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of Recent Decisions

2018• Vol. 1

"Can We Lower Our Flood Coverage?"

NJ Appellate Division Affirms Finding Of Gross Negligence

Labor Law 240(1): ALL FACTS MATTER

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.

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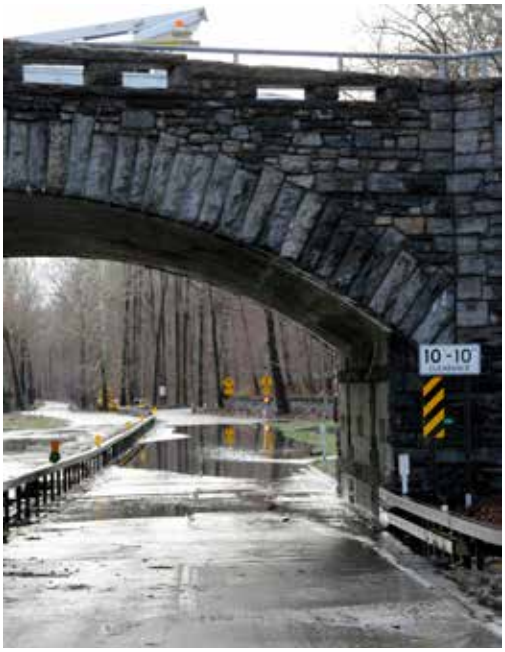

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"Can We Lower Our Flood Coverage?" Insurance Broker Negligent After Being Found To Have Unilaterally Lowered Flood Coverage

by ***Marisa G. Michaelsen***

The Second Circuit Court of Appeals has refused to overturn two jury verdicts that found an insurance broker negligent for reducing the flood sublimit on a New York property owner's policy prior to Hurricane Sandy, resulting in the insurance broker being found liable for $20 million. In *Cammeby's Management Co., L.L.C., et al. v.. Alliant Insurance Services, Inc.*, No. 17-88-cv, Cammeby's, a real estate investment company, sought an insurance policy to protect its properties. The Policy at issue was obtained in late spring, 2011. The Policy initially contained a $10 million flood sublimit. One day after the Policy went into effect, Cammeby's contacted the insurance broker, Alliant, and requested an increase in the flood sublimit to $30 million. Alliant obtained a quote from Affiliated FM, which Cammeby's accepted, and the insurer issued a new Policy reflecting the new $30 million flood sublimit.

As one would expect with an increase of $20 million in protection, Cammeby's premium increased, of which some managers of the properties were not happy. In July, 2011, Cammeby's insurance consultant, Stephen Gerber, emailed Alliant, inquiring about reducing the flood sublimit to the original $10 million. At this point, Alliant seemed to have taken this inquiry as a request, and the broker contacted Affiliated to determine whether the additional $20 million could be cancelled, to which Affiliated agreed. The cancellation was effective July, 2011, and Affiliated returned the pro rata portion of the increased premium and issued an endorsement showing the sublimit coverage had been reduced to $10 million.

A little over one year later, in September, 2012, Hurricane Sandy caused damage to Cammeby's properties in excess of $30 million. Cammeby's filed a claim with Affiliated, to which Affiliated responded that the coverage was limited to only $10 million. Cammeby's claimed, however, that nobody with actual authority had authorized the reduction in limits, and that the email in July, 2011 was simply an inquiry as to whether the flood sublimit could be reduced, not an instruction to actually lower it.

During trial, Alliant argued that Cammeby's had ratified the reduction of flood insurance limits by accepting the endorsement and acceptance of the premium reduction. Additionally, two emails from Cammeby's vice president, in August, 2011, read "we

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have $10 million of flood coverage". However, Cammeby's submitted evidence of subsequent endorsements listing $30 million in flood sublimit, and the testimony of its insurance consultant, who testified he never approved of a reduction and he was under the impression Cammeby's maintained the $30 million sublimit.

The first jury found that the broker was negligent, and rejected the ratification defense. A new trial was granted due to a defect in the original jury instructions regarding the ratification defense. A second jury trial on the ratification issue also rejected this defense and found Alliant negligent for $20 million. Alliant then appealed this second jury trial, and the Appellate Court affirmed the district court's ruling holding Alliant liable for negligence for reducing the policy limit. The Court concluded that a reasonable juror could find Cammeby's lacked the knowledge or intent necessary to authorize the policy limit reduction.

Learning Point: With more frequent extreme weather events such as Hurricane Sandy, companies and properties need to ensure they are sufficiently covered for catastrophic events. Additionally, a major takeaway for insurance brokers and any business situation is to ensure the person you are working with has authority to enter into an agreement or modification; apparent authority may not be sufficient. Further, ensure clarification if an inquiry can be read more than one way. For instance, when receiving an email asking "if we can lower our flood sublimit to $10 million", it would be wise to follow up and ask "is someone with authority requesting we make this change?" ♦

New York Federal Court Excludes Coverage While Applying Flood Exclusion

by ***Michael W. Jacobson***

The Eastern District Court of New York recently held that Great Northern Insurance Company's ("Great Northern") Policy issued to Madelaine Chocolate Novelties ("Madelaine") unambiguously excludes storm surge in its flood exclusion. *Madelaine Chocolate Novelties v. Great N. Ins. Co.*, No. 15 CV 5830 (RJD) (SMG) (GRB), 2017 U.S. Dist. LEXIS 157821 (E.D.N.Y. Sep. 26, 2017).

The Court further held that the Policy's wind endorsement is not in conflict with the Policy's flood exclusion and does not create an ambiguity. *Id.* at *6. The Court's decision adopted the Magistrate Judge's report and recommendation. *Madelaine Chocolate Novelties, Inc. v.. Great N. Ins. Co.*, No. CV 15-5830(RJD)(SMG)(GRB), 2017 U.S. Dist. LEXIS 103015 (E.D.N.Y. June 30, 2017).

