CM EAST COAST REPORT

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Awarding Lost Earnings In Accident Case Even Though Jury Finds No "Serious Injury"

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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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Custom Endorsement Limiting Liability For A Sewer Backup Enforced In Favor Of Insurer

by ***Ryan J. Weber***

A New Jersey Appellate Court found policy language limiting liability for a sewer backup to $25,000 was unambiguous and affirmed the Law Division's grant of summary judgment to the insurer, Ohio Security Insurance Company. In *Fouzia Salih v. Ohio Security Insurance Company*, Docket No. A-1179-17T1, Superior Court of New Jersey Appellate Division (December 3, 2018), the Court rejected the insured's attempt to make the policy language ambiguous by using case law offering a different interpretation of the policy provision. *Id.*

Ohio Security Insurance Company issued an all-risk policy to Plaintiff, Fouzia Salih, to insure her property in Paterson, New Jersey. *Id.* at *1. The policy contained a Water Exclusion Endorsement that excluded coverage for "water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump, or related equipment." *Id.* at *3. However, the policy provided limited coverage under the Custom Protector Plus Endorsement for water damage which "backs up into a building or structure through sewers or drains which are directly connected to a sanitary sewer or septic system." *Id.* at *3. The maximum coverage limit for this endorsement was $25,000 and if a loss was only covered by this endorsement, loss of business income or expense would not apply. *Id.* at *3.

The insured leased her property to Jehad Daher who operated a restaurant on the premises. On October 12, 2015, Daher noticed water and an odor in the restaurant, and contacted the insured's son who then hired Anytime Plumbing to inspect the property. *Id.* at *1. The plumber found a clog in the bathroom toilet which had caused dirty water, including human feces, to overflow into the restaurant. The property suffered heavy water damage to tiles, the basement, first-floor bathroom and the kitchen. The furnace and water heater were also destroyed by the backup. *Id.* at *2. As a result of the damages, the restaurant was inoperable and Daher stopped paying rent. The insured hired a restoration company to remove the damaged tiles and drywall, and clean the property. A claims adjuster hired by the insured valued the damages at $169,933.63 and Salih filed a claim with Ohio Security. After an investigation, Ohio Security determined the loss was caused by a backup of sewage and denied coverage for the loss in excess of $25,000 pursuant to the Custom Protector Plus Endorsement. *Id.* at *2-3.

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The insured filed a Complaint against Ohio Security for breach of contract and Ohio Security responded by filing a motion for summary judgment relying on the Custom Protector Plus Endorsement. *Id*. at *4. The insured argued that the loss was not a backup of sewage but an "accidental discharge or leakage of water . . . as a direct result of the breaking apart or cracking of a plumbing . . . system . . . that is located on the described premises and contains water or steam" as defined in the Causes of Loss-Special Form. *Id*. at *5. The insured cited case law from multiple jurisdictions that the sewage backup must occur off the insured premises for the limitation to apply. The insured argued that because the loss was not a backup of sewage, she should recover under the business income provision of the policy. *Id*. at *5.

The motion judge acknowledged that policy exclusions are generally construed against the insurer and that the parties presented the court with two different interpretations of the subject policy. However, the motion judge relied on *Oxford Realty Group Cedar v. Travelers Excess & Surplus Lines Co.*, 229 N.J. 196 (2017) and found the insured purchased and bargained for water coverage damage in the Custom Protector Plus Endorsement with a limit of $25,000. *Salih*, Docket No. A-1179-17T1 at 6-7. Summary judgment was granted to the insurer, Ohio Security.

On appeal, the New Jersey Appellate Court first determined if there was a genuine issue of material fact. The Appellate Court agreed with the motion judge that there were no factual disputes and the issue on appeal was "solely a question of law." *Id*. at *8. The Court then reviewed some general principles for interpreting insurance contracts, and recognized that ambiguous language was generally construed in favor of the insured and that unambiguous language should stand without court interference. *Id*. at *8-9. Based on these principles, the Appellate Court agreed with the motion judge that Ohio Security was entitled to summary judgment as a matter of law.

The Appellate Court next addressed the insured's argument that the motion judge erred by relying on *Oxford Realty* to determine the policy was not ambiguous. In *Oxford Realty*, a flood endorsement was included in the policy that limited liability to $1,000,000 for all damage caused by a flood. Without this endorsement, there would be no coverage for flood damage. The New Jersey Supreme Court found that the flood endorsement unambiguously put a limit on recovery for flood damage and denied coverage to the insured in excess of that limit. *Id*. at *209. The Appellate Court noted the similarities to the present case where the Ohio Security policy included the Custom Protector Plus Endorsement which limited recovery to a maximum of $25,000. *Salih*, Docket No. A-1179-17T1 at 12.

The Appellate Court found that the policy terms were clear, unambiguous and supported Ohio Security's interpretation. *Id*. at *12. The Court also rejected the insured's attempt to create ambiguity by offering alternate interpretations of the policy provision by relying on case law that differentiates a "sewer backup" from an "accidental discharge of water." *Id*. at *12-13. Thus, the Appellate Court affirmed the order for summary judgement.

Learning Point: Insurers can create custom endorsements that limit liability for specific losses provided the policy language is clear and unambiguous. Alternate interpretations of policy provisions are not enough to create ambiguity in the face of clear policy language. ♦

Second Circuit Clarifies The Importance Of Issuing An Explicit Reservation Of Rights Letter When Providing Insureds With A Defense

by ***Daniel D. Pojero***

The Second Circuit's decision in *Sparta Insurance Company v. Technology Insurance Company*, 2018 U.S. App. LEXIS 27165 (2d Cir. 2018) clarifies the importance of an insurer explicitly and specifically reserving its rights when providing additional insureds with coverage to ensure that they will not be later estopped from asserting policy defenses that could have potentially saved the insurer significant defense costs. In the instant case, Sparta Insurance Company's ("Sparta") failure to consider the interplay between its "other insurance" clause and Technology Insurance Company's ("Technology") "other insurance" clause resulted in Sparta having to bear the full cost of the defense of the owner and general contractor due to its insufficient reservation of rights or lack thereof.

The Second Circuit addressed a dispute between Sparta and Technology regarding their respective responsibility for liability for injuries a worker incurred after falling into a drywell while paving a parking lot owned by South Nassau Communities Hospital ("SNCH"). SNCH had hired Stasi Brothers Asphalt Corp. ("Stasi") as the general contractor for the work to be done in the parking lot, and in turn, Stasi hired Roadwork Ahead, Inc. ("Roadwork") as a subcontractor for the paving work. Sparta issued a commercial general liability insurance policy to Roadwork during the project. Technology issued a commercial general liability insurance policy to Stasi which also provided additional insured coverage to SNCH. The subcontract between Stasi and Roadwork provided that Roadwork was to defend and indemnify Stasi "from any and all claims and liability for . . . personal injury . . . arising out of . . . the execution of the work." After Roadwork's employee was injured while working on the project, the employee commenced litigation against SNCH and Stasi.

