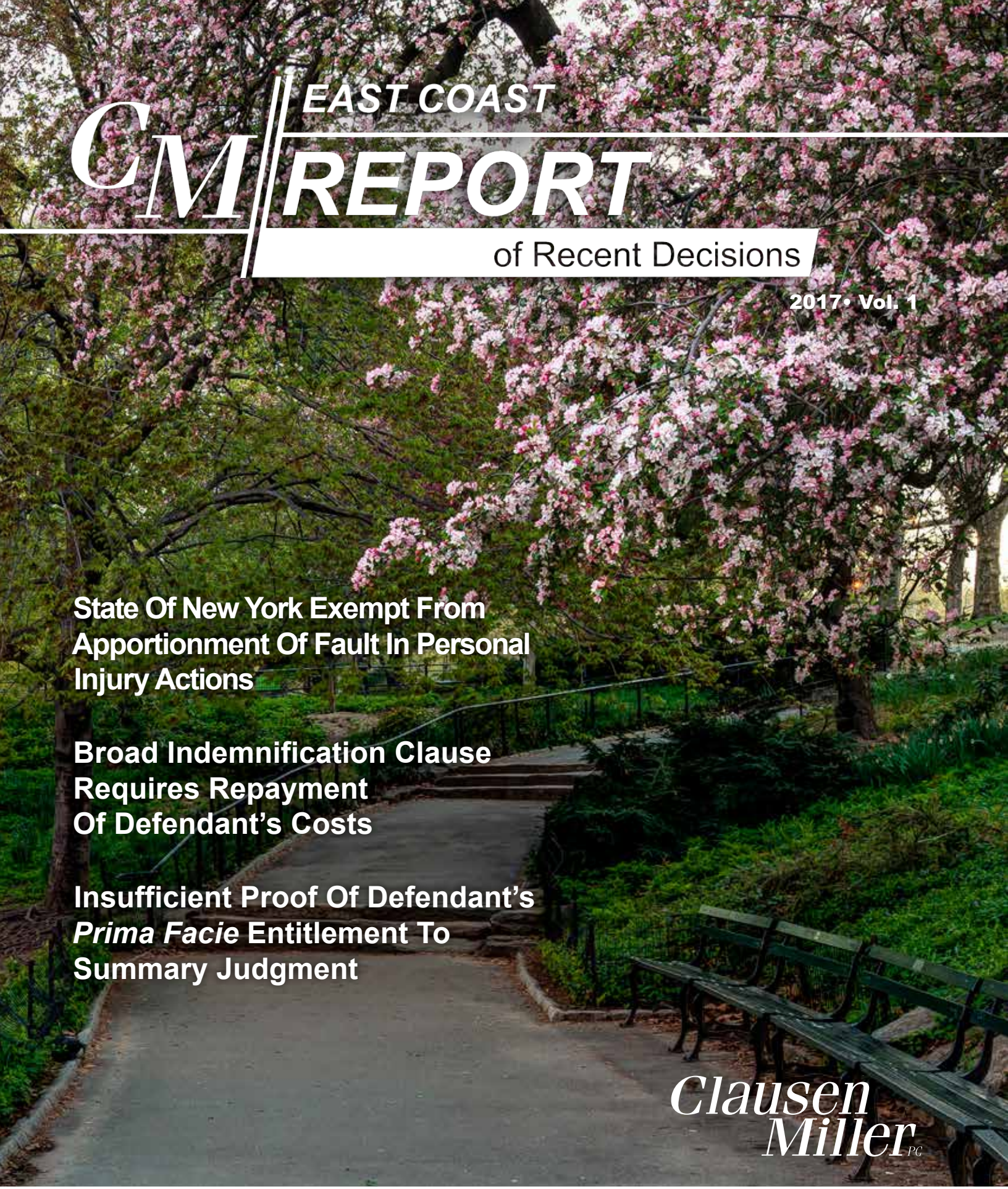

EAST COAST CM REPORT

of Recent Decisions

2017• Vol. 1

State Of New York Exempt From Apportionment Of Fault In Personal Injury Actions

Broad Indemnification Clause Requires Repayment Of Defendant's Costs

Insufficient Proof Of Defendant's *Prima Facie* Entitlement To Summary Judgment

Clausen Miller PC

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.

