MASSACHUSETTS Lawyers Weekly
MASSLAWYERSWEEKLY.COM
VOLUME 49 NUMBER 33 Part of the BRIDGETOWER MEDIA network AUGUST 17, 2020 $9.00

Questions, reservations over jury trial plan

SJC panel eyes August for start of 'test' period

By Pat Murphy
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Lawyers eager for the resumption of jury trials in state court say they have reservations about whether a Supreme Judicial Court committee's recent proposals to ramp up operations in phases adequately address the practical challenges of ensuring fair and safe proceedings as the threat of COVID-19 persists.

On July 31, the Jury Management Advisory Committee issued its report and recommendations for the resumption of jury trials during the ongoing pandemic. In March, the SJC continued all jury trials in both civil and criminal cases in response to Gov. Charlie Baker's declaration of a state of emergency. Under a supplemental SJC order, jury trials have been continued to a date no earlier than Sept. 8.

> "I don't think it is possible right now to seat a jury that is reflective of the community."
> — Brendan G. Carney, president of MATA

The committee's 122-page report recommends the rollout of jury trials in three phases following a "mock trial" dry run to be conducted this month.

"The biggest issue is doing everything we can to reduce risk and ensure the health and safety of everyone who comes into the court," said Jury Commissioner Pamela J. Wood, a member of the SJC committee.

Brendan G. Carney, president of the Massachusetts Academy of Trial Attorneys, commended the group for drafting a "thorough and comprehensive" plan.

But Boston lawyer Victoria Kelleher said she is concerned that there is insufficient information on how well court facilities have been adapted to ensure the safety of all trial participants.

"In some ways we're putting the cart before the horse in talking about reopening plans without really knowing what the safety of the courthouses is," said Kelleher, president of the Massachusetts Association of Criminal Defense Lawyers.

Continued on page 26

IMPORTANT OPINIONS OF THE WEEK

Zoning — Telecommunications Act

Two town residents could not intervene in litigation over the town's decision not to approve a wireless telecommunications facility, as the residents failed to show that the town did not adequately represent their interests, the 1st U.S. Circuit Court of Appeals rules.

PAGE 10

Divorce — Misrepresentation

A divorce judgment should be upheld because there was no error in the judge's determination that the wife's inaccurate financial disclosures made at the time of the divorce were not material and did not amount to misrepresentation, the Appeals Court holds.

PAGE 13

Real property — Conservation restriction

A judge erred in ruling that a plaintiff with a right to enforce a conservation restriction could not obtain monetary damages, as "the right to enforce the restriction encompasses a right to recover money damages in an appropriate case," the Appeals Court decides.

PAGE 16

SDP — Due process

A petition requesting that a respondent be committed as a sexually dangerous person should have been dismissed because "the filing of the SDP petition years before he will be released into the community violates principles of due process," the Appeals Court concludes.

PAGE 17

INSIDE THIS ISSUE

Food for thought

A Boston lawyer pens his first novel, finding inspiration for the tale in the protests staged by employees and customers of the Market Basket supermarket chain. In this week's Hearsay column.

PAGE 4

ALSO INSIDE

Warrant is needed to deploy pole cameras

By Kris Olson
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Police who used pole cameras to record around-the-clock footage at the homes of two criminal defendants were conducting a search under Article 14 of the state constitution and should have sought a warrant, the Supreme Judicial Court has ruled.

At the defendants' urging, the court extended the "mosaic theory" it had adopted earlier this year in *Commonwealth v. McCarthy* to establish that the defendants had a reasonable expectation of privacy in the information investigators had gathered. *McCarthy* involved four automatic license plate readers placed in fixed positions on the ends of the two bridges leading to Cape Cod.

Writing for the court in *McCarthy*, Justice Frank M. Gaziano noted that a "detailed account of a person's movements, drawn from electronic surveillance,

Continued on page 27

Variance not necessary to exceed height requirement

Special permit suffices for new nonconformity

By Eric T. Berkman
Lawyers Weekly Correspondent

Homeowners who planned to replace a pre-existing nonconforming detached garage with a new one that exceeded municipal height restrictions did not need a variance to proceed, the Appeals Court has decided.

NESTOR
Defense counsel for homeowners

The existing garage did not comply with setback requirements implemented after it was built and from which it was protected by G.L.c. 40A, §6, as a pre-existing nonconforming structure. The proposed new garage was to be built on the same footprint but with a 15-foot roof to accommodate a standard-sized garage door.

The Gloucester Zoning Board of Appeals approved the project, issuing a special permit to exceed the 12-foot height limit for accessory buildings.

Abutters brought a Chapter 40A appeal, and a Superior Court judge ruled that, under the Appeals Court's 2014 *Deadrick v. Zoning Bd. of Appeals of Chatham* decision, the homeowners did in fact need a variance. *Deadrick* had found that a modification to a pre-existing nonconforming one- or two-family residence resulting in a new nonconformity requires a variance.

