



CM EAST COAST **REPORT**

of Recent Decisions

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And Vandalism**

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Court Declares Trial Court
Erroneously Exceeded
Authority Under Unfair
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**CM's Spotlight On Diversity
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Coverage For Mischief And Vandalism Applies Only To Human Conduct

by Dawn Brehony

The United States District Court for the Western District of Pennsylvania held that acts of raccoons in causing damage to a dwelling cannot be considered “vandalism and mischief” so as to fall within the coverage afforded under a specified perils dwelling policy.

In *Capital Flip, LLC v. American Modern Select Ins. Co.*, 2:19-cv-180 (W.D.PA. 2019, Sept. 19, 2019), in rejecting an insured’s argument that raccoon damage fell within a the policy’s coverage for “vandalism and malicious mischief,” Judge William A. Stickman agreed with the insurer that raccoons cannot, as a matter of law, engage in vandalism or perpetrate mischief—much less with malice.

Plaintiff Capital Flip, LLC (“Capital Flip”) discovered that raccoons had entered a dwelling it owned in the Pittsburgh area, causing substantial damage to the interior. The property was insured by a dwelling policy issued by American Modern Select Insurance Company (“American Modern”). The dwelling policy offered coverage for certain “perils insured against,” including “vandalism and mischief.” *Id.* at *2.

Capital Flip made a claim under the dwelling policy, positing that the damage caused by the raccoons fell within the peril of “vandalism

and malicious mischief.” *Id.* at *2. American Modern denied the claim on the basis that animal damage to dwellings is not covered in the list of perils and, as such, there is no coverage for the damage caused by the raccoons. *Id.* at *3. Thereafter, Capital Flip brought suit against American Modern for breach of contract and bad faith, and American Modern subsequently filed a motion to dismiss. *Id.*

In opposition to American Modern’s motion to dismiss, Capital Flip argued that the policy is ambiguous because it does not specifically define “vandalism” or “malicious mischief,” and because the terms are undefined, they may include damage caused by raccoons and other animals. *Id.*

Rejecting Capital Flip’s argument, the Court explained that it is well-established that a term is not necessarily ambiguous if an insurance policy does not include its specific definition. *Id.* at *5-6. The Court looks to both dictionary definitions and specific legal usage of the terms to show that they are inapplicable to animal behavior. *Id.* at *6. The Court further looked to the Pennsylvania Crimes Codes, noting that the concepts of vandalism and common law malicious mischief are intertwined in the offense of Criminal Mischief, which requires a human actor. *Id.* at *7. The Court



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explained, “animals are subject only to the laws of nature, not the Pennsylvania Crimes Code or law governing human conduct.” *Id.*

The Court further examined persuasive law from other jurisdictions on the issue, explaining that such other courts have declined to interpret the

terms “vandalism” and “malicious mischief” to encompass animal behavior holding that, as a matter of law, they can only apply to human conduct. *Id.* at *7-8.

In granting American Modern’s motion to dismiss, the District Court reasoned that raccoons and their companions in the animal kingdom cannot formulate the intent needed to engage in vandalism or malicious misconduct, noting that “animals do not have conscious agency.” *Id.* at *9. Accordingly, the Court found that based on the plain and unambiguous language of the policy, there was no coverage under the policy for the raccoon damage to the dwelling.

Learning Point: Courts continue to enforce unambiguous policy provisions declining coverage for vandalism and malicious mischief when alleged to have been caused by an animal. All the more reason to keep raccoons out of your house. ♦



A Pennsylvania Superior Court Narrows The “Business Pursuits” Exclusion To Injuries That Have A Causal Relationship To An Insured’s Duties At Work

by Ryan J. Weber

A Philadelphia Superior Court affirmed the trial court’s order denying summary judgment to the insurer, Nationwide Mutual Insurance Company (“Nationwide”), and found the “business pursuit” exclusion did not apply to an insured whose alleged injurious actions did not arise from his job at the Pennsylvania Department of Transportation (“PennDOT”). *Nationwide Mutual Insurance Company v. August W. Arnold, et al.*, 2019 Pa. Super. LEXIS 692 (July 11, 2019). The Court declined to construe the “business pursuits” exclusion so broadly that allegations with any link to an insured’s work would preclude coverage.

Nationwide issued an Umbrella Liability Policy to the insured, August W. Arnold (“Arnold”). The policy provided coverage for a claims defense of a suit against the insured resulting from an occurrence covered by the policy. The definition of occurrence under the policy included an accident which results in a personal injury caused by the insured during the policy period. The policy specifically excluded an occurrence arising out of the business pursuits or business property of an insured.

Nationwide brought this declaratory judgment action to seek relief from its obligation to defend and/or indemnify its insured, Arnold, in a separate lawsuit brought by CMC Engineering, Inc. (“CMC”) against Arnold and his attorney, Jon Pushinsky (“CMC Action”). The CMC Action arose from the unsuccessful prosecution of a *qui tam* action brought by Arnold on behalf of the United States against CMC and others where Arnold alleged that consultants who provided services to PennDOT falsified their credentials to qualify for higher pay rates. CMC then brought suit against Arnold and Pushinsky for violations of the Dragonetti Act, Abuse of Process and Intentional Interference of Contractual Relations.

Nationwide filed a motion for summary judgment which stated the “business pursuits” exclusion in Arnold’s Umbrella Policy excluded coverage for the CMC Action. Nationwide argued that the alleged actions by the insured which caused injury to CMC, namely the *qui tam* lawsuit initiated by the insured, arose from his employment at PennDOT where the insured had access to the documents and records which



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formed the basis of the *qui tam* action. The Common Pleas Court relied on the two prong test of continuity and profit motive adopted from the Third Circuit, and found the “business exclusion” did not apply and Nationwide had a duty to defend the insured in the CMC Action.

