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NJ Appellate Court Finds Unlicensed Drivers Not Entitled To PIP Benefits

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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Coverage For Contaminated Milk? Arguments On Appeal Are Spoiled When Not Raised At Trial

by ***Thomas J. Hennessey***

In a contested coverage and contribution lawsuit brought by an insured's general liability ("GL") carrier against the insured's auto liability carrier, the United States Court of Appeals for the Second Circuit, in the case of *Harleysville Worcester Ins. Co. v. Wesco Ins. Co.*, 2019 U.S. App. LEXIS 3349, 2019 WL 413655 (2d Cir. Feb. 1, 2019), heard arguments as to whether the GL carrier was entitled to contribution from the insured's auto carrier arising from the GL carrier's sole defense and indemnification of their insured related to a third-party's claim for damages resulting from contaminated milk. Upon appeal following summary judgment in favor of the GL carrier, the Second Circuit specifically adjudicated the issue as to whether the auto carrier could make arguments on appeal that were not raised at the District Court level in its opposition to the GL carrier's motion for summary judgment. In its affirmation of the District Court's judgment, the Second Circuit held that the auto carrier was unable to demonstrate manifest injustice or some extraordinary need for the Second Circuit to consider arguments not raised to the District Court judge. As a result, and without any showing of a plain error committed by the District Court judge, the order obligating the insured's auto carrier to reimburse the GL carrier for costs of defense and indemnity was upheld.

Harleysville's dispute with Wesco stemmed from a lawsuit initiated by Great Lakes Cheese of NY, Inc. ("Great Lakes") against Harleysville and Wesco's insured, Bernard Thomas, dba M&T Transport ("M&T"). During August, 2013, M&T delivered milk contaminated with metal filing to Great Lakes. As a result of the contaminated milk, Great Lakes' factory incurred substantial damage. When M&T was served with the lawsuit initiated by Great Lakes, it immediately placed its GL carrier, Harleysville, and its auto liability carrier, Wesco, on notice of the lawsuit. In efforts to prudently protect M&T, which was shown to be a local "mom and pop" transporter that faced substantial personal exposure to the claims of Great Lakes, Harleysville provided a defense under reservation of rights. The record on appeal demonstrated that the liability adjuster for Harleysville placed Wesco on notice of the lawsuit, and sought cost sharing for the duty to defend. However, at all material times during the litigation, Wesco simply denied coverage and refused to defend M&T.

As litigation proceeded, factual discovery revealed that M&T's use of a milk transport trailer was the cause of the milk contamination. Even though Harleysville's GL policy contained an automobile exclusion, it continued with the defense of

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M&T under its reservation of rights. During mediation, Harleysville agreed to provide $1,000,000.00 in indemnity (policy limit) to M&T upon the condition that M&T assign "all of its rights, claims for relief and causes of action against Wesco." *Harleysville Worcester Ins. Co. v. Wesco Ins. Co.*, 2019 U.S. App. LEXIS 3349, 2019 WL 413655 (2d Cir. Feb. 1, 2019).

Following settlement of Great Lakes' claims against M&T, Harleysville initiated the subject litigation against Wesco to seek contribution for the defense and indemnity provided to M&T. At all times during Harleysville's federal District Court litigation against Wesco, Wesco maintained that Great Lakes' claims against M&T were not covered under the auto liability policy. In pursuit of recovery, Harleysville moved for summary judgment and argued that despite its GL policy specifically excluding coverage as a result of its automobile exclusion, Wesco is liable to reimburse Harleysville in full for the amount paid to indemnify M&T in settlement of the claims asserted by Great Lakes. Upon adjudication by District Court Judge Alison J. Nathan, summary judgment was granted to Harleysville as Judge Nathan found, as a matter of law, that Wesco's policy provided coverage for M&T, and that Wesco was contractually obligated to provide a defense and indemnity for M&T arising from the claims asserted by Great Lakes. From that decision, Wesco appealed to the Second Circuit.

On appeal, Wesco did what the Second Circuit labeled as an "about-face". Surprisingly, Wesco conceded that its policy covered the claims asserted by Great Lakes against M&T. However, Wesco argued that Harleysville still cannot recover for the indemnity paid to M&T as Wesco argued that Harleysville made a voluntary payment on behalf of M&T. As the record on appeal makes clear, at all times during Wesco's defense, Wesco maintained that its policy did not provide coverage for the claims asserted by Great Lakes. While the Second Circuit acknowledged that it has the discretion to consider arguments raised for the first time on appeal, Wesco would be required to demonstrate some form of injustice or extraordinary need for the Court to warrant exercise of its discretion. As the Second Circuit proclaimed, "the general rule that an appellate court does not consider an issue not passed upon below may be overcome only when necessary to avoid manifest injustice, or where there is some extraordinary need to consider appellants' claim." *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 73 (2d Cir. 1995). Additionally, the Second Circuit specially addressed Wesco's failure to set forth an alternative or hypothetical defense in its opposition to Harleysville's motion for summary judgment.

