CM EAST COAST REPORT

of Recent Decisions

2021• Vol. 1

Maine's Supreme Judicial Court Finds A Policy's "Earth Movement Exclusion" Applies To Any Earth Movement

Defendant Success On Summary Judgment Utilizing The Storm-In-Progress Rule

CM Subrogation Group Wins Partial Motion For Summary Judgment Applying Retail Valuation

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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Paul V. Esposito
Yesy A. Sanchez
Lisa M. Shiderly
Kelli J. Untiedt
Ian T. Williamson
Elizabeth Zakheim

CASE NOTES CONTRIBUTING WRITERS

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Too Far Or Not Far Enough? NY Extends Its Bystander Rule To Grandparents

by ***Paul V. Esposito***

The sudden loss of or serious injury to a loved one is so often so devastating. It can be worse when it was witnessed, and worse still when caused by another's fault. The combination can cause anxieties, depressions, nightmares, a whole gamut of emotional problems lasting a survivor's lifetime.

The law now provides that a plaintiff's emotional damages are compensable, even without accompanying physical impact. It even allows recovery for bystanders emotionally damaged by another's injury. But it has struggled with categorizing who is entitled to bystander recovery, and under what circumstances.

The New York Court of Appeals recently expanded bystander recovery to the grandparents of a child killed in an accident. *Greene v. Esplanade Venture P'ship*, 2021 N.Y. LEXIS 104. Some argue the ruling went too far; others, not far enough.

In May, 2015, Susan Frierson and two-year old granddaughter Greta Greene were outside a building when debris fell off its façade. The debris hit both, Greta far worse. She died the next day. Susan and Greta had established a close relationship. Susan participated in Greta's birthing and provided care during her early weeks. By her first birthday, Greta was having overnights with Susan. The two had developed a powerful emotional bond.

Susan and Greta's mother brought negligence and wrongful death claims against the building owner. They moved to amend the Complaint, raising a cause of action for recovery by Susan under the zone-of-danger doctrine. The lower court granted the motion. It ruled that as a grandparent, Susan should be considered an "immediate family member" entitled to recover. A split Appellate Division disagreed: a plaintiff may only recover for emotional damages caused by injury to a plaintiff's spouse or children.

The Court of Appeals—New York's highest court—ruled that a grandparent should be included as an immediate family member. But that was the extent of the judges' agreement.

Tracing the history of the zone-of-danger rule, the majority noted that the law did not set the outer limit on the "immediate family." It recognized that the nature of family relationships has evolved. In particular, the involvement of grandparents in family life has expanded; grandparents often share a special relationship with their grandchildren. Though the zone-of-

Paul V. Esposito
is a partner with Clausen Miller P.C. who was previously an Illinois assistant attorney general. He continues to research, write, and argue in federal and state courts all over the country, a personal passion to him. Paul has worked closely with some of the country's best trial lawyers, against some of the country's best trial lawyers. Whatever the issues, the goal always remains the same: win first at trial, and from there, win on appeal.
pesposito@clausen.com

danger doctrine provides a "narrow avenue of bystander recovery," the "special status" of grandparents brings them within the class of "immediate family."

Concurring in the result only, one judge wrote that the majority missed a golden opportunity to fix a flawed doctrine. She saw three problems with it: (1) a plaintiff must be physically near a killed or injured person, (2) "immediate family" is defined by marriage and blood rather than friendship and love, and (3) the doctrine is based on an unfounded fear of excessive litigation.

The concurring judge argues that recovery should be available under two circumstances. The first is when persons perceive the death or serious injury of another with whom they have a "strong personal and loving bond." The second is when a person: (1) actually observes the death or serious injury of another, even a stranger, and (2) is at immediate risk of serious physical harm. Following the Third Restatement of Torts, other states have adopted these categories. The broader categories recognize the evolving norms of family life, where blood or marital relationships are often not involved; and they provide fairer results in given cases. For example, should an estranged and uninterested parent be allowed to recover as "immediate family"? And should parents seeing their child hit by a car not be allowed to recover if they were outside the zone of danger? To the concurring judge, the majority opinion offers too little opportunity for justice.

Another judge did not see the wisdom of expanding the potential pool of plaintiffs. But he saw no value in dissenting to the majority's narrow ruling allowing recovery to grandparents within a zone of danger.

Learning Point: New York has retained the zone-of-danger rule for bystander recovery, with extension for grandparents. Future challenges to the doctrine nationwide are likely to seek further expansions rather than a contraction of it. So it will be interesting to learn whether the first concurrence wins converts in other states—and ultimately in New York. ♦

Maine's Supreme Judicial Court Finds That A Policy's "Earth Movement Exclusion" Applies To Any Earth Movement, Regardless Of The Cause

by ***Kelli J. Untiedt***

In *Bibeau v. Concord General Mutual Insurance Company*, 244 A3d 712, 2021 ME 4 (2021), the Supreme Judicial Court of Maine addressed certain specific provisions of a homeowner's insurance policy and whether those provisions unambiguously exclude coverage for substantial losses sustained by the policy holder.

Arthur Bibeau appealed a summary judgment entered by the Superior Court in favor of Concord General Mutual Insurance Company ("Concord") on Bibeau's Complaint for alleged breaches and violations of the homeowner's insurance policy issued to him by Concord. Bibeau contended that the Superior Court erred in finding that the policy unambiguously excluded from coverage losses caused by earth movement.

In 2006, Bibeau purchased a home in Portland, Maine which he insured through the policy issued to him by Concord. Shortly thereafter, Bibeau identified and repaired a water line leak. Approximately 11 years later, in September, 2017, Bibeau submitted a notice of claim to Concord for damage to the home, including extensive damage and cracking to the foundation, uneven floors and stairs, and cracking drywall. Bibeau argued that this damage was caused by the water line leak in 2006. Bibeau's expert asserted that the leak "pushed sand and other material under the foundation of the home, compromising the foundation's integrity, causing it to drop down or 'settle.'" *Id.* at 3. Concord's expert disagreed about the cause of the settling, instead opining that the settling was due to the house being built on unsuitable ground with a non-uniform soil composition, which resulted in the house settling at different rates. The Supreme Judicial Court noted that, regardless of the disagreement as to the settling's cause, there was no dispute that the damage to the house was the result of earth moving under the house's foundation.

Concord denied Bibeau's claim based on the policy's earth movement exclusion and the anti-concurrent-causation clause. Bibeau then filed a Complaint against Concord, alleging breach of the policy and unfair claims settlement practices. Concord moved for summary judgment, which the Superior Court entered in favor of Concord in April, 2020. The court found that there was no genuine dispute that the damage to the home, and thus Bibeau's losses, were caused by earth movement and

Kelli J. Untiedt
is an associate in the Subrogation Group. Prior to joining the firm, Kelli served as an Assistant District Attorney in the Office of the Bronx County District Attorney where she worked in the Investigations Division, Economic Crimes Bureau. As an Assistant District Attorney, Kelli was responsible for numerous investigations and cases, and successfully negotiated a multitude of plea agreements. Kelli received her B.A. in Government and Psychology from Georgetown University and her J.D. from Boston University School of Law.
kuntiedt@clausen.com

therefore excluded from coverage by the unambiguous language of the policy's earth movement exclusion.

