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THE PASCHOS LAW UPDATE NEWSLETTER

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January, 2013**I. GENERAL LITIGATION****Plaintiff May Recover Delay Damages Only On the Amount of Legally Recoverable Damages to Which He Was Entitled Pursuant to the Molded Verdict**

In *Marlette v. State Farm Mut. Auto. Ins. Co.*, --- A.3d ---, 2012 WL 6720916 (Pa. December 28, 2012), plaintiffs, Richard and Marleen Marlette were involved in an automobile accident. While stopped in traffic, the car they were operating was hit when the vehicle operated by Herman Jordan crossed the center line and sideswiped them. Mr. Marlette sustained serious physical injuries, as well as lost wages and impairment of his earning capacity. The Marlettes filed suit against Jordan, who was uninsured, and their own insurer, State Farm Mutual Automobile Insurance Company ("State Farm"), for uninsured motorist ("UM") coverage. Liability was uncontested, and the case proceeded to trial on damages.

Following a two-day trial, the jury returned a verdict in favor of the Marlettes, awarding Mr. Marlette \$550,000 for his bodily injuries and lost wages, and Mrs. Marlette \$150,000 for loss of consortium. The trial court molded the \$700,000 verdict to reflect the \$250,000 policy limit of the Marlettes' UM policy with State Farm, which was issued in Florida. The trial court credited an earlier payment of \$16,693.02 by State Farm, resulting in a verdict of \$233,306.98. Subsequently, pursuant to Pa.R.Civ.P. 238, the Marlettes filed a motion for delay damages on the \$550,000 verdict in favor of Mr. Marlette, which State Farm opposed. The trial court granted the Marlettes' motion, but awarded delay damages in the amount of \$28,223.76, which the trial court calculated by applying the applicable interest rate to the molded verdict of \$233,306.98.

The Marlettes and State Farm filed cross-appeals with the Superior Court. The Marlettes argued the trial court abused its discretion by calculating its award of delay damages based on the molded verdict, rather than the actual jury verdict of \$550,000 in favor of Mr. Marlette. State Farm argued that the trial court erred in awarding any delay damages whatsoever because, when added to the molded verdict amount, it resulted in a judgment in excess of the Marlettes' \$250,000 UM policy limit, which State Farm alleged was impermissible under both Pennsylvania and Florida law. Alternatively, State Farm argued that calculation of delay damages must be based on the verdict as molded to reflect the Marlettes' UM policy limits.

In a divided opinion, the Pennsylvania Superior Court vacated the trial court's judgment on delay damages, and remanded for recalculation of delay damages based on the amount of the jury verdict. The majority first rejected State Farm's argument that the Marlettes were not entitled to any delay damages, noting that an award of delay damages was not precluded by Pennsylvania or Florida law, or by the language of the Marlettes' UM policy. The majority further determined that the amount of delay damages should be calculated based on the amount of the jury verdict.

State Farm filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was granted limited to the issue of whether the Superior Court erred in holding that the Marlettes may recover delay damages based on the amount of the jury verdict in favor of Mr. Marlette, as opposed to the amount which the Marlettes were entitled to recover under their policy with State Farm. Upon review of the matter, the Pennsylvania Supreme Court concluded that a plaintiff may recover delay damages only on the amount of legally-recoverable damages to which he is entitled pursuant to the molded verdict. The court remanded the case to the Pennsylvania Superior Court for remand to the trial court for reinstatement of its original award of delay damages.

II. EMPLOYMENT LAW

Police Officer Testifying in a Discrimination Lawsuit Against his Employer Police Department Engages in Whistle-Blowing Activity

In *Marra v. Township of Harrison*, --- F.Supp.2d ----, 2012 WL 6624205 (D.N.J., December 19, 2012), plaintiff, George Marra, Sergeant in the Harrison Township Police Department, alleged that he was subject to adverse employment actions and that he was passed over for promotions in retaliation for testifying against the former Harrison Township Police Chief in a discrimination suit brought by a female police officer, Christine Kemp. Ms. Kemp's civil lawsuit against Harrison Township alleged that Police Chief Frank Rodgers discriminated against her on the basis of gender and subjected her to sexual harassment and a hostile work environment. Plaintiff was deposed in the lawsuit and testified as to derogatory statements Rodgers had said about Ms. Kemp.

