Lum, Drasco & Positan LLC
ATTORNEYS AT LAW SINCE 1870

Law Notes

Fall Newsletter
November 2022

Lum, Drasco & Positan LLC
Attorneys At Law Since 1870

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FIRM NEWS

Wayne J. Positan was reappointed to the New Jersey State Bar Foundation's Medal of Honor Committee.

Scott E. Reiser was recently appointed as a Vice-Chair of the Equity Jurisprudence Committee of the New Jersey Bar Association.

On October 13, 2022, the Litigation Counsel of America inducted **Gina M. Sorge** as a Fellow into its organization.

Dennis J. Drasco participated as a panelist on a Trial Advocacy Seminar sponsored by the New Jersey Institute for Continuing Legal Education in conjunction with the American College of Trial Lawyers (ACTL). Dennis, who is a Fellow of ACTL, participated in a segment dealing with the direct and cross examination of expert witnesses. The Seminar took place on July 14-15, 2022.

Mark R. Mikhael has joined the Firm as an Associate with our Litigation Department. Mark is a recent Seton Hall University School of Law graduate. He clerked for the Honorable Judge Keith E. Lynott, J.S.C in Essex County. During his time at Seton Hall, he interned for the Hon. Judge Vincent F. Papalia at the United States Bankruptcy Court for the District of New Jersey, the Becton Dickinson legal department, and with the New Jersey Law Revision Commission. Prior to entering the legal profession, he worked as an instructor at various higher education institutions, including the American University in Cairo.

Scott E. Reiser began serving a three-year term as a Member-at-Large of the Council of the American Bar Association, Section of Litigation in August 2022. The Council is the policy-making body of the Section of Litigation, which is one of the largest entities within the ABA. Scott has been active in the Section of Litigation for several years and has previously served as a Co-Chair of the Section's Ethics & Professionalism Committee, an as a co-Chair of the Section's Content Management Committee.

On August 17, The New Jersey Fellows of the American College of Trial Lawyers (ACTL) hosted a Gala at the Park Chateau in East Brunswick and presented the Francis X. Dee Award, for outstanding service, to firm member and Fellow of the American College of Trial Lawyers, **Dennis J. Drasco**. National President of the ACTL, Michael O'Donnell, from Colorado, was in attendance for the presentation.

On May 2, 2022, **Scott E. Reiser** was sworn into a three-year term as a Trustee of the Essex County Bar Association. Scott has been active with the ECBA for fifteen years, including most recently serving for several years as Co-Chair of the ECBA Chancery Practice Committee.

On April 22, 2022, Lum, Drasco & Positan members **Gina M. Sorge** and **Dennis J. Drasco,** secured a $9,425,000.00 settlement for the Estate of a Sussex County man who was electrocuted in Andover Township on March 2, 2018. The case settled on the eve of trial, before the Honorable Robert J. Brennan, J.S.C., following a four-year litigation.

Twelve attorneys at Lum, Drasco & Positan LLC have been selected by their peers for inclusion in The Best Lawyers in America® 2023 and one lawyer is "Lawyer of the Year" recipient:

Since it was first published in 1983, Best Lawyers® has become universally regarded as the definitive guide to legal excellence. Best Lawyers lists are compiled based on an exhaustive peer-review evaluation. Almost 108,000 industry leading lawyers are eligible to vote (from around the world), and we have received over 13 million evaluations on the legal abilities of other lawyers based on their specific practice areas around the world. For the 2021 Edition of The Best Lawyers in America©, 9.4 million votes were analyzed, which resulted in more than 67,000 leading lawyers being included in the new edition. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in Best Lawyers is considered a singular honor. (No aspect of this advertisement has been approved by the Supreme Court of New Jersey).

Lum, Drasco & Positan LLC – 2023 "Lawyer of the Year" Recipient

Bernadette Hamilton Condon – Litigation – Construction

Lum, Drasco & Positan LLC – The Best Lawyers in America® 2023 Edition

Dennis J. Drasco (2001), was named in the fields of Appellate Practice, Arbitration, Commercial Litigation, Construction Law, Litigation – Construction, Litigation – Insurance, Litigation – Real Estate, Litigation – Trusts and Estates.