Bibeau timely appealed the judgment, arguing that the court erred in finding that the policy language was unambiguous and the damage was excluded based on the earth movement exclusion.

The Supreme Judicial Court noted that a grant of summary judgment is reviewed *de novo* and by viewing the evidence in the light most favorable to the non-prevailing party, in this case, Bibeau. In so doing, the Court reviews the matter to determine whether sufficient evidence exists for a fact-finder to choose between two or more competing versions of a fact which affects the outcome of the case. The Supreme Judicial Court further noted that review of a court's interpretation of an insurance policy is a question of law and subject to *de novo* review. Ambiguous policy language is construed strictly against the insurance company, however, unambiguous language is interpreted in accordance with its plain meaning. In determining whether ambiguity exists, the Court looks to whether an average person, untrained in insurance or the law, would find the language open to different interpretations.

The Supreme Judicial Court first looked to the policy itself, focusing on three sections: Property Coverages, Perils Insured Against, including Exceptions, and Exclusions. The Supreme Judicial Court first noted that Bibeau's home was covered by the policy, however, the scope of the coverage was limited by the subsequent provisions. The Peril's Exception provision, which states that "*unless the loss is otherwise excluded*, we cover the loss" resulting from a water pipe leak off the residential premises. *Id*. at 8. Based on this language, the Supreme Judicial Court then turned to the Exclusions set out in the policy. The Exclusions provision notes that the policy does not insure against losses caused by "earthquakes, landslides, mudslides, mudflow, subsidence, sinkholes or '[a]ny other earth movement including earth sinking, rising or shifting; caused by or resulting from human or animal forces or any act of nature.'" *Id*. at 9. The Supreme Judicial Court further notes that the Exclusions provision contains an anti-concurrent-causation clause, which essentially bars coverage where a claimed loss is caused by any combination of covered and excluded losses.

Bibeau maintained that the earth movement exclusion is ambiguous, arguing that similar provisions excluded only losses caused by natural disasters and the provision at issue should be read similarly. The Supreme Judicial Court, however, disagreed. The Court pointed to a Mississippi case which evaluated an identical provision to the one at issue here and found the exclusion to be unambiguous. The Supreme Judicial Court noted that the language in the earth movement exclusion is specifically not limited to natural causes, but rather applies to "any earth movement . . . caused by or resulting from human or animal forces or any act of nature." *Id*. at 16. Thus, the Supreme Judicial Court concluded that the earth movement exception unambiguously applies to any earth movement, including that at issue in this case.

The Supreme Judicial Court also disagreed with Bibeau's further argument that the policy language regarding covered perils was ambiguous. The Supreme Judicial Court noted that, although the language does "require some careful reading and analysis" it does not contain language that is "reasonably susceptible to different interpretations" and is therefore unambiguous. *Id*. at 19.

The Supreme Judicial Court ultimately concluded that the policy at issue "generally covers direct physical loss to Bibeau's home, but it explicitly does not cover any losses caused by earth movement" such as the loss which occurred here. *Id*. at 20. The lower court's grant of summary judgment in favor of Concord was affirmed.

Learning Point: Where a policy's enumerated exclusions are unambiguous, the Court will interpret them in accordance with their plain meaning. Ambiguity in policy language, however, will be strictly construed against the insurer. ♦

New Jersey Appellate Court Upholds The Umpire's Finding, Which Determined That The Spreadsheets Attached To The Applicable Policies Did Not Transform The Insurance Agreement Into A Valued Policy

by ***Yesy A. Sanchez***

In *Max v. Great Am. Sec. Ins. Co.*, 2021 N.J. Super Unpub. Lexis 394, the New Jersey Appellate Court was tasked with determining whether the arbitration award, and the trial court's subsequent confirmation, were proper. This included a determination made by the Umpire that the applicable dealer policies were not valued policies, despite one of the policies having attached spreadsheets itemizing the values of the insured properties.

This case involves renowned German-American artist Peter Max, and a loss sustained at a warehouse storing a majority of his artwork. The plaintiffs Peter Max, Viamax, Inc. and ALP, Inc. (collectively "Max") maintained a warehouse facility in Lyndhurst, New Jersey. *Id.* at *2. The artwork stored at the warehouse included various paintings, posters, and other paper formats. *Id.* In 2012, Superstorm Sandy flooded the warehouse and caused damage to a significant amount of the artwork. *Id.* The majority of the damaged items included unsold or extra works of arts that accumulated over many years. *Id.*

On the date of loss, Max maintained a dealer's insurance policy with Great American Security Company ("Great American") that provided coverage up to $75 Million. *Id.* Max also maintained an excess insurance policy with Interested Underwriters at Lloyds ("Lloyds") with a coverage limit of $325 Million. *Id.* Lloyd's policy was subject to all the terms, conditions and clauses contained in the Great American Policy. *Id.* However, the Lloyd's Policy included the attachment of several spreadsheets listing the values of the stored artworks. *Id.* at *4.

The parties were unable to agree on the amount of loss. *Id.* at *2. Pursuant to the terms of the Great American Policy, Great American and Lloyd's issued a written demand for an appraisal to determine the value of the loss. The parties agreed to designate an Umpire to resolve any differences between the appraisals. The Umpire's final appraisal and appointment was governed by the New Jersey Alternative Procedure for Dispute Resolution Act, N.J. Stat. §2A:23A-1 (hereinafter the "Act"). *Id.* at 3.

Yesy A. Sanchez
is an associate in Clausen Miller's New York office. He focuses his practice on the defense of personal injury, premises liability, and other tort cases. As a litigator, Yesy has argued cases in the Bronx, Queens, Kings, and New York County. As a trial attorney, Yesy has tried cases in Queens and New York County, as well as the United States District Court for the Eastern District of New York.
ysanchez@clausen.com

The appraisals submitted by the parties' differed substantially. *Id.* In accordance with the agreement, the dispute was submitted to the Umpire for resolution. *Id*. The Umpire valued the loss at $48,876,014. *Id*. The Umpire's written decision detailed the appraisal process, the disputes between the appraisers, the methodology employed by each appraisal, and how the Umpire resolved those disputes in determining the loss amount. *Id*. The Umpire also divided the loss into six categories: prints and posters, overpaints, paintings, acrylic, mixed media on paper, and other. *Id*.

In making a determination, the Umpire made specific factual findings that affected the method and valuation of the loss. For instance, the Umpire determined that the doctrine of *contra proferentem* did not apply. *Id*. at 3–4. The doctrine of *contra proferentem* states that where a contract is negotiated between parties of unequal bargaining power, a court will generally resolve any ambiguity in favor of the non-drafting party. *Id*. (citing *Chubb Custom Ins. v. Prudential Ins.*, 195 N.J. 231, 238, 948 A.2d 1285 (2008)). The Umpire reasoned that the Great American Policy was not a contract of adhesion (standard form), but rather "a standard dealer's policy that was altered by sophisticated parties, capably represented, who engaged in an arms-length transaction." In other words, the Umpire was not required to interpret any ambiguities in favor of Max. *Id*. at 4.

