From the Law Offices of

PERKINS & ANCTIL P.C.

ATTORNEYS AT LAW

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LAW QUARTERLY

IN THIS ISSUE

ANNOUNCEMENTS

Perkins & Anctil is pleased to continue the firm's quarterly educational seminars. Our next event will be a round table seminar held on Thursday, April 16, 2015. We will be hosting top industry professionals covering the following topics: Common Pitfalls at Closings; Purchase and Sale Agreement Concerns; Affordable Housing; Hot Condominium Issues; Title Insurance; Home Staging; and Homeowner's Insurance. For additional information and complimentary registration, visit our website at **www.perkinslawpc.com**. We hope that you are able to attend what will surely be an exciting and informative event!

Once again, the firm will be an Exhibitor at **The New England Condo & Apartment Management Expo**, to be held at The World Trade Center Exhibit Hall, 200 Seaport Boulevard, Boston, MA on Thursday, April 30, 2015. Our attorneys and staff will be located at Booth 326. Don't miss this unique opportunity to meet with us and visit over a hundred additional vendors all specializing in serving the condominium industry. For additional information, please visit **http://spring.ne-expo.com**. We look forward to seeing you there!

Attorneys Perkins, Chenelle and Eriksen recently returned from the Community Association Institute's 36th Annual Law Seminar, in San Francisco, CA. Our firm strives to stay current with the latest industry news and developments. Included in this newsletter, you will find a few of the takeaways from the conference. If you would like further information, please visit our website and blog, **www.perkinslawpc.com or www.perkinslawpc.com/blog/**

"Fighting Words" (and Worse) in the Internet Age

By: Scott Eriksen, Esq.

Google *"them's fightin' words"* and you'll yield no shortage of hits in response, ranging from a picture of Yosemite Sam to the following definition: *"An old-time expression interjected after one is on the receiving end of a harsh criticism. A fight will usually occur as a result"* (Urban Dictionary.com). No surprises there: "fightin' words" are what they are. It's easy to picture a caricature cowboy – not unlike Yosemite – uttering this retort to some personal insult while drawing two six-shooters from hip holsters. But the term "fighting words" also has a more important meaning in the context of our constitutionally protected rights as well. "Fighting words," the U.S. Supreme Court has said, are a category of speech which is ***not*** protected by the First Amendment. They are words that by their utterance "inflict injury or tend to incite an immediate breach of the peace" (the Supreme Court and Urban Dictionary are, surprisingly, pretty close on this one). When the Supreme Court decided the seminal decision regarding "fighting words" in 1942, fighting words were most likely exchanged in face-to-face contact. Fast forward 70+ years, and things are different.

The Internet is a wonderful, powerful tool. Without the Internet, it would have been harder to write this article, or to research case law, or to learn about world events, etc. etc. We use the Internet every day, and most of the time for productive (or if not strictly productive, at least not destructive) purposes. Yet the Internet, like any powerful tool, can be weaponized and misused. We have all heard the horrific stories of cyber-bullying, a new wave of digital-age intimidation where cowards hide behind a monitor and spew vitriol without fear of immediate consequence. I'd wager many perpetrators of such despicable acts are too spineless to face their victims in person, but just because they don't doesn't mean that these words are any less likely to "inflict injury" or "breach the peace." Now "fighting words" take on a new context, and states have been legislating to keep up with this changing trend. Cyber-stalking and bullying statutes have been, in recent years, an important focus for law-makers, and courts and law enforcement are challenged with applying existing criminal codes to digital acts of misconduct.

Take the recent Supreme Judicial Court case of *Commonwealth v. Johnson* 470 Mass. 300, 301-319, 2014 Mass. LEXIS 955, 1-38 (Mass. 2014). The Court's decision, spanning about 10 pages, is a fascinating but disturbing read of a neighbor dispute on digital steroids. Husband and wife William and Gail Johnson were convicted of criminal harassment for waging a campaign of cyber-harassment against their neighbors, James and Bernadette Lyons. Through a family friend – Colton – the Johnsons engaged in a series of increasingly pernicious attacks against the Lyonses.

