EAST COAST CM REPORT of Recent Decisions

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CM EAST COAST REPORT of Recent Decisions

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New York Appellate Court Holds That Plaintiff's Comparative Fault Will Preclude Plaintiff From Obtaining Summary Judgment Against Defendants On Liability

by Allison M. Burbage

In *Rodriguez v. City of New York,* 37 N.Y.S.3d 93 (N.Y. App. Div. 2016), the Appellate Division, First Department considered whether a plaintiff seeking summary judgment on liability must establish, as a matter of law, that he is free from comparative fault. In a 3-2 decision, the Court affirmed that a plaintiff may not be awarded partial summary judgment if the defendant has raised an issue of fact as to the plaintiff's comparative negligence.

On the date of his accident, Plaintiff Carlos Rodriguez was employed as a New York City sanitation worker. On a snowy night, he and two other sanitation workers were fitting tire chains on sanitation trucks in order to provide better traction in the snow. While one sanitation worker was backing a truck into the garage, and a second sanitation worker was directing him, Plaintiff was waiting outside of the garage. As the truck was being backed into the garage, Plaintiff began to walk toward the garage, with his back to the truck, between a rack of tires and the front of a parked Prius. As he walked, Plaintiff did not keep the truck within his sight. Plaintiff testified that he could hear the truck beeping as it moved in reverse. When the driver of the truck applied the brakes, the snow on the ground caused the truck to slide into the back of the Prius. Plaintiff was pinned between the front of the Prius and the row of tires.

Plaintiff moved for partial summary judgment on liability, arguing that Defendant's employees were solely responsible for the accident, and that their failure to maintain proper control of the truck established a *prima facie* case of negligence. In opposition, Defendant argued that triable issues of fact existed as to whether Plaintiff was free from comparative fault. The lower court denied Plaintiff's motion, finding that even if Defendant's negligence was established, the question of Plaintiff's comparative fault must be resolved at trial.

In affirming the lower court's decision, the First Department considered whether, on a motion for summary judgment brought by Plaintiff on the issue of liability, the motion: (1) should be granted, and the issue of Plaintiff's contributory negligence be considered during the damages portion of a trial, or (2) be denied, if

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Defendant raises an issue of fact with respect to the Plaintiff's negligence, and Plaintiff fails to show the absence of negligence on his part, leaving that issue to be considered during the liability portion of a trial. In its opinion, the majority emphasized that "the causal role of each party's conduct should not be determined in isolation," and that Plaintiff's failure to make a *prima facie* showing as to its own freedom from comparative fault will warrant the denial of a motion for summary judgment. *See Maniscalco v. New York City Transit Auth.*, 95 A.D.3d 510, 511, 943 N.Y.S.2d 486 (2012).

In dissent, Judges Acosta and Moskowitz argued that on a motion for summary judgment, a plaintiff's burden is only to make a *prima facie* showing of the defendant's negligence, not a showing of freedom from his own comparative fault. The dissenting judges further argued that the comparative negligence doctrine does not bear upon whether a defendant is liable, but rather upon the extent of a defendant's liability where both the defendant and plaintiff engaged in culpable conduct that resulted in injury. Therefore, where a defendant fails to raise issues of fact regarding its own negligence, partial summary judgment is warranted with respect to defendant's negligence, in that defendant will be liable to the extent it proximately caused the injury. The plaintiff's burden, they argued, is not to establish that a defendant's negligence was the sole proximate cause of his injuries, but rather to make a general showing that defendant's negligence was a substantial cause of the events which led to injury. *See Tselebis v. Ryder Truck Rental, Inc.*, 72 A.D.3d 198, 200, 895 N.Y.S.2d 389 (2010).

The non-dissenting judges argued that the dissenting theory is simply not sound. Under the dissenting theory, any showing of liability on the part of a defendant would warrant the granting of partial summary judgment to a plaintiff, which, in turn, would essentially deny a jury the opportunity to consider the issue of proximate cause. Furthermore, in addition to the prejudicial effect this would have on a defendant's case, the theory is not procedurally sound. A defendant would still be entitled to present a case on plaintiff's culpable conduct at damages trial, during which a jury could find the plaintiff's own actions to be the sole proximate cause of the accident, thereby defeating the purpose of granting a plaintiff summary judgment in the first place.

Both the majority opinion and the dissent cited extensive case law supporting their respective positions, and acknowledged that this issue may require a Court of Appeals ruling to reconcile the conflicting schools of thought. For now, however, although the burden of proving the affirmative defense of comparative negligence at trial remains on the defendant, for purposes of summary judgment, a plaintiff in a negligence action cannot obtain summary judgment on liability if triable issues remain as to the plaintiff's own negligence and share of culpability for the accident.

