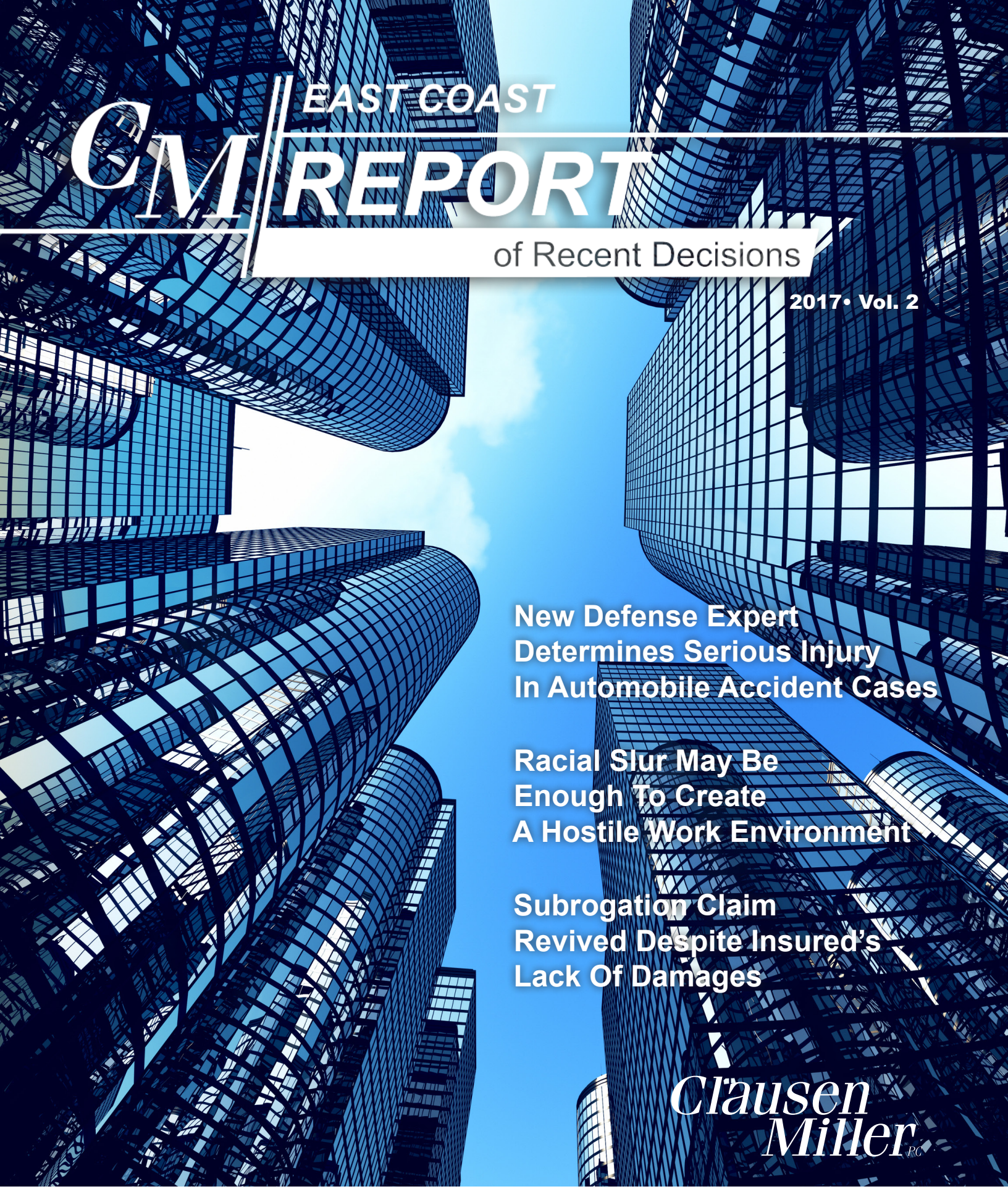

EAST COAST CM REPORT

of Recent Decisions

2017• Vol. 2

New Defense Expert Determines Serious Injury In Automobile Accident Cases

Racial Slur May Be Enough To Create A Hostile Work Environment

Subrogation Claim Revived Despite Insured's Lack Of Damages

Clausen Miller P.C.

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.

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FEATURES

12 ***Case Notes***

ARTICLES

AUTO LIABILITY

3 Where Does It Hurt? A New Defense Expert Comes To The Scene When Determining Whether The Plaintiff Suffered A Serious Injury In Automobile Accident Cases

by George Caran

COVERAGE

5 Proximate Cause Test Applied To Determine Additional Insured Status Under New York Law

by Dawn M. Brehony

LABOR & EMPLOYMENT

7 Raising Substantial Doubts About Long-Established Precedent, Second Circuit Finds That Even A Single "Sufficiently Severe" Racial Slur May Be Enough To Create A Hostile Work Environment Under Title VII

by Brian I. Confino

LABOR LAW

8 Summary Judgment Not Granted Under Labor Law 240 (1) Where Triable Issues of Fact Exist

by Ian T. Williamson

SUBROGATION

10 Subrogation Claim Revived Despite Insured's Lack Of Damages

by Terence H. DeMarzo

Where Does It Hurt? A New Defense Expert Comes To The Scene When Determining Whether The Plaintiff Suffered A Serious Injury In Automobile Accident Cases

by ***George Caran***

Just about every experienced civil litigator has at some point in their career handled an automobile accident case. This rite of passage is especially prominent with litigators that practice in New York State. Quite simply, there is no way of avoiding the tidal wave of auto personal injury actions. And if one has handled such a case, to be sure, that attorney was faced with the prospect of drafting a "threshold motion."

