's acreage from the family acreage. Plaintiff did not get along with her brother's wife so Plaintiff would visit her brother at times when his wife was away from the home. Plaintiff would typically traverse across the family acreage and scale the stone retaining wall by way of a

makeshift ladder Plaintiff's brother had built from a discarded commercial air conditioning unit. Late one night Plaintiff was visiting her brother when the brother's wife suddenly showed up. Plaintiff hurriedly tried to rush back to her house and in her haste fell from the ladder on the retaining wall and shattered her leg. Plaintiff sued her brother for negligence alleging more than \$750,000.00 in damages. The Court found that Defendant (Plaintiff's brother) owed no legal duty to Plaintiff and that the retaining wall and adjoining ladder were open and obvious conditions. The Court granted summary judgment in favor of Defendant.



### JUSTIN MEEK

Justin Meek is an experienced trial lawyer with a focus on matters involving insurance law, attorney malpractice, personal injury, and contracts. Justin also represents clients in business transactions, trust and estate litigation, and contract disputes. He has been recognized by Oklahoma Super Lawyers® as a Rising Star in 2010, 2011 and 2012 and as a Super Lawyer in 2013, 2014, 2015, 2016, and 2017.



### CAROLYN SMITH

Carolyn Smith is a partner practicing general civil litigation at DeWitt Paruolo & Meek. She represents individuals and both local and national companies in litigation throughout Oklahoma. Ms. Smith represents clients in all stages of the litigation process, including trial, in both state and federal court. Ms. Smith primarily concentrates her practice on matters involving general civil litigation, complex litigation, business litigation, insurance law, insurance bad faith, personal injury and legal malpractice.

## GB'S LINDA TONKOVICH WINS WEST COAST CASUALTY OLLIE AWARD

**C**ongratulations to Linda Tonkovich, Lead Construction Resolution Manager of Gallagher Bassett, this year's recipient of the West Coast Casualty prestigious Ollie Award. "Linda's deep expertise in CD, years as the steadfast co-chair of the West Coast Casualty Conference, ability to be the glue holding mediation together, selflessness, and generous mentoring of others" were all factors according to this year's presenter.

The Ollie Award is named for the late Judge Jerrold S. Oliver, a founding father of the alternate resolution process in construction defect claims and litigation. The Ollie Award is presented at the West Coast Casualty Construction Defect Seminar to recognize a professional who has invoked the same spirit of loyalty and trust for the betterment of the entire construction defect community.

"What makes it most special is that the winner is chosen by vote of the community." Linda has given her time and talent to the WCCC since 1996, and has been the Chair of the Speakers and Topics Committee since 2005. Along with the recognition, a donation has been made to Habitat for Humanity in Linda's name.

Ajay Sinha, Chief Claim Officer of Gallagher Bassett, commented "this is high praise coming from those who should know – people Linda had served and worked with throughout her career. We appreciate all Linda has done

on behalf of GB and our clients over the years demonstrating that expertise and bringing it to bear to improve their outcomes."

Congratulations, Linda, on this remarkable achievement!



**LINDA TONKOVICH**

An advertisement for 'The Gavel' website. It features a blue background with a globe on the left and a stylized 'G' logo. The text 'CLICK and GO' is prominently displayed in a bold, italicized font. Below it, the website address 'www.TheGavel.net' is shown in a blue box. At the bottom, it says 'you're 1-click away from streamlining your work'.

# PENNSYLVANIA



## GREGORY HIRTZEL AND CODY KAUFFMAN PRESENTED TRAUMATIC BRAIN INJURY WEBINAR

**G**regory Hirtzel and Cody Kauffman of Fowler Hirtzel McNulty & Spaulding recently presented a webinar discussing the investigation and evaluation of Traumatic Brain Injury ("TBI") claims. The webinar focused on strategies for defending what often are highly subjective and potentially significant damage claims. This presentation reviewed the science be-

hind traumatic brain injury and the pertinent factors to consider in evaluating these claims and in assessing whether the individual's claimed symptomology comports with what is reported in the literature. There was also an in-depth review of appropriate expert retention and an analysis of jury verdicts involving claims of TBI.



### GREGORY HIRTZEL

The scope of Gregory Hirtzel's practice currently includes the defense of complex and large catastrophic personal injury claims throughout the Commonwealth of Pennsylvania. The areas in which he primarily practices include construction liability and defects, trucking and motor vehicle, and product liability and insurance coverage issues, including UM and UIM claims.