CM EAST COAST REPORT of Recent Decisions
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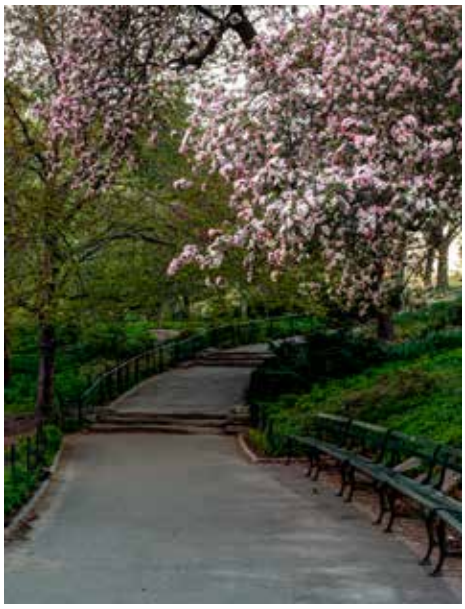

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FEATURES

14 ***Case Notes***

ARTICLES

CONTRIBUTION

3 Court Of Appeals Rules State Of New York Exempt From Apportionment Of Fault In Personal Injury Actions For Noneconomic Losses Under CPLR §1601 (1)
by Ian T. Williamson

COVERAGE

5 Disclaimers Of Coverage Issued Only To An Additional Insured's Insurer Insufficient Under New York Law
by Dawn Brehony

INDEMNIFICATION

7 New York Appellate Court Holds That Although There Was No Negligence, Broad Indemnification Clause Requires Repayment Of Defendant's Costs Related To The Defense Of The Action
by Marina O'Keeffe

LABOR LAW

9 Means And Methods Or Dangerous Condition On The Premises: Labor Law §200 Summary Judgment Unavailable When Proximate Cause Unclear
by Serena A. Skala

11 To Prevail On A Claim Under Labor Law § 240(1) Plaintiff Is Not Required To Describe The Accident In Detail
by Catherine P. O'Hern

LIABILITY

12 Gaps In Plaintiff's Proof Insufficient To Establish Defendant's *Prima Facie* Entitlement To Summary Judgment
by Gregory J. Popadiuk

Court Of Appeals Rules State Of New York Exempt From Apportionment Of Fault In Personal Injury Actions For Noneconomic Losses Under CPLR §1601 (1)

by ***Ian T. Williamson***

In *Artibee v. Home Place Corporation*, 2017 NY Slip Op 01145 (Court of Appeals, February 14, 2017), Carol Artibee ("Plaintiff") was injured when a large branch fell through her Jeep while she was driving along a state highway. Plaintiff brought suit against the landowner in Supreme Court, Warren County, alleging Home Place Corporation ("Defendant") was negligent in failing to inspect, trim and remove the offending tree. Plaintiff also commenced a separate action against the State of New York (State) in the Court of Claims, alleging that Department of Transportation employees were negligent in failing to monitor hazards along the state highway, did not properly maintain the trees and failed to warn motorists of said hazards. In the Supreme Court action, Defendant moved to introduce evidence at trial of the State's negligence, and sought a jury charge to apportion liability between Defendant and the State. Plaintiff argued that hearing evidence of the State's negligence was permissible, but objected to the jury's apportionment of fault to the State. The Supreme Court agreed with Plaintiff and refused to issue the apportionment charge to the jury. The Appellate Division later reversed, and the Third Department granted Plaintiff's leave to appeal to the Court of Appeals.

CPLR § 1601 (1) attempts to relieve some of the liability burden on a defendant when that defendant's liability is found to be 50% or less of the total liability assigned to all persons liable and mandates that liability to such claimant shall not exceed defendant's equitable share determined in accordance with that defendant's relative culpability. CPLR § 1601 (1) "modified the common law rule of joint and several liability by limiting a joint tortfeasor's liability in certain circumstances." *See Rangolan v. County of Nassau*, 96 NY2d 42, 46 (2001). As such, "where potential tortfeasors are not joined in an action, the culpability of a nonparty tortfeasor may be imposed upon a named defendant [only] if the plaintiff can show that he or she is unable to obtain jurisdiction over the nonparty tortfeasor." *Id.* at 98.

