CM EAST COAST REPORT of Recent Decisions

2015 • Vol. 4

Routine Maintenance Not A Protected Activity Under The New York Labor Law

Second Circuit Corrects The New York Southern District's Use Of "Factual Nexus" Test

Moving For Summary Judgment In A Premises Liability Case

A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.

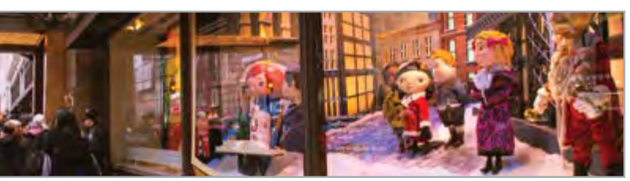
Clausen Miller PC

CM EAST COAST REPORT of Recent Decisions

FEATURES

12 *CM News*
13 *On The Litigation Front*
14 *Case Notes*

REPORT STAFF



ARTICLES

LABOR LAW

3 Checking Lighting Fixtures At A Construction Project Is Routine Maintenance And Not A Protected Activity Under The New York Labor Law
by Gregory J. Popadiuk

LIABILITY COVERAGE

5 Third Circuit Employs "Fresh Wrong" Analysis And Holds "Prior Publication" Exclusion Applies When Current Advertisements Are "Substantially Similar"
by Christopher J. Liegel

7 Second Circuit Corrects The New York Southern District's Use Of "Factual Nexus" Test In Affirming Decision That Coverage Did Not Exist Based On The Policy Exclusion That All Related Claims Should Be Treated As A Single Claim
by Michael W. Jacobson

PREMISES LIABILITY

8 New York Appellate Division Affirms That A Defendant Moving For Summary Judgment In A Premises Liability Case Can Meet Its Initial Burden By Demonstrating That The Plaintiff Did Not Know What Caused Him Or Her To Fall
by Allison L. Pisciotta

PROPERTY COVERAGE

9 Heavy-Lifting Crane Held "Integral" And Not "Incidental" To Construction Work, And Thus Not Covered As "Temporary Work" In Builder's Risk Policy
by Rebecca Ahdoot

Checking Lighting Fixtures At A Construction Project Is Routine Maintenance And Not A Protected Activity Under The New York Labor Law

by ***Gregory J. Popadiuk***

In *Guevera v. Simon Prop. Group, Inc.*, 2015 NY Slip Op 09254 (2d Dep't December 16, 2015), the Appellate Division, Second Department affirmed an order of the trial court denying the Plaintiff's motion for summary judgment under Labor Law §240(1), commonly referred to as the "Scaffold Law." In the same opinion, the Appellate Division affirmed the trial court's decision granting the property owner Defendants' cross-motion for summary judgment in its entirety, and dismissing the Labor Law §§200, 240(1) and 241(6) and common law negligence claims.

Plaintiff Ignacio Guevera was an employee of the Third-Party Defendant County Wide Electric. He was working in a retail store owned by Defendant Pacific Sunwear Stores, Corp. and leased from Defendant Simon Property Group, Inc. Plaintiff was standing on a ladder at the premises and checking to see if the lighting fixtures in the ceiling required new bulbs. While doing so, he removed the cover of a ballast box of one of the fixtures and received an electrical shock from a loose cable, which caused him to fall from the ladder and sustain injuries.

Labor Law §240 imposes strict liability on owners, general contractors and their agents for injuries arising out of elevation related hazards. The law provides as follows:

> All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Although Plaintiff's accident undoubtedly resulted from an elevation-related risk in that he fell from a ladder, the Appellate Division determined that he was involved in routine maintenance rather than repair work and, therefore, his activity did not fall within the

Gregory J. Popadiuk
is an Associate in the New York office of Clausen Miller P.C. His areas of practice include labor law, premises liability, property damage and construction. He has successfully defended property owners and contractors in a variety of personal injury cases. Greg received his B.S. degree at University of Maryland, College Park and his J.D. Touro College, Jacob D. Fuchsberg Law Center.
gpopadiuk@clausen.com

purview of Labor Law §240(1). The Appellate Division relied on several cases including a New York Court of Appeals decision in *Smith v. Shell Oil Co.*, 85 N.Y.2d 1000, 630 N.Y.S.2d 962 (1995), where it was found that an illuminated sign with a burnt-out light bulb is not broken, and does not need repair. Rather, it needed maintenance of a sort different from "painting, cleaning or pointing," which are the only types of maintenance provided for under Labor Law §240(1). *Id.* Similarly, Plaintiff in *Guevera* was performing maintenance work in checking light fixtures.

The Appellate Division dismissed Plaintiff's Labor Law §200, §241(6) and common law negligence claims. Labor Law §200 imposes a general duty to protect the health and safety of employees and is a codification of common law negligence. Generally, where an accident is caused by a condition of the workplace and not by the method of work, a plaintiff need not prove that the owner, contractor or their agent supervised or controlled the work, but only that they caused or had notice of the dangerous condition. The Court held that Defendants' neither caused nor had notice of the loose cable that allegedly caused Plaintiff's electrical shock and, therefore, dismissed the Labor Law §200 claim.

