



CM EAST COAST **REPORT**

of Recent Decisions

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Where Lease Delegates
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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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Massachusetts Appellate Court Holds Broker On The “Hook” For Spoiled Seafood

by *Alexandra DiFusco*

WhiteCap International Seafood Exporters, Inc. (“Plaintiff”) filed suit against insurance broker Eastern Insurance Group, LLC (“Defendant”). The Appeals Court of Massachusetts vacated Defendant’s motion for summary judgment. *Whitecap International Seafood Exporters, Inc. v. Eastern Insurance Group, LLC*, 97 Mass. App. Ct. 578 (Mass. App. Ct. 2020). The Court concluded that genuine issues of material fact existed as to whether a coverage extension in a warehouse legal liability insurance policy that Defendant *could* have obtained for Plaintiff would have provided liability coverage. *Id.*

This case arises out of a forklift accident in a warehouse owned by Cold Storage Solutions (“CSS”). *Id.* at *579. CSS hired Defendant to obtain warehouse legal liability insurance for each of its warehouses. *Id.* In October, 2011, a forklift accident occurred at one of the warehouses, causing several freezer racks, and the frozen food stored inside, to collapse. *Id.* A large quantity of Plaintiff’s inventory of frozen crab was involved in the collapse, and any non-damaged inventory was removed from the warehouse and transported elsewhere for storage. *Id.* At the point of transfer from the warehouse, Plaintiff’s unharmed product suffered spoliation damage from temperature fluctuation during its transport. *Id.* at *579-580.

Litigation soon ensued, and in settlement, CSS and its President, Thomas Parenteau (“Parenteau”) assigned to Plaintiff their claims against Defendant for its failure to obtain the insurance that was originally requested. *Id.* at *580. Plaintiff asserted against Defendant claims for breach of fiduciary duty, breach of contract, professional negligence, negligent misrepresentation, gross negligence, and bad faith, among other things. *Id.*

Defendant filed a motion for summary judgment, arguing that its failure to obtain the requested insurance did not cause any harm to Plaintiff, because such insurance would not have provided liability coverage for the damage to Plaintiff’s crab. *Id.* at *581. Central to the summary judgment record was an insurance policy issued by Defendant to a CSS entity covering a nearby warehouse similar to the one at issue in the instant case. *Id.* The lower court agreed with Defendant and permitted summary judgment in its favor; Plaintiff appealed the decision. *Id.*

The Appellate Court began its analysis by outlining the general principles of burdens of proof as they pertain to coverage issues: “an insured bears the initial burden of proving that the claimed loss falls within the coverage of the insurance policy. Once the insured



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does this, the burden then shifts to the insurer to show that a separate exclusion to coverage is applicable to the particular circumstances of the case.” *Id.* at *581. The Court explained that where an insured seeks to establish coverage through an exception contained within a policy exclusion, the burden shifts back to the insured to prove coverage for the claimed loss. *Id.* at *582. The Court added that an insurer who moves for summary judgment bears the burden of showing that the insured would be unable to meet its burden of proof at trial. *Id.*

Because the case turned on policy interpretation—a question of law—the Court’s review was *de novo*. *Id.* at *582. The focus of the Court’s analysis was Plaintiff’s argument that Defendant’s liability for the damage would have been covered under three different sections of the policy were it issued: (1) an exception to the spoilage exclusion; (2) a supplemental coverage for cold storage; and (3) a coverage extension for “property while it is being moved . . . to prevent a loss caused by a covered peril.” *Id.*

The policy’s spoilage exclusion exception provided that “if spoilage results in a specific peril, we do cover the loss or damage caused by that specified peril.” *Id.* at *583. Plaintiff argued that the phrase “results in” as it appears in the exception should be interpreted to mean “results from,” because to find it to mean “causes” would render the exception to the spoilage exclusion meaningless (as spoilage could never cause many of the specific perils, such as aircraft, hail, or windstorm). *Id.* The Court,

examining the policy as a whole, concluded that contrary to Plaintiff’s assertion, the phrase “results in” contained in the exception should be given its plain and ordinary meaning, and therefore because the temperature fluctuation damage to Plaintiff’s undamaged crab did not cause a specified peril, Plaintiff could not seek liability coverage through this exception. *Id.* at *583-584.

Next, the Court examined a policy endorsement providing coverage for spoilage under limited circumstances, including where the spoilage “is caused by . . . a sudden or accidental breakdown or malfunction of refrigeration equipment” or by “the incorrect usage of the refrigeration equipment.” *Id.* at *584. Plaintiff argued that the spoliation damage to its crab was tied to the fact that CSS personnel tried to cool the loading area of the warehouse by keeping the door to the freezer open, an action which constituted an “incorrect usage of the refrigeration equipment.” *Id.* at *585. The Court found this argument to be based upon a chain of causation analysis established in *Jussim v. Massachusetts Bay Ins. Co.*, 415 Mass. 24, 27, 610 N.E.2d 954 (1993). *Id.* Under such an analysis, if “the efficient proximate cause is an insured risk, there will be coverage even though the final form of the property damage, produced by a series of related events, appears to take the loss outside of the terms of the policy.” *Id.* (quotations omitted). The Court recognized that such an analysis was typically applied to first-party policy coverages (and not third-party liability coverages) and found that even if the *Jussim*

analysis were applicable, an insured may recover only when a covered event causes a loss in the form of an excluded event. *Id.* Finding that a covered event did not cause the loss at issue in Plaintiff’s case, the Court found the endorsement inapplicable. *Id.* at *585-586.

