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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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New Jersey Appeals Court Holds That Permissive Use Does Not Always Mean Express Permission

by ***Alexandra DiFusco***

A group of car accident victims ("Plaintiffs") filed suit against Bernardo Galvan-Martinez, Audiberto Munoz-Munoz and insurers Plymouth Rock Insurance Company and High Point Property & Casualty Company ("Defendants"). The Appellate Division of the Superior Court of New Jersey reversed summary judgment granted in favor of Plymouth Rock Insurance Company ("Plymouth") and High Point Property & Casualty Company ("High Point"), vacated the denial of summary judgment to Plaintiffs, and remanded for further proceedings. *Ramirez v. Galvan-Martinez*, 2020 N.J. Super. Unpub. LEXIS 2094* (App. Div.). The Court, in reviewing the available evidence in a light most favorable to Plaintiffs, concluded that a jury could reasonably infer that Bernardo Galvan-Martinez had implied permission to use Audiberto Munoz-Munoz's vehicle. *Id.* at *11.

This case arises out of an automobile accident in which Bernardo Galvan-Martinez ("Galvin-Martinez"), an unlicensed driver, was operating Audiberto Munoz-Munoz's ("Munoz-Munoz") vehicle. *Id.* at *1-2. The two men, neighbors and good friends, spent the night prior to the accident drinking at Galvan-Martinez's residence. *Id.* at *2. Munoz-Munoz agreed to drive Galvan-Martinez to work the following morning "if [he] had time," Munoz-Munoz leaving his vehicle and his keys at Galvan-Martinez's residence and walking home sometime after midnight. *Id.* The next morning, Galvan-Martinez left for work, utilizing the vehicle Munoz-Munoz left at his home to drive himself without Munoz-Munoz's permission. *Id.* Galvan-Martinez later called Munoz-Munoz to inform him that he took the vehicle "without permission" and was involved in an accident. *Id.* At no point did Munoz-Munoz report the vehicle missing. *Id.*

The accident victims later filed suit against Galvan-Martinez, Munoz-Munoz, Plymouth and High Point. *Id.* at *3-4. Munoz-Munoz subsequently filed a motion for summary judgment, arguing that no agency relationship existed between himself and Galvan-Martinez. *Id.* Plaintiffs also cross-moved for summary judgment against High Point to establish the carrier's coverage obligation. *Id.* Lastly, Plymouth and High Point cross-moved for summary judgment, asserting they had no obligation to provide coverage because Galvan-Martinez did not have permission to operate Munoz-Munoz's vehicle on the date of the accident. *Id.* The trial court granted summary judgment to Munoz, denied Plaintiffs' cross-motion, and granted summary judgment to Plymouth and High

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Point, finding that no competent evidence existed to suggest Galvan-Martinez had permissive use of the vehicle in question on the date of the accident. *Id.* at *5. Plaintiffs appealed. *Id.* at *6.

As there was no dispute as to the material facts of the case, the appeal was reviewed by the Court *de novo*. *Id.* at *7. The Court's analysis began by identifying the applicable statutes, N.J.S.A. 39-6A-3 and N.J.S.A-39-6B-1. *Id.* The statutes require vehicle owners to carry minimum limits of liability coverage for the benefit of innocent third parties, arising out of operation or use of the vehicle. *Id.* at *7-8.

Next, the Court outlined New Jersey's longstanding public policy regarding automobile insurance, first citing to New Jersey Supreme Court decision *Matits v. Nationwide Ins. Co.*: "since automobile liability insurance contracts are written solely by the insurer and in face of the legislative purpose to benefit persons injured, such contracts are to be construed liberally in favor of the injured." *Id.* at *8 (citations omitted). The Court further recognized the *Matits* Court's "broadest possible interpretation" of who is an insured, adopting the "initial permission rule." *Id.* (citations omitted). The initial permission rule holds that if the owner initially gives permission to another to use his insured vehicle, then short of the vehicle later being stolen, the insurer is required to provide liability coverage for the protection of victims who suffer injury arising out of the use of said vehicle. *Id.* The Court went on to cite to various other cases, outlining a history of broad construction of permissive use in automobile insurance policies, and explaining that since the *Matits* decision, the Supreme Court of New Jersey has continued to find coverage wherever there was "initial permission" to operate the vehicle. *Id.* at *9.

The Court also cited to *State Farm Mut. Auto Ins. Co. v. Zurich Am. Ins. Co.*, 62 N.J. 155 (1973), for the finding that insured policyholders may give their express or implied permission for someone to use their vehicle, implied permission existing where "parties pursue a course of conduct signifying a mutual acquiescence or lack of objection that results in inferential permission." *Id.* (citations omitted). The *Zurich* Court went on to liken implied permission to "actual permission circumstantially proven," and explained that for implied permission to exist, there must be a relationship between the parties that garners implied consent to the use of the other's vehicle. *Id.* at *9-10. (citations omitted). While the Court recognized that a close relationship between the parties is not always dispositive of implied permission, it is still a factor to be weighed in the totality of the circumstances. *Id.* at *10. (citations omitted).

Applying this analysis of the concepts of "initial permission" and "implied permission" to the facts of their case, the Court was persuaded that a jury could reasonably infer from the facts that Galvan-Martinez had implied permission to use Munoz-Munoz's vehicle. *Id.* at *11. In coming to this conclusion, the Court cited to Plaintiffs' restatement of the facts of the case in support of their appeal: the Defendants, friends and next door neighbors, interacted constantly; Galvan-Martinez had given Munoz-Munoz rides before; Galvan-Martinez did not retrieve his vehicle keys from Munoz-Munoz's home that morning; and Munoz-Munoz did not report his vehicle stolen. *Id.* While acknowledging that Galvan-Martinez was an unlicensed driver at the time of the accident, the Court agreed with the lower court that this fact was not dispositive on the issue of permissive use, but instead was a factor to be weighed by the fact-finder. *Id.*

The Court therefore reversed the award of summary judgment to Plymouth Rock and High Point, vacated the Order denying Plaintiffs' summary judgment, and remanded for further proceedings. *Id.* at *11-12.

Learning Point: The specific facts of your case matter when permissive use is at issue. Express permission is not required—the courts will look to several factors in determining whether implied permission is sufficient. ♦

New York Appeals Court Determines Validity Of Battery Exclusion

edited by ***Robert A. Stern***

In *Union Mutual Fire Insurance Co. v. Johnson*, 2020 NY Slip Op 07947, the New York Appellate Division was tasked with determining if a battery exclusion was a valid basis for excluding coverage.