Finally, Labor Law §241(6) applies to construction, excavation and demolition work. It provides, in pertinent part, as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places.

The Labor Law §241(6) claim was dismissed because Plaintiff was not involved in the activity of construction, excavation or demolition. The statute does not protect workers involved in maintenance or replacement of parts.

Learning Points: Labor Law §240(1) is historically a Plaintiff-friendly statute and the subject of increasing summary judgment motion practice by the Plaintiffs' bar. However, *Guevera* reemphasizes that not every case in which a plaintiff who is working at a construction site and falls from a ladder, or is injured as a result of an elevation-related risk will automatically warrant the protection of Labor Law §240(1). Rather, it is important from a defense perspective to inquire thoroughly through deposition testimony and other discovery measures as to what type of work the plaintiff was performing at the time that he or she was allegedly injured. ♦

Third Circuit Employs "Fresh Wrong" Analysis And Holds "Prior Publication" Exclusion Applies When Current Advertisements Are "Substantially Similar"

by **Christopher J. Liegel**

In *Hanover v. Urban Outfitters, Inc.*, 2015 U.S. App. LEXIS 18459 (3d Cir., Oct. 23, 2015), the United States Court of Appeals for the Third Circuit, in an issue of first impression, employed the "fresh wrongs" analysis and held that where an alleged trademark infringement began prior to the date in which an insurance policy took effect, the insurer had no duty to defend pursuant to the "prior publication" exclusion when the alleged advertising torts occurring within the policy period were found to be "substantially similar" to those which occurred prior.

A "prior publication" exclusion of liability insurance prevents a company from obtaining ongoing insurance coverage for a course of tortious conduct that is continuous in nature. In *Hanover*, the Third Circuit was required to consider the scope of this exclusion. In February, 2012, the Navajo Nation sued Urban Outfitters for trademark infringement. Navajo Nation alleged that Urban Outfitters "advertised, promoted, and sold its goods under the 'Navaho' and 'Navajo' names and marks" on both the internet and in stores. The Complaint further alleged that the infringement had occurred "since at least March 14, 2009." Thereafter, Urban Outfitters tendered the Complaint to OneBeacon American Insurance Company ("OneBeacon") and Hanover Insurance Company ("Hanover").

OneBeacon provided commercial general liability coverage to Urban Outfitters, in effect until July 7, 2010. Thereafter, a "fronting policy" took effect, providing identical coverage and naming Hanover as the responsible insurer. Hanover also issued a separate commercial general liability and umbrella policy, effective July 7, 2011, to July 7, 2012. All of the Hanover policies excluded coverage for "personal and advertising injury" liability "arising out of oral or written publication of material whose first publication took place before the beginning of the policy period," *i.e.*, prior to July 7, 2010. In 2013, the district court held that Hanover had no duty to defend or indemnify since Hanover did not issue insurance coverage until after the alleged infringement began. Thus, the district court's ruling indicated that the "prior publication" exclusion applied even to several new products infringing upon the 'Navajo' name, which only became available after July, 2010.

Christopher J. Liegel
is an associate in the New York office of Clausen Miller P.C. Chris received his B.A. from Gettysburg College, *magna cum laude*. He received his J.D. from Brooklyn Law School, where he was a recipient of the Brooklyn Law School Silver Public Service Award, and the CALI Award for Excellence in Appellate Advocacy.
cliegel@clausen.com

On appeal, the Third Circuit analyzed whether Urban Outfitters' liability-triggering conduct preceded or post-dated the Hanover policy period's inception. Urban Outfitters argued that extrinsic evidence should be used to determine whether Hanover owed a duty to defend in the Navajo Nation litigation. The Court rejected this argument, as Pennsylvania law provides that the determination of a duty to defend relies solely upon the language of the policy and the allegations of the complaint. Thereafter, upon further review of the Hanover policy language and pleadings, the Court determined that a precise commencement date of the alleged infringement could not be determined. However, given Navajo Nation's use of the qualifying language, "since at least March 16, 2009," the Court stated that this at least provided a fixed start date from which to measure the infringement, occurring at least sixteen months prior to Hanover's issuance of insurance. Thus, Hanover owed no duty unless the Complaint alleged "fresh wrongs" that occurred after the Policy was in effect.

The Third Circuit indicated that this was an issue of first impression, and examined the Ninth Circuit's analysis of "fresh wrongs" in *Street Surfing, LLC v. Great American E&S Insurance*, 752 F.3d 853 (9th Cir., 2014). In Street Surfing, the Ninth Circuit stated that post-coverage publications were not "fresh wrongs" if they were "substantially similar" to pre-coverage publications that carried out the same alleged infringement. With this framework in mind, the Third Circuit reasoned that "variations occurring within a common, clearly identifiable advertising objective, do not give rise to 'fresh wrongs.'" Thus, to determine whether two sets of advertisements share a common objective, the court indicated that it could look to whether the plaintiff charged the insured with separate torts, whether there was a lull or break in time between pre and post coverage advertising, and whether there was a "common theme."