Plaintiffs that commence personal injury actions that arise out of automobile accidents which are governed by New York law must meet certain criteria in order to recover an award for personal and economic injuries. Specifically, they must meet the requirements of Insurance Law 5104(a) which states: "…there shall be no right of recovery for non-economic loss, except in the case of a serious injury." A serious injury is defined by Insurance Law 5102(d) and states that a plaintiff must establish that he suffered the following to qualify:

> …a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Due to the serious injury requirement, in many instances in automobile personal injury cases, liability is decided based on whether the plaintiff suffered a medically determined serious injury. These cases lend themselves to summary judgment motions if the defendant feels that the plaintiff failed to meet the serious injury "threshold," even if the defendant is 100% liable for the accident. Usually, defendants subject the plaintiff to a physical examination as a means of evaluating the claimed injuries. The overwhelming majority of cases lend themselves to an orthopedic and

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neurologic examination. Most of the time, the case hinges on whether the plaintiff is free of pain, has full range of motion of the injured body part and whether the doctor feels that there is no evidence of permanent effects from the accident. However, these examinations are easily countered by the plaintiff's own doctors who also perform an exam and, of course, find exactly the opposite: continuing pain, continuing residuals and restrictions in the ranges of motion of the injured body part. Thus, the plaintiff easily creates a triable issue of fact premised on a battle of the experts. Defendants, therefore, look for additional experts to tip the scale in their favor, experts such as trauma doctors.

In *Moore-Brown v. Sofi Hacking Corp.*, 2017 NY Slip Op 04902 (1st Dep't, June 15, 2017), the Appellate Division, First Department, issued a seemingly innocuous decision after it dismissed a case due to its finding that Plaintiff failed to prove she suffered a serious injury, no doubt one of many such cases heard by this Department every year. However, what is different and unique in this rather short, three paragraph opinion, was the Court's discussion of a trauma expert and it being persuaded by this expert's opinion that Plaintiff does not meet any of the serious injury categories. The opinion starts by stating that Defendant's orthopedist found no range of motion deficits and that Plaintiff's examination was normal. The Court then stated that the defense neurologist found normal neurological results. The neurologist, according to the Court, did find limitation in one range of motion test, but felt that this did not "undermine his conclusion" that Plaintiff did not have permanent injuries. The opinion then goes on to state that Defendant, through the report of an emergency room medicine expert, demonstrated that Plaintiff's allegation of a cervical injury was inconsistent with her medical records. The records showed that she failed to make cervical complaints at the hospital. The expert concluded, just by reviewing Plaintiff's emergency room records, that there was no evidence "of traumatic injury to her cervical spine." This expert's conclusion, despite the fact that one of the defense experts found limitations, usually the death knell in these cases, was an important factor to the Court in holding that the injuries were not causally related to the accident. The Court cited in support of its position *Frias v. Gonzalez-Vargas*, 147 A.D.3d 500 (1st Dep't 2017). Although *Frias* involved triable issues of fact whether the plaintiff suffered a serious injury, in *Frias*, the appellate court also considered the findings and report of an emergency room expert in formulating its opinion. The *Moore-Brown* Court upheld the trial court's dismissal of the action and threw the case out.

The opinion is devoid of any discussion as to the circumstances of the accident or whether the accident was of the low impact, no damage variety. Nevertheless, the opinion has the potential to send reverberations through the auto personal injury world and gives the defendants another option when dealing with automobile accident cases and the issue of serious injury.

Learning Point: There are two lessons from *Moore-Brown*. First, when dealing with automobile personal injury actions, the defense counsel should look beyond the usual medical examinations of the plaintiff, as important as they are, and take a different approach such as retaining an emergency room trauma expert to review the records. When handling an automobile accident case, defense counsel should look at the accident circumstances and determine whether it was a low impact accident. Defense counsel should obtain photographs of the vehicles, especially if there is minor or no damage to the vehicles. Counsel should, when deposing the plaintiff, dedicate a portion of the deposition to determining the speeds of the vehicles, the impact that the plaintiff felt and then what, if any, complaints the plaintiff made as to injuries immediately after the accident. If the plaintiff went to the hospital, obtaining the ambulance call report and hospital records should be a priority. In order to successfully defend such cases, defense counsel must realize that the key to winning goes beyond the usual orthopedist and neurologist. Second, even if one of your experts determines that the plaintiff has some limitations (in *Moore-Brown*, the neurologist), the Court may not consider this an automatic failure by the defendant to meet *prima facie* entitlement to judgment as a matter of law and dismissal of the case is still possible. ♦

