THE FPT NEWS

". . . useful information for clients and prospective clients."

© 2016 Fischer Porter & Thomas, P.C.
Attorneys at Law

Spring 2016
Vol. X, No. 1

DWI IN THE COURTROOM

Fighting to the Last Breath

For Mitch Ignatoff, who works out of the Fischer Porter & Thomas suite, successfully defending people accused of drunk driving (DWI) and other traffic and petty offenses is a passion he's had for over 30 years. He will try cases rather than take a guilty plea. The reason is simple: if there is not an offer to plea on a first offense, then generally the maximum suspension will be 7 months. In that case, according to Mitch, you might as well try the case. A second offense is a two-year loss of license whether you plead guilty or are found guilty, so you might as well try the case. A third offense is 180 days in jail, which cannot be served on weekends, and ten years loss of license. With such high stakes, you should try the case. Almost inevitably, there is going to be some error that will result in an appeal. You may also win the trial.

To try cases, you have to understand what are known as the Standardized Field Sobriety Tests (SFST), which are (1) the walk and turn, heal to toe for 9 steps, and (2) the one leg stand, where you have to hold one leg approximately 3 inches above the ground for 1 minute. The police do a third test, called the horizontal gaze nystagmus test, which cannot be used in the prosecution of your case. Things such as lighting conditions, levelness of the ground under your

Continued on page 2

INSIDE THIS ISSUE

2015 YEAR IN REVIEW

Another Busy Year

In 2015, clients brought many new and interesting challenges to the attorneys at Fischer Porter & Thomas, which, we are proud to report, resulted in many positive outcomes. Under Scott Porter's leadership, we were deeply involved in prosecuting shareholder dispute cases in Middlesex and Union Counties; estate disputes in Bergen County; and construction cases in Mercer County. In the Supreme Court of New York in New York City, we successfully navigated clients through difficult commercial landlord-tenant and easement disputes. In federal courts in both NJ and NY, we resolved a complicated securities fraud case and were retained to defend another client in a case involving complex scientific studies relied upon by investors.

As anticipated, our matrimonial practice exploded in 2015. We are now handling divorce actions in Bergen, Essex, Hudson, and Middlesex Counties. These cases involve the equitable division of substantial real estate holdings, legal practices, and matrimonial debt. Our matrimonial clients have been very satisfied due to the hard work, diligence, and commitment of our associate, James Faller. Our experience as commercial litigators and the strategic use of mediation as a means to resolve some, if not all, disputed issues helps our clients to conclude one chapter in life and begin the next.

Our trial calendar was dominated by Scott Porter's Chancery trial in Middlesex County, which lasted three months. Our clients, the plaintiffs, could no longer tolerate the oppressive conduct and actions of the company's former president. The lawsuit started in October of 2009, with plaintiffs seeking to expel the founding member and making claims for breach of fiduciary duties, breach of contract, and relief pursuant to New Jersey's Oppressed Minority Shareholder Statute. After years of motion practice, an

Continued on page 2

DWI IN COURT (continued from page 1)

feet, road markings, and the type of shoes you are wearing can make a difference. Know that the SFST can, and should be refused. There are no consequences to this refusal and it prevents prosecution based on your behavior at the scene. You really need to keep in mind your rights under the 4th amendment. If these rights are violated, the resulting evidence will be suppressed, and, generally, this means that you win because the prosecutor will be unable to use your behavior at the scene or the breath test to prosecute you.

It is important for your lawyer to understand how the Alcotest operates, because the prosecution must prove that the Alcotest was operating properly when you were blowing into it. This can involve expert testimony by someone qualified to opine on how the police are required to service and operate the machine. The Alcotest uses both infrared and electrochemical testing to measure the alcohol in your breath. The electrochemical testing uses a fuel cell, which must be replaced about every 2 years. Various known commercial alcohol solutions are used to test whether the Alcotest is operating properly, but adjustments can only be made by the manufacturer. You should know that the Alcotest treats your lungs as if they were wrapped in plastic. It does not account for the alcohol absorbed from surrounding tissues while you breathe in and out. The premise of the theory behind the Alcotest is that the last air you breathe out is from deep in your lungs where the aveoli exchange oxygen with the blood. There is no scientific proof of this theory.