On appeal, the Pennsylvania Superior Court first examined the Complaint from the CMC Action noting “Nationwide’s duty to defend is dependent on the allegations set forth in the underlying complaint.” *Nationwide*, 2019 Pa. Super. LEXIS 692 at 3. The Court noted that in the CMC Complaint, CMC asserted that Arnold made accusations in the *qui tam* action that were false, and that Arnold’s position with PennDOT did not involve contract interpretation or billing rates which were the crux of the *qui tam* action. CMC further asserted that the PennDOT officials who were responsible for these tasks had given CMC approval.

The Superior Court next addressed Nationwide’s argument that the trial court incorrectly applied the two prong “business pursuits” exclusion test. Nationwide argued that the trial court erred by looking at the *qui tam* action itself as a business pursuit instead of Arnold’s job at PennDOT from which the alleged injury to CMC arose. The Superior Court agreed that the trial court

incorrectly applied the two prong test by characterizing the *qui tam* action as Arnold’s business pursuit. The Court found “it is clear that Arnold’s employment at PennDOT constitutes a business pursuit, as it is an activity done with the requisite continuity and profit motive.” *Id.* at *5.

The Superior Court then addressed the issue of whether Arnold’s lengthy litigation of an allegedly false *qui tam* action arose from his job at PennDOT. The Court noted that it is Nationwide’s burden to prove the applicability of the “business pursuits” exclusion and that there is not extensive case law on the subject. The Court examined the non-binding case of *Aetna Cas. And Sur. Co. v. Ericksen*, 903 F. Supp. 836 (M.D. Pa. 1995). In *Ericksen*, the Court determined that “an insurer is not liable to defend and indemnify an action wherein an injury is alleged in a complaint (1) to have been caused by the insured while the insured was engaged in his or her business, as that word is defined in the policy, and (2) to have a causal connection to the business of the insured.” *Id.* at *4. The *Ericksen* court found there was no causal connection between the insured’s statements to a newspaper regarding her colleague which caused the alleged injury and her duties and responsibilities as a professor.

The Superior Court found that much like in *Ericksen*, the actions taken by Arnold that form the basis of the CMC Complaint occurred outside of his duties and responsibilities at PennDOT. *Nationwide*, 2019 Pa. Super. LEXIS 692 at 5. The Court noted that the CMC Complaint alleged that Arnold’s responsibilities at PennDOT did not include contract interpretation or billing rates. The Court found that even though the subject matter of Arnold’s *qui tam* action concerned matters taking place at PennDOT, it does not establish a causal connection between Arnold’s professional duties and CMC’s alleged injuries. The Superior Court concluded that Arnold’s litigation of an allegedly baseless *qui tam* action against CMC did not arise out of his business pursuits. The Court determined the “business pursuits” exclusion does not apply and Nationwide has a duty to defend Arnold in the CMC Action.

Learning Point: For the “business pursuits” exclusion to apply, the alleged injury caused by the insured must have a causal relationship to the duties and responsibilities of his job. It is not enough that the alleged injury has some nexus to the insured’s work. ♦

Pennsylvania Superior Court Declares That The Trial Court Erroneously Exceeded Its Authority Under The Unfair Trade Practice And Consumer Protection Law When It Awarded Plaintiffs Quadruple Damages Under The Unfair Trade Practice And Consumer Protection Law

by *Yesy Sanchez*

The Superior Court of Pennsylvania recently reversed a ruling on appeal that awarded plaintiffs restitution damages in addition to treble damages under the Unfair Trade Practice and Consumer Protection Law (“UTPCPL”).

In *Richards v. Ameriprise Fin., Inc.*, 2019 PA Super 254 (2019), the Superior Court held that under the UTPCPL statute the courts were granted discretion to award plaintiffs up to three times their actual damages, in addition to costs and attorney’s fees, and that the trial court effectively awarded quadruple damages when it awarded the insured restitution damages equal to the actual damages, in addition to treble damages. As such, the trial court exceeded its authority under the UTPCPL.

James G. Richards and Helen Richards (the “Richards”) claimed damages against Ameriprise Financial, Inc., Ameriprise Financial Services, Inc., Riversource Life Insurance Company, and Thomas A. Bouchard (collectively “Ameriprise”) in the amount of \$15,053.59 plus interest resulting from a lump sum prepayment paid out to Ameriprise,

purportedly intended to prevent a universal life policy from lapsing.

In 1994, the Richards purchased a \$100,000 universal life insurance policy intended to avoid a reduction in income should Mr. Richards die before Mrs. Richards. Ameriprise represented that the annual premiums would remain at \$6,000, or \$500 per month. The policy was purchased and the resulting application and policy were consistent with these payment terms. In 2000, Ameriprise informed the Richards that a \$15,053.59 prepayment was required, in addition to the \$500 monthly premium, in order to avoid a lapse in the policy. The Richards issued the prepayment on top of their standard monthly payment. In 2005, Mr. Richards passed and the \$100,000 benefit was paid to Mrs. Richards.

In July, 2008, the Richards filed a lawsuit in Allegheny County Court of Common Pleas against Ameriprise alleging negligent and fraudulent misrepresentation, breach of fiduciary duty, negligent supervision, and violation of the UTPCPL. The breach of fiduciary duty and negligent supervision claims were dismissed via



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summary judgment. Following a three day non-jury trial, the court awarded \$102,019.32 in liability damages, based on the UTPCPL claim only. The award consisted of actual damages in the amount \$34,006.44, which represented the lump sum payment plus interest, and treble damages. The total award by the trial court was \$264,691.40 which also included \$50,000 in punitive damages and \$112,672.08 in attorney's fees and costs.

