EAST COAST CM REPORT

of Recent Decisions

2021• Vol. 4

Judge Grants Insurers Motion To Compel Arbitration By Enforcing Arbitration Clause

Executive Orders Restricting Businesses Do Not Amount To Compensatory Regulatory Taking

Decision Shines Spotlight On Burden Of Proof In Third-Party Actions For Negligent Spoliation Of Evidence

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

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Judge Grants Insurers Motion To Compel Arbitration By Enforcing Arbitration Clause In Insurance Policy

by ***James G. Papadakis***

In *299 N. Federal Master LLC v. General Security Indemnity Co. of Arizona et al.*, case number 0:21-cv-62349, in the U.S. District Court for the Southern District of Florida, the Plaintiff, owner of The Dalmar Hotel in Fort Lauderdale, Florida filed a breach of contract lawsuit against its insurers, including General Security Indemnity Company of Arizona, based on their failure to pay out the required damages per the insurance policy. According to the Complaint, Plaintiff alleges that the Dalmar Hotel suffered damage in September, 2017, from Hurricane Irma, and further water damage in 2018 on separate occasions. The Defendant-Insurers subsequently filed a Motion to Compel Arbitration and Stay Litigation. Defendant-Insurers argued that the Court should send the dispute to arbitration pursuant to the arbitration clause in the Policy.

The Court held that the arbitration provision in the Policy is valid and falls within the scope of the United Nations Conventions on the recognition and enforcement of foreign arbitration awards. Judge Kathleen M. Williams stated that the arbitration provision provides for arbitration in New York, which is and has been a signatory to the U.N. Convention since June 10, 1958. Judge Williams further reasoned that some of the insurer parties to the Policy are foreign thereby giving credence to the U.N. Convention. The Court ultimately stayed the case pending an arbitration.

Learning Point: A well-drafted arbitration clause in an insurance policy is valid and effective. Such a clause can avoid litigation and also dictate where the arbitration will take place. ♦

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Second Circuit Declined To Assign A Specialized Or Industry-Specific Definition To The Term "Broadcasting," As Used In An Insurance Policy, Where The Policy Did Not Explicitly Indicate That A Specialized Meaning Was Assigned

by ***Yesy A. Sanchez***

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In *Dish Network Corp. v Ace Am. Ins. Co.*, 2021 U.S. App. LEXIS 37942 (2d Cir Dec. 22, 2021, No. 20-0268-cv), the U.S. Court of Appeals for the Second Circuit was asked to consider whether the term "Broadcasting" was limited to the free transmission of audio/video signal to the general public, or it also included transmission to paid subscribers. The Court was also asked to determine whether an industry-specific definition of "broadcasting" was contemplated by the parties to an insurance contract. The outcome of these issues would determine whether a subscription-based television provider was entitled to recover legal expenses from its insurer, resulting from multiple underlying lawsuits against the provider.

Dish Network Corporation and its subsidiary Dish Network L.L.C. (collectively "Dish") provides subscription-based television programming to paying customers. *Id.* at *3. In 2004, Dish purchased a commercial general liability policy from Ace American Insurance Company ("Ace"), which it renewed on a yearly basis. *Id.* at *4. In May, 2012, Dish was sued by multiple television networks, who alleged breach of contract and copyright infringement (hereinafter the "Network Lawsuits"). *Id.* at *5. The television networks sought to enjoin Dish from marketing and distributing Dish's digital video recorder, the "Hopper." *Id.* At issue, was the Hopper's feature that automatically skipped advertisements during play-back of the networks' respective copyrighted programming. *Id.*

Pursuant to the Policy, Dish sought coverage from Ace for the Network Lawsuits. In July, 2012, Ace informed Dish that it did not have a duty to defend or reimburse Dish for the Network Lawsuits, since coverage for these lawsuits was barred by the "Media Exclusion" contained in the Policy. *Id.* at 6. While the Policy provided coverage for advertising injury, including "[i]nfringing upon another's copyright, trade dress or slogan in [an] advertisement," the Policy excluded coverage for liability arising from personal and advertising injury committed by an insured whose business is "advertising," "broadcasting," "publishing" or

"telecasting." *Id.* at *5 (citing Policy at 624). Ace determined that Dish was in the business of "broadcasting," as highlighted by the fact that Dish broadcasted programming from the networks that were suing it. *Id.* at 6. Dish settled the Network Lawsuits without incurring any monetary payments to the networks. *Id.*

In May, 2016, Dish sued Ace in US District Court for the Southern District of New York , alleging that Ace breached its duty to defend Dish in the Network Lawsuits. *Id.* Dish sought to recover the legal expenses it incurred in connection with the Network Lawsuits. *Id.* In March, 2019, Ace and Dish cross-moved for summary judgment. Resolution rested on the Court's interpretation of the term "broadcasting," and whether Dish was in the business of broadcasting.

Dish argued that "broadcasting" required "transmission of programming *to the public at large for free [emphasis added]*," and that its subscription-based service did not constitute broadcasting within the plain meaning of the word. The District Court rejected Dish's argument and held that the "plain and ordinary meaning" of the terms "broadcast" and "telecast" encompassed a subscription-based broadcasting service, like the one provided by Dish. The District Court granted Ace's motion for summary judgment and denied Dish's motion. *Id.* at 7. The District Court held that Ace did not have a duty to defend Dish in the Network Lawsuits because Dish was in the business of broadcasting and telecasting, and therefore, coverage was barred under the Media Exclusion. Dish appealed to the Second Circuit. *Id.* at *1.