A DWI charge can negatively impact your life in many ways. Be sure to engage capable counsel. - *MI*

For more information or to learn about Fischer Porter & Thomas, P.C., and our firm's services and experience, see our website at www.fpt-law.com or call telephone number (201) 569-5959 and ask to speak with one of our attorneys:

Arthur "Scott" L. Porter, Jr.
aporter@fpt-law.com

Alan C. Thomas
athomas@fpt-law.com

Aaron E. Albert
aalbert@fpt-law.com

Reena Forst
rforst@fpt-law.com

James N. Faller
jfaller@fpt-law.com

Our address in New Jersey is 560 Sylvan Avenue (Route 9W), Third Floor, Suite 3061, Englewood Cliffs, NJ 07632.

A Correspondent Law Firm to LawExchange International
www.lawexchangeinternational.com

2015 REVIEW (continued from page 1)

appeal, settlement negotiations, and depositions, the trial started on September 15th and continued almost every week thereafter until the beginning of 2016. A decision is expected sometime this spring.

As we have in the past, we successfully litigated against some of the largest firms in New Jersey and New York. One of our greatest achievements last year was beating back claims of undue influence and fraud brought by a disgruntled son of a wealthy man who collected modern art with extraordinary value. These famous paintings were sold, with the proceeds transferred to the rightful recipient as intended by the decedent. After suit was filed, our team of Scott Porter and Alan Thomas worked aggressively to rebut the long list of charges brought by a major New Jersey firm. In the end, we achieved a solution via mediation that protected the sale proceeds for our client and his heirs, developed an estate plan for our clients' grandchildren, and provided financial security to the disgruntled son. This result was a smashing success, and we once again affirmed that we can go toe to toe with the big guns.

The firm's resolve to use litigation as a tactic to achieve clients' objectives has always been balanced with our view that mediation and arbitration can lead to more expedient results, without the years of lost time and energy required for litigation. In 2015, Aaron Albert completed his training to become a mediator in the state of New York and Alan Thomas began his quest to become a mediator in New Jersey. The use of mediation was best exemplified in 2015 by our settlement of a hotly contested easement dispute involving owners of a luxury coop on one side and the neighboring warehouse operator on the other. Through our efforts in mediation, the warehouse operator agreed to reimburse the majority of our clients' legal fees and further agreed that, if future disputes arose, they would be submitted to mediation rather than restart the litigation.

This past year also saw our continued mix of litigation advocacy with our role as general counsel for businesses and individuals in the real estate, ecommerce, construction, manufacturing, and restaurant industries, in both New Jersey and New York. Moreover, negotiating employment agreements and separation agreements for executives continues to be an active part of our employment practice. We also handled commercial and residential real estate transactions, estate planning matters, personal injury, and auto accident cases for our clients. - *ALP*

HIGHWAY CONSTRUCTION LITIGATION:
AND YOU THOUGHT THE TRAFFIC WAS BAD

Highway construction projects in New Jersey often end in litigation, with the prime contractor suing the State for costs associated with changes, delays, or design errors. Typically, contractors claim that the schedule prepared by the State's design consultant was impossible to perform because of conflicts (more than one thing needing to be done in the same place at the same time), design errors (field conditions not as shown in the plans), delays in answers to questions or approvals, and so on. Frequently, utility companies have "facilities" (poles and overhead lines, buried cables or pipes running through the highway right-of-way) that have to be relocated when a highway is to be widened or rerouted, or a bridge repaired or replaced. On the other side, the State typically claims that utility companies delayed the contractor's work or made it inefficient by failing to relocate their facilities according to the project schedule.

FPT has represented an Internet service provider in several of these lawsuits. A typical sequence of events is that the prime contractor sues the State's Department of Transportation for payment of claims that were asserted but denied during the project, and the State then brings the utilities into the lawsuit, claiming that if the State is liable to the contractor for any costs, the utilities are liable to the State for any portion of those costs that the utilities caused. These lawsuits can involve numerous parties – the prime contractor, the State's DOT, the State's design consultant, possibly a contracted project manager, and 5-10 utilities, including telephone companies, internet service providers, cable TV providers, electric and gas utilities, water companies, and any company or municipality with "facilities" running through the highway right-of-way that must be relocated as part of the project. Each utility may also have used one or more contractors of its own to relocate its facilities.

Each utility company typically has a contract with the State, and the State may be required to pay each utility to relocate its facilities. The State's contract with the prime contractor for the project may also contain a provision stating that the State does not have to pay the contractor for any delays or inefficiencies caused by the utilities' failure to relocate their facilities on time. The contract may also provide that the State has to allow the contractor extra time, but is not responsible for the cost of inefficiencies caused by utility delays.

Continued next column

The prime contractor, however, may argue that the State's design or its internal delays or errors, rather than any delay by the utilities, were the cause of the contractor's increased costs. And the utilities may argue that any delay in relocating their facilities was actually caused by the contractor or the State. The contractor does not usually assert claims against the utilities because the contractor has no relationship with the utilities, since it is the State that contracts with the utilities for relocation of facilities in the State's right-of-way.