The Umpire also determined that the Great American Policy was not a "valued policy." *Id*. The Umpire concluded that the spreadsheets containing a list of values for Max's artwork, which were attached to the Lloyd's Policy only, did not represent the parties' agreement to accept the values contained therein. *Id*. A "valued policy" is a policy in which the value of the insured property is definitely settled by the policy. *Id*. (citing *Karcher v. Philadelphia Fire & Marine Ins.*, 32 N.J. Super. 496, 499, 108 A.2d 638 (App. Div. 1954), modified on other grounds, 19 N.J. 214, 116 A.2d 1 (1955)). Under a valued policy, proof of the actual value is unnecessary when a total loss has occurred. *Id*. In the instant matter, Max sought to recover its losses pursuant to the higher values provided in the spreadsheets.

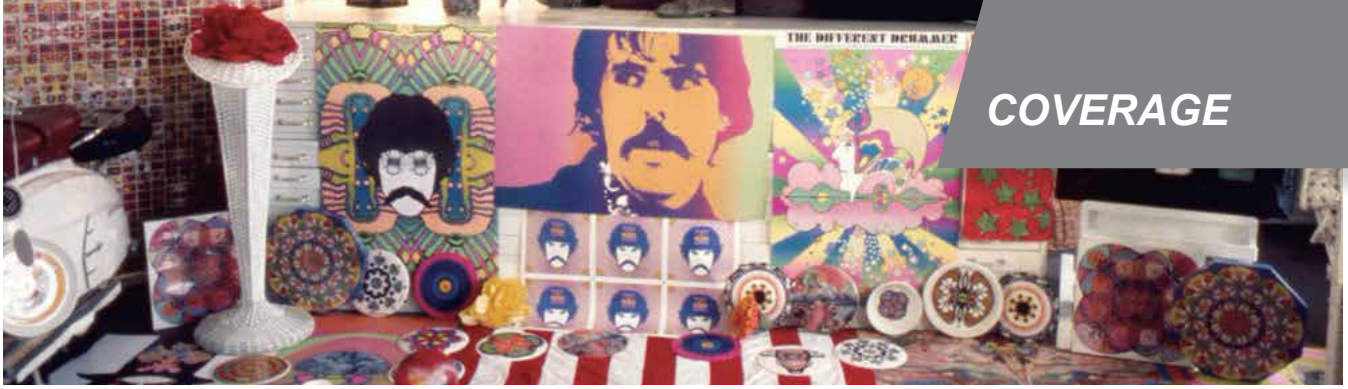
However, the Umpire evaluated the losses pursuant to the terms and conditions of the Great American Policy. *Id*. In particular, General Endorsement No. 4, which provided for the valuation of original works of art and posters at "retail value," while the valuation of other prints and posters would be calculated at wholesale value. *Id*. Pursuant to this endorsement, the Umpire applied a blockage discount to three of the six categories of artwork (overpaints, prints and posters). *Id*.

Max disagreed with the Umpire's findings and in 2018 Max filed an action in Superior Court seeking to modify the Umpire's award. *Id*. at 4–5. The modification was filed pursuant to N.J.S.A §2A:23A-13(f) of the Act, which allowed for summary review of the arbitration award where the "umpire committed prejudicial error in applying applicable law to the issues and facts presented." N.J.S.A. 2A:23A-13(f).

At the trial level, Max raised three arguments that contradicted the Umpire's findings. Specifically, Max argued that: 1) the doctrine of *contra proferentem* applied because the parties did not have equal bargaining power, 2) that the policies were valued policies, and 3) the blockage discount was improper. The trial court denied Max's request for a modification of the Umpire's award. *Id.* at 5.

At the trial level, the court concluded that the Umpire's refusal to apply the doctrine of *contra proferentem* was proper, based on "substantial evidence" found in the record supporting the Umpire's factual determination that the parties were of equal bargaining power. *Id.* The trial court cited the Umpire's written decision, which concluded that Max was "a sophisticated business" that generated six million dollars in revenue in 2012, and that it was "capably represented by its insurance broker" who bargained for General Endorsement No. 4. *Id*.

The trial court also determined that "substantial credible evidence" supported the Umpire's finding that these were not valued policies. *Id*. at 5–6. The trial court concluded that there was nothing in the record to support Max's proposition that the spreadsheets attached to the Lloyd's policy established that the valuation in the spreadsheets controlled the Great American Policy. *Id*. at 6. The trial court reasoned that if the policies were valued policies, "there would have



been no necessity for the extensive, painstaking . . . and detailed appraisal evaluations undertaken by each side of the dispute." *Id.*

The court also rejected Max's argument that the Umpire erred in the interpretation and application of the policy term "retail value" by applying blockage discounts. *Id.* The trial court found that the Umpire's determination of "retail value" was properly derived from Max's sales history, volume and practices. *Id.* at 6–7. The trial court agreed that many of the categories of artwork were largely sold at bulk prices, which did not coincide with gallery asking prices. *Id.* at 7. The trial court also agreed with the Umpire's finding that Max's approach to valuation did not account for the possibility that many of the unsold artworks would likely not sell at the prices listed in the spreadsheets. *Id.*

Max filed a motion for reconsideration, which was denied. Max appealed to the New Jersey Appellate Division. *Id.* The Appellate Court refused to interfere with the Arbitration award or the trial court's findings. *Id.* at 8. The appellate court upheld the Umpire's findings and determined that Max's appeal was barred by New Jersey statutes (the "Act"). *Id.*

As the Appellate Court explained, a party may challenge an arbitration award via a summary application to the Superior Court, however, once the trial court grants an order confirming, modifying, or correcting the arbitration award "there shall be no further appeal or review of the judgment or degree." *Id.* at 8–9. This is because parties who enter into an agreement under the Act waive their right to an appeal of the arbitrator's decision. *Id.* at 8.

The Appellate Court noted that there are "rare circumstances" where "public policy" require appellate review of an arbitration award. *Id.* at 9. For instance, where appellate review is required to fulfill the appellate courts supervisory function over the trial court. *Id.* 9–10. Such examples include cases that presented "unsettled questions of statutory interpretation" that required procedural guidance, or cases where the trial court did not apply the correct legal standard of review and did not rule on the plaintiff's claims. *Id.*

The Appellate Court held that the trial court did not depart from the Act in any manner, and that the record does not present "rare circumstances" that would support an exception to the Act. *Id.* at 10. The Appellate Court stated that the trial court "carefully considered the record presented," and that the trial court's decision was reasoned and well-supported. *Id.*

The Appellate Court concluded that Max's challenges on appeal were merely disagreements regarding the interpretation of the language in the policies and the Umpire's finding regarding the sophistication and coverage expectations. *Id.* The Court therefore upheld the Umpire's findings, including the determination that the spreadsheets attached to the Lloyd's Policy did not support Max's contention that the Great American Policy was a valued policy. The valuation method performed by the Umpire was consistent with the terms and condition of the Great American Policy, including General Endorsement No. 4.