Proximate Cause Test Applied To Determine Additional Insured Status Under New York Law

by ***Dawn M. Brehony***

In *The Burlington Insurance Company v. New York City Transit Authority*, 2017 NY Slip Op 04384 (June 6, 2017), reversing the Appellate Court's decision, the Court of Appeals—New York's highest court—held that an insurance policy endorsement extending coverage to additional insureds for liability for bodily injury "caused, in whole or in part" by the "acts or omissions" of the named insured is limited to injury proximately caused by the named insured, and is not extended to any injury causally linked to the named insured. In rejecting the argument that an additional insured obligation is owed under this language when the named insured is not at fault, the Court concluded that the Appellate Division "wrongly concluded that an additional insured may collect for an injury caused solely by its own negligence, even where the named insured bears no legal fault for the underlying harm." *Id.* at 1. Accordingly, the Court of Appeals rejected the notion that "caused, in whole or in part" equates to "but for" causation, and further rejected the Appellate Division's conclusion that the phrases "arising out of" and "caused by" do not "materially differ." *Id.*

Defendant New York City Transit Authority ("NYCTA") contracted with non-party Breaking Solutions, Inc. ("BSI") to perform excavation work on a subway construction project. *Id.* at *1. In compliance with NYCTA's insurance requirements, BSI procured commercial general liability coverage from Burlington Insurance Company listing NYCTA, and MTA New York City ("City") as additional insureds. As required by NYCTA, BSI agreed to use language in the latest additional insured endorsement form issued by ISO, which provides that NYCTA, MTA, and the City are additional insureds:

> …only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
>
> 2. The acts or omissions of those acting on your behalf.

Id. at *2.

During the relevant policy period, a BSI employee fell while attempting to avoid an explosion after a BSI machine touched live electrical cable buried in concrete at the excavation

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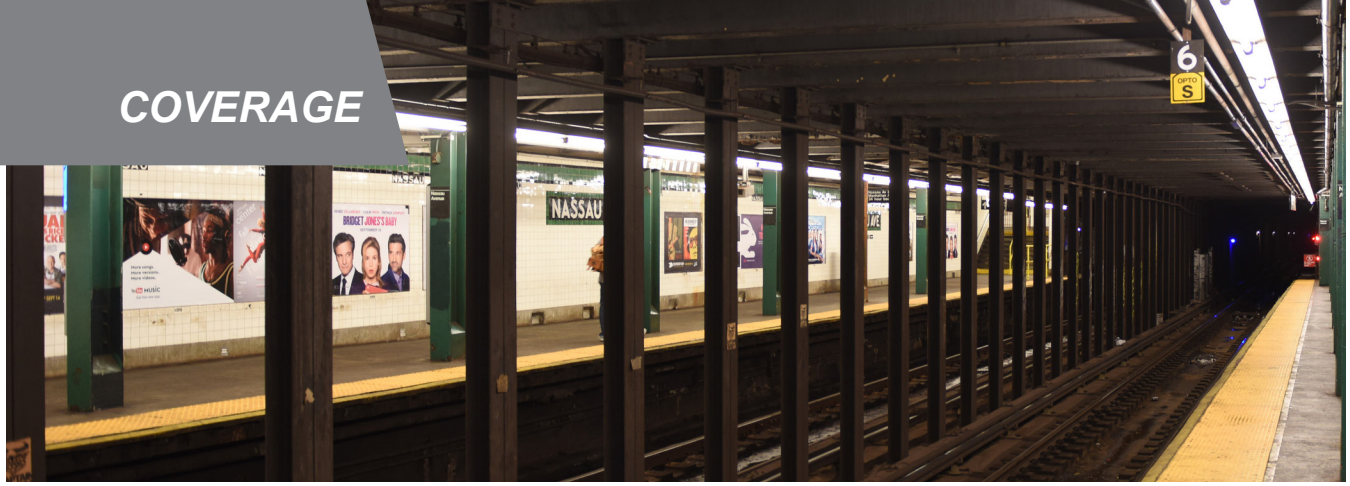


site. *Id.* He and his wife sued the City, and Burlington accepted the City's tender under a reservation of rights. *Id.* at *3. The City filed a third-party Complaint against NYCTA and MTA, asserting claims for contribution and indemnification based upon a lease agreement. *Id.* at *3. NYCTA also tendered its defense to Burlington as an additional insured under the BSI Policy. *Id.*

Burlington accepted NYCTA's tender of defense subject to a reservation of rights. However, through discovery in the underlying action, it was discovered that NYCTA had failed to identify, mark or protect said cable, and the BSI employee was not only acting properly in his work, but could not have known of the location of the cable or that it was electrified. The cause of the accident was attributed to a deficient inspection process for identifying job site hazards. *Id.* at *8. As such, Burlington disclaimed coverage to NYCTA and MTA on the grounds that Defendants were not additional insureds within the meaning of the policy because NYCTA was solely responsible for the accident that caused the injury. *Id.* at *1.