The Richards filed a motion to correct the amount of the judgment and verdict arguing that Ameriprise failed to include \$34,006.44 in addition to the treble damages of \$102,019.32 for a total of \$136,025.75 in liability damages. The trial court denied Plaintiff's motion without explanation. An appeal and cross appeal were filed. On appeal, the Superior Court reversed the award of punitive damages, affirmed the remainder of the judgment, and remanded the case to the trial court to recalculate the damages. On remand, the Richards once again sought to add \$34,006.44 in restitution damages to the treble damages already awarded in the amount \$102,019.32.

In support, the Richards cited to the Superior Court's Opinion referencing their award of "\$34,006.44 in restitution *and* \$102,019.32 in treble damages." (Emphasis added). The trial court granted the Richards' motion, and amended the jury verdict and judgment to include the additional \$34,006.44, increasing the liability damages to \$136,025.76. Ameriprise appealed the amended verdict asserting that the trial court erred on remand by awarding the Richards quadruple damages under the UTPCPL. Ameriprise also appealed the portion of the amended verdict and judgment increasing the attorney's fees awarded to the Richards.

In the instant appeal, the Richards argued that restitution and treble damages were both allowed under the UTPCPL. In support of their argument, the Richards cited jury verdicts awarding restitution, and treble damages under UTPCPL. However, Ameriprise successfully distinguished these cases by pointing out that the restitution award constituted damages under a separate non-UTPCPL claim and was not awarded under the UTPCPL. Ameriprise also asserted that Plaintiffs

only recovered under the UTPCPL claim and that their damages were limited to treble damages.

The Court held that the trial court exceeded its discretion under the UTPCPL by awarding restitution damages plus treble damages. As the Court explained, the UTPCPL grants the courts discretion to award plaintiff's up to three times their actual damages. The courts may also provide additional relief as they deem "necessary or proper," such as costs and attorney's fees. The Court noted that the trial court did not find any liability under the Richards' other causes of action, and as such, their damages were limited to treble damages under the UTPCPL.

Learning Point: Carriers must follow the policy's terms, including those pertaining to payment, otherwise the courts may seek to award the highest damages. While the Richards trial court's attempt to award quadruple damages under the UTPCPL was reversed, the carrier was still required to pay Plaintiffs a substantial sum as compared to Plaintiffs' actual damages. If prepayment is required on a policy then it must be clearly stated in the terms of the policy. ♦



Connecticut Supreme Court Accepts The “Alternative Liability” Doctrine Shifting Burden Of Proof In Negligence Action To Defendants When Plaintiff Cannot Prove Which Caused The Harm But Each One Could Have

by Elizabeth Zakheim

The Connecticut Supreme Court adopted the alternative liability doctrine in *Connecticut Interlocal Risk Management Agency v. Jackson*. 2019 Conn. LEXIS 230 [Sep. 1, 2019, No. 19946]. The Connecticut Supreme Court then pulled the matter from the appellate court, as a case of first impression, after the trial court ruled against Plaintiff and granted summary judgment to Defendants, saying that adopting new theories of liability was the role of appellate courts.

A fire destroyed a privately-owned mill and a town-owned aboveground sewage line that was in the mill’s basement. Plaintiff subrogee Connecticut Interlocal Risk Management Agency (“Plaintiff”) compensated its insured, the Town of Sommers, for the aboveground sewage line then commenced a negligence action. The fire was caused by the careless discard of smoking materials when, in the middle of the night, three (then) teenagers (“Defendants”) walked around inside the mill drinking and smoking, then flicking their unextinguished cigarette butts on its wooden floors. About 35 minutes after the Defendants left the mill, at 2:20 a.m., the structure was engulfed in flames. The trial court granted

summary judgment to Defendants finding that Plaintiff did not prove causation because it did not know which Defendant actually caused the fire, and refused Plaintiff’s request to consider the alternative liability doctrine as outside the scope of its authority; Plaintiff appealed.

The alternative liability doctrine, first articulated in California’s *Summers v. Tice* (33 Cal. 2d 80, 85-87, 199 P.2d 1) is accepted in some form by most jurisdictions. The Second Restatement of Torts §433 B (3) explains that alternative liability applies when two or more engage in tortious conduct and the plaintiff has been able to prove (by proving duty, breach, causation and damages) that he was harmed by the tortious acts, but it is unclear which one of the tortious actors actually caused the harm. The result is that a court then transfers the burden of proof from the plaintiff to each of the wrongful actors to prove that its actions did not cause the harm.

Shifting the burden of proof from the plaintiff to the defendants using alternative liability doctrine makes it an exception, the rationale for which is so that the innocent plaintiff “is not deprived of his right to redress.” *Id.* at *12-13. The courts state that when



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the plaintiff was harmed by others' negligence, it is equitable to require the wrongdoers to exculpate themselves.

As an exception created in the interests of justice, the alternative liability doctrine places rigorous requirements on the plaintiff before the court will shift the burden of proof to the defendants. The plaintiff must prove that all of the possible wrongdoers were named as defendants in the action. The plaintiff must prove all four elements in a claim of negligence as against the defendants (duty, breach, damages and causation) establishing that each defendant acted negligently. And, the plaintiff must prove that the negligent actions of the wrongdoers (all of whom were named as defendants) were sufficiently similar and simultaneous.

In *Connecticut Interlocal Risk Management Agency v. Jackson*, Plaintiff proved that the action was brought against all possible wrongdoers, who were all acting at the same time while in the mill, as well as duty, breach and damages, and causation in that the conduct of each Defendant in carelessly discarding his cigarette butts could have on his own caused the fire. However, Plaintiff could not prove which specific Defendant's negligence ultimately caused the fire. On appeal, the Connecticut Supreme Court adopted the alternative liability exception as a "fairer, more sensible alternative" to leaving a Plaintiff

without any avenue to be made whole. *Id.* at *16-17. The Court reiterated that a plaintiff must prove that each potential defendant was named in the action, and each defendant by his negligence alone could have caused the harm, as well as the defendants' duty, breach, causation and damages. The plaintiff does not need to prove that s/he is completely faultless. Once the burden shifts to the defendants, in Connecticut, if the defendants are unable to prove that they are not liable to the plaintiff, then the general apportionment scheme will prevail and each defendant will have to pay his proportionate share (the plaintiff cannot choose to hold one defendant liable for the entirety of the damages).