In that Roadwork was not named in the underlying lawsuit and pursuant to the indemnification clause in the subcontract, Technology requested that Sparta defend and indemnify Technology's insureds, Stasi and SNCH. Sparta agreed to pick up the defense and indemnification of Stasi and SNCH, but failed to spell out the terms and conditions that might bear on this obligation.

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Specifically, Sparta's May 29, 2013 email to counsel for Stasi and Technology's representative stated that it agreed to "pick up the defense and indemnification, pursuant to the contract and [its] policy." *Id.* at *5. In addition, by letter dated July 9, 2013, Sparta advised the Owner that it would "defend and indemnify" SNCH and Stasi as additional insureds under the commercial general liability policy that Sparta issued to Roadwork. The Court stated that neither of these communications suggested that Sparta anticipated asserting any policy defenses to coverage, or that it was reserving the right to do so later. *Id.* at *5-6. Perhaps most importantly, a May 29, 2013 email from defense counsel in the underlying lawsuit to Sparta's representative referred to Sparta's undertaking of the defense as "without reservation", and gave notice that defense counsel planned to "close [their] file for Technology and open one for Sparta". *Id.* at *6. Sparta did not make any objection to defense counsel's characterization of Sparta's acceptance as "without reservation." Nevertheless, more than nine months after accepting the defense of SNCH and Stasi, Sparta attempted to adopt the position that its undertaking was made subject to a reservation of rights limiting its coverage to the terms and conditions of the policy it issued to Roadwork. After Technology refused, Sparta then sought a declaration that Technology provides coverage for the defense and is obligated to reimburse Sparta for past and accruing costs.

In New York, an insurer that assumes the defense of an insured may be estopped from asserting a defense to coverage, no matter how valid, if the insurer unreasonably delays in disclaiming coverage and the insured suffers prejudice as a result of that delay. *Bluestein & Sander v. Chicago Ins. Co.*, 276 F.3d 119, 122 (2d Cir. 2002). After both parties moved for summary judgment, the district court granted Technology's motion in part, ruling that Technology has no obligation to reimburse Sparta for past and accruing defense costs to defend Stasi and SNCH in the underlying lawsuit.

Contrary to Sparta's contention, Sparta undertook the defense in the underlying lawsuit with knowledge of facts constituting a defense to coverage of its policy. When Sparta made its initial coverage determination, Sparta had copies of the subcontract and its own insurance policy that outlined Roadwork's responsibility to indemnify Stasi and SNCH. In fact, Sparta's excess coverage defenses arise from the interpretation of Sparta's very own policy terms. Sparta relied on its July 9, 2013 letter to SNCH for its contention that it accepted the tender subject to a reservation of rights. *Sparta Ins. Co. v. Tech. Ins. Co.*, 2017 U.S. Dist. LEXIS 177316 *12-13 (S.D.N.Y. 2017). The Court, however, noted that this letter did nothing to put Technology on notice that Sparta may later seek reimbursement for defense costs. Furthermore, as the district court observed and the Second Circuit affirmed, Sparta's argument regarding its coverage obligations are based upon the terms of its own policy and other facts known to Sparta at the time it agreed to undertake the defense of the SNCH and Stasi. Accordingly, the Court ruled that Sparta's failure to clearly reserve its rights and its delay in asserting any such defenses is plainly unreasonable as a matter of law.

For the Court to permit Sparta to assert defenses to coverage would have prejudiced Stasi and Technology on several bases. Under New York law, prejudice may be presumed where an insurer without asserting policy defenses or reserving the privilege to do so, undertakes the defense of a case, in reliance on which the insured suffers the detriment of losing the right to control its own defense, even if the insurer is not in fact obligated to provide coverage. *Chicago Ins. Co.*, 276 F.3d at 119. In that regard, in reliance on Sparta's undertaking of the defense, Stasi chose to forego filing a third-party complaint against Roadwork for indemnification of SNCH and Stasi in the underlying tort suit. That suit is now ready for trial and the opportunity to file such a complaint has been lost. That being the case, the Second Circuit found that Technology had demonstrated that it would be materially prejudiced if it has to bear the cost of defending an action it lost the ability to control. The Court therefore estopped Sparta from seeking reimbursement of past and accruing defense costs from Technology in the underlying lawsuit because Sparta failed to give any

notice to Technology that it may later assert policy defenses to coverage.

Learning Point: When an insurer provides an insured with a defense, setting forth an explicit statement that notifies the insured a potential for policy defenses exists is crucial in the event an insurer later learns that valid bases for non-coverage exist. As demonstrated by the instant case, courts will not interpret an insurer stating that coverage is provided "pursuant to the terms of its policy" as a sufficient reservation of rights. Here, Sparta's failure to consider the interplay between the "other insurance" clauses in the two policies left Sparta bearing the full burden of defense costs even though Technology was obligated to contribute to the costs. ♦

Plaintiff Can Be Awarded Past Or Future Lost Earnings In A Motor Vehicle Accident Case Even Though A Jury Finds No "Serious Injury" Under The Insurance Law

by ***Gregory J. Popadiuk***

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In *Gore v. Cardany*, 2918 NY Slip Op 08632 (2018), the Appellate Division, Second Department reversed an order from the Westchester County Supreme Court which granted Defendant's motion to set aside a jury verdict on the issue of damages for past lost earnings in the sum of $156,000 and future lost earnings in the sum of $750,000, and for judgment as a matter of law in favor of Defendant against Plaintiff, in effect, dismissing the Complaint.

Plaintiff was allegedly injured when a motor vehicle that he was operating was struck in the rear by a vehicle operated by Defendant. Plaintiff was granted summary judgment on the issue of liability, and the case proceeded to a jury trial on the issue of damages. Plaintiff sustained injuries to his left shoulder, which required an arthroscopic surgery, as well as his cervical and lumbar spines which were treated with epidural steroid injections. Following the trial, the jury determined that Plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law as a result of the accident. Specifically, Plaintiff did not sustain a permanent consequential limitation of use, the significant limitation of use or a medically determined injury or impairment of a non-permanent nature which prevent him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Prior to the accident, Plaintiff was employed by the Jewish Child Care Association as a residential supervisor, earning a salary of $52,000 annually. He never returned to work after the accident. In fact, his position was eliminated 6 months after the accident. The jury awarded Plaintiff damages for past lost earnings in the sum of $156,000 and future lost earnings in the sum of $750,000 over 15 years. Defendant moved to set aside the jury verdict on the issue of damages for past and future lost earnings, and for judgment as a matter of law. The trial court granted Defendant's motion and Plaintiff appealed.

The Appellate Division, Second Department modified the trial court's order by reversing the trial court and awarding Plaintiff past lost earnings in the amount of $156,000 but affirming the trial court in granting Defendant's motion to set aside the jury verdict on the issue of damages for future lost earnings in the sum of $750,000. In reaching its decision, the Appellate Division, Second Department stated that a jury verdict can only be set aside

when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possible lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the non-moving party. In addition, the Appellate Division, Second Department noted that Plaintiff has the burden of establishing damages for past and future lost earnings with reasonable certainty and that Plaintiff is not required to prove that he or she sustained a "serious injury" as defined by the Insurance Law in order to recover for economic loss exceeding $50,000 incurred as a result of a motor vehicle accident. Where the only evidence supporting Plaintiff's claims for past and future lost earnings is his or her own conclusory unsubstantiated testimony, without legally sufficient documentation or other competent evidence, is insufficient to establish lost earnings.