The final extension examined provided coverage for “any direct physical loss to covered property while it is being moved . . . to prevent a loss caused by a covered peril.” *Id.* at *586. The Court found that the use of the word “any” within the extension meant that the types of “direct physical loss” were not limited to loss caused by covered perils alone. *Id.* Although Defendant attempted to argue that there was no emergency which required the moving of Plaintiff’s crab, the Court refuted the argument, citing to Parenteau’s Affidavit to the contrary and the extensive damage to the freezer racks. *Id.* Additionally, the Court quickly refuted Defendant’s argument that the damage to Plaintiff’s crab did not occur within ten days of the forklift accident, as the record was not clear as to when the crab was actually moved. *Id.* Finding genuine issues of material fact to exist as to these events, the Appellate Court vacated the lower court’s grant of summary judgment in favor of Eastern Insurance. *Id.*

Learning Point: Even where no policy is actually issued, an insurance broker may still be liable to a would-be insured for damages covered under a comparable policy it should have been issued. Also, every piece of supporting information counts in defeating a summary judgment motion. ♦

New York Appellate Court Scrutinizes Deadly Physical Force By The Police

by *George (Djordje) Caran*

Due to recent high profile events involving the police and citizens suspected of criminal activity where deadly force was used, there is much greater scrutiny placed on police officers and their employers, the municipalities. As is often the case in such encounters, besides potential criminal charges being brought, the victims may sue in civil court and allege causes of action rooted in wrongful death and violations of civil rights. The Second Department in *Owens v. City of New York*, 2020 N.Y. App. Div. LEXIS 3104, 2020 NY Slip Op 03019, (2d Dep't, May 27, 2020) issued a decision which revisited and analyzed in detail the legal standards imposed on municipalities and police officers in situations where deadly force is used.

The facts of the case depict a deadly encounter between the New York City Police Department and an eighteen-year old named Khriel Coppin. Mr. Coppin was shot and killed by police officers after they responded to a "domestic dispute with a gun" 911 call. The tense situation ended when fourteen shots were fired at Mr. Coppin. The facts evince that Mr. Coppin was mentally disturbed. When the 911 call was placed by his mother, Mr. Coppin was heard in the background yelling: "I got a gun and I am going to kill you." When the police responded, Mr. Coppin was brandishing knives in both hands and lunged at the

police officers as they approached the apartment where Mr. Coppin was located. Mr. Coppin then retreated into his apartment and was pursued. The police observed Mr. Coppin trying to exit out of the apartment window while exclaiming to the police that he had a gun. As he was making his escape, one of his hands was concealed under his sweatshirt. After refusing to expose his hands as instructed by the officers, Mr. Coppin was shot and killed.

Ms. Denise Elliot Owens, the decedent's mother, commenced a lawsuit against the municipality, City of New York, and its employees, the police officers that shot Mr. Coppin. The suit alleged common law wrongful death causes of action against the City and police officers as employees, as well as actions rooted in violation of 42 USC Section 1983, based on excessive force, violation of civil rights and deprivation of a plaintiff's right to family association leveled against the officers.

The City and the police officers moved for summary judgment to dismiss the case and claims. Defendant police officers alleged that they did not use excessive force and that deadly force was warranted and reasonable. The officers also argued that the actions were discretionary in nature and therefore they were entitled to qualified immunity. The City argued that it can avail itself of



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the complete defense of governmental immunity because the police officers' actions were discretionary. The doctrine of discretionary authority grants immunity to a municipality if its employee acted reasonably and the acts could produce different acceptable results. The lower court agreed and dismissed the entire action. Plaintiff appealed and the Appellate Court, Second Department, issued an opinion which largely reversed the main portions of the lower court's decision, in particular, the causes of action for wrongful death against the municipality and civil rights violations against the officers were restored. The Court discussed governmental immunity, qualified immunity and whether Defendants demonstrated that they applied reasonable force, or whether there are triable issues of fact.

In addressing the wrongful death cause of action, the Court defined justified deadly physical force as one where the officer exercised the degree of care that is reasonable under the circumstances. It nevertheless found triable issues of fact with regards to whether the municipal employees (the officers) were negligent in using deadly force. The Appellate Division relied upon the Patrol Guide and reiterated that a police officer is justified in using deadly force if the officer has "probable cause to believe they must protect themselves or another person present from imminent death or serious physical injury." The Court then concluded that the testimonies of the police officers and non-party witnesses created triable issues of fact as to whether excessive force was used. The Court then denied the City's

assertion of governmental immunity. The Court acknowledged that a municipality cannot be held liable if its employee performs an action which can be deemed as discretionary since the municipality is protected by the doctrine of governmental immunity. The Court rationalized that since the use of deadly force by officers is governed by the Patrol Guide, it is not a discretionary action. The Court stated that deadly force is a ministerial action which has a compulsory result and therefore not discretionary.