The case involves a claim for property damage in excess of $40 million, and business income loss and extra expense in the amount of $13.5 million arising from Hurricane Sandy. Storm surge from Sandy inundated and damaged Madelaine's facilities in Queens, New York. The Policy at issue contained the following flood exclusion:

> "This insurance does not apply to loss or damage caused by or resulting from: • waves, tidal water or tidal waves; or • rising overflowing or breaking of any boundary, of any natural or man-made lakes, reservoirs, ponds, brooks, rivers, streams, harbors, oceans or any other body of water or watercourse, whether driven by wind or not, regardless of any other cause or event that directly or indirectly:
> • contributes concurrently to; or
> • contributes in any sequence to, the loss or damage, even if such other cause or event would otherwise be covered."

Id. at *3-4 (E.D.N.Y. Sep. 26, 2017)

The Court noted that the Second Circuit recently held that the inundation of sea water resulting from Sandy's storm surge is a flood, and that this Court had also previously decided this issue in a case with identical policy language. *Id.* at *4 (E.D.N.Y. Sep. 26, 2017).

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Madelaine argued that the Policy's wind endorsement provided a separate basis for coverage inflicted by the storm surge and that the endorsement did not incorporate the flood exclusion contained in the body of the Policy. *Id*. at *5 (E.D.N.Y. Sep. 26, 2017). The Court rejected this argument finding the windstorm endorsement addresses the amount of the deductible, and also contained anti-concurrent language to prevent the endorsement from creating or extending coverage. *Id*. at *5 (E.D.N.Y. Sep. 26, 2017). The Magistrate's opinion detailed that the Windstorm endorsement stated in plain language that "all other terms and conditions remain unchanged." *Id*. at *26 (E.D.N.Y. June 30, 2017).

Thus, the Court held that the flood exclusion was unambiguous in its exclusion of coverage for waves, tidal water, tidal waves and overflowing water that is driven by wind, and because the damage to Madelaine's property was the result of an excluded peril and not the covered peril "windstorm," the terms of the windstorm endorsement were not applicable. *Id*. at *6 (E.D.N.Y. Sep. 26, 2017).

Learning Point: An unambiguous flood exclusion excludes damage from storm surge. ♦

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NJ Appellate Division Affirms Finding Of Gross Negligence For . . . Failure To Plow Snow!

by ***Thomas J. Hennessey***

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In a contested coverage and indemnification lawsuit arising from an underlying personal injury action, the Appellate Division of New Jersey, in the case of *Moran-Alvardo v. Nev. Court Realty, LLC*, 2018 N.J. Super. Unpub. LEXIS 483 (decided on March 1, 2018), heard arguments as to whether a carrier is bound to extend coverage under its additional insured endorsement despite a finding of grossly negligent conduct on the part of the additional insured. In the Court's holding, the carrier's obligation to extend coverage was held to be coextensive with the liability of the policyholder's contractual obligation to indemnify the additional insured. As the policyholder was only contractually bound to indemnify the additional insured for damages arising from ordinary negligence, the Appellate Division held that a finding of gross negligence preluded the policyholder's obligation to indemnify the additional insured, thereby striking down any requirement for the carrier to extend coverage and indemnity to the additional insured.

In the underlying slip and fall lawsuit, the plaintiff was injured when he slipped and fell on snow/ice in the parking lot of a strip mall owned by defendant Nevada Court Realty, LLC ("Nevada"). The plaintiff also included Nevada's commercial tenant, EZ Donuts, Inc. ("EZ"), as a named defendant in the litigation. Nevada then initiated a third-party action against EZ, and EZ's insurance carrier, Travelers, demanding indemnification and coverage. In its third-party action, Nevada alleged that the lease obligated EZ to indemnify Nevada for any claims arising from the use of EZ's premises, and for Travelers to provide coverage to Nevada, as Nevada was a named additional insured on EZ's policy.

At trial (after a prior appeal unrelated to this article), Nevada and EZ stipulated as to the location of the plaintiff's fall, and further stipulated that Nevada was contractually obligated to remove ice or snow in the area where the plaintiff fell. Under those stipulated facts, in addition to testimony and the plaintiff's deposition transcript which described the condition of the snow and ice in Nevada's parking lot as not being touched at the time of his slip and fall, the Trial Court found that Nevada's failure to clear the parking lot of ice and snow three days after the last snow fall constituted gross negligence.

The New Jersey Supreme Court set forth precedent for a broad definition of gross negligence. To find gross

negligence, a trial court will employ the following standard:

Gross negligence falls on a continuum between ordinary negligence and recklessness. Negligence is defined generally as the failure to exercise that degree of care for the safety of others, which a person of ordinary prudence would exercise under similar circumstances. Gross negligence is a higher degree of negligence. While negligence is the failure to exercise ordinary or reasonable care that leads to a natural and probable injury, gross negligence is the failure to exercise slight care or diligence. Although gross negligence is something more than inattention or mistaken judgment, it does not require willful or wanton misconduct or recklessness. *Steinberg v.. Sahara Sam's Oasis, LLC*, 142 A.3d 742, 744-745 (N.J. 2016)

Insurance practitioners should be attentive to the Court's focus on an alleged tortfeasor's "failure to exercise slight care or diligence." *Id.* Often, policies of general liability insurance will exclude coverage for gross negligence. Additionally, when encountering claims to indemnify or extend coverage to third-parties and/or additional insureds, a careful analysis must be performed of the policyholder's contractual obligations to indemnify or provide insurance coverage to the claimant.

In *Moran-Alvardo*, Third-Party Defendant Travelers vigorously argued that its insured, EZ, had no contractual duty to indemnify Nevada pursuant to the terms of the lease agreement. According to the terms of Nevada's lease with EZ, EZ was obligated to indemnify Nevada for negligence, but not for gross negligence or willful misconduct. Following a bench trial of all issues, the Trial Court found that EZ was under no obligation to indemnify Nevada for Nevada's grossly negligent conduct that caused the injury. However, the Trial Court mandated Travelers to extend coverage to Nevada pursuant to its additional insured endorsement. Travelers appealed the Trial Court's order to provide coverage to Nevada.

The issue on appeal was whether Travelers' duty to extend coverage pursuant to its additional insured endorsement was separate to, or dependent on, the underlying liability of EZ to Nevada.