The record on appeal was clear that Wesco's opposition to Harleysville's motion for summary judgment was founded solely upon its position that coverage was not afforded under the auto liability policy. Had Wesco proffered an "even if", hypothetical or alternative argument to address the possibility that the District Court would find that its policy covered M&T, Wesco's appeal may not have been struck down by the Second Circuit for failure to show an injustice or extraordinary need for the Court to consider arguments not raised a the District Court level. As the Second Circuit set forth, "A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones regardless of consistency." Fed. R. Civ. P. 8(d)(2) & (3). Wesco's failure to argue alternative or hypothetical defenses in its defense of Harleysville's motion for summary judgment restricted the Second Circuit's discretion and prevented consideration of any arguments or defenses that Wesco failed to set forth in the underlying litigation. Following Wesco's baffling "about-face" admission of coverage, compounded by the Court's inability to consider arguments not set forth at the trial level, Wesco's appeal was found to be without merit, and the judgment of the District Court was affirmed.

Leaning Point: In defense or opposition of motions, alternative or hypothetical arguments will open the door to more arguments at the appellate level should an appeal be necessary, even if the alternative or hypothetical argument is inconsistent with the primary defense or opposition. ♦

Georgia High Court Clarifies The Standard For Bad Faith Failure To Settle Within Policy Limits

by ***Dawn M. Brehony***

On March 11, 2019, the Georgia Supreme Court handed down a unanimous decision clarifying that an insurer may not be sued for bad faith failure-to-settle within policy limits absent a valid offer.

In *First Acceptance Insurance Company of Georgia v. Hughes*, 2019 Ga. LEXIS 161 (Ga. S.C. Mar. 11, 2019), Georgia's highest court addressed the issue of whether an insurer's duty to settle arises only when the injured party presents a valid offer to settle within the insured's policy limits or whether, even absent such offer, a duty arises when the insurer knows or reasonably should know that a settlement within the insured's policy limits is possible. In a unanimous decision, the Court concluded that "an insurer's duty to settle arises only when the injured party presents a valid offer to settle within the insured's policy limits." *Id.* at *1.

In *Hughes*, Ronald Jackson was involved in a 2008 multi-vehicle accident and subsequently died from his injuries. At the time of the accident, he was insured under an auto policy issued by First Acceptance Insurance Company of Georgia, Inc. ("First Acceptance"), with $25,000 per person and $50,000 per accident bodily injury liability limits. After the accident, First Acceptance was advised that five individuals suffered varying levels of injuries in the accident. *Id.* at *2. First Acceptance adjusters determined that not only did the policy provide coverage to Jackson, but early in their investigation they determined that Jackson was liable for the loss and that his exposure for claims exceeded policy limits. *Id.*

An attorney for two of the injured individuals—Julie An and Jina Hong—sent two letters on June 2, 2009, to First Acceptance. The first letter stated that his clients would be interested in attending a global settlement conference, and, in the alternative, offered to settle their claims for the available policy limits. The letter noted that First Acceptance could settle An and Hong's claims within policy limits by providing a release and the insurance information requested therein. In the second letter, the claimants' counsel additionally requested that First Acceptance provide certain policy information within 30 days. *Id.* at *4.

First Acceptance did not respond to the letters. Thereafter, in July, 2009, An and Hong sued Jackson's estate. In February, 2010, First Acceptance offered to settle Hong's claim for $25,000 and in September, 2010, First Acceptance offered to settle An's and Hong's claims for $25,000 each, which equaled the $50,000 policy

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limit. The offers were rejected. In a July, 2012 trial, the jury returned a verdict in favor of An and Hong, and awarded over $5.3 million in damages for Hong's injuries. *Id.* at *5.

In June, 2014, the administrator of Jackson's estate filed this suit against First Acceptance alleging negligence and bad faith in First Acceptance's failure to settle Hong's claim within the policy limits. *Id.* at *5. The trial court granted First Acceptance's motion for summary judgment. However, the Court of Appeals reversed the trial court as it found that issues of material fact existed as to whether the June 2, 2009 letters constituted a time-limited settlement offer and whether First Acceptance acted in bad faith in failing to accept it. The Georgia Supreme Court granted certiorari and reversed the Court of Appeals decision. *Id.* at *16.

In doing so, the Supreme Court expressly stated that an insurer does not have a duty to settle a claim within policy limits absent a valid offer from the claimant to do so. *Id.* at *1. Additionally, before an insurer can be held for bad faith in refusing to accept an offer to settle within policy limits, the insurer must reject such offer. In that regard, while the Court found that the June 2, 2009 letters constituted an offer to settle Hong and An's claims, the court noted that the letters failed to specify when acceptance of the offer was required. Specifically, the Georgia Supreme Court noted that because "An and Hong's offer was not a time-limited settlement demand, First Acceptance was not put on notice that its failure to accept the offer within any specific period would constitute a refusal of the offer." *Id.* at *15.

Learning Point: This decision makes clear that in Georgia an insurer cannot be liable for bad faith for failing to tender policy limits absent a clear and unequivocal offer, and the insurer rejects such offer. This decision will likely reduce the number of bad faith failure-to-settle actions filed against insurers in Georgia given that Georgia's highest court has clearly stated that an insurer's duty to settle is not triggered until a valid offer to settle within policy limits is made. ♦

Automobile Insurer Does Not Have An Affirmative Duty To Investigate A Potential Insured's Personal Health Insurance Coverage

by ***Colin J. Gorman***

In *Lledon James et al. v. State Farm Insurance Company*, No. A-5174-16TC (Jan. 18, 2019), the New Jersey Appellate Division was asked to determine whether an automobile insurance provider has a legal obligation to investigate an insured's personal health insurance.

