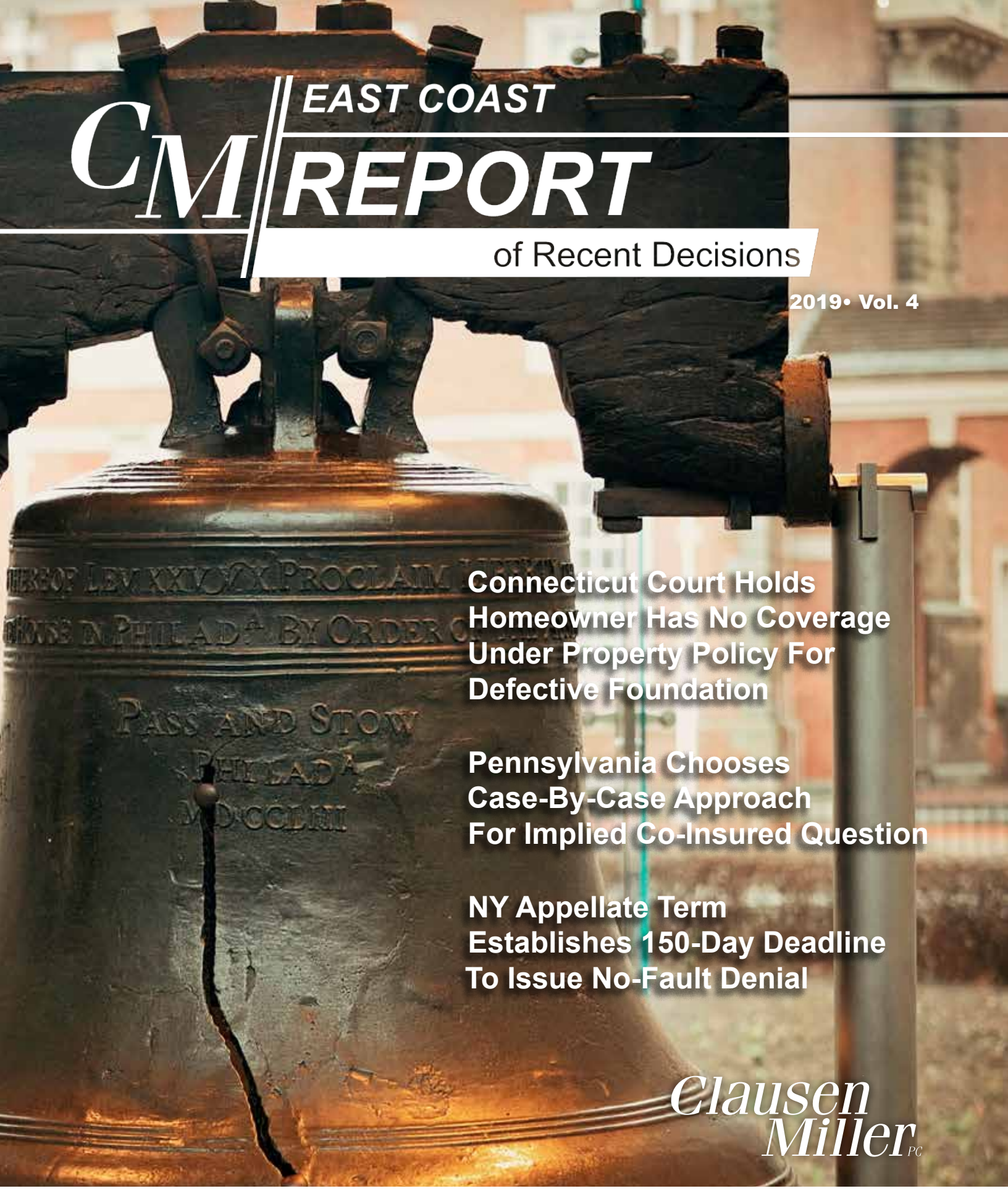

EAST COAST CM REPORT

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2019• Vol. 4

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Clausen Miller PC

A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.

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Connecticut Court Holds That Homeowner Has No Coverage Under Property Policy For Defective Foundation

by ***Thomas J. Hennessey***

In *Jemiola v. Hartford Cas. Ins. Co.*, 2019 Conn. LEXIS 340, 2019 WL 5955904 (Nov. 12, 2019), Edith Jemiola ("Ms. Jemiola"), a homeowner in Northeastern Connecticut, brought a coverage lawsuit against Hartford Casualty Insurance Company ("Hartford"), her homeowner's property insurance carrier. The Supreme Court of Connecticut was asked to determine whether Hartford breached its homeowners insurance policy by denying coverage for cracks in the basement walls of Ms. Jemiola's residence under the "collapse provision" of the policy. The Court held that the "collapse provision" found within the applicable policy of insurance in effect on the date of loss unambiguously foreclosed coverage for the damages sustained by Ms. Jemiola.

The underlying facts stem from decades of alleged fraud and defectively manufactured concrete by the now defunct J.J. Mottes Concrete Company ("Mottes"), formally based in Stafford, Connecticut. It is estimated that approximately 34,000 homes built since 1983 in Northeastern Connecticut could be contaminated with defective concrete that originated from Mottes's facility. Specifically, investigations conducted by various governmental agencies within the State of Connecticut uncovered that Mottes sourced its raw materials from Becker's Quarry (owned by a company related to Mottes) which was found to contain high levels of pyrrhotite. Pyrrhotite, when exposed to excessive levels of water and oxygen, will oxidize and rust, thereby causing concrete to crack, crumble and ultimately compromise the structural integrity of a home's foundation. The allegations of fraud center upon Mottes's reported habitual use of old, or stale, concrete from prior jobs, which was routinely kept loose and prevented from hardening by application of excessive amounts of water, and then mixed with fresh concrete allocated for the next job to increase profits.

Years after purchasing her home in 1986, Ms. Jemiola began to notice nail-pops and cracks in the drywall of her home. Then, in 2006, Ms. Jemiola started to notice cracks in her foundation. After making minor cosmetic repairs, more severe cracking was observed which prompted Ms. Jemiola to file a claim with Hartford. Upon inspection by an engineer engaged by Hartford, the claim was denied as the engineer determined that the foundation was cracking due to faulty workmanship and the type of material used in the foundation. Further, the engineer found that the settling of walls and foundations

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were excluded from coverage under the applicable policy. Additionally, Hartford's denial cited the engineer's findings that the structural integrity of the foundation walls was not compromised, thereby not causing an imminent threat of collapse. After reviewing the denial, Ms. Jemiola, commenced the subject lawsuit and claimed that the "collapse provision" contained within the policy afforded coverage for the damage sustained, and as a result, Hartford breached its contractual obligation to cover her loss.

Interestingly, Ms. Jemiola insured her residence with Hartford continuously since 1986. A preliminary issue highly contested through discovery and motion practice was the applicable policy and the precise date of loss. This issue was of grave importance to Ms. Jemiola because policies issued by Hartford prior to 2005 failed to define the term "collapse." Ms. Jemiola argued that the standard set forth in the Connecticut Supreme Court's decision of *Breach v. Middlesex Mutual Assurance Co.*, 205 Conn. 246, 532 A. 2d 1297 (1987), which held that when the word "collapse" is found undefined in a policy of insurance, there is "sufficient ambiguity to include coverage for any *substantial impairment* of the home's structural integrity," *id*. (emphasis added), should apply to Ms. Jemiola's demand for coverage. According to Ms. Jemiola, the cracking and crumbling of her foundation started in the mid-1990's and should constitute a substantial impairment, thereby mandating coverage under the applicable policy.