On appeal, Dish once again argued that its services did not fall under the plain meaning of the word "broadcasting" since Dish provides programming to paying customers only, and emphasized that its customers have to use a "special receiver" to decrypt the Dish signal. In other words, its transmissions are not "public," "for general reception," or "for an unlimited number of receivers." *Id.* at *12. According to Dish, this specialized industry-specific definition of "broadcasting" was supported by various industry sources, including the Federal Communications Commission ("FCC") and Federal Communications Act ("FCA") regulations. *Id.* at *17. Dish also argued that the "plain and ordinary" meaning of "broadcasting" did not apply to Dish because the Policy described Dish's business as "communication," and therefore, the Media Exclusion did not apply. *Id.* at *15.

The Second Circuit relied on New York law, which requires courts to give effect to the intent of the parties to an insurance contract, as expressed within the "clear language of the contract." *Id.* at *7 (citing *Parks Real Est. Purchasing Grp. v. St. Paul Fire Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006). The Second Circuit reasoned that unambiguous terms and provisions of an insurance policy are to be given their "plain and ordinary meaning." *Id.* (citing *Fed. Ins. Co. v. Am Home Assurance Co.*, 639 F.3d 557, 567 (2d. Cir. 2001). The Court noted that "[p]lain and ordinary meaning may not be disregarded to find an ambiguity where none exists." *Id.*

With respect to policy exclusions, the Court reasoned that an insurer seeking to exclude coverage under its policy "must do so in clear and unmistakable language," and that "any such exclusion or exceptions . . . must be specific, and clear in order to be enforced." *Id.* at *7–8 (citing *Beazley Ins. Co. v. ACE Am. Ins. Co.*, 880 F.3d 64, 69 (2d Cir. 2018). Simply stated, "an insurer bears the burden of proving that an exclusion applies." *Id.* (citing *Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co.*, 702 F.3d 118, 121 (2d Cir. 2012).

In interpreting the Policy, the Court relied on the dictionary definition of "broadcasting." As a verb, "broadcasting" or "broadcast" was defined as "to make widely known: disseminate or distribute widely," "to send out from a transmitting station (a radio or television program for an unlimited number of receivers," or "to send out radio or television signals)." *Id.* at *12 (citing *Webster's Third New International Dictionary, Unabridged* (2002)). As a noun, it was defined as "the act of sending out sound or images by radio or television transmission esp. for general reception." *Id.*

The Court found that it was "clear" that "broadcast," meant "transmitting a signal, especially a radio or television signal, to some number of receivers–which is precisely the nature of Dish's business." *Id.* at *12–13. Thus, the Second Circuit rejected Dish's "preferred" definition of "broadcasting." *Id.* at *18.

The Second Circuit also rejected Dish's second argument, claiming that a specialized or industry-specific definition of "broadcasting" was used in the Policy. The Court held that New York law was "clear" that a "narrow, technical definition" was not assigned to a term in an insurance policy, where it was not explicitly stated that the term was meant to have a specialized meaning. *Id.* at *16 (citing *Michaels v. City of Buffalo*, 85 N.Y.2d 754, 757 (1995). The Policy did not indicate that "broadcasting" was assigned a specialized or technical meaning. *Id.* at *17. Nor did the Policy indicate that it intended to incorporate a legal or statutory definition, such as that provided by the FCC or FCA. *Id.*

Lastly, the Court was unconvinced by Dish's third argument that Dish was in the business of communication, and not broadcasting. *Id.* at *15–16. In support, Dish noted that the Policy's "Business of Insured" provision describing Dish's business as "communication," and therefore the Media Exclusion did not apply. *Id.* at *14. In rejecting this argument, the Court reasoned that the purpose of the "Business of Insured" provision contained in the Policy was to provide a "general identification" of Dish's operations, and that Dish failed to provide any legal or other support to indicate otherwise. *Id.* at 14–15. Last, but not least, the Court found that Dish's argument made "no sense because broadcasting is unquestionably communication, regardless of whether a fee is charged." *Id* at *15.

Learning Point: Where the parties intend to assign a specialized or industry-specific definition to a term in the policy, it must be explicitly stated in the policy that a special meaning is being assigned. Otherwise, the court will give the term its plain and ordinary definition. Further, the "Business of the Insured" provision should make clear that the description therein serves only as a general identification of the business, and that it should not be interpreted as an exhaustive listing of the insured's operations. ♦

Executive Orders Restricting Businesses Do Not Amount To Compensatory Regulatory Taking

by ***Marisa G. Michaelsen***

The New Jersey Appellate Division recently affirmed a lower court holding that Plaintiff's business was not entitled to compensation from the State as a result of shutdown orders and restrictions in 2020. In *JWC Fitness, LLC v. Philip D. Murphy, in his capacity as the Governor of the State of New Jersey*, Docket No. A-0639-20 (N.J. October 18, 2021), the Court determined the statutory standard for compensation was not met, and the Executive Orders did not effectuate a taking of Plaintiff's property within the meaning of both the state and federal constitutions.

Plaintiff, JWC Fitness, LLC, owned a kickboxing business in New Jersey that shut its doors in March, 2020, in compliance with Governor Murphy's Executive Orders enacted due to the COVID-19 pandemic. Plaintiff sued Governor Phil Murphy, claiming it was owed compensation for lost revenue during the COVID-related shutdown enacted by Murphy's Executive Orders ("EOs"), which mandated the closure of gyms, restaurants, and other non-essential businesses under the Civilian Defense and Disaster Control Act ("DCA"). In addition, Plaintiff accused Governor Murphy of violating its rights under the Fifth and Fourteenth Amendments of the US Constitution. Plaintiff's argument centered on two points: the Governor exercised his power to "commandeer and utilize" its property under the DCA, and the Governor's EOs constituted a taking under the state and federal constitutions. The New Jersey Appellate Division rejected Plaintiff's arguments and denied relief.