The trial court granted Burlington's motion for summary judgment, concluding that NYCTA and MTA were not additional insureds under the Burlington policy. The Appellate Division reversed, concluding that "the act of triggering the explosion…was a cause of [the employee's] injury" within the meaning of the policy. However, the Court of Appeals disagreed with the Appellate Division.

In a 4-2 decision, the Court of Appeals rejected NYCTA's and MTA's argument that the "caused, in whole or in part" in the endorsement means "but for causation." *Id.* at *4. The Court concluded that there was no coverage obligation because, "by its terms, the policy endorsement is limited to those injuries proximately caused by BSI." *Id.* Specifically, because the endorsement states that the injury must be "caused in whole or in part," and "but for" causation cannot be partial, the Court found that this endorsement requires legal "proximate causation" to apply. "An event may not be wholly or partially connected to a result, it either is or it is not connected. Stated differently, although there may be more than one proximate cause, all 'but for' causes bear some connection to the outcome even if all do not lead to legal liability. Thus, these words—in whole or in part—can only modify 'proximate cause.'" *Id.* at *5. The Court concluded that BSI was not at fault. *Id.* at *4. It explained that while the explosion would not have occurred, and the employee likewise would not have been injured but for BSI's machine coming into contact with the live cable, "that triggering act was not the proximate cause of the employee's injuries since BSI was not at fault in operating the machine in the manner that led it to touch the live cable." *Id.*

In reaching its conclusion, the Court noted that NYCTA required that the policy procured by BSI include the additional insured coverage used in the latest ISO form. *Id.* This form was amended in 2004 to replace the "arising out of" language with "caused, in whole or in part." *Id.* The Court noted that "the change was intended to provide coverage for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional insured's sole negligence." *Id.*

Learning Point: In refusing to extend coverage to NYCTA and MTA, New York's highest court expressed its unwillingness to shift liability for the additional insured's sole negligence. Be mindful that insurers may continue to have an obligation to defend a purported additional insured where the underlying complaint alleges that the named insured is potentially legally responsible. The impact of this decision extends solely to the duty to indemnify where the facts indicate that the named insured is not negligent. ♦

Raising Substantial Doubts About Long-Established Precedent, Second Circuit Finds That Even A Single "Sufficiently Severe" Racial Slur May Be Enough To Create A Hostile Work Environment Under Title VII

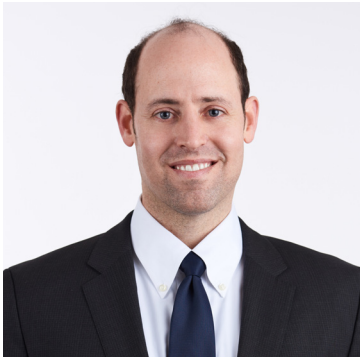
by ***Brian I. Confino***

In *Daniel v. T&M Protection Resources, LLC*, 15-cv-560 (2d Cir. April 25, 2017), the Second Circuit Court of Appeals reversed summary judgment dismissing a hostile work environment claim under Title VII. The Decision, which may create more litigation for employers, clarified that a single incident can suffice to state a claim for discriminatory hostile work environment in the workplace.

In *Daniel*, Plaintiff, a black, gay man from the Caribbean, alleged that he was discriminated against because of his race, sexual orientation and national origin. Specifically, he claimed that a supervisor, on one occasion, used foul language racial slur. In granting summary judgment for the employer, the lower court disregarded this comment, holding that this single racial slur cannot, as a matter of law, by itself sustain a Title VII hostile work environment claim.

In reversing the decision, the Second Circuit acknowledged that its prior case law instructed that to create a hostile work environment, "there must be a steady barrage of opprobrious racial comments" (plural). In supporting its Decision, the Court reasoned that this did not foreclose the possibility that a single slur could be enough if "sufficiently severe". In evaluating the severity of the one-time slur at issue, the Court asserted that "perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet… by a supervisor in the presence of his subordinates." While not definitively saying that the use of this slur could alone form the basis of a hostile work environment claim under Title VII, the Court believed that "the district court improperly relied on our precedents when it rejected this possibility as a matter of law".

Learning Point: Employers in New York, Connecticut and Vermont may find that the already high bar to obtain summary judgment dismissing hostile work environment claims under Title VII have been elevated even further. *Daniel* should serve as a reminder that employers must be vigilant about creating work environments that are free of harassment. It is important for employers to provide regular anti-harassment training to all employees, and continue to vigorously stress that all employees, particularly supervisors, must be exceedingly cautious about the words they use in the workplace. All alleged utterances that violate company policy should be immediately investigated, even if only said once. ♦



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Summary Judgment Not Granted Under Labor Law 240 (1) Where Triable Issues Of Fact Exist

by ***Ian T. Williamson***

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In *O'Brien v. Port Authority of New York and New Jersey*, 2017 NY Slip Op 02466 (Court of Appeals, March 30, 2017), Thomas O'Brien ("Plaintiff") was an employee of DCM Erectors ("DCM"), a subcontractor performing work at the construction site of 1 World Trade Center. Plaintiff alleged he was injured while attempting to descend a temporary exterior steel staircase on the work site. It had been raining intermittently throughout the day, and Plaintiff claimed that the staircase was "steep, slippery and smooth on the edges." He slipped on the first step, falling down approximately 8 subsequent steps sustaining various injuries. Plaintiff held on to the metal handrail; however, it afforded no stability as it was wet. Plaintiff brought suit against the owner of the premises, Port Authority of New York and New Jersey, and the general contractor, Tishman Construction Corporation of New York, seeking summary judgment under Labor Law §240 (1).