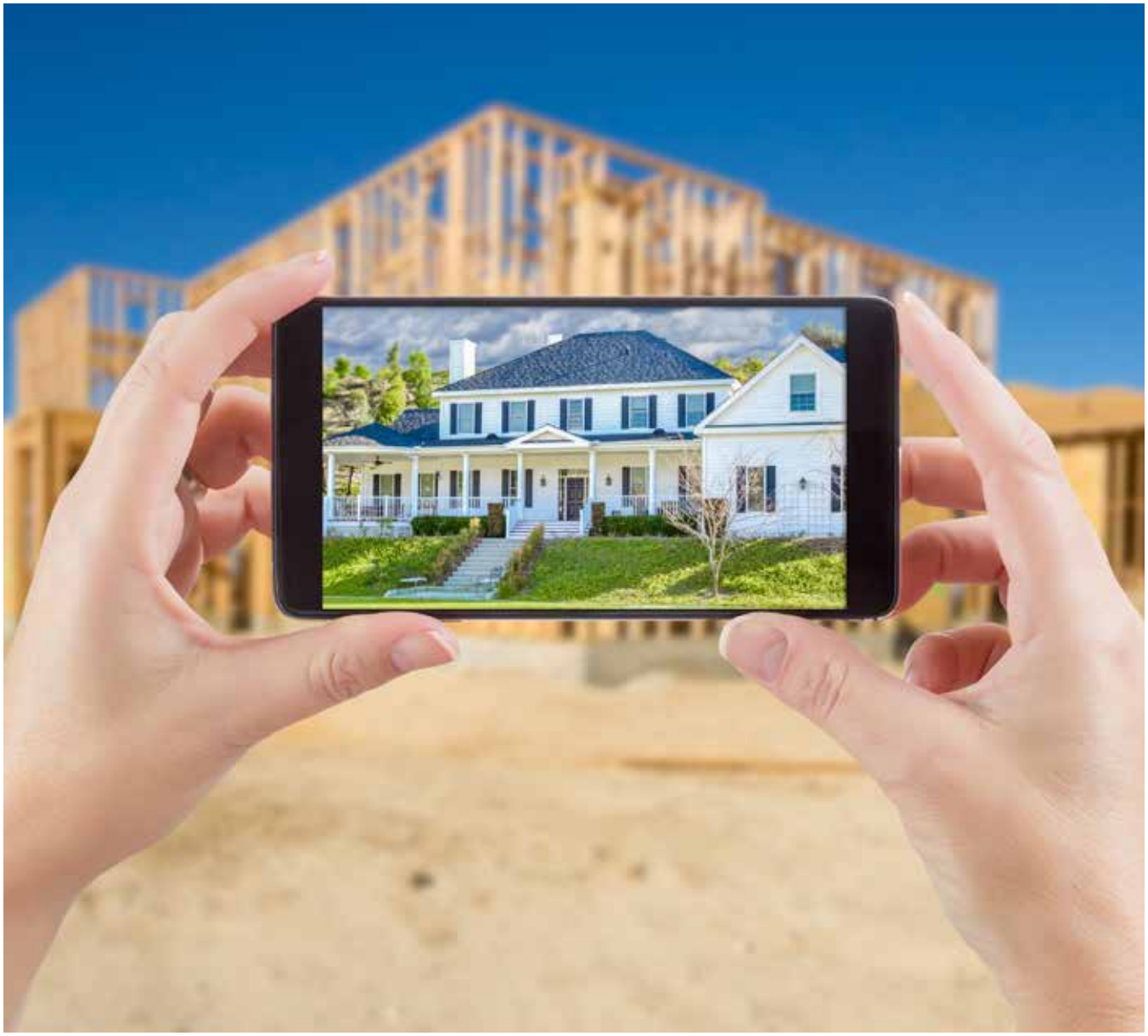
However, Hartford argued in response that the loss occurred in 2006, when cracking to the foundation first occurred, thereby causing the 2006 policy to take effect which contained the following language pertaining to coverage for a "collapse" occurrence: The term "collapse" is narrowly defined to mean "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose." *Jemiola v. Hartford Cas. Ins. Co.*, 2019 Conn. LEXIS 340, 2019 WL 5955904 (Nov. 12, 2019). Additionally, the 2006 policy further limited coverage for "collapse" occurrences by the following three provisions: "One, a building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse, two, a part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the buildings, and three, a building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage, or expansion." *Id*. Therefore, based on the limitations contained in the 2006 policy, Ms. Jemiola argued that the cracking first observed in the 1990's was the first occurrence of substantial impairment to her foundation.

The Court found that the loss occurred in 2006, when cracking was first observed to the foundation, not in the 1990's as argued by Ms. Jemiola. As a result, the Court affirmed that coverage would be excluded pursuant to the applicable policy limitations that narrowly defined occurrences of "collapse". Due to the arguments concerning the applicable date of loss and the change in policy language by Hartford, the Court took this opportunity to explain the elements necessary to satisfy the "substantial impairment" standard set forth in *Breach* should a policy of insurance not define the word "collapse."

For 32 years prior to the case at bar, the Connecticut Supreme Court had never laid out the elements necessary to satisfy the "substantial impairment" standard set forth in *Breach*. In reference to the related case of *Karas v. Liberty Ins. Corp.*, 2019 Conn. LEXIS 341, 2019 WL 5955947 (November 12, 2019), in which the Court took up certified questions of law from the Federal District Court of Connecticut, the Court held that a substantial impairment of the structural integrity of a building means "that the building is in imminent danger of falling down" and therefore unsafe to occupy. *Id*. Further, the Court explained that to satisfy this standard, the specific facts of the case and the strength and credibility of the expert testimony will be necessary in the fact finding phase while adjudicating the dispute. As applied to Ms. Jemiola's claim for coverage, the Court reasoned that regardless of the precise date of loss and the applicable policy, the undisputed fact that Ms. Jemiola was still living in her home and the expert testimony which explained that the subject house was not in imminent danger of falling down, would cause the Court to exclude

coverage whether it applied the *Breach* standard or the applicable policy limitations in the 2006 policy.

Learning Point: The Court's standard for substantial impairment should be carefully reviewed if the applicable policy of insurance does not define "collapse." If, in the rare situation that coverage is afforded to a homeowner who incurs damages resulting from a crumbling foundation, subrogation recovery professionals should consider real estate brokers and home inspectors as a potential target for recovery since damage to a home's foundation likely rises to a material fact, thereby mandating disclosure by real estate brokers to the buyer, and prompting a duty to warn on the part of the home inspector. ♦



First Department Opens Door To Allow Consideration Of Circumstantial Facts In Duty To Defend Cases