In 2014, Defendant Christopher Briggs was injured on the Premises of Defendant Christopher Johnson, when Johnson shot Briggs several times in his abdomen. Following the shooting incident, Briggs commenced suit against Johnson to recover damages for the injuries that he sustained. At the time of the shooting incident, Johnson was insured by Plaintiff, Union Mutual Fire Insurance Company.

Upon receiving notice of the personal injury action, Union Mutual sent Johnson a declination letter stating that pursuant to the assault and/or battery exclusion in the Policy issued to Johnson, Union Mutual would not be defending Johnson and any liability for damages caused by the shooting would not be covered under the Policy. Union Mutual then commenced suit against Johnson and Briggs seeking a judgment that: "(1) pursuant to the assault and/or battery exclusion in the subject policy, Union Mutual is not obligated to defend or indemnify Johnson in connection with the underlying action, and (2) based on Johnson's material misrepresentations regarding his use of the subject premises, the subject policy is void ab initio." *Union Mutual Fire Insurance Co. v. Johnson*, 2020 NY Slip Op 07947.

Union Mutual then moved for Summary Judgment. After reviewing its motion, the lower court denied the motion without prejudice, allowing the motion to be renewed after "reasonable discovery" had taken place. Union Mutual timely filed an appeal.

The Appellate Court was asked to decide whether the lower court erred in denying Union Mutual's Summary Judgment motion. The Appellate Court made clear what is needed for a party to succeed in a motion for Summary Judgment. The Court noted: "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Id.* (citing *Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 and Zuckerman v City of New York*, 49 NY2d 557, 562.) Additionally the Appellate Court stated: "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Id.* (citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853.)

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The Court also set forth what is needed for a duty to defend to be triggered. The Court stated: "The duty to defend is triggered whenever the allegations of a complaint, liberally construed, suggest a reasonable possibility of coverage, or the insurer has actual knowledge of facts establishing a reasonable possibility of coverage." *Id.* (citing *Bruckner Realty, LLC v County Oil Co., Inc.*, 40 AD3d 898, 900; and *Amato v National Specialty Ins. Co.*, 134 AD3d 966, 968; *Parler v North Sea Ins. Co.*, 129 AD3d 926, 927.) The Court also noted: "An insurer may also disclaim coverage on the basis of a policy exclusion by demonstrating that the allegations of the complaint cast that pleading solely and entirely within the exclusion." *Id.* (citing *Bruckner Realty, LLC v County Oil Co., Inc.*, 40 AD3d at 900.)

The Court then needed to determine, based on the underlying facts, if Union had "no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision." *Id.* (citing *Matter of Transtate Ins. Co.*, 303 AD2d 516, 516.) In his action, Briggs alleged that he sustained his injuries while lawfully on Johnson's Premises and that Johnson was "negligent in failing to properly monitor, secure, supervise and/or intervene to prevent an individual from entering the residence with a firearm." *Id.* The Court also noted that the assault and/or battery exclusion in the Union Mutual Policy has an exception for "bodily injury resulting from use of reasonable force to protect persons or property." *Id.*

In reviewing all the facts, the Court ruled that the record was silent as to the motive or the identity of the shooter. Due to this silence, the Court noted that it did not know if the shooting was self-defense, which would fall into the exclusion. As the record was silent to this matter, and no party presented evidence to establish those details, the Court held that Union Mutual "failed to establish, *prima facie*, that the allegations in the complaint in the underlying action cast that complaint solely and entirely within the assault and/or battery exclusion so as to entitle it to judgment as a matter of law." *Id.* Accordingly, the Court agreed with the lower court's decision denying Union Mutual's Summary Judgment Motion.

Learning Point: During litigation, an insurance company must establish that there are no facts that can establish a reasonable possibility of coverage in order to succeed on a challenge to coverage. The insurance company must establish that all facts fall solely and entirely within the policy exclusion. ♦

Statutory Insurance Minimums Supersede Insurance Policy Step-Down Provisions

by ***Marisa G. Michaelsen***

The New Jersey Appellate Division recently held an insurance carrier for a commercial motor vehicle is required to provide minimum statutory insurance coverage when engaged in intrastate or interstate commerce, even if the operator of the commercial driver was not listed on the insurance policy and despite a step-down provision included in the Policy. *Rafanello v. Taylor-Esquivel, et al.*, Appellate Division Docket Number: A-4397-18T2. In *Rafanello*, Plaintiff was rear-ended by a dump truck operated by Defendant Taylor-Esquivel, during the course of his employment with NAB Trucking, LLC ("NAB"). Plaintiff's vehicle was caused to strike a third vehicle, and debris from the dump truck landed on an additional two vehicles. Plaintiff suffered personal injuries as a result of the accident.

NAB, through its insurance broker, had obtained a Commercial Automobile Policy from American Millennium Insurance Company ("AMIC"). The AMIC Policy did list the dump truck involved in the accident, indicating the truck was a 2006 Sterling L-9800, weighing in excess of 26,001 pounds. The AMIC Policy also provided a "covered driver" section, but operator Taylor-Esquivel was not listed as a covered driver due to his "unacceptable" driving history. On the insurance application, NAB acknowledged it engaged in interstate transport. The AMIC Policy provided liability coverage of $750,000 per accident, but also included a step-down provision providing a maximum coverage limit of $35,000 for liability arising from incidents involving an individual not listed as a covered driver.

Plaintiff filed suit against operator Taylor-Esquivel, as well as Plaintiff's own insurance company, Encompass Property & Casualty Insurance Company of America ("Encompass"), alleging he was entitled to Underinsured Motorist Coverage ("UIM") due to insufficient coverage under the AMIC Policy obtained by NAB. Encompass then filed a Third-Party Complaint against AMIC alleging that it was not required to provide UIM coverage, as Plaintiff's claimed injuries did not exceed $750,000, and due to NAB's involvement in interstate or intrastate commerce, they were required to provide $750,000 in coverage.

The Trial Court found the step-down provision in the AMIC policy was triggered because the driver of the dump truck, Taylor-Esquivel, was not listed in the Covered Driver's section of the AMIC Policy. Thus, the trial court determined NAB's exposure was capped at $35,000, and dismissed Encompass' third-party complaint. Encompass

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appealed, arguing AMIC was obligated to provide the minimum amount mandated by New Jersey state law and federal law for commercial vehicles.