Wayne J. Positan (1993), was named in the fields of Appellate Practice, Arbitration, Commercial Litigation, Employment Law – Management, Labor Law – Management, Litigation – Labor and Employment. Wayne Positan has over forty years of experience representing management and defendants in labor and employment matters, including discrimination, whistleblower, and non-compete litigation, as well as traditional labor practice in the private and public sectors.

Paul A. Sandars III (2005), who was named in the fields of Commercial Litigation, Construction Law, Litigation – Construction, is a member of the firm. He concentrates his practice in complex commercial litigation as well as construction law and litigation. He is a frequent lecturer on construction law issues, and has been certified as an American Arbitration Association Construction Arbitrator.

Kevin J. O'Connor (2015), who was named in the field of Commercial Litigation, concentrates his practice in the area of civil litigation with a focus on commercial litigation, insurance law, eminent domain, land use law, and life, health and disability insurance law.

Gina M. Sorge (2019), who was named in the field of Family Law, has been certified as a Matrimonial Law Attorney by the New Jersey Supreme Court since 2013. She presently serves as a Bergen, Essex and Morris County Family Court appointed Early Settlement Panelist.

Bernadette Hamilton Condon (2015), who was named "Lawyer of the Year" in the field of Litigation – Construction and further named as a Best Lawyer in the fields of Construction Law, Litigation – Construction, is a member of the firm's litigation department. She concentrates her practice in commercial and business litigation. Bernadette handles a wide variety of contract, construction and shareholder

disputes. She also has extensive experience representing condominium and homeowners' associations in transition litigation and general governance matters.

Daniel M. Santarsiero (2016), who was named in the fields of Employment Law – Management, Labor Law – Management, represents management and individuals in defense litigation and counseling in connection with various labor and employment matters including discrimination claims, harassment claims, whistleblower, public policy claims as well as wage and hour claims and collective bargaining. Daniel also provides counseling in connection with various employment disputes including employee grievances other workplace issue in both the private and public sector.

Jack P. Baron (2021), who was named in the field of Corporate Law, is a member of the firm, concentrating his practice in commercial transactions, including acquisitions, sales and reorganizations of businesses; commercial real estate matters, and asset based financing. In addition to counseling clients in business matters, Jack has an in depth knowledge of estate and trust law, and assists his clients in estate and succession planning.

Scott E. Reiser (2015), who was named in the field of Commercial Litigation, litigates a broad array of commercial disputes, business ownership matters, various commercial cases, and estate and trust matters.

Richard C. Camp (2019), who was named in the fields of Family Law Arbitration, Family Law Mediation, Mediation, is a retired Superior Court judge. He handles both family and civil cases and serves as a Discovery Master in complex matters.

Elizabeth Moon (2016), who was named in the field of Employment Law – Management, represents employers and individuals in litigation against claims of discrimination, retaliation, harassment, breach of contract, defamation, and other employment-related claims in cases alleging violations of federal laws including Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act as well as violations of state laws including the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, and the New Jersey Family Leave Act. Ms. Moon also defends governmental entities and their employees against claims arising under the New Jersey Tort Claims Act, the New Jersey Civil Rights Act, and 42 U.S.C. § 1983.

Cynthia A. Matheke (2003), who was named in the fields of Personal Injury Litigation – Defendants, Personal Injury Litigation – Plaintiffs, is concentrating on both office and hospital based cases of negligence and malpractice, including ancillary departments of pathology, nursing, pharmacy, and radiological imaging. She has expanded her practice to include cases of nursing home neglect.

THE END OF PER SE BANS ON RECOVERY FOR LOST PROFIT DAMAGES FOR NEW BUSINESSES

By: Marla Buitrago Rincon, Esq.

The New Jersey Supreme Court has officially eliminated per se bans on lost profits damages for new businesses. In Schwartz v. Menas, 279 A.3d 436 (2022), the Court rejected a per se rule barring any new business's claim for lost profits damages and held that lost profits may be recoverable if they can be established with a reasonable degree of certainty. This decision will significantly affect the recovery available to new businesses for breaches of contract and/or other interferences with prospective profits.