The first salvo was a false ad on Craigslist claiming that James and Bernadette had free golf carts available at their home (which was not at all true) and caused dozens of people to come to their home. For round two, the Johnsons directed their cyber-bully Colton to post another Craigslist ad offering James' "late son's" motorcycle for sale and "directing interested parties to call Jim on his cellular telephone ***after 10 P.M.***" About a week later, the Johnsons' lackey sent an e-mail message to the Lyonses *from a fictitious account with the subject: "It's just a game for me."* The email body contained James' and Bernadette's personal identifying information, including their home telephone number and address, Social Security numbers, bank name and location, and James' date of birth and cellular telephone number. The message ended with: *"Remember, if you aren't miserable, I aint happy! Let's Play."*

Soon after that, things got really nasty. William, using Colton's home telephone, called the Department of Children and Families ("DCF") to file a false report alleging child abuse by James against his son. As a result of this call, two DCF investigators arrived at the

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Lyonses' home at 10:30 P.M. one night and said they had to examine the boy. James and Bernadette woke their sleeping child and permitted the investigators to inspect him. DCF closed the case when the son denied any abuse and the investigators found no signs of it. As if this wasn't foul enough, the Johnsons, again through Colton, sent another anonymous e-mail message to the Lyonses from a different fictitious e-mail account. "The subject line was *'Brian,'* and the text read, *'What have you done James? … or … Why James? You stole the innocence of a young man.'"* Shortly thereafter, James received a letter by postal mail purportedly from an individual Brian who accused Jim of sexually molesting him as a teenager, and threatened to press charges against him.

Fortunately, not long after this incident the police tracked the Internet activity back to Colton, who in turn implicated the Johnsons. The Johnsons were charged with making a false report of child abuse, identity fraud, conspiracy, and criminal harassment (under G. L. c. 265, § 43A (a)). Colton entered into a plea agreement with the Commonwealth in exchange for his testimony against the Johnsons. On December 1, 2011, a jury convicted the Johnsons of criminal harassment and convicted William of making a false report of child abuse. The Johnsons appealed their convictions and the SJC transferred the case on its own initiative.

Among the issues raised on appeal by the Johnsons was the "constitutionality of the criminal harassment statute, G. L. c. 265, § 43A (a), and its application to acts of cyberharassment …" The Court also considered whether the "pattern of harassing conduct" carried out by the Johnsons (through Colton) included speech which "was protected by the First Amendment to the United States Constitution…" In affirming the Johnsons' convictions, the Court found that the sole purpose of the Johnsons' "speech" – if one could indeed even call it that – was "to further their endeavor to intentionally harass the Lyonses" and as such was "not protected by the First Amendment." Echoing the U.S. Supreme Court the SJC made clear that "speech or writing used as an integral part of conduct in violation of a valid criminal statute is not protected by the First Amendment." Having decided the constitutionality of the applicable statute in the instant case – G. L. c. 265, § 43A (a) – the SJC concluded that the Johnsons' speech served only "to implement [their] purpose to harass and cause substantial emotional distress to the Lyonses in violation of § 43A (a)." Going further, the SJC found that the Johnsons did not identify any "lawful purpose of their 'communications' that would" entitle them to First Amendment protections. In addition to admonishing the content of the Johnsons' speech, the Court expressed its distress with "the frightening number, frequency, and type of harassing contacts with which the [Johnsons] bombarded the Lyonses."

Justice, in this case, was served. What's more, the SJC admirably and definitively dispelled the notion that the First Amendment can be misappropriated as a shield to protect vile, criminal conduct like that perpetrated by the Johnsons. This is a useful holding for our clients who have been victims of unlawful cyberbullying or harassment. Faced with such attacks, they can rest assured that justice will not be denied as a result of perverse invocations of "constitutional rights." Cyberbullies who break the law are on notice: they may hide behind their keyboards, but not the Bill of Rights.

Bank Attorney's Refusal to Redact the Debtor's Personal information Proved to be costly

Summary by: David R. Chenelle, Esq.

Redaction of personal information of an individual when filing documents with the Court is strictly required under the Federal Rule of Bankruptcy Procedure 9037(a). Failure to follow this requirement can prove to be a very costly mistake!

Specifically Federal Rule of Bankruptcy Procedure 9037(a) states:

> **Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:
>
> (1) The last four digits of the social-security number and tax payer identification number;
>
> (2) The year of the individual's birth;
>
> (3) The minor's initials; and
>
> (4) The last four digits of the financial account-number.

Unfortunately the creditor's attorney in the case of *In Re: Kristen L. Lunden* did not follow this simple rule.