Here, it was clear that the Navajo Nation alleged a continuous pattern of infringement from at least 2009. At no point in the pleadings did the Navajo Nation charge Urban Outfitters with committing separate torts both before and during the coverage period. Instead, the Navajo Nation clearly alleged that Urban Outfitters had used the Navajo name well before the Hanover period commenced. More importantly, the post-coverage advertisements shared a common advertising objective with the pre-coverage advertisements, namely, to use the identity, goodwill, and/or reputation associated with the 'Navajo' or 'Navaho' names for Urban Outfitters' commercial benefit. The Third Circuit found that there was no "fresh wrong" triggering any duty owed by Hanover.

Learning Point: The purpose of insurance is to disperse risk. However, an insurer cannot insure against some action or alleged wrong that has already begun. In this case, although the Hanover policy clearly covered the insured's alleged trademark infringement, the prior publication exclusion specifically excluded coverage for personal and advertising injury, serving to prevent Urban Outfitters from passing the risk for its continued misconduct on to Hanover. Urban Outfitters engaged in liability triggering behavior both before and after Hanover issued coverage. As such, if the alleged wrongs were substantially similar, the Third Circuit was required to apply the exclusion as a matter of equity, so as not to provide the insured with a greater coverage than was contracted for. In doing so, the Court took on an issue of first impression—the "fresh wrong" analysis—and clearly stated that any advertising torts, even if occurring well into the coverage period, will not trigger a duty to defend if those torts could be traced to an identifiable advertising objective which occurred pre-coverage. Liability insurers issuing policies with "prior publication" exclusions may not be required to defend or indemnify an insured even if the advertising injury is alleged to have occurred within the policy period. ♦

Second Circuit Corrects The New York Southern District's Use Of "Factual Nexus" Test In Affirming Decision That Coverage Did Not Exist Based On The Policy Exclusion That All Related Claims Should Be Treated As A Single Claim

by ***Michael W. Jacobson***

The Second Circuit Court of Appeals recently affirmed a ruling on appeal from the Southern District of New York that a Related Claims policy exclusion precluded coverage when the underlying lawsuits were related to a previous litigation and should be treated as a single claim filed on the date of the earliest action, which was filed outside the coverage period in 2008. *Nomura Holding Am., Inc. v. Fed. Ins. Co.*, No. 14-3789, 2015 U.S. App. LEXIS 18486, *4 (2d Cir. Oct. 21, 2015).

In affirming the district court's decision, the Second Circuit corrected the district court's use of the "factual nexus" test to determine that the present claims were related to a previous suit and are precluded from coverage. *Id.* at *2. The Court stated that the proper standard is to interpret provisions of an insurance contract under the plain language when the contract is unambiguous. *Id.* at *3.

The Court noted that "Under New York law, it is axiomatic that an insurance contract should be interpreted under its 'plain language' where a contract is unambiguous." *Id.* at *2 citing *VAM Check Cashing Corp. v. Fed. Ins. Co.*, 699 F.3d 727, 729 (2d Cir. 2012). The Court went on to state that despite reaching the correct result, there was "no reason to depart from this well-established principle and invoke a test that employs a different standard." *Id.* at *2.

The Policies in question defined "Related Claims" as "all Claims for Wrongful Acts based upon, arising from, or in consequence of the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events." *Id.* at *3.

The district court's analyses of whether the claims "'are neither factually nor legally distinct, but instead arise from common facts' and where the 'logically connected facts and circumstances demonstrate a factual nexus' among the Claims," was the incorrect inquiry. *Id.* at 3 (citations omitted). The Court stated that the proper analyses is: "whether the underlying claims are 'based upon, arising from, or in

Continued on page 17

Michael W. Jacobson
is an associate in the New York office of Clausen Miller P.C. Mike received his B.A. from Drew University and his J.D. from Seton Hall University School of Law. While in law school, he was a member of the Juvenile Justice Clinic.
mjacobson@clausen.com

New York Appellate Division Affirms That A Defendant Moving For Summary Judgment In A Premises Liability Case Can Meet Its Initial Burden By Demonstrating That The Plaintiff Did Not Know What Caused Him Or Her To Fall

by ***Allison L. Pisciotta***

Allison L. Pisciotta
is an associate in the New York office of Clausen Miller P.C. Allison focuses her practice primarily on the defense of premises liability, property damage, and construction accident claims. She obtained her B.A. in Political Science from Emory University and her J.D. from Brooklyn Law School.
apisciotta@clausen.com

In *Giannotti v. Hudson Val. Fed. Credit Union*, 2015 N.Y. Slip. Op. 08383 (2d Dep't Nov. 18, 2015), the Appellate Division, Second Department, recently affirmed that "a plaintiff's inability to identify what had caused […] her to fall is fatal to [her case and…] a defendant moving for summary judgment dismissing the complaint can meet its initial burden as the movant simply by demonstrating that the plaintiff did not know what had caused […] her to fall." *See Kudrina v. 82-04 Lefferts Tenants Corp.*, 110 A.D.3d 963, 964 (2d Dep't 2013).

Defendant is a credit union that was sued by Plaintiff, who was allegedly injured when she tripped and fell over a rug in the credit union's lobby. Plaintiff was following one of Defendant's employees to the employee's office when she tripped. After the fall, Plaintiff noticed that part of the edge of the rug was bent upwards.