In reversing the Supreme Court decision, the Appellate Division, Third Department noted that sovereign immunity was what ultimately barred the Defendant from impleading the State as a co-defendant in Supreme

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Court, not a jurisdictional limitation as CPLR §1601 (1) requires. The Court of Appeals disagreed, pointing out that case law and the New York State Constitution preserves the State's immunity from suit, and instead exclusively confers jurisdiction against the State to the Court of Claims.

The Court of Appeals strictly construed CPLR § 1601 (1)'s scope of whether it refers to both personal and subject matter jurisdiction. In doing so, it deferred heavily to the language, legislative history and purpose of the statute. Since the statute itself made no specific mention of "personal" jurisdiction, the Court would not infer that personal jurisdiction was implied. The Court recognized that the purpose of § 1601 was to remediate inequities created by joint and several liability on low-fault, deep pocket defendants, thus averting a potential insurance crisis in the midst of New York's 1975 shift from a contributory negligence state to one of comparative fault. In this vein, while the burden of recovery would be placed on defendants to sue the State in the Court of Claims, it protected deep pocket defendants from having to seek contribution from insolvent tortfeasors with a higher apportionment of fault. In the Court's view, this was consistent with CPLR § 1601's legislative intent.

In her dissenting opinion, Justice Abdus-Salaam stated that she believed the majority's finding was too restrictive to the point where the legislative intent was thwarted. By reserving a party's apportionment recourse to the Court of Claims, she reasoned that the State was given preferential treatment over other tortfeasors to the detriment of defendant-turned-plaintiff in the Court of Claims action. Justice Abdus-Salaam emphasized that the focus of interpretation should lie in the analysis of the statutory text itself, specifically stating that the plain language of § 1601 already provides for suing the State at a Supreme Court level and it is that which we should use as a litmus in determining legislative intent.

Learning Point: In a State Court action (Supreme Court or Civil Court) involving personal injury for noneconomic losses, a defendant may not assign a portion of fault to the State of New York. If a defendant wishes to apportion fault to the State of New York, the defendant *must* file a separate action for contribution against the State of New York in the Court of Claims upon the completion of the State Court action.

Disclaimers Of Coverage Issued Only To An Additional Insured's Insurer Insufficient Under New York Law

by ***Dawn Brehony***

The New York Appellate Division, Second Department, held that a disclaimer of coverage sent to an additional insured's insurer, which was not an agent for receipt of a notice of disclaimer, and not to the additional insured, was an ineffective disclaimer of coverage under N.Y. Ins. Law Section 3420(d).

In *Harco Construction, LLC v. First Mercury Ins. Co.*, 2017 NY Slip Op 01846 (2d Dep't March 15, 2017), Plaintiff Harco Construction ("Harco") entered into a contract with Plaintiff 301-303 West 125th, LLC ("301-303"), to perform construction services on 301-303's premises. Thereafter, Harco entered into a subcontract with Defendant Disano Demolition Co. ("Disano"). Pursuant to the subcontract, Disano agreed to perform demolition services on 301-303's premises. The subcontract also required Disano to procure and maintain a commercial general liability policy naming Plaintiffs as additional insureds. Disano maintained its commercial general liability policy with Defendant First Mercury Insurance Company, which policy included an endorsement titled "Additional Insured—Owners, Lessees or Contractors—Automatic Status When Required In Construction Agreement With You." This Endorsement explicitly stated that "Who is An Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." Harco was also named under another liability insurance policy issued by a different non-party insurer, Mt. Hawley Insurance Company ("Mt. Hawley"). *Id.*

