Gibson & Behman, P.C.

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Gibson & Behman Wins Defense Verdict in New Hampshire Products Liability Case

Gibson & Behman recently obtained a defense verdict in favor of a product distributor sued on theories of negligence and strict product liability.

Gibson & Behman won the defense verdict for Michael Weinig, Inc. (USA) following a four-day trial in Hillsborough County Superior Court in Nashua, NH, which absolved their client of negligence and all counts of strict liability in connection with an April 8, 2004 accident occurring at Batesville Casket Company, Inc.

Plaintiff Victor Rivera, injured while employed as a moulder operator at Batesville Casket Company, Inc. in Nashua, NH claimed that a portion of the clamp on a moulder's spindle came loose at a high speed, was ejected from the moulder and struck his leg, causing a comminuted compound fracture of his right tibia and resulting in approximately $150,000 in medical bills and $40,000 in lost wages.

Gibson & Behman argued both that the product was not unreasonably dangerous and the moulder at subject was absent of defect. Moreover, they asserted it would be inappropriate to hold the product distributor liable for failure to maintain a product used at Batesville Casket Company for 18 years prior to the April 8, 2004 incident.

Gibson & Behman was able to show that prior to the accident at issue, a similar incident occurred; however in this instance the product was not in operation and no one was injured by the fallen clamp.

Upon questioning, the Plaintiff testified that he noticed the fallen clamp and subsequently he and a co-worker attempted to repair the machine themselves without reporting it either to management or maintenance. The Plaintiff further testified that neither he nor his co-worker consulted the parts manual prior to attempting to repair the moulder. It was later determined that the Plaintiff and co-worker failed to properly re-install the clamp, resulting in the unfortunate April 8, 2004 incident.

"I believe this case highlights the ability of New Hampshire jurors to stay focused through a complex product liability trial

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Rhode Island

Gibson & Behman Wins Motion for Summary Judgment

Brian T. Dougan, Esquire, of Gibson & Behman, P.C.'s Providence, Rhode Island office recently won a Motion For Summary Judgment on behalf of U-Haul Co. regarding an out of state rental agency's liability for actions of its lessee in Rhode Island.

Facts: This case arises out of an incident which occurred on May 26, 2003 in the Plaintiff's driveway in Providence, Rhode Island. On or about May 26, 2003, co-Defendant, Craig Iannucci, leased a U-Haul vehicle in Connecticut from U-Haul of Connecticut. The U-Haul vehicle was loaded by and under the direction of Mr. Iannucci. Mr. Iannucci drove the U-Haul vehicle to Providence, Rhode Island and parked the U-Haul vehicle in the Plaintiff's driveway. As Mr. Iannucci lifted the back gate of the U-Haul vehicle to unload his belongings, Mr. Iannucci's bed frame, which he placed in the U-Haul vehicle, fell out of the vehicle and struck his sister, the Plaintiff, in the head.

U-Haul's Argument: Attorney Dougan argued that there are only two statutes that impose vicarious liability on a vehicle's owner for the negligence of the vehicle's driver. Neither statute applies here. R.I. Gen. Laws § 31-34-4 ("for hire motor vehicles" statute) holds a vehicle owner liable for the negligence of the operator of the vehicle where (1) the owner of the for hire vehicle gives permission to another to operate the vehicle and (2) the owner is a party who files proof of financial responsibility with the State of Rhode Island or who is required to file proof of financial responsibility. Only Rhode Island vehicle rental companies are required to provide proof of financial responsibility. Neither Defendant is a Rhode Island vehicle rental company.

R.I. Gen. Laws § 31-33-6 ("vehicle owner" statute) imposes vicarious liability on the owner of a motor vehicle by making the operator the "agent" of the owner. The vehicle owner statute only imposes liability when accidents occur on Rhode Island public roads. Here, the accident occurred on private property.