Contrary to the trial court's determination, the Appellate Division, Second Department held that Plaintiff established damages for past lost earnings with reasonable certainty through his own testimony and the submission of W-2 forms. There was a valid line of reasoning and permissible inferences from which the jury could reach the conclusion that Plaintiff was initially unable to work because of the injuries that he sustained in the accident. However, Plaintiff failed to meet his burden of establishing damages for future lost earnings with reasonable certainty since he did not provide any competent medical evidence that he would be unable to perform any work in the future.

Learning Points: A claim for lost earnings is comprised of several elements including medical proof of disability, proof of the difference between the plaintiff's lost earning capacity before and after the accident, and proof of the amount of the loss, including necessary documentation. Furthermore, in a motor vehicle accident case, while a plaintiff can recover economic loss in excess of basic economic loss when there is no proof of a "serious injury" as defined by the Insurance Law, there must still be proof in the record that supports the lost earnings award with reasonable certainty. ♦

Insurer's Compliance With N.J.A.C. § 11.2-17.10(A)(9) Does Not Automatically Entitle It To Summary Judgment

by ***Kristian E. Alfonso***

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In *Ferro v. Travelers Ins. Co. a/k/a St. Paul Protective Ins. Co.*, No. A-5174-16T3 (Dec. 3, 2018), the New Jersey Appellate Division analyzed the significance of an insurance company's "cut-off letter" under N.J.A.C. § 11.2-17.10(a)(9).

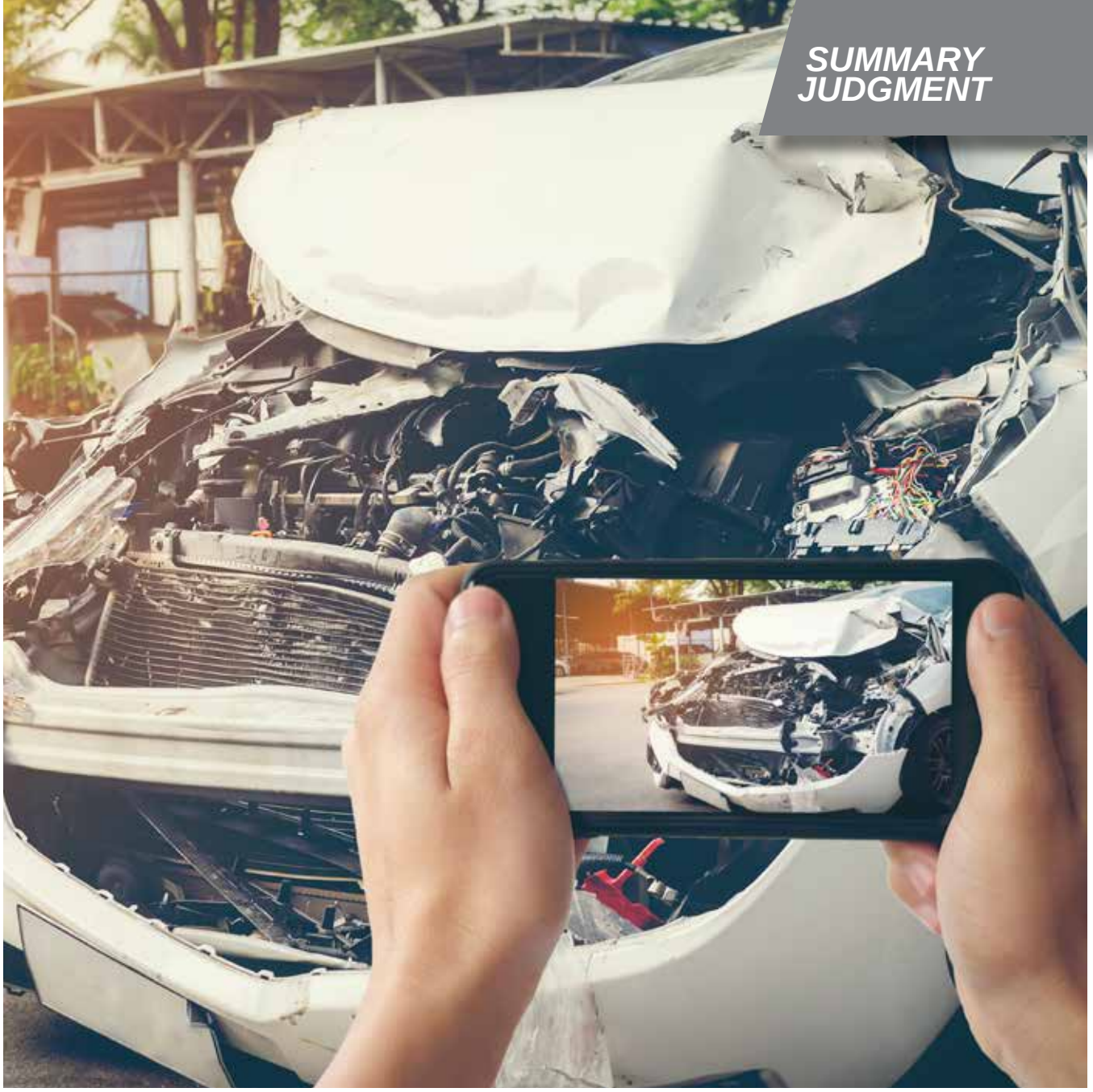
On October 28, 2016, Plaintiff's motor vehicle collided with another vehicle. According to the police report, Plaintiff was at fault for the accident and Plaintiff was able to drive his vehicle to a repair shop. Plaintiff did not immediately report the accident to Defendant, his insurance company. Rather, on November 7, 2016, the driver of the other vehicle reported the accident to Defendant. On November 8, 2016, Defendant sent Plaintiff a letter that acknowledged the claim and advised, "if we determine there is coverage for this loss[,] we will not make payment on storage charges incurred after [November 15, 2016]. We request that you have your vehicle moved before this date to a location which does not have any storage fees." Defendant retained an independent automobile evaluation company to value Plaintiff's vehicle, which it valued between $9,521.00 and $9,958.00. During this time, Plaintiff unsuccessfully attempted to obtain an amended police report that did not place fault for the accident on him.

On November 22, 2016, Defendant sent Plaintiff a letter advising Plaintiff of his right to appeal if the "'final' offered claim settlement remain[ed] unacceptable to [him]." The parties continued to negotiate regarding the valuation of the vehicle for several months because Plaintiff maintained that he had made improvements to the vehicle—which had 269,000 miles on it—that needed to be included in the valuation.

Subsequently, on May 1, 2017, Plaintiff filed the Complaint alleging breach of an insurance contract and bad faith. The Trial Court granted Defendant's motion for summary judgment on both claims.