On September 20, 2011, a partially demolished five-story building on 301-303's premises collapsed, causing debris to fall on the street and onto a city bus, and ultimately resulting in numerous personal injury actions. Shortly thereafter, on behalf of Harco and 301-303, Mt. Hawley issued a letter to First Mercury, placing First Mercury on notice, and requesting a defense and indemnity of Harco and 301-303 in connection with "any claims and suits that arise out of the accident." *Id.* Mt. Hawley requested confirmation that Plaintiffs were additional insureds under the Disano policy issued by First Mercury. First Mercury responded with a letter to Mt. Hawley, disclaiming any duty to defend or indemnify Harco, asserting an exclusion for "[a]ll work over 1 story in height," which it purported barred coverage for the claims. First

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Mercury did not disclaim coverage as to 301-303. It also did not issue the disclaimer letter directly to either Harco or 301-303. *Id.* As a result, Harco and 301-303 commenced this action, seeking a declaration that First Mercury was obligated to defend and indemnify them in the underlying actions.

As an initial matter, the Court concluded that First Mutual made a *prima facie* showing that 301-303 did not qualify as an additional insured under the policy issued by First Mutual to Disano and, as such, it was not required to disclaim coverage as to 301-303, noting that a disclaimer is not necessary when a claim does not fall within the insuring agreement.

However, the Second Department concluded that when First Mercury failed to send a disclaimer to Harco, an additional insured under its policy, First Mercury violated N.Y. Ins. Law Section 3420(d), which, for claims arising from accidents resulting in bodily injury or death, requires that an insurer timely disclaim coverage or be estopped form doing so. The Court reasoned that while First Mercury issued a disclaimer letter to Mt. Hawley, it never issued one directly to Harco, and, although Mt. Hawley was acting on behalf of Harco when it sent notice of the incident to First Mercury, "that did not make Mt. Hawley the plaintiffs' agent for all purposes, or for the specific purpose that is relevant here: receipt of a notice of disclaimer." *Id.* (internal citations omitted). The Court further explained that Mt. Hawley's interests were not necessarily the same as Harco's in the litigation, and, because Harco had its own interests at stake, Harco was entitled to direct notice from First Mercury under N.Y. Ins. Law Section 3420(d). *Id.*

Learning Point: When disclaiming coverage in matters involving bodily injury or death, it is paramount that the insurer provide timely notice of the disclaimer to the insured seeking coverage and the party that provided the initial notice of claim. ♦

New York Appellate Court Holds That Although There Was No Negligence, Broad Indemnification Clause Requires Repayment Of Defendant's Costs Related To The Defense Of The Action

by ***Marina O'Keeffe***

In *Robinson v. Brooks Shopping Center, LLC, et. al.*, 2017 N.Y. App. Div. LEXIS 1929, 2017 NY Slip Op 01972, Plaintiff tripped and fell over an alleged defect in a parking lot within the shopping center. Plaintiff commenced an action against the owner and managing company for the shopping center alleging negligence. After joinder of issue, the owner and managing company commenced a third-party action against a road contractor (who was hired to resurface roads of the parking lot) seeking common law and contractual indemnification. They also commenced a second third-party action against a maintenance contractor (who was hired to perform general maintenance and cleaning) seeking the same relief.

During her deposition, Plaintiff stated that there was an "uneven spot" which "wasn't as level as the other side" of a "little ridge" of concrete in the ground in the parking lot. The Court applied principles established by *Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66 (2015) and found that the alleged defect, as described by Plaintiff, "without more," was a trivial defect and not a trap or snare and, therefore, nonactionable. The Court dismissed Plaintiff's Complaint.

The Court then turned its attention to indemnification claims. First, the Court opined that since Plaintiff's Complaint alleged that the owner and managing company were liable based on their own wrongdoing in failing to maintain the premises, third-party and second third-party claims for common law indemnification were properly dismissed by the lower court. The Court cited *Great Am. Ins. Cos. v Bearcat Fin. Servs., Inc.*, 90AD3d 533, which established that a party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification.

The Court then analyzed indemnification provisions in two contracts: 1) between the owner/managing company and the maintenance contractor, and 2) between the owner/managing company and the road contractor.

In the first contract between the owner/managing company and the maintenance contractor, the indemnification provision required the maintenance contractor to indemnify the owner and managing company for property damage, bodily injury, or death only arising out of or related to the maintenance

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contractor's negligence. Because the maintenance contractor was not negligent, the owner and managing company were not entitled to contractual indemnification.