History of New Business Rule and the Reasonably Certain Standard of Proof

The "new business rule" banning lost profits damages originated in Weiss v. Revenue Building & Loan Association, 116 N.J.L. 208 (E. & A. 1936), where the court found that "damages for breach of contract "must be the reasonably certain and definite consequences of the breach" and in new businesses "the prospective profits are too remote, contingent and speculative to meet the legal standard of reasonable certainty." Id. at 210-213. The dispute in Weiss involved a lease of a residential property. Id. at 209-10. At trial, the plaintiff admitted that he had never operated a rooming house where the buildings were located, however, over the defendant's objection, the plaintiff was permitted to estimate the profit that he would have earned had he operated a rooming house in the buildings, based on the profit he had earned by operating houses at other locations. Id. at 212-13. Given the plaintiff's lack of experience operating a rooming house at the location at issue, the Court of Errors and Appeals reversed the trial court's judgment and remanded for further proceedings because, if considered, the proposed rooming house's anticipated profits to be "so remote speculative and problematical as to preclude their consideration in the appraisement of the loss." Id. at 209-10.

Although the "new business rule" was the standard in New Jersey, many other states that have considered the rule have found that it is not a per se ban, but rather, that lost profits may be recoverable if they can be established with a reasonable degree of certainty. Notably, the Second Restatement of Contracts provides that "damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." Restatement (Second) of Contracts § 352. The comments to the Restatement further provide that if a business is new or it is a speculative one that is subject to great fluctuations in volume, costs or prices, proof will be more difficult. Id. § 352, cmt. b. Nevertheless, damages may be established with reasonable certainty "with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises and the like." Ibid.

Deviation from the New Business Rule in Schwartz v. Menas

Schwartz v. Menas, 279 A.3d 436, 438 (2022) involved consolidated appeals pertaining to two separate residential development projects. In the first suit, plaintiffs, Larry Schwartz and NJ 322 LLC, sued their former legal counsel, two real estate developers, and executives employed by the developers, alleging that the defendants' tortious conduct deprived plaintiffs of the opportunity to construct an affordable housing complex in Monroe Township, New Jersey ("the Monroe project"). Id. In the second action, plaintiff Schwartz sued his former counsel for legal malpractice and breach of contract arising from another proposed residential development in Egg Harbor Township ("the Egg Harbor project). Id. It was undisputed that plaintiffs had never financed or built a residential development before they sought to construct the housing project at issue. Id.

As to the Monroe project, plaintiffs contended that Defendants arranged to have the property rezoned so that only affordable housing could be built on it, which resulted in the developer pulling out of the project. Id. at 439. Plaintiffs hired a damages expert who prepared a report that included his opinion on "the profits that would likely have been earned by plaintiffs in the event that their development goals and objectives in connection with the development of the project had not been frustrated by defendant's alleged conduct." Id. at 438. The expert presented two different lost profits damages models, however, he failed to acknowledge in his report that Plaintiff Schwartz had never been involved with a residential development or built housing of any kind. Id.

With regard to the Egg Harbor project, Schwartz contended that his former counsel apprised him of the opportunity to invest in two properties and later advised him to abandon a previously approved age-restricted development in favor of a different project that required new approvals. Id. at 439-40. Schwartz also alleged that the former counsel arranged for other members to replace him as the managing member of the project depriving him of the opportunity to develop two properties. Id. The same damages expert hired for the Monroe suit presented three lost profits damages models for the property. Id. at 441. The expert once again did not acknowledge that Schwartz had never developed residential housing and

assumed that Plaintiff would have obtained financing and would have partnered with experienced developers to construct the housing. Id. at 441-42.

In both cases defendants moved to bar the testimony of plaintiffs' damages expert on the ground that plaintiffs had no experience in residential construction and thus were not entitled to seek lost profits damages. Id. at 440-42. The trial court granted defendants' motions and barred the expert testimony of plaintiffs' expert pursuant to the new business rule and subsequently granted summary judgment motions dismissing plaintiffs' Complaint with prejudice. Id.

