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ATTORNEYS AND COUNSELLORS AT LAW

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CIVIL PROCEDURE – Because Connecticut is a fact-pleading state rather than a notice-pleading state, a Superior Court determines that a plaintiff must allege facts beyond mere reference to the language delineated in General Statutes § 14-295 in order to state a claim for double or treble damages based on said statute:

The defendant moved to strike the plaintiff's claim for double or treble damages brought pursuant to General Statutes § 14-295 in a wrongful death claim arising out of an alleged rear-end collision. The defendant argued that the plaintiff failed to allege sufficient facts to establish reckless or deliberate conduct. In opposition, the plaintiff argued that the "majority view" among superior courts was that a plaintiff need only make the general allegations referenced in § 14-295. The court grants the motion to strike, concluding that Connecticut is a fact-pleading, not a notice-pleading, state and that the legislature did not evidence any intention to dispense with the fact-pleading requirements of which it is presumed to have been aware in enacting the statute at issue. *Bumpus v. Tropiano*, 2008 WL 3853364 (Conn.Super.)(Corradino, J.)

CIVIL PROCEDURE – The Appellate Court affirms the preclusion of expert testimony in a medical malpractice action:

The plaintiff alleged malpractice against her physician, a board certified internist, arising out of the alleged failure to timely diagnosis the plaintiff's condition, leading to the plaintiff's death. The plaintiff disclosed two expert witnesses. The first opined that the decedent died from a pulmonary embolism, and that the defendant failed to timely diagnosis and treat the condition. The second expert was board certified in both cardiology and internal medicine, and opined that the decedent could have died from one of three conditions: a pulmonary embolism, ischemic heart disease or viral myocarditis, and that the failure of the defendant to diagnosis or follow up and treat

these conditions was a breach of the standard of care of a board certified internist. On appeal, the Appellate Court affirms the granting of a motion in limine to preclude the testimony of the second expert. Even though the expert intended to opine that the failure of the defendant to diagnose any one of the three possible causes breached the standard of care applicable to a board certified internist, because the expert admitted that he arrived at his diagnosis of viral myocarditis and ischemic heart disease as a result of his education, training and experience as a cardiologist, his opinion was not appropriate as to an internist. The Appellate Court further states that the expert's proposed testimony as to the cause of death was speculative since he could only limit the cause of death to three possible causes. Finally, the Court also concludes that the proposed testimony of the second expert was properly excluded since

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it was, in part, duplicative of the first expert's proposed testimony and, in part, contradictory of the first expert's proposed testimony, creating a potential to confuse the jury. *Russo v. Phoenix Internal Medicine Assoc., P.C.*, 109 Conn. App. 80 (2008)

CONSTRUCTION LAW – *The owner of a residential home under construction owes no duty to the injured employee of an independent contractor under the circumstances presented:* The plaintiff was employed by an independent contractor to perform blasting work at a construction project at a residence owned by the defendant. He was allegedly injured when he was struck by either an excavator bucket or an item hanging from the excavator bucket, and was propelled ten to fifteen feet. The defendant owner moved for summary judgment on the basis that he owed no duty to the plaintiff as he was not in control of the work area when the alleged accident occurred. The plaintiff argued in opposition to the motion that there were issues of fact with regard to the degree of control which the defendant exercised based on allegedly conflicting averments from the defendant in his affidavit and his deposition testimony. The court grants the motion for summary judgment. The court finds that there are no such issues of fact. It further concludes that none of the exceptions articulated by the Appellate Court in *Mozeleski v. Thomas*, 76 Conn.App. 287, cert. denied 264 Conn. 904 (2003), applies on which a duty of care may be predicated. Specifically, the trial court finds that inspecting the work done by subcontractors does not indicate control over the worksite; that furnishing specifications for the job does not demonstrate control of the manner and means of accomplishing the work; and that the fact that an owner may remove contractors from a job does not demonstrate control of the worksite because it is a contractual and not a supervisory right. The trial court further concludes that there are no allegations in the complaint which would bring the claim within the exception for ultra-hazardous activities and no evidence or argument that the defendant had a non-delegable duty to take safety precautions at the site beyond those previously addressed. *Heaslip v. Mota's Sewer Service, LLC*, 2008 WL 2345282 (Conn. Super.)(Peck, J.)