To understand the end, I must first present a brief travel of the case and its facts. Finding herself in financial distress and having no other options, Kristen Lunden filed for protection under the U.S. Bankruptcy Code, specifically Chapter 7 on March 7, 2014. Contained within her Schedules was a listed interest in real estate located in Athol, MA that served as her primary residence. ("Property") All of her equity in the Property had been properly protected.

Prior to her filing, Ms. Lunden was sued in a civil action by Lenkar, LLC for monies owed. This case was prosecuted in State Court which ultimately issued a judgment against Ms. Lunden in the amount of $141,704.00. Thereafter, that judgment was recorded as a Judicial Lien against the Property in the Registry of Deeds.

Pursuant to §522(f) of the U.S. Bankruptcy Code, Ms. Lunden's bankruptcy counsel filed the appropriate Motion to Avoid Judicial Lien by claiming that the lien impaired her interest in the Property (the "Motion"). That Motion contained as an exhibit a comparative market analysis which indicated that value of the Property was $148,971.00. Lenkar, through its attorney objected to the Motion claiming that it believed the value of the Property was $180,000.00, which would result in only a partial avoidance of the lien. In other words, if Lenkar's value of the Property was correct, it would have still received some money from its lien against Ms. Lunden's Property. In support of its valuation claim Lenkar used Ms. Lunden's "Financial Statement of Judgment Debtor", which had been previously submitted by her in the prior state court action. ("Financial Statement").

Much to its later regret, the Financial Statement submitted by Lenkar also contained Ms. Lunden's full Social Security Number, address and her date of birth: all the information that the redaction rules were created to avoid! Having noticed that the filing contained information barred by the Court pursuant to its redaction rules, Ms. Lunden's counsel contacted Lenkar's counsel requesting that the documents be immediately removed or amended to redact the Ms. Lunden's sensitive personal information. Not realizing the errors of his ways, Lenkar's counsel refused to do so. Thereafter Lunden filed with the Court a Motion for Sanctions and Costs pointing out to the Court Lenkar's failure to redact the documents when they were initially filed and the refusal to remove the documents when the issue was identified.

Thereafter Lenkar filed an opposition to the Motion for Sanctions claiming that the filed document was excluded from the Redaction rule as it was a court document from a previous small claims case. The Court stated in its 14 page decision that Lenkar's argument that the redaction rule did not apply simply because the document was already part of an official record of a state-court proceeding was without merit and the argument was "rather specious". Lenkar's opposition was denied.

As a cost for his indiscretion and bad judgment, the U.S. Bankruptcy Court, J. Boroff, found that the actions of Lenkar's counsel warranted sanctions, including: the payment of punitive damages to the court in the amount of $1,000.00; payment of Ms. Lunden's legal fees and costs; payment of Ms. Lunden's credit monitoring for a year; and an additional $1,000.00 payment for the benefit of Ms. Lunden.

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Federal Rule of Bankruptcy Procedure 9037(a) is not complex and Lenkar's counsel should have been cognizant that the Bankruptcy Court Procedural Rules are substantially different from state court. Ultimately, Lenkar's counsel chose to ignore counsel's request to "fix" the error and in the end provided a very good practice tip to other attorneys!

Maternity Leave For Men: The New "Parental Leave" Law.

By: Kimberly A. Alley, Esq.

Attention employers: It's time to update your employment policies again. Revisions to the Massachusetts Maternity Leave Act (MMLA) have transformed it into the "Parental Leave Law," effective April 7, 2015.

The Parental Leave Law ("PLL") provides job-protected unpaid leave to both male and female employees for birth, adoption or placement of a child pursuant to a court order. An employee is entitled to parental leave after three months of employment, regardless of whether his or her initial probationary period is longer.

Although the MMLA required an employee to provide two weeks notice of maternity leave without exception, the new PLL allows notice forgiveness. This means that an employee may provide fewer than 2 weeks notice of leave if the delay is beyond the employee's control.

The new law does not change other aspects of the MMLA. An employer must still post notice of the parental leave law and the employer's policies. The leave may be paid or unpaid. Violation of the PLL also continues to be a violation of Massachusetts' anti-discrimination laws pursuant to M.G.L. c. 151B.