But the Appeals Court reversed, clarifying that, under *Deadrick*, a variance is unnecessary when a specific local ordinance or bylaw provision allows for what otherwise would be a new nonconformity.

"In the case before us, §3.2.1 of the [Gloucester] zoning ordinance allows owners ... to exceed [the height requirement] if they secure approval through a separate special permit process open to the owners of conforming structures and nonconforming structures alike," Judge James R. Milkey wrote for the court. "Those who secure approval to exceed the twelve-foot height

Continued on page 25

MLW The full text of the ruling in *Comstock, et al. v. Zoning Board of Appeals of Gloucester, et al.* can be found at masslawyersweekly.com.

Bar sees more questions than answers in jury trial plan

Continued from page 1

The public comment period on the committee's recommendations closed on Aug. 14.

Face masks for all

The committee's report starts by recommending a mock trial in "mid-August" using staff volunteers at a single location "for the purpose of identifying issues and making adjustments."

After the initial test phase, Phase 1 calls for trials before juries of six for certain civil cases as well as minor criminal and juvenile cases. Phase 1 trials would occur in a select number of courthouses deemed able to accommodate the proceedings in accordance with social distancing and other safety protocols.

Phase 2 would consist of trials before juries of 12 in limited locations for "serious" criminal cases and civil cases "of particular significance."

Phase 3 provides for conducting "as many trials as possible" at all locations able to satisfy social distancing and other safety criteria. The Phase 3 plan also suggests the increased use of non-courthouse space to conduct jury trials in order to address the backlog of cases should the pandemic continue well into 2021.

"The plaintiffs' civil bar's interests are aligned with the court's interests because there's a big backlog of civil cases," Carney said. "The insurance industry has less incentive to resolve cases without jury trials. Some of the small- and medium-value cases are still moving, but the significant cases are at a standstill."

Cathryn Spaulding, president of the Massachusetts Defense Lawyers Association, disputed the notion that civil cases are not being resolved because of the cessation of jury trials.

"We have a lot of cases that are settling because we understand these cases are sitting while interest is accruing against our clients," the insurance defense attorney said.

The committee also recommended that the SJC reduce to six the number of jurors in Superior Court civil cases, including petitions for annual review of sexual dangerousness commitment and Housing Court cases.

Carney said the recommendation makes sense.

"From the perspective of the plaintiffs' civil bar, considering the environment that we're in with the virus, it would almost always be preferable to have six jurors," he said. "I can't think of any cases where 12 would be preferable."

But there needs to be clarification as to whether six-person juries in Superior Court would be mandatory or something to be decided by the parties with input from the court, Spaulding said.

"Obviously, our hope is to get to Phase 3 and have jury trials with 12 jurors like we've had for 300 years," Spaulding said.

While six-member juries work in the District Court, they "will not fly" in Superior Court, according to Andrew P. Botti, director of the litigation department at McLane Middleton in Woburn.

"Superior Court matters tend to be more serious and worth a lot more money," Botti said. "I'm not sure I'd like to try a six-person Superior Court jury trial. In any event, it's got to be up to the parties involved."

In light of the health concerns raised by the pandemic, the committee also recommended that people 70 or over be permitted to elect not to serve as jurors and that anyone else could defer service for up to one year. Likewise, the panel recommended broad opt-outs for those vulnerable because of their health, status as a caregiver, or for other circumstances related to COVID-19.

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In terms of risk-reduction measures in courthouses, the JMAC report calls for the "universal" wearing of facemasks covering the nose and mouth. An exception allows witnesses to testify while wearing acrylic face shields or when they are behind Plexiglas barriers. A similar exception is carved out for jurors during individual voir dire.

Kelleher expressed concern that many who work in the state's courthouses routinely violate existing facemask and social distancing protocols, raising the question of whether there will be a similar disregard of any new protocols for the resumption of jury trials.

"I can appreciate that it's difficult to keep masks on all the time, but a lot of people in courthouses — including judges — are not wearing their masks," Kelleher said. "In some instances, [judges] are directing people to take their masks off when they're speaking."

Kelleher added that the wearing of facemasks by trial participants raises due process concerns for criminal defendants.

"A lot of what is communicated in social interactions is through facial expressions," Kelleher said. "Face-to-face confrontation means face to face. You can have a witness on the stand who theoretically is not wearing a mask, but there's a lot more going on in the courtroom that is lost when you have people wearing masks."

Need for further guidance?

Kelleher said the judiciary needs to be more creative in addressing the problem of criminal defendants held in custody without bail. In June, the SJC in *Commonwealth v. Lougee* decided that the periods of delay resulting from continuances made necessary by the pandemic are excluded from the computation of the time limits on pre-trial detention under G.L.c. 276, §§58A and 58B.

