TARSHIS CATANIA LIBERTH MAHON & MILLIGRAM PLLC

attorneys and counsellors at law

Newsletter

Issue 14

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January 2009

Hobart S. Simpson

Elevated to Partner

The law firm of Tarshis, Catania, Liberth, Mahon & Milligram, PLLC takes pleasure in announcing that **Hobart J. Simpson** has become a partner as of January 1, 2009. He graduated from the State University of New York at New Paltz (B.A., *magna cum laude*) and received his J.D. from Albany Law School. His areas of practice include construction, commercial, personal injury and general litigation.

Michelle F. Rider

Joins Firm As Partner

Michelle F. Rider has joined the firm as partner. Ms. Rider received her B.B.A in Accounting, summa cum laude, from St. Bonaventure University in 1988 and was a staff accountant with Coopers & Lybrand, having become a certified public accountant in 1991. She graduated from Albany Law School of Union University, cum laude, in 1995 where she was a member of the Albany Law Review. Her past experiences in both private practice and as in-house counsel for a multi-national public company have led her to develop a practical, business oriented approach and style to her legal analysis and client relationships. Her areas of practice include corporate law, commercial transactions, acquisitions and divestitures and estate and succession planning.

WHERE THERE'S A WILL, THERE'S A WAY

Joseph A. Catania, Jr.

The distraught mother engaged our firm to help. The family had just suffered a terrible tragedy. A treasured young boy was dead. Was there anything we could do to bring some measure of justice and resolution to her and the boy's father?

On a fall day a few years ago, twin 13-year-old brothers were enlisted by their grandfather and cousin to "drive" deer within their range so that the two adults could shoot them. The young boys were given rifles. They were in camouflage. The grandfather and cousin instructed them to move out ahead of them and along the terrain to force the deer into their range. The grandfather, a diabetic with poor eyesight and an unsteady hand, mistook one of the boys for game, and pulled the trigger.

When the boy went down, his twin pleaded for help. The grandfather and cousin reluctantly came to where the boys were positioned. One of the two kicked at him as if he didn't believe the boy was shot. They refused to help him. They took time to drag an illegally taken deer out of the woods and load it on their pick-up truck, drive to the store to shop for a pair of hunting gloves and, only then, after almost an hour of indifferent neglect, brought the child to the hospital. It was too late. The boy bled to death. The grandfather and cousin plead guilty to manslaughter and criminally negligent homicide, respectively. The grandfather is still in jail.

Our firm arranged to have the young boy's mother appointed as Administratrix of his Estate so, as the Estate's representative, she could bring an action on its behalf against the guilty parties for the dead child's pain and suffering and the financial loss to the Estate caused by his death, known as a wrongful death claim.

Unfortunately, the cousin was uninsured and essentially asset-less. The insurance company that would have covered the grandfather disclaimed coverage, relying on an exclusion in the policy for bodily injury claims made by a related member of the household against its insured. The child, indeed, had resided with the grandfather and was, therefore, a related person who was a member of the household. Our research disclosed that the disclaimer was valid. It seemed that there was no fund against which the child's Estate could recover and that any meaningful justice would elude the client.

Was there a way around this dilemma? We thought so. Many years ago automobile insurance policies excluded coverage for interspousal claims arising out of automobile accidents. However, if the passenger spouse was injured in an accident caused, at least in part, by the spouse who was operating the vehicle, it was common practice to sue the other offending vehicle only. That party inevitably and subsequently brought a claim against the spouse that had operated the vehicle. Lawyers call this a "claim over". The defendant third party pleads: "If I am found responsible in any degree or percentage, then I say that the operator of the other vehicle, driven by the injured party's spouse, should also be found responsible, in whole or in part, and should pay me the amount of any verdict against me that represents more than my fair share of culpability for the accident".

A line of cases held that on that claim over, the insurance company could not disclaim. Since the party bringing the claim over was the other vehicle involved in the accident and not the "related spouse", the exclusion did not apply.