Employers with more than 50 employees who are subject to the federal Family and Medical Leave Act (FMLA) will face challenges in harmonizing the FMLA and PLL in their employment policies. The FMLA provides 12 weeks of job-protected leave, but is only available if an employee has worked at least 12 months or 1,250 hours in the year preceding the requested leave. The FMLA also does not provide for leave resulting from a child's placement pursuant to court order. Accordingly, the PLL will cover some male employees who are not entitled to leave under the FMLA.

Employers should review their leave policies to ensure compliance with the PLL by April 7, 2015. Please contact Perkins & Anctil, P.C. if your company needs assistance with revising its employment practice policies.

"Welcome Back My Friends To The Show (Or Rather Snow) That Never Ends..."

By: Charles A. Perkins, Jr., Esq.

With deference to those who remember the old Emerson Lake and Palmer Song quoted above, and with another potential snow storm pending for Saturday, February 21, 2015, trustees, managers, unit owners, lawyers and those who are endlessly shoveling roofs and plowing roads, have collectively "had it" with the weather this winter.

Hopefully spring is right around the corner, but the problems encountered this winter will not be going away any time soon. With that in mind, we offer the following reminders to assist all of those dealing with this most memorable winter season.

1. When possible, document all areas that suffer damage from snow, ice or snow removal, and supplement this documentation with the date and time of said incident as well as pictures evidencing said damage. Unless otherwise required by contract, this report should be submitted to the board, in one document, during the spring so that repairs can be discussed and initiated with the appropriate vendors.

2. Trustees or Unit Owners should ensure that all heating and dryer vents are clear of any snow or ice depending on the language in the condominium documents which establishes the party responsible for this type of maintenance.

3. It is clear that due to the severe weather conditions this winter, we anticipate that many boards will experience a budget deficiency. In the event this does arise, we feel that transparency should be the key when addressing damage caused by the snow and ice or its removal, and the plan to cover the cost of these expenses.

In the short term, we recommend that boards develop a plan to pay vendors for any snow related expenses. If the current budget does not have enough funds in place to cover these expenses, be advised that borrowing from the working capital is possible. We are also aware that some boards may choose to borrow from another line item in their budget or in certain situations borrow from their reserve accounts. However, we advise that prior to borrowing any funds, the board should discuss a specific plan to repay these loans. Please note that special assessments are not collectible as a priority lien pursuant to M.G.L. c. 183A and we advise that this type of assessment be avoided when possible.

Boards should consider borrowing funds from a bank, if possible, and/or raising the funds needed by creating a budget amendment over the remaining part of this fiscal year. We recommend that in the event this does occur, the board should notify unit owners as soon as possible.

4. If you are a unit owner, we ask that you treat the professionals you contact for any repair or snow removal requests with the utmost courtesy. Please keep in mind that vendors may be dealing with hundreds of e-mails or telephone calls on a daily basis and they need their sleep too.

5. Please keep off the roads when possible and contact your respective associations regarding snow removal policies.

Perkins & Anctil, P.C. remains committed to assisting our clients during this difficult winter season. Please feel free to contact our office so that we can assist you with any questions or concerns that may arise.

Send In The Drones *Don't Worry They're Here...*

By: Charles A. Perkins, Jr., Esq.

Technology has a way of sweeping over the public before it is ready for regulation. Witness Craigslist, Facebook, Twitter and Uber.

The next areas where we can expect issues to arise pertain to the use of drones. Amazon indicated last year that it may utilize unmanned drones to deliver packages to individual residences. There are also other entities which would like to incorporate drones into their business operations. Real estate companies are using Drones to take pictures of their prospective listings.

Aside from concerns raised by the Federal Aviation Administration, there are a multitude of issues associated with drones and condominium associations. These include landing in the common areas and any liability associated with the same. Covenant restrictions should address concerns related to both the location and time for the use of drones on association property and determining how close to the units a drone can travel before it constitutes trespass. Finally, will insurance companies be ready to address issues associated with the use of drones?

Our newer condominium documents contain the following provisions regarding drones:

> "No drones or other remote-controlled aerial equipment, toys or vehicles shall be used anywhere on the condominium common areas and facilities. No unit owner shall receive deliveries by drone."

It is likely that as time progresses there will be governmental regulation regarding drones very similar to the regulation surrounding satellite dishes. However, notwithstanding any

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of the aforementioned concerns regarding drones, in the words used by Judy Collins regarding clowns…don't worry they're here!