In the second contract between the owner/managing company and the road contractor, the indemnification provision in the contract was broad and required the road contractor to indemnify defendants for liability, damage, etc., "resulting from, arising out of or occurring in connection with the execution of the work [performed by the road contractor]," including attorneys' fees. The Court found that although there was no negligence on part of the road contractor, the owner and managing company, nonetheless, were entitled to contractual indemnification insofar as they incurred costs related to work performed by the road contractor.

Learning Point: Although some indemnification provisions are hard to understand and interpret, the important question a party should ask itself is whether its obligation is limited to the claims arising out of its own negligence? ♦

Means And Methods Or Dangerous Condition On The Premises: Labor Law §200 Summary Judgment Unavailable When Proximate Cause Unclear

by **Serena A. Skala**

In *Shaughnessy v. Huntington Hosp. Assoc.*, 2017 N.Y. App. Div. LEXIS 1128; 2017 NY Slip Op 1245, Plaintiff, a steam fitter, was allegedly injured when he fell from a ladder as he was installing refrigeration piping into a ceiling as part of a renovation project in a hospital owned by Defendant/third-party plaintiff Huntington Hospital Association. In addition to arguing that the ladder upon which he was performing his work failed, Plaintiff argued that plastic sheeting that was covering the walls and the floor of the room in which he was working at the time of the accident contributed to the happening of the accident (the Court did not indicate where the plastic sheeting came from or which entity installed it). A subcontractor on the job, HVAC, Inc., was hired to perform work on the air-conditioning system. After the close of discovery, HVAC moved for summary judgment on Plaintiffs Labor Law § 200 claim arguing, *inter alia*, that it did not direct, control or supervise Plaintiff's work such that it cannot be found liable under Labor Law § 200.

The Second Department upheld the lower court's denial of HVAC's application for summary judgment but on different grounds than those relied upon by the lower court. The Second Department reiterated that when a plaintiff's injury stems from the manner in which the work is being performed, a defendant is required to establish that it did not direct, control or supervise the plaintiff in order to obtain summary judgment as to Labor Law §200. However, the Court further elaborated the well-established case law that when the accident is alleged to involve defects in both the premises as well as the equipment being used at the work site, a defendant moving for summary judgment must address *both* liability standards: i.e. supervision and control as well as notice of the dangerous conditions.

Plaintiff alleged both that the ladder upon which he was working and that plastic sheeting covering the floors and ceiling contributed to his accident. Therefore, the Second Department found that HVAC must both establish that it did not create or have actual or constructive notice of the dangerous condition (i.e. the plastic sheeting), and that it did not direct, control or supervise Plaintiff's work. The Appellate Division found issue with discrepancies in the testimony of HVAC's senior employees who oversaw the work that Plaintiff was performing and Plaintiff's testimony as to which entity he worked for at the time of the incident. Therefore, even though HVAC established that it did not create the dangerous condition, or have actual or constructive notice of it, there was an issue of fact as to whether it directed, controlled or supervised Plaintiff's work rendering summary judgment unavailable.

Learning Point: A defendant moving on Labor Law §200 should consider addressing both liability standards in a motion for summary judgment, even if the fact pattern seems to only fit one liability scenario. The lines between when an accident was caused by a dangerous condition versus the means and method of performing work are becoming blurrier. ♦

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To Prevail On A Claim Under Labor Law § 240(1) Plaintiff Is Not Required To Describe The Accident In Detail

by ***Catherine P. O'Hern***

Success on overcoming a defendant's motion for summary judgment to dismiss a Labor Law § 240(1) claim does not depend on the plaintiff's ability to describe the details of how the accident occurred.

In *Weicht v. City of New York*, 2017 N. Y. Slip Op. 01995, decided March 21, 2017, the New York Appellate Division First Department unanimously affirmed the Bronx County Supreme Court's decision to grant Plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim and to deny Defendant's cross-motion for summary judgment to dismiss Plaintiff's claim despite Plaintiff's inability to remember the precise details of how his accident occurred. The Appellate Division held that a plaintiff is not required to describe the specific details of the accident alleged to have caused his injury, if the plaintiff can establish negligence and causation by circumstantial evidence.