On October 11, 2012, Lynval James obtained an auto insurance policy from State Farm Insurance. The insurance policy covered Lynval, his wife Lurline James, and his son Lledon James. When purchasing the insurance, Lynval provided the agent with a copy of the declarations page from a previous automobile policy he had with Geico, which provided for $15,000 in PIP coverage with a $2,500 deductible, and his private health insurance card. Lurline had her own private health insurance and Lledon had Medicaid.

On September 10, 2014, Lurline and Lledon were both injured in an automobile accident. Lynval reported the accident to State Farm and submitted a claim for PIP benefits. State Farm processed the claim and referred medical expenses to the private health insurance carriers. Later, State Farm discovered that Lledon did not have private health insurance but was covered by Medicaid. State Farm then applied the $2,500 deductible included in the policy and a $750 statutory penalty under N.J.S.A 39:6A-4.3(f) because Lledon did not have private health insurance at the time of the accident.

Plaintiffs filed their complaint seeking to reform their policy to provide the maximum $250,000 PIP benefits. Plaintiffs argued that the policy was invalid because Lledon was covered by Medicaid, not private health insurance. Plaintiffs further alleged that State Farm had disregarded their request for maximum coverage, and that State Farm's actions were willful, wanton, and grossly negligent. State Farm moved for summary judgment which was granted by the Law Division judge, finding that State Farm was immune from liability under N.J.S.A. 17:28-1.9(a).

On appeal, Plaintiffs argued that the Law Division was incorrect when it found State Farm immune from liability under N.J.S.A. 17:28-1.9(a). Plaintiffs claim that when Lynval met with the State Farm agent, he advised the agent that he wanted PIP coverage of $250,000 and a $2,500 deductible. Lynval alleged that the State Farm agent only presented him with the signature page of a coverage selection form. Lynval claimed to

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have signed the form and that the State Farm agent filled out the rest after he had left the office.

State Farm opposed Plaintiffs' allegations and argued that Lynval was provided with a New Jersey Policy Coverage Selection form which outlined the various types of coverage. The coverage selection form shows that Lynval selected $15,000 in PIP with a $2,500 deductible and signed the form. The coverage selection form also shows that Lynval designated his personal health insurance policy as the primary for PIP.

N.J.S.A. 17:28-1.9 provides that " . . . no . . . insurer . . . shall be liable in an action for damages on account of the election of a given level of motor vehicle insurance coverage by a named insured as long as those limits provide at least the minimum coverage required by law…" The statute further provides that "no . . . insurer . . . shall be liable in an action for damages on account of the election of a given level of motor vehicle insurance coverage by a named insured as long as those limits provide at least the minimum coverage required…except for that [insurer] causing damage as the result of [its] willful, wanton or grossly negligent act of commission or omission." The purpose of N.J.S.A. 17:28-1.9 was to limit the "explosion of litigation by providing blanket immunity except in cases of willful, wanton, or gross negligence." *Strube v. Travelers Indem. Co.*, 277 N.J. Super. 236, 237, 242 (App. Div. 1994).

The Appellate Division found that State Farm met the requirements for immunity under N.J.S.A. 17:28-1.9. The Court found that Plaintiffs were provided the appropriate coverage selection forms and received the minimum coverage required by law. The Court rejected Plaintiffs' argument that they were provided an incomplete coverage selection form. The Court noted that it is immaterial which party physically completed the form, as long as the coverage selection form was signed and return by the Insured. *Baldassano v. High Point Ins. Co.*, 396 N.J. Super. 457 (App. Div. 2007) Furthermore, a completed and executed coverage form is "prima facie evidence of the named insured's knowing election or rejection of any option." N.J.S.A. 39:6A-23(e)

The Appellate Division further found that State Farm's actions were not willful, wanton, or grossly negligent in regards to determining if Plaintiffs had private health insurance. Under N.J.S.A. 17:28-1.9, willful conduct is defined as a "deliberate or intentional act" and "an insurer will be held liable for its 'willful' conduct, if it deliberately misrepresents the scope of available coverage in a given policy." *Pizzullo v. N.J. Mfrs. Ins. Co.*, 391 N.J. Super. 113, 125 (App. Div. 2007. Additionally, gross negligence is defined as "deviation from the standard of reasonable professional conduct expected from an insurance carrier." *Id.* at 126.

The Court noted that the burden was on Plaintiffs to provide proof of adequate health insurance. Further, Plaintiffs offered no evidence that Sate Farm owed a duty to Lyncal to investigate whether each member of the family had private health insurance. The Court reasoned that the duty to investigate only arises when information is received that would trigger the need for an investigation. Lynval provided the State Farm agent with his own private health insurance card but gave no further information regarding Lurline or Lledon, and their health insurance status. Plaintiffs presented the State Farm agent with no information that would trigger an investigation into Plaintiffs' health insurance status.

Therefore, finding that State Farm had provided the minimum coverage provided by law and did not act in a willful, wanton, or grossly negligent manner, the Appellate Division affirmed Defendant's motion for summary judgment, pursuant to the immunity provisions in N.J.S.A. 17:28-1.9.