Under R.I. Gen. Laws § 31-34-4, any person who violates the statute "shall be guilty of a misdemeanor." To extend the application of this statute to foreign rental companies would subject those who fail to file proof of financial responsibility in Rhode Island to criminal penalties, and as a general rule, criminal laws do not operate beyond their territorial limits. *Fratus v. Amerco*, 575 A.2d 989, 992 (R.I. 1990). Thus, a foreign rental agency is not required to submit proof of financial responsibility in Rhode Island and cannot be held liable under R.I. Gen. Laws § 31-34-4 for the alleged negligence of the lessee of one of its vehicles in Rhode Island. *Fratus*, 575 A.2d at 992; *Lopes v. Phillips*, 680 A.2d 65, 68 (R.I. 1996).

In *Lopes*, the lessee leased a motor vehicle in Massachusetts. *Lopes*, 680 A.2d at 66. The lessee operated the motor vehicle in Providence, Rhode Island and negligently struck Mr. Lopes' vehicle. *Id*. The Court held that the car rental company could not be held liable for the alleged negligent acts of its lessee in Rhode Island because the vehicle was not leased in Rhode Island. *Id*. at 66-68. Neither the rental company, nor its vehicle had any relationship to Rhode Island, except that the lessee, of her own volition, had driven the vehicle into the state. *Id*. at 68.

The Court in *Lopes* relied heavily on *Fratus v. Amerco*, 575 A.2d 989 (R.I. 1990). In *Fratus*, the Court found that R.I. Gen. Laws § 31-34-4 could not be applied extraterritorially to an out of state bailment. *Id*. at 992. In *Fratus,* the Court reasoned that the duty to file proof of financial responsibility was limited to owners of vehicles that were registered in Rhode Island or that were required to be registered in Rhode Island. *Id*. at 993. The *Lopes* Court, applying the standard set forth in *Fratus*, concluded that, as a matter of law, a rental car company situated in Massachusetts that was not

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Rhode Island

Gibson & Behman Wins Motion for Summary Judgment, continued

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required to file proof of financial responsibility in Rhode Island could not be held vicariously liable for the alleged negligent acts of the driver of one of its vehicles in Rhode Island. *Lopes*, 680 A.2d at 68.

Like the Defendant in *Lopes*, U-Haul neither files, nor is required to file, proof of financial responsibility in Rhode Island, as U-Haul is a foreign rental company. Similar to the lessee in *Lopes*, the lessee here, Craig Iannucci, leased the vehicle out of state and is the only alleged negligent party. In this case, neither U-Haul nor the rented vehicle had any connection to Rhode Island except that Mr. Iannucci drove the vehicle into the State. The U-Haul and its contents were under the sole control and direction of Mr. Iannucci, and any alleged negligence is on his part. Plaintiff asserts that Mr. Iannucci failed to properly load cargo into the U-Haul vehicle, negligently operated the U-Haul vehicle and negligently failed to secure the area around the vehicle prior to unloading its cargo. Like the Court in *Lopes*, this Court should find that U-Haul is not vicariously liable for the alleged negligent acts of Craig Iannucci in Rhode Island because U-Haul is a foreign rental company.

The Rhode Island "vehicle owner" statute is clear – where an accident takes place outside of Rhode Island or on a private road, R.I. Gen. Laws § 31-33-6 does not impose liability. *Pettine v. Tuplin*, 46 A.2d 42 (R. I. 1946) (the vicarious liability statute applicable to a general vehicle owner does not apply where the accident occurred on a private drive); *Pescosolido v. Crugnale*, 171 A.2d 443 (R. I. 1961) (the vicarious liability statute does not apply where the accident happened at a service station because it is not on a public highway). R.I. Gen. Laws § 31-33-6 only imposes vicarious liability on a vehicle owner if an accident occurs on a "public highway" in the state of Rhode Island; a "public highway" is defined as one "dedicated to the use of the public and not a private way used by the public merely by invitation of the owner." *Pettine*, 46 A.2d at 44. Thus, vicarious liability will not be imposed on a vehicle owner where an accident occurs on a private road in Rhode Island.

Therefore, U-Haul is not liable under the Rhode Island vehicle owner statute and summary judgment is appropriate.