In *Weicht*, Plaintiff's claim arose from an injury during his fall to the ground when the bottom of the ladder he was descending suddenly slipped out from under him. Despite Plaintiff's inability to testify about the specific details of how the accident occurred, the lower court granted his motion for partial summary judgment on his Labor Law § 240(1) claim and the Appellate Division unanimously affirmed.

As evidence that the accident occurred as alleged, Plaintiff submitted the workers compensation report of the incident in addition to his employer's OSHA report. Instead of raising any issue of triable fact in opposition to Plaintiff's *prima facie* case, Defendants challenged only the evidence submitted by Plaintiff in support of his motion and were unsuccessful in their motion for summary judgment to dismiss the Labor Law § 240(1) claim.

Despite Defendants' challenge to Plaintiff's evidence, the Court found that both the workers compensation report and the OSHA report provided by Plaintiff's employer were properly authenticated and properly admitted as business records by the lower court, and that the reports provided sufficient circumstantial evidence to show that the when the bottom of the ladder suddenly slipped out from under Plaintiff, it caused him to fall to the ground. In its analysis, the Court determined that Plaintiff had provided circumstantial evidence sufficient to establish negligence and causation; thus, he was deserving of the relief granted, notwithstanding Plaintiff's inability to describe the accident in detail.

Learning Point: If a plaintiff can prove negligence and causation by circumstantial evidence, claims under Labor Law § 240(1) may not be dismissible due to the plaintiff's inability to provide specific details about the accident. ♦

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Gaps In Plaintiff's Proof Insufficient To Establish Defendant's *Prima Facie* Entitlement To Summary Judgment

by **Gregory J. Popadiuk**

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In *Jiann Hwa Fang v. Metropolitan Transp. Auth.*, 2017 NY Slip Op (2d Dep't March 8, 2017), the Appellate Division, Second Department affirmed an order of the trial court denying Defendant, MTA Bus Company's ("MTA Bus") motion for summary judgment. MTA Bus argued that since the decedent was not hit by a bus that it owned, Plaintiff could not prove that the accident was the result of any negligence on its part or on the part of its bus operator. The Court held that a defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case. It was the burden of MTA Bus, as the movant, to establish its *prima facie* entitlement to summary judgment by eliminating all triable issues of fact as to whether the vehicle that struck the decedent was the subject MTA bus. The failure to do so resulted in the motion for summary judgment of MTA Bus being denied.

Plaintiff's decedent, Cheng Chui Ing Fang, was struck and killed by a motor vehicle while crossing Springfield Boulevard at the intersection of 73rd Avenue in Queens County, at approximately 7:30 p.m. on March 7, 2013. It was alleged that a QM5 bus with bus number 3386 was operated by a non-party witness Mr. John Pitarra. Mr. Pitarra made a left turn from 73rd Avenue onto Springfield Boulevard and struck the decedent as she was crossing. He left the scene of the incident. During his deposition, Mr. Pitarra testified that he made a left turn from 73rd Avenue onto Springfield Boulevard on the evening and time in question, but did not see or feel anything. According to him, traffic was light on Springfield Boulevard and there were no vehicles in front of him when he made the left turn. He noted that another QM5 bus was directly behind him and made the turn together with him. It was raining, sleeting and hailing at the time, and visibility was reduced. Mr. Pitarra admitted to the responding police investigator that it was possible that he could have struck something. A bus passenger and non-party witness Mr. Frank Rescigno got off of the bus when it stopped on Springfield Boulevard and 69th Avenue one block away from the 73rd Avenue intersection. After getting off of the bus, Mr. Rescigno walked to his parked car directly across the street from the bus stop. An Asian man, who sounded and acted frantically, approached him. This man began pointing in broken English and said that a bus had hit someone. It was possible that this Asian man said "QM" or something to that effect and then walked away. Mr. Rescigno was able to discern a human body lying in the street. He ran to the body and called 911. The police accident report identified the vehicle that struck the

decedent as MTA bus number 3386, based, in part on an inspection of the bus conducted approximately 19 miles away from the accident site.