Learning Point: An Automobile Insurer does not have an affirmative duty to investigate the health insurance status of all potential insureds. Furthermore, an insurer is entitled to immunity under N.J.S.A. 17:28-1.9 unless the insured can prove that they were not provided the minimum coverage required by law or that the insurer acted in a willful, wanton, or grossly negligent manner. ♦

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NJ Appellate Court Finds Unlicensed Drivers Are Not Entitled To PIP Benefits Despite Permission By Vehicle Owner

by ***Alexandra DiFusco***

A New Jersey Appellate Court found that unlicensed drivers are not entitled to personal injury protection ("PIP") benefits for injuries resulting from a car crash even if given permission to drive by the car's owner, thereby affirming the Law Division's dismissal of plaintiff Norma Blanco-Sanchez's Complaint. *Norma Blanco-Sanchez v. Personal Service Insurance Company*, Docket No. A-5393-16T4, Superior Court of New Jersey Appellate Division (February 28, 2019).

Plaintiff's mother, Vilma Sanchez ("Sanchez"), was issued an insurance policy pertaining to her vehicle from Defendant Personal Service Insurance Company, the policy provided PIP coverage up to $15,000 in covered medical expenses. *Id.* at 3. Under the policy, an "eligible injured person" was defined as "the named insured or any relative of the named insured, if the named insured or relative sustains bodily injury . . . as a result of any accident while occupying, using, entering into, or alighting from a private passenger auto…." *Id.* at 3-4. The policy excluded from coverage "the bodily injury of any person at the time of the accident . . . who was operating or occupying a private passenger auto without the permission of the owner or other named insured." *Id.* at 4.

On December 8, 2014, after parking her vehicle on the street, Sanchez called Plaintiff and requested she have someone move the vehicle. *Id.* at 3. Plaintiff agreed, but decided to move the vehicle herself and was involved in an accident, sustaining injuries and incurring certain medical expenses. *Id.* Plaintiff filed for PIP benefits under Sanchez's policy and Defendant denied coverage, reasoning that Plaintiff did not have permission to operate the vehicle, and specifically stating that "to give permission to an unlicensed driver would be impossible." *Id.* at 4. Plaintiff then filed a Complaint for declaratory relief, requesting judgment be entered declaring that Defendant was required to provide PIP benefits, as no statutory or case law proscribed that an insured could not grant permission to a person without a license. *Id.* Defendant, in filing its answer, admitted to issuing Vilma Sanchez a policy which included PIP coverage, but still denied that Plaintiff was entitled to coverage. *Id.*

Defendant filed a motion for summary judgment, Plaintiff cross-moved for the same, and the Superior Court granted Defendant's motion, denied Plaintiff's cross-motion, and dismissed the Complaint. *Id.* at 5. The judge found that Sanchez gave

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Plaintiff "implied permission" to operate the vehicle, and the policy contained no exclusion for unlicensed drivers. *Id.* Despite those findings, the judge concluded that "you can't give permission to extend coverage in a situation where they couldn't have [received] coverage to begin with," further explaining that "whether it's unlicensed or suspended . . . the plaintiff cannot benefit from his or her own . . . illegal conduct." *Id.* at 5-6.

Plaintiff appealed, arguing that she was entitled to PIP benefits as a "resident relative" under N.J.S.A. 39:6A-4, and she was a "permissive user" of Sanchez's vehicle because Sanchez gave her specific permission to use her vehicle. *Id.* at 6. To deny her PIP benefits, Plaintiff asserted, would be to insert a provision in the policy and statute which improperly limits an insured or owner's ability to give a third-party permission to use an insured vehicle. *Id.*

The Appellate Court (the "Court") reviewed the judgment *de novo*, explaining that "statutory interpretation is a legal issue" and according "no deference to the trial judge's interpretive conclusions." *Id.* quoting *Leggette v. Gov't Emps. Ins. Co.*, 450 N.J. Super. 261, 264 (App. Div. 2017). The same principles were applied in reviewing the trial court's interpretation of the subject policy. *Blanco-Sanchez* at 7 citing *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 224 N.J. 189, 199 (2016).

The Court did not go into great detail in assessing Plaintiff's contention that she was a "resident relative" under N.J.S.A. 39:6A-4, acknowledging that the statute mandates PIP benefits without regard to fault for the named insured and members of their household. *Id.* at 6-7. Under N.J.S.A. 39:6A-4.2, this coverage was considered primary for both the named insured and "any resident relative who is not a named insured under an automobile policy of his own." *Id.* at 7.

Next, the Court found that although the policy's exclusion was authorized based upon the "clear language" of N.J.S.A. 39:6A-7, which outlines those individuals that insurers may exclude from PIP coverage, including those persons "occupying or operating an automobile without the permission of the owner or other named insured," the policy did not exclude coverage for permissive but unlicensed drivers. *Id.* at 8-9. The analysis then turned to New Jersey public policy to determine whether coverage to Plaintiff was barred. *Id.* at 9.

Although acknowledging that public policy requires coverage for third-party liability claims made by innocent third-parties as a result of the negligence of unlicensed permissive drivers, the Court utilized *Martin v. Rutgers Cas. Ins. Co.*, 346 N.J. Super. 320, 326 (App. Div. 2002) to demonstrate the distinction between third-party and first-party coverage. *Id.* at 10. In *Martin*, the plaintiff, an unlicensed driver of a vehicle owned by her fiancé's stepfather, did not know her licensed had been revoked when she was involved in a collision. *Martin*, 346 N.J. Super. at 321-322. The court in *Martin* found that even if the plaintiff had permission to drive the vehicle, she was not entitled to PIP or UM coverage for her injuries, differentiating between "an individual who had to know she was not entitled to drive" and "an unwitting, injured passenger" or "an individual injured as a result of a collision with a vehicle driven by plaintiff." *Id.* at 325-326.