by **Grace R. Guo**

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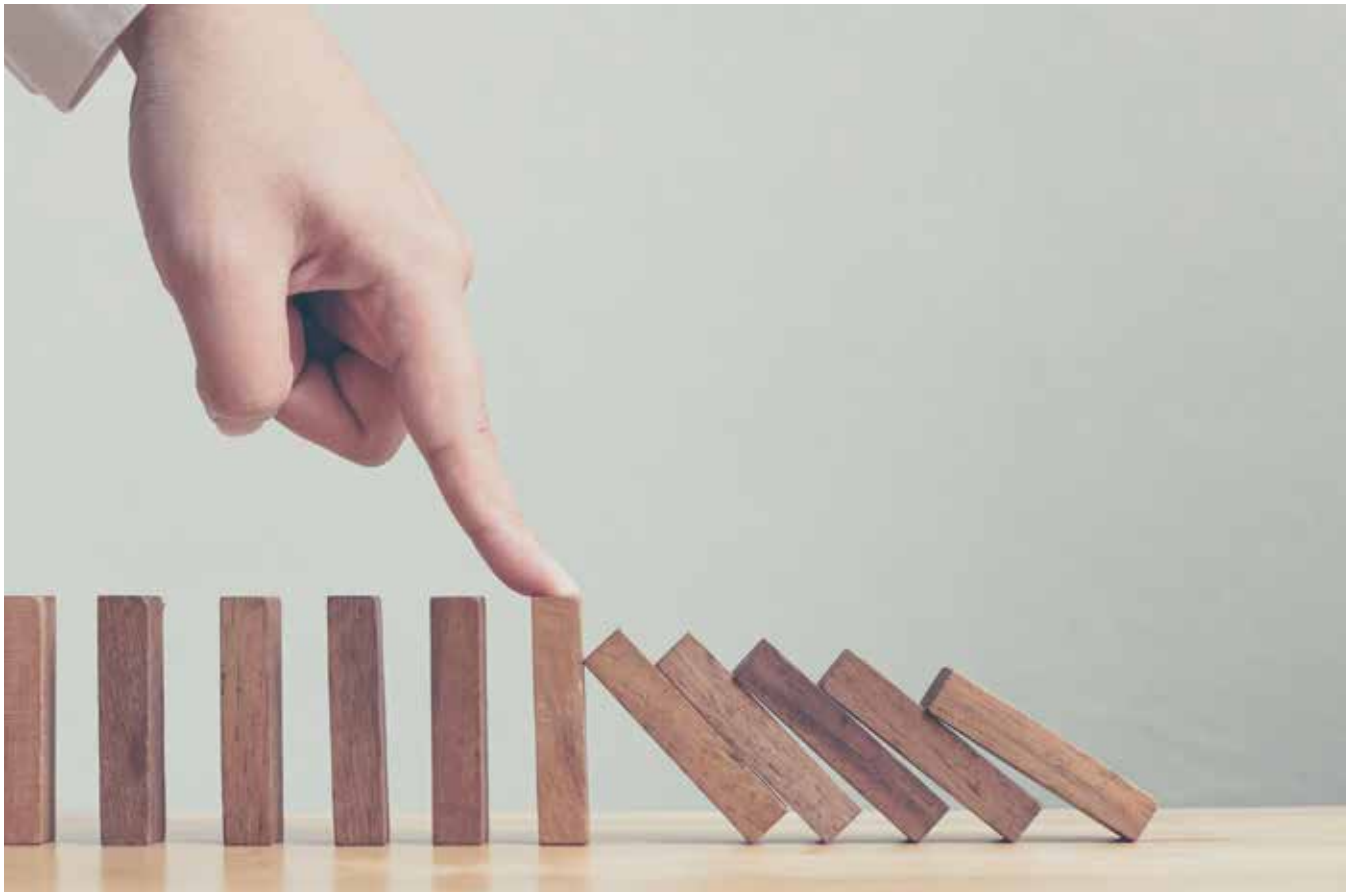
The New York State Court of Appeals ruled that courts must look at the allegations of the complaint and the terms of the policy in determining an insurer's duty to defend its insured. *Technicon Elec. Corp. v. Am. Home Assurance Co.*, 74 N.Y.2d 66, 73 (1989). However, there has been departmental split on the interpretation of the ruling. The Appellate Division, Second Department, allows deposition testimonies from an underlying action to be considered in determining the issue of whether an insurer owes a duty to defend. *City of New York v. First Natl. Ins. Co. of Am.*, 79 A.D.3d 789, 790 (2d Dep't 2010). The Appellate Division, First Department, held that courts must look at whether the allegations set forth in a complaint give rise to a "reasonable possibility of recovery under the policy." *Atl. Ins. Co. v. Terk Tech. Corp.*, 309 A.D.2d 22 (1st Dep't 2003). Attorneys in the First Department have puzzled over the interpretation of "reasonable possibility." Recently, in *Paramount Ins. Co. v. Federal Ins. Co.*, 174 A.D.3d 476 (1st Dep't 2019), the First Department clarified this issue.

Paramount involved an appeal arising from a declaratory judgment action filed by Paramount Insurance Company ("Paramount") against Federal Insurance Company ("Federal") that arose out of an underlying personal injury action. Paramount insured the landlord and defendant in the underlying action, David Ellis Real Estate, L.P. ("DERE"); while Federal insured the tenant and co-Defendant in the underlying action, Blue Water Grill ("BWG"). Paramount sought a declaration that Federal had a duty to defend DERE in the underlying action. Federal instead argued that it had no duty to defend DERE because it was not an additional insured on BWG's policy, and even if it was, the Paramount policy was the primary policy while the Federal policy was excess. Federal relied on depositions and proceedings subsequent to the Complaint to support its position that it did not have a duty to defend DERE. The lower court rejected Federal's reliance on documents other than the Complaint itself and the policies. The lower court granted Paramount's motion for summary judgment; the court held that Federal had a duty to defend DERE and that its policy provided primary coverage.

The Appellate Court, First Department ruled on this issue twice. The first decision on March 7, 2019, was later recalled and vacated on July 23, 2019. Both times, the Court affirmed the lower court's ruling that Federal had a duty to defend; but vacated the declaration that the Federal policy is primary and



the direction that Federal reimburses Paramount. The only change in the July decision was to modify the Court's reasoning in reaching its ruling. In the March decision, the Court reasoned that the lower court properly declined to consider anything but the Complaint and the policies in reaching its decision. *Paramount Ins. Co. v. Federal Ins. Co.*, 170 A.D.3d 464 (1st Dep't 2019). In the July decision, however, the Court considered the facts adduced in the underlying action but stated that the ambiguity of whether the accident took place in the demised premises is not dispositive of the coverage issue under Federal's policy and, as such, is not determinative of its duty to defend.

On the issue of priority of coverage, the Court vacated the lower court's decision and reasoned that courts must review and consider all of the relevant policies, not just the policies of the parties to the declaratory judgment action. Policies issued to other parties to the underlying action were not submitted for the lower court's consideration in determining this issue of priority. Therefore, it was premature for the lower court to conclude that the Federal policy was primary.

Learning Point: Based on this ruling, it signifies a shift in the First Department's position on whether extraneous and circumstantial evidence may be considered in addition to the complaint itself. Furthermore, even the policies to be considered have been expanded to all relevant policies. Courts now must look at how policies interplay with each other in the underlying action, not just the policies of the parties before them. Attorneys may now consider the totality of the circumstances in reaching their evaluation on the priority of coverage in duty to defend matters. ♦

Pennsylvania Chooses Case-By-Case Approach For Landlord-Tenant Implied Co-Insured Question

by ***Timothy F. Brown***

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Pennsylvania's appellate court recently applied a case-by-case approach to determine whether a property insurer can pursue a subrogation claim against a tenant who negligently caused damage to the property. In *Joella v. Cole*, 2019 PA Super. 313 (Pa. Super. Ct. 2019), the Court reviewed three methods other courts have used to determine when an insurer may pursue recovery against negligent tenants: the pro-subrogation approach; the anti-subrogation approach; or the case-by-case approach. Ultimately, the Court clarified that although no prior Pennsylvania cases had explicitly stated which method would apply, Pennsylvania courts had in fact previously applied the case-by-case approach.

On April 15, 2017, a fire occurred at the Landlord's apartment building located in Pen Argyl, Pennsylvania. Investigators determined that the fire originated in Defendant-Tenant's apartment and was caused by Defendant-Tenant's improper use of an extension cord with a microwave. Specifically, the Defendant-Tenant had run the extension cord across hinges of a cabinet to the microwave, resulting in damage to the extension cord. Eventually, electricity escaped the damaged cord, igniting nearby combustibles and causing a fire. The fire resulted in approximately $180,000.00 in damage to the building.

The Landlord's insurer brought a subrogation action against the Defendant-Tenant alleging one count of negligence. At issue was whether the terms of the lease required the Landlord to maintain fire insurance which included the Defendant-Tenant as an implied co-insured. If the terms of the lease required such coverage, then subrogation would be unavailable for the Landlord's insurer.

Before analyzing the terms of the lease, the Court reviewed how other state courts have resolved the issue of subrogation in light of the landlord-tenant relationship. The Court noted two antithetical bright-line rules other states have adopted: the pro-subrogation approach and the anti-subrogation approach.

The pro-subrogation approach permits the landlord's insurer to pursue a subrogation claim against a negligent tenant provided the lease contains no express terms to the contrary. The Court noted the public policy interest in holding tenants responsible for their negligent actions:

> [A] tenant has the responsibility to exercise ordinary care and should not be exculpated from the consequences of his own negligence unless the landlord and the tenant have expressly agreed that the tenant will not be

> held liable for the loss resulting from the tenant's negligence.