Defendant moved for summary judgment dismissing the Complaint. Defendant submitted Plaintiff's deposition transcript wherein Plaintiff testified that she did not notice the rug before her fall and only observed the folded condition of the rug after her fall. An Affidavit from the employee was submitted which stated that she did not see any condition of the rug that would have caused Plaintiff to fall. Surveillance video from the day of the accident also showed that the rug was not in any defective condition before Plaintiff's fall. The lower court granted Defendant's motion for summary judgment.

On appeal, the Second Department highlighted that while a defendant moving for summary judgment has the initial burden of establishing that it did not create the dangerous condition, or have actual or constructive notice of the condition, a defendant can also meet its initial burden by showing that the plaintiff did not know what caused the fall.

Since Plaintiff did not present any proof of a defective condition of the rug at the time of the accident, the Second Department found that the folded condition of the rug observed after Plaintiff's accident could have been caused by Plaintiff when she fell. The Second Department

Continued on page 17

Heavy-Lifting Crane Held "Integral" And Not "Incidental" To Construction Work, And Thus Not Covered As "Temporary Work" In Builder's Risk Policy

by ***Rebecca Ahdoot***

The Appellate Division, First Department recently held that insurers are not required to insure the collapse of a large crane post-Superstorm Sandy. *Lend Lease* (US) *Constr. LMB Inc. v Zurich Am. Ins. Co.*, 2015 NY Slip Op 09389 (1st Dep't Dec. 22, 2015). The Court interpreted the meaning of "temporary work" in a builders risk policy, and it held that the custom-designed crane used to build a high-rise luxury tower was "integral," not "incidental" to the building, and as such did not meet the definition of "temporary works."

The claim was a $6.4 million claim for removal, re-erection and economic loss. Before Sandy impacted New York, property owner Extell West 57th Street and construction manager LendLease were building a mixed-use high rise. LendLease retained a contractor for superstructure concrete work, and its work included furnishing, erecting and dismantling two tower cranes. The crane's erection process was very in-depth and was supervised by an engineer. The crane was to be removed from the job when complete. However, as the building was being built, the crane's mast was tied to the floor slabs and some of the reinforcing materials were to stay in the building.

Extell and Lendlease obtained builders risk policies providing that they "insured against all risks of direct physical loss of or damage to covered property." The definition of "covered property" included "property under construction" and "temporary works." The definition of "temporary works" was "[a]ll scaffolding (including scaffolding erection costs), formwork, falsework, shoring, fences and temporary buildings or structures, including office and job site trailers, all incidental to the project, the value of which has been included in the estimated total project value." There was a coverage exclusion for "contractor's tools, machinery, plant and equipment including spare parts and accessories … and property of a similar nature not destined to become a permanent part of the insured project."

Sandy's high winds caused the 750-foot tall crane's boom to flip over and some parts to fall off. It took several months to repair the crane. Surrounding blocks were evacuated and gas mains shut-off in an attempt to limit the damage. The insurers disclaimed coverage indicating that the crane was not "covered property" and was excluded by the contractor's tools provision. They argued that

Rebecca Ahdoot
is an associate in the New York office of Clausen Miller P.C. doing general practice. She received her Juris Doctor, *cum laude*, from Brooklyn Law School in May of 2010. Rebecca is a board member of the Iranian American Bar Association of New York.
rahdoot@clausen.com

the crane was too substantial and crucial to be seen as "incidental," and thus did not fit into the category of structures in the temporary works provision. Moreover, they argued that the contractor's tools exclusion applied since ultimately the crane would not become a permanent part of the project. On the other hand, the owner and construction manager argued that the crane was going to be dismantled at the end of the project and thus was "temporary."

The Court ultimately held that the crane was "integrated" into the building and that rather than serving a "subordinate role," it was used to lift heavy items such as concrete slaps, structural steel and other equipment, so it was integral and indispensable as the building could not have otherwise been built. As a result, the crane was not subject to the temporary works provision. Even if it could be a "temporary work," the Court went further to state that the crane was "without question, contractor's machinery or equipment that is excluded from coverage." This is because it would be removed at the end of the project and was characterized as "heavy equipment" in the installer's contract.

Learning Point: A heavy-lifting crane that performs necessary tasks for the construction of the building is "integrated," rather than "incidental" to the building, and thus is not covered under a builders risk policy as a "temporary work." ♦

Clausen Miller Presents Client-Site Seminars For CLE and/or CE Credit

As part of our commitment to impeccable client service, we are proud to provide client work-site presentations for Continuing Legal Education ("CLE") and/or Continuing Education ("CE") credit. Some of our currently available courses are listed below. Please view the complete list and individual course descriptions at www.clausen.com/index.cfm/fa/home.resources/resources.cfm for information regarding the state specific CE credit hours as well as course and instructor details.