The Appellate Division analyzed NJSA 39:5B-32 (New Jersey Motor Vehicles and Traffic Regulation) and NJAC 13:60-13:60-2.1 (New Jersey Motor Carrier Safety Regulations), which established separate statutory schemes for commercial motor vehicles having a registered weight of 10,001 pounds or more, such as the dump truck involved in this matter. New Jersey, through the New Jersey Motor Carrier Safety Regulations, adopted the Federal Motor Carrier Safety Act, which in part mandates the minimum coverage of $750,000 for commercial motor vehicles participating in intrastate or interstate commerce. New Jersey expanded the federal requirement to cover all commercial motor vehicles engaged in interstate and intrastate commerce transporting cargo. This Court examined the definitions of several classes of motor vehicles, respective insurance requirements by statutes, as well as the federal regulations adopted by New Jersey.

After this analysis, the Appellate Division held that because NAB was operating a commercial vehicle as defined by federal motor carrier safety regulations and adopted by New Jersey, while engaged in intrastate commerce, it must carry a minimum policy under the regulations of at least $750,000, and the step-down provision was not triggered. The Court held that Taylor-Esquivel not listed as a covered driver was irrelevant, because otherwise it would distort and ignore the impacts of both state and federal regulations adopted to protect drivers on public roadways. Insurance requirements for commercial vehicles in New Jersey are much higher than private individuals, to guarantee compensation to accident victims injured by vehicles transporting cargo and individuals in interstate commerce. The Court remanded this matter, concluding that AMIC was required to provide the $750,000 in coverage due to the vehicle involved in this accident was a commercial vehicle, despite the step-down provision for drivers not listed on the Policy.

Learning Point: This case highlights the importance of knowing state and federal statutory insurance minimums. Coverage limits stated within a policy may be rejected when there is conflicting statutory insurance minimums required for certain vehicles. ♦

New York Appellate Court Held That Conclusory Allegations Of Only Theories Of Premises Liability Are Not Enough To Warrant Coverage When The Facts Plead Details Otherwise

by ***Grace R. Guo***

First-party insurance claims often arise when an insurance company denies coverage to the insured after a coverage claim has been filed. The disputes between the parties often arise out of whether the underlying incident is a covered loss. An insurance policy often includes exclusions to coverage provided. One of the most common exclusions to a premises liability insurance policy is the assault and battery exclusion. This means that if the cause of action in the underlying action stems from assault and battery, the insurance company is not obligated to provide coverage to the insured.

If the insured seeks damages under a theory of premises liability separate from assault and battery pleaded in the underlying action, is the insurance company obligated to provide coverage? The answer is no, if the facts plead in the underlying personal injury action are solely and entirely within the policy exclusion and the allegations are subject to no other interpretation. *See Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006); *see also U.S. Underwriters Ins. Co.v. Val-Blue Corp.*, 85 N.Y.3d 821 (1995); *Essex Ins. Co. v. Young*, 17 A.D.3d 1134 (4th Dept. 2005). In *NHJB Inc. v. Utica First Ins. Co.*, 2020 N.Y. Slip. Op. 05319 (4th Dept. 2020), the Court provides further clarification and signifies that in first-party insurance claims that arise out of personal injuries, factual allegations in the underlying action should be the determining factors when considering coverage, not conclusory allegations merely placed in the Complaint with no legal significance.

NHJB involved 4 appeals arising from a first-party insurance claim that involved an underlying personal injury action. The underlying action arose from an assault and battery incident at Molly's Pub, which was owned and operated by NHJB Inc. An employee of Molly's Pub shoved the decedent William Sager, Jr., which caused him to fall down a flight of stairs and sustained fatal injuries. The employee pleaded guilty to manslaughter in the first degree and was sentenced to 18 years in prison. The Estate of William Sager, Jr. commenced an action against the employee Adam O'Shei and 10 other defendants (including Molly's Pub) (the "Sager Action"). The insurer disclaimed coverage when initially notified about the incident citing the Assault and Battery exclusion in the Policy. Thereafter, both Adam

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O'Shei and NHJB, Inc. commenced separate actions against Utica First Insurance Company, which were later consolidated, seeking coverage and defense with regard to the Sager Action. NHJB, Inc. alleged that Utica erroneously denied coverage because the plaintiffs in the Sager Action complained not only of assault and battery, but they also asserted a separate premises liability cause of action based upon NHJB Inc.'s negligence in creating and/or permitting a dangerous and/or defective condition on the premises. This allegation of premises liability presented a reasonable possibility of coverage and, as such, NHJB Inc. argued that Utica had a duty to defend it in the Sager Action.

The Appellate Court responded only to the last appeal and dismissed the first 3 since the orders in appeal Nos. 1, 2 and 3 were either subsumed or substantively modified by the last order. With respect to the last order, the lower court granted in part NHJB Inc.'s motion for partial summary judgment and granted NHJB Inc.'s motion to compel, and denied those parts of Utica's cross motion seeking summary judgment dismissing the Complaint. The lower court stated that Utica is obligated to defend NHJB, Inc. in the underlying personal injury action through the completion of discovery to determine if a defective condition existed on the premises.

The Appellate Court held that the lower court erred in its order, vacated the award of judgment to the insured, granted Utica's cross-motion and granted Utica's declaratory judgment. The Court stated that no cause of action would have existed but for the assault; therefore, the assault and battery exclusion is applicable and precluded coverage. The Court further stated that a determination of coverage need not await discovery since the analysis of such depends on the facts plead, not the conclusory assertions in the underlying Complaint. Therefore, even if discovery revealed that there was a defect with respect to the stairs, the fact remains that, but for the employee's assault, Decedent would not have fallen down the stairs.

Learning Points: Based on this ruling, it signifies that the Fourth Department focuses more on the facts plead rather than the broad allegations asserted. This hard line drawn by the Appellate Court will benefit the insurers as they no longer need to wait until the completion of discovery in the underlying actions for coverage analysis. ♦

New Jersey Appellate Court Holds Landlord Accountable For A Black Ice Injury Due To An Inexplicit Indemnification Clause

by ***Ryan J. Weber***

The Superior Court of New Jersey affirmed in part and reversed in part the trial court's order denying the tenant, Outback Steak House's ("Outback"), motion for summary judgment as to liability and granting the landlord, Hartz Mountain Industries, Inc.'s ("Hartz"), cross-motion for indemnification. *Daswani v. Outback Steakhouse*, Docket No. A-4620-18T2 Superior Court of New Jersey Appellate Division (December 7, 2020). As to the summary judgment motion, the appellate court agreed with the trial court's finding that Outback had a duty to maintain a safe premises and that there were issues of fact on whether Outback had constructive notice of the dangerous condition which caused Plaintiff, Kamal Daswani's, injuries. With the cross-motion for indemnification, the Court found the trial court erred by not recognizing that claims of negligence against an indemnitee are not covered by an indemnification agreement absent explicit contractual language to the contrary.