2019 Pa. Super. LEXIS 1040 at *5.

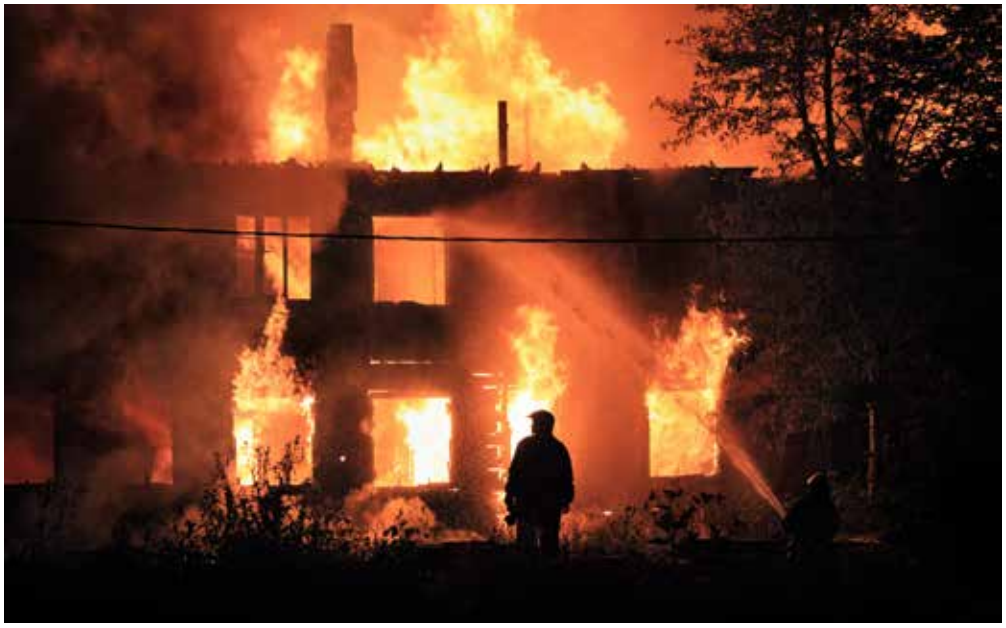
The anti-subrogation approach takes the opposite stance and precludes actions against the tenant by the landlord's insurer. Courts that have applied the anti-subrogation approach note the shared possessory interests of the tenant and the landlord. Courts that have applied the anti-subrogation approach reason that "the special relationship between the landlord and tenant placed the tenant in a substantially different position than a fire-causing third party." *Id.* at *6. Included in this special relationship is that the tenant's rent theoretically serves as a portion of the landlord's insurance premiums.

The third approach, which the Court endorses, requires a case-by-case analysis to determine if a landlord's insurer may pursue subrogation against the tenant. Under this approach, a court reviews the terms of the lease to determine the parties' intent.

In *Joella*, the Court determined that the terms of the lease created a reasonable expectation for the tenant that she would be a co-insured for any damage caused to the property. The Court specifically noted the lease contained paragraphs which stated that the Landlord would be responsible for providing insurance for the property. Additionally, the lease included a paragraph granting the Tenant the right to obtain additional insurance for her personal possessions "not covered by the Landlord's fire insurance." *Id.* at *11. The Court concluded that a tenant reading the lease could reasonably expect to be included as a co-insured under the landlord's property insurance. The Court held that "based on the reasonable expectations of the parties as expressed in the lease, Tenant is an implied co-insured under Landlord's insurance policy." *Id.* at *14.

Although the terms of the Landlord's insurance policy did not explicitly list the Tenant as a co-insured, the Court determined that the lease specifically required the Landlord to obtain insurance for the property. Therefore, the Tenant was an implied co-insured on the Landlord's policy. Consequently, the Court dismissed the suit against the Tenant.

Learning Point: Courts may limit recovery against a negligent tenant even if the lease lacks any explicit language doing so. Pennsylvania Courts will look to the terms of the lease to determine if parties intended for a tenant to be a co-insured under a landlord's policy. ♦



New York Appellate Term Establishes 150-Day Deadline To Issue A No-Fault Denial Based Upon An Applicant's Failure To Comply With A Verification Request

by ***Alexandra DiFusco***

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A New York Appellate Court denied insurer MVAIC's cross-motion for summary judgment, dismissing the claim as premature and finding that under no-fault regulation 11 NYCRR 65-3.5, the deadline to issue a denial based upon the grounds that an applicant failed to provide complete verification is 150 days after the initial request for verification. *Chapa Prods. Corp. v. MVAIC*, 2019 NY Slip Op 29341 (App. T. 2d Dep't).

The action was brought by Chapa Products Corp. ("Chapa") against MVAIC to recover assigned first-party no-fault benefits. Chapa then moved for summary judgment, MVAIC cross-moved for summary judgment dismissing the Complaint, arguing that under the applicable no-fault regulations, it had properly denied Chapa's claim due to Chapa's failure to provide verification requested within 120 days of that request. The Civil Court of King's County denied Chapa's motion and granted MVAIC's cross-motion for summary judgment dismissing the Complaint with prejudice.

Chapa appealed the trial court's decision, asserting that MVAIC's defense that Chapa failed to provide additional verification within 120 days was without merit because: (1) MVAIC failed to demonstrate that it denied the claim for failure to provide verification within 30 days of expiration of the 120-day period mentioned above (denial of claim forms were mailed 208 days after the initial verification requests were dispatched); and (2) Chapa demonstrated that it had timely responded to those verification requests.

The Appellate Court first addressed Chapa's argument regarding MVAIC's untimely denial, which was brought for the first time on appeal. With various case citations in support, the Court reasoned that because the argument appeared on the face of the record, and could not have been avoided if raised in civil court, it may be considered on appeal. The Court further opined that appellate review was proper because, like the mootness doctrine, there was a likelihood of recurrence of the issue, it had previously evaded review, and was a substantial issue related to no-fault insurance.

The Court next discussed the current state of New York no-fault regulations, specifically 11 NYCRR 65-3.8(b)(3), which states that an insurer *may* issue

a denial based upon an applicant's failure to provide requested verification within 120 days after the request. The Court pointed out that while the regulations do not specify a time frame for issuing a denial, the general rule is that no-fault payments are considered overdue if not paid within 30 days of receipt of proof of claim.

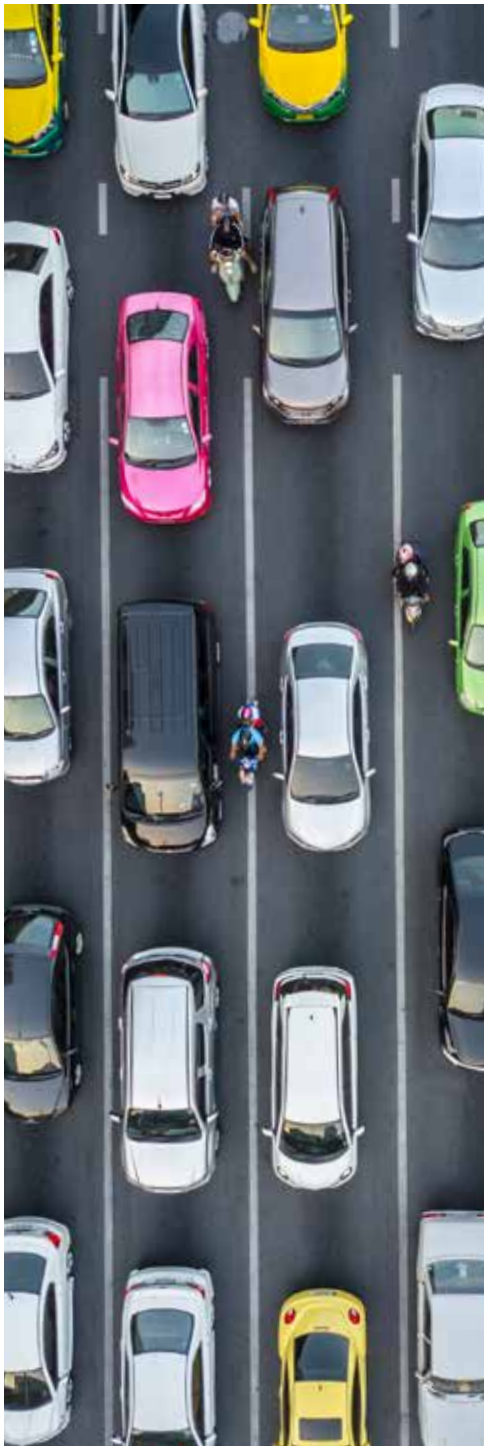
The Court disagreed with MVAIC's argument that due to the lack of a set time frame within the regulations, an insurer should be allowed to issue a denial any time after the 120-day period has passed, noting that the Appellate Division, Second Department has applied a 30-day time period in which to pay or deny a claim, citing *Westchester Med. Ctr. v. Lincoln Gen. Ins. Co.*, 60 A.D.3d 1034, 877 N.Y.S.2d 340 (2009). In *Westchester Med Ctr.*, it was determined that the 30 days to pay or deny a claim begins to run on the date of the second failure to appear, or the date that the insurer is permitted to conclude that there was a failure to comply with a condition precedent to coverage. Finding the instant case analogous to *Westchester Med. Ctr.*, the Court concluded that the deadline to issue a denial due to an applicant's failure to provide complete verification is 150 days after the initial request, or 30 days after the insurer is permitted to conclude that there was a failure to fully comply with a verification request (the date on which the 120-day period ends).