For background, the DCA empowers the Governor to make orders, rules, and regulations as may be necessary to meet various problems presented by an emergency. The DCA authorizes payment of the reasonable amount of privately owned property that the Governor "may commandeer and utilize", for the governmental purpose of securing the defense of the state or protecting or promoting the public health, safety, or welfare. However, the DCA does not anticipate the State will be obligated to pay compensation when it merely exercises its powers to regulate the use of property in the context of a declared emergency.

In response to the COVID-19 pandemic, in March, 2020, Governor Murphy declared a public health emergency and state of emergency, invoking the authorities granted to him under the State Constitution and various State statutes, including the Emergency Health Powers Act and the DCA. These EOs, among other things, directed the closure

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of various non-essential businesses, including gyms and fitness centers. As COVID-19 infections waned in the spring and summer of 2020, Governor Murphy issued additional EOs that permitted the reopening of many previously closed facilities, subject to limitations to mitigate the spread of COVID-19, such as capacity limitations and mandates for social distancing, masks and sanitation. Since then, Governor Murphy has continued to declare that the public health emergency continued to exist in New Jersey, and ordered and directed that all COVID-19 EOs remain in full force and effect.

As to Plaintiff's facility, although it was permitted to resume classes at limited capacity, the gym was unable to resume its business model of offering unlimited classes for a flat monthly fee, and the class sizes were severely reduced to maintain the social distancing requirements. Plaintiff hoped to eventually open at full capacity, but in September, 2020, Plaintiff's landlord commenced eviction proceedings due to Plaintiff's non-payment of rent. Plaintiff closed permanently in October, 2020.

The Appellate Court analyzed the statutory language in the DCA, and found that to "commandeer" property entails seizing the property or taking possession of it, akin to a physical taking under the constitution. Similarly, to "utilize" property anticipates a physical taking of property for public use, as with a physical taking. The Court continued, stating that the two terms were connected by "and", meaning the most reasonable understanding of the DCA authorizes the government to seize property or take possession of it akin to a physical taking under the constitution, for the purpose of avoiding or protecting against an emergency.

The Appellate Court held that the EOs issued by Governor Murphy in relation to the COVID-19 health crisis did not meet the definitions for 'commandeer' or 'utilize', and therefore Plaintiff does not meet the statutory requirements for compensation. The Court found that the EOs merely regulated the use of Plaintiff's property, in the public interest of handling COVID-19. The Court did not find a regulatory taking, even accepting that the EOs had a significant impact on the operations of gyms and fitness centers. However, Plaintiff's gym was not deprived of all economic beneficial or productive use of its property, but merely reduced revenue. Plaintiff's gym operated live-streamed group fitness classes, which were offered free of charge per a business decision. Further, when gyms were permitted to re-open with limitations, Plaintiff did not take full advantage of this opportunity. Plaintiff's gym also qualified for more than $21,000 in federal aid for employee salaries and rent, as well as unemployment benefits that had been enhanced pursuant to federal legislation.

In addition, Plaintiff failed to assert a recognizable property right for the purpose of a constitutional takings claim. Both the federal and state constitutions protect against a governmental taking of private property without just compensation. Here, Plaintiff is a tenant and does not own the property at issue. In addition, the EOs did not physically take any property owned by Plaintiff. The State did not occupy, claim ownership, or seize any physical assets or physical property of Plaintiff. The Court noted that the State placed temporary regulatory restrictions on the ability to operate its business, but conducting a business does not constitute a property right. The State is not liable for a regulatory taking merely because operations permitted resulted in lower revenue than Plaintiff might have earned without the regulations in place.

Lastly, the Court rejected Plaintiff's claim that the EOs constituted a taking. Specifically, the Court noted that the limitations placed by the EOs were placed on numerous categories of businesses, not specific to Plaintiff's facility or even to gyms and fitness centers as a group. The limitations placed on numerous categories of businesses were valid exercises of the State's police powers in the context of a public health emergency, to mitigate the spread of COVID-19. Therefore, the New Jersey Appellate Court denied Plaintiff's demand for compensation.

Learning Point: The Courts in New Jersey are upholding state and local orders by governments put in place to slow the spread of COVID-19. The restrictions imposed by the mandates have had significant effect on individuals and businesses, but the limitations constituted valid exercises of State police powers in the context of a public health emergency. ♦

Summary Judgment Granted For Defendant Property Owner Due To Strong Lack Of Notice Defense

by ***Lisa M. Doolittle***

Recently, the New York Supreme Court, Second Department reversed an order of the lower court that denied a defendant's summary judgment motion utilizing a lack of notice defense in an action that involved a ceiling collapse. *Matson v. Dermer Management, Inc.*, 2021 NY Slip Op 06842 (2d Dep't, December 8, 2021). This is a significant decision because it demonstrates the importance of strong and thorough discovery, specifically relating to notice, in premises liability matters.

In *Matson*, Plaintiffs were allegedly injured when a portion of their bedroom ceiling collapsed on top of them. Defendant Dermer Management, Inc. was the property manager of the mixed-use rental building where the accident occurred and Defendant 336 Lex, Inc. was the owner of the property (hereinafter together as "Defendants"). Defendants moved for summary judgment dismissing the Complaint, arguing that Defendants had no notice that the bedroom ceiling was in a hazardous condition.