When this consolidated appeal reached the Appellate Division, the court acknowledged the majority of jurisdictions that have considered the issue have rejected the "new business rule" in favor of a rule that allows a new business to recover lost profits when they can be proven with reasonable certainty. Id. at 442. However, the Appellate Division considered itself constrained to follow Weiss and apply the "new business rule." Id. at 438. Further, the Appellate Division held that even if the "new business rule" did not apply, the expert's opinions were too speculative to meet the standard of reasonable certainty, given the expert's failure to analyze the impact of plaintiff's inexperience on his prospective lost profits and his reliance on successful projects conducted by experienced developers in calculating those profits. Ibid.

The New Jersey Supreme Court noted that it had never previously considered whether a plaintiff's status as a new business constitutes an important factor in determining whether lost profits damages may be proven with reasonable certainty, or whether it bars such damages entirely. Id. at 445. The Court used an abuse of discretion standard for the evidentiary issue of the expert report and de novo review for the summary judgment motions. Id. at 443. The Court looked to New York where courts found that the "new business rule" is not a ban, but rather an evidentiary rule that creates a higher level of proof needed to achieve reasonable certainty as to the amount of damages. Travellers Int'l A.G. v. USFI, Inc., 89 F.3d 82, 86 (2d Cir. 1994). The Court also looked to Illinois where courts found that although a new business generally has no right to recover the right to recover lost profits, the Supreme Court of Illinois made clear "[t]here is no inviolate rule that a new business can never prove lost profits." Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 407 (Ill. 2006). The Court found that these states' views are consistent with the approach of the Second Restatement of Contracts and that most courts that have considered the "new business rule" reject a per se bar for lost profits claims by new businesses and instead carefully scrutinize such claims, treating a new business's inexperience as an important factor in the reasonable certainty standard. Schwartz, 279 A.3d 436 at 447.

Findings

Consistent with the New York and Illinois decisions, the New Jersey Supreme Court recognized that it is substantially more difficult for a new business than for an experienced business to prove lost profits damages with reasonable certainty. Id. at 447-48. However, the Court departed from Weiss to the extent that it could be read to adopt a per se bar on all lot profits damages claims by new businesses and concurred with the majority of courts in declining to follow the "new business rule." Id. The Court further opined that courts should conduct "a fact-specific evaluation of the evidence in the setting of the individual case and carefully scrutinize a new business's claim that, but for the conduct of the defendant, it would have gained substantial profit in a venture in which it had no experience." Id. If a new business seeks lost profits that are remote, uncertain, or speculative, the trial court should bar the evidence supporting the claim and should enter summary judgment. Id. However, lost profits may be recoverable if they can be established with a reasonable degree of certainty, the correct standard going forward. Id. As such, Schwartz was reversed and remanded for the trial court to determine whether plaintiffs lost profits evidence is sufficient to establish their claim for damages with reasonable certainty despite plaintiff's inexperience. Id.

Implications for New Businesses

The Schwartz decision has certainly opened the door to an additional avenue of recovery which was previously unavailable due to the "new business rule." New businesses now have the opportunity to

present evidence of lost profits in New Jersey, however, this is not a free-for-all. New businesses must provide sufficient evidence to reach the standard of reasonable certainty for any alleged lost profits. This standard is a difficult standard to meet, and as the Court recognized, more difficult for a new business to meet than for an existing business. Some of the evidence that can be used to establish lost profits with reasonable certainty as the Restatement provides is expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises and the like. However, it is important to note that a new business's inexperience is still an important factor that will be considered by the courts.

EMPLOYER'S RIGHT TO TERMINATE AN EMPLOYEE FOR OFFENSIVE SOCIAL MEDIA POSTS - McVEY v. ATLANTICARE

By: Mark R. Mikhael, Esq.

How can an employer manage the goals of promoting a positive, value driven workplace and ensuring adequate legal protection?