INSURANCE LAW – *A bystander emotional distress claim does not trigger a separate per person policy limit:* A minor was struck and injured by a motor vehicle operated by the defendant. The minor's mother was also

a party plaintiff in the suit, alleging bystander emotional distress as a result of witnessing the injuries to her son. The defendant carried a motor vehicle liability insurance policy with a \$100,000.00 per person limit and a \$300,000.00 per accident limit. On appeal from the trial court's decision, the Supreme Court affirms the finding that the bystander emotional distress claim does not constitute a separate "bodily injury" so as to trigger a separate per occurrence limit. The policy defined "bodily injury" as "any bodily injury, sickness, disease or death sustained by any person." Following its prior precedent, the Supreme Court opines that emotional distress without accompanying physical harm does not constitute a "bodily injury" under this definition. In the case at bar, there was, therefore, "only one bodily injury within the meaning of the policy . . . , namely, the injuries suffered by the plaintiff's son." Accordingly, the Court holds that the mother could not recover under a separate \$100,000.00 policy limit. *Taylor v. Mucci*, 288 Conn. 379 (2008)

INSURANCE LAW – *A policy amendment which makes workers' compensation benefits received by an insured deductible for purposes of determining whether an insured is entitled to underinsured motorist benefits is effective without the written consent of the insured:* The plaintiff's decedent allegedly died as a result of injuries she sustained in a motor vehicle accident. At the time of the accident, she had underinsured motorist benefits under a policy issued by American Spirit which was thereafter transferred to Infinity. The policy provided for uninsured motorist benefits in the amount of \$100,000 per person and \$300,000 per accident. The plaintiff's decedent received \$20,000 from the alleged tortfeasor and nearly \$200,000 in surviving dependent benefits from the decedent's employer's workers' compensation carrier. The defendants in the underinsured motorist claim moved for summary judgment on the basis that the plaintiff's decedent recovered more from the tortfeasor and workers' compensation carrier than the underinsured motorist limits of the policy. The plaintiff objected, arguing that the policy language permitting the deduction of workers' compensation benefits received by an insured was added after the original policy was issued and the plaintiff had not consented to the amendment adding that language. Reviewing the language contained in General Statutes § 38a-336(a)(1), on which the plaintiff relied in making its argument, the court concludes that the language applies solely to an insured's selection of policy limits and

does not preclude an insurer from amending a policy by appropriate means to add a clause providing for a reduction of uninsured motorist benefits by amounts received from workers' compensation. The court enters judgment for the defendants, concluding that the plaintiff is not entitled to recover any uninsured motorist benefits under the policy for his decedent's accident. *Johnson v. Great American Spirit Ins. Co.*, 2008 WL 2553031 (Conn.Super.)(Peck, J.)

INSURANCE LAW – A Superior Court determines that an underinsured motorist claim accrues on the date the plaintiff was allegedly involved in a motor vehicle accident for purposes of determining whether the old Offer of Judgment procedure applies to the claim: The plaintiff alleged that she was involved and sustained injuries in a motor vehicle accident that occurred on April 10, 2004. She brought an underinsured motorist claim and, on July 9, 2008, filed an offer of judgment. The defendant objected to the offer of judgment, arguing that the amended offer of compromise procedure was applicable to the claim. In support of its position, it argued that the claim did not accrue until the plaintiff had exhausted the policy limits of the alleged tortfeasor, after the effective date of the amended offer of judgment procedure. The court rejects the defendant's argument. Noting that in Connecticut, "a cause of action accrues when a plaintiff suffers actionable harm," which occurs "when the plaintiff discovers or should discover, through the exercise of reasonable care, that he or she has been injured and that the defendant's conduct caused such injury," the court concludes that the complaint sets forth facts to establish "that the plaintiff knew she was injured, due to conduct of the defendants, well before October 1, 2005." *Waldo v. Liberty Mutual*, 2008 WL 3916458 (Conn.Super.)(Alvord, J.)

INSURANCE LAW – The Supreme Court holds that the issue of late notice should have been submitted to the jury: The insured publishing company brought suit against its insurer claiming that it had breached the policy by refusing to pay the claim arising out of employee dishonesty and theft during January of 1995. The insured notified its insurance agent of the loss during January of 1995. The agent notified the insurer during March of 1995. The insurer informed the insured that it would be unable to investigate the claims until proof of loss forms were filed. The insured did not return the forms until August of 1995. After suit was commenced, the insurer asserted as a special

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PEOPLE IN THE NEWS

Jackson, O'Keefe and Phelan attends the annual Connecticut Conference of Municipalities Conference



Jackson, O'Keefe and Phelan partners (left to right) Kathryn M. Cunningham, Joseph M. Busher, Jr., and Denise Martino Phelan, at the Connecticut Conference of Municipalities' annual convention at the Connecticut Convention Center in Hartford on October 22, where the firm had an opportunity to greet many clients.