It is well known that "[t]he owner of property has a duty to maintain its property 'in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.'" *Matson*, 2021 N.Y. Slip Op 06842 (*citing Basso v. Miller*, 40 N.Y.2d 233, 241 (1976) (internal quotation marks omitted). Here, the Second Department stated that "defendants established their entitlement to judgment as a matter of law by demonstrating, *prima facie*, that they did not have actual or constructive notice that the bedroom ceiling was in a defective condition." *Mason*, 2021 N.Y. Slip Op 06842.

Defendants presented strong evidence that established their lack of notice defense. This evidence included proof that Plaintiffs had been residing in the third-floor apartment for more than four years, and in that timeframe Plaintiffs did not notice any defects in the bedroom ceiling nor make any complaints to Defendants regarding the condition of the ceiling. Defendants also presented evidence that the debris that had fallen from the ceiling was dry, and there was no evidence of a leak in the building at the time of the accident.

Learning Point: This decision highlights the importance of strong and thorough discovery. When defending premises liability matters, it is important to investigate the accident site as quickly after the inception of the matter as possible to determine the state of the alleged hazardous condition and ensure photos are taken, and reports are completed regarding the state of the accident site. It is also important to elicit deposition testimony from the plaintiff regarding any complaints made regarding the hazardous condition and exactly what the plaintiff saw with respect to the hazardous condition. Additionally, defense counsel should gather all paper discovery relating to the hazardous condition, such as maintenance records, any 311 complaints, and property records. Defense counsel should also remember this decision when defending premises liability cases and ensure thorough discovery is completed, as it can be important to any potential summary judgment motion. ♦

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N.J. Appellate Division Decision Shines Spotlight On Burden Of Proof In Third-Party Actions For Negligent Spoliation Of Evidence

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An integral component of placing a potential target on notice of a pending claim is an admonition to preserve evidence. Whenever possession or control of evidence is transferred between parties (or non-parties) of an ongoing investigation or litigation, plaintiff's and defense attorneys know well that whenever ceding evidence, they must secure a written agreement concerning the preservation of evidence from the party to whom the evidence is transferred. Both plaintiff's and defense attorneys are well aware of the obligation to preserve evidence once litigation involving their clients has commenced, and that there can be sanctions, at times drastic, for the spoliation, or deliberate destruction or discarding of evidence. When a party to litigation spoliates evidence, sanctions may include the court directing the factfinder to apply an adverse inference against the spoliating party. *Rosenblit v. Zimmerman*, 166 N.J. 391, 401-02 (2001).

The New Jersey Appellate Division recently weighed in on the standard for establishing a claim of negligent spoliation of evidence against a third-party who is not putatively inculpated by the spoliated evidence. In *27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co.*, 469 N.J. Super. 200 (App. Div. 2021), a sprinkler system at the Plaintiff's commercial premises activated, causing its principal tenant to terminate its lease as it deemed the leased premises "untenantable." Plaintiff presented a claim to its insurance carrier, Samsung Fire & Marine Insurance Company (Samsung), and investigated potential targets responsible for the sprinkler failure. Meanwhile, Samsung investigated potential targets for subrogation purposes and requested that 27-35 Jackson Ave. LLC (Jackson), its insured, transfer to it the failed sprinkler head for expert examination.

Samsung concluded that there was no subrogation potential. Jackson notified Samsung that it intended to pursue litigation to recover for uninsured business interruption losses and requested that Samsung return the sprinkler head. Ultimately, Samsung replied that "it [did not] have the sprinkler head." Samsung's expert testified that, Samsung not having provided an evidence preservation protocol, he had discarded the sprinkler head within a couple of days of Samsung instructing him to close the file.

Jackson filed litigation against Samsung, alleging that Samsung negligently or intentionally caused the loss of the sprinkler head, and that Jackson suffered damages in the

form of inability to recover damages from a target responsible for the flood loss. Jackson produced an expert who, disagreeing with Samsung's expert and criticizing such expert for failing to test the sprinkler head for corrosion, concluded that the sprinkler head would have probably shown either a manufacturing, installation or maintenance defect, but stated that he could not conclude which of these was the case in light of his inability to test the sprinkler head. After discovery, Samsung moved for summary judgment. Jackson cross-moved for summary judgment arguing that the court should penalize Samsung with an adverse inference that the spoliated evidence would have enabled Jackson to recover damages.

The trial court granted Samsung's motion and denied Jackson's cross-motion. The trial court concluded that the sanction of an adverse inference is available only when the adverse inference to be made will implicate the spoliating party. In this case, it is not Jackson's insurer Samsung, but the manufacturer, installer or maintainer of the sprinkler head who would putatively be implicated by the adverse inference. The trial court further concluded that Jackson's expert's conclusion was a net opinion since, as the expert had declined to opine as to the precise nature of the defect, he necessarily failed to present the data and reasoning that led him to his conclusions.

On appeal, the Appellate Division agreed with the trial court that the sanction of an adverse inference is available only when the spoliating party is implicated by the putative adverse inference. The Appellate Division disagreed with the trial court's characterization of Jackson's expert's opinion. According to the Appellate Division, the expert having considered Samsung's expert's test results and ensuing conclusions, having specifically noted Samsung's expert's failure to consider or test for corrosion, and having explained the mechanism and operation of the sprinkler head in depth over the course of a deposition whose transcript was hundreds of pages long. However, the Appellate Division affirmed the trial court's grant of summary judgment. The Appellate Division explained that in order to prevail on a claim for third-party negligent spoliation of evidence, a plaintiff must prove all of the elements of a common law negligence claim, to wit, duty, breach of duty, proximate cause and damages. Applying the requirement of proximate causation in the context of negligent spoliation of evidence requires the plaintiff to prove that he would have prevailed in a suit to recover damages but for the spoliation of the evidence.