Learning Point: In Connecticut, a negligence claim can now move forward and may prove successful even if the plaintiff cannot narrow the field of wrongdoers to one responsible defendant by shifting the burden of proof to all defendants. However, before the burden of proof is shifted to the defendants, the plaintiff must first prove: that all possible wrongdoers were named as defendants; all the defendants acted largely simultaneously and similarly; and all the elements of negligence: duty, breach, injury and causation (in that each defendant's actions could have caused the harm suffered). ♦

New Jersey Appellate Division Upholds Subrogation Waiver Provisions In AIA Construction Contract

by *Kristian E. Alfonso*

The New Jersey Appellate Division upheld a trial court decision construing the subrogation waiver provision in a form construction contract from the American Institute of Architects (“AIA”) against ACE American Insurance Company’s (“ACE”) right to subrogate. *See ACE American Insurance Co. v. American Medical Plumbing, Inc.*, Docket No. A-5395-16T4 (App. Div. Apr. 4, 2019).

In March, 2012, ACE’s Insured, Equinox Development Corporation, contracted with Grace Construction Management Company, LLC (“Grace”) to building the core and shell of a new health club. Grace subcontracted with American Medical Plumbing, Inc. (“AMP”) to perform the plumbing. In April, 2013, after Grace’s work under the contract was complete, a water main broke and flooded the new health club. ACE paid its Insured’s claim of approximately \$1.2 million and sought to subrogate against the plumbing subcontractor, AMP.

The AIA contract at issue in the litigation was a form A201-2007 General Conditions of the Contract for Construction (the “Contract”). The Contract contained two relevant

provisions to the issue of waiver of subrogation. Section 11.3.5 stated that:

If during the Project construction period the Owner insures properties, real or person or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment, property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

Similarly, Section 11.3.7 provided:

The Owner and Contractor waive all rights against . . . each other and any of their subcontractors, agents and employees, each of the other . . . for damages caused by fire or other causes of loss to



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the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary.

The trial court granted AMP's Motion for Summary Judgment based on the waiver of subrogation provisions in the Contract. On appeal, ACE argued that the subrogation waiver in Section 11.3.7 had a spatial and temporal limit. Specifically, ACE argued that Section 11.3.7 did not apply to an adjacent property and was limited to claims arising before the construction was complete. ACE underscored that most of the damage sustained was to furnishing rather than the "core and shell" discussed in the Contract, and that the claim arose after the work was completed. In terms of Section

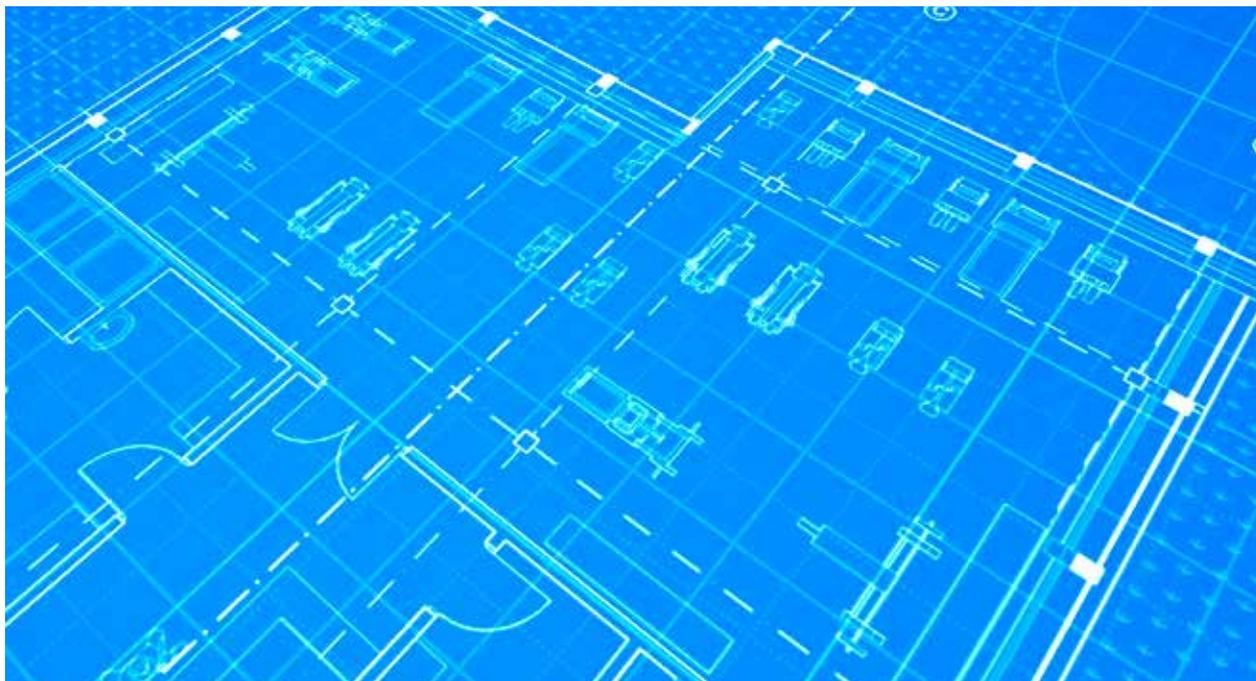
11.3.5, ACE argued that it did not apply because its insurance policy was limited to the work being performed during the construction period.