Learning Point: In a plaintiff's motion for summary judgment on the issue of liability in a negligence action, if issues of fact are raised with respect to plaintiff's own comparative negligence, and plaintiff is unable to negate the presence of comparative liability on his own part, the motion for summary judgment must be denied as a matter of law. This decision provides a deep analysis into plaintiff's burden of proof as the proponent of a motion for summary judgment. Although the dissenting judges were in the minority, the arguments made in favor of their alternate position are persuasive, and may affect cases with similar issues going forward. It is likely that this matter will advance to the Court of Appeals for a final determination. ♦

New Jersey Supreme Court Holds That Consequential Damages From Subcontractor's Faulty Workmanship Constituted Property Damage

by ***Robert A. Stern***

In *Cypress Point Condominium Association, Inc. v. Adria Towers LLC*, 2016 N.J. LEXIS 847 (August, 2016), New Jersey's Supreme Court was faced with the question: "whether rain water damage caused by a subcontractor's faulty workmanship constitutes 'property damage' and an 'occurrence' under a property developer's commercial general liability (CGL) insurance policy."

The Court noted that the long standing principle in New Jersey is that insurance provisions are interpreted according to standard contract rules of construction. First, courts review the provisions to determine whether they are plain; if so, it will be enforced as written. If the provision is subject to more than one interpretation, the courts will look to extrinsic evidence. If the provision is subject to more than one interpretation, the interpretation favoring coverage will be applied.

The Court then addressed CGL policies, and specifically the policy at issue. The Court noted that the CGL policy at issued used the 1986 ISO form. That policy defined "an 'occurrence' in a way that does not directly include 'property damage,' stating that an 'occurrence' is 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" The policy also included "a significant exception to the 'your work' exclusion clause, which eliminates coverage for "'property damage' to 'your work' arising out of it or any part of it."" As referenced by the Court, the exception "provides that the exclusion 'does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.'"

The Court next addressed the seminal New Jersey case of *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979). In *Weedo*, the "Court found that the replacement or repair of faulty goods and works is a business expense, to be borne by the insured, and that CGL policies did not indemnify insureds where the claimed damages are the cost of correcting the alleged defective work." The Court then addressed a Florida Supreme Court decision and Fourth Circuit Court of Appeal decision, and noted that these "cases, while not controlling, represent a strong recent trend of interpreting the term 'occurrence' to encompass unanticipated damage to nondefective property resulting from poor workmanship."

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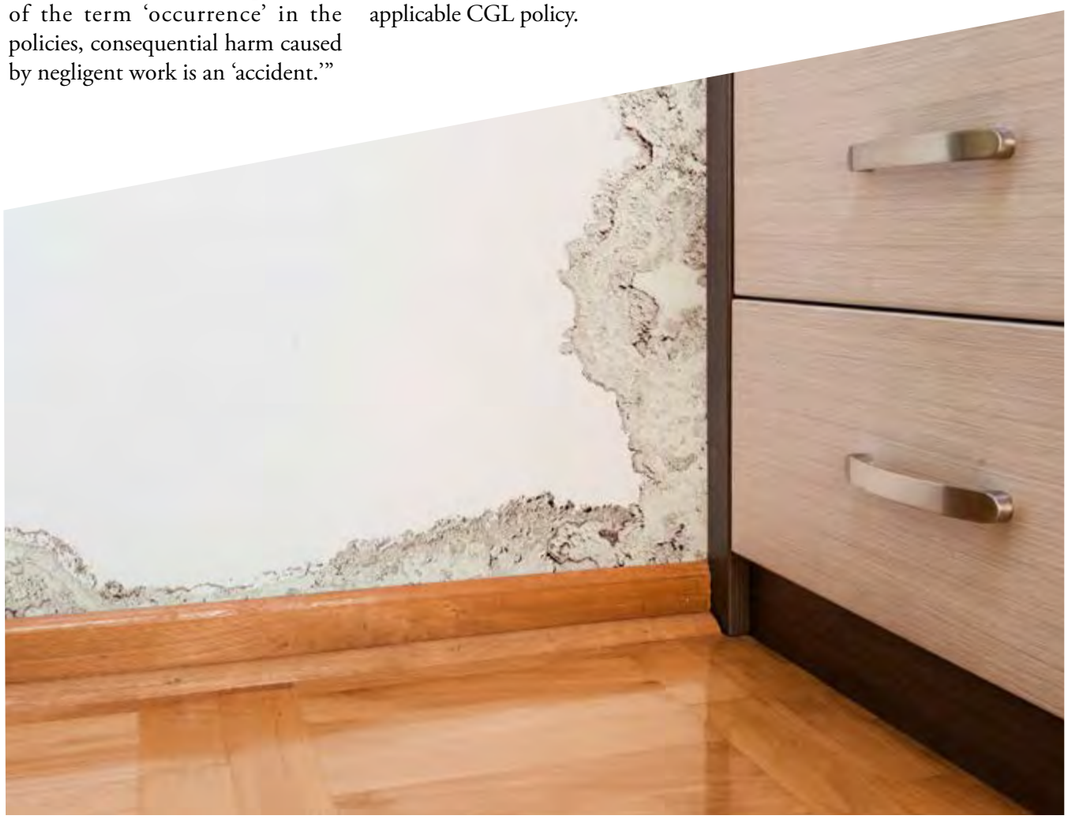
With this background, the Court provided its reasoning and holding regarding the issue at hand. The Court first concluded that "the post-construction consequential damages, which resulted in loss of use of the affected areas by residents, were covered 'property damage' under the terms of the policies." Although the term "accident" was not defined in the policy, relying upon its plain meaning and case law in the homeowner's context, the Court concluded "that 'accident' encompasses unintended and unexpected harm caused by negligent conduct. In other words, under the Court's interpretation of the term 'occurrence' in the policies, consequential harm caused by negligent work is an 'accident.'"