The Court then turned to the issue of the violation of decedent's and Plaintiff's civil rights which is actionable through the Deprivation of Rights Statute, Section 1983. The Court indicated that the standard for analysis of excessive force is objective reasonableness which was established under the Fourth Amendment. The Court stated that the standard is one of a reasonable officer on the scene and not one of a 20/20 hindsight after the fact. Whether an officer's actions are reasonable requires probable cause that the suspect posed a serious threat of death or serious danger to the officer or others. It then stated that whether reasonable force was used is "intensely factual." The Court recognized that police officers are entitled to qualified immunity, only if the officers' actions did not violate a clearly established right or law, or if they objectively believed that the actions will not violate a clearly established right or law. In finding a triable issue of fact as to the reasonableness of the officers' actions the Court claimed that qualified immunity cannot be asserted.

The Court did preserve the dismissal of causes of action against the officers for excessive force with regards to the number of shots fired and failure to intervene to stop the killing.

Learning Point: The Court applied a similar if not identical test for whether wrongful death or civil rights violations are viable, with the exception that in the case of a civil rights violation, the Court analyzed the standard as established under the Fourth Amendment. Nevertheless, the standards mirror each other and are rooted in the classic reasonable degree of care doctrine which requires a police officer to exercise reasonable care under the specific circumstances. The case re-affirms the right to governmental immunity for municipalities and the right to qualified immunity for governmental officers even though in this case the Court felt they did not apply. The case articulates a threshold for when deadly physical force can be used when taking into consideration the circumstances of the specific incident, and where the decedent seemed to pose a danger to the officers and others. ♦



New Jersey Appellate Court Rejects “Ongoing Storm” Defense

by Timothy F. Brown

The New Jersey Appellate Division recently rejected the ongoing storm rule as a defense for commercial landowners in slip and fall cases. The ongoing storm rule absolves landowners of liability for failing to clear a sidewalk of ice and snow during the course of a storm. In *Pareja v. Princeton International Properties*, ___ A.3d ___ (N.J. Super. App. Div. April 9, 2020), the Appellate Court held that a commercial landowner has a duty to clean adjacent public walkways covered by ice or snow, and cannot wait until the storm has ended. Rather, once the landowner has notice of the obstructed walkway, the landowner must act in a reasonably prudent manner to clear the path. The Court noted that reasonableness is the key factor in determining whether the landowner acted in a negligent manner.

The property at issue in *Pareja* consisted of a mixed use building with two offices on the first floor, and apartments on the second and third floor. Adjacent to the building, and included as part of the property, was a paved parking lot. The parking lot had a concrete driveway apron, allowing access to the street. During depositions, Defendant noted that it contracted a landscaping company to perform snow and ice removal at the property. However, prior to and during the storm, no snow or ice pre-treatment or removal occurred.

On January 11, 2015, the National Weather Service issued a winter storm advisory for the region surrounding the property. On the morning of January 12, 2015, a winter storm consisting of a mixture of snow, rain and sleet blanketed the region. At 7:50 a.m., Plaintiff walked towards the property. He noted that a slight drizzle consisting of sleet continued to fall at that time. As he stepped onto the driveway apron, Plaintiff slipped on an undetected patch of black ice.

The Trial Court applied the ongoing storm rule and held that Defendant did not have a duty to remove or reduce ice hazards until after the storm had subsided. On appeal, the Appellate Division noted that the New Jersey Supreme Court never addressed the ongoing storm rule, and reversed.

The Appellate Division noted that commercial landowners have a duty to maintain public sidewalks abutting their properties. That duty to maintain includes removing ice and snow that accumulates on the sidewalks. The duty does not disappear simply because a storm is ongoing. Rather, the Appellate Division held that various factors weigh in favor of imposing a duty on landowners to clear sidewalks during the course of a storm.



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First, the Court noted the relationship between landowners and those who may come onto the property. A commercial landowner has notice that the general public will utilize the public sidewalks and should be expected to act in a reasonably prudent manner to remove or reduce ice and snow hazards. Second, the Court found that the risk of injury from ice and snow covered sidewalks is entirely foreseeable. Third, the Court did not find imposing the duty on the landowner to be unreasonably burdensome. Fourth, the Court believed that imposing the duty on the landowner served the public interest in deterring tortious behavior. Finally, the Court concluded that imposing the duty on landowners abided by notions of fairness and common sense—a landowner is in the best position to remove or reduce ice and snow hazards.

The Appellate Division made clear that in rejecting the ongoing storm rule, it was not imposing another bright-line rule. Instead, New Jersey courts must look to the actions of the landowner in light of the

circumstances. A landowner may be liable “only if, after actual or constructive notice, it fails to act in a reasonably prudent manner to remove or reduce the foreseeable hazard.” The Appellate Division then provided eight factors to consider in assessing the reasonableness of a commercial landowner’s conduct:

- (1) whether any action would be inexpedient or impractical;
- (2) the extent of the precipitation, including the amount of snow or ice accumulation;
- (3) the timing of the precipitation, whether it is day or night;
- (4) the nature of the efforts, if any, to prevent, remove, or reduce snow or ice accumulation, especially whether conditions were so hazardous as to make it unsafe for the landowner or any contractor to venture out in the elements;
- (5) the minimal usage consequent on a “closed” facility in contrast to a normal work week;

(6) the number of individuals expected to use the public sidewalk, premises, and the area in need of attention;

(7) the past, current, and anticipated weather conditions, including but not solely dependent on reliable weather predictions, and the practicality of reasonable safety measures or methods of ingress or egress; and

(8) any other relevant factors.

