CM EAST COAST REPORT of Recent Decisions

2021• Vol. 3

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Clausen Miller P.C.

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 Appellate Court Refuses To Reform Insurance Policy To Reflect The Owner As An Additional Insured

by ***Yesy A. Sanchez***

In *Affiliated FM Ins. v. Rothschild Realty I, L.P.*, 2021 N.J. Super. Unpub. LEXIS 1661(Super Ct App Div Aug. 6, 2021), the New Jersey Appellate Court had to address whether a property owner met the high burden required to reform an insurance policy, which it claimed was necessary due to a mutual mistake between the insured and the carrier. In particular, the owner sought to reform the portion of the policy that did not list the owner as the additional insured under the tenant's policy.

Rothschild Realty I, L.P. ("Rothschild") owned a warehouse, which it leased to Universal Carpet Design, Inc. ("Universal"). In February, 2014, the warehouse roof collapsed, causing damage to merchandize owned by Beauvais Carpets, Inc. ("Beauvais"). Affiliated FM Insurance Company ("Affiliated") compensated Beauvais for the damaged carpets, pursuant to an insurance policy maintained by Beauvais. Subsequently, Affiliated brought a subrogation action against Rothschild and Universal seeking to recover the funds paid to Beauvais ("Underlying Claim").

Rothschild sought coverage for the Underlying Claim from Harleysville Insurance Company ("Harleysville"), the general liability carrier for Universal. The lease between Rothschild and Universal required Universal to obtain general liability insurance for the warehouse. The lease also required Universal to name Rothschild as an additional insured under the Policy. In other words, the lease required Universal to obtain insurance and name Rothschild as an additional insured under the Harleysville Policy.

The Harleysville Policy did not name Rothschild as an additional insured, as such, Harleysville denied Rothschild request for coverage. Rothschild commenced a third-party action against Harleysville seeking to reform the portion of the Harleysville Policy that did not list Rothschild as an additional insured.

By way of background, in 2004, Universal retained the Walsdorf Agency, Inc. to obtain the requisite insurance policy for the warehouse. Walsdorf completed the insurance application, which was signed by Edward J. Drennan, a 50% owner of Universal. The subsection entitled "Additional Interest/Certificate Recipient" in the application listed "ED J. Drennan" as an "Additional Insured." The application described Drennan as the "Building Owner." Rothschild was not listed as an additional insured. The Harleysville Policy was renewed with no changes made to the "Additional Insured" section of the Policy.

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Based on this insurance application the underwriter for Harleysville believed that Drennan was both the owner of the building, and the principal of Universal. Harleysville charged the minimal premium for designating Drennan as an additional insured. The underwriter's decision to charge the minimum premium was based on his belief that naming Drennan as an additional insured did not increase the overall risk, since he was both the owner of the property and the principal of Universal, the warehouse tenant.

After Rothschild filed the Complaint against Harleysville, Affiliated and Rothschild settled the Underlying lawsuit for $75,000. Thereafter, both Rothschild and Harleysville moved for summary judgment on the Third-party Complaint. Rothschild sought to reform the Harleysville Policy to include Rothschild as an additional insured, which would require Harleysville to provide coverage for the Underlying lawsuit. Rothschild argued that there was a "mutual mistake" by Universal and Harleysville, and that they intended to insure the warehouse owner, Rothschild, but erroneously listed Drennan as the owner.

Rothschild also argued that there was a unilateral mistake in listing Drennan as the owner, and that this mistake, coupled with Harleysville's "inequitable conduct," required reformation of the Harleysville Policy. This argument relied on a 2013 certificate of insurance found in possession of Heffner Agency, Inc. ("Heffner"), which listed Rothschild as a certificate holder and "additional insured/landlord." Heffner procured the commercial liability insurance policy from Harleysville. Rothschild argued that Harleysville was under a duty to investigate the identity of the owner.

Harleysville argued that the Policy language was clear and unambiguous, and that Rothschild was not covered under the Policy as an additional insured. In other words, there was no mistake because Harleysville issued the Policy as requested in the insurance application.

In deciding the respective motions, the trial court ruled in favor of Harleysville and against Rothschild. *Id.* at *6. The trial court determined that Rothschild was not covered under the Harleysville Policy because it was not listed as an additional insured. *Id.* The trial court was not convinced that a mutual mistake was made because the facts did not indicate an intent to insure anyone other than Drennan. *Id.* at *6–7.

The trial court noted that the underwriter for Harleysville testified that he charged the minimum premium for an additional insured because he understood that Drennan was both the owner of the warehouse and the principal of Universal. *Id.* The underwriter further testified that if the request was made to insure an independent property owner, such as Rothschild, the premium charged would have been different in order to reflect the higher risk. *Id.*

The trial court concluded that Rothschild failed to meet its high burden of proving by "clear and convincing" evidence that both Universal and Harleysville intended to insure the owner of the warehouse. *Id.* at *7. It further concluded that the facts indicate that Harleysville and Universal intended to insured Drennan "as listed in the application." *Id.* The court reasoned that if Harleysville intended to insure Rothschild it would have charged a higher premium to coincide with the higher risk. *Id.*

The trial court dismissed Rothschild's claim that Harleysville's conduct, in failing to investigate the true ownership of the property, was unconscionable. *Id.* Indeed, the court held that Harleysville issued the Policy in accordance with the information provided in the insurance application. *Id.* at *8. The court also noted that the Policy was renewed for nearly ten years without any requests for corrections from Rothschild or Universal. *Id.*

Rothschild appealed the trial court's decision. The Appellate Court reviewed Rothschild and Harleysville's motions using a *de novo* standard of review, which accords no deference to the trial court's decision. *Id.* at *10.