On appeal, Travelers argued against coverage for Nevada because the Trial Court concluded that EZ did not have a contractual duty to indemnify Nevada for damages resulting from Nevada's gross negligence. Travelers explained that without a finding of liability of EZ, Nevada, as an additional insured, would be subject to Travelers' policy exclusions that bar coverage for acts of gross negligence. Therefore, Travelers' policy would preclude coverage for grossly negligent conduct of Nevada. In support of its argument, Travelers cited *Pennsville Shopping Ctr. Corp. v.. Am. Motorists Ins. Co.*, 315 N.J. Super. 519, 523 (App. Div. 1998), where the Appellate Division held that, "the obligation of the tenant's insurance company to provide coverage to a names additional insured landlord must be . . . coextensive with the tenant's own liability." *Id.*

As EZ's lease with Nevada clearly excluded any duty for EZ to indemnify Nevada for grossly negligent conduct, the Appellate Division affirmed the Trial Court's holding that EZ had no duty to indemnify Nevada. However, the Appellate Division reversed the Trial Court and held that Travelers had no duty to afford coverage to Nevada. As an additional insured under EZ's policy, Nevada was bound to the terms, conditions and exclusions contained within EZ's policy with Travelers. Therefore, as the Appellate Division found that EZ had no liability to Nevada, in addition to enforcing Travelers' policy exclusion for damages arising from gross negligence, Travelers was right to enforce its exclusion and bar coverage to Nevada.

Learning Point: A simple act of ignoring the duty to plow snow and ice can support a claim of gross negligence if the facts indicate that the alleged tortfeasor failed to exercise slight care or diligence. When encountered with claims for indemnification and/or coverage from an additional insured, always assess the contractual obligations and liability of the policyholder to the additional insured and determine whether there are grounds to bar coverage. ♦

Labor Law 240(1): ALL FACTS MATTER

by **Catherine P. O'Hern**

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New York's Labor Law Section 240(1) is unique; no other State has a similar statute. Section 240(1) imposes a nondelegable, absolute liability on owners and general contractors for construction-related injuries, even when the party found liable does not perform or supervise the work, and does not employ the injured worker. *See Blake v.. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 (2003). In order to establish his entitlement to judgment on liability as a matter of law, the plaintiff is required to show that the defendant violated the statute and that the violation was the proximate cause of the plaintiff's injury. *Miller v.. Spall Dev. Corp.*, 45 A.D.3d 1297, 1297 (4th Dep't 2007), quoting *Cahill v.. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 39 (2004).

In two recent cases decided by New York's Appellate Courts under Section 240(1), *Bonczar v.. American Multi-Cinema, Inc.*, 2018 NY Slip Op 00712 (4th Dep't Feb. 2, 2018) and *Rom v.. Eurostruct, Inc.*, 2018 N.Y. Slip Op. 01262 (1st Dep't Feb. 22, 2018), the Courts arrived at two, precisely different outcomes from two, almost identical accidents. These decisions emphasize the significance the Appellate Court places on fact-sensitive analysis in its Section 240(1) decisions.

In *Bonczar*, Plaintiff commenced his action seeking damages for injuries sustained when he fell from a ladder while working for his employer, a subcontractor for a company hired by Defendant. Plaintiff testified that he did not know why the ladder wobbled causing his fall and Defendant provided no issue of fact in opposition. The trial court granted Plaintiff's Motion for partial summary judgment on the issue of liability and Defendant appealed. The Appellate Division, Fourth Judicial Department, reversed on the law and denied Plaintiff's Motion. It is noteworthy that the dissent in *Bonczar* is more than twice as long as the concurring opinion.

The *Bonczar* Court concluded that because Plaintiff "acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so," Plaintiff failed to meet his initial burden as required under the Statute. *Bonczar* at *1. In citing to the decision in *Blake*, the *Bonczar* Court determined that Plaintiff's acknowledgment created a plausible view, sufficient to raise a question of fact regarding whether Plaintiff's own acts or omissions were the sole cause of the action and eliminating any statutory violation. *Id.*; *Blake* at 289, n 8.

In *Rom*, the facts of Plaintiff's accident are almost identical to the facts of Plaintiff's accident in *Bonczar*, yet the outcome is quite different. Plaintiff, Bradford Rom,

commenced his action seeking damages for injuries sustained when he fell from a ladder that suddenly shifted and collapsed underneath him, for no apparent reason, causing his fall. Rom did not offer any reason or explanation for the ladder's sudden movement and no one had witnessed the fall to provide any issue of fact in opposition. The trial court granted Plaintiff's Motion for partial summary judgment on the issue of liability and Defendant appealed. The Appellate Division, First Judicial Department, unanimously affirmed the lower court's Order.

The *Rom* Court concluded that where, as here, "a ladder collapses or malfunctions for no apparent reason," the presumption that Labor Law 240(1) is violated remains intact. *Rom* at *2, citing *O'Brien v.. Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 (2017)(internal citations omitted).

The only difference between these two cases is that in *Bonczar*, the Plaintiff testified that he could not remember whether he performed a check of the ladder's locking mechanism and the positioning of the ladder prior to his fall. No such acknowledgement of uncertainty by Plaintiff is mentioned in *Rom*. Perhaps Plaintiff was more certain about the checks he performed on the ladder or perhaps he was never asked that question. Such information is not provided.

The dissent in *Bonczar* agreed with the Court in *Blake*, *supra*, that where, as here, "a ladder collapses or malfunctions for no apparent reason," the presumption that Labor Law 240(1) is violated remains intact. *Bonczar* at *2 (citing *Blake* at 289, n 8). Moreover, the dissent concluded that Plaintiff's failure to remember whether he checked the ladder did not support a "nonspeculative inference" that the sole proximate cause of his injuries was his alleged possible failure to do so. *Bonczar* at *2. Notwithstanding the *Bonczar* dissent's well-reasoned analysis, it is not the opinion of the Court and is merely persuasive authority.