Lastly, the Court addressed Plaintiff's reliance upon *Matits v. Nationwide Mut. Ins. Co.* to support her argument that if coverage was afforded to a licensed, intoxicated driver, there is no public policy justification to deny her coverage here. *Id.* at 12. *Matits* involved an accident caused by a vehicle's permissive user who drove while intoxicated. *Matits v. Nationwide Mut. Ins. Co.*, 33 N.J. 488 (1960). The Court found Plaintiff's argument meritless, explaining that *Matits* involved a third-party claim against a licensed driver, while Plaintiff here was never licensed to operate a vehicle for any purpose. *Blanco-Sanchez* at 13.

The Appellate Court, in concluding the *de novo* review, found that the trial court correctly dismissed Plaintiff's Complaint, thus affirming the grant of summary judgment to Defendant.

Learning Point: Under New Jersey law, an unlicensed driver may never be considered a "permissive user" for purposes of PIP coverage, even with no explicit exclusion for unlicensed drivers within the policy. ♦

Rodriguez v. City Of New York, Exploring The Impact The Court Of Appeals' Decision Had On Litigation, One Year Later

by **Djordje Caran**

In *Rodriguez v. City of New York*, 31 N.Y.3d 312 (April 3, 2018) the Court of Appeals discussed what a plaintiff needs to show in order to prevail on a motion for partial summary judgment. The Court held that neither the relevant CPLR provision for summary judgment, 3212 nor Article 14 of the CPLR, which codifies comparative fault in New York State, requires that plaintiff prove two things: 1. *Prima facie* that defendant is liable, and 2. That plaintiff is free from negligence or comparative fault. The Court held that a plaintiff need only show *prima facie* proof of defendant's negligence. There was a vigorous dissent and the Court was split 4-3. Understandably, the defense bar was concerned since the decision would effectively take the issue of defendant's fault out of a jury's hands in a larger amount of cases as juries need not consider whether defendant was negligent and would be instructed that defendant had already been found liable. It does not, however, do away with charging a jury on the issue of plaintiff's comparative negligence. As is often argued, motions for summary judgment promote judicial economy, narrow the issues and cut out unnecessary, costly and prolonged litigation. In the context of a partial summary judgment, the plaintiff seeks to establish liability against the defendant as a matter of law, by doing so, the plaintiff ensures that a jury must find some liability against the defendant, which very often means an automatic monetary award.

One year after *Rodriguez*, it is worthwhile to review the appellate court cases that relied in some form on *Rodriguez* to fashion their decisions. We will explore what arguments the defendants used to oppose the granting of summary judgment and also what the courts indicate *Rodriguez* means. There are thirty-two appellate cases which cite to *Rodriguez* in New York State. Out of the thirty-two cases, the case distribution reveals that the Second Department has cited *Rodriguez* in twenty cases. The First Department has cited to *Rodriguez* in eight cases. The Fourth Department cited to the case in only three decisions, while the Third Department cited to it only once.

Out of the thirty-two cases, an overwhelming, twenty-eight cases involved motor vehicle accidents, pedestrian knock down accidents

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or motorcycle accidents. Two cases involved Labor Law 240 or 241(6) type accidents, one involved a trip and fall premises accident and one involved a farm animal running onto the road.

The motor vehicle accidents mostly involved rear-end collisions, followed by intersection/stop sign collisions, change lane cases, left turn cases and pedestrian knockdown cases. The cases involving rear end collisions are usually prone to summary judgment outright and the appellate courts' granting summary judgment in these type of cases is not novel. The appellate courts did emphasize that the defendant cannot raise a triable issue of fact by arguing that even though plaintiff met *prima facie* entitlement to judgment as a matter of law, the plaintiff failed to prove that it was free from comparative negligence for the happening of the accident. *See Buchanan v. Keller*, 2019 N.Y. App. Div. LEXIS 1371 (2d Dep't, Feb. 27, 2019) involving a rear end collision; *Silverio v. Ford Motor Co.*, 90 N.Y.S.3d 894 (1st Dep't, January 29, 2019) defendant changed lanes into path of plaintiff; *Kraynova v. Lowy*, 166 A.D.3d 600 (2d Dep't 2018) involving a stop sign.

Despite the fact that the plaintiff does not have to demonstrate freedom from comparative negligence in order to be granted summary judgment, the progeny that sprung from *Rodriguez* is replete with instances where triable issues of fact were raised. In *Gute v. Grease Kleeners, Inc.*, 2019 N.Y. App. Div. LEXIS 1613 (2d Dep't, March 6, 2019), the court found triable issues of fact due to non-negligent explanation by defendant that he was faced with an emergency situation. Similarly, in *Adam v. Catania*, 2019 N.Y. App. Div. LEXIS 1604 (2d Dep't, March 6, 2019), a triable issue of fact was noted because the police report raised questions as to whether the defendant was negligent. The courts also found triable issues of fact involving a dispute as to who disobeyed a red light at an intersection, *Duvalsaint v. Yupe-Garcia*, 2019 N.Y. App. Div. LEXIS 1202 (2d Dep't, February 20, 2019). However, the fact that plaintiff was speeding when defendant made a left turn does not raise a triable issue of fact as speeding goes to comparative negligence. *Ming-Fai Jon v. Wager*, 165 A.D.3d 1253 (2d Dep't 2018).