On March 1, 2002, Outback and Hartz entered into a lease agreement where Outback leased a portion of Hartz's property to operate a restaurant in a large commercial complex in Secaucus, New Jersey. In the lease agreement, Hartz agreed to maintain and keep the development and building common areas which included landscaped areas, sidewalks and covered and uncovered walkways. The lease agreement required Outback to maintain commercial public liability insurance with a five million dollar combined single limit per occurrence and to name Hartz as an additional insured. The lease also contained an indemnification clause which stated Outback would indemnify Hartz from any claims arising from "any accident, injury or damage whatever (unless caused solely by [Hartz's] negligence) occurring in the Premises." *Daswani*, Docket No. A-4620-18T2 at 3. Hartz would indemnify Outback from any claims arising from "any willful act or negligence of [Hartz] or its agents in connection with the conduct or management of the Common Areas." *Id.*

After the lease agreement was executed, Outback decided to self-insure rather than obtain a commercial public liability policy. To achieve this goal, Hartz and Outback entered into a superseding indemnification agreement on August 10, 2005. The purpose of the agreement was to provide Hartz the same coverage as to self-insured claims as Hartz would have as an additional insured under Outback's liability insurance. The

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indemnification agreement stated that Outback would indemnify and defend Hartz against any claim which is the subject of any complaint naming both Hartz and Outback as defendants as long as the claim is a self-insured claim.

On January 24, 2016, Plaintiff, Kamal Daswani, finished his lunch at Outback Steakhouse and then left through the southern exit leading towards his hotel. An employee of Outback opened the door for Plaintiff but did not give him any warnings as he exited. Mr. Daswani claims he took one step out of the exit and slipped on black ice which caused him to sustain a serious fracture of the right ankle. There had been a large snow storm prior to Mr. Daswani's fall. However, he claims there was no snow on the walkway and he saw nothing obstructing the path. Mr. Daswani noted there was no rock salt or sand on the walkway. The police officer who arrived on the scene told Plaintiff that he saw some black ice on the path.

On May 5, 2017, Mr. Daswani filed a Complaint against Outback and Hartz, among others. After discovery was completed, Outback filed a motion for summary judgment which sought dismissal of Plaintiff's Complaint for failure to identify the cause of his fall. Hartz filed a cross-motion for summary judgment on the same grounds and also sought indemnification from Outback based on the August 10, 2005 indemnification agreement.

The trial judge concluded that summary judgment as to liability was not appropriate because a jury could find that, based on the weather conditions, Outback and Hartz had constructive notice of the condition that caused Plaintiff's injuries and that a reasonable fact finder could conclude that black ice was the cause of the fall. The trial judge granted Hartz's request for indemnification from Outback based on the indemnification agreement. On Outback's motion for reconsideration, the trial judge found that Outback was obligated to indemnify Hartz for Hartz's own negligence because the agreement did not specifically exclude Hartz's negligence.

On appeal, the New Jersey Appellate Court first addressed Outback's argument that the motion judged erred by denying its motion for summary judgment on the issue of liability. The Court stated that it is well-settled that common law imposes a duty on a commercial tenant for injuries which occur on an adjoining sidewalk and that Outback had a duty to maintain a safe premises. In reviewing the evidence, the Court found "the inclement weather conditions over the weekend; the absence of salt or sand on the sidewalk; the fact that the black ice was observed by the responding police officer; and plaintiff's testimony that the ice was located immediately adjacent to the door through which he exited the restaurant, taken together was sufficient to raise an issue of fact that Outback knew or should have known of the ice, and that it was negligent in failing to take precautions to address the dangerous condition." *Daswani*, Docket No. A-4620-18T2 at 11.

The Court next addressed Outback's argument that there was no clear language in the indemnification agreement that required Outback to indemnify Hartz for Hartz's own negligence. The Court stated that indemnification agreements are interpreted based on the rules of contract construction with an objective to determine the intent of the parties. The Court next examined well-established case law on indemnification agreements. In *Azurak v. Corp. Prop. Inv'rs*, the court reaffirmed the bright-line rule that indemnification and defense for an indemnitee's own negligence requires explicit language. *Azurak v. Corp. Prop. Inv'rs*, 175 N.J. 110, 112 (2003). Noting that the *Azurak* rule is one of inclusion and not exclusion, the Superior Court of New Jersey found that because there was no clear, explicit language as to Hartz's negligence included in the 2005 indemnification agreement, the trial court erred in requiring Outback to indemnify Hartz. The Court also pointed to the indemnity provision in the 2002 lease agreement as evidence of Hartz's intent when it executed the 2005 indemnification agreement.

Learning Point: The Court followed a bright-line rule that indemnification agreements are not to be construed to indemnify an indemnitee for its own negligence absent explicit language. This case illustrates the importance of drafting contractual agreements with clear, unequivocal language that adequately expresses the parties' intentions. ♦

New York's Highest Court Curbs The Vicious Propensity Requirement And Creates An Additional Liability Tier In Animal Attack Cases For Animal Care Businesses

by ***Djordje Caran***

Owners of pets and domesticated animals owe the public a duty of care if their animals injure members of the public. New York is the only State that applies a vicious propensity test to animal attack cases. This test was codified by the New York Court of Appeals, in *Bard v. Jahnke*, 848 N.E.2d 463, 815 N.Y.S.2d 16 (2006) which effectively narrowed the theory of recovery against owners and allowed actions to proceed only if the plaintiff was able to prove that the owner was aware of an animal's vicious propensities at which point the courts may find the owner strictly liable. Traditional ordinary negligence was removed as a viable cause of action as it pertains to owners.

In *Hewitt v. Palmer Veterinary Clinic, P.C.*, 2020 N.Y. LEXIS 2513, 2020 NY Slip Op 05975 (Court of Appeals October 22, 2020), the Court of Appeals took on the issue of the standard of care that a third-party, such as a veterinary clinic, owes to a plaintiff when injured by an animal that is arguably in its care. Ms. Marsha Hewitt was waiting in the Palmer Clinic waiting room with her cat when one of the clinic's employees escorted Vanilla, a dog that had just underwent a veterinary procedure, was handed over to her owner. Vanilla slipped out of her collar, lunged at Ms. Hewitt's cat and in the process bit Ms. Hewitt and pulled her pony tail. Ms. Hewitt's lawsuit ensued wherein she alleged several ordinary negligence claims, including that the clinic breached its duty of care by not providing a safe waiting area and by bringing an agitated dog into the waiting area. The clinic moved for summary judgment arguing that it could not be held strictly liable since it had no knowledge of the dog's vicious propensities, which according to the clinic was a condition precedent to imposing liability. Plaintiff argued that the clinic can be held liable by the use of the ordinary negligence standard.