Therefore, the Court held that "because the result of the subcontractors' faulty workmanship—consequential water damage to the completed and nondefective portions of Cypress Point—was an 'accident,' it is an 'occurrence' under the policies and is provided an initial grant of coverage."

Finally, the Court addressed the exception to the "your work" exclusion. Namely, the Court noted that damages caused by a subcontractor are an exception to the "your work" exclusion. Since the damages at bar were caused by a subcontractor, the claims were fully covered under the applicable CGL policy.

Learning Point: In New Jersey, consequential damages caused by a subcontractors' faulty workmanship constitute "property damage"; "the event resulting in that damage—water from rain flowing into the interior of the property due to the subcontractors' faulty workmanship—is an "occurrence" under the plain language of the CGL policies at issue; and the subcontractor exception to the "your work" exclusion applied to damages flowing from a subcontractors' conduct. ♦



"Your Work" Exclusion Precludes A Defense Where Underlying Complaint Only Alleges Damages To Builders' Own Work

by ***Dawn M. Brehony***

In *Essex Insurance Co. v. DiMucci Development Corp. of Ponce Inlet, Inc.*, case no. 6:15-cv-00486, the United States District Court for the Middle District of Florida, Orlando Division, applying Florida law, concluded that an insurer is not required to defend its insured builder in an underlying suit alleging construction defects at one of its Florida condominium complexes. There, the commercial general liability policies included a "your work" exclusion which precluded coverage because the underlying lawsuit alleged only damage to the builder's own work.

DiMucci Development Corp. of Ponce Inlet, Inc. ("DiMucci"), a company that builds condominiums and townhomes, was insured by Evanston for a consecutive three year period from 2003 through 2005. *Id.* at *2. During that time frame, DiMucci constructed the Towers Grande Condominium, a 132-condominium unit, in Florida. DiMucci handled all of the construction of the building, including the bar for the roof, which work was performed by a roofing contractor. *Id.* at *23.

In 2012, the Towers Grande Condominium Association ("Association") commenced an action against DiMucci and the roofing contractor alleging that they failed to construct the building "properly and adequately," resulting in building defects and deficiencies (the "Underlying Action"). *Id.* at *4. Specifically, the Association identified damages to the roof, generator exhaust pipe, HVAC, as well as alleged water intrusion issues. *Id.*

DiMucci looked to Evanston to defend and indemnify it in the Underlying Action. In turn, Evanston brought suit against DiMucci seeking a declaration that it does not have a duty to defend or indemnify DiMucci for claims asserted in the Underlying Action. *Id.* at *2.

The parties cross-moved for summary judgment and, in ruling on those motions, the District Court concluded that the Complaint in the Underlying Action alleged an "occurrence" as defined by the policies, which resulted in property damage. As such, the District Court concluded that the Underlying Action fell within the coverage of the Evanston policies. However, the District Court looked to determine whether any policy exclusions "clearly extinguish [the] Insurers duty to defend." *Id.* at *17.

In analyzing the allegations in the Underlying Action, the Court concluded that the "your work" exclusion ultimately negated Evanston's defense obligation under the policies, explaining that DiMucci's

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"work encompass[ed] the overall construction of the Towers Grande, excluding the roof." *Id.* at *23. Thus, because the Underlying Complaint alleged that DiMucci's "defective work on one portion of the Towers also caused property damage to other portions of the building also constructed by [DiMucci]," the "your work" exclusion bars coverage. As such, the District Court held that the insurer is not obligated to defend DiMucci in the Underlying Action. *Id.*

Learning Point: When determining whether a "your work" exclusion applies to bar coverage, an insurer needs to closely examine the specific damages being alleged in the underlying complaint to determine whether they are limited to the insured's own work. ♦

New York Appellate Court Tightens Reins On The Application Of Labor Law §240 (1) In Falling Object Cases

by **Serena A. Skala**

In *Seales v Trident Structural Corp.*, 2016 N.Y. App. Div. LEXIS 6100, 2016 NY Slip Op 06204, a construction worker who was injured by a piece of falling sheetrock on a construction site brought an action against the site's owner and Trident Structural Corp., the contractor responsible for carpentry, structural work, framing, roofing and sheetrock installation on site, alleging violation of New York Labor Law §§ 240, 241(6) and 200, and common law negligence.

At the time of the incident, Plaintiff was installing a new sprinkler system as part of a renovation and construction project at a building in New York. While ascending a staircase from the fifth to the sixth floor, Plaintiff was hit in the head and rendered unconscious by a piece of falling sheetrock. Although Plaintiff's employer provided him with a hard hat, he was not wearing it at the time.

Plaintiff moved for summary judgment on the issue of liability alleging a violation of Labor Law § 240(1). The owners of the building cross-moved for summary judgment seeking the dismissal of the Complaint and all cross-claims asserted against them. Trident, the owner of the sheetrock, cross moved for summary judgment also seeking dismissal of the Complaint and all cross-claims. The lower court denied Plaintiffs' motion for summary judgment and denied the owners' cross motion for summary judgment. However, it granted Trident's cross motion for summary judgment and dismissed the Compliant and all cross claims asserted against Trident. The owners and Plaintiff appealed.