The Court agreed with Chapa's argument that MVAIC did not preserve its defense that Chapa had not provided the requested verification within 120 days after the initial request, mailing its denial of claim forms 208 days after the initial verification requests were dispatched. As such, the Court concluded that the Civil Court should not have granted MVAIC's cross-motion for summary judgment dismissing the claim.

Regarding the Civil Court's determination that Chapa's responses to MVAIC's verification requests were non-compliant, the Court agreed, citing to various cases in support, and concluding that historically, an insurer has not been required to pay or deny claims based upon receipt of a partial response to a verification request. The Court added that the present version of 11 NYCRR 65-3.8(b)(3) does not obligate an insurer to pay or deny a claim prior to its receipt of all requested verification but states that an insurer "may" issue a denial.

Abiding by precedent, the Court dismissed the action as premature, reasoning that when a request for verification has not been fully complied with prior to commencement of a no-fault action, the action should be dismissed.

Learning Point: No-fault insurers should be mindful of the present interpretation of 11 NYCRR 65-3.8(b)(3), setting forth a 150-day deadline to issue a claim denial—30 days after an applicant's 120-day time frame to comply with a verification request. ♦



Plaintiff Unable To Seek Personal Injury Protection Coverage From Tortfeasor's Relatives

by ***Colin J. Gorman***

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In *Nesby v. Fleurmond*, 2019 N.J. Super. LEXIS 162 (App. Div. November 18, 2019), the New Jersey Appellate Division determined whether a Plaintiff with limited Personal Injury Protection (PIP) coverage could target the insurance policies of a Defendant's relatives, when Defendant is uninsured.

In October, 2014, Plaintiff, Raymond Nesby, was injured in an automobile accident. Nesby's vehicle was struck from behind by the vehicle being driven by Defendant Sheryl Fleurmond. Fleurmond did not own the vehicle that she was driving and did not have her own automobile insurance policy. The vehicle being driven by Fleurmond was owned by Defendant Chris Decaro. Decaro had an automobile insurance policy issued by Progressive Garden State Insurance Company. At the time of the accident, Fleurmond lived with her mother and her sister. Fleurmond's mother owned a vehicle insured by AAA MAIC and her sister owned a vehicle insured by GEICO. Neither the mother's nor the sister's vehicle was involved in the accident.

As a result of the accident, Nesby claimed to have medical costs exceeding $400,000. Nesby's PIP benefits covered $15,000 of these medical costs. The remainder of his medical bills were paid by his personal health insurance carrier. Nesby then tendered his claim to Progressive, which offered the full $25,000 policy limit of Decaro's policy in exchange for Nesby agreeing to release both Fleurmond and Decaro. Nesby accepted the offer and signed the release, which released both Fleurmond and Decaro from any and all claims.

Prior to signing the release, Nesby's counsel sent a "Longworth letter" to GEICO and AAA MAIC, notifying the carriers of Progressive's offer. According to Nesby, neither carrier objected to the proposed settlement but both carriers later denied coverage.

Nesby went forward and filed suit against Fleurmond and Decaro, seeking damages for the injuries suffered in the accident. Nesby did not name either GEICO or AAA MAIC as defendants, but the fourth count of his Complaint sought to compel insurance coverage from both carriers. Nesby then moved for a declaratory judgment against GEICO and AAA MAIC, seeking coverage under the policies issued to Fleurmond's mother and sister. The trial judge denied Nesby's motion, ruling that Nesby had settled his claims with Fleurmond and Decaro, and that Nesby had no relation with GEICO and AAA MAIC, which would entitle him to coverage under those policies.

On appeal, Nesby argued that the Trial Judge erred in his determination and that he is entitled to PIP coverage and bodily injury benefits under the GEICO and AAA MAIC policies. Specifically, Nesby argued that because he settled his claim with Progressive, he may now proceed against the other two carriers and that because his PIP coverage was exhausted, the additional policies must cover the excess. The Appellate Court disagreed with Nesby's arguments.

The New Jersey Legislature provided for PIP benefits as part of its no-fault automobile insurance system. N.J.S.A. 39:6A-1 to 35 states that the benefits include payment of medical expenses, without regard to fault, for the named insured and resident members of his or her family, others occupying a vehicle of the named insured, or pedestrians injured in an automobile accident. *Palisades Safety & Ins. Ass'n v. Bastien*, 175 N.J. 144, 147-48 (2003).

The Appellate Court noted that, in this matter, Nesby is clearly not an Insured under the GEICO or AAA MAIC polices, and further Nesby did not live with either insured and was not driving a vehicle insured under either policy. As such, Nesby did not fall into the classes of covered persons under N.J.S.A. 39:6A-1 to 35, and is not entitled to PIP benefits under either the GEICO or AAA MAIC policy.

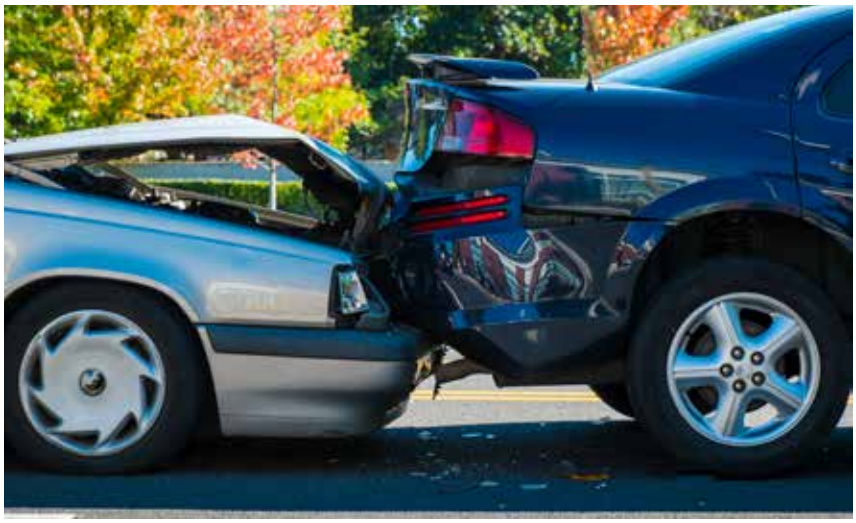
Additionally, the Appellate Court was not persuaded by Nesby's argument that New Jersey allowed for the "stacking" of policies for PIP benefits. The Court noted that stacking is actually forbidden under N.J.S.A. 39:6A-4.2, which states "…no person shall recover personal injury protection benefits under more than one automobile insurance policy for injuries sustained in any one accident."

Furthermore, the Appellate Court noted that even if Nesby was able to seek coverage under the GEICO or AAA MAIC policies, Nesby settled his claims with Fleurmond and Decaro, and released them from any and all claims arising from the accident. In general, when a release's language refers to "any and all claims", the Courts do not permit exceptions. *Isetts v. Borough of Roseland*, 364 N.J. Super. 247, 255-56 (App. Div. 2003). As such, because Nesby did not preserve his right to proceed against either GEICO or AAA MAIC in the release, he is not entitled to litigate his settled claim against either insurer.