The Appellate Division was unpersuaded by ACE's arguments and affirmed the trial court's decision. The Appellate Division opined that, "ACE's blanket all-risk policy fell within both categories of coverage subject to section 11.3.7.... Since the all-risk coverage both satisfied A201's insurance requirement and was 'applicable to the Work,' section 11.3.7 waived all claims for damages 'to the extent covered' by the policy." The Court also noted that, "the evident purpose of section 11.3.5 is to preserve the subrogation waiver for post-completion damages."

In addition, the Court held that ACE's spatial and temporal limit arguments must fail. The temporal

limit failed because, "by its terms, the subrogation waiver under section 11.3.7 also continues after completion of construction if the policy that satisfied 11.3.7 remains in force." The Court continued, "nor does section 11.3.7 imply a temporal limitation. Where an owner chooses to continue a policy that both satisfied and exceeded the coverage required by section 11.3, the subrogation waiver continues, too." The Court concluded that, "together, the two provisions ensure a seamless waiver that shields the contracting parties from suit by subrogees."

Learning Point: New Jersey Courts will construe subrogation waivers in AIA contracts to work concurrently to waive subrogation. ♦



Third Department Addresses Retroactive Application Of Amendment To Workers' Compensation Law Involving Permanent Partial Disability And Labor Market Attachment

by *Ian T. Williamson*

In the *Matter of the Claim of Theresa Scott v. Visiting Nurses Home Care, at al.*, 2019 NY Slip Op 04259 (App. Div., 3d Dept., May 30, 2019), the Third Department was asked to determine whether a claimant could reap the retroactive benefit of a 2017 amendment to Workers' Compensation Law §15(3)(w) which allowed claimants to receive compensation in cases of partial disability without having to prove they are looking for work at time of disability classification. In 2016, the Workers' Compensation Board (the "Board") had previously found that the claimant in question was not entitled to an award as she was not attached to the labor market and, in fact, had voluntarily withdrawn from it. The Third Department affirmed the decision of the Board, which ruled that claimant was required to demonstrate an ongoing attachment to the labor market and declined to reinstate her award.

The claimant, Theresa Scott, had an established claim for injuries to her head and neck resulting from a 1993 accident. She was classified in 1998 as having a permanent partial disability and received continuing awards based upon her reduced wage-earning capacity. In 2014, the

employer's Workers' Compensation carrier moved to reopen the claim on the issue of labor market attachment, and argued that the claimant's post-classification reduction in wage-earning capacity was due to her own failure to pursue job leads. The claim was reopened by the Board and at a hearing on December 29, 2015, a Workers' Compensation Law Judge found that the claimant failed to remain attached to the labor market by failing to search for work, or participate in job training and placement services. By decision filed on June 27, 2016, the Board agreed, finding that claimant had failed to demonstrate any continued attachment to the labor market after the issue was raised, and that she had voluntarily withdrawn from the labor market effective as of her last hearing date, December 29, 2015.

Effective April, 2017, Workers' Compensation Law §15(3)(w) was amended to provide that in certain cases of permanent partial disability, "compensation . . . shall be payable during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor



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market.” *Matter of O’Donnell v. Erie County*, 162 A.D.3d 1278, 1280 (2018), *lv granted*, 32 N.Y.3d 907 (2018). This amendment serves to relieve certain permanent partial disability claimants from the need to demonstrate a continued attachment to the labor market, as previously required, in order to be entitled to wage replacement benefits. *Matter of Zamora v. New York Neurologic Assoc.*, 19 N.Y.3d 186, 191 (2012).

The Third Department stated that because the proper meaning and application of the added statutory phrase—“entitled to benefits at the time of classification”—is ambiguous, and the legislation does not contain a clear retroactivity provision, it is necessary to examine the legislative history to ascertain the legislative intent. *Matter of Shannon*, 25 N.Y.3d 345, 351 (2015). The Third Department further stated that the effective date of the legislation is a separate question from whether the statute should apply to claims and rights then in existence. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998).

Although the amendment does not specifically state that it applies to claimants classified as permanently partially disabled prior to its effective date, the legislative history supports this interpretation and deserves deference. *Matter of O’Donnell v. Erie County*, 162 A.D.3d 1280. The Court recognized that there is still an implicit limit to retroactive

application of the amendment, as there are “different degrees of retroactivity.” *Becker v. Huss Co.*, 43 N.Y.2d 527, 540 (1978). So, the amendment can apply in some cases of permanent partial disability, relieving claimants of the obligation to show market attachment. In other cases, depending on the circumstances, it may not work in claimants’ favor.

To put it in clearer perspective, in *Matter of O’Donnell*, the injured claimant retired from her position following an injury and was classified as having a permanent partial disability. Her retirement was deemed to have been an involuntary withdrawal from the labor market. At the time the 2017 amendment went into effect, there had been no final Board determination regarding her attachment to the labor market. The Board ultimately applied the 2017 amendment to the claimant’s pending case and concluded that she was not required to demonstrate an attachment to the labor market. In *Matter of O’Donnell*, the Third Department found that “the amendment was clearly intended to apply to claimants, such as O’Donnell, who have involuntarily withdrawn from the labor market and were entitled to receive wage replacement benefits having been classified with a permanent partial disability.”

The Third Department noted that in December, 2016, four (4) months before the 2017 amendment went into effect—the Board had finally

determined, based on then-governing precedent, that the claimant was required to but had not remained attached to the labor market and had voluntarily withdrawn, suspending her award until she demonstrated such attachment. Of significant importance, the Third Department noted that the Governor’s Bill Jacket for the legislation contained a letter from the Board’s counsel summarizing the various amendments to the Workers’ Compensation Law that were included. On the issue of retroactivity, counsel’s letter states that “[t]his amendment . . . affects previously decided cases in which there has not been a finding that the claimant had voluntarily removed him[self] or herself from the labor market at the time of classification. Here, there had been a Board finding of voluntary withdrawal and, therefore, retroactivity was not extended.