The Appellate Court upheld the trial court's decision. The Appellate Court reasoned that the Policy's words should be given their plain and ordinary meaning, and should not be interpreted in a way that affords the insured "a better policy of insurance than the one purchased." *Id.* at *10 (citing *Passaic Valley sewerage Comm'v. St. Paul Fire & Marine Ins. Co.*, 206 N.J. 596 607-08 (2011) and quoting

Memorial Properties, LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525, 46 A.3d 525 (2012)).

The Court explained that reformation of an insurance policy is appropriate where both parties agree to terms at the same time, and the writing fails to express that understanding correctly. *Id.* at *10-11 (citing S*t. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden*, 88 N.J. 571, 579,443 A.2d 1052 (1982). The Court stated that in order to reform an insurance policy there must be "clear and convincing proof" that the reformed contract would represent the agreement as understood by the contracting parties. *Id.* at *11.

The Appellate Court determined that Harleysville issued the Policy as requested in the insurance application, which listed Drennan as additional insured. *Id.* The Court also relied on the underwriter's testimony which indicated that the insurance premium would have been higher, had Harleysville understood that Rothschild, and not Drennan, was to be listed as the additional insured. *Id.* at *11–12.

The Court was not convinced by Rothschild's argument that reformation was warranted, based on a unilateral mistake and Harleysville's alleged "unconscionable" conduct. *Id.* at *12. The general rule for reformation under a theory of unilateral mistake requires a mistake by one party and fraud or unconscionable conduct by the other party. *Id.* (citing *N.J. Transit Corp. v. Certain Underwrites at Lloyd's London*, 461 N.J. Super. 440, 464, 221 A.3d 1180 (App. Div. 2019). Rothschild's argument, that the 2013 certificate of insurance listing Rothschild as an additional insured under the Harleysville Policy triggered a duty for Harleysville to investigate, was not convincing. *Id.*

The Court explained that an insurer's duty to investigate is limited, and that the duty only arises when the independent investigation discloses sufficient facts to "seriously impair the value" of the application. *Id.* at *13 (quoting *Ledley v. William Penn Life Inns. Co.*, 138 N.J. 627, 639, 651 A.2d 92 (1995). However, the Court emphasized that the insured is responsible for the accuracy and truthfulness of its application for insurance. *Id.* at *13–14 (citing *Progressive Cas. Ins. Co. v. Hanna*, 316 N.J. Super. 63, 70, 719 A.2d 683 (App. Div. 1998).

The Court held that Universal was obligated to ensure that its insurance application contained correct information to the specific application questions. Here, the insurance application requested that Drennan be listed as an additional insured, Harleysville complied with the request, and that the same coverage was renewed for nearly a decade—without objection from Rothschild or Universal. *Id.* at *14–15. As such, Rothschild was not entitled to coverage under the Harleysville Policy.

Learning Point: A carrier that provides coverage pursuant to the information contained in the insurance application will not be required to provide coverage where the policy as written, and accepted by the insured, does not afford coverage. Insureds are obligated to provide the correct information in the application for insurance. Moreover, insureds are under a duty to examine the insurance policy to ensure that the terms are consistent with what they requested. The insured is also under a duty to notify the carrier of any inconsistency, and to notify the carrier of its refusal to accept the policy as is. Notwithstanding, the carrier must be aware that an insurance application may trigger a duty to investigate, under limited circumstances. ♦

Business Owed No Duty Of Care To Plaintiff Who Was Struck By Van Door As No Relationship Existed Between The Property Owner And The Tortfeasor

by ***Djordje Caran***

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One of the main issues that a defendant has to determine in a tort case is whether it had a duty to the injured plaintiff since as it is often said: "no duty, no liability." In the context of a premises liability matter, the property owner owes a duty to persons who are lawfully on its property. If there is no duty owed to the plaintiff, then liability cannot be attached to the property owner. Very often, duty is attached if the plaintiff demonstrated a degree of control over the instrumentality or individual that caused the accident.

In *Toltchelnikova v. Cmty. Recycling*, 149 N.Y.S.3d 900, 2021 N.Y. App. Div. LEXIS 4798, (2d Dep't. August 18, 2021), the Court considered the issue of duty and tackled a rather unique fact pattern. Plaintiff alleged that she was walking on the sidewalk next to a Key Food Supermarket on a windy, March day. At the same time, David R. Vaknin was operating a van owned by Community Recycling LLC. Mr. Vaknin parked the vehicle in front of the supermarket and was in the process of emptying a large metal bin full of clothes. The bin was located on the Key Food premises. As Plaintiff was walking on the public sidewalk she traversed along the rear of the van when a gust of wind suddenly swung the van door open, striking her in the head and caused severe injuries. The metal bin in question that Mr. Vaknin was utilizing to collect clothes dropped off by the public was located on Key Food's property and had the supermarket's emblem prominently painted on it.