The trial court agreed with the clinic and dismissed the case after applying the vicious propensity standard in order to determine if the clinic may be held liable. Plaintiff appealed the decision and the Appellate Division, 3rd Department (167 A.D.3d 1120, 89 N.Y.S.3d 738), upheld the lower court's rationale and concluded that the clinic can only be held liable if it had notice of an animal's vicious propensities. Plaintiff appealed this decision to the Court of Appeals.

The Court of Appeals did not agree with the rationale of the lower courts and reversed the decision that granted Defendant summary judgment. The

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Court stated that the law in New York as it relates to owners' liability, does not allow a parallel negligence claim to be brought against it. Only a claim for strict negligence, which relies solely on the vicious propensity rule, can be brought. The Court then pointed to the fact that a clinic is not an owner and proceeded to discuss the seemingly sliding scale of negligence when it comes to various parties to a case. The Court indicated that besides the animal owner, a landlord may be liable under the vicious propensity standard, but that ordinary negligence will be applied to the landlord who did not own the animal thus doing away with strict liability. Ordinary negligence was also applied to farm animal owners whose animals strayed from the property.

The Court stated that the clinic owed a duty to Plaintiff because she was located within the clinic's premises. The Court then based its rationale on the notion that the clinic's employees are skilled professionals and should know that an animal may be stressed, upset and vicious if it undergoes treatment at a clinic. The Court added that it was foreseeable for an animal to behave erratically or aggressively in a stressful unfamiliar environment. The Court stated that a clinic is in the best position to secure against these risks because it has control over the space, is equipped to guard against animal behavior and can anticipate the possibility that an animal will act aggressively while in their charge. A veterinary clinic, the Court claimed, can design spaces, rules and procedures to mitigate such a risk.

The Court further stated that the clinic cannot rely upon a demonstration that it lacked notice of the animal's vicious propensities as it is not entitled to the protections that an owner is afforded. The Court did state that it will not subject the clinic to a standard of strict negligence if there is evidence that a negligence claim may exist. The clinic's liability was measured against an ordinary negligence standard which required foreseeability as an element.

The concurring opinion took aim at the *Bard* case, even though it was not up for consideration due to the circumstances in *Hewitt*, wherein the actual owner of the dog was discontinued as a party in the case. Nevertheless, the concurring judges forcefully encouraged the majority to do away with the vicious propensities and strict liability standards, and suggested that the best approach was to use an ordinary negligence standard for all potential tortfeasors no matter what the relationship is to the animal or accident circumstances. The majority dismissed the concurring opinion as irrelevant since all of the Justices agreed that the *Bard* opinion is not eligible to be reviewed as the Appellant and Respondent did not rely on that precedent.

Learning Point: Unlike a claim against an owner of pet, a negligence claim against a clinic can exist. A clinic can be held liable for injuries caused by a pet within its premises, even if the clinic does not have knowledge of the pet's vicious propensities. The final question to address is whether the insured is the owner of the animal or the owner of the property where the accident occurred, in order to determine whether the vicious propensity standard will be applied. If the insured is neither and is a business proprietor, such as a veterinary clinic, it should defend the case under the ordinary negligence, reasonableness standard and consider foreseeability as a factor rather than notice. It is believed that the opinion will also have liability implications for other businesses such as doggy daycare, pet grooming establishments or pet friendly hotels, to name a few which will likely be held liable under the ordinary negligence standard. ♦

New Jersey Shuts Door On Elevated Arguments Against *Res Ipsa Loquitur*

edited by **Robert A. Stern**

The New Jersey Appellate Court reaffirmed that the doctrine of *res ipsa loquitur* and requires a plaintiff to demonstrate that its injury was not the result from the plaintiff's own action. *Pannucci v. Edgewood Park Senior Housing et. al*, No. A-4735-17T3 (App. Div. Nov. 30, 2020). Traditionally, a plaintiff must present evidence that: (1) the injury is of the kind that typically results from negligence; (2) the defendant had exclusive control of the thing that caused the injury; and (3) the injury did not result from the plaintiff's own voluntary act or neglect.

Plaintiff resided in an apartment building for senior citizens. Defendants were the owners of the building as well as the company hired to service the building's elevators. One morning, Plaintiff returned from walking her Pomeranian. As she approached the elevator, she observed the elevator open and a man exit. Her dog quickly entered the elevator. Unfortunately for Plaintiff, she was not as spry as her dog. Her arm, holding onto the leash attached to her dog, extended forward and was caught as the elevator door closed. Plaintiff struggled to stop the doors from closing on her. In one final Indiana Jones-like maneuver, she squeezed into the elevator cab. As a result of the incident, Plaintiff suffered injuries to her left shoulder, left side, back, neck and right arm. The elevator was serviced regularly and had never before posed a problem to Plaintiff. Likewise, Defendants never noticed or found a problem with the elevator.

At summary judgment, Plaintiff argued she could proceed under the theory of *res ipsa loquitur*. The trial court held that one could infer that Plaintiff caused her own injuries by keeping her dog on a long leash and forcibly attempting to stop the elevator doors.

On appeal, Plaintiff relied on opinions from several other states that had found the third prong of the doctrine incompatible with comparative negligence statutes. The Appellate Division rejected this argument on two grounds. First, the Appellate Division noted that the third prong consists of a narrow inquiry to determine whether the plaintiff's conduct is an alternative explanation for the incident. As a way of illustrating the application of the third prong, the Appellate Division presented a scenario in which a hotel guest is scalded by an extremely hot shower. In such an instance, the hotel guest would have to demonstrate that nothing s/he had done contributed to the scalding, *i.e.* turning the faucet too far. Second, the Appellate Division noted that the doctrine of *res ipsa loquitur* is settled law in New Jersey and as such the Appellate Division is not the proper court to overrule or change long-standing legal doctrines.