One solution could be giving defendants in custody the option to have a trial before a judge, Kelleher said. If the judge returns a guilty verdict, the defendant would then have the right to a jury trial at a later date.

The judiciary should also look to expedite hearings on dispositive motions such as motions to suppress in order to reduce the number of defendants in custody while awaiting trial, she said.

"The courts need to take a harder look at how to get these people out of custody if we can't figure out a way to try these cases safely," Kelleher said.

The courts should also examine whether trial judges should be provided guidance on how to handle certain scenarios that may arise, such as a juror showing up for trial with an elevated temperature, Kelleher said. She acknowledged that, ultimately, a judge enjoys broad discretion in declaring a mistrial but that guidelines might be helpful.

"[Every juror is] going to have to be advised about somebody who showed up who was potentially COVID-positive," Kelleher said. "Then you have a jury that's very, very distracted. [Jurors] not being able to attend to the issues at hand not only raises concerns for defense, but for the prosecution as well." Spaulding said standard guidance is needed on the mistrial issue.

"That shouldn't be a discretionary matter at all," Spaulding said. "The courts should be on the same page when making a decision about someone becoming ill during trial."

Social justice concerns

Kelleher speculated that the courts will find it a challenge to call enough prospective jurors to meet the demand given the fear generated by the pandemic and the generous allowances for people to excuse themselves from jury duty.

Jury Commissioner Wood said maintaining adequate numbers in the jury pool is definitely a concern.

"I don't know what's going to happen because we are in uncharted waters," Wood said. "Certainly we'll have lower numbers than we would have in a non-pandemic period. We're going to have to issue a larger number of summonses to get the numbers we used to have."

Meanwhile, Kelleher said minorities in particular may seek to excuse themselves, preventing the empanelment of juries that represent a cross-section of the community.

"COVID has been shown to affect people of color at a much higher rate than white people," Kelleher said. "Often times our clients are people of color. Having a jury that reflects not only the community but also the clients that we serve is important to us and a major issue related to racial justice."

Carney agreed.

"I don't think it is possible right now to seat a jury that is reflective of the community because you're going to be eliminating most of the people over the age of 60 and also probably a lot of minority members of the community, because the data suggests they are more susceptible to the virus," Carney said.

He also noted that many parents will be unavailable for jury duty because their children will be at home in the fall attending school remotely.

"As a plaintiffs' attorney, you're going to face a dilemma in having to choose between not getting a resolution for your client and going forward with a trial with a jury that may not be impartial because it's not reflective of the community," he said. MLW

THIS WEEK'S DECISIONS

For full opinions, visit lwopinions.com

LAND COURT

Continued from page 24

interference with the plaintiff's use and enjoyment of his or her land. Thus, for example, a landowner's conduct can be unreasonable if the harm to a neighbor is substantial and the landowner could avoid the harm in whole or in part without undue hardship. …

"Applying this analysis, I find that the Proprietors acted unreasonably in installing the culvert and directing surface water flow in a stream onto the Prunhuber property. …

"The installation of the culvert so as to direct water flow onto the Prunhuber property was especially unreasonable given that the harm to the Prunhuber property could be avoided at a reasonable cost. …

"The Proprietors act as a kind of private equivalent to a municipal department of public works, although with no power to make a taking. They had no easement or permission to drain water onto the Prunhuber property. Instead, they decided that the Prunhuber property should be the sole property affected by their solution to a general problem on Lakeside Drive. '[I]t is unreasonable to impose on private individuals a disproportionate share of the cost of this public benefit.' … The Proprietors acted unreasonably, and are liable to the Prunhuber Trust for the nuisance they created. …

"The Prunhuber Trust does not seek money damages. Rather, the Trust seeks an injunction. The flow of water onto the Prunhuber is a continuing trespass. In that circumstance, an injunction prohibiting the continuing trespass is an appropriate remedy. ... Similarly, an injunction abating the nuisance of a continuing flow of water is also an appropriate remedy. ... I find that an injunction is appropriate here. The invasion of the Prunhuber property is ongoing, and must be stopped. The possible ways to stop it were put before the Proprietors, and they simply ignored them. Certainly, the cost of various remedies is a factor. For this reason, I will enter an injunction giving the Proprietors two options. Judgment shall enter enjoining the Proprietors from maintaining the culvert in its current state. The Proprietors will be ordered to, within ninety days, either (a) install a trench and rock-lined swale at the outlet of the culvert directing the flow of water withing the layout of Lakeside Drive southerly to the point where it can discharge onto the unnamed private way between Lots 2 and 11 as shown on the 1965 plan, or (b) regrade Lakeside Drive along the Prunhuber property so that water again flows off Lakeside Drive in a sheet flow along the entire bound of the Prunhuber property."

Prunhuber, et al. v. Allen (Lawyers Weekly No. 14-037-20) (48 pages) (Foster, J.) (Berkshire Land Court) (Docket No. MISC 16-000306) (April 16, 2020).