### CODY KAUFFMAN

Cody Kauffman is an associate in Fowler Hirtzel McNulty & Spaulding's Lancaster Office. Mr. Kauffman focuses his practice on defending complex commercial, construction, product and general liability cases. He develops cases from inception through trial by managing all aspects including investigation, pleadings, and discovery.



# RHODE ISLAND

*PL*  
GUNNING & LAFAZIA

## DEFENSE VERDICT IN FIVE DAY TRIAL

**K**evin Holley was the “boots on the ground” and he was called out by the client to the scene that day. The client was life- flighted out from the scene because there were thought to be life threatening injuries. Once the client got to the hospital it was safe to say that the injuries were not as bad. The plaintiff is Ihor Havryliv. Mr. Havryliv is bringing this action seeking damages for physical injuries sustained when the motorcycle he was riding collided with a truck operated by the defendant Jean Romel Rayneld and owned by the defendant Vango Distribution, Inc. The plaintiff alleges that the defendant Jean Romel Rayneld was negligent in the operation of the truck so as to cause the collision with Mr. Havryliv’s motorcycle. As a result of the accident, Mr. Havryliv suffered in-

juries. The defendant denies any negligence and alleges that the accident was solely the fault of the plaintiff.

The defendant claims \$137,000 in medical bills and \$46,000 in wages – the last offer was \$50,000 but the defendant demanded \$700,000. There was a defense verdict after a five-day jury trial.

Expert former mass trooper had reconnaissance and had to subpoena in, for trial, the records keeper of the hospital to show what the average range of payments that they would accept. The plaintiff’s attorney would not agree to a reduced number of boardable medicals. The hospital said they take as little as zero and as high as the full \$100,000.



### KEVIN HOLLEY

Kevin has extensive jury trial experience in Rhode Island and Massachusetts as well as excellent appellate experience, having briefed and argued numerous reported decisions that are published in the Atlantic Reporter, the Massachusetts Appellate Court Reporter, the Federal Supplement Second Series, and the Federal Reporter, Third Series.

# TEXAS

## DALLAS & FT. WORTH

MACDONALD  DEVIN  
ATTORNEYS

### FIRM SECURES SUMMARY JUDGEMENT VICTORY IN \$9 MILLION CONSTRUCTION DEFECT CASE

In the face of a \$9 million claim based on significant and extensive construction defects, John Kenefick and Jason Jung prevailed on a motion for summary judgment that spared the firm's client from any exposure.

John and Jason secured the victory this month after arguing the motion in March before Judge Heygood-McCoy in the 153rd District Court in Tarrant County. The lawsuit was brought by a homeowners' association against the firm's client, which had financed the construction project and taken the property back from the developer/general contractor through a Deed in Lieu of Foreclosure.

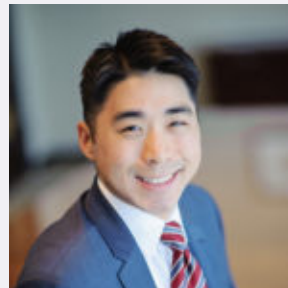
The HOA claimed that the client had actively concealed construction defects during the period it controlled the HOA and that it actively masked those defects when it prepared the units for sale to the current owners. Plaintiffs brought claims of negligence, breach of contract, and fraud all based on the alleged concealment of defects in both the common elements and the individual units.

Supported by the hard work of Steven Baggett and Tyler Vesely, John and Jason successfully argued that the HOA had missed the statute of limitations, overcoming the plaintiffs' assertions that the firm's client actively concealed the defects and ignored the advice of consultants who found pervasive issues on the project.

Congratulations to the entire team for obtaining this outstanding result.



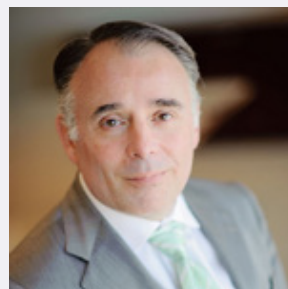
**STEVEN BAGGETT**



**JASON CHUNG**



**TYLER VESLEY**



**JOHN KENEFICK**

# VIRGINIA



## THE FAIRFAX CIRCUIT COURT ARRANGES COSTS AND FEES AFTER PLAINTIFF'S SECOND VOLUNTARY NONSUIT

Each legal jurisdiction across the country has its own unique set of procedural rules and potential pitfalls. In Virginia, one of our legal oddities is the “voluntary nonsuit.” As Jessica Relyea of KPM LAW’s Restaurant and Retail Litigation team has previously explained, a nonsuit is a voluntary dismissal, which allows a Plaintiff to correct a flaw in her case and refile in the future. In practice, voluntary nonsuit is a free “do-over.”