Naturally, this standard poses a formidable, if not invariably insurmountable, obstacle to a plaintiff who is dependent on the spoliated evidence to recover damages. The Appellate Division acknowledged this problem and noted that, for this reason, several other jurisdictions have lowered the burden on plaintiffs in this situation. For example, the Illinois Supreme Court concluded that a plaintiff who establishes "a reasonable probability of succeeding in the underlying suit" has met his burden. *Boyd v. Travelers Insurance Company*, 652 N.E.2d 267, 271 (Ill. 1995); see also *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 20-21 (Mont. 1999). Reaching even further, the Alabama Supreme Court held that when a plaintiff establishes that a defendant spoliated evidence, there is a rebuttable presumption that the plaintiff would have prevailed in the underlying suit but for the spoliation of the evidence. *Smith v. Atkinson*, 771 So.2d 429 (Ala. 2000).

Some other jurisdictions, however, have not lowered the burden. The Appellate Division concluded that, since, to date, the New Jersey Supreme Court has not considered applying a lesser standard of proof to plaintiffs in negligent spoliation cases, it will not lower the burden of proof for plaintiffs in this situation.

Learning Point: In New Jersey, the current state of spoliation of evidence jurisprudence serves to reinforce the importance of having in place adequate preservation of evidence agreements whenever you transfer evidence, not only to an adverse party but even, or especially, when as subrogation counsel, you transfer evidence to an insured. Conversely, the current indeterminacy concerning the burden faced by a prospective plaintiff asserting a claim for negligent spoliation should provide ample incentive for a party with custody of evidence to diligently safeguard such evidence against spoliation. ♦

GA Court Of Appeals Denies Employee's Claim To Subrogation Settlement Proceeds

by **Tyler D. Hardy**

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The Georgia Court of Appeals has knocked down an attempt by the estate of a worker injured in a truck collision to claim a piece of an insurance settlement secured through a subrogation action.

The appeals court in *Wilson Bush, As administrator of the Estate of Jerry Michael Singleton v. Liberty Mutual Insurance Company*, 361 Ga. App. 475, ruled on October 15, 2021, under Georgia law, that an insurance company does not have a duty to protect an employee's legal interest in a subrogation action.

On November 15, 2013, Jerry Singleton was involved in a car accident with Robert Earle. When they crashed, both Singleton and Earle were working for their respective trucking companies: Singleton for Wilson Trucking Company, and Earle for the Waggoners Trucking, Inc. At the time, Liberty Mutual was the workers' compensation insurer for Wilson Trucking. Singleton made a worker's compensation claim, and Liberty Mutual started making medical and indemnity payments to Singleton. *Id.* at 3.

Five months after the accident, Liberty Mutual received notice that Singleton hired legal counsel to pursue personal injury claims against Earle and Waggoners. Soon after receiving this notice, Liberty Mutual notified these parties of Liberty Mutual's potential claim against them to recover money paid to Singleton in workers' compensation benefits, and it notified Singleton's counsel of its subrogation lien.

In February, 2015, Liberty Mutual and Singleton agreed to settle his workers' compensation claim for $50,000.00. In total, Liberty Mutual paid Singleton about $104,000.00 in workers' compensation benefits. In May, 2015, Singleton died. *Id.* at 4.

On November 13, 2015, two days before the statute of limitations for personal-injury actions ran, Liberty Mutual sued Earle and Waggoners under OCGA § 34-9-11.1. Nineteen months into Liberty Mutual's subrogation action, the Estate's administrator moved to intervene based on OCGA §§ 9-11-24 and 34-9-11.1.2. The trial court denied the motion on the ground that the administrator lacked standing to intervene.

As trial approached, Liberty Mutual and Waggoners settled the claims for $45,000.00. As a result, the subrogation action was dismissed with prejudice on August 2, 2017. Because the settlement amount was less than Liberty Mutual's subrogation lien, no money from the settlement was paid to Singleton's Estate. *Id.* at 6.

On February 21, 2018, the Estate filed the within lawsuit against Earle Waggoners and Liberty Mutual, claiming that Liberty Mutual breached its fiduciary duty to protect the Estate's interest in the subrogation action. Liberty Mutual subsequently moved for summary judgment. The trial court granted Liberty Mutual's motion concluding that Liberty Mutual did not have a fiduciary relationship with Singleton or his Estate based on either OCGA § 34-9-11.1 or the conduct of the parties.

On appeal, the administrator of Singleton's Estate contended that the trial court erred in concluding that Liberty Mutual did not owe the Estate a fiduciary duty to protect its interests in the subrogation action. The administrator alleged that under OCGA § 34-9-11.1, there also lies a corresponding duty to protect the injured Plaintiff's claim rather than simply pursuing the insurer's own interests in the litigation. The appeals court rejected this argument. *Id*. at 6-7.

Under Georgia law, "When an employee is paid workers' compensation for injuries caused by someone other than their employer, Georgia law allows the employee to sue that third party OCGA § 34-9-11.1 (a). In those circumstances, Georgia law also grants the workers compensation insurer a subrogation lien against any recovery from the employee's lawsuit, in an amount up to the compensation paid to the employee. OCGA § 34-9-11.1 (b). If the employee does not bring that lawsuit within a year after the injury, the insurer may bring that suit itself to protect and enforce its subrogation lien. OCGA § 34-9-11.1 (c). If the insurer recovers more than the amount of its lien, any excess must be paid to the employee. *Id*. at 1-2.