Learning Point: The policy language trumps any attachments included with the policy. In determining whether the insurance agreement is a valued policy, the courts will rely on the terms and conditions contained in the policy, irrespective of other documents attached to the policy. Therefore, any documents purporting to establish a set value to the insured property will not, by itself, alter the policy. In accepting these types of valuation documents, the insurer must be certain that the policy language clearly dictates the method of valuating that governs the loss. Failure to include this type of language may subject the carrier to larger losses, and bind the carrier to values assigned by the insured. ♦

Defendant Success On Summary Judgment Utilizing The Storm-In-Progress Rule

by ***Lisa M. Shiderly***

Lisa M. Shiderly
is an associate at Clausen Miller's New York office. She focuses her practice on the defense of claims involving personal injury, professional liability, construction litigation, premises liability, products liability, New York Labor Law, and general negligence matters. Prior to joining Clausen Miller, Lisa worked as an Associate at New York City-based insurance defense law firms where she represented a wide range of clients against general negligence and other tort claims.
lshiderly@clausen.com

Recently, the New York Second Department affirmed an order of the lower court in favor of summary judgment for a defendant whose argument utilized the storm-in-progress rule. *Balagyozyan v. Federal Realty LP, et al.*, 2021 N.Y. Slip Op 00827 (2d Dep't, 2021). This is a significant decision because it demonstrates the strength of the storm-in-progress defense, even when the defendant had taken steps to clear the snow and ice prior to the storm being complete.

In *Balagyozyan*, Plaintiff was allegedly injured when he slipped and fell on ice on a sidewalk abutting property owned by Defendant Federal Realty ("Federal Realty"). Pursuant to a written contract, Defendant Executive Snow ("Executive Snow") was responsible for removing snow and ice from the property. Plaintiff alleged that Defendants were negligent in failing to remove snow and ice from the sidewalk. Executive Snow moved for summary judgment, arguing that the storm-in-progress rule protects it from liability.

The Second Department stated that:

> [u]nder the 'storm-in-progress' rule a property owner, tenant in possession, or, where relevant, a snow removal contractor will not be held responsible for accidents caused by snow or ice that accumulates during a storm until an adequate period of time has passed following the cessation of the storm to allow . . . an opportunity to ameliorate the hazards caused by the storm.

Balagyozyan, 2021 N.Y. Slip Op 00827 (citing *Fernandez v. City of New York*, 125 A.D.3d 800 (2d Dep't 2015). However, once a landowner or a tenant elects to engage in snow removal, it is required to act with "reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm." *Fernandez*, 125 A.D.3d at 801.

Executive Snow presented expert evidence and climatological data showing that the accident occurred while a storm was in progress. Executive Snow also demonstrated that its efforts to remove snow and ice from the sidewalk during the storm did not create a hazardous condition or exacerbate the natural hazard created by the storm.

When weighing the evidence, the Appellate Court affirmed the lower court's order granting summary judgment for Executive Snow, stating that "the mere failure of a defendant to remove all of the snow and ice, without more, does not establish that the defendant increased the risk of harm." *Balagyozyan*, 2021 N.Y. Slip Op 00827 (citing *Aronov v. St. Vincent's Hous. Dev. Fund Co.*, 145 A.D.3d 648 (2d Dep't 2016).

Learning Point: *Balagyozyan* affirms the strength of the storm-in-progress defense, even when the property owner, snow contractor, etc. had taken steps to clear the snow during the storm. Defense counsel should remember this decision if defending a claim of negligence against a client who had already begun clearing the snow and ice prior to the storm ending. ♦

New Hampshire Supreme Court Analogizes Students In Campus Housing Relationship With College To Landlord-Tenant Relationship In Applying The Anti-Subrogation Doctrine

by ***Elizabeth Zakheim***

In *Ro v. Factory Mutual Insurance Company*, the New Hampshire Supreme Court affirmed the judgment of the lower courts that granted summary judgment to Plaintiffs in their declaratory judgment action in which the courts ruled that the two student plaintiffs ("Students") that resided in the Dartmouth College ("Dartmouth") dormitories were implied co-insureds under the university's fire insurance policy issued by Factory Mutual Insurance Company ("Factory Mutual"). Consequently, subrogation could not be pursued against the students. No. 2019-0620, 2021 N.H. LEXIS 34 (Mar. 10, 2021).

The two Students lived in a separate on-campus dormitory, and paid Dartmouth for room and board. Each student acknowledged that they received a student handbook that detailed prohibitions on possessing charcoal grills in dormitories, lighting an open flame in dormitories, and placing items on or using (except in cases of emergency) parts of the dormitories not designed for recreational or functional use. The handbook also noted that violation of the open flame policy "may" result in liability for damage due to fire, and placed responsibility on students for claims arising from damage to college property, and provided that student residents "assume any and all liability for damage or claims that result from their own negligence," including that of their visitors or guests, and that student residents who damage or vandalize Dartmouth property "will typically be expected to pay restitution."

In October, 2016, the Students set up a charcoal grill on a platform outside a fourth floor window of one student's dormitory room. The grill started a fire on the platform, which then spread to the roof. All four floors of the dormitory sustained water damage from firefighting efforts. Factory Mutual, which insured the building, paid Dartmouth $4,544,313.55 and then brought a subrogation claim against the Students. The Students then brought this declaratory judgment action, seeking that the Court determine that they are implied co-insureds under the fire insurance policy that Factory Mutual issued to Dartmouth. Factory Mutual brought counterclaims for negligence and breach of contract, then both parties moved for summary judgment.

The Trial Court ruled in favor of the Students by comparing the facts to a landlord-tenant relationship and concluded that "the expectations and equitable considerations that motivated" the Supreme Court's previous decisions in landlord-tenant lease agreements also apply to on-campus housing agreements with students. *Id.* at *3. The Trial Court concluded that the

Elizabeth Zakheim
is an associate in the New York office of Clausen Miller P.C. in the subrogation department. Before pursuing legal studies, she had a career in communications and advocacy, most recently as Press Officer for the New York City Fire Department (FDNY). At Brooklyn Law School, Elizabeth was a member of the Brooklyn Journal of International Law and interned with the United States Attorney Office for the Eastern District of New York's Civil Division, Justice Leventhal of New York State's Second Appellate Division, and United States Magistrate Judge Ramon E. Reyes, Jr. in the Eastern District of New York.
ezakheim@clausen.com

counterclaims could not be maintained against either Student because the possessory interest that each Student had in the dormitories was insurable and "analogous to that of a tenant who rents one unit in a residential complex but causes fire damage to another unit in the complex" forbidding subrogation against the Students. *Id*. at *4.