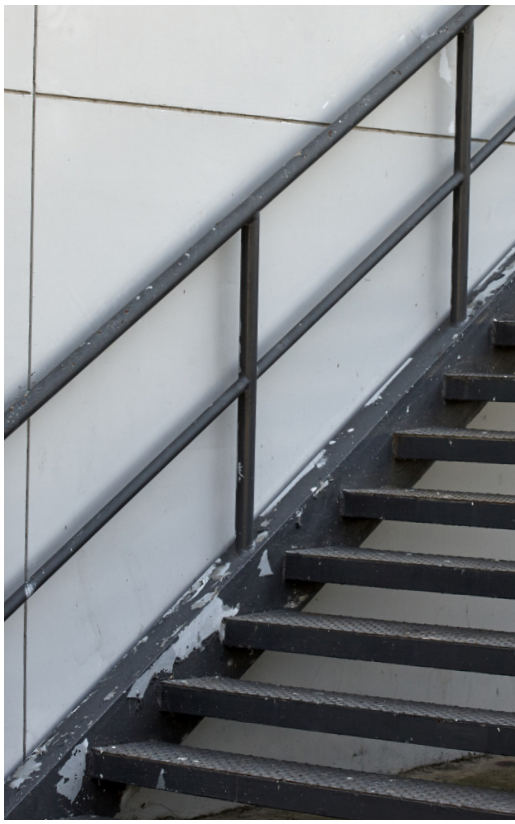
The Court of Appeals considered whether, under Labor Law §240 (1), Plaintiff would be entitled to summary judgment. It modified the Appellate Division's order which had granted Plaintiff partial summary judgment on his claim and ultimately denied summary judgment on the Labor Law §240 (1) claim. In determining whether Plaintiff was entitled to summary judgment, the Court of Appeals directed its attention to the conflicting engineer expert affidavits. Neither engineer actually saw the staircase in question. Instead, both referenced photographs in the record. Plaintiff's expert asserted that the only anti-slip measures on the staircase included worn and "small round protruding [metal] nubs" offering limited protection. He further reasoned that worn steel stairs are hazardous, particularly when wet, and that allowing an employee to access to such constituted a dangerous condition, not in compliance with accepted standards of construction site safety. Defendants' engineer expert also submitted two affidavits which maintained that the steel staircase was designed with proper specifications for indoor and outdoor use, and that the metal nub traction provided was done so in accordance with acceptable industry standards. He further pointed out that the stairs were constructed with perforated holes, and this measure was included to specifically allow rain water to drain through the steps.

Labor Law §240 (1) mandates that owners and contractors provide employees with devices such as "scaffolding, hoists, stays, ladders

…placed and operated as to give proper protection to a person so employed." Liability under §240 (1) may be statutorily imposed only where the "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *Nicometi v. Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 (2015). In prior cases concerning plaintiffs who were injured from collapsed or malfunctioning ladders or scaffolds, the courts have presumed that such devices were not sufficient so as to provide proper protection within the ambit of §240 (1). The Court distinguished the case at bar specifically because the parties' conflicting engineer reports created a question as to whether the staircase provided adequate protection, and noted that simply falling down a staircase does not imply that the statute was necessarily violated.

In her dissent, Judge Rivera took issue with the implications of the majority's interpretation of §240 (1). She argued that the appeal of §240 (1) lies within holding owners and contractors ultimately liable for the safety of all employees on the work site. In her opinion, owners and contractors should not solely rely on industry custom and acceptability standards as fulfilling their obligation to their employees under Labor Law. Indeed, they should take it as far as they have to in order to ensure the safety of all employees on site. When this is put into practice, assuming that the staircase specifications were perfectly compliant with safety regulations, the mere fact that water and metal together cannot provide sufficient traction should have been the reason that Defendants closed off access to the stairway to its employees. For Judge Rivera, the fact that Defendants did nothing to dispute that the metal staircase was actually wet on the day of Plaintiff's injury created a challenge because such is an exact reason why a plaintiff would receive summary judgment. In the context of Labor Law §240 (1), if a "defendant's assertions in response to plaintiff's motion fail to raise a fact question as to the adequacy of the safety device, or the credibility of the plaintiff, the plaintiff must be accorded summary judgment." *Klein v. City of New York*, 89 NY2d 833, 835 (1996).