Additional Insured Targeted Tender Issues And Other Emerging Trends Affecting Strategic Claims Determinations

Additional Insured Targeted Tender Issues and Other Legal Considerations Affecting Strategic Coverage and Litigation Determination

Alternatives to Litigation: Negotiation and Mediation

An Ethical Obligation or Simply an Option?: Choose Your Own Adventure When Adjusting a First Party Property Claim

An Insider's Guide To New York Practice

Appellate and Trial Protocols for Resolving Coverage, Casualty and Recovery Issues Facing the Insurance Claims Professional

Attorney-Client Privilege and Work Product Doctrine

Bad Faith Law and Strategy for the Claims Professional and Appellate Protocols for the Resolutions of Such Claims

Breaking Bad Faith, Failure To Settle Within Policy Limits, And Strategy For The Claims Professional

Builders Risk Insurance: Case Law, Exclusions, Triggers And Indemnification

Coverage and Trial/Appellate Litigation— Strategies Affecting Coverage Determinations

Coverage Summer School: "Hot" Insurance Topics for "Cool" Claims Handling

Deep Pockets: Prosecuting & Defending Government Liabilities— US & Municipalities

Developments In Property Insurance Coverage Law

Discovery in the Bad Faith Context

Jumping Over the Evidentiary Hurdles to Victory

Miscellaneous Issues of Interest Relating to Property Insurance

Recent Developments In Insurance Coverage Litigation

Recent Trends In Bad Faith And E-Discovery Issues And Protocols To Resolve Same For The Claims Professional

Subrogation: Initial Recognition, Roadblocks and Strategies

Targeted Tenders, Suits Against Employers, And Other Legal Issues Facing The Claims Professional

Tips And Strategies For The Claims Professional: What You Need To Know About Medicare Reporting, The Affordable Care Act, Targeted Tenders, And Unilateral Settlement Agreements

If you are interested in a course or topic not currently listed in our available courses, please contact the Clausen Miller Marketing Department at marketing@clausen.com

NEW INDIANA OFFICE ALREADY SERVICING MANY CM CLIENTS

In November 2015, Clausen Miller opened its new office in Michigan City, Indiana. Managing Partners **Paige M. Neel** and **Kimbley A. Kearney** report that the office is already defending clients in cases involving complex insurance coverage disputes, broker/agent liability, employment discrimination, civil rights violations, personal injury, transportation, and appellate law. Due to its central location, the new office enhances the firm's ability to offer its full array of legal services throughout Indiana.

For more information about CM's Indiana office, please contact Paige at **pneel@clausen.com** or Kim at **kkearney@clausen.com**.

CASUALTY DEFENSE GROUP OBTAINS DECISION DISMISSING LABOR LAW THIRD-PARTY AND CROSS-CLAIMS

CM Partners **Carl M. Perri** and **Matthew J. Van Dusen** were retained to represent defendant/fourth third-party defendant Celtic Sheet Metal, Inc. ("Celtic"), an air conditioning duct installation company. Celtic was hired by defendant/fourth third-party plaintiff Admore Air Conditioning Corp. ("Admore"), to install metal duct work in a newly constructed high rise building in New York City. Plaintiff, an employee of a first third-party defendant curtain window installation company was walking backwards moving materials on a poor lighted floor and stepped into an uncovered hole injuring his back and knee. Plaintiff filed a New York Labor Law action in the New York Supreme Court, Bronx County. Admore was brought into the case and ultimately brought a third-party action against Celtic based upon their contract. Thereafter, Plaintiff filed a direct claim against Celtic.

After completion of document and deposition discovery, Plaintiff realized that neither Admore, nor Celtic created or had anything to do with the hole in question. Thus, Plaintiff voluntarily dismissed with prejudice his claims against Celtic, Admore and many other defendants that discovery revealed had nothing to do with the hole. The defendant owner/general contractor and the defendant carpentry company who failed to cover the hole would not agree to release their cross-claims against any defendants who Plaintiff voluntarily dismissed against. Plaintiff's employer would not dismiss its cross-claims either, because it remained in the case, so all third-party and cross-claims amongst the many defendants remained. Celtic was forced to move for summary judgment to have the third-party and cross-claims dismissed or go to trial.

Messrs. Perri and Van Dusen filed a motion for summary judgment pursuant to New York CPLR § 3212 seeking to have the third-party and cross-claims dismissed. They argued, based upon the evidence, that Celtic did not create the hole, had no involvement with the hole, and could not have physically used the hole in any way. In the Decision and Order, dated December 10, 2015, Justice Howard H. Sherman summarily dismissed all third-party and cross-claims against Celtic. In the Decision and Order, dated December 10, 2015, Justice Howard H. Sherman summarily dismissed all third-party and cross-claims against Celtic.

If you would like to learn more about New York Labor Law, construction litigation and personal injury issues, please feel free to e-mail **Carl M. Perri** (**cperri@clausen.com**) or **Matthew J. Van Dusen** (**mvandusen@clausen.com**) or call them at 212-805-3900.