On appeal, Plaintiff argued that there were genuine issues of material fact as to whether Defendant's November 8, 2016 "cut-off letter," breached the insurance policy. Conversely, Defendant argued that the "cut-off letter" did not breach the insurance policy because it complied with N.J.A.C. § 11.2-17.10(a)(9).

N.J.A.C. § 11.2-17.10(a)(9) provides that, "An insurer shall provide notice to a claimant three working days prior to the termination of payment for automobile storage charges...." The Appellate Division noted that "under 'duty to protect' clauses in insurance contracts, 'any act of the



insured in recovering, saving and preserving the property, in case of loss or damage, shall be considered as done for the benefit of all concerned, and all reasonable expenses thus incurred constitute a claim under the policy.'" *State Farm Mut. Auto. Ins. Co. v. Toro*, 127 N.J. Super. 223, 227-28 (Law Div. 1974) (citing *Parodi v. Universal Ins. Co.*, 128 N.J.L. 433 (Sup. Ct. 1942)). The Appellate Division opined that Defendant's compliance with N.J.A.C. § 11.2-17.10(a)(9) did not necessarily mean Defendant's actions were reasonable and did not automatically entitle it to summary judgment. However, the Court noted that Defendant's conduct was reasonable compared with Plaintiff's actions, which the Court found were obstructionist and unreasonable. Therefore, the Appellate Division affirmed summary judgment as to the breach of insurance contract claim. Similarly, the Appellate Division affirmed summary judgment on Plaintiff's bad faith claim, holding that Defendant's method for valuing Plaintiff's vehicle was reasonable and tendered fair value to Plaintiff's vehicle.

Learning Point: An insurer's compliance with N.J.A.C. § 11.2-17.10(a)(9) does not automatically entitle the insurer to a finding of reasonableness or entitle the insurer to summary judgment. ♦

Third Department Upholds Workers' Compensation Board's Decision Denying Claim For Injury Occurring At Employee's Parking Garage While Scanning Employee Parking Pass

by ***Ian T. Williamson***

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In the *Matter of the Claim of Shelly A. Grover v. State Insurance Fund, Workers' Compensation Board*, 2018 NY Slip Op 06601 (App. Div., 3d Dept., October 4, 2018), the Third Department upheld the Workers' Compensation Board's finding that claimant's injury did not arise out of and in the course of employment, thus denying her claim for Workers' Compensation benefits.

The claimant, Shelly A. Grover, alleged that she injured her left shoulder on her way to work when she reached out of her car window to scan her parking pass in order to enter a parking garage located at her employer's building. Though she initially established a claim after a hearing, the Workers' Compensation Board reversed on the ground that her injury did not arise out of and in the course of her employment.

The law sets forth that a compensable injury under the Workers' Compensation Law requires that it arise both out of and in the course of employment. *Workers Compensation Law §§ 2[7]; 10[1]*. The law is also clear that "in general, accidents that occur outside of work hours and in public areas away from the workplace are not compensable." *Matter of O'Neil v. City of Albany Police Dept.*, 81 A.D.3d 1048, 1048-1049 (2011); *Matter of Husted v. Seneca Steel Serv.*, 41 N.Y.2d 140, 142 (1976). If a parking lot is maintained by the employer, then it "constitutes precincts of employment." *Matter of Ott v. Gem Elec. Mfg. Co.*, 44 A.D.2d 331, 332 (1974).

In reaching its decision, the Third Department had to determine whether the Workers' Compensation Board's conclusion was supported by substantial evidence; if so, it should not be disturbed. *Matter of Figueroa v. Perfect Shoulder Co., Inc.*, 68 A.D.3d 1586, 1587 (2009); *Matter of Tompkins v. Morgan Stanley Dean Witter*, 1 A.D.3d 695 (2003). In evaluating the "substantial evidence submitted to the Workers' Compensation Board," the Court considered the following: (1) the claimant injured herself as she extended her arm from within her car to scan her pass at a kiosk to gain entrance into the parking garage that she utilized for her job, (2) the garage was also open to the general public and employees of other building tenants, and, to enter the garage, they would have to obtain a ticket or scan a pass at the same kiosk, (3) within the garage, there was a parking area that was dedicated for building tenants, including the employer, and their employees, (4) to access this "dedicated" area, an individual

would have to similarly scan a pass at a kiosk with a gate (however, the claimant did not injure herself at this location), and (5) although the employer provided free parking to claimant, the garage was owned by the building owner and was maintained by a third-party operator.

The Third Department referenced the Workers' Compensation Board finding that the parking garage was utilized by members of the public, as well as other businesses located within the same building as the employer. It further recognized that the employer did not own or maintain the garage and as such, did not extend its premises to the area where the claimant's injury occurred. *Matter of Lawton v. Eastman Kodak Co.*, 206 A.D.2d 813, 814 (1994). Acknowledging that while certain facts could have supported a different result, the Third Department reasoned that substantial evidence supported the Board's decision and therefore found no basis to disturb it. *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 181 (1978). The Third Department acknowledged that even if the incident giving rise to claimant's injury occurred in that "gray area where the risks of street travel merge with the risks attendant with employment and where the mere fact that the accident took place on a public road or sidewalk may not ipso facto negate the right to compensation" (*Matter of Husted v. Seneca Steel Serv.*, 41 N.Y.2d at 144), a compensable injury still would not exist because the risk of injury from reaching out of a car to scan a parking pass was a risk shared by the general public and was not a special hazard. *Matter of Cushion v. Brooklyn Botanic Garden*, 46 A.D.3d 1095, 1096 (2007).

In her dissenting opinion, Justice Garry stated that the proper disposition of the case should not be based upon the "substantial evidence" standard of review, as this is not a case where the Workers' Compensation Board was weighing and balancing conflicting evidence. The location and circumstances of the claimant's alleged accident were not in dispute and the appeal solely hinged upon the resulting legal determination. Justice Garry contended the Workers' Compensation Board was required to apply the policy established by the precedent to the relevant undisputed facts and its failure to do so should ultimately result in the reversal of its decision as a matter of law.

"[A]s a general rule, accidents that occur in public areas away from the workplace and outside of work hours are not compensable." *Matter of Stratton v. New York State Comptroller*, 112 A.D.3d 1081, 1082 (2013); *Matter of Brennan v. New York State Dept. of Health*, 159 A.D.3d 1250, 1251 (2018). Justice Garry observed, however, that "an employer, by making arrangements for employee parking, may be found to have extended its premises to the area of the approved parking facility so that an accident that occurs therein may be found to have arisen within the precincts of the claimant's employments, rendering it compensable. This is particularly true where the claimant is injured on the way to work and in such physical proximity to his or her worksite as to establish a relationship between the accident and the employment." *Matter of Thatcher v. Crouse-Irving Mem. Hosp.*, 253 A.D.2d 990, 991 (1998), *Matter of Stratton v. New York State Comptroller*, 112 A.D.2d at 1082.