The recent decision by the New Jersey Appellate Division in McVey v. AtlantiCare Medical System Inc., et al., 472 N.J. Super. 278 (App. Div. 2022), is a helpful starting point for a discussion on social media policy, workplace culture, and employer values.

In this case, the Appellate Division found that AtlantiCare Medical System Inc. et al. did not violate the free speech rights guaranteed to Heather J. McVey by the United States and the New Jersey Constitutions.

McVey operated a Facebook page under the name "Jayne Heather." This personal social media profile included her photograph and prominent references to her employment with AtlantiCare.

Approximately 10 years earlier, AtlantiCare drafted a social media policy that covered its employees' use of AtlantiCare social media accounts as well as employees' personal accounts. Such policies encouraged employees to consider the effect of their social media posts on "AtlantiCare employee job performance, . . . AtlantiCare brand and/or reputations, and AtlantiCare's business interests." The policy presented guidance for operators of social media accounts with identifiers that could be used to establish a connection between the individual posting and AtlantiCare. Such profiles and posts were required to be presented professionally as representative of AtlantiCare. AtlantiCare further articulated a policy on diversity. Such policy instructed employees to present their points of view in a manner mindful of the "diverse set of customs, values[,] and points of view" associated with the AtlantiCare workforce, customers, vendors, and partners.

May of 2020 was characterized by widespread social unrest flowing from the death of George Floyd. The killing of an unarmed African-American resonated with many American citizens and, indeed, many individuals across the globe. It was in this turbulent context that McVey authored posts in a Facebook discussion that her opposition described as "non-derogatory, non-discriminatory . . . expressions of her personal belief[s]." She, at one point during an online discussion, stated, with reference to African-Americans, "they are not dying . . . they are killing themselves." She further indicated that all lives mattered to her, a fact she supported with reference to her employment history as a nurse, and that she did not support rioting in response to the death of George Floyd.

These posts came to the attention of McVey's employer, AtlantiCare. Subsequently, AtlantiCare management discussed the matter with McVey before suspending her pending the outcome of an internal investigation. Approximately a week later, McVey met with AtlantiCare executives who cited her "repeated instances of poor management judgment – a failure to uphold AtlantiCare values" as the reason for their decision to terminate her employment.

McVey brought suit against AtlantiCare arguing that her termination violated rights guaranteed her by the United States and New Jersey Constitutions. Her exercise of speech was, she contended, protected by New Jersey public policy and, thus, her termination was wrongful. The trial court disagreed and McVey's one count complaint was dismissed on the grounds that it asserted a constitutional free speech claim against a private employer where there was no state action.

The Appellate Division affirmed the dismissal of the Complaint, concluding McVey's argument that her termination violated New Jersey public policy was of no moment. The Court indicated that in the absence of a specific statutory grant of protection or state action, terminations on the basis of speech do not violate public policy.

While the termination was found to comport with New Jersey and Federal law, the opinion, in some respects, is narrow and reflective of the facts of the case. McVey was an at-will employee of a private employer. AtlantiCare's policy was provided to all employees and set forth the conduct that was covered, situations in which the social media policy applied, and clearly defined when a post from a personal account would be considered identified with AtlantiCare. Had the "Jayne Heather" account not included references to AtlantiCare or the policy not drafted to cover certain online behaviors, the outcome may have been different. Of course, as alluded to in the Appellate Division opinion, the context of a statement may factor into whether similar claims are successful.

Social media is dynamic, changing the way parties communicate their identities and ideas. Moreover, the roll out of a social media policy that regulate employee conduct on their personal accounts is a nuanced process that requires understanding of an employer's goals for their workplace, their values, and, of course, their bottom line. Thus, questions on how to promote values like diversity in an open workplace culture while ensuring adequate legal protection must be considered. Moreover, details such has how employer policies are communicated to employees are vital considerations.

An employment law attorney experienced with these issues can help develop workplace policies, including those that govern social media, that comply with State and Federal laws, as well as those laws governing the workplace and support an employer with guidance on how to roll out the same in a manner that supports their goals for workplace culture in light of their values.

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