AGENCY

THIRD-PARTY TOUR GUIDE POTENTIAL AGENT OF RESORT

Taylor v. The Point at Saranac Lake, Inc., 2016 N.Y. App. Div. LEXIS 236 (N.Y. App. Div. 3d Dep't)

While staying at, and with the help of defendant resort, decedent booked an off-site snowmobile tour. During the excursion, decedent crossed the highway and was struck and killed by a motor vehicle. ***Held:*** Resort was not entitled to summary judgment on guest's negligence claim because the hotel's promotion materials and conduct created a question of fact as to whether the guest could have reasonably believed that the excursion company possessed authority to conduct the snowmobile tour as the resort's agent.

ATTORNEY'S FEES

ATTORNEY'S FEES NOT AVAILABLE TO VICTORIOUS INSURED

MacDonald v. Webb Ins. Agency, Inc., 2015-Ohio-4623 (Ohio App.)

After winning declaratory judgment action regarding coverage, insureds brought separate action to recover attorney's fees incurred. ***Held in a case of first impression:*** Attorneys' fees are not damages in a negligence action. Under the "American Rule," litigants may not recover attorney's fees absent a contract, statute, or an opponent's bad faith. Nothing in the insurance contract or statutes allowed recovery of fees. Allowing insureds to recover fees under a negligence theory analogous to legal malpractice would violate the American Rule.

DISCOVERY

COURT CONFIRMS RULES REGARDING SOCIAL MEDIA DISCLOSURE

Forman v. Henkin, 2015 N.Y. App. Div. LEXIS 9353 (N.Y. App. Div. 1st Dep't)

Plaintiff sued for injuries sustained when she fell from a horse. Defendant sought disclosure of plaintiff's social media information, such as photos and messages, which the trial court denied. ***Held:*** A majority of the court adhered to precedent and rejected the dissent's desire to open such information to discovery. There must be a factual predicate for requesting such information. Mere speculation that the requested information might be relevant to rebut plaintiff's claims of injury or disability is not a proper basis for requiring access to a plaintiff's social media account.

FIRST-PARTY PROPERTY

INCREASED RISK OF FUTURE SPOILAGE EXCLUDED UNDER "ALL RISKS" POLICY

H.P. Hood, LLC v. Allianz Global Risks U.S. Ins. Co., 39 N.E.3d 769 (Mass. App.)

After customer rejected insured's production run because of faulty bottle seals, insured claimed coverage under its "all risks" property policy. ***Held:*** Even if loss qualified as "property damage," coverage was excluded as "faulty workmanship, material, construction or design, from any cause." The bottle cap liners were faulty because of material, workmanship, and/or design and the failure to meet customer demands is not within all-risk coverage. Coverage was unavailable through the "resulting loss provisions" of the exclusion. The initial property damage did not lead to different other property damage. The entire loss was bound up in the increased risk of future spoilage caused by faulty seals.

LABOR LAW

SOLE PROXIMATE CAUSE DEFENSE AGAINST STRICT LIABILITY UNDER NEW YORK'S SCAFFOLD LAW

Gillis v. Brown, 133 A.D.3d 1374 (N.Y. App. Div. 4th Dep't)

While securing roofing material to trusses on defendants' barn, the plywood beneath plaintiff shifted, causing him to fall and injure himself. A question arose as to whether plaintiff disregarded instructions to use a "man-lift," and whether use of such equipment would have prevented the accident. ***Held:*** Plaintiff was not entitled to summary judgment on his Labor Law § 240(1) claim insomuch as there were issues of fact as to whether plaintiff was the sole proximate cause of his injures.

BACK INJURY SUSTAINED WHEN WORKER LIFTED BEAM FROM SCAFFOLD TO WALL NOT PROTECTED UNDER LABOR LAW § 240(1)

Cardenas v. BBM Constr. Corp., 133 A.D. 3d 626 (N.Y. App. Div. 2d Dep't)

Plaintiff filed a Labor Law § 240(1) claim for injuries he allegedly sustained while installing a 500-pound beam into the wall of a house, while standing on a scaffold 14-15 feet off of the ground. ***Held:*** The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of elevation risks, and not to all perils that may be connected in some tangential way to the effects of gravity. Plaintiff's claim did not arise from a protected elevation-related activity, but was the result of a general construction site danger.

LEGAL MALPRACTICE

MOTHER'S LOSS OF LIFE ESTATE CONSTITUTES ACTUAL DAMAGES

Brissette v. Ryan, 40 N.E.3d 554 (Mass. App.)

After attorney told client to trust her children as to transfer of house to them, children denied her a life estate. ***Held:*** Failure to receive a life estate is actual damages supporting legal malpractice action. A life estate is a property right giving holder possession of property and the right to freely alienate it during estate. Allowing mother to live on property at sufferance merely pertains to the extent of damages, not the actual loss.

LIABILITY INSURANCE COVERAGE

OPERATION OF VEHICLE BY EXCLUDED DRIVER TERMINATES COVERAGE

Commerce Ins. Co. v. Gentile, 36 N.E.3d 1243 (Mass. App.)

Grandson involved in a vehicle accident was an "excluded operator" under policy. ***Held:*** Policy violation relieved insurer from duty to pay the optional coverage for victims' injuries. The operator-exclusion unambiguously stated that grandson could not drive vehicle "under any circumstances whatsoever." Insurer reduced its premium in exchange for the exclusion.

