LEGAL INSIGHTS

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Knockouts and Drug Tests: The Cautionary Tale of Wanderlei Silva

By Shawn Schatzle

It was October 31, 2004. Wanderlei "The Axe Murderer" Silva, the PRIDE middleweight champion, knocked out challenger Quinton "Rampage" Jackson with a barrage of knees to the head in front of 24,028 fans at the Saitama Super Arena in Japan. He quickly ascended the ropes and let out a guttural scream in celebration. The finish came at three minutes and 26 seconds into the third round. With the victory, Silva had extended his unbeaten streak to a remarkable 18 straight fights. As one of the most popular athletes in mixed martial arts, "The Axe Murderer" was on top of the world.

He would eventually lose his championship belt to former Olympic wrestler Dan Henderson at the PRIDE 34 event held on February 24, 2007. In total, Silva's title reign lasted for over six years, an almost unheard length of time to hold a major championship in a sport that involves so many different ways to lose. PRIDE would only hold one more event before being bought out by and effectively absorbed into the current top promotion in mixed martial arts, the Ultimate Fighting Championship (UFC). Silva's UFC return—he had

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Trivial Matters? The New York Court of Appeals Examines Trivial Defects

By Jarett L. Warner

Ruling in three separate cases, *Hutchinson v. Sheridan Hill House Corp.*, *Zelichenko v. 301 Oriental Boulevard, LLC* and *Adler v. QPI-VIII LLC*, 26 N.Y.3d 66 (October 20, 2015), New York's highest court, the Court of Appeals, has recently issued a decision analyzing what constitutes an actionable versus a trivial defect with regard to a trip and fall accident. The decision analyzed the law and facts with regard to three separate cases. Here is a summary of these cases and the Court's analysis.

General Background Regarding Trivial Defect

The Court of Appeals has previously held that not every difference in elevation is actionable. *See Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997) (holding that an alleged half-inch raise of slab outside of a county building

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Court of Appeals Limits No-Fault Reimbursement Rights

By Gail L. Ritzert

Giving a stern warning to those who venture into the realm of no-fault recovery claims, the New York Court of Appeals issued a decision on June 14, 2016 that strictly construes who is entitled to seek reimbursement under 11 NYCRR 65-3.11 for medical treatment provided to a claimant. *See Aetna Health Plans v. Hanover Insurance Company,* 2016 N.Y. Slip Op 04658 (2016). This decision is a wake-up call to health insurers and HMOs who do not diligently investigate and promptly deny claims.

Aetna Health Plans, an HMO, provided health insurance coverage to Luz Herrera, who suffered personal injuries in an automobile accident that occurred on April 25, 2008. The automobile Herrera was operating at the time of the accident was insured by Hanover. Although Herrera's medical bills should have been paid by Hanover, her no-fault carrier, her medical providers mistakenly billed Aetna. Aetna paid the bills, initially totaling $19,649.10.

In March 2009, Aetna sought reimbursement from Hanover for the medical bills it paid, and simultaneously filed a lien for reimbursement against any recovery Herrera might obtain in litigation. Hanover did not respond to this request. In January 2010, Herrera's attorney submitted to Hanover copies of the medical bills paid by Aetna, demanding payment. When Hanover ignored this request, her counsel demanded arbitration claiming that Herrera was entitled to no-fault benefits under Hanover's policy because Aetna maintained a lien and Hanover, as the no-fault carrier, never paid the bills nor denied coverage for the bills submitted. The arbitrator denied the claim holding that (1) the Aetna documents submitted on Herrera's behalf were not actually bills and (2) even if the documents (which contained the language "This Is Not A Bill") were bills, Herrera lacked standing to make a claim because Aetna paid the bills and not Herrera. The arbitrator further held that since Aetna had a lien against Herrera, until such time as she satisfied the lien asserted by Aetna, she had no standing to pursue the claim.