Learning Point: A plaintiff moving for summary judgment under Labor Law §240 (1) should be aware that injuries sustained on the work site are not always presumed to be the result of a statutory violation. In this vein, correlation does not imply causation. ♦



Subrogation Claim Revived Despite Insured's Lack Of Damages

by ***Terence H. DeMarzo***

In *Andalora v. R.D. Mech. Corp.*, 448 N.J.Super. 229 (App. Div. 2017), the Superior Court of New Jersey, Appellate Division, revived an insurer's subrogation claim and held that Mt. Hawley Insurance Company ("Mt. Hawley") could pursue its indemnification claim against The Hartford LLC ("Hartford"). The Appellate Division reversed a lower court's decision dismissing Mt. Hawley's Complaint against Hartford, holding that although Mt. Hawley's insured, ICS Builder's Inc. ("ISC"), did not sustain actual damages, Mt. Hawley retained its right to subrogate against the at-fault party.

Mt. Hawley provided insurance coverage to General Contractor, ICS, for its 2006 construction project. During the course of construction, ICS sub-contracted some of the work to Swift Construction, LLC ("Swift"). In June, 2006, a worker at the construction site fell and sustained bodily injuries. As a result, both insurers engaged in extensive litigation related to coverage and payment issues. In 2010, the worker settled his personal injury suit for $5,000,000.00. As part of the settlement with the injured worked, Hartford contributed $3,000,000.00 on behalf of Swift.

In separate coverage litigation, Hartford filed a motion to require Mt. Hawley to proffer $1,000,000.00 as its share of Hartford's $3,000,000.00 settlement payment. Despite Mt. Hawley's argument that there had been no findings of fault, the court granted the motion. However, Mt. Hawley made it clear it was not going to wind up on the hook to pay its $1,000,000.00 toward the settlement without first having its day in court whether its insured was liable for the accident. *Andalora v. R.D. Mech. Corp.*, 448 N.J. Super. 229, 234 (App. Div. 2017).

Subsequent to the settlement of the personal injury suit, Swift moved for summary judgment on ICS's indemnification claim on the theory that ICS had no damages because Swift's insurer, Hartford, had provided ICS with a defense in the personal injury suit, and both Hartford and ICS's insurer, Mt. Hawley, paid to settle that lawsuit. Swift argued that ICS paid nothing and therefore could not claim any damage that required indemnification. The Law Division judge agreed and granted the Motion dismissing the action, with prejudice, in a March 20, 2015 Order. *Id.* at 35.

However, the Appellate Division ultimately disagreed, finding that lower court dismissal of ISC's indemnification claims with prejudice elevated "form over substance" and constituted a "miscarriage of justice." *Id.* at 236. As a result, the Appellate Division held that Mt. Hawley's right

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to assert the subrogation claim did not turn on whether ICS suffered any actual damages and allowed Mt. Hawley to bring its own action because of Swift's alleged breach of an indemnification clause in the construction contract.

Hartford argued that the lower court was correct in its assertion that no subrogation rights arose since ICS did not sustain any damages. Mt. Hawley admitted ICS did not sustain any direct damages; however, Mt. Hawley argued it did suffer damages in the form of its $1,000,000.00 contribution. As such, Mt. Hawley argued that once it paid the $1,000,000.00 settlement, ICS's indemnification claim could be pursued by Mt. Hawley as subrogee. Mt. Hawley's rights in pursuing that claim would then be controlled by the terms of the indemnification clause in the contract between ICS and Swift. *Id.* at 236.

The Court ultimately agreed with Mt. Hawley and held that Mt. Hawley had the right to assert its subrogation claim. *Id.* at 237. The Court stated that in a subrogation claim based on contract, the insurer steps into the shoes of the insured and can, through subrogation, enforce the contractual obligation of the third-party. The subrogee in effect steps into the shoes of the insured and can recover only if the insured likewise could have recovered. *Id.* at 237. As such, the Court allowed Mt. Hawley to assert ICS's right to indemnification against Swift in spite of ICS suffering no tangible damage.

Therefore, since the Court allowed Mt. Hawley to step into the shoes of ICS, Mt. Hawley had a right to enforce ICS's contractual right to indemnification from Swift. The indemnification clause required Swift to indemnify ICS against any damage claim filed against ICS. *Id.* at 237. Consequently, the Court held Mt. Hawley had the right to subrogate against the Hartford for its prior $1,000,000.00 payment.

Underlying the Court's position regarding Mt. Hawley's subrogation rights was the consideration that the Hartford unilaterally paid the personal injury settlement. The Court noted that any other result would unfairly deny Mt. Hawley the right to litigate the underlying issue of its insured's (and hence, Mt. Hawley's) legal liability to pay anything toward the settlement. *Id.* at 239.

Of note, the Court also suggested that Mt. Hawley was the real party-in-interest and once it actually paid its portion of the settlement to the Hartford, it should have substituted in as plaintiff over ICS. The Court noted that this was a moot point, as Mt. Hawley instituted its own separate Federal action to enforce its subrogation rights after the March 20, 2015 Order. In the interest of justice, the Court allowed Mt. Hawley to continue its Federal action; however, it made it clear it would have allowed Mt. Hawley to continue its action in the Superior Court had Mt. Hawley not brought its own Federal suit.