LIMITATIONS OF ACTIONS/FIRST-PARTY PROPERTY CLAIMS

REQUEST FOR ARBITRATION DID NOT TOLL STATUTE OF LIMITATIONS

Hawley v. Preferred Mut. Ins. Co., 36 N.E.3d 1284 (Mass. App.)

Five days before two-year limitations period expired on water damage claim, insured requested arbitration. ***Held:*** Request did not give insurer adequate time to respond. Insured could have sued within the limitations period and requested a delay to allow arbitration to proceed. ***Further held:*** By waiting nearly two years following the denial of arbitration, insured did not promptly file suit. Insurer disputed coverage and did not mislead insured as to the timing of suit. ***Further held:*** Insurer acted in good faith because policy exclusion for constant or repeated leakage of water may have precluded coverage.

DISCOVERY RULE INAPPLICABLE TO WATER DAMAGE CLAIM

Nurse v. Omega U.S. Ins., Inc., 38 N.E.3d 759 (Mass. App.)

Insured filed suit exactly two years after discovering water damage in his apartment building. ***Held:*** The discovery rule on commencement of actions does not extend to cases governed by the insurance code's statute of limitations. The statute required the commencement of actions within two years from "the time the loss occurred." The plain language of the statute did not require a determination of when the cause of action accrued. Insured's dwelling policy also required the filing of suit within two years "after the date loss or damage occurs." The loss occurred nine days before insured discovered it.

MEDICAL NEGLIGENCE

DOCTORS OWED DUTY TO THIRD PERSONS TO WARN PATIENT OF DRUG'S EFFECTS

Davis v. South Nassau Communities Hosp., 2015 N.Y. LEXIS 3897 (N.Y.)

A hospital patient crashed into a bus soon after discharge from the hospital, causing injuries. The patient had been given medications that caused

drowsiness, but the doctors had not informed her that the drugs caused impairment. The injured persons sued the doctors, who moved to dismiss based on a lack of duty. ***Held:*** Defendants had a duty to plaintiffs to warn the patient that the drugs administered to her impaired her ability to safely operate an automobile. "[T]o take the affirmative step of administering the medication at issue without warning [the patient] about the disorienting effect of those drugs was to create a peril affecting every motorist in [the patient's] vicinity."

WRONGFUL BIRTH CLAIM ACCRUES UPON BIRTH

B.F. v. Reproductive Medicine Assoc. of N.Y., LLP, 2015 N.Y. App. Div. LEXIS 9367 (N.Y. App. Div. 1st Dep't)

Plaintiffs sued doctors alleging negligent screening for birth defects. The doctors unsuccessfully moved to dismiss on statute of limitations grounds, arguing that plaintiffs filed suit more than 3 years after the doctors had finished implanting the embryo. ***Held:*** Affirmed. "Whether [a] legally cognizable injury will befall potential parents as the result of the gestation of an impaired fetus cannot be known until the pregnancy ends. Only if there is a live birth will the injury be suffered." Thus, the birth of the baby was the proper start point for the running of the statute of limitations on the medical negligence claim and suit had been timely filed.

MUNICIPAL LAW

ODOT IMMUNE FROM LIABILITY FOR HIGHWAY IMPROVEMENT DECISIONS

Risner v. Ohio Dep't of Trans., 2015-Ohio-4443 (Ohio)

Decedent was killed at intersection not protected by traffic lights. ***Held in a split decision:*** ODOT had immunity arising from decisions whether to improve portions of highway. ODOT is the most authoritative decision maker in the area and enjoys statutory discretion. ODOT may be liable for negligently implementing a decision, but once it decides to improve a portion of highway, it has no duty to improve surrounding areas.

NEGLIGENCE

APARTMENT OWNER NOT LIABLE FOR SHOOTINGS

Belizaire v. Furr, 36 N.E.3d 1261 (Mass. App.)

One person was shot dead and three others injured at party in owner's apartment building. ***Held:*** Owner could not foresee the shootings. There had been no prior criminal history at the property. Owner neither knew nor reasonably should have known that a physical attack might occur. Prior drug activity did not demonstrate a reasonable foreseeability of murder. Owner was not affiliated with assailant and unaware of dispute between assailant and decedent.

CONNECTION OF INJURIES TO CRANE COLLAPSE TOO ATTENUATED

Matter of 91st St. Crane Collapse Litig., 133 A.D.3d 478 (N.Y. App. Div. 1st Dep't)

Plaintiff heard loud bangs and got up to run out of his work shanty at a construction site to investigate. He tripped and fell over a tool en route to the source of the ruckus and was injured. He subsequently sued the construction defendants, alleging violations of Labor Law § 240, § 241, § 200 and common law negligence. The trial court denied defendants' motions for summary judgment. ***Held:*** Reversed in part. Plaintiff's injury was so attenuated that it could not be reasonably connected to the crane's collapse. Therefore, the Labor Law § 240 claim should have been dismissed.

PROPERTY OWNERS NOT HARBORERS OF TENANT'S DOG

Morris v. Cordell, 2015-Ohio-4342 (Ohio App.)