Plaintiff's Argument: The Plaintiff argued that since there is no vicarious liability for out of state rental agencies under Rhode Island law, that this Court should apply the law of where the car was rented, Connecticut. Connecticut law imposes vicarious liability upon lessors for out of state accidents. The Plaintiff points to the decision by the Rhode Island Supreme Court in *Victoria v. Smythe*, 703 A.2d 619 (R.I. 1997) which held that an out of state rental agency, incorporated in Florida, would be held vicariously liable for the actions of its lessee in Rhode Island and that Florida law should apply because Florida has the most significant interest in the case. Furthermore, the Rhode Island Supreme Court opined that Florida had the better rule of law by finding out of State rental agencies vicariously liable for the actions of its lessees.

Decision: Judge Hurst agreed with Attorney Dougan's assertion that that R.I. Gen. Law § 31-34-4 ("for hire motor vehicles" statute) and R.I. Gen. Law § 31-33-6 ("vehicle owner" statute) did not apply to this case. Judge Hurst also found the Plaintiff's argument that Connecticut law should apply to be unpersuasive because this was a Rhode Island Plaintiff, the alleged tortfeasor is a Rhode Island resident and the accident occurred in Rhode Island and therefore, it was Rhode Island which had the most significant interest in this case. Because Rhode Island had the most significant interest and its laws hold that out of state rental agencies are not vicariously liable for the acts of its lessees, U-Haul's Motion For Summary Judgment was granted by Judge Hurst thereby dismissing U-Haul from this case.

New York

New York Remains a "Non-Prejudice" State… For Now

New York Insurance Companies recently avoided the legislative pains of an extremely dangerous and potentially expensive Bill known as S.6306.

S.6306 was passed in late June by both Houses of the New York State Legislature and sought to prohibit an insurer from denying a claim based on late notice unless the insurer could show "material prejudice" stemming from the delay in notice.

Furthermore, the Bill was intended to allow an injured party to file suit for declaratory judgment against an insurer without first obtaining judgment against the insured tort-feasor. Under the current New York law there is a requirement that a third party such as a Plaintiff or a claimant cannot sue an insurer directly until the underlying claim is resolved.

Also, the declaratory judgment provision of the Bill would have permitted Plaintiffs to directly sue a Defendant's insurance company to uncover and resolve all issues related to insurance coverage before the Plaintiff proved that the Defendant owed him anything.

The Bill, which faced tremendous opposition from insurance companies, was vetoed by Governor Eliot Spitzer but was given the opportunity to be revised and resubmitted at a later point in time, inviting further debate on the issues. Governor Spitzer was very enthusiastic about the Bill and its efforts at preventing insurers from denying coverage. The Legislature believes the Bill would allow "a more stream-lined litigation process, along with certainty and prompt payment for a Plaintiff."

The Legislators sought to preclude the insurers from being able to deny a claim under the late notice provision believing that the delay holds no "negative effect on the insurer's ability to respond to a claim." The Legislators also detailed their beliefs that "such denials amount to a windfall to the insurer based upon a technicality."

On the contrary however, the insurance companies believe that the Bill would have held several negative impacts for insurers and claimants alike. One belief is that the passing of the Bill would have only resulted in higher insurance costs and more litigation.

Also, it is the belief of the insurance companies that the Bill would have resulted in a tremendous increase in the amount of insurance fraud, exposing them to frivolous claims and increased costs to defend the same.

Governor Spitzer noted the late notice provision as an "important reform" but also decided that the bill was passed without sufficient feedback from all parties regarding the potential impact of the provisions.

The Governor also noted that "although there are some drafting issues with these provisions, particularly with respect to the burden of proof that must be met, if this bill merely permitted late notices of claim where there is no prejudice to the insurer, I would sign it."

In Particular, Governor Spitzer was quite fond of the Bill's declaratory judgment provision, known as Section 3001. Governor Spitzer stated that it "would allow claimants to determine whether and to what extent a Defendant's insurance coverage is available to compensate the claimant for his or her damages, before significant expense and effort is expended in prolonged litigation.

"The Bill's dual goals, streaminglining litigation and prohibiting the denial of coverage for mere technicalities, are sound, and hopefully we can enact a new Bill that accomplishes these important goals in a manner that protects the interests of the claimants, policyholders, and insurers alike," he said.

Therefore, for now, New York remains a "non-prejudice" state as it relates to late notices. Should the Bill have been passed it would have brought New York into the majority of jurisdictions which require that the carrier prove substantial prejudice before allowing a disclaimer of coverage.