Both of the defendants, the grandfather and cousin, had defaulted in the action brought by our office against them since neither had means to pay for any defense, let alone respond to any verdict. However, on behalf of the estate, it was agreed to waive the default of the cousin so that he could "claim over" against the grandfather. After all, it appeared that most of the culpable conduct was on the grandfather's shoulders anyway. By analogizing to the line of cases involving automobile policies, we thought we could secure coverage for the grandfather on any claim made by the cousin against him for contribution to satisfy a verdict. The exclusion would not apply since the claim, unlike that made by the Estate, was someone who, although related, was not a member of the household.

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AT- WILL DOCTRINE ALIVE AND WELL

Jay F. Jason

In a recent case entitled, Smalley, *et al.* v. The Dreyfus Corp., *et al*, 10 NY3rd 55, 853N.Y.S.2d270 (2008), the Court of Appeals reaffirmed the long held rule in New York that, absent "a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at-will remains unimpaired" citing Murphy v. American Home Products Corp., 58N.Y.2d293, 305, 461 N.Y.S. 2d 232 (1983).

In the Smalley case the plaintiffs alleged that they were fraudulently induced to either accept employment or to remain employed based upon the representations of their employer that it was not contemplating a merger with another financial services firm. Unbeknownst to those employees, the employer actually was engaged in merger discussions during the time that it represented otherwise to the plaintiffs. Ultimately, after four years of such merger discussions the employer did consummate a merger. As a result of that merger the employment of each of the plaintiffs was terminated.

The Court observed that the plaintiffs were each employees at-will. That is to say, none of the plaintiffs had an employment contract with a definite term and there was no impermissible purpose or statutory proscription to their termination. In fact, each of the employees acknowledged having executed an employment contract that stated "I understand that such employment will be for an indefinite period and may be terminate at any time with or without notice."

The plaintiffs attempted to avoid the well established consequences of the New York employment at-will doctrine by asserting a tort of "fraudulent inducement." As it has in the past, the Court of Appeals took a dim view of this attempt to avoid the consequences of employment at-will. As in many other cases where discharged employees have tried to construct a tort cause of action in order to collect damages from a discharging employer, the Court ruled here, consistent with its many other decisions, that employment at-will means exactly that. The court reiterated that just as employees at-will have the unfettered right to terminate their employment without notice or damages flowing to the employer, so too do employers have the right to terminated at-will employees.

Therefore, despite the numerous attempts by plaintiffs who feel aggrieved by the actions of their employers in terminating their employment, the Court of Appeals has once again reaffirmed that it will not allow such plaintiffs to avoid this long established doctrine of New York Law.

IMPORTANT DATE

IF YOU PLAN TO ASCERT A TAX EXEMPT STATUS, YOU MUST APPLY FOR RECOGNITION WITH THE IRS BEFORE

MARCH 1

WHAT HAVE WE BEEN UP TO?

Steven I. Milligram

* A settlement on a personal injury case. 90 year old client fell out of the bed which resulted in a fractured hip.

* Settlement of a wrongful death case. A woman was run over by a car and died instantly. Settled for almost full amount of insurance coverage.

* A summary judgment in favor of our client and a dismissal of all claims against our client upheld in appellate division.

Rhett Weires, Esq., a partner specializing in litigation, successfully defended a prominent local hospital against a wrongful death malpractice claim. Plaintiff brought a wrongful death suit on the behalf of the estate of the decedent, claiming malpractice on the part of the hospital and two surgeons. After a three week trial the jury delivered a verdict finding that the hospital's care and treatment did not depart from accepted standards, thereby vindicating the hospital.

Rhett D. Weires

TEAM TCLMM GETS DOWN AND DIRTY FOR HABITAT FOR HUMANITY

During late October, a few of our attorneys gave up their time and "dug in." Our firm has been volunteering for the Habitat for Humanity Attorney Build Day for several years now. This latest project was to rebuild a house on East Parameter Street in downtown Newburgh.

Julia Goings-Perrot Associate (left)….

Even doing hard labor, Julia still has a smile!

Michael Catania, Associate….

"Anyone need a ride?"

WHAT HAVE WE BEEN UP TO?