Learning Point: Although these decisions come from different Appellate Departments, it is important to remember that all facts matter. In Labor Law Section 240(1) claims, the plaintiffs have the initial burden and must be prepared to testify without creating an inference that may allow a plausible scenario, sufficient to raise a question of fact about the plaintiff's own acts or omissions that could eliminate the defendant's violation at summary judgment. The defendants must be prepared to question the plaintiffs thoroughly. The defendants must inquire about all the plaintiffs' acts or omissions to identify each and every fact in support of possible affirmative defenses available, and to discover any opportunities to make "nonspeculative inferences." ♦

An Open, Obvious And Known To Plaintiff Condition Can Be Deemed As Inherently Dangerous In Certain Circumstances

by ***Marina O'Keeffe***

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In *Farrugia v. 1440 Broadway Assoc.*, 2018 NY Slip Op 00347, Plaintiff sued the Building Owner and the Contractor for personal injuries, which he allegedly sustained while working in the basement of the building. Plaintiff, an employee of the building managing company, was repairing equipment in the basement and was working in the vicinity of an opening in the floor, which was left after the contractor removed an obsolete tank. Plaintiff testified that he had seen this opening numerous times before the accident and even complained about it to his supervisor. However, at the time of the accident, he was facing away from the opening and when he turned around to grab a tool from the floor, his foot went into the opening and he fell as a result.

The Contractor filed a motion for summary judgment stating that it was hired to remove the tank, which it did, and its work was inspected and accepted by the Building Owner. The Contractor argued that it did not create the dangerous condition and did not breach any duty to Plaintiff. He also argued that none of the *Espinal* exceptions were applicable here, because it did not launch an instrument of harm, did not displace anyone's duty to maintain the premises safely and there is no evidence that Plaintiff detrimentally relied on the Contractor's continued performance. The Contractor further argued that even if all other arguments fail, Plaintiff's Complaint should be dismissed because the dangerous condition was open, obvious and known to Plaintiff.

The Building Owner filed a motion in partial opposition to the Contractor's motion. The Building Owner argued that a triable issue of fact existed as to whether the Contractor created the dangerous condition by removing the tank and exposing the opening, which was under the tank, and failing to take any corrective action to cover the opening that the Contractor's work exposed. The Building Owner, however, supported the portion of the Contractor's motion, which sought dismissal of Plaintiff's Complaint because the dangerous condition was open, obvious and known to Plaintiff.

The trial court denied both motions and Defendants appealed. The Appellate Court concluded that although the dangerous condition was open, obvious and known to Plaintiff, the Building Owner still has a non-delegable duty to maintain its premises in a reasonably safe condition. "Plaintiff's awareness of a dangerous condition does not negate

a duty to warn of the hazard, but only goes to the issue of comparative negligence." *Francis v. 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599, 600 (1st Dep't 2010). The Court stated that the dangerous condition was in close proximity to equipment, which Plaintiff was repairing at the time of the accident, and therefore, the circumstances of Plaintiff's accident present an issue of fact as to whether it was inherently dangerous. The Court concluded that Defendants did not establish that the opening was not only open and obvious, but that there was no duty to warn and the condition was not inherently dangerous.

The Court then turned its attention to the Contractor's duties. The Court examined the Contractor's argument that the dangerous condition Plaintiff complained of was exactly what was called for in its Contract with the Building Owner. In its analysis, the Court noted that the opening in the floor did exist before the Contractor removed the tank, however, while the tank was in the basement, it obscured the opening and made it difficult or almost impossible for anyone to step into the opening. Once the tank was removed, the opening became exposed. The Court opined that by leaving the opening without "any kind of warning or minimal protection," the Contractor created the dangerous condition. *Timmins v. Tishman Constr. Corp.*, 9 AD3d 62, 67 (1st Dep't 2004). "Thus the issue is not whether [the Contractor] had a contractual obligation to protect the opening, but whether by leaving the opening […] exposed it created an unreasonable risk of harm to the plaintiff."

Learning Point: Dutiful performance of contractual obligations does not shield a contractor from tort liability in favor of a non-contracting third party. ♦

Restatement Of The Law Of Liability Insurance Makes Its Mark Prior To Approval

by ***Amy R. Paulus***

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As we reported last issue, Clausen Miller's Restatement of Liability Insurance Law Task Force assists insurers in understanding, monitoring, and responding to the *Restatement's* unprecedented "rewriting" of the common law on liability insurance on a broad array of issues. In a dramatic departure from the historic purpose of a Restatement, the *Restatement* of Liability Insurance Law is largely an advocacy piece, unabashedly promoted by its lead authors as a tool to change existing law to favor policyholders. The *Restatement* drafts have been met with sustained objections and criticism since inception as a Principles project, and the American Law Institute deferred a final vote on this *Restatement* until its next annual meeting in May 2018.

Numerous sections of the draft *Restatement* contain extremely controversial proposals that seek to fundamentally alter availability of insurance coverage and the ability of insurers to conduct business pursuant to existing contracts. For example, the current draft *Restatement* proposes replacement of the "plain meaning rule" for determining the meaning of a policy term with a "plain meaning presumption" that can be refuted by the policyholder with extrinsic evidence of a contractual intent. Further, even if a policy term is unambiguous on its face, that plain meaning can be overcome if a court determines that a reasonable person would clearly give the term a different meaning in light of extrinsic evidence. The draft *Restatement* proposes that a policyholder be allowed to rely on a broad array of extrinsic evidence to support its proposed interpretation of a claimed ambiguous policy provision. Conversely, the draft *Restatement* restricts the ability of insurers to present extrinsic sources of meaning to support the insurers' proposed interpretation to defeat a claim of ambiguity. Obviously, this proposal rewrites the black-letter "plain meaning" rule of contract interpretation.

The draft *Restatement* suggests an expansion of the insurer's duty to defend, and broadens the "four corners" analysis by also requiring insurers to consider not only the facts alleged but also facts that become known through the insurer's investigation. However, extrinsic facts will only defeat a duty to defend that otherwise exists when the issue concerns whether the claimant is an insured or whether a vehicle is covered under an auto policy. The *Restatement* also advocates for the imposition of severe penalties for an insurer's "unreasonable" failure to defend, and an expansion of consequences for a breach of a duty to settle a claim, including a waiver of policy limits.

The draft *Restatement* seeks to impose liability on insurers for selecting defense counsel that commit legal malpractice. Further, the draft *Restatement* proposes that insurers pay legal fees of policyholders in coverage disputes beyond the current standards contained in statutes or court rules—an obvious abrogation of the *American Rule*.