Given the complexity of the claims, these lawsuits can go on for years. Discovery for a lawsuit over a big highway project can involve 150,000 or more pages of documents, including contracts, plans, schedules, e-mails, log books, meeting minutes, letters, invoices, payment records and other documents from the State, the prime contractor, the design consultant, and all the utilities. Attorneys for each party have to review all the other parties' documents. There may be depositions of representatives from the State's design, project management, and utilities coordination departments, as well as from the prime contractor, the design consultant, the utilities and their contractors.

Like any other lawsuit, these cases often settle. Given the high cost of litigation and the amount of discovery required, a "nuisance value" contribution from each utility can often bridge the gap between the State's and contractor's settlement positions, regardless of the merits of the claims against the utilities. When the State and the contractor are far apart, however, the case may go all the way to trial, maximizing the costs for all parties, even though the State is always represented by the Attorney General's office. Naturally, these costs are "budgeted" into every highway construction bid and every quote from a utility for relocating its facilities for highway construction. Given the complexity of these projects, however, it is hard to think of a better way to figure out how each party should be fairly compensated for the costs incurred on the project when disputes arise, as they inevitably do. - *AEA*

What is the weather's impact on New Jersey roads? We have two seasons: Winter and Construction.

In CASE you were wondering . . . Interesting or Quirky Court Decisions

Watch what you say. McFarlane was convicted of murder and other crimes and sentenced to 60 years in prison. In another case, the sentencing judge remarked during a status conference that he "always" sentenced convicted murderers to 60 years, and a review of the judge's sentencing history revealed that it was true. The New Jersey Supreme Court reversed McFarlane's sentence and remanded to another judge for re-sentencing to insure the individualized assessment required by the Code of Criminal Justice. *State v. McFarlane* (N.J. 2016)

Waive the flag, not your rights. Typically, a statement made during plea negotiations is inadmissible at trial under Evidence Rule 410. But, a New Jersey court has ruled that such statements may be used to impeach your testimony at a State trial. During plea negotiations to determine Drug Court eligibility as solely an addict, Williams signed a statement for the prosecutor implicating others as suppliers. Upon learning she was also a supplier, the prosecutor withdrew consent to a plea and gave notice that the statement would used to impeach Williams if she testified at trial. The court ruled that use of the statement was valid and remanded for a hearing on whether Williams waived her right to the protections of Rule 410 knowingly and voluntarily. *State v. Williams* (App. Div. 2016).

Worth the paper? The custodial parent's signing of a non-relocation agreement - agreeing not to relocate outside of New Jersey - can be overcome whether the agreement was made in good faith or bad faith. The Appellate Division sets forth the complex procedure, but in the end "the best interests of the child" standard rules the day. *Bisbing v. Bisbing* (App. Div. 2016).

Continued next column

Board of Directors Limits. The Board cannot change the quorum requirements for shareholder meetings. The NJ Business Corporation Act's default quorum requirement of 50% can only be adjusted by amending the Certificate of Incorporation at a shareholder's meeting with a quorum. *Sterling Laurel Realty v. Laurel Gardens Co-op* (App. Div. 2016).

Curious about an old friend? L.I. and C.M. dated and were engaged to be married, but broke it off and both went onto other relationships. Twenty-seven years later, they found each other online and exchange messages online and via text. When she realized C.M. wanted more, L.I. wanted all messaging to stop and used another old boyfriend to communicate that desire. C.M. sent some nasty messages to both of them. Yet without a history of domestic violence, L.I. could not get a final restraining order under the Domestic Violence Act. *L.I. v. C.M.* (App. Div. 2016).

The Lord Giveth . . . Plaintiff won a judgment for $2.9 million for unlawful distribution of copyrighted martial arts instruction videos. Because Defendant could not pay the full judgment, Plaintiff sought relief under the Uniform Fraudulent Transfer Act ("UFTA") to recoup gifts made by the defendant to various charities. The Court ruled that there is no public policy immunizing charities from UFTA law suits; only the Legislature can do that. Upon amending its complaint, Plaintiff can proceed to collect from the charities. *Zenshin LLC v. New Monmouth Baptist Church* (App. Div. 2016).

Property Tax Too High? Challenging your town's value assessment is not easy. Even if you overcome the legal presumption that the assessment is valid, your expert's years of experience are an inadequate foundation to prove adjustments to the assessment are needed. All facts must be in evidence. *Mir v. Paterson* (Tax Ct. 2016). - *ACT*