The Appellate Court overturned the lower court's denial and granted the owners' motion for summary judgment dismissing Plaintiff's cause of action alleging a violation of Labor Law § 240(1). Surprisingly, however, the Court did not use the recalcitrant worker doctrine as a basis for the denial; instead, the Court followed the letter of the law stating that a plaintiff must show more than simply that an object fell. The Court held that Plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking. Notably, the Court held that Plaintiff must show that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute.

The Court also reversed the lower court's dismissal of the Complaint against Trident. The Court stated that there were issues of fact as to whether Trident was an agent of the owner or a general contractor at the time of the incident.

Learning Point: Although Labor Law §240 is broadly applied, a plaintiff must show more than simply that an object fell causing injury to a plaintiff. In moving for summary judgment, Labor Law Defendants should focus on the letter of the law as to whether the object required securing for the purposes of the job. ♦

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Insurers May Preserve Late Notice Defense Even If The Defense Is Not Explicit In A Reservation Of Rights

by ***Rebecca Ahdoot***

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In *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*, 2016 N.Y. Slip. Op. 06012 (Sept. 15, 2016), the New York Court of Appeals held that Defendant, OneBeacon Ins. Group., LLC (and its predecessor companies), did not waive its right to assert the late notice defense by failing to explicitly identify late notice in disclaimer letters. The Court observed that OneBeacon previously identified the defense in early communications with Plaintiff, Estee Lauder Inc. As such, the Court held that under common-law principles, triable issues of fact exist as to whether Defendants had "clearly manifested an intent to abandon their late notice defense."

Notably, the underlying case involved property damage, not bodily injury or death. Plaintiff Estee Lauder brought the declaratory judgment action to compel OneBeacon to pay for costs to indemnify it for underlying claims brought by New York State related to alleged dumping of hazardous materials into landfills. The Appellate Division, in its now overturned decision, explained that it was relying on common law in holding that a ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense. The Appellate Division also explicitly stated that it was not holding that Insurance Law § 3420(d)(2), which requires that liability insurers who "disclaim liability or deny coverage for death or bodily injury" "shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured," applied to property damage cases. Instead, the Appellate Division found that OneBeacon did not dispute that it had knowledge of grounds for the late notice defense prior to disclaiming, but failed to include the defense in its disclaimer letters.

Learning Point: Even if an insurer does not raise the defense of late notice in a reservation of rights letter to its insured, if the defense is raised in prior communications between the parties, a triable issue of fact will exist as to whether the insurer clearly manifested an intent to abandon the late notice defense. ♦

New York Appellate Court Holds That Snow Removal Contractor's Omissions Are Not Sufficient To Constitute Creation Or Exacerbation Of A Dangerous Condition Absent Good Evidence

by ***Ian T. Williamson***

In *Santos v. Deanco Servs., Inc*., 2016 NY Slip Op 05489b (2d Dep't July 13, 2016), the Appellate Division, Second Department, reversed an interlocutory judgment which initially denied Defendant's motions pursuant to CPLR 4401 seeking to dismiss the Complaint and CPLR 4404(a) to set aside the verdict and for judgment, both as a matter of law. This was the first time the Second Department was asked to consider whether a snow removal contractor's failure to do something would constitute a "launch of force" or "instrument of harm" thus triggering its liability in a personal injury suit brought by a plaintiff.

Plaintiff was a manager of Lowe's Home Improvement (Lowe's) store. He alleged he tripped and fell in an employees-only portion of the store known as a "bullpen." At the time of the incident, Lowe's had a contract with a snow removal contractor, Deanco Services, Inc. (Deanco), whereby Deanco agreed to provide snow removal services to Lowe's. It subcontracted with a third-party defendant, BTN Excavating Services, Inc. (BTN), who had performed snow removal services on Lowe's premises the morning of Plaintiff's accident. A jury previously apportioned comparative fault at 50% for Plaintiff and 50% for Deanco. For purposes of this appeal, the Court only addressed Deanco's liability.

The Court noted that the case of *Espinal v. Melville Snow Contrs.*, 98 NY2d 136 (2002), is the governing authority with regard to the liability issue. The general rule is that a contractor's breach of contractual obligation does not extend liability to others who are not in privity with that contractor. In *Espinal*, however, the Court of Appeals recognized three exceptions to that rule: (1) Where its failure to exercise reasonable care in the performance of its contractual duties launches a force or instrument of harm; (2) Where the plaintiff detrimentally relies on the continuing performance of the contractor's duty; and (3) Where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely.

The Court considered only whether the first exception would be applicable in *Santos*: Would an alleged passive failure of BTN to treat Lowe's bullpen area qualify as a launching of force or instrument of harm thus exposing Deanco to tort liability for Plaintiff's injury? Factually, it was undisputed that there had indeed

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been snowfall in the hours leading up to Plaintiff's accident, and that the "bullpen" area was covered by the contract and plowed by BTN. Under such circumstances, Deanco could only be held liable based on the conclusion that Deanco breached its snow removal contract with Lowe's when BTN either failed to salt the bullpen or had done so inadequately

Generally, a "launch of a force" or "instrument of harm" requires that the contractor do something to create or exacerbate a dangerous condition. While the Court could not rule out a contractor's passive omissions conceivably creating or exacerbating a dangerous condition just as effectively as active omissions, it highlighted the importance of evidence linking such conduct to the creation or exacerbation of a condition.