Learning Point: In order to succeed under *res ipsa loquitur*, a plaintiff in New Jersey will have to demonstrate that it did not contribute to the injury. ♦

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SUBROGATION GROUP'S SUCCESS CONTINUES

100% Recovery On Food Contamination Claim

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. Mr. Stern worked with the Insured in presenting a claim to the targets. Mr. Stern then negotiated settlement terms, which included CM's client receiving 100% of its indemnity payments to its Insured, and the Insured withdrawing its pending claims and waiving any further claims against CM's client (the Insured reached a separate payment agreement with the targets). If you have any questions concerning subrogation, negotiation and/or recoverable damages, please contact **Robert Stern** at 212-805-3900 (**rstern@clausen.com**).

Six Figure Settlement After Failed Mediation

CM Senior Partner Robert A. Stern (New York/New Jersey) was assigned a water loss at the Insured's commercial two story building located in New York. The building was newly renovated. A water pipe to a sink on the second floor froze and burst, releasing water throughout the Premises. We commenced litigation against all the applicable contractors. Naturally, we were faced with various defenses, including, but not limited to, the Insured completely repairing the scene before putting CM's client on notice of the loss, terms in the contracts waiving subrogation, additional named insured endorsements to the Policy, the Insured opening the window of the room with the sink and leaving the window open for many days in the winter, and almost a quarter of the claimed damages actually not being attributed to Defendants. CM Partner Mara Goltsman took the lead in the Mediation, which occurred after paper discovery but before depositions. The litigation did not settle at the Mediation. Thereafter, Mr. Stern worked with Ms. Goltsman in continuing to negotiate through the mediator with Defendants. After a few weeks, the litigation settled for hundreds of thousands of dollars above the value of the matter. If you have any questions concerning subrogation, negotiation and/or recoverable damages, please contact **Robert Stern** at 212-805-3900 (rstern@clausen.com) or **Mara Goltsman** at 212-805-3900 (**mgoltsman@clausen.com**).

Making A Recovery Despite The Waiver Of Subrogation Provision

CM Senior Partner Robert A. Stern (New York/New Jersey) was assigned a seven figure loss at a building under construction. The Construction Manager and a subcontractor involved with the item we claimed to have caused the loss were placed on notice. Quickly, we received denials based on: (1) no proof that what we claimed the subcontractor did wrong the subcontractor actually did, (2) the Construction Manager and Subcontractor being identified in our client's Builder's Risk Policy as Additional Named insured, and (3) the waiver of subrogation provision in the construction contract. With pre-suit settlement not possible, we filed litigation. We felt very strongly with our responses to the first 2 defenses; however, we knew that the waiver of subrogation provision was a real problem. We convinced defense counsel to file a Motion to Dismiss on the waiver provision. If the court agreed with our argument, then Defendants would pay a lot of money to settle the matter; if the court disagreed with our argument, then the matter would be closed. While the motion was pending, Defendants agreed to Mediation. The Mediation was successful and we settled the matter. Unbeknownst to the mediator or counsel, at the same time, the court issued its decision granting the motion to dismiss. Since the settlement agreement was executed before anyone knew of the court's decision, Defendants paid us. If you have any questions concerning subrogation, negotiation and/or recoverable damages, please contact **Robert Stern** at 212-805-3900 (**rstern@clausen.com**)

ARBITRATION

COURT JUDGMENT IN ACCORDANCE WITH ARBITRATOR DECISION IS ON THE MERITS FOR *RES JUDICATA* PURPOSES

Phyllis Larmel v. Metro North Commuter Railroad Co., AC 42647 (Conn. App.)

In premises action, arbitrator issued decision finding for defendant and plaintiff failed to request a trial *de novo* within twenty days of decision as required by statute. Court then rendered judgment in accordance with the arbitrator's decision. Plaintiff filed new action pursuant to an accidental failure of suit statute. The trial court dismissed the action, finding a lack of subject matter jurisdiction because there had been a final judgment on the merits. Plaintiff appealed. ***Held:*** Reversed. Dismissal on jurisdictional grounds was improper. However, the prior judgment was a judgment on the merits and the trial court should have rendered judgment for the defendant on that basis rather than dismiss the action.

ARBITRATION PROVISION BINDS ELDERLY RESIDENT INJURED IN FALL

Roberts v. K&D Devel. 51, L.L.C., 2020-Ohio-4986 (Ohio App.)

Woman injured in nursing home fall protested use of arbitration provision. ***Held:*** Provision was enforceable. It was signed by defendants and consistent with statute. It was neither procedurally nor substantively unconscionable. Agreement was executed by woman's representative. There is no evidence she was rushed or documents were inadequately explained.

CIVIL PROCEDURE

ACTION DISMISSED FOR FAILURE TO PROSECUTE DESPITE ATTEMPTED ATTORNEY WITHDRAWAL

Admin. of Estate of Marie J. Vaccaro v. Christopher P. Loscalzo, AC 42951 (Conn. App.)

Plaintiffs sued defendants for wrongful death. One plaintiff died and despite efforts by defendants, plaintiffs did not serve any discovery, take any depositions, close the pleadings, disclose any experts, or respond to outstanding discovery requests or substitute the estate as a proper party. Nearly two years later, plaintiffs' counsel sought to withdraw and the living plaintiff objected. The trial court denied the motion to withdraw and granted the defendants' motion to dismiss for failure to prosecute. ***Held:*** Affirmed. There was a pattern of misconduct by plaintiffs over the course of three years and they were on notice of the possibility of dismissal since defendants repeatedly requested it. Plaintiffs were aware of their attorneys' misconduct.

SUBPOENA SEEKING JUDGE'S TESTIMONY PROPERLY QUASHED

Van Ryn v. Goland, 2020 NY Slip Op 07263 (N.Y. App. Div. 3d Dep't)

Plaintiff served subpoena commanding supreme court justice to testify as witness on plaintiff's behalf as to prior proceedings before the justice. ***Held:*** Plaintiff failed to establish good faith factual basis for overriding prohibition against requiring judges to testify in same matters over which they are presiding. Plaintiff's former counsel and defendant's counsel also witnessed the disputed events, and plaintiff failed to show judge had any knowledge not available to them.

CONSTITUTIONAL LAW

FAILURE TO EXERCISE DISCRETION TO GRANT A DEPORTATION PAROLE ELIGIBILITY HEARING IS NOT PROTECTED BY § 1983

Wright v. Giles, AC 42686 (Conn. App.)

Plaintiff brought a § 1983 action against defendants for allegedly violating his due process rights by failing to implement policies, procedures, and/or regulations providing him with a deportation parole hearing and/or with eligibility. The trial court dismissed the complaint on sovereign immunity grounds. ***Held:*** Affirmed on the alternative ground that plaintiff lacked standing. The possibility of deportation parole does not create a legal interest in parole eligibility.