Justice Garry acknowledged that although some portions of the garage were open to the public, the claimant in question used a section available exclusively to employees located in the building by use of a parking pass. Specifically, the employer assigned claimant a parking space in the garage and provided a parking pass to her at no charge, thus affirmatively encouraging claimant to park there. Justice Garry justified that this constituted "a sufficient nexus in time and place between the parking facility, the use of which was fully endorsed by the employer, and the employer's premises to render claimant's accident compensable as occurring within the precincts of her employment." *Matter of Thatcher v. Crouse-Irving Mem. Hosp.*, 253 A.D.2d at 991; *Matter of Stratton v. New York Comptroller*, 112 A.D.3d at 1082.

Learning Point: In New York, a claimant injured in a parking garage while arriving or departing employment may not be able to establish a claim for Workers' Compensation benefits. There are several variables, including ownership and maintenance of the garage, location of injury and who has access to the parking garage, that are useful to determine if a claimant's injury arose out of and in the course of employment. ♦

New Jersey Court Reverses Dismissal Of Suit Brought By Workers' Compensation Carrier Seeking To Recover Reimbursement Of Benefits Paid To An Injured Employee, From Third-Party Tortfeasors, In An Instance Where The Injured Employee Could Not Recover From The Third-Party

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The New Jersey Superior Court, Appellate Division, recently reversed a ruling on appeal that dismissed a subrogation claim brought by a workers' compensation carrier seeking reimbursement of workers' compensation benefits paid to an injured employee. *New Jersey Transit Corp. v. Sanchez*, A-01761-17T3 (App. Div. N.J. 2018) A determining factor in dismissing the claim was that the injured employee could not sue his own automobile insurer or the tortfeasors to obtain reimbursement. The underlying claim is based on a work-related motor vehicle accident.

In 2014, David Mercogliano was involved in a two-vehicle auto accident during the course of his employment with Plaintiff, the New Jersey Transit Corporation ("NJ Transit"). The vehicle operated by Mercogliano was owned by NJ Transit. The other vehicle was owned by Chad Smith and operated by Sandra Sanchez (collectively the "Defendants"). At the time of the loss, Mercogliano, Sanchez and Smith each carried a personal automobile insurance policy. Mercogliano's policy provided him with $250,000 in personal injury protection ("PIP"). However, Mercogliano's policy was subject to the verbal threshold which precluded him from recovering medical expenses and lost wages from his insurer or the tortfeasors in the absence of a permanent injury, as defined by N.J.S.A. 39:6A-8(a). The parties stipulated that Mercogliano's injuries fell below the threshold.

NJ Transit's workers' compensation carrier paid Mercogliano $33,625.70 in benefits, which included medical as well as temporary and permanent indemnity benefits. Thereafter the carrier commenced a subrogation action on behalf of NJ Transit pursuant to section 40 of the Worker's Compensation Act ("WCA") to recover benefits paid to Mercogliano. NJ Transit argued that under section 40, the workers' compensation carrier has the right to seek recovery of benefits paid to an injured employee against a third-party tortfeasor.

Defendants argued that under N.J.S.A. 39:6A of the Automobile Insurance Cost Reduction Act ("AICRA"), NJ Transit was barred from seeking recovery of noneconomic damages from a third-party tortfeasor.

At the trial level, both NJ Transit and Defendants filed cross-motions for summary judgment. NJ Transit sought a declaratory judgment that it was permitted to pursue its claim for reimbursement of the worker's compensation benefits paid to Mercogliano against Defendants. Defendants moved for dismissal under the theory that Mercogliano was not entitled to recover against them, and in turn, NJ Transit as the subrogee was barred from seeking reimbursement from Defendants.

The motion judge agreed with Defendants and held that NJ Transit's subrogation claim was barred by AICRA's collateral source rule. The trial court reasoned that as the subrogee, NJ Transit stood in the same shoes as Mercogliano; and, since Mercogliano's PIP coverage did not permit him to sue a third-party tortfeasor, where worker's compensation benefits were received, NJ Transit was also precluded.

The motion court explained that AICRA "places the primary obligation to pay benefits covered by both workers' compensation and PIP on the employer rather than the PIP insurer." (quoting *Portnoff v. N.J. Mfrs. Ins. Co.*, 392 N.J. Super. 377, 383 (App. Div. 2007)). Since the verbal threshold applied to Mercogliano's PIP auto policy, and it was undisputed that Mercogliano did not sustain a permanent injury, he was unable to pursue claims against Defendants. Accordingly, NJ Transit could not exercise a right to sue not held by Mercogliano. In other words, the no-fault system setup by AICRA limited the injured workers' right to recovery and that the workers' compensation carrier, as a subrogee, was subject to the same limitation.

On appeal, NJ Transit argued that its right for reimbursement of benefits paid to Mercogliano is governed by the WCA, not AICRA. NJ Transit argued that section 40 of WCA permits a workers' compensation carrier to recover reimbursements for benefits paid to an injured employee against the tortfeasors "*whether or not the employee is fully compensated.*" (quoting *Utica Mt. Ins. Co. v. Maran & Maran*, 142 N.J. 609, 613 A.2d 680 (1995)).

The Appellate Court clarified that the issue did not involve a worker's compensation carrier attempting to recover from the injured employee's PIP insurer. Rather, the issue was whether a workers' compensation carrier may recover from the tortfeasor. The court noted that the tortfeasor's automobile liability coverage would indemnify the tortfeasors, not their PIP coverage. The Court further noted that the verbal threshold in Mercogliano's policy did not apply to economic loss, such as medical expenses and lost wages. In the instant matter, NJ Transit only sought recovery of economic damages.

In reversing the motion court's decision, the Appellate Court held that injured workers' right to sue a third-party tortfeasor was governed by the WCA and not AICRA. Therefore, the worker, and in turn the workers' compensation carrier, has the right to seek reimbursement for medical expenses and lost wages.

The Court relied on the interpretation of AICRA's statutory language and legislative history found in *Lambert v. Travelers Indemnity*, 447 N.J. Super. 61 (App. Div. 2016), which did *not* expressly state that the no-fault system limited a worker's ability to recover for damages based on a work-related automobile accident. More importantly, there was no suggestion that the legislature intended to treat workers' compensation carriers as PIP insurers.

The Court took the *Lambert* court's analyses a step further and reasoned that "if the Legislature had intended to treat workers injured in automobile accidents differently from workers injured in any other manner, it would have unambiguously expressed such an intent." The Court reiterated that if NJ transit is successful in its recovery, the reimbursement will be paid by the tortfeasors' automotive insurance, specifically, their automobile liability coverage. Accordingly, NJ Transit's attempt to obtain reimbursement does not conflict with AICRA's collateral source rule.