With respect to trigger and allocation, the draft *Restatement* proposes a default "injury in fact" trigger, but suggests a minimal burden of proof for the policyholder, which would allow a policyholder to trigger coverage under multiple policies based on evidence of exposure only. Then, the burden would shift to the insurer to show that no injury or damage actually occurred in its policy period. The draft *Restatement* adopts a time-on-the-risk allocation standard, but will likely add an exception to pro rata allocation for periods of time when insurance is allegedly "unavailable" for risks such as asbestos liability or when absolute pollution exclusions were added to CGL policies.

Other controversial provisions include commentary on when excess policies are implicated and whether excess insurers must "drop down" following the insolvency of a primary insurer. The draft *Restatement* also proposes restrictions on the "known loss" doctrine, limiting it solely to situations in which the policyholder is subjectively aware than an adverse judgment with regard to its liability is substantially certain.

Should the aspirational, pro-policyholder advocacy aspects of the *Restatement* take hold within the courts, the practical implications for insurers may be dramatic. For example, the punitive measures advocated for breach of the duty to defend or to settle a claim may result in insurers undertaking the defense of many uncovered claims, and filing an increased number of declaratory judgment actions to obtain a judicial imprimatur for the termination of its defense. Further, with increased claim costs, at least one scholarly commentator has posited that the *Restatement* will ultimately increase insurance premiums and reduce the availability of insurance, especially for the low income. *See* George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, Geo. Mason L. Rev. Vol. 24:635 (2017).

The Council of Advisors to the *Restatement* Reporters recently approved Draft No. 4, except for §3 (the presumption in favor of the plain-meaning of standard form policy terms), §4 (ambiguous terms and extrinsic evidence), and §12 (liability of the insurer for the conduct of defense), and conforming changes to §§47 and 48 (insurance for known liabilities and remedies). The Reporters will present their proposed revisions to the Council in March 2018, and the final Draft is still scheduled to be presented for approval at the ALI Annual Meeting in May 2018.

While we await the final version and vote next month, at least two courts have seen fit to cite to the ***draft*** *Restatement* as authority supporting their opinions on the issues of reimbursement of defense costs for uncovered claims, and to support a jury instruction on the definition of "cooperation" within the meaning of a liability policy. Further, one court recently rejected the policyholder's attempt to use the draft *Restatement* to essentially overrule existing New York precedent regarding the consequences for breach of the duty to defend.

In *Selective Ins. Co. of Am. v. Smiley Body Shop, Inc.*, 260 F. Supp .3d 1023; 2017 U.S.Dist. LEXIS 81007 (May 26, 2017), the District Court for the Southern District of Indiana considered whether Selective was entitled to recoup the costs it paid to defend a policyholder up to the point that the policyholder obtain summary judgment in its favor in the underlying lawsuit. The court denied Selective's motion, noting that Selective did not point to any provisions in its policy that would support recoupment, and in the absence of Indiana law on the issue, referred to three reported decisions from other jurisdictions. In addition, the court cited to Section 21 of the Draft of the *Restatement*, which provides that "[u]less otherwise stated in the insurance policy or otherwise agreed to by the insured, and insurer may not seek recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend

or pay defense costs." *Restatement* of the Law of Liability Insurance §21 (discussion draft, to be considered by the members of the American Law Institute).

In July 2017, the District Court for the Southern District of Texas also cited at length to the draft *Restatement*, despite the fact that it is not final. In *Mid-Continent Cas. Co. v. Petroleum Solutions, Inc.*, 2017 U.S.Dist. LEXIS 107603; 2017 WL 2964933 (July 12, 2017), the court considered Mid-Continent's motion for a new trial based in part on its argument that the court erroneously charged the jury on the meaning of the cooperation clause in its CGL policy. Mid-Continent contended that the court's instruction that the policyholder "complied with the cooperation clause if PSI's conduct was reasonable and justified under all the circumstances that existed," improperly defined "cooperate," thereby casting doubt on whether the jury was properly guided in its deliberations. Mid-Continent argued that the court should have directed the jury to use the plain meaning of the wording of the cooperation clause. Mid-Continent proposed a jury instruction defining "cooperate" as "to be helpful by doing what someone asks or tells you to do."

The *Mid-Continent* court found that there was no basis in the policy language for Mid-Continent's proposed instruction, nor did the proposed instruction correctly state Texas law. The court found that the long-standing test articulated in Texas for "cooperation" described the insured's conduct as "reasonable and justified under the circumstances." The court also relied on Couch on Insurance for the principle that "[a]n insured cannot arbitrarily or unreasonably decline to assist in making a fair and legitimate defense or refuse to permit any defense to be made in his or her name."

Significantly, the *Mid-Continent* court then cited to Comment b. of the Restatement, tentative draft No.1, Section 29, dated March 21, 2016—note this is not even the most current draft of the Restatement. Comment b. in this 2016 draft provides:

> *b. Reasonable Assistance.*
>
> The duty to cooperate should take into account the position of the particular insured whose conduct is at issue, as well as the needs of the insurer. What is reasonable depends on, among other things, the knowledge and experience of the insured, the extent of the risks presented by the legal action, the complexity of the action, the ability of the insurer to obtain the information or other object of cooperation from sources other than the insured, the good-faith effort of the insured, and the extent to which cooperation is needed to reduce the insurer's exposure.

Additionally, the Reporter's Note b. states that "[c]ourts have consistently subjected the duty to cooperate to a reasonableness test." *Id.*

With this lengthy footnote citation, the *Mid-Continent* court bolstered its decision to deny Mid-Continent's motion for a new trial. What is particularly surprising about this decision is that the court did not need to cite to the 2016 tentative draft of the *Restatement* because Texas case law directly on point fully supported the court's ultimate ruling. Thus, one must ask why the court went further than required to include a lengthy discussion of a non-final draft of the *Restatement*. One must also consider whether this signals the potential willingness of other courts to unnecessarily adopt or give credence to the *Restatement* in circumstances in which it is clearly unnecessary to do so.