Learning Point: *Andalora* is instructive of the notion that not all subrogation actions are the same. Most carriers deal with the garden variety subrogation action where the insurer pays its insured and brings suit to recover payments made to the insured. However, as *Andalora* illustrates, not all subrogation actions follow the classic subrogation format. Carriers need to be cognizant that even in situations where it does not directly pay an insured, or even where it appears an insured suffers no harm, there may be rights which the carrier is entitled to enforce. Counsel also must be conscious that whenever a carrier makes a payment, there may be an avenue for recovery. Most carriers may be focused on protecting subrogation rights in the beginning stages of a loss. However, as *Andalora* illustrates, subrogation rights may arise well in the future. It is wise to have subrogation counsel involved to protect a carrier's right to recovery, whenever and wherever the situation may arise. ♦

INSURANCE CLAIMS PRACTICES

INSURER ENTITLED TO DEMAND FULL RELEASE FOR INSUREDS

Caira v. Zurich Am. Ins. Co., 2017 Mass. App. LEXIS 46 (Mass. App.)

Despite existence of excess insurance, primary insurer conditioned payout on a release of all claims against insured. ***Held:*** Settlement statute does not require an insurer to surrender its policy without a full release of its insured. Although insurer must act fairly and promptly when liability is reasonably clear, it also must protect insured from continued exposure. Payment without a release is not a settlement.

INSURER'S SETTLEMENT OFFERS FAIR AND REASONABLE

Silva v. Norfolk & Dedham Mut. Fire Ins. Co., 2017 Mass. App. LEXIS 48 (Mass. App.)

Third-party claimant sued insurer for unreasonably low settlement offers during trial and appeal. ***Held:*** The offers were reasonable. By statute, an insurer must effectuate a prompt fair settlement once liability becomes reasonably clear. But liability includes damages, and the insurer's investigation raised questions as to the cause and extent of damages. Also, the insurer's post-trial offer to pay policy limits without interest did not warrant higher damages. An offer of interest is only needed to toll the accrual of further interest, not to avoid penalty.

LEGAL MALPRACTICE

DEFENDANT DID NOT DISPROVE PROXIMATE CAUSATION AS A MATTER OF LAW

Ragunandan v. Donado, 150 N.Y.S.3d 889 (N.Y. App. Div. 2d Dep't)

Plaintiff filed legal malpractice action against an attorney who represented her at a real estate closing. The attorney-defendant, in good faith, distributed funds according to a valid contract that he played no role in drafting. The attorney's motion for summary judgment contended that "any deficiency in his skill and knowledge was not a proximate cause of the plaintiff's damages," and that another party was the actual proximate cause of the damages. The motion court granted the motion. ***Held:*** Reversed. Defendant failed to establish, *prima facie*, the absence of proximate cause. The court opined, "[t]he fact that another person may have taken advantage of the defendant's allegedly deficient performance to cause damages to the plaintiff did not, under the circumstances of this case, establish, *prima facie*, that the defendant's alleged deficiencies were not also a proximate cause of her damages."

LIABILITY INSURANCE COVERAGE

POLLUTION EXCLUSION BARS COVERAGE FOR CONTAMINATED SEDIMENT EXPOSURE

Cincinnati Ins. Co. v. Roy's Plumbing, Inc., No. 16-2511-cv, 2017 U.S. App. LEXIS 9729 (2d Cir.)

Three families residing near a containment area in Niagara Falls claimed that a contractor performed negligent work that exposed a substantial amount of contaminated sediment, which then migrated to their homes causing physical injuries and property damage. The contractor sought coverage under its policy, which the insurer denied pursuant to a pollution exclusion. The district court granted summary judgment to the insurer, finding that coverage was barred because the underlying suit alleged only injuries arising out of traditional environmental pollution. ***Held:*** Affirmed. The insurer showed that the underlying allegations fell within the policy's pollution exclusion and therefore had no duty to defend or indemnify the insured.

DAMAGE TO SCALLOPS WAS "ACCIDENT" UNDER POLICY

Hanover Ins. Group, Inc. v. Raw Seafoods, Inc., 2017 Mass. App. LEXIS 49 (Mass. App.)

Processor damaged scallops but could not explain how or why. ***Held:*** The damage was a covered occurrence under the processor's CGL policy. The policy defines "occurrence" as an accident: an unexpected happening neither intended nor designed. The processor had never experienced a similar problem. Damaging scallops was not an ordinary part of the process. There was no evidence of intent to damage the scallops; processor had been found liable for negligence only. Proving exact cause of damage was unnecessary.

BUSINESS-PURSUITS EXCEPTION APPLIES TO ACTS OUTSIDE SCOPE OF EMPLOYMENT

Nguyen v. Arbella Ins. Group, 2017 Mass. App. LEXIS 64 (Mass. App.)