While the matter was in arbitration, Herrera's medical providers continued to bill Aetna, and Aetna continue to pay an additional $23,525.73 in medical treatment charges. Herrera submitted these bills to Hanover for payment and informed Hanover that she assigned her rights to Aetna.

Aetna commenced an action against Hanover seeking reimbursement of the monies it paid on Herrera's behalf, plus interests and fees. Following receipt of Hanover's answer, which contained multiple affirmative defenses, Aetna moved for summary judgment. Aetna argued that Hanover breached its contract with its assignor, arguing that as Herrera's assignee, Aetna was entitled to reimbursement from Hanover.

Hanover opposed the motion and cross-moved for a dismissal of the complaint based on a lack of standing. It argued that Aetna was not entitled to direct reimbursement from Hanover under 11 NYCRR 65-3.11 because it was an insurance company and not a provider of health care services.

11 NYCRR 65-1.33 provides:

> 65-3.11 Direct payments.
>
> (a) An insurer shall pay benefits for any element of loss, other than death benefits, directly to the applicant or, when appropriate, to the applicant's parent or legal guardian or to any person legally responsible for necessities, or, upon assignment by the applicant or any of the aforementioned persons, shall pay benefits directly to providers of health care services as covered under section five thousand one hundred two (a)(1) of this article, or to the applicant's employer for loss of earnings from work as authorized under section five thousand one hundred two (a)(2) of this article. Death benefits shall be paid to the estate of the eligible injured person a right of recovery

Hanover argued that the regulation only permitted assignments to be made to health care providers, and that Aetna was not in privity of contract with Hanover. In reply, Aetna argued that Hanover was judicially estopped from arguing

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that Aetna lacked standing because in the prior arbitration, Hanover asserted, and the arbitrator agreed, that Aetna was the proper party with standing.

The Supreme Court granted Hanover's cross-motion to dismiss the complaint. This decision was unanimously affirmed by the Appellate Division, First Department. Both decisions were based on the finding that Aetna was not a provider of health care services, thus it was not entitled to a direct recovery from Hanover.

The Court of Appeals affirmed the Appellate Division decision. In doing so, the Court rejected Aetna's argument that, as the assignee of Hanover's insured, it was entitled to a recovery. In rejecting Aetna's claim, the Court held that 11 NYCRR 65-1.33 provides that "an insurer shall pay benefits for any loss, other than death benefits, directly to the applicant *or, upon assignment by the applicant . . . shall pay benefits directly to providers of health care services . . .*" (citations omitted). The Court found that since Herrera had already assigned the right to recoup payments to her health care providers she had no rights to assign to Aetna. Additionally, the Court held that the regulation, by its very language, permits only the insured or the providers of health care services by an assignment from the insured to receive direct no-fault benefits, finding that because Aetna did not qualify as a health care provider, Herrera could not assign her right to it.

This decision follows the circular letter issued by the State Insurance Department's Office of General Counsel on January 28, 2008, which rendered an informal opinion stating that an HMO is not entitled to subrogate its recovery under the no-fault insurance law, noting that an HMO is not required to pay for an insured's treatment in the first instance when its insured is injured in an automobile accident.

No-fault insurers also need to take note of this decision. No-fault carriers must immediately and vigorously investigate all claims to ascertain whether the claimant seeking benefits under its policy was within the scope of employment at the time of the accident. If the claimant was in the scope of his or her employment, in New York, the claimant's workers' compensation carrier is responsible to pay the medical bills and lost wage claims. Under that scenario, the no-fault carrier must promptly disclaim coverage.

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HRRV in the Community

Building Bridges: Understanding People with Different Abilities

Last year as co-chair of the Special Education PTA, Tara C. Fappiano, HRRV's resident partner in the White Plains office, helped develop an innovative program for the Tuckahoe Union Free School District called Building Bridges: Understanding People with Different Abilities.