The evidence in *Santos* did not include any meteorological data or climatology records which would have detailed the nature of the storm, potential snowmelt and refreeze, and air temperature at different points. Plaintiff did not know when the ice formed or how long it had been there. There was no expert testimony regarding the prudent measures to take in such a storm, nor was there evidence concerning the timeline of the bullpen's worsening condition. Absent such evidence, the Court reasoned it would be speculative to conclude that Deanco's omissions created or exacerbated the icy condition.

The Court further noted that a failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a pre-existing icy condition from improving. *See Stiver v. Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 (2007); *Rudloff v. Woodland Pond Condominium Assn.*, 109 AD3d 810, 811 (2d Dep't 2013); *Foster v. Herbert Slepoy Corp.*, 76 AD3d 210, 215 (2d Dep't 2010). The Court held that the first of the *Espinal* exceptions cannot be triggered where, as here, there is only speculation and conjecture regarding whether the contractor created or exacerbated an icy condition.

Learning Point: A plaintiff who is injured due to a slip and fall on snow or ice must present sufficient evidence which links a snow removal contractor's passive conduct to the creation or exacerbation of a dangerous condition. This includes showing how a contractor failed to perform services or did not do so adequately. Helpful evidence includes the use of factual data such as weather reports, expert witness testimony and personal knowledge. The plaintiff's evidence should allow a jury to rationally infer and to subsequently conclude the contractor's failure to act caused plaintiff's injury. ♦

Connecticut High Court Holds That Workers Compensation Insurers Can Sue Third-Parties To Recover Payments Made To An Injured Worker

by Gregory J. Popadiuk

In *Pacific Ins. Co., Ltd. v. Champion Steel, LLC*, SC 19402, SC 19403 (Conn. 2016), the Supreme Court of Connecticut held that a Workers Compensation insurer can maintain an equitable subrogation claim against third-party tortfeasors to recover benefits paid on behalf of an insured employer to an injured employee. The common law doctrine of equitable subrogation enables an insurance company that has made a payment to its insured to substitute itself for the insured and proceed against the responsible tortfeasor. It prevents a tortfeasor from being unjustly enriched by the fortuitous circumstance that the victim's loss is covered by an insurer.

On May 17, 2011, James Doughty was an employee of Stanford Dulaire doing business as Connecticut Reliable Welding, LLC ("Reliable"). He was working on a construction site when the retractable lifeline he was wearing failed, causing him to fall and sustain physical injuries. As Mr. Doughty's injuries occurred during the course of employment, Reliable was required to pay benefits under Connecticut's Workers' Compensation Act ("the Act"). Plaintiff Pacific Life Insurance Company ("Pacific") had issued an insurance policy providing Workers' Compensation coverage to Reliable and paid Mr. Doughty Workers' Compensation benefits.

Pacific then commenced suit against Defendants, Champion Steel, LLC, Shepard Steel Company, Inc. and Dimeo Construction Company, seeking to recover the benefits it paid to Mr. Doughty. Pacific alleged that Defendants collectively were negligent in their failure to provide an adequate fall arrest system at the work site which ultimately caused Mr. Doughty's injuries.

The trial court determined that Pacific did not have standing to bring this action because it did not cite any authority recognizing a Workers' Compensation insurer's right to bring an equitable subrogation claim. The trial court reasoned that the Act deviated from the common law by creating a right for the employer to pursue an action against a third-party. According to the trial court, the Act must be strictly construed and it was for the legislature and not the courts to carve out exceptions including an insurer's right to commence a subrogation claim.

The Connecticut Supreme Court noted that Connecticut law has provided for a broad common law

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right to bring equitable subrogation claims where an insurer has paid an insured for a loss caused by a third-party. As such, it determined that due to Pacific's obligation to pay Workers' Compensation benefits to Mr. Doughty as a result of Defendants' negligence, it had standing since it demonstrated a colorable claim of injury and a direct interest in the outcome of this action. Moreover, the Court held that it has recognized an insurer's broad, common law right to bring a subrogation action when it has paid an insured for a loss caused by a third-party tortfeasor and that the Workers' Compensation statutory scheme had not abrogated that right. Public policy also supported recognizing an equitable subrogation claim because an employer or an employee may not have an incentive to bring an action against the tortfeasor. In this regard, allowing insurers to bring such actions serves the public policy of containing the cost of Workers' Compensation insurance and operates to prevent the unjust enrichment of tortfeasors in situations in which the employee and employer do not bring actions to recover damages caused by the tortfeasors. Finally, the Court emphasized that its decision merely gave Pacific the right to bring its equitable subrogation claims and it did not take any position on whether the insurer's claims would succeed.