Key Food moved for summary judgment with the bulk of discovery outstanding, including depositions of any parties and witnesses. Key Food argued that it did not own, operate or control the van in question. Key Food, in its motion, specifically argued that it had no duty to Plaintiff as it did not instruct, control or have any supervisory authority of the van operator since he was not an employee of Key Food. Key Food also argued that it was not the proximate cause of the accident nor was it foreseeable for the supermarket that a gust of wind would swing open a vehicle door and strike Plaintiff. Plaintiff opposed the motion and argued that there was a clear nexus between Key Food, the van operator and the company that he worked for. Plaintiff presented evidence that there was a nexus between Defendants because Key Food was aware that the company the van operator worked for utilized the

premises to place its metal collection bin, and that Key Food exercised some control and supervision of the company and its employee because the bin was painted in the colors of Key Food with a prominent Key Food emblem on it. The trial court agreed with Plaintiff's arguments and denied Key Food's motion, without prejudice, claiming that there were triable issues of fact and that further discovery is needed. The short decision provided scant detail as to the court's rationale. Key Food appealed.

The Appellate Division Second Department reversed the lower court's decision. It stated that no amount of discovery would create a condition where Key Food could have been liable. The Court opined that the main issue in determining whether Key Food was liable to Plaintiff revolved around whether it owed a duty to her. The Court listed several factors that create a duty and stated that no duty existed because Key Food did not lease, borrow or operate the van at issue. The Court then considered the relationship between Key Food and the van operator, and stated that it did not employ, control, direct or supervise the operator. As a result, the case should have been dismissed.

The Appellate Division appears to state that in determining whether a duty is owed to a plaintiff there has to be more than just a peripheral or a conjured up relationship between a property owner and a third-party tortfeasor. The Court emphasized various factors that should be considered such as control or supervision of the tortfeasor, or ownership of the instrumentality. The Court also stated that no further discovery was needed to determine whether there existed a duty of care as it was clear that no viable relationship existed between the property owner and the actual tortfeasor, thus additional discovery would not change the established facts.

Learning Point: When providing a defense to a property owner, or other allegedly liable parties, an attorney should immediately determine whether there is a duty which flows from the owner to a plaintiff, in particular if the actual tortfeasor is a third-party. If upon close scrutiny there appears to be no duty owed to the plaintiff, a property owner should not hesitate to move for dismissal as soon as practicable and thus shift the burden on plaintiff to come forward with admissible evidence demonstrating the existence of a duty of care. By making the motion early in the case, the defense will save the expenditure of time and defense costs, as well as serve to promote judicial economy. ♦

New York Appellate Division Enforces Time Limitation Provision In Homeowners Policy

by **Veronica Abraham**

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In *Avery v. WJM Dev. Corp.*, 2021 NY Slip Op 04961 (App. Div., 2d Dep't., September 15, 2021), the Appellate Division held the trial court correctly determined that the insureds' action against their insurer was time-barred because a homeowners insurance policy provision provided the action had to be commenced within two years after the occurrence causing loss or damage. The insureds filed suit six years after the fire.

On February 21, 2009, Plaintiff Linda Avery's home in Mount Vernon was damaged by a fire. *Id.* at 2. At the time of the fire, her property was covered by a homeowners insurance policy issued by Defendant Charter Oak Fire Insurance Company. Linda Avery hired an architect, Defendant Tom F. Abillama, in July, 2009, to draft and submit building plans for the property's restoration.

In June, 2015, Plaintiffs Linda Avery and Kyle Avery (her son) filed an action against Charter Oak to recover damages for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, negligence, breach of fiduciary duty, and intentional infliction of emotional distress. *Id.* at *2. Plaintiffs alleged that Charter Oak breached the homeowners insurance policy and the implied covenant of good faith and fair dealing by issuing certain payments for repairs that were performed inadequately, "then notifying Linda that it would not renew her homeowners insurance policy in April 2012 due to excessive claims based on the fire loss." *Id.* at *3. Plaintiffs alleged Abillama recommended Defendant Lucien Martin and his company, Defendant WJM Development Corp., to perform the repairs and misrepresented that Martin and WJM were properly insured and that Abillama possessed a work permit. *Id.* Plaintiffs further alleged Linda Avery "discovered Abillama did not have a work permit due to Martin and WJM being uninsured after the City of Mount Vernon Buildings Department issued a stop work order." *Id.* Thus, Plaintiffs believed they were entitled to damages from Abillama for fraud, negligence, and breach of fiduciary duty, and that Kyle Avery was entitled to damages for intentional or negligent infliction of emotional distress due to "being deprived of having a home to live in until the repairs were made." *Id.*

Defendants Charter Oak and Abillama filed motions to dismiss the Amended Complaint, pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7). *Id.* at *3. The trial court granted both motions to dismiss finding that the claims against Charter Oak were time-barred, and the claims against