DAMAGES

NON-ECONOMIC DAMAGES IN PERSONAL INJURY ACTION NEED SUPPORT OF SUBJECTIVE COMPLAINTS AND MEDICAL SCIENCE

La Tanya Autry v. Brendon Hosey, AC 42869 (Conn. App.)

Plaintiff sought economic and noneconomic damages from being struck by police cruiser while crossing street. Court found in plaintiff's favor at bench trial. In calculating noneconomic damages, court found emotional trauma suffered by pedestrians struck by vehicles is "generally greater" than that suffered by motor vehicle occupants. ***Held:*** Reversed and remanded for new hearing on damages. There was both lack of subjective complaint from plaintiff and lack of verification by medical science to support conclusion pedestrians struck by motor vehicles suffer greater emotional trauma than motor vehicle occupants.

EVIDENCE

EVIDENCE HEARING NOT AUTOMATICALLY REQUIRED FOR MOTION TO DISMISS

Nationstar Mortgage, LLC v. Robert Gabriel, AC 42747 (Conn. App.)

Plaintiff mortgage company sought immediate possession of premises because defendants' rights to occupy had terminated. Each defendant was served with copy of the notice to quit by abode service. Trial court rendered judgment of possession for plaintiff. Defendants filed a motion to dismiss for lack of subject matter jurisdiction, claiming the notice to quit was not served on all designated occupants of the property, attaching an affidavit of one of the occupants. The trial court denied defendants' request for an evidentiary hearing. ***Held:*** Affirmed. There was ample evidence supporting that defendants were served. The marshal's return of service was *prima facie* evidence of service. A hearing was not required.

FIRST-PARTY PROPERTY

REFUSAL TO SUBMIT TO APPRAISAL VALID BASIS FOR CLAIM

Creekside Crossing Condo. Ass'n v. Empire Indem. Ins. Co., 2020 U.S. Dist. Lexis 189384 (M.D. Fla.)

Insurer moved to dismiss an association's amended complaint, which included a claim to compel appraisal due to insurer's failure to honor a written demand for appraisal. ***Held:*** Given refusal to submit to appraisal process, insured can state a claim for breach of contract based solely on the Insurer's noncompliance with the appraisal provision.

INSURED MAY REMEDY APPRAISAL OBLIGATIONS AFTER FILING SUIT

Diamond Lake Condo. Ass'n v. Empire Indem. Ins., 2020 U.S. Dist. LEXIS 181392 (M.D. Fla.)

Insured invoked policy's appraisal provision and ultimately, insurer disagreed with amounts claimed and stated they would continue investigation. About the same time suit was filed, insurer stated investigation complete and issued payment. However, after negotiating the appraisal process for months, the insured then asserted appraisal was premature because it had yet to complete its investigation. ***Held:*** Insured had not waived right to appraisal and may remedy any post-loss and pre-filing appraisal obligations after filing suit.

Sunflower Condo. Ass'n v. Everest Nat'l Ins. Co., 2020 U.S. Dist. LEXIS 213157 (S.D. Fla.)

More than 10 months elapsed between Hurricane Irma and insured's submission of insurance claim. Insured was aware of damages shortly after hurricane and began making roof repairs that same month. Insured did not provide notice because it did not believe the loss exceeded the deductible. Insurer claimed it was prejudiced by the late reporting. ***Held:*** Ability to assess and address any damage was prejudiced. An insured's good faith belief damage is trivial or not covered by policy is insufficient to justify non-compliance with policy's notice provision.

CONTINGENCY FEE MULTIPLIER REQUIRES SPECIFIC PROOF

Univ. Prop. & Cas. Ins. Co. v. Deshpande, 2020 Fla. App. LEXIS 16067 (Fla. App.)

Insurer litigated amount of attorneys' fees and costs. At hearing, plaintiff's firm testified generally to the accuracy of the firm's billing and that each attorney's hourly rate was reasonable based on the South Florida market and

the attorney's respective experience. Fee expert also opined 2.0 multiplier was appropriate based on favorable outcome achieved and likelihood of recovery at case outset. ***Held:*** Absent evidence the relevant market requires a contingency fee multiplier to obtain competent counsel, a multiplier should not be awarded. Insured must prove that without risk-enhancement it would have faced substantial difficulties in finding counsel in relevant market.

STATUTORY REQUIREMENT STRICTLY CONSTRUED IN COVERAGE ACTION

Julien v. United Prop. & Cas. Ins. Co., 2020 Fla. App. LEXIS 13520 (Fla. App.)

Insured sued insurer but failed to file civil remedy notice with Department of Financial Services and with insurer before commencing suit. ***Held:*** Statute required notice of specific statute and specific policy provision relevant to the insurer's alleged violation. As insured failed to provide these, he failed to satisfy a condition precedent to suit, which was fatal to claim.

DAMAGE NOT A COVERED "COLLAPSE" UNDER POLICY

Parauda v. Encompass Ins. Co. of Am., 2020 NY Slip Op 06802 (N.Y. App. Div. 2d Dep't)

Plaintiffs filed claim with defendant insurer under homeowner's policy for alleged damage to home, including decayed framing behind brick facade due to water infiltration. ***Held:*** Trial court should have granted insurer summary judgment. Claimed damage did not involve an abrupt falling down or caving in of any part of the property which was no longer "standing," as required to constitute a covered "collapse" under the policy. Claimed damage fell within certain exclusions.

INSURANCE LITIGATION

POLICYHOLDER PHYSICIAN ENTITLED TO CASH PROCEEDS FROM INSURANCE CONVERSION

Maple Med., LLP v. Scott, 2020 N.Y. App. Div. LEXIS 7587 (N.Y. App. Div. 2d Dep't)

Dispute arose as to whether physician policyholder or practice that paid premiums was entitled to cash consideration paid as part of insurance company's conversion from mutual insurance company to stock insurance company. ***Held:*** Insurance Law § 7307 and the plan of conversion made clear the physician, as policyholder, was entitled to the consideration.

LIABILITY INSURANCE COVERAGE

DEFENDANT DOES NOT ESTABLISH SUBCONTRACTOR'S WORK LED TO INJURY

Edward Horton Builders, Inc. v. Arch Specialty Ins. Co., 2020 NY Slip Op 07355 (N.Y. App. Div. 2d Dep't)

Plaintiff sought defense and indemnification in underlying action. Defendant relied on policy exclusion excluding coverage for claims for bodily injury arising from work performed on plaintiff's behalf by a subcontractor. ***Held:*** Defendant's submissions (insurance policy, agreement between plaintiff and its subcontractor, and the underlying complaint) did not establish that the underlying action arose from work performed by the plaintiff's subcontractor.