Building Bridges aims to teach children, in grades kindergarten to 5th grade, about understanding people with different types of disabilities: sight impairments, hearing impairments, autism, physical disabilities and learning disabilities.

This year, as director of the program, Tara organized a week in February in which more than 40 parent volunteers went into over 25 classrooms to show the children what it is like to live with different abilities, and foster awareness and understanding.

The Building Bridges week included seven different assemblies featuring a variety of speakers: persons with hearing and sight impairments, a service dog and its trainer, a World Record-holding Paralympian and an award-winning author of two books about a superhero with autism as well as a panel of high school students who discussed how they have overcome their own learning disabilities. The program was universally well-received by children, parents and teachers. Tara was proud and happy to donate her time to this important community program on a topic that is important and personal to her.

Prudential Center Attendee Asserts in Class Action Suit that Website Terms and Conditions Contain Illegal Provisions in Violation of New Jersey Consumer Protection Law

By Shawn Schatzle

The Prudential Center in Newark, New Jersey is home to the New Jersey Devils hockey team and the Seton Hall Pirates college basketball team. It was also the former home of the New Jersey Nets basketball team before the franchise relocated to Brooklyn. In addition to sporting events, the facility regularly hosts concerts, professional wrestling matches and mixed martial arts bouts. One regular attendee of events at the Prudential Center, however, contends that the "Terms and Conditions" of its website violate New Jersey law.

Josephine Guzman, on behalf of herself and all others similarly situated, recently filed a class action lawsuit in the U.S. District Court of New Jersey, in which she alleges that Devils Arena Entertainment, LLC (Devils Arena), the operator of the Prudential Center, has imposed illegal and exculpatory provisions upon all users of its website. She alleges that Devils Arena has unlawfully sought to nullify the legal duties and responsibilities it owes its consumers. Guzman's claims are based primarily on New Jersey's Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA).

The TCCWNA is a consumer protection law that provides standing to consumers to obtain damages from a seller who provides a contract, warranty, notice or sign which includes language that violates New Jersey or federal law in any respect. *See* N.J.S.A. 56:12-14.

To prove a TCCWNA claim, a plaintiff must show that: (1) he or she is a consumer or potential consumer within the statute's definition; (2) the defendant is a seller; (3) the defendant (a) offers or enters into a written consumer contract, or (b) gives or displays any written consumer warranty, notice or sign; and (4) the offer or written contract, warranty, notice or sign includes a provision that violates any clearly established legal right of a consumer or responsibility of a seller. *See MB Imps., Inc. v. T&M Imps., LLC,* 2012 U.S. Dist. LEXIS 168693, 21 (D.N.J. Nov. 28, 2012).

Essentially, any writing that may be shown to a consumer in connection with the sale of a product or service may constitute a "notice" under the TCCWNA. *See Watkins v. DineEquity, Inc.*, 2012 U.S. Dist. LEXIS 122677, 17 (D.N.J. Aug. 29, 2012). The TCCWNA can impose liability on a seller who merely "gives or displays" such a notice. *See MB Imps., Inc. v. T&M Imps., LLC*, 2012 U.S. Dist. LEXIS 168693, 21 (D.N.J. Nov. 28, 2012). A consumer is defined under the statute as