Finally, the Appellate Division ruled that issues of fact existed as to whether Defendant had actual or constructive notice of the slippery condition outside the property, and whether Defendant acted reasonably under the circumstances. The Court concluded that there were questions for the jury to decide. Accordingly, the Appellate Division reversed.

Learning Point: In New Jersey, commercial landowners must take reasonable steps to clear public walkways prior to and during a storm. ♦



Landlord Not Liable For Snow/Ice Slip-And-Fall Injuries On Property Where Lease Clearly Delegates Responsibility Of Removal To Tenant

by *Marisa G. Michaelsen*

New Jersey has historically held that a property owner owes a ‘non-delegable’ duty to maintain their property in a safe and reasonable manner. In *Richard Underhill v. Borough of Caldwell, et al.*, A-1800-18T4 (May 21, 2020), the Superior Court of New Jersey, Appellate Division, held that the duty of snow and ice removal can be lawfully delegated to the tenant. In *Underhill*, Plaintiff parked his vehicle in a municipal parking lot in the Borough of Caldwell. Upon returning to his vehicle, he slipped on black ice that had accumulated on the blacktop pavement, suffering injuries that included a fractured right hip. The municipal lot at issue was owned by Defendants Carol Dakin and Susan Fields, who leased the property to the Borough in 1998 for a term of approximately 20 years. Pursuant to the lease agreement, the Borough was contractually responsible for maintenance of the lot, including snow and ice removal.

For some background, in New Jersey, a cause of action for premises liability is a negligence action. Negligence requires the plaintiff to establish four elements: (1) duty of care, (2) breach of that duty, (3) actual and proximate causation, and (4) damages. The duty of care owed under a premises liability claim depends on whether

the injured person is a business invitee, a licensee, or a trespasser. A property owner generally has a non-delegable duty to keep its property safe from known and reasonably discoverable dangerous conditions. Notice is a defense, as is comparative negligence. In general, owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is in the scope of the invitation. The duty of due care requires an owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe. To establish a breach of duty, there must be a foreseeable risk to potential victims. For obvious disrepair or danger, the breach occurs when the owner knew or should have known about the danger, yet took no measures to fix or warn visitors. However, a property owner may also be liable for unknown dangers or hazards, if the owner should have encountered the dangers during the regular care and maintenance of the property.

In *Underhill*, Plaintiff’s liability expert asserted that there existed several low spots in the pavement that caused water to remain in puddles, which may have been



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present at initial installation of the asphalt or developed over time. This expert opined that the failure to eliminate the depressions within the asphalt caused storm water runoff to remain and form into ice. Both the Borough and the property owners moved for summary judgment. The trial court concluded that Plaintiff's expert did not establish when the depressions in the asphalt were created nor how long they had been there; and, therefore, Plaintiffs were unable to establish the Borough or the Property Owners had adequate notice of the accumulation of ice. Plaintiff appealed as to the Property Owners only.

The Appellate Court in *Underhill* focused on whether a duty of care was owed by the Property Owners to remove snow and ice from the parking lot that they leased to the Borough. This Court relied upon another recent New Jersey Supreme Court decision, *Shields v. Ramslee Motors*, 240 N.J. 479 (2020), where the Supreme Court found it would be unfair to hold a landlord responsible for a condition of disrepair over which it had vested the tenant with exclusive possession. The Court in *Shields* relied on the language within the lease, as well as utilized a four-part test to determine the fairness in where a duty should lie, found in *Hopkins v. Fox & Lazlo*

Realtors, 132 N.J. 426 (1993). This four-part *Hopkins* test analyzes: (a) the relationship of the parties; (b) the nature of the risk; (c) the opportunity to exercise care; and (d) public interest.

Applying this same four-factor test, the Appellate Court in *Underhill* found that the landlord had no ongoing relationship with Plaintiff, nor knowledge of who visited the property or derived any benefits from them. As to the second factor, although winter weather is generally foreseeable, it is also transient. It would be unfair to place responsibility of snow and ice removal on a commercial landlord who lacks control of the property, but should instead remain with the tenant who has control over the property and tools to eliminate the risks. Next, the Court stated that because the landlord does not maintain a presence on the property, nor do they have access to information about the conditions of the property, it would be impractical to require the landlord to prevent the harm accompanying temporary slippery conditions. As to the last factor, the Court stated that this point could be debated, due to the Borough's non-liability, as persons injured could be left without recourse. However, the Court noted that would also be true if the Borough outright owned the

municipal lot, and there are public policies in play that may make private would-be landlords reluctant to lease to public entities.

Importantly, the lease entered into by the Property Owners and the Borough states specifically that the Borough will bear the cost and expense of maintenance, and "will keep the demised premises free of obstructions, snow and ice." The Court, through the holding in *Shields* and applying the four-factor *Hopkins* test, ultimately determined a property owner does not have a duty to remove snow and ice from a property when the tenant maintains exclusive possession and control of the property, as well as exclusive responsibility to remove snow and ice from the premises.