Finally, we report that most recently another court was presented with the *Draft Restatement* by a policyholder but this time swung and missed. In *Catlin Specialty Ins. Co. v. J.J. White*, 2018 U.S. Dist. LEXIS 31189 (Feb. 27, 2018), the U.S. District Court for the Eastern District of Pennsylvania found that under applicable New York law, Catlin breached its duty to defend the policyholder under a pollution liability policy. The policyholders then argued that the insurer should be estopped from challenging whether indemnity coverage was owed for the underlying settlement as a consequence of its breach of the duty to defend. The policyholders cited to the *Draft Restatement*, §19 (Draft Mar. 28, 2017), which advocates that "an insurer that breaches the duty to defend without a reasonable basis for its conduct must provide coverage for the legal action for the which the defense was sought, notwithstanding

any grounds for contesting coverage." The court notes that a comment to this draft section contends that "this rule encourages insurers to fulfill their duty to defend by providing a consequence for a wrongful breach of that duty," and that "[o]rdinary contract damages may not provide an adequate incentive for insurers to defend." *Id*.

However, the *Catlin* court relied instead on *K2 Inv. Grp. v. Am. Guar. & Liab. Ins. Co.*, 6 N.E.3d 1117, 1119-1121 (N.Y. 2014), which reaffirmed existing New York Court of Appeals precedent in the *Servidone* case that previously considered and rejected such arguments and "policy concerns." The *Servidone* and *K2* courts both concluded that the duty to indemnify is determined by the actual basis for the insured's liability, not the broader duty to defend standard based on the allegations in the pleadings. Thus, "to hold the insurer liable to indemnify on the mere 'possibility' of coverage perceived from the face of the complaint – the standard applicable to the duty to defend – the court [would] enlarge[] the bargained for coverage as a penalty for the breach of the duty to defend, and this it cannot do." *Servidone Construction Corp. v. Sec. Ins. Co. of Hartford*, 477 N.E.2d 441, 442-445 (N.Y. 1985).

CM's Restatement Task Force will continue to report on all significant developments, while maintaining its proprietary database to track the issues, jurisdictions/courts, rulings, briefs and other aspects of how the *Restatement* is used to alter the current state of insurance law. Our Task Force is positioned to provide consulting services, *amicus* briefing, and generally to assist insurers in setting the record straight. Should you have any questions or wish to discuss any issues relating to the *Restatement* or our Task Force, please contact Task Force Chair **Amy Paulus** at **apaulus@clausen.com**, or the Senior Members of the Task Force: **Colleen Beverly** at **cbeverly@clausen.com**, **Ilene Korey** at **ikorey@clausen.com**, or **Mark Zimmerman** at **mzimmerman@clausen.com**. ♦

Absence Of A Handrail As A Proximate Cause Of An Accident Is Speculative Without An Expert's Opinion And Insufficient To Defeat Summary Judgment

by **Gregory J. Popadiuk**

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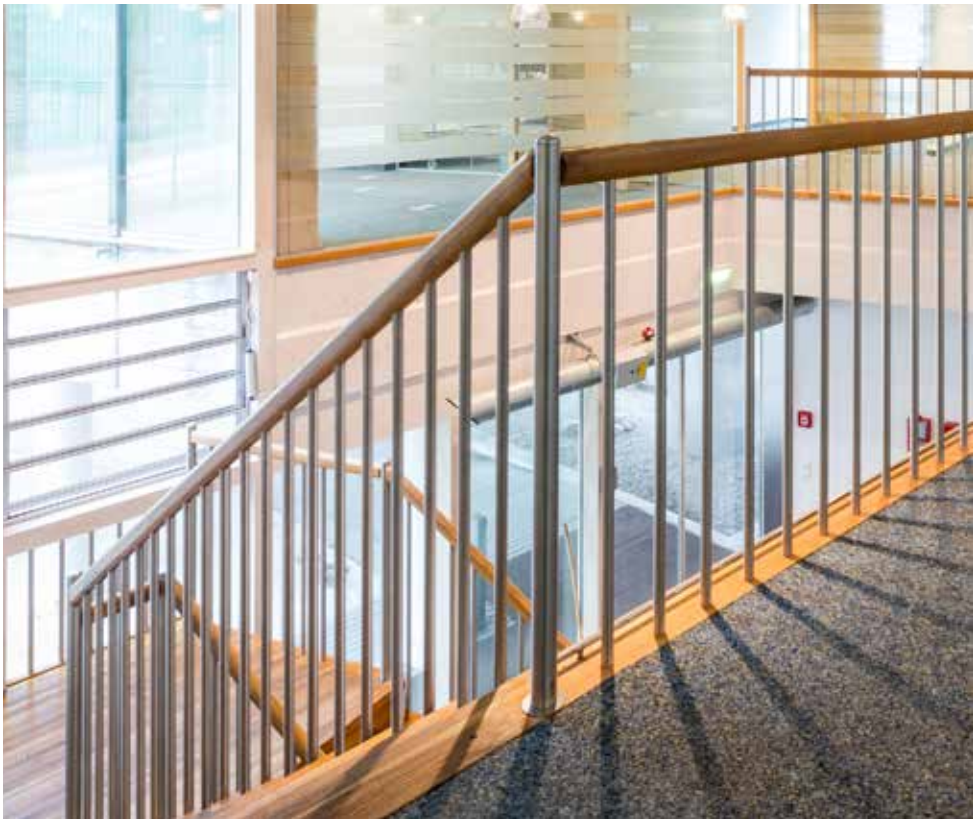
In *Morchyk v.. Acadia 3780-3858 Nostrand Avenue, LLC*, 2018 NY Slip Op 01032 (2d Dep't February 28, 2018), the Appellate Division, Second Department affirmed an order from the trial court granting Defendant building owner's motion for summary judgment. The Appellate Division held that Defendant established its *prima facie* entitlement to summary judgment as a matter of law by demonstrating that Plaintiff was unable to identify the cause of her fall. The Appellate Division also noted that Plaintiff's assertion that the absence of a handrail on the side of the stairs where she fell constituted a Building Code violation was conclusory and insufficient to defeat Defendant's motion.