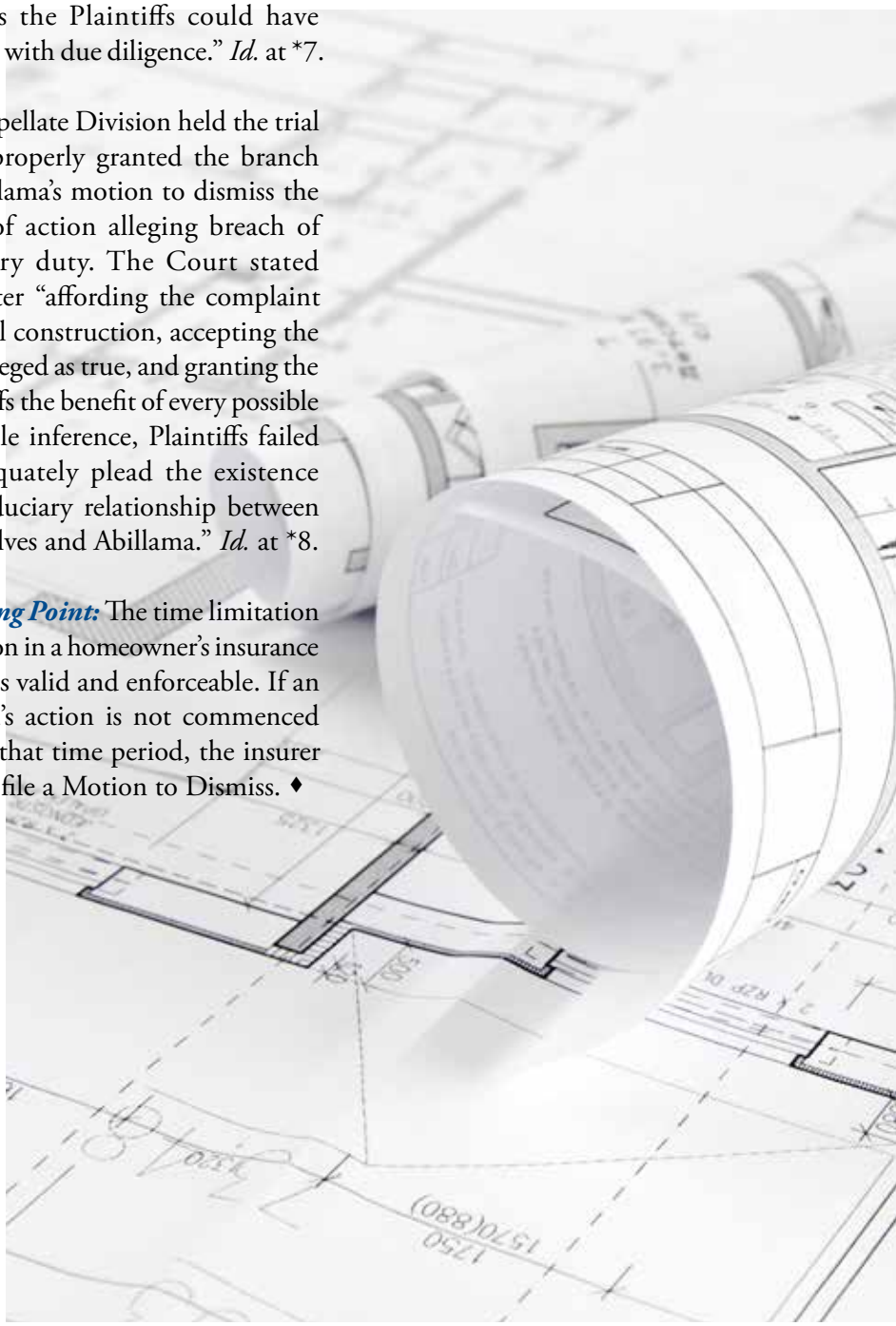
Abillama were time-barred and failed to state a cause of action. *Id.* at *4. Plaintiffs appealed.

The Appellate Division found that Charter Oak "established, *prima facie*, that the time to assert the claims against it expired based upon a provision in the policy providing that the action must be commenced 'within two years after the occurrence causing loss or damage'." *Id.* at 5. The Court stated that the time limitation provision to commence an action in the homeowners insurance policy "is valid and enforceable." *Id.* The Court further stated that the negligence action against Abillama is time-barred because the acts complained of took place, at the latest, in April, 2012, and the lawsuit was not commenced until June, 2015, over three years later. It was outside the three-year statute of limitations for a cause of action alleging negligence. *Id.*

The Appellate Division disagreed with the trial court's decision dismissing the fraud cause of action as to Abillama due to it being time-barred. "A cause of action alleging fraud must be commenced within the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . could with reasonable diligence have discovered it." *Id.* at *6. The alleged fraud occurred in 2011 and 2012, and the action was commenced in June, 2015, within the six year statute of limitations. *Id.* Thus, the cause of action alleging fraud against Abillama was timely commenced. However, Abillama was entitled to dismissal of the cause of action alleging fraud against him for failure to state a cause of action. The Appellate Division afforded the Complaint a liberal construction accepting the facts alleged as true, and found the "Plaintiffs failed to allege reasonable reliance upon Abillama's alleged misrepresentations, which pertained to facts the Plaintiffs could have verified with due diligence." *Id.* at *7.

The Appellate Division held the trial court properly granted the branch of Abillama's motion to dismiss the cause of action alleging breach of fiduciary duty. The Court stated that after "affording the complaint a liberal construction, accepting the facts alleged as true, and granting the Plaintiffs the benefit of every possible favorable inference, Plaintiffs failed to adequately plead the existence of a fiduciary relationship between themselves and Abillama." *Id.* at *8.