On appeal, the Supreme Court examined its 2004 ruling in *Cambridge Mutual Fire Insurance Co. v. Crete*, which formed the basis for the decision below. 150 N.H. 673, 846 A.2d 521. In *Crete*, a tenant negligently started a fire in his apartment, causing significant damage to the building and the insurer paid the building owner for the insured losses, and then sought to recover from the tenant in subrogation. The tenant in *Crete* argued that New Hampshire should adopt Oklahoma's *Sutton* Rule (*Sutton v. Jondahl*, 1975 OK CIV APP 2, 532 P.2d 478) and apply the anti-subrogation doctrine since the tenant may be considered a co-insured of the landlord when fire damages occur at a leased residential premises. The New Hampshire Supreme Court found the argument persuasive and adopted the *Sutton* Rule, stating that New Hampshire is "joining the majority of jurisdictions, we agreed with the *Sutton* Court's reasoning that "'[b]asic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary.'" *Ro v. Factory Mut. Ins. Co*., 2021 N.H. LEXIS 34, *5-6, 2021 WL 915034 (N.H. March 10, 2021) (internal citations omitted).

In both *Crete* and *Ro*, the New Hampshire Supreme Court considered the analysis by courts of states that adopted the *Sutton* Rule that deemed the relationship between a student residing in on-campus housing and the university analogous to a landlord-tenant relationship. The Court found that in the landlord-tenant relationship, a tenant can expect that a landlord would have fire insurance that would apply to the whole building and that the tenant's rent would contribute to paying for that coverage, and therefore, would afford the tenant some level of protection; the insurer can expect to cover damage caused by the negligence of a tenant; and, the landlord cannot expect the tenant to obtain fire insurance that would cover the whole building in which he rents one apartment, which would also create waste.

Applying its analysis of the landlord-tenant relationship to the relationship between the Students and Dartmouth, the Supreme Court found that the relationship is sufficiently similar to that of a landlord-tenant and, therefore, the anti-subrogation doctrine set forth in *Crete* applied to the Students. A reasonable student residing in a dormitory could expect that his payments for room and board would go into funding the college or university's expenses, including those for fire insurance and as a result could (reasonably) expect that the fire insurance will "inure[]" to his benefit and as a result, under the *Crete* anti-subrogation doctrine, would be an implied co-insured. The Supreme Court further extended the anti-subrogation doctrine in *Crete* by specifically stating that the doctrine extends beyond the leased premises to damages to another apartment in a residential complex and, as a result, even though one of the students did not reside in the dormitory damaged, that student did reside on campus and could expect the same protection for damaging another dormitory as a tenant who damages another apartment. *Ro* at *19-21.

Additionally, the Supreme Court rejected Factory Mutual's argument that subrogation is appropriate because even though the Students violated Dartmouth policy when they negligently started the fire, the insurer knew that it was insuring a college dormitory and that it was possible that students would violate Dartmouth policies; and, presumably, adjusted its rates to account for that risk. Therefore, it assumed the risk when it accepted the premium payments for the policy involved.

Learning Point: Subrogation is an equitable doctrine, which means that courts consider principles of equity and fairness that include meeting the expectations. It is important to pay attention to the various relationships at play, since the outcome will often depend on these fundamental principles and are not always rigidly applied or predictable. In New Hampshire, as to the anti-subrogation doctrine, the student-college housing relationship is treated the same as the landlord-tenant relationship. ♦

Third Department Allows § 114-a Discretionary Penalty, But Refuses To Permanently Steamroll Claimant's Benefits

by ***Ian T. Williamson***

In the *Matter of the Claim of Brian Dunleavy v. Federated Fire Protection (Turner Construction), Workers' Compensation Board*, 2021 NY Slip Op 01464 (App. Div., 3d Dept., March 11, 2021), the Third Department affirmed a Workers' Compensation Board decision refusing to permanently disqualify a claimant from receiving benefits while allowing a discretionary penalty under § 114-a of the Compensation Law.

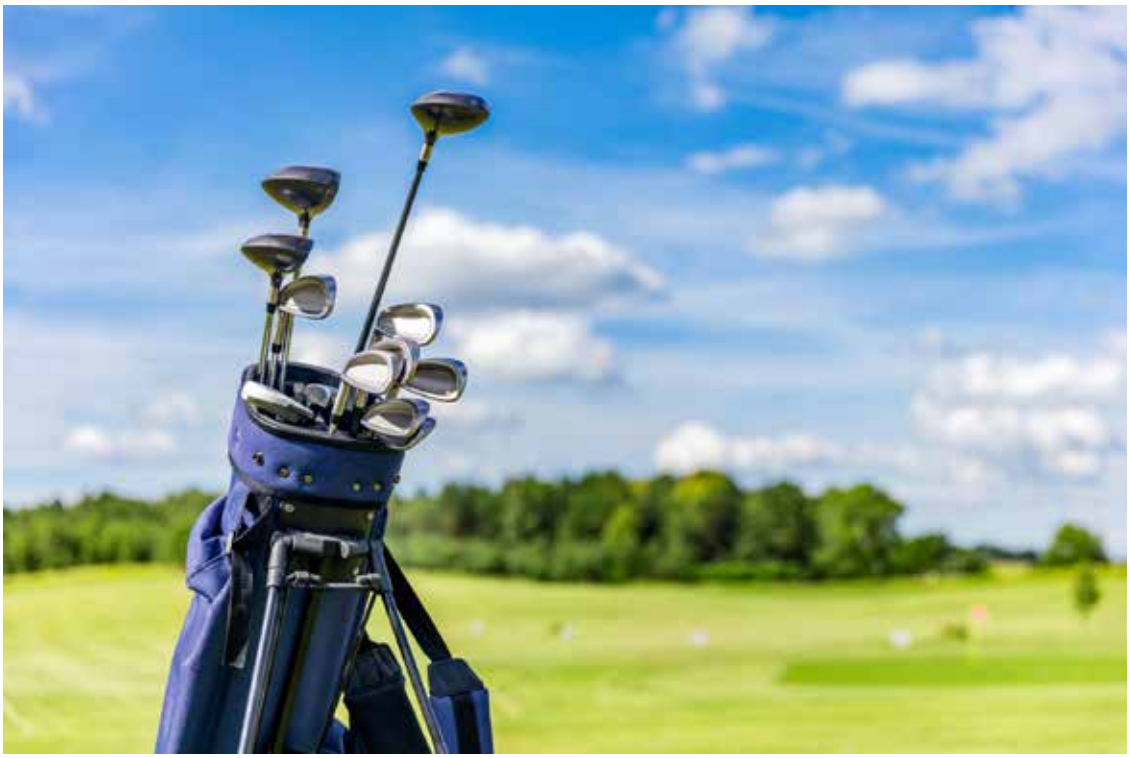
Claimant was a steamfitter with 30 years of experience installing sprinkler systems. In August, 2013, he filed a claim for compensation benefits alleging that the cumulative occupational stress had caused damage to his neck. In an IME questionnaire, claimant indicated that the pain rendered him with "zero range of motion," and that he was unable to work or engage in any activities or hobbies.