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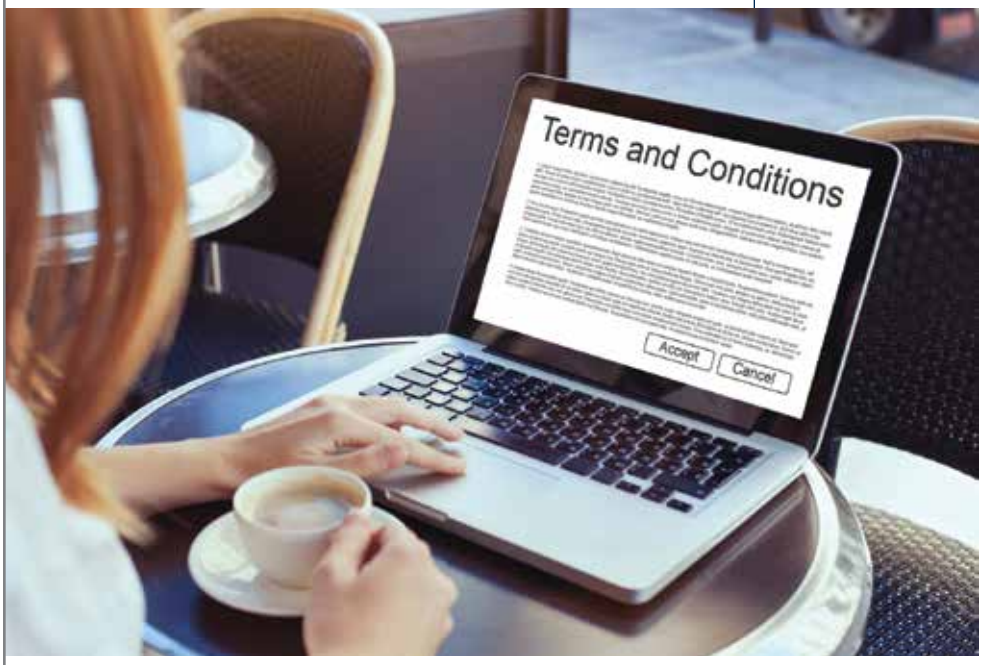

This case is a reminder for sports organizations—and businesses of any type—that engage in commerce directed toward New Jersey consumers to ensure that the fine print associated with their products is lawful.

Prudential Center Attendee Asserts in Class Action Suit that Website Terms and Conditions Contain Illegal Provisions in Violation of New Jersey Consumer Protection Law

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"any individual who buys . . . any . . . property . . . or service . . . which is primarily for personal, family or household purposes." *See* N.J.S.A. 56:12-15. The statute has specifically been applied to online retailers. *See Shelton v. Restaurant.com, Inc.*, 2013 N.J. Lexis 726 (Sup. Ct. N.J. 2013). It has also been applied to the sale of tickets to live events. *See Katz v. Live Nation, Inc.*, 2010 U.S. Dist. LEXIS 60123 (D.N.J. June 17, 2010).

Notably, the statute also applies to prospective consumers and therefore requires no agreement or contract between the consumer and the seller, nor does it even require proof of any actual damages. Any seller may be liable for a civil penalty of not less than $100 or actual damages, at the election of the consumer, if the seller violates the TCCWNA. *See Slack v. Suburban Propane Partners, L.P.*, 2010 U.S. Dist. LEXIS 135530, 16 (D.N.J. Dec. 22, 2010). The Superior Court of New Jersey, Appellate Division has held that class actions are permissible under the TCCWNA. *See United Cons. Fin. Ser. v. Carbo*, 982 A.2d 7 (N.J. Sup. Ct. App. Div. 2009).

A seller who makes any statement in writing that is related to the sale of a product or service may be held liable for damages under the TCCWNA in the event that the statement is deemed to violate New Jersey law or federal law, regardless of whether the consumer in question actually sustained any damages.

Guzman's claims under the TCCWNA are based on numerous provisions of the Prudential Center's website Terms and Conditions. For example, she points to language which limits the liability of Devils Arena for any damages arising out of a consumer's use of the website, including damages related to viruses that may infect a computer through the downloading of information from the website. She asserts that this provision violates the well-established duty of care to avoid creating an unreasonable risk of harm, as it essentially bars consumers from asserting claims against Devils Arena even if it negligently managed or maintained its website.

Additionally, Guzman notes that the aforementioned provisions on the website also purport to specifically bar consumers from seeking punitive damages. She asserts that such language violates the New Jersey Punitive Damages Act (NJPDA). Furthermore, and among other allegations, Guzman points to language in the Terms and Conditions which appears to limit its liability for the actions of third parties who intercept personal information through the website. She asserts that this language unlawfully serves to waive Devils Arena's duty to take reasonable steps to protect consumers from the criminal acts of third parties.