Learning Point: A commercial landlord in New Jersey does not owe a duty of care to an invitee when the lease makes clear that the tenant has control over the property. Duties to remove snow and ice can now be definitely delegable, and it is likely the court will follow this analysis with other maintenance and repair issues. The focus turns onto the specific language within the lease, but may provide early relief to landlords in premises liability matters. ♦

New York Appellate Court Allows Homeowners To Give Certain Specific Instructions And Still Be Protected By The Homeowner's Exemption To New York State's Labor Law

by *Grace R. Guo*

Homeowners often hire contractors to work on their homes for repairs, remodeling and/or reconstructions. They typically have a purpose in mind when they hire people to work on their homes. When relaying their desired effects, homeowners are often unaware of the inherent liability they may be exposing themselves to. As such, homeowners are often named as a Defendant in a New York State Labor Law §§ 240(1) and 241(6) lawsuit.

Can homeowners be liable for a contractor or worker's injury sustained while working on their homes? The answer is in the affirmative—homeowners may be liable for work-related injuries even if they did not hire the contractor or worker directly. The New York State Labor Law §§ 240(1) and 241(6) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty, which has proximately caused injury. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219 (1991). The courts have repeatedly held that such duty is non-delegable and that an owner is liable for a violation of the statute even though the job was performed by an independent contractor over which it exercised no supervision or control. *Gordon v. Eastern Railway*

Supply, Inc., 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912 (1993); *Rocovich, supra* at 513; *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 49, 618 N.E.2d 82 (1993). Therefore, homeowners may be unknowingly exposing themselves to absolute liability simply by way of improper communication, which in turn may mean raised insurance premium and even personal liability of financial compensation.

There is an exception to the Labor Law §§ 240(1) and 241(6) liability that “owners of one and two-family dwellings who contract for but do not direct or control the work” are exempt from liability under the general rule. This is commonly referred to as the homeowner's exemption. This exemption was enacted to “protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability.” *Acosta v. Hadjigavriel*, 18 A.D.3d 406, 406-07, 794 N.Y.S.2d 445 (2d Dept. 2005); see *Szczepanski v. Dandrea Constr. Corp.*, 90 A.D.3d 642, 934 N.Y.S.2d 432 (2d Dept. 2011). In order to benefit from the homeowner's exemption, a homeowner must show that: (1) the work was conducted at a dwelling



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that is a residence for one or two families; (2) the dwelling is not used for commercial purposes; and (3) the homeowners did not direct or control the work. *Murillo v. Porteus*, 108 A.D.3d 753, 754, 970 N.Y.S.2d 235, 237 (2d Dept. 2013). There have been many litigations over what constitutes a homeowner directing or controlling the work. Recently, in *Johnny Salgado v. Kenneth Rubin, et al.*, 2020 N.Y. Slip. Op. 02640 (2d Dept. 2020), the Second Department further clarified this issue.

Salgado involved an appeal arising from a personal injury action filed by Johnny Salgado against homeowners Kenneth and Carol Rubin, under Labor Law §§ 200, 240(1) and 241(6). Mr. and Mrs. Rubin found out that a water pipe in their vacation home froze and ruptured, causing a leak that collapsed a second-floor bedroom

ceiling, and resulting wall and floor damage. They hired a contractor who hired Cleancrafters Inc. to repair the ruptured water pipe. Mr. Salgado worked as a crew leader for Cleancrafters and was the plumber assigned to repair the water pipe. While working on-site, Mr. Salgado got up to the attic to take photographs of the resulting water damage. While he was in the attic, he felt a beam/joist give way under his weight, causing him to lose balance and fall from the attic floor/bedroom ceiling onto the second-floor bedroom ground. He filed an action against the homeowners for his injuries sustained as a result thereof.

The issue of contention in the lower court was whether Mr. and Mrs. Rubin directed or controlled Mr. Salgado's work making them liable for his injuries under Labor Law. Mr. Salgado claimed that the homeowners requested him to don and wear blue plastic booties over his footwear, and requested him to double insulate the repaired water pipe to avoid a reoccurrence of freezing. The Rubins denied making those requests. Mr. Salgado also claimed that the owners requested him and his crew to carry personal effects out of the area they worked in with specific instructions on how to do so, and requested specifically that all debris and waste be routed through the home's French doors and out into the yard via wheelbarrow for disposal at the dumpster.

The lower court concluded that even if Mrs. Rubin watched over the crew and made all these requests

with specific instructions, this sort of monitoring does not equate to the kind of supervision, control and direction within the meaning of the Labor Law.

The Appellate Court, Second Department affirmed the lower court's decision. The key issue was what would be considered to be "more extensive" than that would be expected out of a typical homeowner hiring a contractor to work on their home. The Court agreed with the lower court to distinguish between discussions of the results the homeowner wished to see and discussions of the method or manner in which the work was to be performed. It seemed that the homeowners' purported requests of wearing booties to protect the floor, moving personal effects to avoid damages, double insulating the pipes to avoid future freezing, and how to dispose debris to keep the house clean were all decisions regarding aesthetic matters and the homeowners' desired end result. These decisions did not amount to direction or control in the context of Labor Law §§ 240(1) and 241(6).

Learning Points: Based on this ruling, it signifies that the Second Department is willing to grant a broad interpretation of the homeowner's exemption to accept even specific instructions by homeowners, as long as they are relevant to the owners' overall desired result. This may mean that the application of the homeowner's exemption hinges heavily on how homeowners communicate their instructions. ♦



New Jersey Appellate Court Determines The Lessor Of Two Wrongs

by *Colin J. Gorman*

In *Lynn Funding, LLC, Etc. v. Joseph Deangelo* (N.J. Super. Ct. App. Div. 2020), the New Jersey Appellate Division was tasked with determining which is worse: an untimely filed claim or inexcusable neglect?