In 2016, claimant's physician verified that he had sustained a permanent injury to his cervical spine rendering him only capable of sedentary work at most. Claimant subsequently completed a loss of wage earning capacity vocational data form in June, 2017, stating that his previous employment as a steamfitter was his only employment for the preceding ten years. Though claimant denied being able to sufficiently play golf or complete any residential chores, his employer's compensation carrier conducted surveillance, which clearly demonstrated claimant golfing, as well as completing associated golf-related tasks such as carrying his golf bag, squatting and bending. Further, video footage showed claimant using various power tools to perform landscaping at his father's residence. In addition, it was discovered that claimant had worked for the fire department concurrently with his work as a steamfitter until 2012, before his date of disability.

Upon review, the Board found that claimant had indeed sustained a permanent partial disability and suffered a 65% loss of wage-earning capacity, and that the claimant was not attached to the market (actively seeking new employment) which would trigger the payment of benefits. The carrier, in its appeal of the Board's decision, argued that the claimant's wage-earning capacity should also not be believed as his misrepresentations called into question the veracity of claimant's true capacity.

Compensation Law § 114-a(1), provides that a claimant who, for the purpose of obtaining disability compensation or influencing a determination relative thereto, "knowingly makes a false statement or representation as to a material fact shall be disqualified from receiving any compensation

Ian T. Williamson
is a senior associate in the New York office of Clausen Miller P.C., where his areas of practice include premises liability, labor law, property damage, automobile accidents and construction. Prior to joining Clausen Miller, Ian defended a major utility company in bodily injury cases relating to construction site, premises liability and automobile accidents. He also has extensive experience representing defendants in New York State asbestos litigation.
iwilliamson@clausen.com



directly attributable to such false statement or representation." This mandatory penalty serves to prevent claimants from unjustly recovering compensation directly attributable to such false statements. In addition to this mandatory penalty, a claimant can also be penalized by the Board, at its discretion to "disqualify a claimant from receiving future benefits or . . . impose an additional penalty up to the amount of the mandatory penalty." *Matter of Restrepo v. Plaza Motors of Brooklyn Inc.*, 181 AD3d at 1108, 1110 (2020).

In deciding whether to apply the mandatory penalty permanently barring claimant's benefits, the focus is on the claimant's conduct, which should be egregious or severe with a lack of mitigating circumstances. *Matter of Concliffe v. Darden Rest.*, 187 AD3d 1398, 1401 (2020). To determine whether the discretional penalty should be assessed, judicial review considers whether the penalty imposed is so disproportionate to the offense as to be shocking to one's sense of fairness. *Matter of Restrepo v. Plaza Motors of Brooklyn Inc.*, 181 AD3d at 1110.

On appeal, the Third Department agreed with the Board that while claimant underestimated his level of participation in his recreational activities and did not mention his prior work with the Fire Department, these misrepresentations failed to reach the threshold to be considered so egregious or pervasive as to permanently disqualify him from receiving benefits. It allowed the Board's discretionary penalty, which was assessed at $10,000, on any future benefits claimant should earn pending sufficient demonstration of attachment to the labor market. The Court refused to alter the Board's original determination as to claimant's wage-earning capacity, finding that such factors as his age, education, proficiency in English and limited work experience justified the 65% loss as assessed.

Learning Point: The two penalties of Compensation Law § 114-a have shifting burdens. The mandatory penalty puts the onus on the claimant to be as honest as possible in representing his/her injuries to avoid a possible permanent disqualification of a benefit award. For the discretionary penalty to be permitted, the Compensation Board must act likewise dutifully and ensure that the penalty assessed is both fair and proportional to the claimant's conduct. ♦

SUBROGATION GROUP WINS PARTIAL MOTION FOR SUMMARY JUDGMENT APPLYING RETAIL VALUATION

CM Partner **Robert A. Stern** was retained to investigate a water loss at a mall in New Jersey. Our Insured was a retail store. The Insured submitted a claim to CM's client for the damage to its high-end ceramic dinnerware, and formal dishware, flatware and glassware. After adjustment, CM's client indemnified the Insured at full retail price, pursuant to the Policy. The mall was undergoing renovations at the time of the water loss. After investigation, CM filed a subrogation suit on behalf of its client against the General Contractor, Mall Owner and Management Company. After some discovery, Defendants filed a Partial Motion for Summary Judgment seeking a declaration from the Court that CM's client's recoverable damages should be limited to wholesale costs. After briefing and oral argument, the Court issued a five (5) page Decision denying the Motion and holding that the proper measure of recoverable damages is the retail cost. If you have questions regarding Subrogation or Recoverable Damages, please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212-805-3900).

ARBITRATION

LACK OF REASONABLE NOTICE OF ARBITRATION REQUIREMENT DOOMS AWARD

Kauders v. Uber Techs., Inc., 159 N.E.3d 1033 (Mass.)

After being denied ride, Uber customer sued to avoid arbitration award. ***Held:*** Customer contract did not provide reasonable notice of arbitration requirement or ability to reasonably manifest assent. Reasonable users may not understand that registration process for rides created a contractual relationship. The online interface between Uber and customers did not require customers to read the terms and conditions, which lacked prominence. The registration process did not invite customers to affirmatively acknowledge their agreement to Uber's terms and conditions.

ASSIGNMENT

POLICYHOLDER'S ASSIGNMENT INVALID WHERE PREVIOUSLY ASSIGNED SAME RIGHTS

Bruno v. Harford Ins. Co., 2021 U.S. Dist. LEXIS 11709 (M.D. Fla.)

Plaintiffs initiated breach of contract action against defendant alleging policyholder assigned to plaintiffs certain rights with respect to insurance claim. Defendant moved to dismiss, arguing plaintiffs lacked standing because the policyholder previously made a valid assignment of the same allegedly assigned rights. ***Held:*** An assignor cannot assign rights and then later assign those same rights again. A right once assigned can no longer be enforced or transferred by any party other than the assignee.

BAD FAITH

CIVIL REMEDY NOTICE MUST "STATE WITH SPECIFICITY" THE POLICY LANGUAGE AND STATUTORY PROVISIONS AT ISSUE

Julien v. United Prop. & Cas. Ins. Co., 2021 Fla. App. LEXIS 3131 (Fla. App.)

Circuit court dismissed insured's bad faith lawsuit because the insured's civil remedy notice failed to satisfy the statutory requirement that an insured "state with specificity" the policy language and the statutory provisions at issue. ***Held:*** Affirmed. Insured's civil remedy notice that listed nearly all policy sections and which cited thirty-five statutory provisions failed to satisfy the requirement that insured specify the statutory and policy provisions at issue.

CIVIL PROCEDURE

PROPOSAL FOR SETTLEMENT UNENFORCEABLE WHEN SERVED EARLIER THAN NINETY DAYS AFTER PLAINTIFF ADDED TO ACTION

Arizone v. Homeowners Choice Prop. & Cas. Ins. Co., 2021 Fla. App. LEXIS 3793 (Fla. App.)