Additionally, the plaintiff notes that the aforementioned provisions on the website also purport to specifically bar consumers from seeking punitive damages. She asserts that such language violates the New Jersey Punitive Damages Act (NJPDA).

In response to Guzman's claims, Devils Arena may file a motion to dismiss, which will seek to argue that her claims should not be subject to class certification. Devils Arena may also argue that the various provisions cited by Guzman do not violate any clear provision of New Jersey law and federal law, and that she has therefore failed to state a cognizable cause of action. However, if Guzman can overcome such arguments, then the potential damages may be relatively large, even if no member of the purported class sustained any actual damages. As the TCCWNA imposes statutory damages of at least $100 per consumer, a class of 1,000 plaintiff would result in damages of at least $100,000.

This case is a reminder for sports organizations—and businesses of any type—that engage in commerce directed toward New Jersey consumers to ensure that the fine print associated with their products is lawful. Although a business may be selling products and services in good faith, a technical error in the fine print could result in damages under the TCCWNA.

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When A Storm Rages

By Gail L. Ritzert

Whether you represent or insure residential or commercial property owners, sooner rather than later a claim will come across your desk that arises from a slip and fall caused by rain or snow and ice. After you have confirmed that the loss occurred on property owned or controlled by the insured, your next inquiry must be into the weather.

Under New York law "*[t]he owner/possessor of land/a building has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable. This duty does not depend upon whether plaintiff is an invitee, licensee or trespasser; it is owed to all persons reasonably expected to be on the premises." See* New York State Pattern Jury Instruction 2:90.

However, when faced with a claim that arises from the effects of weather, New York law provides that the party in control of the premises must be given a reasonable amount of time to remedy the dangerous condition if caused by a snowstorm. This time is measured from the end of the storm and, if the subject accident occurs while precipitation is still in progress, the defendant cannot generally be held liable for the alleged hazardous condition caused by the precipitation. However, in the event that the entity in control of the premises undertakes snow removal during the course of the precipitation, it may be held liable if its actions worsened the existing condition.

Similarly, although the landowner/possessor is not generally responsible for the removal of snow and ice from an adjacent sidewalk absent a statutory provision expressly imposing tort liability, if the owner/possessor chooses to remove the snow and ice from the abutting sidewalk, it must be removed with reasonable care, or liability may attach.

In a May 2016 decision, the Court of Appeals reaffirmed its holding in *Solazzo v. New York City Transit Auth*., 6 N.Y.3d 734 (2005), that "[a]lthough a landowner owes a duty of care to keep his or her property in a reasonably safe condition, he 'will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter.'" *Sherman v. New York State Thruway Authority,* 27 N.Y.2d 1019 (2016).

In *Sherman,* the plaintiff was a New York State Trooper who sought to recover for the personal injuries he sustained when he slipped and fell on an icy patch on the sidewalk outside Troop T barracks in Newburgh, New York. It was still raining when he left the barracks to respond to a traffic accident and slipped and fell. There had been an ice storm the night before, and the certified weather report confirmed that a wintery mix of snow, sleet and rain was falling when the plaintiff arrived at the barracks at 6:50 a.m., and that it was still raining when he left the barracks at 8:15 a.m. Thus, the Court, in a 4-3 decision, held that "the undisputed facts that precipitation was falling at the time of claimant's accident and had done so for a substantial time prior thereto, while the temperatures remained near freezing, established that the storm was still in progress and that the Authority's duty to abate the icy condition has not arisen." *Id.* at 1021.