While walking dog, plaintiff was injured when another dog darted out of nearby building to wrestle plaintiff's dog. ***Held:*** Building owners lacked possession or control of premises where the dog lived and plaintiff needed to establish liability as harborers. Owners had oral agreement with tenant/niece to pay rent and utilities. Niece took care of property. Owners did not have keys and only entered with niece's permission. There were no common areas shared by owners and niece.

PREMISES LIABILITY

DEFECT ON NOSING OF STAIR DOES NOT PRECLUDE LIABILITY

Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66 (N.Y.)

Plaintiff tripped and fell on a staircase, sustaining injuries. Defendant moved to dismiss on the basis that the asserted defect was trivial. The trial court denied the motion. However, the appellate court reversed since the defect was on the nosing, where a person does not usually step, as opposed to the walking surface of the stair. ***Held:*** Reversed. Regardless of the fact that the defect was in a place where some people would not step, the defect was "in a place where a person may in the normal course of events place the weight of his or her body, resting on a foot." Therefore, summary judgment should have been denied.

OUT-OF-POSSESSION LANDLORD NOT LIABLE FOR SLIP AND FALL ACCIDENT

McLaughlin v. New Scotland Ave, LLC, 132 A.D.3d 1190 (N.Y. App. Div. 3d Dep't)

Out-of-possession defendant landlord, upon leasing premises, transferred possession and control of premises to tenant. He did not retain any contractual obligation to perform snow or ice maintenance, and was unaware of any dangerous condition on the property at the time of plaintiff's pedestrian accident. ***Held***: Landlord was entitled to summary judgment on plaintiff's slip and fall claim.

LIABILITY COVERAGE cont. from pg. 7

consequence of the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events' as the previous claim." *Id.*

The Court determined that the above error was not dispositive of the outcome and affirmed the district court's decision stating that the "district court's side-by-side review of the underlying claims and the Plumbers' Union claim demonstrated, there is no genuine dispute that the claims in the five underlying lawsuits are 'Related Claims' to the Plumbers' Union claim as defined by the Policies." *Id.* at *4. The Court concluded that because the earlier claim was "first made" in 2008, the underlying claims fell outside the ambit of coverage provided by the Policies. *Id.* at *4.

Learning Point: The Related Claims exclusion treats all related claims as a single claim filed on the date the earliest claim was made. Moreover, New York law requires that an insurance contract must be interpreted under its plain language when the policy is unambiguous. ♦

PREMISES LIABILITY cont. from pg. 8

further found that Plaintiff failed to raise a triable issue of fact in opposition to Defendant's motion for summary judgment and affirmed the decision granting Defendant's motion for summary judgment dismissing the Complaint.

Learning Point: A defendant moving for summary judgment in a premises liability case can meet its initial burden by showing that the plaintiff did not know what caused him or her to fall. Moreover, the plaintiff fails to raise a triable issue of fact where she does not show proof that the defective condition was present when the plaintiff fell, as opposed to after she fell. ♦

Clausen Miller P.C.

10 South LaSalle Street
Chicago, IL 60603
Telephone: (312) 855-1010
Facsimile: (312) 606-7777

200 Commerce Square
Michigan City, IN 46360
Telephone: (219) 262-6106

28 Liberty Street
39th Floor
New York, NY 10005
Telephone: (212) 805-3900
Facsimile: (212) 805-3939

100 Campus Drive
Suite 112
Florham Park, NJ 07932
Telephone: (973) 410-4130
Facsimile: (973) 410-4169

17901 Von Karman Avenue
Suite 650
Irvine, CA 92614
Telephone: (949) 260-3100
Facsimile: (949) 260-3190

Clausen Miller LLP
34 Lime Street
London EC3M 7AT U.K.
Telephone: 44.20.7645.7970
Facsimile: 44.20.7645.7971

Clausen Miller International:

Grenier Avocats
9, rue de l'Echelle
75001 Paris, France
Telephone: 33.1.40.20.94.00
Facsimile: 33.1.40.20.98.00

Studio Legale Corapi
Via Flaminia, 318
00196-Roma, Italy
Telephone: 39.06.32.18.563
Facsimile: 39.06.32.00.992

van Cutsem-Wittamer-Marnef & Partners
Avenue Louise 235
B-1050 Brussels, Belgium
Telephone: 32.2.543.02.00
Facsimile: 32.2.538.13.78

Wilhelm Partnerschaft von Rechtsanwälten mbB
Reichsstraße 43
40217 Düsseldorf, Germany
Telephone: 492.116.877460
Facsimile: 492.116.8774620

CMI CLAUSEN MILLER INTERNATIONAL

Clausen Miller Speakers Bureau

Clausen Miller Offers On-Site Presentations Addressing Your Business Needs

As part of Clausen Miller's commitment to impeccable client service, our attorneys are offering to share their legal expertise by providing a client work-site presentation regarding legal issues that affect your business practice. If you are interested in having one of our attorneys create a custom presentation targeting the specific needs of your department, please contact our Marketing Department:

Stephanie Lyons
Clausen Miller P.C.
10 South LaSalle Street
Chicago, IL 60603
(312) 855-1010

marketing@clausen.com
www.clausen.com