REPEATED FAILURE TO APPEAR FOR "IME" VITIATES COVERAGE

PV Holding Corp. v. Hank Ross Medical, P.C., 2020 NY Slip Op 06367 (N.Y. App. Div. 1st Dep't)

Insurer sought summary judgment declaring no obligation to pay no-fault benefits to health care defendants who provided services to individual defendants who claimed injury arising from an automobile accident. ***Held:*** Insured's repeated nonappearance for properly scheduled independent medical examinations (IME) was a failure on his part to fulfill a condition precedent to coverage, vitiating his coverage under the policy.

INSUREDS TIMELY NOTIFIED OF DOG-BITE EXCLUSION

Villaos v. Nationwide Mut. Fire Ins. Co., 2020-Ohio-5123 (Ohio App.)

Amended homeowners policy excluded dog-bite coverage if dog had history of biting. ***Held:*** Insureds received timely notice of amendment. Insureds could not rebut mailbox-rule presumption that

they received notice. Insureds merely could not remember receiving it. Equity did not support reforming policy to remove exclusion.

LEGAL MALPRACTICE

JURY AWARD NOT SUPPORTED BY EVIDENCE

Morgan & Morgan, P.A. v. Pollock, 2020 Fla. App. LEXIS 15885 (Fla. App.)

Plaintiffs won jury award in legal malpractice action. Defendant argued plaintiffs did not submit proof of the underlying defendant's financial status to satisfy their "collectability" burden of showing the judgment would have been collectible. ***Held:*** Jury award overturned. Requiring proof of collectability prevents a client from recovering more from the attorney than he could have obtained from the tortfeasor in the underlying action.

SETTLEMENT DISSATISFACTION NOT LEGAL MALPRACTICE

Katsoris v. Bodnar & Milone LLP, 2020 N.Y. App. Div. LEXIS 5151 (N.Y. App. Div. 2d Dep't)

Plaintiff claimed his attorney handled his divorce negligently. Plaintiff made only general allegations that he incurred additional legal fees and suffered financial damages and expense, which the trial court held were conclusory and inadequate to constitute actual, ascertainable damages and were inadequate to prove that the stipulation of settlement that plaintiff entered into was "effectively compelled" by his attorney's mistakes. ***Held:*** Affirmed. Plaintiff failed to plead specific factual allegations showing that, had he not settled, he would have obtained a more favorable outcome.

LIMITATIONS OF ACTIONS

STATUTE OF REPOSE SEPARATELY TRIGGERED FOR EACH BUILDING OF CONDO DEVELOPMENT

D'Allessandro v. Lennar Hingham Holdings, LLC, No. SJC-12891 (Mass.)

Condo developer built 28 buildings over seven-year period. ***Held:*** Six-year statute of repose for construction defect claims is separately triggered for each building. Statute triggers upon building's opening for intended use or substantial completion and possession for occupancy by owner. Triggering at completion of entire development extends potential liabilities too long. ***Further held:*** If integral improvement serves multiple buildings, statute starts when improvement is substantially completed and open for intended use.

PATIENT'S MENTAL HEALTH TREATMENT NEGLIGENCE CLAIM BARRED

Hall v. Coleman Behav. Health Servs., 2020-Ohio-4640 (Ohio App.)

Four years after treatment for mental health issues, patient claimed treatment caused him to commit burglary. ***Held:*** Action was barred by two-year negligence limitation. Patient did not allege facts occurring within limitations period. Nothing alleged would have triggered four-year statute for intentional infliction of emotional distress.

MEDICAL MALPRACTICE

AFFILIATION AGREEMENT CONFERRED SOVEREIGN IMMUNITY TO UNIVERSITY AS HOSPITAL'S AGENT

Lazzari v. Guzman, 2020 Fla. App. LEXIS 15288 (Fla. App.)

Medical malpractice suit was brought against university, which argued it was entitled to statutory sovereign immunity for services rendered by its employee, a doctor at a teaching hospital. The university and hospital also had entered into an affiliation agreement whereby the university was the hospital's agent. ***Held:*** All faculty and employees of the university acting pursuant to the agreement were the hospital's agents and could not be personally liable for acts or omissions in the scope of their employment.

NEGLIGENCE

RESTAURANT PATRON FAILS TO PROVE CAUSE OF SLIP AND FALL

Matthews v. Texas Roadhouse Mgt. Corp., 2020-Ohio-5229 (Ohio App.)

Patron slipped on fluid in parking lot. ***Held:*** Patron failed to prove restaurant created hazard or had actual or constructive knowledge about it. Employees did not use area to remove grease or trash. There were

no reports of foreign substances in area, and employees saw nothing.

GROCER NOT LIABLE FOR ILLNESS FOLLOWING EGGPLANT PURCHASE

Sultaana v. Barkia Ents., Inc., 2020-Ohio-4468 (Ohio App.)

Nine days after purchasing eggplant, customer experienced stomach pain and nausea. ***Held:*** Customer failed to prove eggplant caused illness. Customer needed medical expert opinion tying her ailment to eggplant. Her medical records and affidavit were insufficient.

PLEADINGS

FAILURE TO PERFORM DUTY MUST BE ALLEGED AS SPECIAL DEFENSE

Silver Hill Hosp., Inc. v. Dawn Kessler, AC 42545 (Conn. App. 2020)

Hospital sought damages for unpaid medical services it provided defendant. Medicare initially had paid the entire balance; however, it rescinded coverage for part of the services after discovering defendant had workers' compensation coverage. Plaintiff asked defendant to contact Medicare to resolve the dispute and defendant refused. Fact finder found defendant owed a balance to plaintiff and that defendant failed to prove her special defense of *non compos mentis*. The trial court rendered judgment for plaintiff. ***Held:*** Affirmed. Defendant's pleadings did not provide a legal framework from which fact finder could properly assess whether it was plaintiff's duty to resolve the benefits issues.

TORTS

CHAT GROUP MEMBER USING PSEUDONYM FAILS TO STATE DEFAMATION CLAIM

Li v. Zeng, 19-P-1546 (Mass. App.)

Referring to plaintiff's pseudonym, defendant made allegedly defamatory statement about sexual impropriety. ***Held:*** Reference to pseudonym cannot be reasonably interpreted as referring to plaintiff. Because defendant did not unmask plaintiff's actual identity, plaintiff's reputation in community was undiminished.

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