Attorneys Denise Martino Phelan, Kathryn M. Cunningham, and Joseph M. Busher, Jr., recently attended the Connecticut Conference of Municipalities annual convention at the Connecticut Convention Center. Jackson, O'Keefe and Phelan has represented municipalities, their employees and officials, for over fifty years. The firm routinely handles defective highway claims, negligence claims against municipal employees, negligence claims against board of education employees, employment related matters, and also defends claims ranging from property damage, flooding, and land use issues to defamation and interference with business expectancies. For more information about our resources and capabilities, please do not hesitate to contact us or visit our website.

PEOPLE IN THE NEWS

Jackson, O’Keefe and Phelan Attorneys Recognized as “Super Lawyers”



Attorney
Andrew J. O’Keefe



Attorney
Denise Martino Phelan



Attorney
Joseph M. Busher, Jr.

Three partners in the firm have been selected as members of the top 5% of attorneys in New England by *Law and Politics*, in its annual listing of outstanding lawyers who have obtained a high degree of peer recognition and professional achievement.

Attorneys are selected for this distinction during a lengthy, multi-step selection process. The foundation of the process is a 63,000 ballot annual survey sent to active lawyers in Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont and Maine. Attorneys are asked to nominate the best attorneys they have personally observed in action.

Law and Politics researches each candidate by reviewing national and local periodicals and trade journals, searching professional data bases and on-line sources and conducting in-person and telephone meetings with law firms. Additionally, *Law and Politics* examines the background and experience of candidates and evaluates indicators of peer recognition and professional achievement, such as verdicts and settlements, transactions, as well as honors and awards. The candidates are then divided into more than 60 practice areas and are evaluated by a blue ribbon panel of preeminent peers in their practice area. The top 5% of attorneys are selected as Super Lawyers.

The firm congratulates partners Andrew J. O’Keefe, Denise Martino Phelan and Joseph M. Busher, Jr. on obtaining this mark of distinction.

Andrew J. O’Keefe is a founding partner of the law firm. Since forming the firm, his practice has concentrated in the areas of litigation and appellate advocacy. Attorney O’Keefe specializes in all aspects of litigation, including medical malpractice, product liability, commercial litigation, corporate litigation, insurance law, and general negligence. Attorney O’Keefe is an Adjunct Professor of law at the University

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of Connecticut School of Law and his breadth of knowledge regarding tort law and litigation in the state of Connecticut is unsurpassed. Currently, Attorney O'Keefe serves as the Chairman of the Freedom of Information Commission.

Denise Martino Phelan is a partner in the Hartford office of Jackson, O'Keefe and Phelan. Attorney Phelan specializes in all aspects of civil litigation. Her practice has concentrated in the areas of medical malpractice, construction, products liability, wrongful death claims and the defense of state and municipal governments in a wide variety of tort actions. Attorney Phelan has counseled and represented one of the country's leading psychiatric facilities relative to risk management and the defense of various claims. She has also represented numerous municipalities, police departments and boards of education relative to civil claims of a wide variety including employment, civil rights and sexual misconduct.

Attorney Phelan has been a member of the Connecticut Bar for over 28 years. She has also served as a member of the Connecticut Bar Examining Committee since 1992. She has recently been appointed to the Multi-State Professional Responsibility Examination Committee of the National Conference of Bar Examiners. Attorney Phelan was admitted to the Connecticut Bar and the United States District Court for the District of Connecticut in 1980. She was admitted to the United States Circuit Court of Appeals for the Second Circuit in 1985 and the United States Supreme Court in 1988.

Joseph M. Busher, Jr. is a partner in the Hartford office of Jackson, O'Keefe and Phelan. Since joining the firm Attorney Busher has concentrated his practice in insurance coverage litigation, personal injury litigation, general tort litigation, and appellate advocacy. He has prepared over 40 appellate briefs, petitions and motions for the Connecticut Supreme Court, the United States Court of Appeals for the Second Circuit and the Connecticut Appellate Court, and has argued before the Connecticut Appellate Court. He was admitted to the Connecticut Bar in 1996, to the U.S. District Court, District of Connecticut in 1997 the Second Circuit Court of Appeals in 1998, and the Mashantucket Pequot Tribal Court in 2006. He attended the College of the Holy Cross where he obtained his Bachelor of Arts degree, with honors, in 1993. While at Holy Cross he served as the Editor- In-Chief of a college newspaper. He obtained his Doctorate of Jurisprudence from the University of Connecticut School of Law, with honors, in 1996. He concentrated in Constitutional Law and was awarded the American Jurisprudence Award and Cornelius W. Wickersham, Jr. Award for Excellence in Constitutional Law. Attorney Busher is an Adjunct Instructor at the University of Connecticut School of Law, where he teaches a course focusing on appellate advocacy.