Learning Point: It is interesting to note that most recently, the Third Department upheld the holding of *Matter of Scott*, in the case of *Matter of Pryer v. Incorporated Village of Hempstead* (2019 NY Slip Op 06561, September 12, 2019), reiterating the Court’s position that claimants will not be allowed to benefit from the 2017 amendment absent a bona fide showing that s/he remains attached to the labor market. ♦

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Spotlight On Clausen Miller's Diversity And Inclusion Initiatives



Clausen Miller's Board of Directors is doubling down on its commitment to advance the diversity and inclusion values of the firm. The Board recently announced the goal that by 2021, CM will enjoy a deserved national reputation as a firm devoted to diversity and inclusion, earned by recognized improvements in every rank and category of the firm. While CM has long been committed, and significant progress has been made, CM is striving to move the needle more.

In furtherance of these goals, the Board recently named Clausen Miller's first Chief Diversity Officer, Shareholder

and Director Paige M. Neel. Paige recently sat down with CM Report staff to speak about her mission of expanding Clausen Miller's diversity and inclusion efforts.

CM Report: Paige, tell us about some of the advances in diversity and inclusion at Clausen Miller.

Paige Neel: Clausen is fully committed to recruit, hire, develop, retain, and promote the best attorneys and staff at all levels—regardless of race, color, ethnicity, gender, religion, age, LGBTQ identification, marital status, disability, military background or viewpoint. Here at Clausen, we are lucky because

our senior leaders prioritize diversity. When companies encourage diversity and inclusion, fewer employees think about leaving and employee happiness increases. The largest data sets on the state of women in the workplace absolutely support this conclusion.

As our first Chief Diversity Officer, I am looking forward to implementing some concrete programs and measures. For example, we are implementing training on implicit bias, #MeToo issues, and #PayMeToo issues. We will also work directly with our Attorney Recruitment and Retention Committee, Mentorship Committee and Practice Group Chairs to improve mentorship and sponsor opportunities for diverse attorneys throughout our firm. I also envision that we will make commitment to diversity and inclusiveness part of our annual performance evaluation of all partners and all attorneys.

CM Report: What is the largest obstacle that law firms currently face when it comes to hiring and retaining qualified diversity candidates?

Paige Neel: People are the greatest assets of any law firm. We don't sell products; we sell the talents and expertise of our people. So it is absolutely critical for any law firm to have attorneys that are diverse in thought, experience, race, and other differentiators to insure we can provide excellent solutions to our clients' complex problems. To stay competitive, Clausen Miller places significant focus on the retention aspect

and to foster an environment where all of our people thrive. This means providing programs, benefits, and policies that support an inclusive work force in their diverse and ever-changing needs. One of my goals as Clausen's first Chief Diversity Officer is to invest significant time and resources on inclusion areas of gender, race and ethnicity, and sexual orientation. We are rethinking the definition of work—the way it gets done, when, where, and by whom.

CM Report: What new diversity initiatives are you planning in the near future?

Paige Neel: We are continuing to actively recruit diverse attorneys, and I am excited about our latest outreach to diverse law school communities with Clausen's one-day internship program that we will be kicking off later this year. Our program will allow law students to observe and experience a "day in the life" of a Clausen Miller attorney,

be it in court, in a deposition, in a meeting with expert witnesses, as well as informal give-and-take discussions with many different Clausen Miller attorneys across our numerous practice groups. Our goal is for law students from diverse backgrounds to experience firsthand what life in a busy litigation firm looks like and to decide for themselves whether they can see their future here with Clausen Miller.

CM Report: How important are mentors to helping advance one's legal career, and does Clausen Miller maintain any mentorship programs, especially for diverse candidates or lawyers?

Paige Neel: We can never underestimate the value of mentors and sponsors in helping navigate our legal careers. Ask any leader how they got where they are today, and most will tell you that they didn't do it alone. Most can point to a mentor or sponsor who took a vested interest

in them and advocated on their behalf. Here at Clausen, we have a long-standing mentorship program for all new associates who join us, and we make sure that we connect more senior attorneys with new attorneys to provide sound advice. Although true mentorship and sponsor relationships tend to happen naturally, research shows us that some individuals are less likely to take advantage of informal networks and would benefit from a structured program. That's why at Clausen we offer a variety of opportunities by imbedding them into existing mentorship and development programs. In this way, we can connect high-potential young lawyers with senior leaders to provide them with mentorship and sponsorship and to show their protégés how to own and drive their careers, as well as to illuminate the nuances of navigating the legal profession.

PARTNER SERENA SKALA TO PRESENT ON WORK/LIFE BALANCE AT WOMEN IN LEGAL AND LEADERSHIP SUMMIT IN NYC

CM partner **Serena Skala** will speak at the Women in Legal and Corporate Leadership Summit, taking place on November 21, 2019, in NYC (final location to be announced shortly). Serena's presentation explores the importance of achieving a Work/Life Balance for women lawyers.

Serena and her fellow presenters will discuss how to build and manage a high level career while maintaining a balance with their personal lives and family responsibilities. Juggling a dynamic practice and dynamic

personal growth can be challenging, and Serena will offer concrete ideas to help achieve this essential balance. Serena's panel will also discuss workplace and corporate policies and practices that will help employees maintain that balance.

The Women in Law & Corporate Leadership Summit explores the career obstacles, risks and rewards on the path to a fulfilling and productive career for women lawyers including ways to best manage their careers and effective ways for women to promote

themselves. This conference will provide networking and learning opportunities on topics including mentorship, gender equity and career management.

Serena is a partner in our New York City office. She focuses on litigation in the fields of professional liability, premises liability and construction site litigation at both the state and federal levels. Please contact Serena (sskala@clausen.com) to inquire about complimentary passes to attend this event.

APPELLATE PRACTICE

INADEQUATE RECORD CREATES PRESUMPTION COURT ACTED CORRECTLY

Peter White v. Latimer Point Condo. Assoc., Inc. et. al., AC 41345 (Conn. App.)