Lastly, the Appellate Court noted that Nesby's reliance on the use of a "Longworth letter" was misplaced. In *Longworth*, the Court held that in order to protect a UIM carrier's subrogation interest, "an insured receiving an acceptable settlement offer from the tortfeasor should notify his UIM carrier. The carrier may then promptly offer its insured that sum in exchange for assignment to it by the insured of the claim against the tortfeasor." *Longworth v. Van Houten*, 223 N.J. Super. 174 (App. Div. 1988). In this matter, Nesby is not seeking UIM coverage from GEICO or AAA MAIC and, as such, *Longworth* provides no relief.

In sum, finding that Nesby was not a named insured under either the GEICO or AAA MAIC policies, did not reside with the named insureds, did not own or occupy a vehicle under those policies, and released the tortfeasor from any and all claims, the Appellate Court affirmed the Trial Court decision dismissing the claims against both GEICO and AAA MAIC.

Learning Point: The New Jersey Appellate Division was unwilling to extend well-settled principles of insurance law in holding that an injured party is unable to seek PIP coverage for unpaid medical expenses under policies issued by insurance companies to a tortfeasor's relatives. ♦



Icy Reception For Landlords: New York's Highest Court Refuses To Shift Responsibility For Sidewalk Maintenance To Third-Parties

by ***George (Djordje) Caran***

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Like many municipalities throughout the United States, New York City enacted a statute which imposes on real property owners the duty to maintain city owned sidewalks that abut their properties in a reasonably safe condition. The purpose of the law is to shift responsibility for injuries to property owners and away from the municipality. In New York City, this is codified by the Administrative Code of the City of New York, Section 7-210. The City of New York also requires most property owners to remove snow or ice from sidewalks that abut their properties. This requirement was codified in the Administrative Code of the City of New York, Section 16-123 and is also intended to shift responsibility for maintaining public sidewalks from the municipality to the individual property owners. One, two or three family properties that are owner occupied and used for residential purposes are exempt from these requirements.

A contested issue tackled by the lower courts involved commercial property owners that rent to commercial tenants and relinquish control of the property to those tenants. The tenants in turn agree to maintain the public sidewalk. The other contested issue involves third-parties who are not tenants, but who contract with the landlord or tenant to maintain the public sidewalk. The property owners argued that since they no longer had possession or control of the property they were out-of-possession landlords and no longer liable for accidents that occurred on the public sidewalk. The First Department adopted this argument and stated that if the property owner is an out-of-possession landlord, and the condition that caused the accident is transient, the responsibility to maintain the abutting sidewalk could be effectively shifted to the tenant or third-party vendor shielding the owner from liability. The Second Department, on the other hand, did not address any cases that were directly on point; however, the body of cases that the court addressed and which involved similar situations seemed to indicate its willingness to adopt the First Department's rationale. Recently, the Court of Appeals took on this issue and wrote a decision that addresses the argument of whether a property owner can shift responsibility to third-parties for injuries that occur on a public sidewalk, taking into consideration the enacted statutes.

In *He v. Troon Mgt., Inc.*, 2019 N.Y. LEXIS 3023, 2019 NY Slip Op 07643 (Court of Appeals October 24, 2019), Mr. He slipped and fell on the icy sidewalk that was abutting his employer's leased premises. Mr. He sued the property owner, who in turn moved for summary judgment and argued that it is an out-of-possession landlord, and since the condition was transient and not structural, it is not liable. The trial court denied the motion for summary judgment and the owner appealed. The First Department reversed and granted the motion issuing an opinion that supported the position of the property owner that as an out-of-possession landlord it was not responsible for transient conditions, and since snow and ice did not constitute a significant design or structural defect the owner is not liable.

The Court of Appeals resoundingly rejected the argument that summary judgment should be granted simply because the owner is an out-of-possession property owner and reinstated the original lower court decision. The Court stated that Section 7-210 unambiguously imposed a non-delegable duty on the property owner to maintain the City sidewalk. The Court rejected the distinction between in-possession and out-of-possession owners, and stated that the duty applies "with full force" notwithstanding transfer of possession to a tenant or a contractual maintenance agreement with a third-party.

The Court of Appeals began its analysis by emphasizing the intent of the City legislature to impose a non-delegable duty on property owners. The Court then made a point to distinguish between property owned by the actual owner, such as common areas within the building itself and property owned by a third-party, such as the sidewalk, which is owned by the City of New York, but which the Legislature decided should be maintained by a private party. The Court opined that the Legislature was very clear in its intent and that Section 7-210 applies to all owners, whether out-of-possession or not. The Court added that since the Legislature did exclude certain property owners, but not out-of-possession owners, the intent of the Legislature was for such owners to remain liable. Furthermore, the Court stated that the Legislature also required owners to carry premises liability insurance, but excluded non-owners, which to the Court was further confirmation that the governing body of the City of New York did not intend for property owners to shift liability to non-owners, such as tenants. This, the Court felt, imposed on property owners a broader duty to maintain the public sidewalk as compared to non-owners. In interpreting the interplay between common law and statutory requirements imposed on property owners, the Court stated that a property owner may be well within its rights to shift the responsibility to maintain the sidewalk to someone else; the property owner, however, cannot shift the non-delegable duty or liability to someone else, even if the non-owner was negligent. While seemingly extinguishing a viable and useful defense for property owners, the Court was careful in emphasizing that Section 7-210 does not hold owners strictly liable.

Learning Point: A property owner cannot shift liability to a non-owner for injuries on the sidewalk, irrespective of the nature of the condition that caused the injuries, to wit, whether it is a transient condition or a structural/design defect. Property owners are thus constrained in formulating defenses which are purely factual, such as lack of notice, and more easily opposed in the context of summary judgment, especially since an out-of-possession landlord will have the difficult task of claiming lack of notice of a condition when it is not present on the property. Further, an out-of-possession landlord can still claim lack of possession as a defense, but for injuries that occur on the premises and that relate to the property that is owned by the property owner. Property owners, when considering a prospective tenant, will have to be even more vigilant in ensuring that the tenant agrees to maintain an insurance policy which affords the landlord insured status on the tenant's liability policy for accidents on the sidewalk. The landlord will also need to ensure that the tenant policy affords sufficient coverage for any potential liabilities that relate to the public sidewalk in addition to negotiating any agreement by the tenant to maintain the leased premises, exclusive of the public sidewalk. ♦

SUBROGATION GROUP'S SUCCESS CONTINUES

Due to the Confidentiality terms in the settlement papers, this report is general. CM Senior Partner **Robert A. Stern** (New York/New Jersey) was retained to investigate a multi-million dollar food contamination incident. At the conclusion of the investigation, targets were identified and Mr. Stern placed them on notice. In order to allow the targets and Mr. Stern an opportunity to discuss a pre-suit resolution, if possible, a Tolling Agreement was executed by the parties. Another injured party, not represented by Mr. Stern, quickly settled its claim against the targets for a significantly reduced amount. Mr. Stern spent a few more months negotiating with the targets. In the end, Mr. Stern settled his clients' claims against the targets, pre-suit, for 96.5% of RCV damages. If you have any questions concerning subrogation, negotiation and/or recoverable damages, please contact Robert Stern at 212-805-3900 (**rstern@clausen.com**).

APPRAISAL

APPRAISAL DEEMED WAIVED AFTER LITIGATING FOR EIGHT MONTHS

Tamiami Condo. Warehouse Plaza Ass'n v. Markel Am. Ins. Co., 2019 U.S. Dist. LEXIS 200255 (S.D. Fla.)

Plaintiff sued insurer for breach of homeowner's policy after insurer determined hurricane damages fell below applicable deductible. Eight months after filing suit, plaintiff sought appraisal. ***Held:*** Plaintiff waived appraisal where plaintiff propounded interrogatories, request for production, and request for admissions; responded to request for production; participated in depositions; filed motions to remand; and did not issue pre-suit appraisal demand.

INSURED'S PUBLIC ADJUSTER CANNOT SERVE AS DISINTERESTED APPRAISER

State Farm Fla. Ins. Co. v. Valenti, 2019 Fla. App. LEXIS 18432 (Fla. App.)