Learning Point: The time limitation provision in a homeowner's insurance policy is valid and enforceable. If an insured's action is not commenced within that time period, the insurer should file a Motion to Dismiss. ♦



Massachusetts Court Of Appeals Vacates Trial Decision Because Judge Informed Jury That An Insurance Company Was The Real Party-In-Interest

by **Douglas M. Allen**

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In *Antoniadis v. Basnight*, 99 Mass. App. Ct. 172, 164 N.E.3d 206 (2021), Plaintiff George Antoniadis' ("Antoniadis") home renovations ended in flames when a subcontractor hired to finish his floors left oil-soaked rags in a bucket which spontaneously combusted. Mr. Antoniadis' insurance carrier, Amica Mutual Insurance Company ("Amica"), brought a subrogation claim against the subcontractor and the contractor hired to perform the renovations, after settling Antoniadis' insurance claims. *Id.*, 99 Mass. at *173. Amica originally filed the Complaint in its own name, but later removed its name and substituted in that of Antoniadis, in accordance with Massachusetts Rule of Civil Procedure 17(a). *Id.*

Massachusetts Rules of Civil Procedure 17(a) allows an insurance carrier to sue a third-party for losses suffered by its insured under the insured's name. The policy behind this rule is to prevent any bias juries might have against an insurance company as a plaintiff. Closely linked to this rule is the general rule that insurance coverage is inadmissible at trial. *Id.* at *175 (citing Mass. G. Ev*id.* § 411 & note (2020)). The reasoning is that such information "is not probative of any relevant proposition." *Id.* at *176 (citations omitted). "[T]he rules regarding the inadmissibility of insurance exist so that juries will not be swayed by the fact that a deep-pocket insurance company has paid or will pay for the loss." *Id.* at *177.

At trial, however, the judge informed the jury that Amica paid Antoniadis' insurance claim and "stands in the shoes of the homeowner . . . and can seek recovery from persons that they believe are responsible." *Id.* at *173. Defendants emphasized this point through questioning of Antoniadis on cross-examination about his role as the plaintiff (which he denied, requiring the judge to explain to both Antoniadis and the jury that he was indeed the plaintiff), and in its summation by arguing that he "had no interest in the trial." *Id.* at *173-174. Amica's $4 million settlement with Antoniadis was also admitted into evidence, along with Antoniadis' statements made in settlement of the claim. The jury found in favor of Defendants, and Amica filed an appeal.

The Appeals Court of Massachusetts reviewed the trial judge's evidentiary rule for an abuse of discretion,

considering whether there was a clear error in weighing the relevant factors. The Court considered two issues that the trial judge thought made information regarding the existence of insurance coverage probative: the likelihood of Antoniadis' settlement statements with Amica being introduced by Defendants, and Amica's need to prove damages through documentation of their payments to Antoniadis. *Id.* at *176-77. The Appeals Court determined that the judge's decision to inform the jury that Antoniadis was not the real party-in-interest, and to provide the jury with instructions and reminders about the nature of Amica's relationship to Antoniadis, "was not based on a valid evidentiary need." *Id.* at *178. The Court opined that the two issues of concern to the trial judge could have been addressed in a way to conceal Amica's role in the proceeding. "The judge's instructions that Amica paid Antoniadis for his loss created the precise problem that the rules regarding the inadmissibility of insurance seek to avoid: the jury . . . may have been led to consider the claims unimportant or trivial." *Id.* at *177 (citations omitted).

The Court vacated the trial court's judgment and remanded the case for a new trial.

Learning Point: This decision is significant because it reinforces the importance of the inadmissibility of insurance (on both the plaintiff and defendant side) to protect against the risk of prejudice in jury verdicts by the existence of insurance coverage. ♦

No Hoist Here: Second Department Rules Collateral Estoppel Bars Plaintiff's Workers' Compensation Claim Of Elevator Injury

by ***Ian T. Williamson***

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In *Lennon v. 56th and Park (NY) Owner, LLC, et al.*, 2021 NY Slip Op 04972 (App. Div., 2d Dept., September 15, 2021), the Second Department affirmed a lower court decision granting Defendants' motion, pursuant to CPLR 3025(b), for leave to amend their Answer to include the affirmative defense of collateral estoppel, and thereupon, for summary judgment dismissing the second Amended Complaint.

Plaintiff, a construction worker, alleged injuries while working at a Manhattan job site on July 18, 2014. He alleged that while taking the site's hoist elevator, it made a series of unexpected stops and drops, which resulted in knee injuries. Though he claimed others were on the elevator at the same time, he could not produce names of witnesses. At a hearing before an Administrative Law Judge (ALJ) with the Workers' Compensation Board on November 24, 2014, the building's superintendent provided testimony and maintained that the hoist elevator had specific safety features that would have prevented the type of sudden stops of which Plaintiff alleged. These features would have prompted a speedy evaluation, automatically reset the elevator, and necessitated an incident report, none of which happened. The subcontractor's medical examiner also testified that a later medical bill failed to show anything of note happening on the date of the alleged incident. In light of this evidence, the ALJ denied the claim and ruled that it had not been convinced that the incident had happened at all, citing that the initial diagnostics provided from Plaintiff's physician one week after the alleged incident had shown nothing more than simple degenerative changes of Plaintiff's knees.

Plaintiff commenced suit against Defendants seeking damages on grounds of negligence and labor law. Defendants' original Answer was later amended to invoke the affirmative defense of collateral estoppel and Defendants moved for summary judgment dismissing Plaintiff's Complaint. Plaintiff opposed the amendment, arguing it was not timely.