In 2001, Defendant took out a loan to purchase a Mercedes Benz vehicle. Defendant believed the vehicle was defective and stopped making payments. Defendant defaulted on his payment obligations no later than March, 2004. The original lender transferred the loan and, in 2007, the loan was re-transferred to Plaintiff. Seeking to collect on the loan, Plaintiff filed a collection case in 2009 and received a default judgment in 2010. After other collection efforts did not succeed, Plaintiff was able to garnish Defendant's wages in 2017. Having not appeared or responded to the collection action or the default judgment, Defendant moved in 2018 for relief from the default judgment

Under the Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq., Plaintiff was required to bring suit within four years after a cause of action for non-payment by Defendant had accrued. Plaintiff failed to do so and, as such, was in violation of the Fair Debt Collection Practices Act, 15 U.S.C. 1692. With that said, Defendant failed to act or address the default for many years. In its ruling, the lower court held that

Defendant's lack of action amounted to "inexcusable neglect" and could not satisfy the "excusable neglect" standard of Rule 4:50 for relief from the judgment. The Appellate Division was left to determine which "wrong" was more excusable.

The Appellate Court noted that, "In weighing these conflicting circumstances, the [lower court] judge concluded that plaintiff's breach of the Fair Debt Collection Practices Act outweighed defendant's inexcusable neglect; relying on Rule 4:50-1(f) [a "catch-all" provision for relief from judgment in "exceptional circumstances"], the judge granted the motion [for relief from the judgment] and dismissed the time-barred complaint." Reviewing the lower court's reasoning, the Appellate Court found that the lower court did not abuse its discretion and as such affirmed the result.

In reaching its decision, the Appellate Court reasoned that "a court's power to vacate a judgment is based on equitable principles. *Hodgson v. Applegate*, 31 N.J. 29, 37 (1959). Courts must often choose the weightier of two competing equitable rights; at times they may even have to choose the least blameworthy of two competing wrongs." The Court ultimately decided that this case fell into the latter category.



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The Appellate Court noted that, when competing public policies are present, the Court must weigh the importance of the competing policies. In this matter, Plaintiff filed a time-barred collection claim in violation of a federal statutory policy. The purpose of the federal statute is to prevent “abusive debt collection practices.” Defendant, on the other hand, failed to timely move for relief from the default judgment and undermined, according to Plaintiff, “the strong interest in finality of judgments and judicial efficiency.” In its initial decision, the lower court determined that the former policy outweighed the latter. In its review, the Appellate Court declined to override that decision and, as such, affirmed the lower court’s decision dismissing Plaintiff’s complaint and granting Defendant relief from the default judgment.

Learning Point: In weighing two competing wrongs, the New Jersey Appellate Division held that the violation of a federal statute, the Fair Debt Collection Practices Act, was the more serious violation compared to inexcusable neglect in answering a claim. As such, parties seeking to recover debts from a non-responsive party should make all efforts to commence actions within the statute of limitations. Failure to timely commence an action within the statute of limitations will not be cured by a defendant’s willful or inexcusable neglect. ♦



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APPELLATE PRACTICE

FAILURE TO CHALLENGE TRIAL COURT'S LACK OF STANDING DETERMINATION ON APPEAL PREVENTS APPELLATE REVIEW

John S. Kaminsi v. Scott Semple, AC 42288 (Conn. App.)

Plaintiff inmate sought a declaratory judgment and injunctive relief for defendant state employees' alleged failure to investigate alleged abuse inflicted on him by a corrections officer. Defendants successfully moved to dismiss the complaint, arguing in part that plaintiff lacked standing to assert a claim based on a failure to conduct a criminal investigation. Plaintiff appealed. **Held:** Affirmed in part and dismissed in part as moot. Plaintiff failed to challenge on appeal the trial court's determination that he lacked standing to raise some of his claims. Plaintiff, therefore, could not succeed on those claims on appeal.

AUTO INSURANCE

MISSTATEMENT IN APPLICATION VOIDS POLICY

Nationwide Mut. Fire Ins. Co v. Pusser, 2020 Ohio LEXIS 1101 (Ohio)

Insured falsely warranted in auto policy application that no other operators lived in household. **Held:** Insured breach resulted in insurer's voiding policy *ab initio*. Policy

provided that supplying incorrect information "could void the policy from the beginning." Language's non-mandatory nature did not diminish its warning. **Further held:** Insurer need not void policy and return premium before filing declaratory judgment action.

CIVIL PROCEDURE

GOOD CAUSE MUST BE DEMONSTRATED TO OPEN JUDGMENT

USAA Fed. Savings Bank v. Charles Donald Gianetti, AC 42037 (Conn. App.)

Plaintiff successfully foreclosed on certain real property of defendant. Trial court then denied defendant's motion to open the judgment. **Held:** Affirmed. Defendant did not establish good cause for opening the judgment. Evidence below did not support defendant's allegation he could not attend hearing for medical reasons. The court did not receive any information about why or how defendant's failure to attend court that day had prevented him from making any material input to the court's decision whether to grant foreclosure.

FAILURE TO SATISFY NOTICE REQUIREMENT DEPRIVES COURT OF SUBJECT MATTER JURISDICTION IN FORECLOSURE ACTION

MTGLQ Investors, L.P. v. Kevin Hammons, AC 42750 (Conn. App.)