Learning Point: In Connecticut, a Workers' Compensation insurer, after making a payment, may commence a recovery litigation against the tortfeasor. The Connecticut Supreme Court did not enumerate what particular steps an insurer must take, if any, prior to commencing such a lawsuit. By way of comparison, in New York, pursuant to Workers Compensation Law §29(2), if an injured employee fails to commence an action against any potential tortfeasors after the earlier of one year from when the cause of action accrued or six months after the awarding of compensation, then a Workers' Compensation carrier may directly pursue reimbursement of the Workers' Compensation benefits only after giving the injured worker notice of its intention to do so at least thirty days before hand. The failure of the injured employee to take action within thirty days after the formal notice from the carrier operates as an assignment of the injured party's claim to the carrier. In order for the notice to divest the injured party of his right to commence a lawsuit, it must clearly advise the injured party that failure to commence a lawsuit will result in the forfeiture of his/her rights to do so in the future. *Sclafani v. Eastman Kodak Co.*, 727 N.Y.S.2d 277 (N.Y. County Sup. Ct. 2001). Furthermore, before an insurance carrier can bring an action, it must show that the claimant "has taken compensation" and that the claimant has failed to commence an action against the third-party tortfeasor within the time limited by Workers Compensation Law §29(2). Therefore, although Connecticut recognizes an insurer's right to commence an equitable subrogation claim for Workers' Compensation benefits that it has paid, it is important for the practitioner to keep in mind that it is prudent to provide formal notice to the injured worker of its intention to do so if he does not commence a lawsuit on his own behalf. ♦

DEFENSE DEPARTMENT'S SUCCESS IN NEW JERSEY CONTINUES

CM Partners **Carl Perri** (**cperri@clausen.com**) and **Andrew Turkish** (**aturkish@clausen.com**) recently obtained summary judgment in two very large exposure cases in New Jersey.

In the first case, *Asijtuj-Jutzuy v. Werner Co., et al.*, Hudson County, Superior Court, Plaintiff, a masonry laborer, while on scaffolding, fell from a height of 12 feet. As a result of the fall, Plaintiff was rendered a quadriplegic. Plaintiff sued the scaffolding manufacturer, the general contractor, and our client, the supplier of the scaffolding. Plaintiff interposed both products liability theories and general negligence claims. Plaintiff had a workers' compensation lien that approached close to $2 million and his demand was $10 million. On summary judgment, we argued that there was no evidence that the scaffold used by Plaintiff was supplied by our client and even if it was, there was no evidence that the mere supplying of scaffolding rendered our client liable. The motion judge agreed, found that our client was not negligent and granted summary judgment.

In the second case, *Brown v. Waste Management, Inc., et al.*, Essex County, Superior Court, Plaintiff, a factory worker, was working as a sorter on a cardboard conveying line at a garbage recycling factory in Lakewood, New Jersey. Plaintiff's hard hat fell onto the conveyor and when he reached over to retrieve it, he fell onto the conveyor, was thrown down a chute and severely injured. Plaintiff sued the owner of the plant, the manufacturer of the conveyor, the electrician who installed the shut-off switch on the conveyor, the installer of the conveyor, the designer of the plant, and our client, a Dutch company that designed and installed an OCC Screen that connected with the conveyor to remove contaminants from the cardboard. Plaintiff's demand was $3 million. Following service of Plaintiff's expert report, we moved for summary judgment arguing that Plaintiff's expert did not set forth a claim of negligence or products liability against our client. The court agreed and granted summary dismissing all claims against our client.

If you have any defense related questions, please feel free to e-mail **Carl Perri** (**cperri@clausen.com**) or **Andrew Turkish** (**aturkish@clausen.com**), or call them (973-410-4130).

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SUBROGATION DEPARTMENT'S NATIONAL SUCCESS CONTINUES

Seven Figure Settlement Of Energy Related Loss

A number of years ago, CM Partner **Robert A. Stern** (New York/New Jersey) was retained to investigate an Arizona loss involving a turbine failure. Mr. Stern and CM Partner **Tommy Jacobson** (New York/New Jersey) investigated this loss. Due to confidentiality provisions within the settlement papers, details cannot be provided.

Despite waivers of subrogation provisions and other recovery related issues, we filed litigation in Arizona and commenced an arbitration in Texas. Mr. Jacobson took the lead on depositions across the country.

During the course of discovery, the Insured filed for bankruptcy. The Insured also laid-off approximately 300 employees, leaving only some administrative and security personnel on staff. Given this development, we had tremendous difficulty communicating with former employees with relevant knowledge about the subject turbine due to the fact that they were abruptly laid-off by the Insured. One key employee told us, in private, that if he is deposed he is going to put all the blame for the failure on the Insured and not the subrogation target. Another key employee told us, in private, that the Insured reviewed and approved all the work of the target, and thus, he did not understand how we can pursue subrogation. Furthermore, our client's expert testified (as expected) that the Insured contributed to the loss; the parties' experts debated the extent of that contribution and thus how much our client's claim should be reduced.

Mr. Stern handled the Mediation in Arizona. After a day of mediating, no settlement was reached, although the offer was well above Mr. Stern's authority. Since Mr. Stern believed there was more to be offered, Mr. Stern left the Mediation with no settlement. Mr. Stern continued discussions that evening with the Mediator, while driving in his car and then sitting in a parking lot (away from the Mediation site). Once the full and final, "take it or leave it," offer was communicated to Mr. Stern, he tried again to get more money from the target. The Mediator stated there was no more money, we are at the end. At that point, Mr. Stern accepted the seven figure final offer.