UPCOMING SEMINAR: HUMAN RESOURCES LAW UPDATE

Julia Goings—Perrot will be one of three speakers at a local seminar hosted by National Business Institute on March 18th at the Poughkeepsie Grand Hotel. The seminar will cover areas such as lawful recruitment, current wage and leave regulations and lawful terminations. Ms. Goings-Perrot will speak on effective handbooks and record keeping procedures, current wage and leave time regualtions and current legislative trends. Julia practices in the areas of health law, employment law, intellectual property and corporate law. For more information on registering for the seminar, please visit our web site at www.tclmm.com or call our office at 845-565-1100.

Julia also represented a healthcare provider against a health insurance carrier. The carrier dropped their demand against the provider for the return of a substantial amount of alleged overpayment spanning multiple years due to her aggressive efforts.

THE STAFF OF TCLMM "ADOPTS A FAMILY"

The staff of TCLMM participated in Catholic Charities Community Services of Orange County's "Adopt a Family 2008" program. We collected gifts and clothing for a needy family of five. Overall, Catholic Charities distributed more than 7,000 gifts in Orange County and was also able to give assistance to families in Sullivan County.

STEVE TARSHIS SELECTED FOR INCLUSION IN NEW YORK SUPER LAWYERS CORPORATE COUNSEL EDITION

Steven L. Tarshis was chosen to be featured in the January/February 2009 edition of Super Lawyers—Corporate Counsel Edition magazine. Mr. Tarshis was the only Hudson Valley attorney selected in the category Business/Corporate Law. Mr. Tarshis also holds a Masters degree in Taxation.

Super Lawyers is an annual listing of outstanding lawyers who have attained a high degree of peer recognition and professional achievement. The selection process includes peer nominations, a blue ribbon panel review by leading attorneys from each practice area and independent research on the candidates. Factors considered and reviewed include background and years of experience in their primary area of law, the number of cases or transactions, representative clients, major verdicts, honors and awards, position within the bar, scholarly work, lectures and pro bono activity. Only the top 5% of the licensed attorneys in the state are selected.

NEW FMLA REGULATIONS—ARE YOU PREPARED?

The **Family and Medical Leave Act of 1993** is a United States labor law allowing an employee to take unpaid leave due to a serious health condition that makes the employee unable to perform his job or to care for a sick family member or to care for a new son or daughter (including by birth, adoption or foster care). The bill was among the first signed into law by President Clinton in his first term. After years of waiting, on November 17, 2008, the U.S. Labor Department (DOL) published new regulations interpreting the Family and Medical Leave Act (FMLA). These are the first significant changes since 1994, and will impact every employer subject to the law. These changes come in effect on January 16, 2009.

The department says that many of the revisions were designed to clarify the requirements that the FMLA imposes on both employees and employers and to improve the communication between employers and employees.

Here are summaries of some of the significant revisions included in the final rules.

Serious Health Condition: While the rule retains the six individual definitions of "serious health condition," it adds guidance on some regulatory matters. First, it clarifies that if an employee is taking leave involving more than three consecutive calendar days of incapacity plus two visits to a healthcare provider, the two visits must occur within 30 days of the period of incapacity. The first visit must occur within 7 days of onset of incapacity. Second, it defines "periodic visits to a healthcare provider" for chronic serious health conditions as at least two visits to a healthcare provider per year.

Intermittent Leave: The final rule clarifies that employees who take intermittent FMLA leave have a statutory obligation to make a “reasonable effort” to schedule such leave so as not to disrupt unduly the employer's operations.

Employee Notice: The final rule states that when an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

Gaps in Service: The final rule adds a new paragraph that addresses the requirement that employees are eligible to take FMLA leave only if they have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12-month period preceding the leave. The final rule states that, although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of seven years or more need not be counted.

Light Duty: Under the final rule, time spent in "light duty" work does not count against an employee's FMLA leave entitlement, and the employee's right to job restoration is held in abeyance during the light duty period. If an employee is voluntarily doing light duty work, he or she is not on FMLA leave.

Perfect Attendance Awards: The final rule changes how perfect attendance awards are treated to allow employers to deny a "perfect attendance" award to an employee who does not have perfect attendance because he or she took FMLA leave--but only if the employer treats employees taking non-FMLA leave in an identical way.