Plaintiff sought to foreclose on defendant's real property. Defendant opposed, arguing lack of subject matter jurisdiction due to plaintiff's failure to comply with a statutory requirement that a mortgagee provide specific notice to the mortgagor before commencing foreclosure. Plaintiff successfully argued this requirement was satisfied, relying on notice sent in a prior foreclosure action. **Held:** Reversed. The notice requirement is a condition precedent to the commencement of a foreclosure action and notice from a prior action is insufficient.

CORONAVIRUS

CORONAVIRUS QUALIFIES AS COMMUNICABLE DISEASE

Commonwealth v. Humphries, 2020 Va. Cir. LEXIS 45 (Dist. Ct. Va.)

A Virginia court examined whether a defendant's scheduled jury trial, which had commenced for speedy trial purposes, should nevertheless be continued due to the COVID-19 pandemic development. **Held:** The Coronavirus rises to the level of a natural disaster since it qualifies as a communicable disease of a public health threat as defined in Va. Code

Ann. 44-146.16. The pandemic was beyond the control of the court, attorneys, and the parties involved in the case and a jury trial could not be conducted without explicitly endangering the health, welfare, and safety of all parties, including, without limitation, potential and actual jurors.

DECEPTIVE PRACTICES LAW

FAILURE TO ADMIT VIOLATION NOT DECEPTIVE PRACTICE

Collazo v. Netherland Prop. Assets LLC, 2020 NY Slip Op 02128 (N.Y.)

Plaintiffs, former tenants in defendants' building, which was subject to the Rent Stabilization Law, sued for deceptive practices. Defendants had received tax benefits despite the fact many of the apartments were registered as permanently exempt, high rent vacancies. **Held:** Plaintiffs alleged only that defendants failed to admit they violated rent stabilization law in deregulating plaintiffs' apartments rather than any affirmative conduct that would tend to deceive consumers. Such limited allegations did not suffice to establish the existence of consumer-oriented, deceptive acts.

INSURANCE LITIGATION

INSURER ENGAGED IN CONSUMER-ORIENTED CONDUCT

Plavin v. Group Health Inc., 35 N.Y.3d 1 (N.Y.)

The United States Court of Appeals for the Third Circuit asked the New York Court of Appeals to decide whether a plaintiff had sufficiently alleged consumer-oriented conduct to assert claims under New York's General Business Laws based on an insurance company's alleged material misleading representations made directly to the City of New York's employees and retirees about the terms of its insurance plan to induce them to select its plan from among the 11 health insurance plans made available to them. **Held:** By providing a choice of 11 options, the City created a health insurance marketplace for the employees and retirees. Further, the insurer's summary materials contained the only information provided to employees and retirees when determining whether to select its plan. The complaint thus adequately alleged consumer-oriented conduct.

LEGAL MALPRACTICE

FAILURE TO SPECIFY DEFENDANTS' INCORRECT LEGAL ADVICE FATAL

Lloyd's Syndicate 2987 v. Furman Kornfeld & Brennan, LLP, 2020 N.Y. App. Div. LEXIS 2457 (App. Div. 1st Dep't)

Plaintiffs claimed they relied on defendant law firm's negligent advice that they could disclaim coverage of their insured in underlying malpractice action. **Held:** Law firm properly relied on undisputed documentary evidence. Documentary evidence whose authenticity is undisputed and contents are "essentially undeniable" is sufficient to support a motion to dismiss. Plaintiffs failed to allege the basis for defendants' advice was incorrect.

EXPERT NEEDED TO EVALUATE DEFENDANT'S ACTIONS IN LEGAL MALPRACTICE SUIT

Jenkin v. Cadore, 2020 N.Y. App. Div. LEXIS 3774 (App. Div. 2d Dep't)

In a legal malpractice action, the defendant attorney's expert opined that the attorney did not fail to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of legal profession. Plaintiffs provided no countering expert and summary judgment was awarded. **Held:** To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have

incurred any damages, but for the lawyer's negligence. Here plaintiffs did not produce any expert evidence regarding the attorney's conduct, which was fatal.

LIMITATIONS OF ACTIONS

ARCHITECT MALPRACTICE ACTION MAY BE TOLLED UNDER CONTINUOUS REPRESENTATION DOCTRINE

Anderson v. Pinn, 2020 N.Y. App. Div. LEXIS 3737 (App. Div. 2d Dep't)

Client and architect entered into agreement in 2005. Project stalled in 2008 due to lack of financing and further work resumed when client obtained financing. Parties entered into another agreement in 2015, which despite the passing of 10 years, concerned the same single project. **Held:** Lawsuit against architect was not time barred. If plaintiff proves reliance on a continued course of services related to the original professional services provided, the statute of limitations does not begin to run until entire project is finished.

MEDICAL MALPRACTICE

MOTHER CANNOT RECOVER FOR EMOTIONAL HARM FOR IN UTERO INJURY TO FETUS BORN ALIVE

Waring v. Matalon, 2020 N.Y. App. Div. LEXIS 3759 (App. Div. 2d Dep't)

Trial court granted summary judgment in medical malpractice case, holding the mother could not recover for emotional distress, which caused her to deliver a stillborn baby, since the baby was born alive but died less than 20 minutes after birth. **Held:** Affirmed. The New York State Public Health Law defines "live birth" as "complete expulsion or extraction from its mother or product of conception, irrespective of pregnancy duration, which, after such separation, breathes or shows any other evidence of life."