Plaintiff's estate sued the Metropolitan Transportation Authority ("MTA"), MTA Bus and the City of New York. In the trial court, both the MTA and MTA Bus moved for summary judgment. It was determined that MTA Bus was a subsidiary corporation of the MTA pursuant to Public Authorities Law §1266(5). The MTA was a distinct legal entity from its subsidiaries and not liable for the torts of its subsidiary bus companies. Therefore, the trial court held that the MTA was entitled to summary judgment as its functions with respect to public transportation were limited to financing and planning, and did not include operation, maintenance or control of any facility. Moreover, the employees of the subsidiary corporation, MTA Bus, could not be deemed the employees of the MTA. In support of its motion for summary judgment before the trial court, MTA Bus argued that Plaintiff could not prove that the decedent's accident was the result of any negligence on its part or on the part of Mr. Pitarra. However, the evidence established that the bus was owned and operated by MTA Bus and that Mr. Pitarra was an employee of MTA Bus. As such, the motion for summary judgment by MTA Bus was denied as the trial court found that it failed to meet its *prima facie* burden of establishing its affirmative defense that the decedent was not struck by the subject bus.

The Appellate Court affirmed the trial court's holding, noting that although MTA Bus pointed to gaps in Plaintiff's proof, its submissions failed to eliminate all triable issues of fact as to whether the vehicle that struck the decedent was the subject MTA bus. The Court did not address Plaintiff's opposition papers since MTA Bus failed to establish its *prima facie* entitlement to summary judgment.

Learning Points: This Decision reemphasizes the high standard for a defendant seeking summary judgment dismissal of a complaint. In establishing its *prima facie* entitlement to summary judgment, a defendant should anticipate, address and attempt to eliminate each and every potential issue of fact that a plaintiff may argue in opposition to such a motion. Applying such a strategy may potentially mitigate the effectiveness of a plaintiff's opposition papers. Although a gap in a plaintiff's proof may appropriately be the subject of a directed verdict at trial, there is still a strong judicial preference in favor of giving a plaintiff his or her day in court. Thus, courts are consistently reluctant and disinclined to take a plaintiff's case away from him or her at the summary judgment stage. ♦

FIRST-PARTY PROPERTY

POLICY REQUIRING INSURED TO RESIDE AT PROPERTY HELD NOT REFORMED

Nicotera v. Allstate Ins. Co., 147 A.D.3d 1474 (N.Y. App. Div. 4th Dep't)

An elderly woman transferred ownership of her home to an irrevocable family trust. She lived at the property for many years before moving to a nursing home. Roughly two years later the home was damaged by fire. The property was insured in the name of the elderly woman only. The insurer disclaimed coverage on the ground that the named insured did not live at the residence, which the policy required. ***Held:*** Although the court has previously reformed insurance policies that contain incorrect ownership, in this case the plaintiffs are not seeking to merely correct a name, but to rewrite the policy so that it does not include the requirement that the homeowner reside at the insured premises. Summary judgment in favor of the insurer affirmed.

WATER ENTERING THROUGH BROKEN CONDUIT FALLS UNDER WATER DAMAGE EXCLUSION AND ENDORSEMENT

Papa v. Associated Indem. Corp., 2017 NY Slip Op 01118 (N.Y. App. Div. 4th Dep't)

A commercial property suffered water damage in the basement after a power company replaced a utility pole and broke an underground conduit. The conduit channeled water into the basement during heavy rain. The property owner sued insurer claiming that the damage did not fall under a water exclusion or an endorsement, entitling the owner to full coverage. ***Held:*** The court erred in denying the insurer's initial summary judgment motion. An insurance contract is read in light of common speech and the reasonable expectations of a businessperson. The policy limited coverage when groundwater entered the basement though a gap, hole or opening in the wall. Water entering through a conduit falls within this language.