Plaintiff assigned to public adjuster twenty percent of any recovery from plaintiff's insurer for home water leak. Insurer demanded appraisal pursuant to policy appraisal clause, which provided that both parties "will select a qualified, disinterested appraisal." Insurer rejected public adjuster's attempt to name himself as plaintiff's appraiser. ***Held:*** Public adjuster could not serve as plaintiff's disinterested appraiser where adjuster was entitled to a percentage of any recovery, inspected property and submitted claim for plaintiff, and sent letter appointing himself appraiser.

ARBITRATION

ARBITRATOR DID NOT EXCEED AUTHORITY BY FAILING TO APPLY RULES ARBITRATION AGREEMENT DID NOT REFERENCE

Asselin and Vieceli Partnership, LLC v. Steven T. Washburn, AC 41439 (Conn. App.)

Plaintiff sought damages from condo association and property manager for negligence related to defendants' construction of a bulkhead at a marina on plaintiff's property. Arbitration occurred pursuant to an arbitration clause in the construction contract and the arbitrator found defendants negligent and awarded damages. The trial court denied the defendants' demand for a trial *de novo* and confirmed the arbitration award over their objection that the arbitrator should have applied the construction industry rules of the American Arbitration Association. ***Held:*** The arbitrator did not exceed her authority when she did not apply the construction industry rules. The arbitration agreement lacked any reference to those rules.

BAD FAITH

CONSENT JUDGMENT INSUFFICIENT FOR BAD FAITH ACTION

Cawthorn v. Auto-Owners Ins. Co., 2019 U.S. App. LEXIS 32037 (11th Cir.)

Plaintiff passenger was injured in single vehicle accident and sued driver. Parties settled with court entering consent judgment for amount exceeding applicable auto policy limits. Driver assigned right to sue auto insurer for bad faith to plaintiff. Insurer was not party to the settlement agreement. ***Held:*** A necessary element of an insurer bad faith cause of action is an excess judgment, a "final decision—a verdict—reached by a factfinder" in an amount exceeding policy limits, or the functional equivalent thereof. A consent agreement to which the insurer was not a party does not qualify.

CIVIL RIGHTS

PRISON DOCTOR'S SURGERY DENIAL NOT CRUEL AND UNUSUAL PUNISHMENT

Stewart v. Lewis, 2019 U.S. App. LEXIS 31399 (11th Cir.)

Defendant, a Georgia Department of Corrections medical director, denied plaintiff's request for toe surgery and instead recommended conservative management. Plaintiff sued, arguing denial of surgery constituted cruel and unusual punishment in violation of the Eighth Amendment. ***Held:*** Whether correctional facility doctors should have employed additional diagnostic techniques or forms of treatment is a classic example of a matter for medical judgment and not an appropriate basis for Eighth Amendment liability.

DAMAGES

ADDITUR MOTION NOT PERMITTED AS TO HEARING ON DAMAGES

Kathleen Telman v. Gary W. Hoyt, et. al., AC 41599 (Conn. App.)

Plaintiff sought damages in connection with false representations made during defendants' sale of real property to plaintiff. Defendants were defaulted and plaintiff was awarded damages including $4,000 in attorney's fees. Plaintiff filed a motion for an additur as to attorney's fees, which was denied. ***Held:*** Trial court did not abuse its discretion in denying plaintiff's additur motion. Connecticut rules of practice provide for a motion for an additur in connection with a jury trial, not with respect to a hearing on damages.

FIRST-PARTY PROPERTY

COVERAGE FOR MATCHING REQUIRED ONLY AFTER INSURED INCURS COSTS ATTRIBUTABLE TO MATCHING

Vazquez v. Citizens Prop. Ins. Corp., 2019 Fla. App. LEXIS 16008 (Fla. App.)

Water intrusion damaged ceramic tiles and a kitchen cabinet in plaintiff's home. Plaintiff sued insurer based upon a repair estimate, the majority of which included prospective matching costs. Following judgment in favor of insurer, plaintiff appealed a trial court ruling excluding evidence of prospective damages attributable to matching. ***Held:*** The insurer was not liable to pay for damages attributable to matching until "the repairs are made" per Florida's matching statute and the policy's loss settlement provision. As such, the court properly excluded the prospective damages evidence.

LIABILITY INSURANCE COVERAGE

DRAMSHOP EXCLUSION APPLIED

AIX Specialty Ins. Co. v. Members Only Mgmt., LLC, 2019 U.S. App. LEXIS 36656 (11th Cir.)

Nightclub patron drank too much and crashed her vehicle, resulting in passenger death. Passenger's estate sued club per Florida Dram Shop Act. Club tendered defense to insurer who sought declaration of no coverage under the policy's Absolute Liquor Liability Exclusion. District court granted insurer summary judgment, holding exclusion unambiguously barred coverage. Estate appealed. ***Held:*** Exclusion provides no coverage for a claim seeking recovery for bodily injury under "[a]ny statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages." The sole count against the club is under the Dram Shop Act, a statute relating to the "distribution or use of alcoholic beverages". The claim, therefore, falls outside coverage and there is no duty to defend.

FAILURE TO PROVIDE TIMELY NOTICE UNDER CLAIMS-MADE POLICY DOOMS SUIT

ISCO Indus., Inc. v. Great Am. Ins. Co., 2019 Ohio App. LEXIS 4949 (Ohio App.)

Insured notified insurer of lawsuit 17 months after claims-made policy expired, but within the renewal coverage. ***Held:*** Notice was insufficient. The unambiguous policy language required notice to insurer as soon as practicable after insured's receiving notice, but no later than 90 days after the end of the policy period. Given the language, policy renewal did not create an expectation of continuous coverage. For like reason, the notice-prejudice rule was inapplicable. The policy's savings clause could not save the claim without rendering the notice provision meaningless.

MEDICAL MALPRACTICE

REQUIRED PRE-SUIT MEDICAL MALPRACTICE INVESTIGATION REQUIRES FINDING OF INJURY DUE TO ALLEGED MALPRACTICE

Howell v. Balchunas, 2019 Fla. App. LEXIS 18638 (Fla. App.)

Plaintiffs submitted a Notice of Intent to Initiate Litigation supported by an expert radiologist affirmation stating that defendant doctor interpreted a pulmonary CT angiogram incorrectly, below the standard of care. The expert further affirmed that this misreading

could have led the referring physician to miss the correct diagnosis, which could have led to incorrect or no treatment and could have led to harm to plaintiff. ***Held:*** An injury that could have been caused by a medical professional's action does not provide corroboration of reasonable grounds to believe that the claimed negligence resulted in injury.

MUNICIPAL LAW

NO MINISTERIAL DUTY TO OBEY EVERY VEHICLE STATUTE WHILE ENGAGED IN DISCRETIONARY POLICE ACTIVITY

Daley v. Zachary Kashmanian, et. al., AC 41393 (Conn. App.)

Plaintiff sought damages from police detective and city related to his ejection from his motorcycle after it was struck by unmarked police vehicle, which was not equipped with lights or a siren, while the defendant police detective was surveilling plaintiff and traveling above the speed limit in the wrong lane of traffic. The court set aside a jury negligence verdict in favor of plaintiff. ***Held:*** Affirmed as to negligence issue. The police detective was engaged in the discretionary police activity of surveilling plaintiff and thus did not have a ministerial duty to follow every motor vehicle statute.

CITY IMMUNE FROM LIABILITY ARISING OUT OF HOT-PURSUIT ACCIDENT

McConnell v. Dudley, 2019 Ohio LEXIS 2389 (Ohio)

While chasing suspected car thief, officer collided with another car. ***Held:*** Exception in immunity statute for vehicle accident within scope of employment is inapplicable to claims of negligent hiring, training, and supervision. The exception is limited to the driver's "operation" of a vehicle and does not include a city's hiring, training, or supervising an employee.

NEGLIGENCE

NO DUTY TO WARN PLAINTIFF OF OBVIOUS DANGERS OF HIS ACTIONS

Daniel Klein v. Quinnipiac Univ., AC 41964 (Conn. App.)

Plaintiff sought damages from defendant private university for injuries sustained when he hit a speed bump on defendant's campus with his bike. Plaintiff alleged that the speed bump was a dangerous, defective and unsafe condition. The trial court declined to instruct the jury on the definition of, and the duty owed to, a licensee. The jury returned a general verdict in favor the defendant. ***Held:*** Affirmed. There was no evidence that the defendant explicitly or implicitly expressed a desire that plaintiff enter its campus or a willingness that he do so sufficient to send the licensee question to the jury. Defendant was not required to warn plaintiff of the obvious dangers of his action.