NEGLIGENCE

PLAINTIFF FAILS TO PLEAD DEFENDANT KNEW OR SHOULD HAVE KNOWN OF DRIVER'S INCOMPETENCE

Kornfeld v. Zheng, 2020 NY Slip Op 03732, ¶ 1 (App. Div. 1st Dep't)

Plaintiff was injured when livery cab driver for defendant company struck her with his vehicle. Plaintiff brought negligent entrustment and negligent hiring claims against company. **Held:** Plaintiff failed to plead the company knew, or in exercise of ordinary care should have known,

the driver was not competent to operate the vehicle. Bare pleading of control over the driver is insufficient.

PLEADINGS

COMPLAINT ALLEGATIONS THAT COULD REST ON ORDINARY NEGLIGENCE SURVIVE FAILURE TO ATTACH MEDICAL CERTIFICATION

Wendy Young v. Hartford Hosp., AC 41997 (Conn. App.)

Plaintiff sued over injuries sustained in surgery at defendant hospital when robotic surgical system camera allegedly fell on her. She claimed use and placement of camera created dangerous condition. Defendant obtained dismissal of action on ground that plaintiff failed to provide a certificate of good faith and opinion pursuant to medical malpractice statute. Plaintiff claimed court erred in determining her complaint sounded only in medical malpractice and appealed. **Held:** Reversed. The complaint, as drafted, did not foreclose possibility plaintiff's injuries were caused by ordinary negligence not involving the exercise of medical judgment, which would not require certificate of good faith. Some allegations might support conclusion of ordinary negligence.

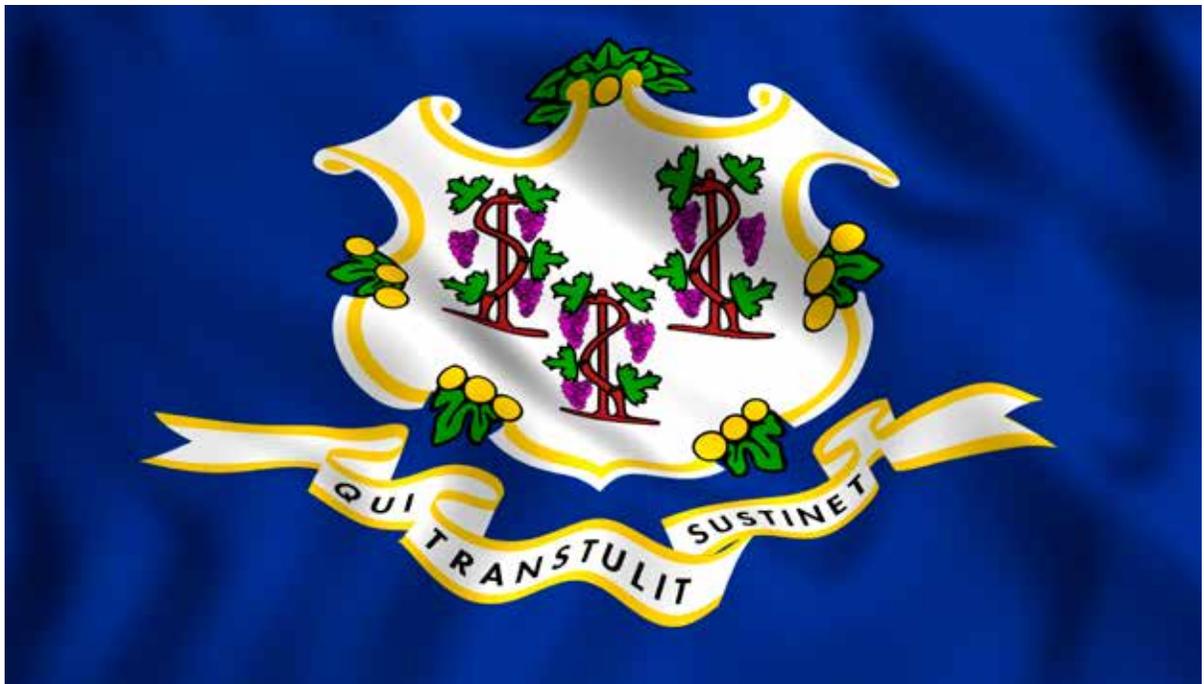
TORTS

SOVEREIGN IMMUNITY FROM LIABILITY FOR POLICE OFFICERS ACTING IN THEIR OFFICIAL RATHER THAN PERSONAL CAPACITIES

Administrator (Estate of Timothy Devine) v. Louis Fusaro, Jr., AC 42164 (Conn. App.)

Plaintiff sued defendants, four members of the tactical unit of the State Police, for the wrongful death of decedent following his suicide after a standoff with law enforcement on public property. The trial court granted defendants' motion to dismiss on the ground the action was barred by

sovereign immunity since it was brought against the defendants in their official, rather than individual, capacities. **Held:** Affirmed. Defendants were state officials, the action against them concerned a matter in which they were representing the state and acting in the scope of their official police duties, the state was the real party in interest because the damages sought were premised entirely on injuries allegedly caused by the official acts of the defendants, and judgment against them would impact how the State Police respond to subsequent situations.



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