Plaintiff condo owner sought a permanent injunction against the condo association and a neighboring condo unit, to prevent them from rebuilding the unit after the original unit sustained storm damage. The rebuilding would allegedly have reduced plaintiff's primary water view. **Held:** Plaintiff did nothing to ensure that the appellate court would have a record on appeal that included the factual findings and legal bases for the trial court's decision. The appellate court, therefore, presumed that the trial court undertook a proper analysis of the law.

AUTO INSURANCE

FAILURE TO COMPLY WITH COOPERATION CLAUSE PRESUMED DETRIMENTAL TO INSURER'S INTERESTS

Amica Mutual Ins. Co. v. Michelle Levine, AC 40999 (Conn. App.)

Insurer sought a declaratory judgment to determine the rights of the parties related to a provision in an automobile insurance policy it had issued to the defendant, which required the defendant to undergo an independent medical examination

("IME") at the insurer's request. **Held:** IME was necessary for the insurer to properly evaluate the claim for benefits. The insurer was prejudiced by defendant's failure to submit to an IME in that it was unable to properly evaluate the claim and determine the causal relation of treatment and care expenses.

CIVIL PROCEDURE

PRIOR SMALL CLAIMS ACTION BARS SHODDY WORKMANSHIP CLAIM

Platon v. Linden-Marshall Contracting Inc., 2019 NY Slip Op 07015, ¶ 1 (N.Y. App. Div 1st Dep't)

Plaintiff sued defendant for unsatisfactory bathroom renovation work. Plaintiff had previously brought a small claims action against defendant. **Held:** Plaintiff's negligence, fraudulent inducement, and General Business Law claims are all barred by the doctrine of res judicata. It does not matter that the small claims court has jurisdictional limits on the amount of damages that may be sought, as it was plaintiff's choice to proceed in that court first.

EMPLOYMENT DISCRIMINATION

DEFICIENT PERFORMANCE IS A LEGITIMATE NONDISCRIMINATORY JUSTIFICATION FOR DISCHARGE

Ulyses Alvarez v. City of Middletown, AC 41478 (Conn. App.)

Plaintiff, a Hispanic American citizen of Puerto Rican descent, brought an employment discrimination claim, alleging defendant had discriminated against him on the basis of national origin and race. **Held:** Summary judgment affirmed. Defendant presented evidence that it had similarly discharged a Caucasian officer during his probationary period due to a failure to meet the police department's expectations and to properly document reports in accordance with department requirements.

EVIDENCE

PRIOR MISCONDUCT EVIDENCE HELD ADMISSIBLE

David Blinn v. Desh Sindwani, AC 40985 (Conn. App.)

Plaintiff sought damages for negligence arising from a 2012 automobile accident. During trial, the court allowed treatment records referencing plaintiff's prior conviction for operating a motor vehicle while under the influence and a citation for a 2014 car accident. **Held:** The probative value of the prior

misconduct evidence outweighed its prejudicial effect as it tended to show that plaintiff's treatment did not result from the underlying motor vehicle accident but from the prior misconduct.

LEGAL MALPRACTICE

HYPOTHETICAL RESULT INSUFFICIENT TO PROVE PROXIMATE CAUSE

Edwards v. Moore, 2019 Ga. App. LEXIS 412 (Ga. App.)

Plaintiff's former attorney drafted a settlement agreement whereby her husband paid alimony while the two were legally separated. Plaintiff changed attorneys and a divorce was granted. Plaintiff's former husband stopped paying alimony as they were no longer legally separated. Plaintiff sued her divorce attorneys, arguing they should have asserted a counterclaim for alimony and sought to reform the settlement agreement to include post-divorce alimony. **Held:** Plaintiff cannot prove the attorneys proximately caused her alimony to cease. There is no evidence that plaintiff would have succeeded on such a counterclaim nor is there evidence of a damages amount.

CLIENT LOSES MALPRACTICE LAWSUIT WHEN HE WAS FULLY AWARE OF AND AGREED TO CONTRACT TERMS

Jenkins v. Bakst, 2019 Mass. App. LEXIS 91 (Mass. App.)

Plaintiff alleged his attorney was negligent in negotiating a stock buy-back clause in his employment agreement; that he advised his attorney he wanted his stock's value measured based on employer annual revenues; that the attorney did not follow instructions; and that he received inadequate payment when subsequently terminated. **Held:** Plaintiff, an experienced business person, read the employment agreement before he signed it and accepted the terms. He was not misled nor did his attorney conceal details. **Further held:** Plaintiff cannot establish causation because he could not show that it was more likely than not that his employer would have accepted his proposed formula.

LIMITATIONS OF ACTIONS

ATTIC PULL-DOWN LADDER AN IMPROVEMENT FOR STATUTE OF REPOSE PURPOSES

Harrell v. Ryland Grp., 2019 Fla App. LEXIS 12372 (Fla. App.)

Homeowner was injured when attic pull-down ladder collapsed. **Held:** Owner's claim failed under the 10-year statute of repose. The ladder improved

the property by adding utility to home operation. Owner filed suit more than ten years after the issuance of certificate of occupancy, possession of property, and completion of work. Owner failed to create issue of fact as to whether work continued after occupancy.

FRAUD CLAIM SUBJECT TO MEDICAL CLAIM STATUTE OF REPOSE

Freeman v. Durrani, 2019 Ohio App. LEXIS 3732 (Ohio App.)

Plaintiff sought to cast medical claim as fraud, alleging physician committed fraud by recommending unnecessary surgery and failing to disclose the risks of surgery. Court dismissed plaintiff's lawsuit as barred under four-year statute of repose related to medical claims. **Held:** Affirmed. Clever pleading cannot transform a medical claim into a claim of fraud and claims that arise out of medical care and treatment are considered medical claims for the purpose of the statute of repose.

