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THE INSURANCE DEFENSE UPDATE

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Major Changes in Health Insurers Subrogation Rights

New General Obligations Law §5-335

General Obligations Law §5-335 was signed into law on November 13, 2009, and was effective immediately. This law may fundamentally impact New York personal injury litigation. This statute prohibits a plaintiff who has settled with one or more defendants from being charged with violating a health insurer's alleged equitable or contractual subrogation rights.

Therefore, this law essentially overrules two Court of Appeals decisions, *Teichman v. Community Hosp. of Western Suffolk*, 87 NY2d 514 (1996), and *Fasso v. Doerr*, 12 NYed 80 (2009), to the extent they recognized health coverage subrogation. Now, double recovery of these expenses is no longer allowed. If the jury awards medical expenses and plaintiff has been covered by health insurance, the court will reduce the award based on that collateral source.

According to sponsors, this new law seeks to prevent health insurers from complicating cases and delaying settlements by attempting to intervene and assert equitable or contractual subrogation claims. Additionally, the health insurance carrier used to recover medical expenses through subrogation rights even though the plaintiff was unable to recover under CPLR §4545(c) due to the collateral source rule. Now, this legislation ends insurance subrogation rights to settlements unless there is a statutory right to reimbursement.



School Board Not Liable For Injury To School Teacher

Dinardo v. City of New York, 2009 WL 4250125 (2009)

Plaintiff, a special education teacher, was injured when she tried to restrain one student from attacking another. The student had been verbally and physically aggressive for several months, and plaintiff had repeatedly expressed concerns to her supervisors about her safety in the classroom. The school's supervisor of special education and the principal both told her that "things were being worked on, things were happening" and urged her to "hang in there because something was being done" to have the student removed. Following her injury, plaintiff commenced an action alleging, among other things, that by virtue of these assurances the Board of Education had assumed an affirmative duty to take action with respect to the removal of the student and that she justifiably relied upon those assurances. When the student was not removed in a timely fashion, plaintiff alleges, the altercation which led to her injury resulted.

On December 1, 2009, the Court of Appeals, in *Dinardo v. City of New York* (---N.E.2d --- 2009 WL 4250125)[NY2009] stated that in negligence cases premised on a special relationship between municipality and plaintiff, "the injured party's reliance is as critical ... as is the municipality's voluntary affirmative undertaking of a duty to act. Indeed, at the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced her either to relax her own vigilance or to forego other available avenues of protection." The assurance by the municipal defendant, however, must be definite enough to generate justifiable reliance by the plaintiff.

The Court of Appeals determined that affording the plaintiff teacher every inference that may properly be drawn from the evidence presented and considering the evidence in a light most favorable to her, there was no rational process by which the jury could have reached a finding that teacher justifiably relied on assurances by the Board of Education.

A Recent Trevett Cristo Success

Firm partner Louis B. Cristo, Esq., successfully obtained a "No Cause" verdict in favor of an insured in a case recently tried in Watertown, New York. The plaintiff, a well-known local race car driver, was injured when struck by another vehicle as he rode his motorcycle through a parking lot. Mr. Cristo represented the owner of the parking lot, whom plaintiff claimed acted negligently in the design or maintenance of the parking lot. The jury awarded plaintiff \$1.6 million in damages but found no liability on the part of the insured owner of the parking lot.

RECENT LABOR LAW UPDATES

The Court Of Appeals Confirms What It Means To Be An “Owner” For The Purposes Of Labor Law §241(6)

Scaparo v. Village of Ilion, et al. --- N.E.2d ----, 2009 WL 4250154 (N.Y.), 2009 N.Y. Slip Op. 08857

On December 1, 2009, the Court of Appeals affirmed its 2004 ruling that imposed Labor Law §241(6) liability upon property owner's who did not contract for work performed on their property by finding there must be "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." *Abbatello v. Lancaster Studio Assoc.*, 3 NY3d 46, 51 (2004). Although the accident in this case occurred on defendant Herkimer County Industrial Development Agency's (HCIDA) property, HCIDA did not contract with the Village of Frankfort (the Village) to have the sewer lateral installed, and had no choice but to allow the Village to enter its property pursuant to a right-of-way, and it did not grant the Village an easement or other property interest creating the right-of-way. Therefore, HCIDA was not found to be an owner for liability purposes under §241(6).