In March 2016, plaintiff Arizone filed breach of contract suit against defendant. In August, an amended complaint was filed adding plaintiff Simon to action. Following defense verdict, trial court awarded defendant fees and costs based on separate August 2016 proposals for settlement served individually upon plaintiffs. ***Held:*** Reversed in part. Critical date for whether proposal for settlement served on Simon was timely was date Simon commenced action, which was August 2016. Thus, proposal for settlement was premature, violating express ninety-day requirement set forth in procedural rules, and unenforceable.

CONTRACT LAW

AMBIGUOUS TERM RESOLVED AGAINST DRAFTER

C & H Shoreline, LLC v. Lorraine Rubino et al., AC 43197 (Conn. App.)

Plaintiff sued defendants for breach of contract due to failure to pay for services rendered. Agreement contained provision providing no action relating to subject matter of agreement could be brought more than one year after claiming knew or should have known of the action. Trial court found action was time barred by provision. Plaintiff appealed. ***Held:*** Affirmed. The one-year limitation provision was ambiguous and applying the *contra proferentem* rule, the ambiguity must be resolved against plaintiff, the undisputed drafter of the agreement.

CONTRACT AMBIGUITY LEFT FOR ULTIMATE FACT FINDER

Joann Anderson v. Town of Bloomfield et al., AC 42905 (Conn. App.)

Plaintiff sued defendant for installing allegedly defective roof pursuant to Town residential rehabilitation program. The Town acted on behalf of the plaintiff to secure appropriate contractors to do the work and entered into all necessary contracts. Defendant installed the roof and was paid by Town. Plaintiff noticed water entering her home. Plaintiff alleged she was a third-party beneficiary of the contract but trial court dismissed action. ***Held:*** Reversed. The contract was ambiguous as to whether defendant and Town intended plaintiff to be a third-party beneficiary, and, therefore was a question for the ultimate fact finder.

EMPLOYMENT LAW

PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT DOCTRINE

Helen Sieranski v. TJC Esq, A Professional Servs. Corp., AC 43272 (Conn. App.)

Plaintiff paralegal's employer asked her to prepare an affidavit stating something that was untrue regarding a litigation matter. She drafted the affidavit but refused to sign it because she knew it was false and defendant terminated her employment. Plaintiff sued for wrongful termination but trial court struck action. ***Held:*** Reversed. The public policy exception to the at-will employment doctrine protects against termination for refusing to assist in submitting false statements to a court.

ABANDONMENT OF DUTIES IS JUSTIFIABLE GROUNDS FOR TERMINATION

Robert Meyers v. Town of Middlefield, AC 42555 (Conn. App.)

Plaintiff town building official was responsible for processing certificate of occupancy applications. Town alleged plaintiff obstructed the issuance of a certificate of occupancy to a company that owned a commercial ski property and voted to terminate him. Plaintiff sued but trial court dismissed action. ***Held:*** Affirmed. Plaintiff constantly interjected new or resolved compliance issues whenever ski company was on verge of being issued certificate, left an inspection against instruction, raised matters outside of his jurisdiction to obstruct the issuance of the certificate, and misplaced paperwork on multiple occasions.

FIRST-PARTY PROPERTY

ORDINANCE AND LAW COVERAGE NOT OWED UNTIL COSTS INCURRED

Sfr Servs. v. Empire Indm. Ins. Co., 2021 U.S. Dist. LEXIS 1768 (M.D. Fla.)

Defendant paid amount determined at court-ordered appraisal in which appraisal panel found roof damage could be repaired utilizing harvested tiles. Following appraisal, plaintiff sued defendant for breach of contract claiming defendant failed to properly indemnify because County permitting authority would not allow harvested tiles. ***Held:*** In accordance with the insurance policy's ordinance and law language, defendant did not owe plaintiff for the increased costs to comply with the ordinance or law until the property is actually repaired or replaced.

LABOR LAW

LABOR LAW CLAIM INVOLVES FORESEEABILITY OF ELEVATION RISK

Goya v. Longwood Housing Dev. Fund Co., 2021 NY Slip Op 01845 (N.Y. App. Div. 1st Dep't)

Plaintiff brought various Labor Law and related claims in relation to construction injury. Defendant argued Labor Law § 240(1) claim should be dismissed because malfunction of fire escape ladder was not foreseeable. ***Held:*** A plaintiff in a case involving collapse of a permanent structure must establish the collapse was "foreseeable," not in strict negligence sense, but in sense of foreseeability of exposure to an elevation-related risk. Here, plaintiff's use of permanent fire escape ladder to reach top of sidewalk shed presented foreseeable elevation-related hazard just as if plaintiff had been using an extension ladder.

LEGAL MALPRACTICE

RETROSPECTIVE COMPLAINTS ABOUT FIRM INSUFFICIENT TO STATE LEGAL MALPRACTICE CLAIM

Garr Silpe, P.C. v. Gorman, 2021 NY Slip Op 01944 (N.Y. App. Div. 1st Dep't)

Woman brought counterclaims for legal malpractice against attorney she hired mid-trial, after she had been represented by eight prior law firms, and at times represented herself. Trial court dismissed her claims. ***Held:*** Conclusory allegations that law firm failed to prepare for trial and gather evidence in her matrimonial action did not state a cause of action for legal malpractice. Retrospective complaints about law firm's recommendations and trial are an insufficient basis to show that plaintiff's decisions are actionable. ***Further held:*** Counterclaims also fail to allege facts that would establish that, but for the firm's negligence, she would have obtained a more favorable result.

LIMITATIONS OF ACTIONS

SAVING STATUTE DOES NOT SAVE CLAIM AFTER STATUTE OF LIMITATIONS AND STATUTE OF REPOSE EXPIRED

Wilson v. Durrani, 2020 Ohio LEXIS 2833 (Ohio)

After voluntarily dismissing late-filed medical malpractice claims, plaintiffs refiled them following expiration of statute of repose. ***Held in a split decision:*** Saving statute only extends time to file action otherwise barred by statute of limitations. It does not provide an exception to a statute of repose, which must come from statute of repose itself. Neither of the two existing exceptions to the statute of repose applied.

MEDICAL MALPRACTICE

FAILURE TO PERFORM BIOPSY OR REFER TO SPECIALIST SUSTAINS CLAIM

Colon v. Choi, 2021 NY Slip Op 01823 (N.Y. App. Div. 3d Dep't)

Plaintiff sued dermatologist to whom decedent was referred for failing to diagnose and treat decedent with adenocarcinoma of the anus. Trial court denied dermatologist's motion for summary judgment. ***Held:*** Affirmed. Estate's expert opined that dermatologist departed from applicable standard of care by not performing biopsy or referring decedent to specialist for biopsy when decedent's condition did not improve and dermatologist failed to appreciate significance of masses with induration.

SETTLEMENT WITH DOCTOR BARS NEGLIGENT CREDENTIALING SUIT AGAINST HOSPITAL

Walling v. Brenya, 2021 Ohio App. LEXIS 25 (Ohio App.)