Learning Point: Verbal threshold limitations do not prevent a worker's compensation carrier from recovering economic damages against the tortfeasor's insurer, even if the injured employee is precluded from seeking recovery against the tortfeasors. As this Appellate Court held, the automobile liability coverage will provide coverage. Underwriters should consider the exposure under WCA in writing policies in order to avoid being blindsided by these types of subrogation claims. ♦

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NEW JERSEY DEFENSE GROUP CONTINUES TO ACHIEVE SIGNIFICANT VICTORIES FOR CLIENTS

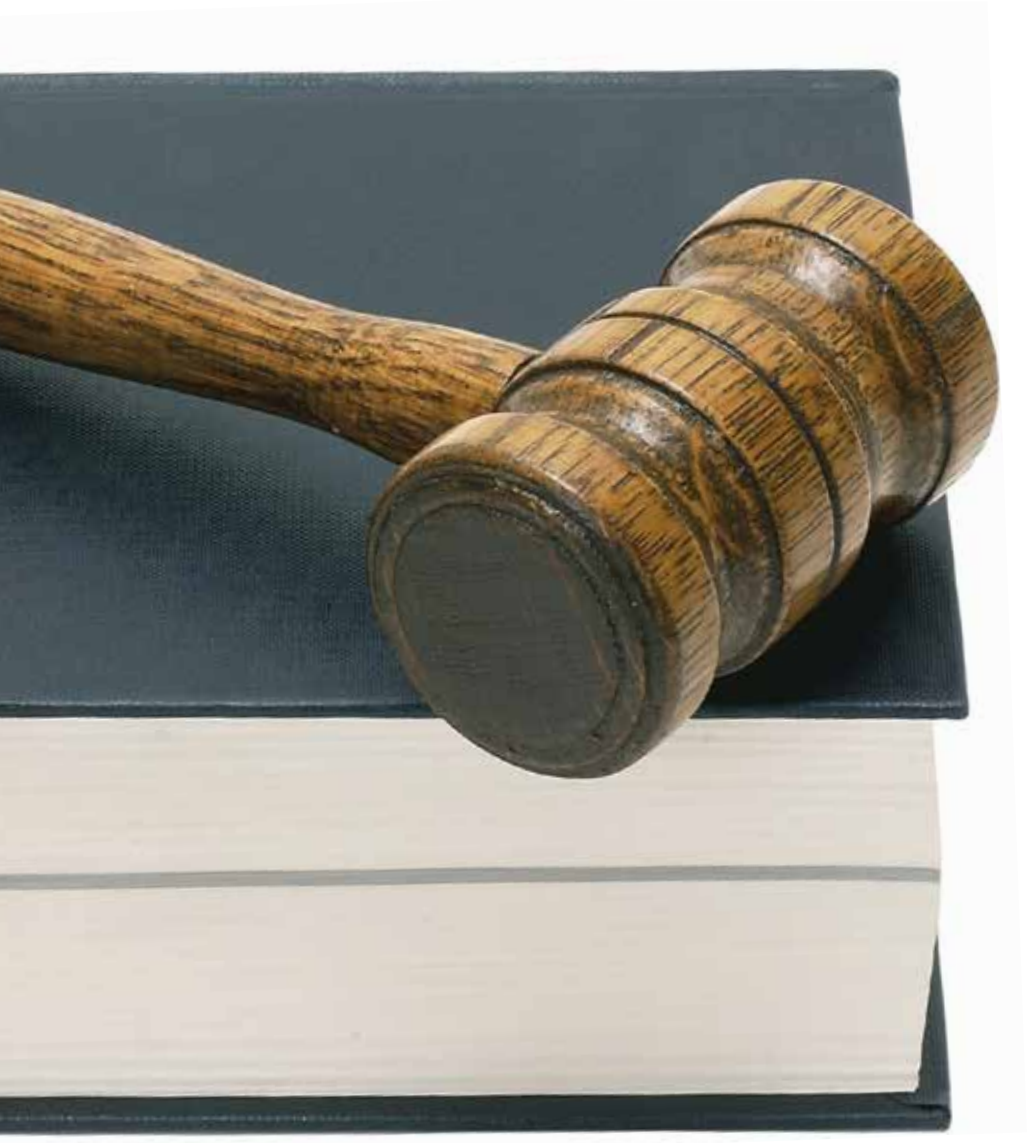
CM Senior Partner **Carl Perri** and NJ Partner **Andrew Turkish** had a number of New Jersey complex cases dismissed via Summary Judgment. Some examples include: summary judgment for Harris Miniature Golf on a claim of defective design of a miniature golf course located in Wildwood, New Jersey, which was venued in Passaic County; summary judgment for the Dutch Manufacturer, Bollegraaf Recycling Solutions in a products liability action venued in Middlesex County; summary judgment in a real estate broker malpractice/consumer fraud action against Keller Williams Realty venued in Camden County; summary judgment for Fein Power Tools and Jancy Engineering, Inc. in a products liability case involving an allegedly defective power drill also venued in Camden County; and summary judgment for Re/Max in a real estate broker malpractice/common law fraud action venued in Ocean County. If you have any defense related questions or need further information, please contact **Carl Perri** at 212-805-3958 (**cperri@clausen.com**) or **Andrew Turkish** at 973-410-4140 (**aturkish@clausen.com**).

SUBROGATION GROUP'S SUCCESS CONTINUES

Due to the Confidentiality terms in the settlement papers, this report is general. CM Senior Partner **Robert A. Stern** (New York/New Jersey) was retained to investigate an explosion. At the conclusion of the investigation, targets were identified and suit was filed. In the middle of discovery, the Court ordered Mediation. CM Associate **Melissa Cloonan** prepared the Mediation Statement and argued that our client was entitled to RCV as opposed to ACV. At the conclusion of the Mediation, all of the other Plaintiffs settled their claims with Defendants for 60% of ACV of their claims. We successfully argued that our client was entitled to recover RCV under an exception to the ACV recovery rule. This resulted in recovery of 95% ACV for our client. If you have any questions concerning subrogation, mediation and/or recoverable damages, please contact **Robert Stern** at 212-805-3900 (**rstern@clausen.com**) or **Melissa Cloonan** at 212-805-3900 (**mcloonan@clausen.com**).

CM Senior Partner **Robert A. Stern** (New York/New Jersey), was retained to investigate and handle subrogation following a fire at the Insured's home. Investigation revealed that the fire started in the attic of the house where the installer and several subsequent contractors failed to de-energize and properly terminate two 220 volt circuits from the prior system, which were no longer needed. Our client's expert opined that the entities responsible for operating and maintaining the HVAC unit

should have ensured that the unused 220 volt circuits were de-energized and properly terminated in junction boxes. CM Associate **Kristian Alfonso** (New York/New Jersey) handled discovery and opposition to Defendants' motions. At oral argument for one of the Defendant's motion for summary judgment, Ms. Alfonso successfully argued that the Insured was not required to produce an expert report that opined on the standard of care, but rather the expert report could be limited to identifying the breach that Defendants committed. The Judge denied summary judgment and we were able to secure a six-figure settlement, representing an 83% recovery for our client. If you have any questions concerning subrogation, expert reports, opposing summary judgments and/or negotiating, please contact **Robert Stern** at 212-805-3900 (**rstern@clausen.com**) or **Kristian Alfonso** at 212-805-3900 (**kalfonso@clausen.com**).



AGENCY

DISTRIBUTION AGREEMENT CREATES FIDUCIARY RELATIONSHIP

Jolen, Inc. v. Brodie and Stone, PLC, 186 Conn. App. 516 (Conn. App.)