The Court affirmed the Appellate Division's conclusion that defendant Our Lady Queen of Apostles Church of St. Mary of Mount Carmel/S.S. Peter and Paul (the Church) was not an owner under Labor Law §241(6) either. The Church was not an owner because it had no interest in the property over which the sewer lateral was placed, and only agreed to pay for the cost of materials.

In reaching this conclusion, the Court noted that municipal employees working at the site testified that no representative from the Church was present at, or gave directions during, the excavation work. Additionally, testimony adduced that the Village assumed full responsibility for installing the lateral sewer line and acknowledged that the lateral would be available for use by future property owners in the area who wished to connect to the Village sewer system. Finally, the Court also determined that the Church was in no position to control the sewer lateral installation process or to insist that proper safety practices were followed under Labor Law §200, citing *Comes v. NYS Elec. & Gas Corp.*, 82 NY2d 876, 877-878 (1993).

The Court Of Appeals Discusses The One Or Two-Family Dwelling Exception Found In Labor Law §§ 240 And 241

Affri v. Basch, --- N.E.2d ----, 2009 WL 4030863 (N.Y.), 2009 N.Y. Slip Op. 08673 (Nov 24, 2009)

In this case, defendants' hired plaintiff, a neighbor who had previously done small jobs for them, to perform renovations to an apartment within their home. The work included the installation of appliances. Plaintiff fell from a ladder while installing a vent on the roof and suffered injuries that required several surgeries.

The issue before the Court was whether defendant exercised sufficient direction and control over plaintiff's work to overcome the one or two-family dwelling exception found in Labor Law §§ 240 and 241. It is well settled that whether a defendant's conduct amounts to direction and control depends upon the degree of supervision exercised over "the method and manner in which the work is performed" *Duda v. Rouse Constr. Corp.*, 32 NY2d 405, 409 (1973).

The majority opinion found that defendants' participation was limited to discussion of the results the homeowner wished to see, not the method or manner in which the work was then to be performed. It was decided defendants did nothing more than what an ordinary homeowner would do in deciding how they wanted the home to look upon completion. The defendants' direction to plaintiff to place a vent through the roof was determined by the Court to be "simply an aesthetic decision." Further, because the defendants did not provide the plaintiff with any equipment or work materials and were not present at the time plaintiff undertook the venting work, the Court concluded that the method and manner of plaintiff's work were left to his judgment and experience.

The Court further held that defendants were also entitled to summary judgment dismissing the causes of action pursuant to Labor Law § 200 and for common law negligence because defendants exercised no supervisory control over the activity bringing about the injury, citing *Lombardi v. Stout*, 80 NY2d 290, 295 (1992). The Court found that Plaintiff's affidavit indicating he was reluctant to go on defendants' roof as insufficient to raise an issue of fact. Because he proceeded to the roof on his own volition to complete the work, the Court found defendants were not liable.

The lengthy dissent of this 4-3 decision would find that the plaintiff did at the very least raise an issue of fact as to whether defendants were directing and controlling his work. The opinion notes that if a homeowner directs the manner and means of the work, it is immaterial that the end result was an aesthetic change.

Longshore and Harbor Workers' Compensation Act (LHWCA) Preempts New York State Labor Law §§ 240(1) and 241(6) Claims.



The Court of Appeals, in *Lee v Astoria Generating Co., LP.* (--- NY2d---, 2009 WL 4016121 [NY, November 23, 2009]), determined that the LHWCA clearly states in section 905(b) that an action in negligence may be brought against a vessel and that such remedy “shall be exclusive of all other remedies against the vessel except remedies available under this chapter” (33 USC § 905[b]). According to our High Court, Congress clearly intended that actions maintained against a vessel be brought solely within the confines of the LHWCA and nowhere in the Act does it permit strict liability claims, as provided in Labor Law §§ 240(1) and 241(6). Therefore, section 905(b) of the LHWCA expressly preempts plaintiff’s Labor Law §§ 240(1) and 241(6) claims.