If you have questions regarding Subrogation or Mediation, please feel free to e-mail Robert (**rstern@clausen.com**) or Tommy (**tjacobson@clausen.com**) or call them (212-805-3900).

70% Of RCV Recovery Despite Waivers Of Subrogation

CM Partner **Robert A. Stern** (New York/New Jersey) and CM Partner **Marc P. Madonia** (New York/New Jersey) investigated and handled a loss involving a water leak at a 40 story NY hotel. While the hotel was under construction, but close to completion, the roof top water tank overflowed, and the water traveled downward, resulting in damage to nearly all floors.

CM retained an expert to investigate the loss. The expert determined that the plumbing contractor improperly constructed the roof top water tank overflow protection system. Although liability appeared favorable, unfortunately, there were enforceable waivers of subrogation in the contracts for the project. Despite this major hurdle for recovery, Mr. Stern received authority from the client to litigate the case and attempt to circumvent the waiver provisions. After many rounds of written discovery and depositions, the matter was mediated. At the mediation, the Mediator pressed us hard to settle cheap in light of the contract provisions. We stuck to our creative arguments and ultimately settled the case for mid-six figures (nearly 70% of RCV).

If you have any subrogation related questions, please feel free to e-mail Robert (**rstern@clausen.com**) or Marc (**mmadonia@clausen.com**) or call them (212-805-3900).

Six Figure Settlement At Pre-Suit Mediation

CM Partner **Marc P. Madonia** (New York/New Jersey) investigated and handled a loss involving a fire at a large soft drink distribution facility in New Jersey. The fire had its origin at an interior light fixture. At the time of the fire, exterior roof work was being performed. To protect the inventory stored inside the facility during the exterior work, a contractor hung plastic from the interior light fixtures.

CM retained an expert to investigate the loss. The expert determined that the fire was the result of an improperly seated florescent bulb that created a high resistance connection. The challenge in the case was that there was no evidence from which the expert could conclude whether the light bulb was originally installed properly by a service contractor, or whether the roofing contractor's work securing plastic to the fixture caused the failure. Despite this major hurdle for recovery, Mr. Madonia successfully convinced the targets that their litigation risk was significant and the claim was mediated pre-suit. The targets pressed the argument that without evidence of which entity caused the loss, there could be no recovery. Despite this issue, Mr. Madonia successfully convinced the targets that the case could survive summary judgment under an enterprise liability argument and a jury would find the targets equally at fault. Ultimately, the case settled after a full day mediation for mid-six figures (well over 50% of the damages).

If you have any subrogation related questions, please feel free to e-mail Marc (**mmadonia@clausen.com**) or call him (212-805-3900).

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

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INSURANCE CLAIMS PRACTICES

INSURER'S FAILURE TO DEAL WITH IRRIGATION CLAIM COSTLY

McLaughlin v. Am. States Ins. Co., 92 Mass. App. Ct. 22 (Mass. App.)

Homeowners sued subcontractor's insurer following installation of defective irrigation system. ***Held:*** Insurer failed to make a fair and reasonable offer once subcontractor's liability became reasonably clear. Insurer had waited over four years after obtaining an independent assessment of liability before making an offer. The timing of an offer must be based on facts known or available at a given moment, not on when a fact-finder rules against the insured. An insured's liability can be reasonably clear even though other potential tortfeasors are involved. Homeowners were entitled to attorney's fees as damages arising out of their prosecution of the claim, interest for the lost use of money, and attorney's fees on appeal.

INSURANCE LITIGATION

COURT OF APPEALS AGREES WITH APPELLATE DIVISION'S VIEW OF FACTS

Dryden Mutual Ins. Co. v. Goessl, 2016 N.Y. Slip Op. 04324 (N.Y. 2016)

Plaintiff insurer sought a declaratory judgment that it did not have a duty to defend and indemnify its insured in an underlying tort action, and that another insurer had the duty to indemnify and defend. The Supreme Court found in favor of the plaintiff but the Appellate Division reversed. ***Held:*** The Court of Appeals affirmed. The lower court made distinct factual findings after applying the principles of contract interpretation to the insurance policies. However, the Appellate Division's new factual findings more nearly comport with the weight of the evidence. As such, plaintiff has a duty to defend and indemnify the defendant in the underlying tort action, and the other insurance provider does not.

LIABILITY INSURANCE COVERAGE

NO DUTY TO DEFEND IN CONSTRUCTION DEFECT CASE

Evanston Ins. Co. v. DiMucci Development Corp., 2016 U.S. Dist. LEXIS 123678 (M.D. Fla.)

A condominium association sued its developer alleging various structural building defects. The developer's insurer, Evanston, subsequently filed a declaratory judgment action contending it had no duty to indemnify the developer. ***Held:*** The district court granted summary judgment, ruling that Evanston does not have a duty to defend because the alleged property damage fell within the "Your Work" Exclusion as the developer's work encompassed the overall construction of the condominiums, excluding the roof.

NEGLIGENCE

MODE-OF-OPERATION ANALYSIS APPLICABLE TO INJURY AT GARDEN STORE

Bowers v. P. Wile's, Inc., 475 Mass. 34 (Mass.)