Medical Certification: In the final rule, the department adopted a change that allows employers to contact the employee's healthcare provider directly. An employer may contact the employee's healthcare provider for two purposes only: clarification and authentication of the medical certification. The employer may request no additional information beyond that included in the certification form

In response to privacy concerns expressed by employees, the department added a requirement to the final rule that specifies the employer's representative contacting the employee's healthcare provider must be a human resource professional, a leave administrator, or a management official, but in no case may it be the employee's direct supervisor.

The revision also specifies that the employee is not required to permit his or her healthcare provider to communicate with the employer. However, if the employee denies the employer permission and doesn't otherwise clarify an unclear certification, the employer may deny the designation of FMLA leave. However, prior to making any contact with the healthcare provider, the employer must first provide the employee an opportunity to resolve any deficiencies in the certification.

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WHERE THERE'S A WILL, THERE'S A WAY

There was still a problem, however. The cousin remained without funds. It is well-settled law that unless the defendant, here the cousin, actually paid more than his share of any verdict, that is, the amount that he might be obligated to pay but which represented money properly to be paid by the grandfather, his claim over against the grandfather did not ripen. If that were the case the claim over was without effect and the carrier did not have to respond.

The litigation strategy had to adapt once more to these circumstances. The Estate prepared to take a verdict against the cousin. The law provides that co-defendants are each jointly responsible for pecuniary loss, that is, loss to the Estate of the decedent of the income that the child would have theoretically contributed to the distributees, here his mom and dad, over time. Therefore, if, for example, a verdict was obtained against the cousin holding him 10% responsible for this tragedy, he would nevertheless be responsible, along with the grandfather, to pay 100% of any award for pecuniary loss. The plan, then, was to loan the cousin the money to allow him to pay the Estate the full amount of any verdict and thereby ripen his claim over against the grandfather for repayment of any amount he paid that the grandfather should properly pay. Appropriate indemnification and loan documents would be arranged to make sure that the money obtained by the loan on behalf of the cousin was placed in escrow and used only to pay the Estate. The Estate in exchange for a release given the cousin would take an assignment of the cousin's cause of action or claim against the grandfather and pursue that claim against the grandfather. We contended there should be coverage to satisfy this claim.

The above strategy was outlined in a detailed submission, supported by appropriate case law and analysis, to the insurance carrier for the grandfather that had initially refused to provide coverage. The carrier, without actually acknowledging the legitimacy of our contentions, nevertheless agreed to settle the case before trial for a meaningful sum of money. We were thus able to secure some measure of comfort and closure for the family of the victim of the defendants' outrageous negligence and indifference.

We pride ourselves on our ability to passionately pursue our client's best interests and to bring hard work and ingenuity to bear in solving their problems.

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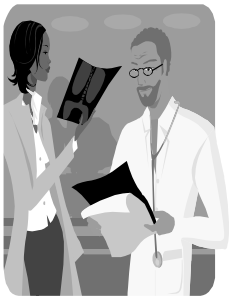
NEW FMLA REGULATIONS—ARE YOU PREPARED?



Fitness for Duty Certification: The final regulation also clarifies that employers may require a fitness-for-duty certification to address an employee's ability to perform essential job functions. However, if the employer does have such a requirement, the employer must provide the employee with a list of those essential job functions no later than the "designation notice" and specify in the designation notice that the fitness-for-duty certification must address the employee's ability to perform those essential functions.

Military Caregiver Leave: Implements the requirement to expand FMLA protections for family members caring for a covered service member with a serious injury or illness incurred in the line of duty on active duty. These family members are able to take up to 26 workweeks of leave in a 12-month period.

Leave for Qualifying Exigencies for Families of National Guard and Reserves: The law allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave to manage their affairs--"qualifying exigencies." The rule defines "qualifying exigencies" as: (1) short-notice deployment (2) military events and related activities (3) childcare and school activities (4) financial and legal arrangements (5) counseling (6) rest and recuperation (7) post-deployment activities and (8) additional activities where the employer and employee agree to the leave.

These changes may cause more confusion for both employees and employers. For more information, please visit our website at www.tclmm.com or call 565-1100.

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