Plaintiff alleged that she sustained personal injuries when she slipped or tripped on a staircase in her office building while walking down the stairs during a ten minute break. The accident happened on the same set of stairs that she had used every day for the preceding six years. The particular staircase had about seven stairs going up from the lobby, then a flat landing and then approximately twelve or more stairs leading to the second floor. The stairs were carpeted and there was a handrail on the wall on the right side as one walked up the stairs. Defendant's deposition witness estimated that the subject staircase was four feet wide. Plaintiff did not recall what type or amount of lighting was in the stairwell. At the time of her accident, she began walking down the staircase on the right side and was unable to use the handrail because someone was walking up the stairs on her left. She fell on the third or fourth step but did not know why she fell and never learned why she fell. She did not observe anything out of the ordinary on the staircase while walking down the stairs. During the six years prior to her accident, Plaintiff never had any problem using the stairs and never complained about the condition of the stairs other than the carpet on the stairs being occasionally dirty. Defendant never received any complaints regarding the stairs or the lighting in the area, and was not aware of any prior accidents occurring on the staircase.

Defendant argued that it was entitled to summary judgment because Plaintiff could not identify the cause of her fall without resorting to speculation, and that it did not create or have actual or constructive notice of any alleged defect on the staircase. In opposition, Plaintiff argued that an issue of fact existed as to whether Defendant was negligent in failing to equip the subject staircase with a handrail on both sides and whether the lack of a handrail on both sides of the stairway was a proximate cause of her accident. Plaintiff also argued that Defendant was negligent *per se* in that the failure to have handrails on both sides of the staircase was in violation of the Building Code as it was over forty-four inches wide and, therefore, was required to have guardrails on each side.

The trial court determined that Plaintiff's inability to identify the cause of her fall was fatal to her cause of action because a finding that Defendant's negligence, if any, proximately caused Plaintiff's injuries would be based on speculation. Furthermore, the trial court held that Plaintiff failed to offer any proof from which it could be inferred that the Building Code provisions upon which she relied were in effect when the building was constructed or when Defendant purchased the building. She only relied upon speculation as to the width of the subject staircase and submitted no evidence that it had been measured by anyone, and presented no expert testimony. Based upon the foregoing, the trial court found that Plaintiff had not come forward with any competent evidence to establish that the failure to provide a second handrail violated the Building Code. Finally, even if a Building Code violation had been established, the trial court did not find that an issue of fact existed as to whether the lack of a second handrail was a proximate cause of Plaintiff's fall since she testified that she did not know why she fell. It would have been speculative to conclude that the presence of a second handrail would have prevented Plaintiff from falling. The trial court granted Defendant's motion for summary judgment. The Appellate Division upheld the trial court's decision in every respect.

Learning Points: Although the defendant was awarded summary judgment, the decision serves as a reminder that any defendant cannot simply rely on a plaintiff's helpful deposition testimony and lack of due diligence, or competence in failing to retain an expert in order to establish its *prima facie* entitlement to summary judgment. When handling a case involving an allegedly defective or dangerous staircase, stairs or other structure or fixture, defendants should always retain an expert early to inspect, measure and opine on whether it was in conformance with the Building Code and other applicable laws, statutes and ordinances in the relevant jurisdiction. ♦



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ARBITRATION

PLAINTIFF COLLATERALLY ESTOPPED BY PRIOR ARBITRATION AWARD

Robert Doyle v. Univ. Underwriters Ins. Co., 2017 Conn. App. LEXIS 514

An arbitrator awarded plaintiff $105,924.00 in arbitration against a driver that injured him. The driver's insurer paid the plaintiff its $100,000.00 policy limit. Plaintiff then sued his insurer, seeking all his purported future medical expenses as underinsured motorist benefits. The trial court granted defendant summary judgment on collateral estoppel grounds and rendered judgment for plaintiff for $5,924.00. Plaintiff appealed. ***Held:*** Affirmed. The damages owed plaintiff had been fully and fairly litigated and decided in the arbitration.

MOTION FOR SUMMARY JUDGMENT CLOTHED AS MOTION IN LIMINE IMPROPER

Casalini v. Alexander Wolf & Son, 2018 N.Y. Slip Op. 00246 (N.Y. App. Div. 1st Dep't)

Plaintiff was injured when he slipped on debris at a construction site and sued under Labor Law § 241(6) and in negligence. Prior to a bench trial, defendants purported to make a motion in limine and the court dismissed the action with prejudice, finding that defendant did not have sufficient notice of, and did not cause or create, the debris condition that caused plaintiff's accident. ***Held:*** Reversed. The motion in limine was actually an untimely motion for summary judgment, brought more than 120 days from the filing of the note of issue, and, therefore, should not have been granted. Further, an issue of material fact cannot form the basis for granting a motion *in limine*.

CONTRACTS

LACK OF EVIDENCE FATAL TO BREACH OF CONTRACT CLAIM

John K. Finney v. Cameron's Auto Towning Repair, 179 Conn. App. 301 (2018)

Plaintiff sought damages from a towing company for allegedly failing to repair his vehicle, which had been towed to its vehicle storage facility after an accident. Plaintiff alleged a failure to give a timely estimate and that he had been falsely informed that the vehicle was being repaired. ***Held:*** The trial court properly granted judgment to defendant. The owner averred that he had never agreed to repair Plaintiff's vehicle and that Plaintiff was free to pick up his vehicle at any time after paying towing-related fees. Plaintiff failed to counter this evidence.

GOVERNMENTAL IMMUNITY

INSPECTION AND REPAIR OF A PLAYSCAPE WAS A DISCRETIONARY ACT; GOVERNMENTAL IMMUNITY APPLIED

McCarroll, et. al. v. Town of East Haven, 2018 Conn. App. LEXIS 112 (2018)

Minor fell from ladder of wooden playscape at school playground. Parents sued defendant town alleging playscape and ladder were in decrepit condition and school personnel were aware. The trial court granted defendant summary judgment based on governmental immunity. ***Held:*** Affirmed. Although town owed plaintiffs a duty of care, the inspection and repair of the playscape was a discretionary act and, thus, governmental immunity applied. The identifiable person-imminent harm exception to discretionary act immunity did not apply.