defense the plaintiff's failure to provide prompt notice as required by the policy and sought a jury instruction on the issue. On appeal, the Connecticut Supreme Court holds that a jury instruction addressing these issues should have been provided. The Supreme Court holds that there was ample evidence to support a jury instruction on these issues and that there were numerous unresolved issues of fact which should have been submitted to the jury, including the timing of the

notice, whether the timing of the notice had prejudiced the defendant, whether the insurance agency was an agent of the insurer, and whether the notice provided was adequate under the policy. The Supreme Court notes that it was the insured's burden to establish that the notice was timely or that the insurer was not prejudiced by the timing of the notice. *National Publishing Co. v. Hartford Fire Ins. Co.*, 287 Conn. 664 (2008)

PEOPLE IN THE NEWS



Attorney
Philip R. Dunn, Jr.

Attorney Philip R. Dunn, Jr., obtains summary judgment in an insurance coverage matter

Attorney Dunn recently obtained summary judgment on behalf of an auto insurer. The uninsured motorist claim arose out of an automobile accident that occurred on September 27, 2005, at 9:00 a.m. in Ledyard, Connecticut. The plaintiff was operating her vehicle in a southbound direction on Route 12 behind the tortfeasor, who lost control of his vehicle on a curve in the road. The plaintiff recovered UM benefits under her own policy and then sought to recover under her mother's policy as well. Attorney Dunn obtained summary judgment pursuant to the policy provisions excluding from the definition of "insured" anyone who owns a motor vehicle that is required to be insured, and barring UM coverage for any motor vehicle or motorcycle owned by the insured.

MEDICAL MALPRACTICE – *A defendant was not entitled to summary judgment on a failure to diagnose lung cancer claim where it was undisputed that the plaintiff had less than a 50% chance of survival with successful treatment:* The plaintiff alleged that a radiologist had failed to diagnose lung cancer by failing to notice changes between a July 2001 and October 2001 chest x-ray. The defendant moved for summary judgment, arguing that the plaintiff could not pursue a lost chance recovery since the plaintiff's expert admitted that the plaintiff had less than a 50% chance of survival or successful treatment even had appropriate treatment been provided. On the plaintiff's appeal, the Appellate Court reverses the Superior Court ruling, holding that the plaintiff should have been permitted to pursue damage claims for pain and suffering, the decedent's inability to experience the palliative benefit of available medical treatment, a decrease in life expectancy, and loss of enjoyment of life. The Court states that the plaintiff should have been given an opportunity to present evidence of proximate cause with regard to these issues and that the evidence proffered by the defendant failed to establish that there was no genuine issue of material fact with regard to these issues. *Peterson v. Ocean Radiology Assoc., P.C.*, 109 Conn. App. 275 (2008)

MUNICIPAL LAW – *A claim alleging a "failure to rescue" the plaintiff's decedent from a flooding portion of roadway is not encompassed within General Statutes § 13a-149, the defective highway statute:* Plaintiff's decedent drove her vehicle onto a portion of roadway which was flooding and ultimately drowned. Her estate brought suit against certain police officers who were at the scene where she became submerged and drowned and the Town by which they were employed. The estate claimed, in part, that the defendants were negligent in failing to come to the decedent's rescue. The defendants moved to strike those counts, arguing that the claims were essentially claims involving an allegedly defective highway and were, therefore, precluded by General Statutes, § 13a-149. The plaintiff argued in opposition that the officers had a duty to rescue the decedent regardless of any alleged defect in the highway and that the alleged damages flowed not from any alleged defect but from the failure of the officers to rescue the decedent. The trial court concludes that "there is no nexus between the police officers' alleged failure to assist the decedent and the defective state of the highway" and, further, that the defective highway is not a consequence of the alleged failure to rescue. While it concludes that the failure to rescue claim is not foreclosed by the defective

highway statute, it nonetheless grants the motion to strike the relevant counts, on the basis that the counts contain allegations which clearly come within the ambit of the defective highway statute. *Padula v. City of West Haven*, 2008 WL 2745902 (Conn.Super.)(Bellis, J.)