In the case at hand, the insurer brought a lawsuit to enforce its subrogation lien after the injured employee failed to bring a lawsuit. The carrier subsequently settled the lawsuit with the third parties for an amount less than its subrogation lien. The employee's Estate failed to recover any funds from said lawsuit. The Estate then sued the insurer on the theory that it failed to sufficiently protect the Estate's interests in the subrogation action. The trial court granted summary judgment in favor of the insurer and the Georgia Court of Appeals affirmed the decision on the basis that "no part of OCGA § 34-9-11.1 imposes a fiduciary duty on an insurer to protect the employee's legal interests in its subrogation action brought under that statute." *Id*.

On appeal, the Court stated: "a relationship that gives rise to a fiduciary duty exists either when a party exercises a controlling influence over the will, conduct and interest of another or when, from a similar relationship of mutual confidence, the law requires the utmost good faith." Examples of fiduciary relationships include the relationship between partners; principal and agent; guardian or conservator and minor or ward, etc. *Id*. at 7.

The Appeals Court then stated: "Like the trial court, we cannot locate any such duty imposed on the insurer in OCGA § 34-9-11.1. Certainly, that statute does not create such a duty expressly. The statute creates other duties for the insurer (or employer) who brings an action under it: it must immediately notify the employee that it's bringing the action, and if it recovers more than the amount of the subrogation lien, that amount must be paid over the employee." *Id*. However, the presence of these express duties owed by the insurer to the employee implies the exclusion of other similar duties, "including a duty to litigate an action for the benefit of an absent employee." *Id*. Additionally, the Court stated: "far from requiring any employee to place his trust in the insurer brining the action—which might move the needle towards a fiduciary relationship—the statute contemplates the employee acting to protect his own interests in any recovery by suing or intervening." *Id*. at 9.

Learning Point: In an insurer's action to enforce a subrogation lien, the insurer did not owe the Estate a fiduciary duty to protect its interest in the subrogation action because no such duty was imposed on the insured under OCGA § 34-9-11.1 ♦

SUBROGATION UNIT'S SUCCESS CONTINUES

Pre-Suit Settlement Against Public Utility For Fire Loss

A fire occured at our Insured's home, located in Pennsylvania, resulting in the total destruction of the home. Various experts were retained to assist in the origin and cause investigation. After inspection and examination, the experts stated that they believed the fire was caused by the failure of the local power lines. However, the experts could not state why the power lines failed. The client did not want to file litigation against the Public Utility because of the experts' opinions. CM Partner **Robert A. Stern** (New York/New Jersey) took over the handling of this claim and opened a settlement dialogue with the Public Utility. Mr. Stern used concepts from the Malfunction Theory to support his arguments against the Public Utility. Due to a confidentiality agreement, we can simply report "that this matter was amicably resolved." If you have questions regarding Subrogation, fire claims, pursuing public utilities and/or settlement negotiations, please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212-805-3900).

Pre-Suit Settlement Against Contractor

CM Partner **Robert A. Stern** (New York/New Jersey) was retained to seek recovery against one of the Insured's contractors. The Insured's manufacturing facility, located in Pennsylvania, was undergoing significant renovations. The contractor at issue was engaged in certain drilling activities. The Insured provided the contractor with various drawings, instructions and directions. However, the Insured failed to provide the contractor with important drawings identifying certain underground lines containing high pressure oil. The contractor breached those lines, releasing oil into the Premises, coming into contact with an open flame, resulting in an explosion/fire. In addition to the contributory negligence, there were the usual waiver, exculpatory, etc. provisions with contractors. After many months of negotiating, this dispute settled for nearly the full recoverable damages. If you have questions regarding Subrogation, explosion/fire claims, pursuing contractors and/or settlement negotiations, please feel free to e-mail Robert (**rstern@clausen.com**) or call him (212-805-3900).

COLLATERAL SOURCE

UNINSURED MOTORIST PAYMENTS ARE NOT COLLATERAL SOURCES TO BE DEDUCTED FROM JURY VERDICT

Ellison v. Willoughby, 2021 Fla. App. LEXIS 13832 (Fla. App.)

Defendant unsuccessfully requested that trial court set off $4 million in settlement proceeds against $30 million jury verdict under set off statute. ***Held:*** Affirmed. Purpose of set off statute is to prevent windfall to plaintiff by way of double recovery. ***Further held:*** Insurer's settlement proceeds did not fall within statutory definition of "collateral sources" under collateral source statutory provision.

DAMAGES

STATE'S SETTLEMENT WITH CIGARETTE MANUFACTURER DOES NOT PRECLUDE PRIVATE SUIT FOR PUNITIVE DAMAGES

Laramie v. Philip Morris USA Inc., 173 N.E.3d 731 (Mass.)

Wife of deceased smoker brought wrongful death action seeking punitive damages. ***Held:*** Claim not barred by Massachusetts' settlement of its own claim against manufacturer for recovery of smoking-related costs paid by State. Claim preclusion requires an identity or privity of parties in the two actions. State law authorized punitive damages to punish for harm caused to personal interests of a party. Settlement agreement did not cover private actions for individual injuries. The two suits raised different causes of action seeking different remedies.

EMPLOYMENT DISCRIMINATION

LEGITIMATE NON-DISCRIMINATORY REASONS FOR DISCHARGE ARE NOT PRETEXT FOR ILLEGAL DISCRIMINATORY BIAS

City of Hartford Police Dep't v. Commiss. on Human Rights & Opport., AC 43420 (Conn. App.)

Plaintiff's Vietnamese employee asserted illegal discriminatory practices following termination of his job as a probationary police officer. The employee claimed that, after he indicated he would file a grievance because a sergeant questioned his ancestry and language skills, other sergeants began complaining about his performance, leading to his termination. The trial court and commission both held the evidence gave rise to an inference of discrimination. ***Held:*** Reversed. There was insufficient evidence to support a causal connection between the sergeant's remarks and the decision to terminate or the sergeant playing any role in the termination decision.