Limited Common Area

Richard Holt and a.v. Gary Keer, et al v. Richard Holt, et al;
Supreme Court of New Hampshire,
Docket No. 2013-0491

By: Charles A. Perkins, Jr., Esq.

In the State of New Hampshire, prior to 2001, it was virtually impossible to create and assign additional limited common areas without 100% vote of the unit owners.

In 2001, the legislature passed RSA 356-B:19, III an amendment which states that upon consent of two-thirds of the vote of the unit owners association (or such higher percentage as the condominium documents may provide) limited common areas may be created or expanded by an amendment to the condominium documents.

This amendment has been used by many associations located in New Hampshire to justify the extension and/or creation of a decks and/or patios. In the past, our firm prepared amendments to the Declaration to allow the expansion or creation of limited common areas as required by RSA 356-B:19. When doing so, we would specifically designate the area to be part of the limited common area and thereafter record the amendment in the applicable registry of deeds. The case of *Holt* calls this process into question.

The *Holt* case involved a four unit condominium association in Hampton, New Hampshire. Although there are extensive facts in this case, we will summarize the facts for purposes of this article. It appears that three of the unit owners joined together to assign all of the limited common area of the property. The court ruled this action was a violation of RSA 356-B:19.

However, it appears the court failed to read the amendment to RSA 356-B:19 and referenced a further part of RSA 356-B:19 holding that:

> "(Emphasis added.) Consequently, any assignment or reassignment of limited common area must both be expressly provided for in the condominium instruments, and comply with the terms of the Act. Id. In order to comply with RSA 356-B:19, I, an amendment to the condominium declaration cannot "alter any rights or obligations with respect to any limited common area" unless the unanimous consent of "all unit owners adversely affected" is obtained. Id.

Furthermore, the court ruled that "when construing a statute, we must give effect to all words in the statute and presume that the legislature did not enact superfluous or redundant words."

> "Rather, we interpret RSA 356-B:19, III in harmony with RSA 356-B:19, I, which provides broad procedural protections for those owners adversely affected by an alteration of rights regarding limited common areas. However, as noted above, RSA 356:B:19, I also allows for situations in which the consent of adversely affected owners would not be required, so long as the condominium documents provided for this before assigning that limited common area. This exception is consonant with the first clause of RSA 356-B:19, III, which requires the condominium instruments to identify which common area not previously assigned as limited common area may be so assigned, and by what method."
>
> The second clause of RSA 356-B:19, III allows limited common areas to be created or expanded" pursuant to a two-thirds vote, or such higher percentage as provided in the condominium instruments. If, as discussed above, "created or expanded" limited common area were construed to include all assignment and reassignment of limited common areas, the second clause would directly conflict with RSA 356:B:19, I. Instead, we interpret the second clause of RSA 356:B:19, III to apply only when the creation or expansion of limited common area would not adversely affect unit owners under RSA 356-B:19, I. For instance, if a condominium association enters into an agreement to purchase additional land, it may choose to create new limited common area for particular unit owners. Because pre-existing common area and limited common area rights would remain unaffected, a unit owner not receiving additional limited common area would not be "adversely affected." Therefore, in the posited scenario, unanimous consent of all owners would not be required. This interpretation comports with the protective purpose of the statute, while, at the same time, it does not render other portions of RSA 356-B:19 a nullity. It is also consistent with the last sentence of RSA 356-B:19, III, which specifically provides that creation of new limited common area cannot alter a unit owner's proportional percentage of common area."

In discussing this matter with lawyers who have knowledge of this case, they believe that it was the court's intention under the amendment to ensure that the provisions of 356-B:19, III are followed to the letter. If you have an amendment that is actually voted on by more than two-thirds of the unit owners and that vote designates certain limited common areas in particular, then those amendments are valid in the eyes of the court. However, in the *Holt* matter, it is clear that bad facts create bad law and this case may call into question many of the limited common areas that have been created in the State of New Hampshire.

About Our Law Firm

Perkins & Anctil, P.C. is one of Massachusetts' and New Hampshire's leading firms practicing condominium law; condominium conversions; real estate law; developer and lender representation; representation before town and municipal boards; landlord/tenant matters; real estate litigation; construction litigation; employment law; personal injury claims, appellate advocacy; criminal defense and bankruptcy. www.perkinslawpc.com

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