Injured Party Settling With One Tortfeasor For Policy Limits & With Second Tortfeasor For Less Than Policy Limits, Forfeits SUM Coverage

Central Mutual Insurance Company v. Bemiss, 12 N.Y.3d 648 (June, 2009)

On or about April 12, 2005, a multiple vehicle accident occurred in the westbound lane of Interstate 90 in the City of Albany. In pertinent part, the vehicle driven by Beverly Bemiss (the third car in line of the pileup) was struck twice in the rear—once by the vehicle driven by Kati Kowalczyk, the fourth in line; and again when the automobile driven by John Genski, the fifth in line, rear-ended Kowalczyk’s vehicle, pushing it into the back of Bemiss’s vehicle a second time. As a consequence of this accident, Bemiss seriously injured her right foot and ankle, which required surgery to repair the Achilles tendon.

Kowalczyk was insured for motor vehicle liability under a policy issued by Government Employees Insurance Company (GEICO), with bodily injury liability limits of \$25,000; Genski was insured under a policy issued by Progressive Northeastern Insurance Company, also with bodily injury liability limits of \$25,000. Central Mutual Insurance Company was Bemiss’s automobile liability insurance carrier. Her single limit policy provided \$100,000 per accident for bodily injury and property damage, and a SUM endorsement for \$100,000 per accident. Since both Kowalczyk’s and Genski’s bodily injury liability limits were less than Bemiss’s, her SUM coverage was activated or triggered as to each of them.

Bemiss’s attorney informed Central that GEICO, Kowalczyk’s insurance carrier, had tendered the policy limits of \$25,000. He further advised that Bemiss intended to accept this offer and execute a release on or after August 27, 2006, unless Central advanced this amount to her in return for her cooperation in any lawsuit on her behalf. Central did not respond to the letter. Bemiss also at some point agreed to settle with Genski and his insurer, Progressive, for \$2,500—e.g., less than the \$25,000 policy limit. Bemiss never notified Central that she intended to settle with Genski, or solicited Central’s consent.

Bemiss executed a single general release in favor of Kowalczyk, GEICO, Genski, and Progressive in consideration of the sum of \$27,500—\$25,000 from GEICO and \$2,500 from Progressive. The release did not preserve Central’s subrogation rights with respect to any payment that might be made to Bemiss under her SUM coverage. Earlier in December (before exhausting Kowalczyk’s policy), Bemiss served Central with a request for arbitration, seeking \$72,500 in SUM benefits.

Central ultimately disclaimed liability to Bemiss and denied SUM coverage. Specifically referencing Condition 10 of Department of Insurance Regulation 35, Central advised Bemiss that she had violated policy conditions by “settling with both responsible parties [i.e., Kowalczyk and Genski] in this loss, and in signing the release, waived [Central’s] subrogation rights.” Condition 10 allows an insured to collect under SUM coverage in a multiple-tortfeasor accident before exhaustion by settlement or judgment. Specifically, 30 days after having given the insurer notice of a tortfeasor’s offer to settle for the maximum available policy limits, the insured may execute a general release with the tortfeasor and retain SUM eligibility unless, in the meantime, the insurer has agreed to advance the settlement amount in exchange for the insured’s cooperation with its subrogation claim

Central maintained that Bemiss was not entitled to SUM benefits because she did not protect its subrogation rights, give prior written notice of her intent to settle, or obtain its written consent before settling for less than the policy limits with Genski/Progressive. In opposition, Bemiss argued that “[t]he policy . . . reads that when there are multiple tortfeasors, and one of those tortfeasors offers the maximum coverage under its policy, then written notice must be given of the policy tender before execution of a release. The policy [does not contain] any language that requires the insured to provide written notice for a partial tender from a second tortfeasor.”

In affirming the Third Department, the Court of Appeals held that Bemiss’ policy contained specific requirements as to her obligations to Central before settling with any tortfeasor for less than the maximum coverage of that tortfeasor’s policy. Bemiss did not furnish notice with respect to the \$2,500 settlement with Genski/Progressive. Yet, had she advised Central of this, and the insurer failed to respond within the time limits set forth in the policy, the settlement for less may have been justified. Nevertheless, Bemiss did not give any such notice, perhaps assuming that her settlement with Kowalczyk for the policy limits relieved her from the obligation of settling for less than the maximum on any other policy. This decision proved to be erroneous and, as a consequence, she was unable to recover under her own policy.