MUNICIPAL LAW – A municipality may not transfer responsibility for snow and ice removal on public sidewalks to the State of Connecticut: General Statutes § 7-163a permits a municipality to adopt an ordinance that shifts to the owner of land abutting a public sidewalk both the duty of care and liability with respect to the presence of snow and ice on the sidewalk. Reversing a ruling of the Superior Court, the Supreme Court holds that this statute does not relieve a municipality of its duty of care or liability with respect to snow or ice on a public sidewalk when the State is the abutting landowner. The Court reasons that § 7-163a does not contain an express waiver of the State's sovereign immunity from liability and, therefore, the City's ordinance pursuant to § 7-163a could not have imposed a duty or liability on the state with respect to public sidewalks that abut State property. The Court further holds that a municipality, therefore, remains responsible for removing snow and/or ice from such public sidewalks and remains liable if it fails to do so. In a dissent, Justice Schaller reasons that municipalities should not be held responsible under these circumstances pursuant to the plain and unambiguous terms of § 7-163a. He argues that the Court bases its decision on the lack of remedy for the plaintiff, a concern which should be addressed to the Legislature rather than the Supreme Court. *Rivers v. New Britain*, 288 Conn. 1 (2008)

TORT LAW – A Superior Court finds that a claim against defendants for the kidnapping, assault and murder of a neighbor by the defendants' worker is insufficient as a matter of law, as the defendants owed no duty to the neighbor on which to predicate liability: The defendants employed an individual to remove trees, perform masonry work and run errands for them. After he was hired, the defendants learned that the individual had a criminal record for offenses including burglary, larceny and disorderly conduct; had previously used marijuana; and, had attempted suicide. The defendants had also observed the individual exhibit violent, unstable and self-abusive behavior on several occasions. On December 12, 2005, the defendants' neighbor was jogging in the area when she was kidnapped by this individual and taken to the defendants' property.

The neighbor was subsequently beaten and expired from her injuries. Her Estate brought suit against her neighbors, alleging negligence for failing to warn the decedent about this individual's violent tendencies, of which they were aware, and also alleging negligent hiring, retention and supervision. The defendants moved to strike the complaint on the basis that they owed no duty to the plaintiff's decedent. The trial court agrees and grants the motion to strike, concluding: (1) that it is not reasonably foreseeable that a person convicted of burglary, larceny and disorderly conduct will later commit assault, battery and murder or that someone who has used marijuana or attempted suicide will subsequently commit such brutal, violent acts; and (2) that public policy considerations do not support finding a duty of care under the circumstances. With respect to the four policy considerations outlined by the Appellate Court in *Seguro v. Cummiskey*, 82 Conn.App. 186 (2004), the trial court concludes that the normal expectation of an employer hiring a person does not include the possibility that someone convicted of burglary, larceny and disorderly conduct will commit violent assault and murder and, further, that the reasonable citizen cannot expect that an employer would be responsible for every vicious criminal act of an off-duty employee, even an employee with a criminal record. The court also concludes that it is the public policy of the state to encourage, or at least not discourage, employers to hire persons with criminal records. It also concludes that the increased potential for litigation weighs against recognizing a duty beyond that which is currently recognized in the state. Finally, looking to neighboring jurisdictions, the court concludes that there are no cases sufficiently similar on the facts to persuade the court to recognize such a duty. *Baker v. Spinney*, 2008 WL 2502609 (Conn.Super.)(Booth, J.)

To receive the Jackson, O'Keefe and Phelan Quarterly Law Reporter via email, please email Attorney Joseph M. Busher at jmbusher@joplaw.com. Archive copies of prior issues of the Quarterly Law Reporter are also available via email in PDF format.

ABOUT THE FIRM

The Law Offices of Jackson, O’Keefe & Phelan are located in Hartford, Southington, and East Haddam, Connecticut. The firm specializes in litigation and appellate work while also providing expertise in general practice areas including banking, real estate, estate planning, probate, divorce, family and corporate law.



Jackson, O’Keefe & Phelan has been engaged in work for major insurance companies since the late 1950s. Our experience in wrongful death, motor vehicle claims, premises liability, insurance law and related coverage questions, arbitration and mediation, product liability, medical and legal malpractice, environmental matters, municipal claims, Section 1983 actions and other federal civil rights claims, as well as property and casualty losses of a diverse nature demonstrate the broad scope of our defense experience.



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