In the original complaint, Plaintiff asserted four Counts against Defendants: (1) a violation of the Conscientious Employee Protection Act ("CEPA"), which protects employees who blow the whistle on unlawful activity by their employers; (2) a violation of the Due Process Clause; (3) a violation of the First and Fourteenth Amendments for retaliation in response to his testimony; and (4) a violation of Due Process rights under the New Jersey Constitution.

Defendants moved to dismiss all counts of the Complaint. In lieu of opposition, Plaintiff filed a motion for leave to file an Amended Complaint. The Amended Complaint voluntarily withdrew the Due Process claims under the U.S. and New Jersey Constitutions and added facts about Plaintiff's deposition and added key language to the CEPA claim.

One argument Defendants made to dismiss the CEPA Claim in Count I of the complaint was that Plaintiff did not engage in whistle-blowing activity because he was performing a duty that was part of his job description—"to provide 'truthful and accurate descriptions' of potentially illegal conduct"—and conduct performed pursuant to an employee's job cannot be the basis for a CEPA claim. The court disagreed with defendants that simply because plaintiff gave truthful deposition testimony he did so in the course of his employment. The court provided that the mandate to testify truthfully in depositions applies to all, and defendants' argument, taken to its logical conclusion, suggests that a police officer could *never* state a claim for retaliation under CEPA if he or she testified against his or her employer, or if he or she disclosed potentially illegal activity to prosecutors, because that conduct is part of a police officer's job. The court held that this is not the case. In this matter, plaintiff's testimony was not related to any police work. A police officer's official duties do not include testifying in civil discrimination lawsuits. The court held that a police officer testifying in a discrimination lawsuit against his employer police department engages in whistle-blowing activity. As such, the court dismissed defendants' motion to dismiss Count I.

Arbitration Agreement in Employee Handbook is Enforceable

In *Brooks v. Brookdale Sr. Living Communities, Inc.*, unpublished, 2012 WL 6652797(D.N.J., December 20, 2012), plaintiff, Cary Brooks, filed claims against her former employer, Defendant Brookdale Senior Living Communities, Inc., alleging discrimination and retaliation in violation of the New Jersey Law Against Discrimination and the New Jersey Workers' Compensation Law. Defendant filed a motion to dismiss and to compel arbitration.

When plaintiff began her employment with the defendant, she received an Associate Handbook ("Handbook"). This document described various company policies and procedures, including Defendant's Binding Arbitration Procedure. Defendants argued that, by signing the Associate Handbook Receipt and Acknowledgement form, plaintiff waived her right to sue in court. Plaintiff responded that because both the Handbook and the Acknowledgement form state that they are not the basis for a "contract of employment," neither document creates any binding commitment to arbitrate work disputes.

The court held that plaintiff's claim must be dismissed because she executed a valid waiver of her right to sue her employer for claims of discrimination and retaliation. In reaching its determination, the court was sympathetic to plaintiff's concerns that, essentially, defendant appeared "to have been talking out of both sides of its proverbial mouth when it provided Plaintiff with the Handbook and Acknowledgement form." That is, the Handbook explicitly states that "the policies and procedures set forth in this Handbook," of which the Arbitration

policy is necessarily a part, "are not intended to create ... *any other type of contract, nor are they to be construed as contractual obligations of any kind.*" (emphasis added). The court found that the defect was cured in the Acknowledgement Form by the use of language explicitly stating that the employee "agree[s] to arbitrate the dispute by a final binding arbitration," even though the inclusion of language on that same form reiterating that the "Handbook does not create a contract of employment, express or implied. . ." seemed to state a different purpose. Notwithstanding, the Court noted it is the established practice of New Jersey courts to read agreements liberally in favor of arbitration, and as such the court granted defendant's motion to compel arbitration.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.

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