INSURANCE CLAIMS PRACTICES

DELAYED-DAMAGE RULE INAPPLICABLE TO SUIT AGAINST INSURANCE AGENCY

LGR Realty, Inc. v. Frank and London Ins. Agency, 2018 Ohio Lexis 297 (Ohio)

After insurer denied coverage based on exclusion of specific property, insured's suit against agency procuring policy

was dismissed as time-barred. ***Held in split decision:*** Delayed-damage rule did not save insured's claim. Generally, a limitations period starts when an injurious act is committed, even though injury occurs later. Under the delayed-damage rule, a cause of action does not accrue until damage occurs. The rule was inapplicable here because the exclusion was in the policy from the start; harm occurred at that time. Concurrence argued rule should be abolished for coverage matters. Dissent argued accrual requires discernible injury.

LIABILITY INSURANCE COVERAGE

NO ADDITIONAL INSURED COVERAGE FOR CONSTRUCTION MANAGER

Gilbane Bldg. Co. et al. v. St. Paul Fire & Marine Ins. Co., 2018 N.Y. Slip. Op. 02117 (N.Y.)

Construction manager sued insurer seeking coverage as additional insured. Policy provided additional insured was "any person or organization with whom you have agreed to add as an additional insured by written contract." Lower Court held construction manager was an additional insured but appellate court reversed. ***Held:*** Appellate decision affirmed. The terms of the policy unambiguously required a written contract between the named insured and an additional insured, if coverage is to be extended to an additional insured. Policy had to be read according to its clear terms.

NEGLIGENCE

PLAINTIFFS DO NOT NEED TO DISPROVE OWN FAULT

Rodriguez v. City of New York, 2018 N.Y. LEXIS 793 (N.Y.)

Worker was injured while "outfitting" sanitation trucks with tire chains and plows to enable them to clear the streets of snow and ice. Worker moved for summary judgment as to defendant's liability, which trial and appellate court denied because plaintiff failed to make a prima facie showing that he was free of comparative negligence. ***Held:*** Acknowledging the issue to be one that has "perplexed courts for some time," the Court of Appeals held that a plaintiff does not need to establish the absence of their own comparative negligence in order to obtain partial summary judgment with respect to a defendant's liability.

POWER COMPANY'S ACTS NOT SHOWN IMMUNE

Connolly v. Long Island Power Auth., 2018 N.Y. Slip Op. 01148 (N.Y.)

Citizens sued a legislatively-created and publicly owned power company alleging negligent failure to shut down power as Hurricane Sandy approached the area. The company moved to dismiss, asserting its actions were governmental and discretionary and that it was entitled to immunity. ***Held:*** The provision of electrical power is a private entity service, therefore, company failed to show it was acting in a governmental, rather than a proprietary, capacity as a matter of law.

EXPERT EVIDENCE NEEDED TO MAKE CAUSAL LINK BETWEEN FALL AND INJURY

Heard v. Dayton View Commons Homes, 2018 Ohio App. LEXIS 619

Tenant slipped and fell because of water seepage under his exterior door. ***Held:*** Tenant failed to link his neck injuries and surgery to the fall. Tenant had history of pre-existing neck problems and a prognosis of future surgery. Tenant needed expert medical evidentiary material to link the fall to all or some of his neck pain.

NY CIVIL RIGHTS LAW

AVATAR MAY BE A PORTRAIT UNDER CIVIL RIGHTS LAW

Lohan v. Take-Two Interactive Software, Inc., 2018 N.Y. Slip. Op. 02208 (N.Y.)

Actress Lindsay Lohan sued Grand Theft Auto game maker claiming her likeness was used without her permission to create an avatar character in the game. Lower Court denied a motion to dismiss but appellate court reversed. ***Held:*** Appellate decision affirmed. An avatar, that is, a graphical representation of a person in a video game or like media, may constitute a

portrait within the meaning of Civil Rights Law §§ 50 and 51. ***Further held:*** Here the character simply was not recognizable as plaintiff and no mention of her was made, meriting dismissal.

TRIAL PRACTICE

COURT MUST DISQUALIFY ITSELF AFTER SUGGESTING STIPULATED JUDGMENT AMOUNT TO BOTH PARTIES, THEN AWARDING THAT VERY AMOUNT

Carvalhos Masonry, LLC v. S and L Variety Contrs., LLC, 2018 Conn. App. LEXIS 93

Defendant appealed a judgment after a bench trial concerning a construction contract dispute. Defendant claimed the trial court should have disqualified itself from deciding liability and damages after it sent a correspondence to both parties, after the trial but before it rendered its decision, suggesting that they stipulate to a judgment for a specific dollar amount—the exact amount the court then awarded. ***Held:*** Reversed and remanded for a new trial. The trial court should recuse itself in such a situation to avoid appearance of bias.

WORKERS' COMPENSATION

11 WEEK CUSTOM WAS PROPER BASIS FOR DETERMINING BENEFITS

Melendez, Jr. v. Fresh Start Gen. Remodeling and Contr., LLC, 2018 Conn. App. LEXIS 97

Claimant was injured in a vehicle being driven to the defendant's home where, for approximately 11 weeks, he had performed handy work for defendant. Defendant argued the claimant was not his employee and not entitled to workers' compensation because he was not regularly employed for over 26 hours per week. Defendant argued the Commission should have examined the hours worked by the claimant over a 52-week period. ***Held:*** Affirmed. The 11-week period of employment was the proper measure and revealed a consistent schedule. A 52-week period was not a reasonable period of time to determine regular employment.

DIVISION OF ATTORNEYS' FEES PROPER SUBJECT FOR COMMISSION

Edward Frantzen v. Davenport Electric, et. al., 2018 Conn. App. LEXIS 81

Attorney who had represented claimant in worker's compensation proceedings appealed a decision determining the Commission could adjudicate a fee dispute between the attorney and a law firm that previously had represented the claimant. The Commission had ordered a 50/50 split of attorney's fees. ***Held:*** Connecticut General Statutes §31-327[b] provided that all attorneys' fees, including the division of fees between successive counsel, are subject to the Commissioner's approval. Therefore, the Commission had authority to adjudicate the fee dispute.

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