Keeping in mind that one of the purposes of collateral estoppel is to conserve the resources of the courts and litigants, the doctrine of collateral estoppel thus "precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity." *Ryan*

v. New York Tel Co., 62 NY2d 494, 500 (1984). A prerequisite to the application of collateral estoppel is that the issue was previously decided and the plaintiff was afforded a fair opportunity to contest the decision. Raising collateral estoppel as an affirmative defense is procedurally a use-it-or-lose-it defense, so if it is not raised it is waived. However, a trial court can exercise its discretion to allow leave to amend. CPLR §3025 (b) sets forth that leave to amend pleadings "shall be freely given upon such terms as may be just." If the proposed amendment would cause prejudice or surprise to another party, or is insufficient or lacks merit, a court can choose not to permit it.

When a party appeals the trial court's order, an appellate court is tasked with determining whether the trial court improvidently exercised its discretion in determining the issue. In reviewing a trial court's finding, an appellate court holistically applies principles of common sense and fairness, while considering the timeliness of the motion for leave to amend, reasonable justifications for the delay, along with the amount of time a party takes to file a motion after it is aware that it should. Here, the Second Department specifically considered the duration of the administrative proceedings, which took a full year and a half to arrive at a unanimous disposition by both the ALJ and Workers' Compensation Board. Once Plaintiff knew of this disposition (in which his Workers' Compensation claim had been denied), he could not have been unreasonably surprised that estoppel would apply to his personal injury claim given that both arose out of the same circumstances. Plaintiff testified at the hearing before the Workers' Compensation Board and was adequately represented by counsel, so he had enjoyed the full opportunity to be heard. Defendants had not sought to amend the Answer to include collateral estoppel at the last minute, suggesting that they had not acted unreasonably.

Finally, whereas Workers' Compensation remedies are designed to quickly remunerate workers who are injured while performing duties within the scope of their employment for lost wages and medical treatment, a claim for personal injury due to negligence is much broader in scope and intended to make an injured party whole for the enduring consequences of his or her injury, including lost income and future medical expenses. *See Auqui v. Seven Thirty One Ltd. Partnership*, 22 NY3d at 256. As long as the issues in both proceedings are identical, collateral estoppel can be invoked fairly and successfully. Plaintiff having had acknowledged injury from the hoist elevator before the Workers' Compensation Board, could not have supported a separate negligence claim. Defendants on the other hand, established their *prima facie* case and were rightfully entitled to judgment as a matter of law that Plaintiff's action was barred by collateral estoppel.

Learning Point: In the evaluation of a personal injury case involving allegations that a worker sustained injuries during the course of his or her employment, it is crucial to obtain and review the plaintiff's Workers' Compensation records to uncover if any determination was made by the ALJ as to causal relationship. It is also good practice for a defendant to raise collateral estoppel as an affirmative defense in such cases as early as possible. ♦

SUBROGATION UNIT'S SUCCESS CONTINUES

Pennsylvania Jury Issues Plaintiff's Verdict

CM Partner **Robert A. Stern** (New York/New Jersey) was retained to seek recovery for a fire loss at the Insured's Premises. A contractor was working at the Premises. Aprox. 7 hours after the contractor left the Premises, the fire was discovered. The damages from the fire exceed $2.7 million. We pursued the contractor that was performing hot work within the Premises. Defendant argued that the area of its work was not anywhere near the area of origin. Defendant further argued (correctly) that the Insured performed an inspection after Defendant left the Premises and discovered no issues. Defendant also argued that the Insured had employees at the Premises and neighboring property for several hours after the contractor left the Premises; if there was a problem caused by Defendant's hot work, the Insured should have noticed a fire shortly after Defendant left the Premises not 7 hours later. After two (2) unsuccessful mediation sessions, the case went to trial. CM Associate **Veronica Abraham** (New Jersey/New York) prepared the case for trial and served as second chair. After a five (5) day trial, the jury returned a verdict agreeing with us that Defendant was negligent in causing the fire. If you have questions regarding Subrogation, fire losses, mediation and/or trial please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212-805-3900), or Veronica (**vabraham@clausen.com**) or call her (973-410-4144).

Pre-Suit Settlement for Wind Turbine Failure

CM Partner **Robert A. Stern** (New York/New Jersey) was retained to seek recovery for the failure of a wind turbine. The business interruption claim and the repair costs of the failed parts of the wind turbine were approx. $350,000.00. Due to a Confidential Settlement Agreement, more details cannot be provided. However, we are permitted to state Robert placed the target on notice, engaged in settlement discussions, executing a Tolling Agreement and then reached an amicable resolution. If you have questions regarding Subrogation, wind turbine losses, Tolling Agreements and/or settlement negotiations please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212-805-3900).

ARBITRATION

FLORIDA UPHOLDS ARBITRATION PROVISION IN CONTRACT

Gordon v. DOS of Crystal River Alf, LLC, 2021 Fla. App. LEXIS 10085 (Fla. App.)

Plaintiff brought wrongful death action against assisted living facility where decedent lived. Trial court held that decedent's authorized agent and power of attorney entered into a valid arbitration agreement written broadly enough to include a wrongful death claim. ***Held:*** Order compelling arbitration affirmed. ***Further held:*** Attorneys' fee provision in arbitration agreement violated public policy and should be stricken. This provision was severable from arbitration agreement, which was otherwise enforceable.

AUTO INSURANCE

INSURED'S FAILURE TO COMPLY WITH EUO IS MATERIAL BREACH OF POLICY

Safeco Ins. Co. v. Barthelemy, 2021 Fla. App. LEXIS 10582 (Fla. App.)