In Virginia, every Plaintiff is allowed one nonsuit as a matter of right. This nonsuit may be taken any time before the case has been submitted to the jury. Va. Code Ann. § 8.01-380(B). The Plaintiff does not need the consent of the parties or the approval of the Court to take the first nonsuit. Plaintiffs routinely use nonsuits to avoid summary judgment, fix procedural or strategic errors, defeat the statute of limitations, or short-circuit a trial that appeared to be going poorly for the Plaintiff. The voluntary nonsuit is one of the most potent tactical weapons available to Plaintiffs in Virginia. Nevertheless, it is not all-powerful.

For example, if the Plaintiff wants to take a second nonsuit under Code §8.01-380(B), she must obtain Court approval. And, as Judge Gardiner from the Fairfax Circuit Court recently held, Code § 8.01-380(b) allows the Judge to award court costs and fees against the nonsuiting party for a second nonsuit.

In the recent case of *Lezlie Day v. Gregory*

Day, (which was decided on April 1, 2019), the plaintiff, Lezlie Day, filed an action for divorce against her husband, Gregory, in 2003. She subsequently nonsuited that action. In 2018, Lezlie filed a second divorce action, in which she alleged acts that had occurred up until the 2003 suit, as well as acts that had occurred between 2003 and 2018.

Shortly thereafter, Lezlie attempted to nonsuit her second divorce proceeding. She argued that her 2003 divorce proceeding and her 2018 divorce proceedings were two entirely separate lawsuits. As such, she should be entitled to voluntary nonsuits in each.

Judge Gardiner disagreed. He noted that the plain text of Code § 8.01-380(B) provides that “only one nonsuit may be taken to a cause of action or against the same party to a proceeding, as a matter of right.” *Id.* (emphasis added). Judge Gardiner explained that the word “proceeding” in the statute refers to a “type or category of case.” Therefore “[w] here a nonsuit has been granted in a case involving a party to the same type of case as a case in which a subsequent nonsuit is sought, a nonsuit will not be considered a first nonsuit.” Judge Gardiner continued to explain that Gregory was a party to the same type of case (i.e., a divorce proceeding) that had been previously nonsuited. As Lezlie had already nonsuited her divorce proceeding against Gregory once, she had used up her one and only automatic nonsuit.



Ultimately, Judge Gardiner allowed the Plaintiff to take a second nonsuit; however, he also granted the defendant approximately \$45,000.00 in court costs and attorney's fees. The practical impact on this ruling could be greater than the legal impact. Given the harshness of the sanction, a Plaintiff may now consider if it is better to move forward to trial with a defective case rather than risk paying legal fees of the other side. On the other hand, if the Plaintiff is simply giving up on his or her case and does not believe a third fil-

ing is likely, he or she may be more inclined to agree to dismiss the case with prejudice instead.

Judge Gardiner's ruling provides one of the few legal decisions in Virginia that has placed limitations on the Plaintiff's right to a voluntary nonsuit. In light of Day v. Day, Plaintiffs' Counsel throughout Virginia should think carefully about when and how they decide to take nonsuits. That first nonsuit is free, but the second might cost \$45,000.00.



### JESSICA RELYEA

Jessica is a partner in the firm's retail and restaurant defense group. Her practice focuses on representing clients in premises liability matters in both federal and state court in Virginia. She handles a wide array of matters ranging from negligence and products liability to intentional torts and employment matters, in all stages of the legal process.

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# WASHINGTON



## DEFENSE VERDICT IN MEDICAL MALPRACTICE CASE

Patrick Sheldon and Natalie Heineman obtained a defense verdict for an oral surgeon in a medical negligence case in which plaintiff alleged the client negligently placed a dental implant into the sinus which caused the patient over a decade of sinus complications. The implant was

placed into the maxillary sinus.

Despite this, Patrick and Natalie convinced the jury our client's treatment complied with the standard of care and that plaintiff's sinus issues were unrelated to the implant.