Patient sued hospital for negligent credentialing of doctor who failed to diagnose and treat stenosis. ***Held:*** Settlement of claim against doctor prevented recovery for negligent credentialing. Proof of malpractice by trial or stipulation must precede negligent credentialing claim. Although physician testified to not diagnosing stenosis, his settlement during trial denied any wrongdoing and liability.

MUNICIPAL LAW AND CORPORATIONS

SEWER RECONSTRUCTION DEEMED GOVERNMENTAL FUNCTION FOR IMMUNITY PURPOSES

Eikenberry v. Muni. of New Lebanon, 2021 Ohio App. LEXIS 459 (Ohio App.)

Apartment owner's sewer line backed up because of contractor's failure to reinstate lateral connection following rehabilitation of sewer main. ***Held:*** City was engaged in governmental function and so immune from liability. Sewer work is governmental function when involving provision, non-provision, planning, design, construction, or reconstruction of line. It is proprietary if involving maintenance, destruction, operation, and upkeep. Given extent of work, specialized equipment needed, and involvement of highest governmental authorities, project was akin to reconstruction—and so governmental.

NEGLIGENCE

FIRST RESPONDERS NOT LIABLE FOR STABBING VICTIMS' TREATMENT DELAYS

Slavin v. Am. Med. Resp. of Mass., Inc., 2021 Mass. App. LEXIS 2 (Mass. App.)

Plaintiff sued city and ambulance service for first failure to timely reach stabbing victims. ***Held:*** Statute barred tort claims against public employees for not preventing or reducing consequences of condition or situation, including violent or tortious conduct of third person, not originally caused by public employer or its agent. Delay in reaching crime scene was not original cause of harm. Plaintiff did not claim that responders provided negligent treatment—an exception allowing recovery.

LITTLE LEAGUER ASSUMED INHERENT RISK OF INJURY FROM METAL CLEATS

Torres v. Loisaida, Inc., 2021 NY Slip Op 01875 (N.Y. App. Div. 1st Dep't)

13-year-old plaintiff was injured when, as he was fielding third base in a baseball game, a baserunner slid into the base and collided with his left shin. Plaintiff had played baseball for seven years. ***Held:*** Recovery for negligent supervision precluded by fact plaintiff voluntarily assumed inherent risks of game. Baserunner's metal cleats did not create enhanced or concealed risk that was not assumed. The little league rules permitted the wearing of such cleats and plaintiff had observed the baserunner wearing the cleats.

SUBROGATION

EXCESSIVE REFERENCES TO INSURANCE RESULT IN REMAND FOR A NEW TRIAL

Antoniadis v. Basnight, 2021 Mass. App. LEXIS 17 (Mass. App.)

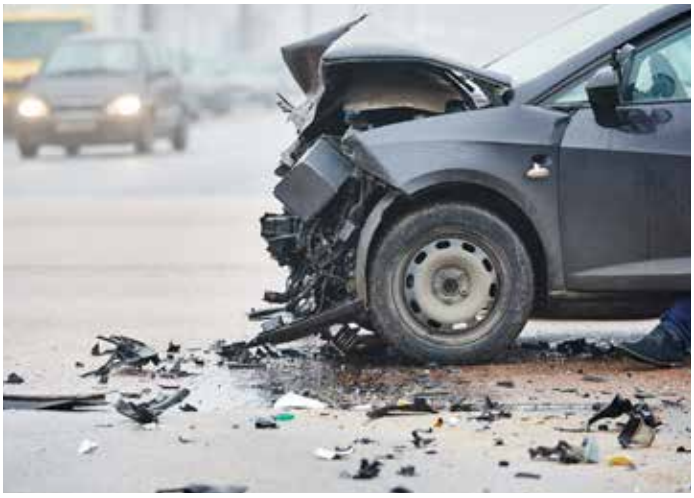
Judge in subrogation trial informed jury about insurance context of case and allowed defendants to introduce insurance matters. ***Held:*** Evidence about insurance must have probative value outweighing prejudicial effect. Evidence of plaintiff's statements to its insurer made unnecessary reference to insurer. Documents concerning insurer's payments could have been redacted to exclude insurer. ***Further held:*** Court erred by not instructing jury on plaintiff's voluntary assumption of duty theory.

VICARIOUS LIABILITY

MOTOR VEHICLE DEALERS IMMUNE FROM LIABILITY WHEN LOANED MOTOR VEHICLE IS INVOLVED IN ACCIDENT

Kyle McCall v. Gina Sopneski, AC 42498 (Conn. App.)

Defendant automobile dealership rented motor vehicle to customer. Customer provided dealership with proof of valid auto insurance policy. Plaintiff sued dealership under vicarious liability theory for injuries sustained when his motorcycle was struck by the loaned motor vehicle driven. Trial court granted dealership summary judgment. ***Held:*** Affirmed. Motor vehicle dealers are immune from liability caused by a loaned automobile, so long as the customer has furnished dealer with proof of liability insurance. The essence of the transaction was a loan because motor vehicle was given to customer for temporary use and customer was not charged fee.



Clausen Miller P.C.

10 South LaSalle Street
Chicago, IL 60603
Telephone: (312) 855-1010
Facsimile: (312) 606-7777

28 Liberty Street
39th Floor
New York, NY 10005
Telephone: (212) 805-3900
Facsimile: (212) 805-3939

17901 Von Karman Avenue
Suite 650
Irvine, CA 92614
Telephone: (949) 260-3100
Facsimile: (949) 260-3190

100 Campus Drive
Suite 112
Florham Park, NJ 07932
Telephone: (973) 410-4130
Facsimile: (973) 410-4169

200 Commerce Square
Michigan City, IN 46360
Telephone: (219) 262-6106

4650 West Spencer Street
Appleton, WI 54914
Telephone: (920) 560-4658

68 Southfield Avenue
2 Stamford Landing Suite 100
Stamford, CT 06902
Telephone: (203) 921-0303

4830 West Kennedy Boulevard
Suite 600
Tampa, FL 33609
Telephone: (813) 509-2578

100 Pine Street
Suite 1250
San Francisco, CA 94111
Telephone: (415) 745-3598

Clausen Miller LLP
34 Lime Street
London EC3M 7AT U.K.
Telephone: 44.20.7645.7970
Facsimile: 44.20.7645.7971

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clausen.com

Clausen Miller International:

CMI CLAUSEN MILLER INTERNATIONAL

Grenier Avocats
9, rue de l'Echelle
75001 Paris, France
Telephone: 33.1.40.20.94.00
Facsimile: 33.1.40.20.98.00

Studio Legale Corapi
Via Flaminia, 318
00196-Roma, Italy
Telephone: 39.06.32.18.563
Facsimile: 39.06.32.00.992

van Cutsem-Wittamer-Marnef & Partners
Avenue Louise 235
B-1050 Brussels, Belgium
Telephone: 32.2.543.02.00
Facsimile: 32.2.538.13.78