LIABILITY INSURANCE COVERAGE

CGL POLICIES DO NOT COVER REPAIRS OF INSURED'S DEFECTIVE WORK

Allied Prop. & Cas. Ins. Co. v. Metro N. Condo. Ass'n, No. 16-1868, 2017 U.S. App. LEXIS 4107 (7th Cir. Mar. 8, 2017)

A subcontractor defectively installed windows in a condominium resulting in significant water damage, including damage to personal property. The subcontractor's CGL policy contained "your work" and "contractual liability" exclusions. The only claim upon which the subcontractor would be liable was remedying the defectively installed windows. ***Held:*** The CGL policy does not cover the claims against the subcontractor. ***Further held:*** The condominium association lacks standing to recover for damage to the personal property of unit owners as it is an individual loss, not a collective loss affecting multiple units or common areas.

Editor's Note: *This case was successfully litigated by Clausen Miller in the trial court and on appeal.*

TOOLS EXCLUSION DEFEATS TEMPORARY WORKS COVERAGE FOR CRANE

Lend Lease (US) Constr. LMB Inc. v. Zurich Am. Ins. Co., 28 N.Y.3d 675 (Ct. App.)

A crane being used in the construction of a skyscraper suffered damages during Superstorm Sandy. The builder's risk insurance policy covered temporary works and contained a contractor's tools exclusion that may defeat the temporary works coverage. ***Held:*** If the crane is covered under the temporary works coverage, the contractor's tools exclusion would defeat that coverage. The exclusion does not render the temporary works provision illusory as it would not defeat all of the coverage afforded under that provision.

LATE NOTICE OBVIATES DUTY TO DEFEND OR INDEMNIFY

Bn Partners Assoc., LLC v. Selective Way Ins. Co., 2017 NY Slip Op 02213 (App. Div. 4th Dep't)

Employee injured at worksite sued property owner, general contractor and property lessor. The defendants then commenced an action against the employer and its insurer seeking a declaration that the insurer is obligated to defend and indemnify them in the underlying personal injury action. ***Held:*** The defendants failed to provide proper notice as required by the policy for 17 months after becoming aware of the lawsuit and have no excuse for the delay. Mailing a letter to the employer's insurance agent is not sufficient as the agent was not an agent of the insurer. Leaving a telephone voicemail likewise does not constitute written notice as required by the policy. The insurer had no obligation to defend or indemnify.

NO DUTY TO ADDITIONAL INSURED WHEN INJURY NOT COVERED

Chappaqua Cent. Sch. Dist. v. Phila. Indem. Ins. Co., 2017 NY Slip Op 02015 (App. Div. 2d Dep't)

A school district leased cafeteria space to an organization running an afterschool program for children. An afterschool program employee was injured when she tripped and fell down a staircase that led from the school to the parking lot. The school district sought a declaration that the program's insurer was obligated to defend and indemnify it as an additional insured. ***Held:*** The injury did not arise out of the "ownership, maintenance or use" of the "premises leased" to the insured, which the policy required. There was no causal relationship between the injury and the risk for which coverage was provided. Thus, there was no obligation to defend or indemnify.

MEDICAL MALPRACTICE

PATIENT'S SUIT AGAINST DENTIST FILED TOO LATE

Pearsall v. Guernsey, 2017 Ohio App. LEXIS 672 (Ohio App.)

Almost three years after receiving treatment, patient sued dentist. ***Held:*** Claim was barred by the one-year medical malpractice statute of limitations. The statute begins to run at the time of actual or constructive discovery, or when patient-physician relationship for the condition ends, whichever is later. Patient had terminated relationship with dentist almost three years before suit. Had patient timely sent a 180-day letter to dentist, patient still filed suit too late. The saving statute was inapplicable because patient's earlier-filed lawsuit named a different dentist. The statute of repose was inapplicable because patient did not file suit within one year of discovery.

TORTS

FAILURE TO NOTIFY EXECUTIVE OFFICER FATAL TO CLAIM

Coren-Hall v. Mass. Bay Transp. Auth., 2017 Mass. App. Unpub. LEXIS 41 (Mass. App.)

After an MBTA bus struck a vehicle that the driver was entering, the driver notified the MBTA's claims department, with a request that the claims department give the notice letter to the proper authority. ***Held:*** The driver failed to meet the statutory requirement of notifying the executive officer. Although the driver later received a settlement offer, this did not establish the executive officer's actual notice within the presentment period. The offer had been made by an unidentified MBTA employee after the period expired. The lack of prejudice to the MBTA was irrelevant.

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