Defendant agreed to be plaintiff's distributing agent in distribution agreement. After agreement terminated, plaintiff sued alleging defendant breached certain fiduciary duties owed to plaintiff. The trial court granted defendant summary judgment on the ground that no fiduciary relationship existed between the parties. ***Held:*** Reversed. The distribution agreement's terms established the existence of a principal-agent relationship between the parties and it necessarily followed that defendant had been plaintiff's fiduciary with respect to matters within the scope of its agency.

CIVIL PROCEDURE

PREJUDGMENT INTEREST RECOVERY DENIED

Muckle v. Pressley, 185 Conn. App. 488 (Conn. App.)

Plaintiff's vehicle sustained significant damage when struck by defendant driving for defendant municipality. As part of damages claim, plaintiff sought prejudgment interest, which trial court denied. ***Held:*** Affirmed. Prejudgment interest may be recovered and allowed in civil actions, but that general rule does not apply to actions to recover damages for injury to a person, or to real or personal property caused by negligence. The court further noted that prejudgment interest is permitted in negligence cases where a plaintiff files an offer of compromise that is rejected by the defendant and the plaintiff recovers an amount equal to or greater than the offer of compromise.

PRIOR JUDGMENT ON NUISANCE CLAIM PRECLUDED SUBSEQUENT NEGLIGENCE CLAIM PREDICATED ON SAME FACTS

Smith v. BL Companies, Inc., 185 Conn. App. 656 (Conn. App.)

Plaintiff sued defendant construction supervisor alleging professional negligence concerning incident where plaintiff fell from retaining wall onto driveway six feet below. Plaintiff previously brought action against defendant alleging the wall constituted a public nuisance, which was resolved in defendant's favor. The trial court granted defendant summary judgment in the negligence action. ***Held:*** Affirmed. Plaintiff's negligence claim was barred by *res judicata* in light of the judgment on the merits in the nuisance action since both claims arose out of the same nucleus of facts.

TRIAL COURT ACTED WITHIN DISCRETION IN DISMISSING ACTION BASED ON LACK OF READINESS FOR TRIAL

Geffner v. Mercy Med. Ctr., 2018 N.Y. App. Div. LEXIS 8231 (N.Y. App. Div. 2d Dep't)

Plaintiff brought malpractice and wrongful death action against hospital and physicians on behalf of father. Plaintiff requested and received trial adjournment due to her expert's unavailability. Two years later, plaintiff again requested an adjournment as her expert "lost employees in his office and was unavailable" and sought to use a substitute expert whose opinions were not disclosed pursuant to the CPLR. The trial court denied this request and dismissed the action given plaintiff's vague excuse, lack of detail as to when she learned of the expert's unavailability, lack of good cause for substitute testimony, and prior adjournment. ***Held:*** Trial court did not improvidently exercise its discretion in dismissing the complaint, but since a dismissal for default is not a determination on the merits, the dismissal should have been without prejudice.

COSTS

BURDEN ON NON-RESIDENTS DID NOT DENY ACCESS TO COURTS

Clement v. Durban, 2018 NY Slip Op 07693 (N.Y.)

Plaintiff commenced personal injury action and then relocated to Georgia, prompting defendants to move, per statute, for an order compelling plaintiff to post a minimum of $500 security for costs in the event she lost the case. Plaintiff challenged the statutes as denying her access to the courts and the question was certified for the Court of Appeals. ***Held:*** The Privileges and Immunities Clause only prevents a state from imposing "unreasonable" burdens on nonresidents. The statutes in question are not dissimilar from those around the country and one who qualifies for poor person status is not subject to the statutes.

DAMAGES

LOST PROFITS MUST BE PROVEN WITH REASONABLE CERTAINTY

De Auto Transport, Inc. v. Eurolite, LLC, 186 Conn. App. 270 (Conn. App.)

Plaintiff sued defendant for wrongful repossession, conversion, and statutory theft in connection with a business deal involving the purchase and use of a truck and trailer. Defendant loaned plaintiff money to purchase the truck and trailer. Plaintiff sought lost profits, and presented testimony and a financial report from a certified public accountant in support but the trial court ruled in defendant's favor. ***Held:*** Affirmed. No credible evidence was presented providing reasonable certainty as to plaintiff's lost profits. The accountant failed to list some of plaintiff's trucks on its tax returns and was unaware of the terms of the loan agreement and the disclosures of the individual principals of plaintiff failed to comply with generally accepted accounting principles.

NONECONOMIC DAMAGE CAP APPLIES TO DEFAMATION

Wayt v. DHSC, LLC, 2018 Ohio LEXIS 2847 (Ohio)

Jury awarded $800,000 on nurse's defamation claim. ***Held in a split decision:*** The $250,000 cap on noneconomic damages applied. The cap applies to tort actions involving loss to person or property, including injuries to reputation, and not just bodily injury or damages arising out of negligence.

DISCOVERY

TRIAL COURT ERRED IN COMPELLING PRODUCTION OF UNREDACTED LEGAL BILLS AND INSURER'S FILES

Teran v. Ast, 164 A.D.3d 1496, 84 N.Y.S.3d 504 (N.Y. App. Div. 2d Dep't)

Plaintiff filed medical malpractice action against internist and treatment facility for failure to timely and properly treat plaintiff's heart condition. Case settled, leaving facility's cross-claim for contractual indemnification against the internist. Internist sought production of unredacted copies of the facility's attorney's bills and the files maintained by the facility's insurance carrier, which the trial court granted. The facility appealed, arguing privilege. ***Held:*** Unredacted copies of legal bills are privileged as they would reveal factual investigation and legal work performed by counsel. An insurance carrier's file is privileged as it contains material prepared for litigation and should not be produced even if the movant shows "substantial need."

POLICE OFFICER RECORDS PROTECTED FROM DISCLOSURE

Matter of New York Civ. Liberties Union v. New York City Police Dept., 2018 NY Slip Op 08423 (N.Y.)

The New York Civil Liberties Union (NYCLU) sought general disclosure of protected disciplinary personnel records from the NYPD pursuant to the Freedom of Information Law. NYCLU contended compliance with Civil Rights Law § 50-a, which requires that police officer personnel records be kept confidential, is unnecessary where an officer's identifying information is adequately redacted. ***Held:*** No disclosure. Civil Rights Law § 50-a was designed to protect police officers from the use of their records as a means for harassment and reprisals and for purposes of cross-examination by plaintiff's counsel during litigation. The statute's protection is not limited to actual or potential litigation.

EXCESS INSURANCE

FAILURE TO MAINTAIN PROPER PRIMARY COVERAGE DOES NOT INVALIDATE UMBRELLA COVERAGE

Gabriel v. Mount Vernon Fire Ins. Co., 186 Conn. App. 163 (Conn. App.)

Plaintiff sustained severe injuries when van in which he was passenger crashed into building and wife brought subrogation action seeking damages under a $1 million umbrella policy issued by the defendant insurer to its insured, the vehicle operator. The subject van was covered by a primary business policy with a $300,000 limit, which amount was paid towards plaintiffs' $1.8 million in judgments. Defendant refused to apply its $1 million umbrella coverage to the unpaid balance because the primary insurance had been insufficient to trigger excess coverage. The trial court rendered judgment in favor of plaintiffs. ***Held:*** Affirmed. The umbrella insurance policy's terms provided that the failure to maintain underlying insurance meeting minimum limits would not invalidate the policy but would merely adjust the net loss defendant was to pay.