### PATRICK SHELDON

With over 30 years of practice, Patrick's current trial practice emphasizes representations of professionals in the health and legal fields in civil matters and disciplinary matters. He represents doctors, lawyers, chiropractors, hospitals, nurses and naturopaths. He has handled hundreds of negligence and disciplinary matters for professionals. Patrick also has trial experience in products liability, premises liability, consumer protection, construction defect and surety matters.



### NATALIE HEINEMAN

Natalie's civil litigation practice focuses on the defense of medical professionals. She represents health care providers in the defense of negligence and wrongful death claims, as well as in state board disciplinary matters. Natalie's practice includes defending physicians, nurses, pharmacists, oral surgeons, chiropractors, therapists, dentists, and other health care specialists.



# WASHINGTON



## SUMMARY JUDGEMENT DISMISSAL OF PREMISES LIABILITY

Shareholder Kimberly Reppart recently won two summary judgment motions resulting in complete dismissal of a premises liability suit asserted against two multi-national retailers. The plaintiff sustained a significant traumatic brain injury when she was hit by a car in a shopping center parking lot.

Plaintiff sued the driver as well as the owner of the shopping plaza and several current and former retail tenants. The court agreed that the retail tenants owed no duty with respect to the design of the parking lot, which the plaintiff claimed contributed to the accident. The dismissal avoids expansion of commercial tenant tort duties with respect to common area parking lots.



### KIMBERLY REPPART

Kimberly Reppart began her broad civil litigation defense practice in 2001, focusing on insurance coverage and bad faith, serious injury and wrongful death, UIM, construction defect, contract disputes, premises liability, property disputes, logging and timber trespass for both insurance companies and corporate clients. Kim also devotes a sizable portion of her practice to appellate work and complex motion practice.

# WEST VIRGINIA



## ATTORNEYS SECURE SUMMARY JUDGEMENT

**B**ailey & Wyant, PLLC Equity Member Kelly Morgan and Of Counsel Kristen Hammond of the Charleston office successfully secured summary judgment for their clients in Kanawha County Circuit Court.

Mrs. Morgan and Mrs. Hammond successfully defended the West Virginia Department of Human Resources against claims of breach of contract, promissory estoppel, as well as negligent and fraudulent inducement, concealment and execution.


Mrs. Morgan and Mrs. Hammond successfully argued that DHHR was entitled to be dismissed based on sovereign immunity, qualified immunity, and the gist of the action doctrine.



KELLY MORGAN



KRISTEN HAMMOND

A 3D map of the United States where each state is composed of the names of major cities within that state, such as New York, Los Angeles, and Chicago.

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## THE GAVEL SUMMER SUMMIT SURGICAL STRIKE!

- Dissecting The Driving Forces Behind Catastrophic Injuries
- The Gavel Interactive Training Seminars- Exclusive CE/CLE Seminars Hosted by Specialist Members from Vetted Law Firm Members and their Clients

**AUGUST 9, 2019  
COLUMBUS, OHIO**



## THE GAVEL CLAIMS & RISK PROFESSIONALS APPRECIATION DINNER

PLEASE BE OUR GUEST

**OCTOBER 24, 2019**

**7:30pm - 9:30pm**

AT THE **GARRISON TAVERN**

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TAMPA, FL 33602

Please RSVP to  
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561.567.1586

# PLEASE SAVE THE DATES!



# RIMS 2019

## The Gavel Booth at RIMS Annual Conference

The Gavel hosted our annual networking booth again during the RIMS Conference in Boston, MA, and we provided complimentary attendance (\$1,800 value) to the 23 law firm members who chose to join us (all law firm members are always welcome!). Also, we sponsored the aisle banners for added exposure! Our booth was at the base of the entrance escalator, just in front of Chubb Insurance. **Please plan to join us at RIMS 2020 in Denver, CO!**







*SAVE THE DATE:*



# THE GAVEL NATIONAL CONFERENCE IV

JANUARY 20-22, 2020

## THE GAVEL EDUCATION PROGRAM

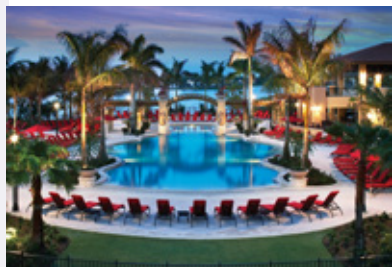
10-12 CE & CLE credits (anticipated) presented by  
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