Insured filed claim with insurer seeking coverage for injuries sustained in auto accident. Insured refused to submit to examination under oath (EUO) and insurer denied coverage. Insured sued insurer for declaratory relief, seeking coverage for policy limits. ***Held:*** Judgment in favor of insured reversed and case remanded for new trial. Insurer was substantially prejudiced because jury was not instructed that without EUO, insurer could not investigate insurance fraud.

COVERAGE DENIED UNDER FLORIDA NO-FAULT LAW

Geico Gen. Ins. Co. v. Hialeah Diagnostics, Inc., 2021 Fla. App. LEXIS 12404 (Fla. App.)

Trial court granted summary judgment allowing payment of personal injury protection to health provider for treatment of injured individual who was not an insured of auto insurer. ***Held:*** Reversed. Insurer did not have to pay benefits to injured passenger of vehicle that collided with second vehicle, when health provider failed to establish that the operator of that second vehicle, the tortfeasor, was a named insured under policy.

CIVIL PROCEDURE

CLAIM FOR ATTORNEY'S FEES MUST BE PLEAD OR CLAIM IS WAIVED

Lenahan v. Lenahan, 2021 Fla. App. LEXIS 11821 (Fla. App.)

Trial court issued order awarding attorney's fees to defendant and plaintiff appealed. ***Held:*** Reversed. Failure to plead entitlement to attorney's fees results in waiver of such claim unless opponent had notice of claim and either agreed to claim or failed to object to failure to plead entitlement to such fees.

PRO SE STATUS NOT REASONABLE EXCUSE FOR DEFAULT

126 Henry Street v. Cater, 2021 NY Slip Op 04689 (N.Y. App. Div. 2d Dep't)

Plaintiff failed to appear for scheduled conferences and court responded by granting default judgment in defense favor. Plaintiff then unsuccessfully sought to vacate the default by offering her pro se status and lack of knowledge as purported reasonable excuses for the default. ***Held:*** Supreme Court did not improvidently exercise its discretion in determining no reasonable excuse was offered. Neither the fact plaintiff was proceeding pro se nor claim she was unfamiliar with discovery process constituted reasonable excuses for failing to appear at the conferences.

ONSLAUGHT OF FRIVOLOUS MOTIONS FORFEITS FREE ACCESS TO COURT

Citimortgage, Inc. v. Weaver, 2021 NY Slip Op 04904, ¶ 2 (N.Y. App. Div. 2d Dep't)

Defendant in a foreclosure action filed numerous frivolous motions and the plaintiff bank sought relief. The trial court enjoined defendant from filing any additional papers in this action without prior court approval. ***Held:*** Affirmed. In light of the numerous frivolous motions filed by defendant, Supreme Court had properly concluded defendant had forfeited the right to free access to the courts by abusing the judicial process.

DAMAGES

MEDICAL CERTAINTY REQUIRED FOR FUTURE MEDICAL EXPENSES

Fan v. Benak, AC 43898 (Conn. App.)

Plaintiff sought damages after her vehicle was struck by vehicle driven by defendant's employee. Plaintiff sought future medical expenses, attaching letter from her treating physician, which stated it was more probable than not that plaintiff would require future medical treatment. Trial court granted the damages and defendants appealed. ***Held:*** Letter from treating physician was sufficient evidence to demonstrate future medical expenses were not speculative.

DEBT COLLECTION

BANK NEED NOT REGISTER AS DEBT COLLECTION AGENCY

Citibank, N.A. v. Yanling Wu, 2021 NY Slip Op 04902 (N.Y. App. Div. 2d Dep't)

Defendant real property owner asserted that, in seeking to foreclose a mortgage on real property, plaintiff bank was required to allege in its complaint that it had obtained a license to act as a "debt collection agency." ***Held:*** A judicial foreclosure action such as the one at bar does not constitute the sort of tactics shocking to the conscience of ordinary people—like phone calls at unreasonable hours and other threatening behavior—that the subject Administrative Code provisions were enacted to address. The bank did not need to be licensed as a debt collection agency.

GOVERNMENTAL IMMUNITY

IDENTIFIABLE PERSON-IMMINENT HARM EXCEPTION INAPPLICABLE TO VOLUNTEERS

Buehler v. Town of Newtown, AC 43087 (Conn. App.)

Plaintiff sought damages when he fell from referee stand while officiating public high school volleyball match. Trial court found defendants' actions were discretionary and that they had governmental immunity. ***Held:*** Affirmed. Plaintiff's presence was voluntary because he had the option to accept or to deny the refereeing assignment, and, therefore, he was not an identifiable person for purposes of the identifiable person-imminent harm exception to governmental immunity.

LIABILITY INSURANCE COVERAGE

ACTUAL PHYSICAL ILLNESS OR INJURY REQUIRED FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM

Warzecha v. USAA Casualty Ins. Co., AC 43984 (Conn. App.)

Plaintiff was insured under homeowner's policy issued by defendant insurer. Plaintiff was sued for negligent infliction of emotional distress. Defendant denied plaintiff's claim for coverage relating to action because policy excluded claims for mental injuries. Trial court granted defendant summary judgment. ***Held:*** Affirmed. Complaint did not allege plaintiff's actions resulted in actual physical illness or injury, which was required for claim for negligent infliction of emotional distress.

LEGAL MALPRACTICE

LEGAL MALPRACTICE ACTION REQUIRES ATTORNEY-CLIENT RELATIONSHIP

Idlibi v. Ollennu, AC 42697 (Conn. App.)