Massachusetts

Gibson & Behman Obtains Defense Verdict for the MBTA

This matter arises from an alleged assault and battery case that occurred on October 11, 2002. The Plaintiff, Michael McNeill, claimed that he was beaten up by two males in an MBTA train station and then landed in the pit and struck the third-rail. As a result of the incident, the Plaintiff sustained burns to his shoulder, right hand, buttocks and head area.

The Plaintiff filed a Complaint against the MBTA alleging negligent security and failure to warn as to the third-rail. In a Motion for Summary Judgment the Plaintiff's failure to warn allegation was dismissed. The Defendant, MBTA, was represented by Scott Behman of Gibson & Behman, P.C.

The Plaintiff claimed medical damages in excess of $400,000 and made a loss wage and diminished earning capacity claim. The Plaintiff originally demanded $1,500,000 (One Million Five Hundred Thousand Dollars). Subsequently the Plaintiff demanded $750,000 (Seven Hundred and Fifty Thousand Dollars). The MBTA offered $25,000 (Twenty-Five Thousand Dollars) to settle the case which the Plaintiff rejected.

The case was tried in Suffolk Superior Court and lasted six days. At trial, defense counsel had substantial evidence that the Plaintiff was the instigator and gained access into the train station under false pretenses as he claimed he was injured and had no money for the train. Once the Plaintiff was allowed into the train station he proceeded immediately up to the platform asking "Where are they?" and posturing for an altercation. The evidence established that the Plaintiff used racial epithets towards one of the alleged assailants, an African-American male. The Plaintiff also struck a young girl who was accompanying the African-American male.

Defense counsel called several witnesses to testify on behalf of the MBTA, including MBTA police officers, inspectors and a toll collector. All of these individuals testified about the security procedures in place at the time of the incident. The Plaintiff failed to establish that the incident was caused by the negligence of the MBTA. After reviewing all of the evidence, the jury found in favor of the MBTA. The Plaintiff has filed a notice of appeal.

Gibson & Behman Wins Defense Verdict in New Hampshire Products Liability Case, continued

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and deny recovery to Plaintiffs who fail to pass the test," said Attorney Kevin O'Neill of Gibson & Behman. "While product cases may rest upon strict liability, the hurdles to recovery remain formidable and effective; however a good product and solid defense will yield a very good result."

Connecticut

Connecticut Upholds Qualified Privilege for Employment References Solicited with Employee's Consent

The Connecticut Supreme Court has announced its first decision affirmatively protecting the ability of employers to provide negative references for current or former employees upon solicitation by a prospective employer. The decision in *Miron v. University of New Haven Police Department* brings Connecticut law into agreement with the Restatement (Second) of Torts and numerous other jurisdictions that provide a qualified privilege for solicited employer references.

The *Miron* case is the result of two isolated incidents that occurred while Ms. Miron sought employment with a municipal police force following a period of employment with the University of New Haven's police department. In April, 2000, Ms. Miron applied for a position with the Glastonbury police department, authorizing, as part of that application, the department's contact with her then-supervisors at the University of New Haven, David Sweet and Henry Starkel. Following negative statements by Sweet and Starkel during an interview regarding Ms. Miron's absence from work and behavior during medical leave, and further negative evaluation of Ms. Miron's leadership abilities and police skills in a written employment questionnaire completed by Mr. Sweet, the Glastonbury police department rejected her application. In June, 2000, Ms. Miron submitted a separate application for a position with the Enfield police department, again consenting to a background investigation consisting of an interview with and questionnaire to be completed by her then-employer. Again, David Sweet was interviewed and completed the questionnaire, and, again, he provided negative references, this time in regard to Ms. Miron's attitude and performance. The Enfield police department, however, hired Ms. Miron in spite of these negative evaluations, only to terminate her employment after approximately eight weeks of training.

Ms. Miron subsequently brought suit alleging (1) defamation and tortious interference with business expectancy as to David Sweet based upon her application to the Glastonbury police department; (2) defamation and tortious interference with business expectancy as to David Sweet and Richard Montefusco based upon her discharge from the Enfield police department; and (3) intentional infliction of emotional distress by Montefusco.