MUNICIPAL LAW AND CORPORATIONS

CITY AND FIREMAN IMMUNE FROM LIABILITY FOR VEHICLE ACCIDENT

Pitzer v. City of Blue Ash, 2019 Ohio App. LEXIS 2994 (Ohio App.)

Woman's car struck firetruck that was on way to emergency. **Held:** City is immune from liability unless firefighter responding to emergency is guilty of willful or wanton misconduct.

Wantonness requires a lack of any care for other drivers. Firefighter was exercising care. **Further held:** Firefighter not personally liable for recklessness, which requires a conscious disregard or indifference to a known or obvious risk. He activated engine lights, used horn, and almost stopped before entering intersection. Technical violation of departmental policy on stopping did not contribute to accident.

NEGLIGENCE

GARDEN-VARIETY EMPLOYEE-RELATED CLAIMS INSUFFICIENT TO SUPPORT A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Nailia Vodovskaia v. Hartford Headache Ctr., LLC, et. al., AC 41049 (Conn. App.)

Plaintiff physician sought damages from a medical practice and its sole member for intentional infliction of emotional distress in connection with the termination of her employment. Defendants obtained summary judgment and plaintiff appealed. **Held:** Affirmed. Plaintiff did not allege any racial, ethnic or similar type of slurs or animus. Allegations of garden-variety employee-related claims do not constitute extreme and outrageous behavior. **Further held:** Defendants did not owe plaintiff a duty to ensure she was given time off from work to seek medical treatment when not feeling well.

NO CREDIBILITY DETERMINATION IN DECIDING SUMMARY JUDGMENT

Isha Sen v. Kostas Tsiongas, AC 40963 (Conn. App.)

Plaintiff sought damages from the landlord and owner of her apartment for negligence in connection with a dog bite she received in the building's common stairway. The landlord obtained summary judgment on the ground that he did not have any knowledge of the alleged vicious propensities of the dog. Plaintiff appealed. **Held:** Reversed. Contradictory accounts of the dog's behavior thwarted summary judgment. For example, plaintiff had claimed that the dog acted viciously towards her when she approached the building and had scratched her husband and bit the son of the dog's owner prior to the incident.

DUTY TO SUPERVISED CHILD ON ZIP LINE MUST BE VIEWED FROM ADULT'S PERSPECTIVE

LaForce v. Dyckman, 2019 Mass. App. LEXIS 116 (Mass. App.)

Father allowed six-year old to ride backyard zip line lacking seat. **Held:** The duty to a supervised child and an adult are identical. Whether danger is open-and-obvious to the child must be viewed from an adult's perspective. **Further held:** There was no duty to remedy the zip line, which was not unreasonably high or improperly constructed.

PROOF OF BUILDING CODE VIOLATION NOT ENOUGH FOR SUMMARY JUDGMENT

Hartnett v. Zuchowski, 2019 NY Slip Op 06934 (N.Y. App. Div. 4th Dep't)

Plaintiff sought summary judgment based on an architect expert's opinion that the staircase on which plaintiff fell violated several sections of the applicable building code. **Held:** In New York, evidence of building code violations constitutes only some evidence of negligence rather than negligence *per se*. The evidence thus failed to carry plaintiff's initial prima facie burden regardless of what evidence defendant had in opposition.

PLAINTIFF'S DEPOSITION SHOWS CASE RESTS ON SPECULATION

Phillips v. LSS Leasing Ltd. Liab. Co., 2019 N.Y. App. Div. LEXIS 7120 (N.Y. App. Div. 2d Dep't)

Plaintiff fell in the lobby of defendant's building and sued. Plaintiff surmised at her deposition that she tripped and fell on a defective part of a runner mat that was located in the lobby of the defendant's building. **Held:** Since plaintiff, who traversed this lobby practically every work day, testified that she did not see the alleged defect either before or after she fell, her testimony was based on speculation, entitling defendant to summary judgment.

PLAINTIFF DEFEATED BY INFORMAL JUDICIAL ADMISSION THAT DEFENDANTS WERE NOT AT FAULT

Rosales v. Rivera, 2019 NY Slip Op 07105 (N.Y. App. Div. 2d Dep't)

Plaintiff was injured in a vehicular accident and sued multiple defendants. While making arguments against some of the defendants, plaintiff asserted they were the sole proximate cause of the accident. **Held:** This informal admission that some defendants were the sole cause of the accident entitled the other defendants to summary judgment.

NO-DUTY WINTER RULE PROTECTS STORE OWNER FROM LIABILITY IN PARKING LOT SLIP AND FALL

Bakies v. RSM Maint., Inc., 2019 Ohio App. LEXIS 3405 (Ohio App.)

Patron slipped on black ice while exiting car in store owner's parking lot. **Held:** the No-duty winter rule assumes that everyone will appreciate and protect themselves from the risks of natural accumulations of ice and snow. The formation of black ice occurred naturally. By contracting with a plowing service, owner did not assume a duty of care as to natural accumulations. Moreover, patron failed to provide expert testimony as to meaning of contract requirements. Owner did not have superior knowledge of situation, nor was there evidence that the black ice concealed another danger.



WORKERS' COMPENSATION

STANDARD OF JUDICIAL REVIEW

Thomas McGinty v. Stamford Police Dept., et. al., AC 41943 (Conn. App.)

Plaintiff, a police officer, had retired in 2011 with a service related disability pension. In April 2009, he had been diagnosed with coronary artery disease and hypertension and filed a claim for benefits. The Workers' Compensation Commissioner determined his claim for benefits was compensable under the Heart and Hypertension Act. The Workers' Compensation Review Board affirmed that decision and defendants appealed. **Held:** Affirmed. Plaintiff's testimony from two cardiologists was credible and persuasive. The role of the court was not to retry the facts, but to determine whether the Commissioner's award could be sustained in view of the factual record.

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