PLAINTIFF STATES CLAIM BY ALLEGING HE WAS DENIED EMPLOYMENT BECAUSE OF CONVICTION

Sassi v. Mobile Life Support Servs., Inc., 37 N.Y.3d 236 (N.Y.)

Trial court ruled that plaintiff did not adequately allege that defendant, plaintiff's former employer, violated the antidiscrimination statutes based on the denial of his application for employment following the completion of his criminal sentence. ***Held:*** Reversed. Plaintiff's allegation that, after he completed his sentence, he applied for reemployment in position he previously held, and defendant denied application solely due to his conviction, was sufficient to state a claim.

EVIDENCE

EXPERT'S TESTIMONY MUST BE RELEVANT TO CASE FACTS

People v. Powell, 2021 NY Slip Op 06424 (N.Y.)

At criminal trial, defendant sought to have expert on false confessions testify on his behalf, but trial court refused to allow it. ***Held:*** Trial court did not abuse its discretion in precluding defendant's proffered expert on false confessions as it would not have aided the jury. Although the expert was an impressively credentialed researcher, she did not explain how her testimony was at all relevant to the circumstances presented by defendant's interrogation.

DENIAL OF *FRYE* HEARING REVERSIBLE ERROR

People v. Wortham, 2021 NY Slip Op 06530 (N.Y.)

Defendant sought to challenge evidence derived from forensic statistical tool via *Frye* hearing but trial court denied the request. ***Held:*** Trial court abused its discretion in denying motion for *Frye* hearing with respect to admissibility of evidence derived from forensic statistical tool. Moreover, error was not harmless as that was strongest evidence tying defendant to contraband and evidence of guilt was not overwhelming without the DNA evidence.

FIRST-PARTY PROPERTY

APPRAISAL PREMATURE FOR SUPPLEMENTAL CLAIM REQUIRING SEPARATE COVERAGE DETERMINATION

Am. Coastal Ins. Co. v. Ironwood, Inc., 2021 Fla. App. LEXIS 14274 (Fla. App.)

Insurer issued payments for roof repairs caused by Hurricane Irma. Insured filed additional claims for damage to doors and windows but did not provide documentation requested by insurer and invoked appraisal before insurer made coverage determination. ***Held:*** Where insurer reasonably disputes insured's compliance with policy's post-loss conditions, question of fact is created that must be resolved by trial court before compelling appraisal.

LODESTAR AMOUNT MUST BE SUPPORTED BY EVIDENCE HOURS BILLED WERE REASONABLE

Citizens Prop. Ins. Corp. v. Casanas, 2021 Fla. App. LEXIS 14270 (Fla. App.)

Insureds sued homeowners' insurer for underpayment of alleged damage to their roof during Hurricane Irma. Matter settled without significant litigation activities. Trial court concluded lodestar was $70,800 and added a 1.8 multiplier for a total fee of $127,440, which was nearly five times the amount of parties' $35,000 settlement. ***Held:*** Reversed. Multiplier should not be awarded if there is no evidence that the relevant market required a contingency fee multiplier to obtain competent counsel.

SEWAGE BACK UP ALSO EXCLUDED UNDER WATER-BACKUP EXCLUSION

AKC, Inc. v. United Spec. Ins. Co., 2021 Ohio LEXIS 1973 (Ohio)

Commercial policy excluded coverage for "water that backs up or overflows from a sewer, drain, or sump." ***Held in a split decision:*** Water backing up from sewer will contain sewage, and average person would understand it. Exclusion was not ambiguous. Insured could have purchased endorsement to remove exclusion. Dissent contends exclusion was ambiguous.

INSURANCE LITIGATION

INSURER NOT ENTITLED TO IMMUNITY DEFENSE UNDER TORT CLAIMS ACT

Berry v. Commerce Ins. Co., 2021 Mass. LEXIS 587 (Mass.)

Police officer injured fellow officer by recklessly driving pick-up truck while returning from lunch break during firearms exercise. ***Held:*** Insurer not entitled to immunity under Tort Claims Act on grounds that driver within scope of employment. Erratic driving was outside officer's duties. His conduct was not motivated to serve employer. Different considerations apply under workers' compensation statute.

LIABILITY INSURANCE COVERAGE

UNINSURED-PREMISES EXCLUSION BARS COVERAGE FOR MISREPRESENTATION CLAIM INVOLVING INSURED'S FORMER PREMISES

Norfolk & Dedham Mut. Fire Ins. Co. v. Norton, 2021 Mass. App. LEXIS 125 (Mass. App.)

Insureds sued for misrepresentations as to sale of former home sought coverage under homeowners' policy covering current home. ***Held:*** Uninsured-premises exclusion barred coverage arising out of uninsured properties.

At time of flooding giving rise to claim, insureds no longer owned the property. Fact insurer covered new home did not entitle insureds to defense and indemnity.

NEGLIGENCE/MEDICAL MALPRACTICE

COURT'S INQUIRY ON NATURE OF ACTION LIMITED TO COMPLAINT'S FACTUAL ALLEGATIONS, WHICH COURT MUST ACCEPT AS TRUE

Torres v. Kendall Healthcare Grp., Ltd., 2021 Fla. App. LEXIS 13843 (Fla. App.)