LIABILITY INSURANCE COVERAGE

INSURERS OWED DUTY TO DEFEND AGAINST ADVERTISING INJURY CLAIM

Holyoke Mut. Ins. Co. v. Vibram U.S.A., Inc., 106 N.E.3d 572 (Mass.)

Insurers denied duty to defend advertising claim arising out of insured's use of deceased track star's name. ***Held:*** A covered "advertising idea" includes concepts, methods, and activities calling the public's attention to a business, product, or service. An idea must relate to marketing, not manufacture or production. The star's family created a connection between their name and the star's legacy to attract customers to their commercial ventures. The family alleged that the insured used the name for the same purpose. It was unnecessary for the family to market a product or idea to develop a secondary meaning for the name. It was enough to use the term in soliciting business.

LIMITATIONS OF ACTIONS

DISCOVERY RULE APPLIES TO EX-FOOTBALL PLAYER'S COMPLAINTS OF CTE INJURIES

Schmitz v. Nat. Coll. Ath. Ass'n, 2018 Ohio LEXIS 2614 (Ohio)

Almost 40 years after his college football career, a player sued the NCAA and his former school for injuries caused by chronic traumatic encephalopathy. ***Held in a split decision:*** Barring his action under the two-year statute of limitations was premature. Mere discovery of injury will not start the statute absent an indication of tortious conduct giving rise to a legal claim. The player's disorientation at the time of injury was inherent to football and did not suggest wrongdoing. The player alleged that he neither knew nor had reason to know of a football-related brain injury. Medical literature was not readily available, and his coaching staff downplayed the seriousness of head impacts. Discovery was needed. ***Also held:*** Player's fraud claims were subject to the two-year statute. They arose out of the school's failure to warn about the risks of football.

MEDICAL MALPRACTICE/ LIMITATIONS OF ACTIONS

WHEN INJURIES AND PSYCHIATRIST'S ACTIONS ARISE FROM SAME CONDUCT, COMPLAINT SOUNDS IN MEDICAL MALPRACTICE

Stagnitta v. Ambrosino, 2018 N.Y. App. Div. LEXIS 7957 (N.Y. App. Div. 2d Dep't)

Plaintiff commenced fraud action against psychiatrist who induced her into a sexual relationship, claiming post-traumatic stress, depression

and failed marriage, resulting in financial loss. Defendant moved to dismiss complaint as time barred because beyond the 2 ½ year medical malpractice statute of limitations period. ***Held:*** The sexualization of a physician-patient relationship sounds in medical malpractice and the injuries incurred under the fraud claim are not separate and distinct from the medical malpractice injuries. Therefore, the 2 ½ year statute of limitations period applied.

COURT DISMISSES AMENDED COMPLAINT FILED AFTER STATUTE OF LIMITATIONS EXPIRED

Cengiz v. Saedeline, 2018 N.J. Super. Unpub. LEXIS 2459 (N.J.)

Plaintiff brought medical malpractice action against physician and fictitious providers alleging they failed to properly diagnose and treat his father's blocked carotid artery. The action was timely filed two years after the stroke. Plaintiff then filed an amended complaint eight months later naming two other cardiologists, who successfully moved to dismiss based on untimeliness. Plaintiff claimed the statute was tolled until he discovered that one of the doctors checked his father's neck several months prior to the stroke and should have appreciated the extensive blockage. ***Held:*** Affirmed. The initial complaint showed awareness of an actionable claim. Furthermore, plaintiff had been at the appointment in question and been concerned with the treatment.

CONTINUOUS TREATMENT OF RELEVANT CONDITION TOLLS STATUTE OF LIMITATIONS

Cohen v. Gold, 165 A.D.3d 879 (N.Y. App. Div. 2d Dep't)

Plaintiff sought dental treatment from defendants between 2009 and 2015. She saw a periodontist in 2015 who diagnosed her with periodontal disease and bone loss, and she underwent numerous procedures. Plaintiff then sued defendants, who successfully moved to dismiss claims for treatment rendered before December 2012 as time barred. ***Held:*** Reversed. Plaintiff established the patient/physician relationship was not terminated as the parties explicitly anticipated further care and monitoring of the condition, by scheduling future appointments. Plaintiff's timely return visit to complain about and seek treatment for a matter related to the initial treatment constitutes continuous treatment. ***Further held:*** Doctor who retired in 2012 could be reached by doctrine via imputation of treatment by other dentists in the practice.

NEGLIGENCE

INJURY FROM UNATTENDED VEHICLE WAS FORESEEABLE

R. L. Currie Corp. v. East Coast Sand & Gravel, Inc., 109 N.E.3d 524 (Mass. App.)

After driver left front-end loader unattended and idling on lot shared with plaintiff, unauthorized user damaged plaintiff's trucks. ***Held:*** The damage was foreseeable. In the wrong hands the loader could cause damage. Defendant failed to follow past practice of hiding keys. There had been prior trespasses, and defendant knew that plaintiff stored equipment on the lot. Defendant did not need to foresee the precise act of vandalism.

IMPROPER CONDUCT BY SENIOR MANAGEMENT NEEDED TO INVOKE THE *IN PARI DELICTO* DOCTRINE BARRING NEGLIGENCE RECOVERY

Merrimack College v. KPMG, LLP, 108 N.E.3d 430 (Mass.)

College sued auditors for negligently failing to catch fraud in college's financial aid unit. ***Held:*** To bar recovery under the *in pari delicto* doctrine, a corporation's senior management must be involved in misconduct. The doctrine is equitable in nature but does not apply to all agents of an organization. The morally blameworthy conduct needed to trigger the doctrine must be committed by those leading the organization.

ACTUAL OR CONSTRUCTIVE NOTICE OF ALLEGED DANGEROUS CONDITION REQUIRED

Bradley v. HWA 1290 III LLC, 32 N.Y.3d 1010 (N.Y.)

Trial court dismissed plaintiffs' claim asserting violation of ANSI standards. ***Held:*** While plaintiffs

could properly rely on violations of ANSI standards as evidence of negligence, actual or constructive notice of the alleged dangerous condition was also required. Plaintiffs had failed to submit sufficient evidence of notice of the condition, necessitating dismissal.

MOM WAS RIGHT: GO TO THE BATHROOM BEFORE GETTING INTO A CAR

Smith v. Hess, 108 N.E.3d 1266 (Ohio App.)

Driver was injured during post-accident investigation when, after crossing guard rail to urinate, he slid down icy embankment into a ravine. ***Held:*** Driver's conduct was not reasonably foreseeable and so broke the chain of causation. The driver was not injured from the vehicle collision. He had exited his car, surveyed the scene, waited several minutes for police to arrive, spoke many times with the responding officer, and at officer's suggestion crossed over the guardrail to walk down a steep ice-covered hill.

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