The lone premises case is *Derix v. Port Auth. of N.Y. & N.J.*, 162 A.D.3d 522 (1st Dep't, June 19, 2018). In *Derix*, plaintiff tripped and fell over a yellow plastic chain that was on the floor. The First Department found that the defendant either created or had notice of the condition. Of note, the First Department held that even though the condition may have been open and obvious, this does not create a triable issue of fact as it only goes towards the issue of comparative negligence. Plaintiff was thus entitled to partial summary judgment.

The two Labor Law cases that cited to *Rodriguez* are *Quizhpi v. South Queens Boys & Girls Club, Inc.*, 166 A.D.3d 683 (2d Dep't 2018) and *Allington v. Templeton Found*, 167 A.D.3d 1437 (4th Dep't 2018). In both cases, plaintiff moved for summary judgment premised on Labor Law Sections 240 and 241(6). In *Quizhpi*, the Second Department stated that plaintiff was entitled to summary judgment on the issue of a violation of an industrial code pursuant to 241(6) and added that this is despite the fact that there may be issues of fact as to plaintiff's comparative negligence. In *Allington*, the court stated that defendant failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident.

Learning Point: The appellate cases which cite to *Rodriguez* have taught us that the courts will no longer consider comparative negligence as a basis for finding triable issues of fact, such as a condition which is open and obvious or that plaintiff was not paying attention. The cases also indicated that a plaintiff does not need to show that s/he is free from culpable conduct. On the other hand, in order for the defendant to raise a triable issue of fact, the defendant will likely have to demonstrate that it was free from negligence, that the plaintiff was the sole proximate cause of the accident or that it was free from negligence and that a co-defendant may be the cause of the

accident. The cases also seem to indicate that in the motor vehicle accident context, the traditional defenses are still applicable, such as arguing that the other party had the red light, or showing that there was an emergency situation, however, culpable conduct on the part of a plaintiff, such as speeding will not bar summary judgment if the defendant violated a traffic law. Similarly, in the premises accident context, the defendant can still rely on the traditional defenses such as lack of notice to raise a triable issue of fact. Finally, in the labor law context arguing that triable issues of fact exist as to allegations of industrial code, 241(6) violations due to comparative negligence will not prevent summary judgment, and the defendant will now have to argue sole proximate cause or recalcitrant worker in order to raise a triable issue of fact. The appellate cases have also revealed that many of the traditional defenses still apply and will raise triable issues of fact. ♦

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EMPLOYMENT LAW

SUMMARY JUDGMENT APPROPRIATE WHERE INSUFFICIENT EVIDENCE TO INFER DISCRIMINATION

Drey Andrade v. Lego Systems, Inc., AC 41322 (Conn. App. 2019)

Plaintiff sued defendant alleging he was terminated based on his sexual orientation. Plaintiff had been informed by his supervisor that his performance with respect to his communication skills, collaboration, and trust building with his manager and employees needed improvement. A performance plan was prepared. In subsequent performance reviews, concerns regarding his job performance persisted and he was offered a transfer to another position where he would be free of managing other employees. Another performance plan was prepared, which plaintiff did not satisfactorily address, and he was terminated. The trial court granted defendant summary judgment. ***Held:*** Affirmed. There was insufficient evidence from which a reasonable jury could infer discrimination from the circumstances surrounding the termination.

PARTY WHO RECEIVED INJUNCTIVE RELIEF IS A PREVAILING PARTY

ERHM Orthopedics, Inc. v. Edwards, 2019 Fla. App. LEXIS 129 (Fla.)

Company selling surgical products entered employment agreement with defendant under which he could not compete where the company did business. The agreement also provided that the prevailing party in a lawsuit was entitled to attorney's fees. Defendant resigned and began working for competitor in the same market. Company sued and won temporary injunction against defendant, but its request for attorneys' fees was denied. ***Held:*** Reversed. Company clearly prevailed on a significant issue in the litigation, entitling it to the fees per the agreement.

EVIDENCE

UNSUBSCRIBED, UNSWORN AFFIDAVIT AND UNAUTHENTICATED POLICE REPORTS INSUFFICIENT TO OPPOSE SUMMARY JUDGMENT

Francis Anderson v. Charles Dike, et. al., AC 40799 (Conn. App. 2019)

Plaintiff patient sued defendant hospital employees after one allegedly closed a door on his hand and intentionally kicked his hand into the door. Plaintiff claimed employees' conduct violated the patients' bill of rights. The trial court granted summary judgment to defendants. ***Held:*** Affirmed. Plaintiff's affidavit opposing summary judgment could not be considered since it was neither subscribed nor sworn to before a notary. Also, the police reports attached to the plaintiff's opposition were improper because they were not authenticated.

DEFENDANT'S PRIOR SAFETY EXPERIENCE AND PLAINTIFF'S PRIOR WORK HISTORY PROPERLY ADMISSIBLE IN NEGLIGENCE CASE

Zaida Melendez v. Spin Cycle Laundromat, LLC, AC 41410 (Conn. App. 2019)

Plaintiff filed negligence lawsuit after a table on which she was folding clothes in the defendant's laundromat collapsed on her foot. The jury returned a defense verdict. Plaintiff filed a motion to set aside the verdict, claiming the trial court improperly allowed the defendant to present evidence of the condition of the table prior to the incident, and to question her regarding her disability and prior work history. The trial court denied the motion. Plaintiff appealed. ***Held:*** Affirmed. Evidence regarding the defendant's prior safety experience with laundry folding tables and the plaintiff's prior work history were relevant to issues of liability and damages, and were properly admitted into evidence.