On appeal, Ms. Miron argued that Connecticut General Statutes §§ 31-128e and 31-128f, of the personnel files act, precluded application of a qualified privilege to negative statements made as part of an employment reference as a result of the employee's inability to review and correct such statements by virtue of the fact that they are not contained in a personnel file. The Court, however, rejected this argument, finding that there was no support "for the proposition that the legislature intended therein to place any limit on the scope of an employee's consent to an employment reference…"

Further, the Court rejected Ms. Miron's second argument that the finding of a qualified privilege for negative employer references was inconsistent with the Connecticut blacklisting statute (Connecticut General Statutes § 31-51). The Court noted that the statute itself provides that "the provisions of this section shall not be construed so as to prohibit any person… from giving a truthful statement of facts concerning a present or former employee…" The Court also determined that Ms. Miron's claim necessarily failed under the blacklisting statute because of the requirement of proof that an employer acted "with the intent and for the purpose of preventing such employee… from engaging in or securing employment from any other person…", which burden was not met by Ms. Miron.

The Connecticut Supreme Court ultimately found it appropriate "to recognize a qualified privilege for the employment references of current or former employers that

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Connecticut

Wylie v. Trio's Bar and Grille, LLC, 43 CLR 275

In *Wylie v. Trio's Bar and Grille, LLC*, the Plaintiff claimed that she suffered injuries as a passenger in a motor vehicle operated by a driver who was intoxicated after the bar served him alcohol while he was in an intoxicated condition. The Plaintiff alleged that the bar engaged in reckless conduct in serving alcoholic beverages to a driver. She also sought recovery pursuant to Conn. Gen. Stat. § 30-102, the Dram Shop Act.

One of the bar's special defenses alleged that the Plaintiff's injuries and losses were a result of her own reckless conduct in that she agreed to get into the motor vehicle of an individual who she believed to be intoxicated, and that said conduct barred her from recovery. Another of the bar's special defenses alleged that the Plaintiff assumed the risk that she would sustain serious injury when she agreed to be a passenger while knowing the driver was intoxicated. The Plaintiff thereafter moved to strike the special defenses of participation and assumption of the risk.

Although a split of authority existed on the issue, the court ultimately rejected both special defenses, recognizing that there was no sound policy reason for allowing an establishment that had willingly engaged in conduct potentially injurious to the public, in disregard to the consequences of the same, to absolve itself of such responsibility. The ramifications of this decision should surface in the coming months, and may result in increased insurance premiums for liquor establishments as insurance companies attempt to offset this newfound increase in liability.

Connecticut Upholds Qualified Privilege for Employment References Solicited with Employee's Consent, continued

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were solicited with the employee's consent," in keeping with the Restatement (Second) of Torts. The Court found this decision to be consistent with relevant precedent, including application of qualified privilege protection for "statements made in the employment setting regarding the qualifications and fitness of an employee" and "communications between managers regarding the review of an employee's job performance and the preparation of documents regarding an employee's termination". Additionally, the Court indicated that its decision would substantiate the integrity of employment references to the benefit of employees, "who stand to benefit from the credibility of positive recommendations", and prospective employers. As a final policy matter, the Court stated that the application of a qualified privilege to employment references would counter what it described as "a culture of silence" in which employers increasingly adopt "no comment" policies.

So, what does this mean for employers in the State of Connecticut?

It is clear that, as a result of *Miron*, employers are now protected by a qualified privilege for employment references of current or former employers that were solicited with the employee's consent. It is clear that these statements are protected by the qualified privilege even if untrue, so long as they are made in good faith. Further, it is clear that this qualified privilege is destroyed when a current or former employer acts with malice or other "improper or unjustifiable motives" in supplying a negative reference.

There remains, however, some grey area in the law. It is unclear whether this qualified privilege attaches to negative references, even those made in good faith, when such references were solicited without the employee's consent. It is also unclear whether the qualified privilege applies to defamatory, but true, statements made in bad faith.

Least clear, however, is whether this qualified privilege is enough, without its outer bounds clearly defined, to counter the current "culture of silence".

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