Plaintiff allegedly fell from wheelchair while undergoing diagnostic imaging at defendant's medical facility because attendant failed to properly secure brakes. Trial court dismissed the negligence action, ruling the complaint sounded in medical malpractice and that plaintiff failed to comply with mandatory pre-suit requirements and the malpractice statute of limitations. ***Held:*** Reversed. Dismissal not warranted at this juncture because plaintiff alleged sufficient facts to plead action as one sounding in negligence.

PRIVATE RIGHTS OF ACTION

NO PRIVATE RIGHT OF ACTION FOR COPY CHARGE VIOLATION

Ortiz v. Ciox Health LLC, 2021 NY Slip Op 06425 (N.Y.)

Plaintiff had made a written request to defendant hospital for paper copies of her medical records, asking that, pursuant to Public Health Law § 18(2)(e), the hospital not charge her in excess of $0.75 per page. Nonetheless, she was charged $1.50 per page. She sued and the Second Circuit asked the Court of Appeals whether plaintiff could maintain an action for the violation. ***Held:*** An implied private right of action does not exist for violations of Public Health Law § 18(2)(e). A plenary private right of action would be inconsistent with the statutory scheme surrounding the cap.

PROVISIONAL REMEDIES

IRREPARABLE HARM STANDARD APPLIES TO REQUEST TO ENJOIN ONGOING ADMINISTRATIVE DISCIPLINARY PROCEEDINGS

United Public Serv. Employees Union, Cops Local 062 v. Hamden, AC 43739 (Conn. App.)

Plaintiff union sought to enjoin defendants from proceeding with disciplinary hearing against police officer until completion of a pending criminal prosecution against the officer. The trial court granted plaintiff's application for a temporary injunction after applying a balancing of the equities test. ***Held:*** Reversed. The proper standard for reviewing a request to enjoin ongoing administrative disciplinary proceedings is the standard for adjudicating a temporary injunction. The trial court made no findings as to whether plaintiff would suffer irreparable harm in the absence of injunctive relief.

SUBJECT MATTER JURISDICTION

POSSESSORY INTEREST REQUIRED IN COMMENCING REAL PROPERTY ACTION

Alfred J. Kloiber et al. v. Linda Jellen et al., AC 43382 (Conn. App.)

Plaintiffs sought injunction and damages from defendants for trespass, private nuisance, common-law negligence and statutory negligence in connection with a property dispute between the parties concerning surface water runoff onto real property located directly between the parties' properties. The trial court rendered judgment in defendants' favor. ***Held:*** Affirmed. Plaintiffs never owned, occupied, resided at, or had a possessory interest in, the subject property and, therefore, lacked standing. The action was dismissed for lack of subject matter jurisdiction.

TORTS

AMAZON NOT LIABLE FOR PRODUCT SOLD, ASSEMBLED THROUGH WEBSITE

Wallace v. Tri-State Assembly LLC, 2021 NY Slip Op. 06664 (N.Y. App. Div. 1st Dep't)

Plaintiff's father purchased a bicycle from a China-based company through Amazon. The father elected to have the bicycle assembled by a co-defendant that offers its assembly services on Amazon and was an Amazon-approved service provider. Plaintiff fell because the handlebars loosened while he was riding it. ***Held:*** Amazon could not be held liable for injury caused by the electric bicycle.

TRIAL PRACTICE

NEW TRIAL WHERE PRECLUDED EVIDENCE MAY HAVE AFFECTED OUTCOME

Andrea Ulanoff v. Becker Salon, LLC, et al., AC 42834 (Conn. App.)

Plaintiff sued defendants, a salon and one of its owners, for injuries sustained when she walked into the salon's glass entryway doors. Defendants successfully precluded a photograph of the salon entrance obtained from the salon's website, which depicted the glass doors without any signage or handles. Defendants claimed the photograph, taken after the date of the accident, was irrelevant and unduly prejudicial as it had been photo-shopped to remove signage and door handles. At trial, one of the plaintiff's witnesses was also precluded from testifying as to whether the salon doors had signage or handles prior to plaintiff's accident. ***Held:*** Reversed. The precluded photograph and testimony were relevant as they went to the appearance of the salon's doors, which was central to plaintiff's case. Whether the photograph had been photo-shopped and the extent to which it may have been altered went not to its admissibility but weight.

VENUE

VENUE OPTIONS MORE LIMITED FOR INDIVIDUALLY-OWNED BUSINESSES

Lividini v. Goldstein, 37 N.Y.3d 1047, 176 N.E.3d 690 (N.Y.)

In podiatric malpractice action, defendant successfully moved to change venue from Bronx County because, although he did some work in Bronx County, his residence and the principal office were not located there. ***Held:*** Affirmed. Defendant's actual residence and principal office were in Westchester County and CPLR 503(d) and the venue statute do not deem an individually-owned business a resident of every county where it has an office or transacts business.

WORKERS' COMPENSATION

CHAIN OF CAUSATION BETWEEN DECEDENT'S COMPENSABLE INJURIES AND DEATH REQUIRED FOR SURVIVORSHIP BENEFITS

Barbara Orzech v. Giacco Oil Company, et al., AC 43941 (Conn. App.)

Plaintiff's deceased spouse slipped while delivering oil to one of its customers. Spouse filed a Workers' Compensation claim relating to the compensability of a knee replacement surgery but died prior to conclusion of the hearings. Plaintiff filed a claim for survivorship benefits. The commissioner and board determined the deceased spouse had died by suicide due to depression stemming from the work injuries. Defendants appealed, arguing that plaintiff's spouse's consumption of an excessive amount of alcohol and medication prior to his death constituted a superseding cause that broke the chain of causation between the work incident and death. ***Held:*** Decedent's manner of death, a suicide from acute intoxication, was an act not untethered to decedent's compensable injuries or the depression he thereafter developed.

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