Patron tripped on stone that migrated from gravel area to a walkway at garden store. ***Held in a split decision:*** Proprietor must take reasonable steps to protect patrons from foreseeable hazards created by third-parties as part of store's manner of operation. Patron must prove that hazard is a recurring feature of a mode of operation rather than just conceivable. If so, a patron need not also prove that proprietor created the condition or that it knew or should have known about it. Questions of fact existed as to whether proprietor created a foreseeable recurring risk and failed to adequately maintain area. The dissent contended that the mode analysis should be limited to spillage or breakage in self-service operations.

DIGNITY FOR ALL STUDENTS ACT DOES NOT PROVIDE PRIVATE RIGHT OF ACTION

Motta v. Eldred Cent. Sch. Dist., 2016 N.Y. Slip Op. 05424 (N.Y. App. Div. 3d Dep't)

A student and his parents sued the school district for alleged harassment and bullying by his classmates. The trial court granted summary judgment to the defendant school district holding there was no private right of action under the Dignity for All Students Act. ***Held:*** The Appellate Division reversed even though the trial court was correct in its interpretation of the Dignity for All Students Act. The school district was not entitled to summary judgment on a negligent supervision of students claim because there was conflicting evidence as to whether the district adequately supervised the students and, if not, whether such negligent supervision caused the injuries.

FAA REGULATIONS DO NOT CREATE DUTY OF CARE

Pasternack v. Laboratory Corp. of Am. Holdings, 2016 N.Y. Slip Op. 05179 (N.Y.)

Airplane pilot, who was also a physician, sued drug testing companies for negligence and fraud for purportedly mishandling a random drug test which lead to the FAA's revocation of his airman certificates and termination of his aviation medical examiner designation. The United States Court of Appeals for the Second Circuit certified questions for the New York Court of Appeals. ***Held:*** The Court of Appeals determined that the regulations and guidelines of the FAA and Department of Transportation are ministerial and do not create a duty of care for drug testing laboratories under New York negligence law. The Court declined to extend case law relating to the negligent taking of drug tests to this case as it is unrelated to scientific integrity and instead a violation of federal regulations.

TRIP ON HANDICAP RAMP NOT ACTIONABLE

Lattimore v. K & A Market, Inc., 2016-Ohio-5295 (Ohio App.)

Patron tripped on the edge of a handicap ramp in a convenience store. ***Held:*** Owner had no duty to warn because ramp was open and obvious. Ramp was distinct from the floor and had a different floor covering. Orange tape marked the edge, and a door sign alerted customers about the uneven rise. A patron's decision to look at a store display is not an attendant circumstance preventing a finding of an open and obvious condition. An owner must create an unusual circumstance causing a diversion of attention. ***Further held:*** There was no municipal code violation establishing negligence *per se*. The code required that railings be maintained in good condition but did not mandate the installation of a railing.

MEDICAL MALPRACTICE

MASSACHUSETTS ADOPTS "CONTINUING TREATMENT DOCTRINE"

Parr v. Rosenthal, 475 Mass. 368 (Mass.)

Minor's leg was amputated allegedly because of physician's negligence. ***Held in a split decision:*** Malpractice limitation statute does not run while physician continues to treat patient for the same or a related condition. It begins once patient learns physician's negligence caused injury or when physician stops treating patient. The doctrine is needed because a patient's continued confidence in physician makes difficult an informed judgment as to negligence. It also gives a physician adequate time to correct a poor result. The doctrine does not affect the seven-year statute of repose. The dissent contends the matter is for the executive and legislative branches.

EVIDENCE OF NEGLIGENT TREATMENT OF OTHER PATIENTS TAINTED JURY'S DELIBERATIVE PROCESS

Mazella v. Beals, 2016 N.Y. Slip Op. 05182 (N.Y.)

Decedent's wife brought a medical malpractice and wrongful death claim against her husband's former psychiatrist alleging that the defendant's negligent treatment resulted in her husband's suicide. Plaintiff won a jury verdict against defendant, which the Appellate Division affirmed. ***Held:*** The Court of Appeals reversed. The trial court abused its discretion by admitting evidence that was irrelevant to the defendant's liability and unduly prejudicial, such as his negligent treatment of twelve other patients. The admission of this evidence, along with its repeated use throughout trial, entitled defendant to a new trial.

PRODUCTS LIABILITY

MANUFACTURER LIABLE FOR FAILURE TO WARN OF DANGER FROM ASBESTOS DUST FROM THIRD PARTY PRODUCTS

In the Matter of New York City Asbestos Litigation, 2016 N.Y. Slip Op. 05063 (N.Y.)

Two lawsuits arising out of decedents' exposure to asbestos while working on valves used in a steam-pipe system, were brought against the valve manufacturer for failure to warn of the dangers of asbestos dust as to products manufactured by third parties. The jury rendered a verdict for plaintiffs. ***Held:*** The Court of Appeals affirmed. The manufacturer took affirmative steps to integrate its valves with the third-party products by endorsing their use and packaging the valves with such components when it sold them. Also, the design and mechanics of the valves prevented them from operating properly without asbestos-bearing components and the asbestos-containing components were economically necessary to allow the valves to work as designed. Thus, the manufacturer had a duty to warn end-users of the danger in using its product with a product produced by another company.

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