Plaintiff sued defendant attorney for legal malpractice, arising out of attorney's conduct during his representation of plaintiff's former spouse in her marital dissolution action against plaintiff. Plaintiff alleged defendant knowingly notarized a fraudulent interrogatory response, counseled the former spouse to provide false testimony, and failed to correct the former spouse's false testimony. ***Held:*** Plaintiff lacked standing to bring a legal malpractice claim against defendant because there was never an attorney-client relationship. ***Further held:*** Negligence and intentional infliction of emotional distress claims were barred by litigation privilege.

MEDICAL MALPRACTICE

OPINION LETTER MUST BE ATTACHED TO COMPLAINT AND DATED BEFORE EXPIRATION OF STATUTE OF LIMITATIONS

Barnes v. Greenwich Hosp., AC 44055 (Conn. App.)

Plaintiff sought damages from her employer physician and hospital for injuries sustained during colonoscopy. Plaintiff failed to attach required opinion letter signed by health care provider to original complaint. Defendants filed motions to dismiss and plaintiff filed amended complaint with opinion letter dated after expiration of applicable statute of limitations. ***Held:*** Plaintiff's failure to attach opinion letter to original complaint, obtain opinion letter prior to filing action, or file amended complaint prior to expiration of statute of limitations was fatal.

NEGLIGENCE

ONGOING STORM DOCTRINE REBUTTABLE BY EVIDENCE OF DANGEROUS CONDITION PRIOR TO ONGOING STORM

Belevich v. Renaissance I, LLC, AC 43085 (Conn. App.)

Plaintiffs sued defendants for slip and fall as result of ice on premises. Trial court granted defendants summary judgment based on ongoing storm doctrine. ***Held:*** Defendants evidenced ongoing storm at time of fall and plaintiffs failed to demonstrate that fall was caused by slippery condition that existed prior to the ongoing storm and that defendants had actual or constructive notice of the allegedly preexisting condition.

PREMISES OWNER NOT LIABLE FOR SHOOTING DURING SHORT-TERM RENTAL

Heath-Latson v. Styller, 169 N.E.2d 155 (Mass.)

Guest was killed during party on short-term rental property. ***Held:*** Owner did not owe duty to take affirmative steps to protect guest from dangerous or unlawful acts of third persons. There is no evidence of prior violence creating foreseeable risk of harm. Nothing in backgrounds of renter and shooter put owner on notice of foreseeable risks. Owner had no control over property during rental.

FALSE ARREST CLAIM CANNOT BE CAST AS NEGLIGENCE ACTION

Danford v. State of New York, 2021 NY Slip Op 04825 (N.Y. App. Div. 4th Dep't)

Plaintiff, who had been arrested and then released, brought false arrest and imprisonment claims against the state more than one year after being released from custody. ***Held:*** False arrest and imprisonment claims were time-barred because not filed until over a year later. ***Further held:*** Plaintiff's contention that his cause of action sounds in negligence is without merit because he must proceed by way of the traditional remedies of false arrest, imprisonment and malicious prosecution in such circumstances.

BENCH TRIAL RESULT OVERTURNED BY DECISIVE EVIDENCE

McDevitt v. State of New York, 2021 NY Slip Op 04795 (N.Y. App. Div. 4th Dep't)

An inmate cooperated with an investigation into a prison guard's relationship with several inmates. The prison guard was later left alone in oversight and allowed inmates to beat the cooperating inmate. The inmate sued defendant alleging it had negligently failed to prevent his attack. A bench trial ruled in defendant's favor. ***Held:*** Reversed. The trial evidence proved decisively that defendant either knew or should have known claimant was at serious risk of attack as a result of his cooperation.

STATUTE OF LIMITATIONS

STATUTE OF REPOSE BARS CLAIMS AGAINST PLUMBER

Szulc v. Siciliano Plbg. & Htg. Co., 171 N.E.3d 1177 (Mass. App.)

After fall in shower caused by seizure, decedent died from hot water burns. ***Held:*** Six-year statute of repose governing actions for negligence in design, planning, construction, or administration of real property improvement barred estate's action. Statutory intent was to protect providers of expertise from unending

risks of liability. Plumber designed and installed piping system for seven water heaters and made judgments about maximizing system. Calibrating water temperature was part of same continuous project.

SUBROGATION

INSURER HAS STANDING TO SUE INSURED'S ATTORNEY

Arch Ins. Co. v. Kubicki Draper, LLC, 2021 Fla. App. LEXIS 10567 (Fla. App.)

Trial court granted summary judgment to defendant law firm with respect to legal malpractice action brought against it by insurer under claim it was subrogated to insured's rights under policy. Plaintiff insurer appealed. ***Held:*** Reversed. Insurer has standing through its contractual subrogation provision to maintain malpractice action against insured's counsel where insurer has a duty to defend.

UM/UIM INSURANCE

VEHICLE MUST BE REGISTERED OR PRINCIPALLY GARAGED IN CONNECTICUT IN ORDER FOR UNINSURED MOTORIST COVERAGE TO APPLY

Finley v. Western Express, Inc., AC 43361 (Conn. App.)

Plaintiff sought to recover uninsured motorist benefits when tractor-trailer he was operating was struck by unavoidable object. The trial court granted defendants' motion for summary judgment, applying Tennessee law because tractor-trailer was not registered or principally garaged in Connecticut. Plaintiff appealed. ***Held:*** Affirmed. Plaintiff failed to challenge the basis for the trial court's ruling that Tennessee law applied.

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