City employee sought defense under his homeowner's policy against former co-employee's tort and civil rights claims. ***Held:*** The business-pursuits policy exclusion applies even if the insured's actions do not serve his personal or his employer's business interests. If a claim arises out of or in connection with an insured's business, the exclusion applies. To qualify as a "business," the insured must be regularly engaged in it as a means of livelihood, and do so for monetary gain. The insured was a city employee working steadily and for pay. It was irrelevant that his conduct was arguably outside the scope of employment.

HAZARDOUS MATERIALS EXCLUSION DID NOT BAR COVERAGE

Hillcrest Coatings, Inc. v. Colony Ins. Co., No. 16-01898, 2017 WL 2491075 (N.Y. App. Div. 4th Dep't)

Company was sued for allegedly creating a "malodorous condition" in the surrounding neighborhood due to its negligent operation of a glass recycling plant. The company sought a declaration that its insurer had a duty to defend the plant operator in the underlying case. The insurer argued that coverage was precluded by a hazardous materials exclusion. The lower court found for the insured. ***Held:*** There was a reasonable possibility of coverage. Therefore, the insurer did not meet its burden of establishing as a matter of law that the hazardous materials exclusion precluded coverage.

LIMITATIONS OF ACTIONS

"FOREIGN OBJECT" EXCEPTION INAPPLICABLE TO CAPSULE CAMERA

Leace v. Kohlroser, 2017 N.Y. App. Div. LEXIS 4351 (N.Y. App. Div. 2d Dep't)

Plaintiff sued doctors, alleging malpractice, when a capsule camera was found in plaintiff's intestines three years after it was swallowed. The trial court granted summary judgment to the doctors, ruling the statute of limitations period had run. ***Held:*** Affirmed. The capsule camera was intentionally swallowed and used diagnostically to visualize the condition of the plaintiff. It was not used or even introduced into the plaintiff's body in the course of a surgical procedure. Thus, the "foreign object" exception to the statute of limitations period does not apply. ***Further Held:*** In determining whether an object that remains in a patient is a "foreign object," courts should consider "the nature of the materials implanted in a patient, as well as their intended function."

MEDICAL MALPRACTICE

DISMISSAL AFFIRMED WHERE EXPERT FAILED TO DEFINE STANDARD OF CARE

Webb v. Albany Med. Ctr., 2017 N.Y. App. Div. LEXIS 5086 (N.Y. App. Div. 3d Dep't)

Plaintiff sued a medical center, alleging a deviation from the standard of care when the plaintiff was injured while helping transfer a patient from a wheelchair to a bed. The plaintiff, who was visiting the patient, argued that the center was negligent because she was not capable of following directions or rendering support in the transfer. The trial court granted the defendant's motion for summary judgment. ***Held:*** Affirmed. The center did not deviate from the accepted standard of care when

utilizing a slide board to transfer the patient. Defendant demonstrated that the patient had successfully completed slide board transfers with minimal or moderate assistance on prior occasions. ***Further Held:*** The affidavit of plaintiff's expert "failed to identify or define the applicable standard of care appropriate in this case, merely asserting, in a conclusory manner, that [the patient] required a higher level of assistance than was provided to her."

PRODUCTS LIABILITY

SCARANGELLA EXCEPTION INAPPLICABLE TO PRODUCTS SOLD TO RENTAL MARKET

Fasolas v. Bobcat of N.Y., Inc., 53 N.Y.S.3d 61 (N.Y. App. Div. 2d Dep't)

Decedent's estate sued a manufacturer and a rental center for wrongful death, alleging that the skid-steer loader the decedent rented was defective because it did not include a window kit to protect the cab as a standard feature. During use, a nine-foot tree entered the cab and crushed the decedent. In defense, the manufacturer cited a Court of Appeals decision, *Scarangella v. Thomas Built Buses*, 717 N.E.2d 679 (N.Y. 1999), for the proposition that sophisticated buyers are in the best position to assess how risky a product is without an optional safety device. ***Held:*** *Scarangella's* manufacturer liability exception does not apply to products sold to the rental market because the rental clientele is less likely to have experience and knowledge concerning such equipment and is not "in a position to engage in rational and reasonable balancing of the risk against the reward of not purchasing the optional safety device" and can not be "assumed to be adequately motivated to do so."

TORTS

EMPLOYER NOT LIABLE FOR INTENTIONAL TORT IN ENVIRONMENTAL MISHAP

Henzerling v. Envtl. Ent., Inc., 2017 Ohio App. LEXIS 1688 (Ohio App.)

Estate of employee sued employer for intentional tort arising out of a fire during a decontamination procedure. ***Held:*** Estate failed to prove employer's deliberate intent to cause injury, as needed to bypass workers' compensation system. A rebuttable presumption of deliberate intent requires evidence of an intentional removal of an equipment safety guard. The submersion tank used in the decontamination process was not an equipment safety guard, and nothing on it was removed. The estate could not prove the employer's knowledge that the contaminated product contained organic material likely to burn or explode.

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