FIRST-PARTY PROPERTY

CAUSATION OF DAMAGES MAY BE HEARD BY COURT AS TO COVERAGE OR APPRAISERS AS TO LOSS AMOUNT

People's Trust Ins. Co. v. Garcia, 2019 Fla. App. LEXIS 791 (Fla.)

Insurer sought to compel an appraisal. Insurer admitted coverage for property damage from roof leak but disputed cause of damage to roofing system. Trial court held issue was an amount-of-loss question for appraisers. ***Held:*** Trial court erred in denying motion to compel appraisal. Further, as the insurer did not wholly deny coverage, causation is an amount-of-loss question for the appraisal panel rather than a coverage question that can only be decided by the court.

LABOR LAW

COURT DEFERENTIAL TO REASONABLE DEPARTMENT OF LABOR INTERPRETATION OF LABOR LAW

Andryeyeva v. New York Health Care, Inc., 2019 N.Y. LEXIS 617 (N.Y.)

Plaintiffs sought certification of a class of home health care aides for alleged violations of the Labor Law based on their respective employers' failure to pay class members a required minimum wage for each hour of a 24-hour shift. Defendants relied on Department of Labor interpretation providing that employees assigned to 24-hour shifts, including home health care aides, would have up to 11 hours excluded from their compensable hours for sleep and meal breaks. ***Held:*** Department of Labor's interpretation of its own wage orders receive deferential treatment. The interpretation here was not unreasonable.

LAND USE

COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THAT OF ADMINISTRATIVE OFFICIALS

Matter of Save America's Clocks, Inc. v. City of N.Y., 2019 N.Y. LEXIS 631 (N.Y.)

Petitioners alleged that the Landmarks Preservation Commission's decision to approve the redevelopment of a historic building previously designated as a landmark was irrational and in error. ***Held:*** Reversed. Decision to close off clock tower in a historic building was not irrational. Decision was well within the discretion of the commission under the Landmarks Preservation Law, and courts lack the power to substitute their judgment for that of properly delegated administrative officials.

LEGAL MALPRACTICE

INSURER LACKS STANDING TO SUE FOR LEGAL MALPRACTICE AS LAW FIRM WAS NOT IN PRIVITY WITH INSURER

Arch Ins. Co. v. Kubicki Draper, LLP, 2019 Fla. App. LEXIS 866 (Fla.)

Insurer hired law firm to defend insured, then sued law firm for malpractice after suit settled. Insurer alleged law firm's delayed statute of limitations defense resulted in avoidable large settlement. Law firm successfully argued to trial court that they were not in privity, and insurer lacked standing to sue. Insurer appealed. ***Held:*** The law firm was not in privity with the insurer and the insurer was not an intended third party beneficiary of the relationship between the law firm and the insured. Insurer lacks standing to sue firm.

LIMITATION OF ACTIONS

SIX-YEAR STATUTE OF REPOSE IN CONSTRUCTION SUITS APPLIES TO ASBESTOS CLAIMS

Stearns v. Met. Life Ins. Co., 2019 Mass. LEXIS 105 (Mass.)

Decedent died of mesothelioma after decades-earlier exposure to asbestos during plant construction. ***Held:*** The six-year statute of repose applies

to negligence actions arising out of the design, planning, construction, or administration of real property improvements. Its purpose was to eliminate the possibility of liability long after work had been completed. The Legislature intended an ironclad rule. No exception existed for diseases with extended latency or for defendants in control of an improvement at the time of an incident.

PROCEDURAL CONDITIONS PRECEDENT DO NOT THWART SAVINGS STATUTE

U.S. Bank Nat'l. Ass'n. v. DLJ Mtge. Capital, Inc., 2019 N.Y. LEXIS 160 (N.Y.)

Trustee of securities trust sued seller for alleged breach of representations and warranties. Seller obtained dismissal, without prejudice, of complaint due to condition precedent in contract requiring notification. Seller appealed, arguing dismissal should be with prejudice. ***Held:*** CPLR 205, which allows a subsequent action within six months of a non-merits dismissal, applied. Failure to comply with a procedural condition precedent prior to the expiration of the statute of limitations does not foreclose use of CPLR 205.

MEDICAL MALPRACTICE

COURT LOOKED TO COMPLAINT ALLEGATIONS TO DETERMINE TYPE OF HEALTH CARE PROVIDER THAT CAN OPINE AS TO THE NEGLIGENCE ALLEGED

Caron v. Conn. Pathology Grp., P.C., 187 Conn. App. 555, 2019 Conn. App. LEXIS 33

Plaintiffs sued in medical malpractice for a false positive cancer diagnosis by anatomic pathologists and submitted an opinion letter from a board certified clinical pathologist in effort to comply with statute. Defendant successfully filed a motion to dismiss due to lack of personal jurisdiction, arguing that plaintiffs had to obtain an opinion letter from an anatomic pathologist. ***Held on appeal:*** The trial court properly interpreted plaintiffs' complaint, which alleged negligence by pathologists in their capacity as anatomic pathologists. The statute requires an opinion letter from a similar health care provider.

STATUTE LITERALLY REQUIRES EXPERT BE IN SAME SPECIALTY AS DEFENDANT

Riggenbach v. Rhodes, 2019 Fla. App. LEXIS 946 (Fl.)