OUT-OF-POSSESSION LANDOWNERS POSSIBLY LIABLE FOR SLIP AND FALL

Xiang Fu He v. Troon Mgmt., Inc., 34 N.Y.3d 167 (N.Y.)

Plaintiff fell on ice that had accumulated due to defendants' alleged negligent maintenance of abutting sidewalk and sued. Trial court rejected defendants' arguments that out-of-possession landowners are not liable for personal injuries based on negligent sidewalk maintenance. The appellate court reversed. ***Held:*** Court of Appeals reversed the Appellate Division, stating that Administrative Code section 7-210 abrogated the common law, imposed a nondelegable duty of care, and shifted civil liability from the city to out-of-possession owners.

DEFENSE SUMMARY JUDGMENT PROPER WHERE VICTIM COULD NOT SHOW ASSAILANT WAS INTRUDER

Laniox v. City of New York, 34 N.Y.3d 994 (N.Y.)

City sought summary judgment based on lack of triable issue of fact as to whether plaintiff's assailant was an intruder. Plaintiff's deposition testimony revealed she was not a resident and did not know any other tenants in the building aside from her two patients. Plaintiff also testified she did not see her assailant's face because it was covered by hood of sweatshirt and she did not know if assailant was tenant or guest. ***Held:*** This evidence was sufficient to shift burden to

plaintiff to provide evidence assailant was intruder, which she failed to do.

GROCER NOT LIABLE FOR IN-STORE MOTORIZED CART ACCIDENT

Rieger v. Giant Eagle, Inc., 2019 Ohio LEXIS 1831 (Ohio)

Shopper was hit by motorized shopping cart driven by untrained patron with dementia. ***Held:*** Shopper's negligence and negligent entrustment claims failed for failure to prove causation. Grocer's knowledge of prior incidents did not provide the evidence. There was no evidence that training would have prevented the accident. Patron's dementia was not a factor. She had regularly driven carts without incident.

FAILURE TO CALL MEDICAL EXPERT DOOMS CLAIM AGAINST NAIL SALON

Tate v. Nails, 2019 Ohio App. LEXIS 4148 (Ohio App.)

Customer complained of finger and nail infection following manicure. ***Held:*** Claim failed for lack of expert testimony. The existence and cause of infections are not within common knowledge. This was particularly true given that the customer did not allege the infection mechanism, *e.g.*, improper sanitation or disinfecting technique.

PERSONAL JURISDICTION

PLAINTIFF MUST USE DILIGENT, PERSISTENT EFFORTS TO DETERMINE ACTUAL ADDRESS OF DEFENDANT FOR SERVICE OF PROCESS

Eric Stevens v. Edward Khalily, et. al., AC 41801 (Conn. App.)

Plaintiff sought damages for intentional infliction of emotional distress. Defendants filed motion to dismiss due to improper service of process as a result of plaintiff's failure to serve them at their last known addresses, and neither of whom was a resident of Connecticut. The trial court granted the motion. Plaintiff appealed. ***Held:*** Affirmed. Plaintiff failed to sustain his burden that he properly served defendants at their last known addresses and that he made a reasonably diligent search to find out their last known addresses, within a reasonable time, before attempting service.

STATES RETAIN SOVEREIGN IMMUNITY AS TO PRIVATE ACTIONS BROUGHT IN OTHER STATES' COURTS

Daniel Reale, et. al. v. State of Rhode Island, et. al., AC 42044 (Conn. App.)

Plaintiff Connecticut resident brought spoliation of evidence action against certain Rhode Island state and town defendants in connection with certain petitions commenced against him in Rhode Island. The trial court granted the defendants' motion to dismiss for lack of personal jurisdiction. ***Held:*** Affirmed. The claims against the state defendants were barred by the doctrine of sovereign immunity and the town defendant was not considered a foreign corporation within the meaning of the applicable long-arm statute.

RESPONDEAT SUPERIOR

PRISON GUARD ACTED OUTSIDE SCOPE IN BRUTAL BEATDOWN

Rivera v. State of New York, 2019 NY Slip Op 08521 (N.Y.)

Inmate sued state under the doctrine of respondeat superior for injuries sustained during a brutal and unprovoked attack initiated by a correction officer but state was awarded summary judgment. ***Held:*** The gratuitous and utterly unauthorized use of force was so egregious as to constitute a significant departure from the normal methods of performance of the duties of a correction officer as a matter of law. This was a malicious attack completely divorced from the employer's interests.

TRIAL

JUROR MISCONDUCT, DECEIT, DESTRUCTION WARRANTS NEW TRIAL

People v. Neulander, 34 N.Y.3d 110 (N.Y.)

Trial court denied request of criminal defendant, convicted on charges of murdering his wife, for new trial based on juror misconduct. ***Held:*** Trial court abused discretion in declining to set aside verdict. Cumulative effect of juror's misconduct, deceit, and destruction of evidence—sending and receiving hundreds of text messages about case despite repeated instructions not to discuss case; accessing local media websites covering trial extensively; hiding misconduct by lying under oath to court, providing false affidavit, tendering doctored text messages in support of affidavit, selectively deleting text messages, and deleting irretrievable internet browsing history—may have affected substantial right to impartial jury.

TORTS

HARD CHECK IN YOUTH HOCKEY NOT ACTIONABLE

Borella v. Renfro, 2019 Mass. App. LEXIS 165 (Mass. App.)

Player sued opposing player and coaches, referees, and rink owners following hard-check injury. ***Held in a split decision:*** To be actionable, an opponent's misconduct must be extreme and outside range of ordinary activity in a contact sport. Penalties expected under normal play do not alter the analysis. There was no evidence of referees missing earlier penalties causally related to later injury. To be liable, coaches must recklessly use a player known for violent tendencies. Rink owners neither scheduled teams with lopsided skill levels nor failed to adopt appropriate rules of play. The dissent argued that majority ignored the prevailing standard and so will discourage participation for fear of injuries.

FICTIONAL PORTRAYAL OF DOCTOR FAILS TO SUPPORT DEFAMATION CLAIM

Dudee v. Philpot, 2019 Ohio App. LEXIS 4019 (Ohio App.)

Doctor sued retired judge for defamation and false light invasion of privacy following publication of novel about character supposedly representing him. ***Held:*** Issues about doctor's marital infidelity were previously litigated, barring further challenges. Some allegedly defamatory statements were substantially true. Others were insufficiently pled, non-verifiable, or mere hyperbole. Statements about doctor's relationship with his children were not defamatory per se, and doctor failed to allege special damages. To support his false-light claims, doctor needed proof of special damages, which were absent.

FORKLIFT INJURY TO EMPLOYEE NOT AN INTENTIONAL TORT

Turner v. Dimex, LLC, 2019 Ohio App. LEXIS 4348 (Ohio App.)

Employee was crushed by forklift with inoperable back-up alarm. ***Held***: Alarm did not qualify as an "equipment safety guard" under statute allowing intentional tort actions against an employer for removal of guards. Removed guard must be designed to protect an operator and others from danger. Under the statute, employer must intend to injure by deliberately removing guard. Mere knowledge of an uncorrected hazardous condition is insufficient.

UM/UIM INSURANCE

MOBILE GYM LOCATED INSIDE TRUCK NOT AN UNINSURED AUTO

Deutsch v. Geico Gen. Ins. Co., 2019 Fla. App. LEXIS 16455 (Fla. App.)

Plaintiff was injured while working out in the back of a truck operated as a mobile gym. Plaintiff sued her insurer, contending the mobile gym was an uninsured/underinsured auto under her policy. The central inquiry was whether the truck was "located for use as a . . . premises," defined as a "building, along with its grounds." ***Held:*** Plaintiff worked out in the truck only when it was stationary, parked, and connected to a power source, never when it was being driven. As such, when the negligence occurred the stationary truck was being used as a building or "premises" and was not an uninsured auto under the policy's terms.

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