Petitioners sought certiorari review of an order denying their motion to dismiss a medical malpractice lawsuit as the pre-suit written expert report from a physician specializing in plastic surgery offered opinions regarding the medical care provided by an orthopedic surgeon. ***Held:*** Reversed. The "same specialty" requirement is to be taken literally and is not synonymous with a physician of different specialty who provided treatment to the same area of the body.

MUNICIPAL LAW

EXTERNAL STAIRS CONSIDERED "SIDEWALK" UNDER PRIOR NOTICE STATUTE

Hinton v. Village of Pulaski, 2019 N.Y. LEXIS 265 (N.Y.)

Plaintiff sued Village after falling down exterior stairway connecting public road to municipal parking lot. Village had not received pre-suit written notice of the alleged defect and the Village Code provided that such notice was necessary for liability to be possible with respect to bridges, roads and sidewalks. Village was granted summary judgment on this basis, which was affirmed by the intermediate appellate court. ***Held:*** Affirmed. A stairway may be classified as a sidewalk for purposes of a prior written notice statute if it functionally fulfills the same purpose that a standard sidewalk would serve.

NEGLIGENCE

LACK OF HANDRAIL ALONG STAIRWELL OPEN AND OBVIOUS

Cika-Heschmeyer v. Young, 2019 Ohio App. LEXIS 510 (Ohio App.)

While inspecting a home for purchase, visitor fell down steps leading to basement. ***Held:*** The lack of a handrail was open and obvious. Visitor had previously viewed the house, which imputed knowledge. It was irrelevant that she could not remember whether a handrail was then missing. A violation of residential code requirements is not negligence per se. As such, the open-and-obvious doctrine may be used as a defense.

AMERICAN LEGION IMMUNE FROM LIABILITY FOR INJURY DURING VILLAGE FESTIVAL

Langenhahn v. W. Bend Mut. Ins. Co., 2019 Wisc. App. LEXIS 76 (Wis. App.)

Leaving village festival, patron tripped on barricade near public crosswalk. ***Held:*** As the festival organizer, American Legion occupied the land and was immune under the recreational immunity statute. The crosswalk did not need to be completely withdrawn from public use to be part of the recreational activity. Patron was engaged in recreational activity at the time of injury. She was leaving a school reunion—the equivalent of picnicking under the statute. Walking to or from an immune activity is itself a recreational activity.

PROXIMATE CAUSE

ACT SETTING CHAIN OF EVENTS IN MOTION WAS SUFFICIENT PROXIMATE CAUSE

Camila Coppedge v. Curtis Travis, AC 40787 (Conn. App. 2019)

Defendant's dog bounded towards plaintiff, startling her. She tripped and fell trying to avoid dog's advance. Judgment in her favor. Defendant appealed arguing: 1) the trial court did not use the words "mischievous" or "vicious" to describe the dog's behavior; and 2) proximate cause could not be established without evidence how far the dog was from plaintiff when she fell. ***Held:*** Affirmed. The "exuberant" dog "bounded" toward the motel where plaintiff was, frightening her, indicating the dog's actions were not passive, innocent or involuntary. Further, it was reasonable to find that the dog charging toward plaintiff set in motion a chain of events that brought about her injuries. Finally, plaintiff's testimony that dog stood over her after she fell supported inference dog was close enough to be proximate cause of fall.

SUBROGATION/ LOSS RECOVERY

TENANT NOT IMPLIED CO-INSURED UNDER POLICY OBTAINED BY LANDLORD

Zurich Am. Ins. Co. v. Puccini, LLC, 2019 Fla. App. LEXIS 1487 (Fla.)

Tenant leased restaurant space from landlord. Landlord's insurer paid landlord damages for building fire and then brought subrogation action against tenant. Tenant successfully argued they were an implied co-insured under policy. Insurer appealed. ***Held:*** Tenant was not implied co-insured. ***The lease:*** held tenant liable for damage caused by its negligence, required tenant to obtain fire insurance, included provisions holding landlord harmless, and tenant agreed to name landlord as additional insured. Parties clearly did not intend to shift risk of loss for tenant's negligence to landlord's insurer.

COLLATERAL SOURCE RULE DOES NOT BAR OFFSET FOR REMEDIATION EXPENSES PAID BY TORTFEASOR'S INSURER

Bunker Hill Ins. Co. v. G. A. Williams & Sons, Inc., 2018 Mass. App. LEXIS 179 (Mass. App.)

After homeowner's insurer obtained subrogation judgment against tank installer for oil spill, installer's insurer sought offset for its prior remediation payment. ***Held:*** Collateral source rule did not bar the offset. The

purpose of the rule is tort deterrence. A tortfeasor may not be benefitted by an injured person's purchase of insurance or receipt of gifts. But because the tank installer purchased the policy that paid remediation expenses, the offset was permissible.

TRIAL PRACTICE

FAILURE TO OBJECT IS FUNCTIONAL EQUIVALENT OF FAILURE TO REQUEST

Ussbasy Garcia v. Robert Cohen, AC 41079 (Conn. App. 2019)

Plaintiff filed negligence lawsuit after she fell on the rear exterior stairs of a premises owned by defendants. Plaintiff requested to charge the jury and proposed jury interrogatories. The trial court declined to use the proposed charge and did not submit the interrogatories to the jury, which returned a general verdict for the defendants. Plaintiff appealed. ***Held:*** Affirmed. Plaintiff's failure to object when the trial court did not submit her interrogatories to the jury was a functional equivalent of a failure to request the interrogatories.

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