The dissenting judges raised the point that the courts have never held that above-freezing rain alone constituted a storm-in-progress that would relieve a property owner from action to clear or maintain its property. In supporting its opinion that the defendant's motion for summary judgment should have been denied, the dissent pointed to the fact that the Authority's records and the certified weather report all indicated that the storm stopped the night before, and that freezing rain had been falling for hours before the accident occurred. As such, it believed that questions of fact existed as to whether conditions were actually a storm-in-progress.

While the dissent presented a vociferous argument, the fact is, the majority held that a certified weather report, coupled with testimony that the storm continued, was sufficient to establish that the defendant was entitled to summary judgment as a matter of law. This decision brings to the forefront the importance of securing certified weather reports as soon as possible to assess not only when the storm stopped, but also the prevailing weather conditions leading up to the time of the accident. When the facts establish that the storm was in progress at the time an accident occurred, counsel should be gathering all evidence and documents from the outset of the assignment to file the motion for summary judgment at the close of discovery.

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Under My Umbrella . . . Baseball Spectator Strikes Out in Bronx County

By Carla Varriale

In *Zlotnick v. New York Yankees Partnership and Major League Baseball* (Supreme Court, Bronx County, Index No. 23243/2012), Justice Lizbeth Gonzalez granted the motion of defendants New York Yankees Partnership (NY Yankees) and Officer of the Commissioner of Baseball d/b/a Major League Baseball (MLB) to dismiss or, in the alternative, for summary judgment in a novel case.

Plaintiff Andrew Zlotnick is an adult, an attorney and a self-professed baseball NY Yankees fan who was struck by a foul ball batted by Hideki Matsui during a game. At the time of the accident, he occupied a Champion Level Field Box seat located approximately three or four rows away from the playing field and near the right field foul pole. He had attended many baseball games at Yankee Stadium and admitted that he was aware of the dangers of foul balls entering the unprotected portions of the stands. He recalled that announcements were made at Yankee Stadium regarding the same. In fact, he had cautioned the children who were with him at the game to be careful because foul balls from a left-handed batter could head in their direction. Matsui is a left-handed batter.

The safety of spectators who choose to sit in unprotected areas of a ball park has been the subject of scrutiny in recent months. Much has been written on the subject (including the *Zlotnick* case) and whether simply providing netting behind home plate is enough to protect spectators, particularly by sportswriter Joe Nocera of the *New York Times*.

Zlotnick presented an interesting spectator safety question because, although the plaintiff conceded he was aware of the risk of injury and chose to sit in an unprotected area anyway, the case involved . . . an umbrella. The game was subject to a rain delay, and he alleged that umbrellas (which he contends should have been banned) obstructed his view and prevented him from perceiving the trajectory of the baseball that struck him. At the time of the accident, the NY Yankees had an umbrella policy which allowed for umbrellas to be used in the stands as long as the use of umbrellas did not interfere with the other guests' enjoyment of the game. Zlotnick never complained about the umbrellas that were opened when it rained intermittently during the game or requested to move to another seat.

New York applies a specialized duty of care in those situations, known as "the Baseball Rule." The Baseball Rule was established by the Court of Appeals and limits the duty of the proprietor of a ball park to provide screening in the area behind home plate where the danger of being struck by a ball is the greatest. "[S]uch screening must be of sufficient extent to provide adequate protection for as many spectators as may be reasonably be expected to desire such seating in the course of an ordinary game." *See Akins v. Glens Falls City School Dist*., 53 N.Y.2d 325 (1981)

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In contrast, some states apply a "duty of reasonable care" or the same duty of care that is applicable to a commercial premises in general (which makes little sense since a baseball stadium is not like a shopping mall or a dry cleaner and presents a different experience and risk of injury, as acknowledged on the *Zlotnick* decision), while other states (such as New Jersey) have crafted baseball-specific liability statutes to protect owners and operators of baseball venues from spectator injury suits.

In *Zlotnick*, NY Yankees proffered evidence that it provided a protected area behind home plate and that the screening was 82 feet wide and 31 feet 8 inches high. The plaintiff's Champion Level Field Box Seat was more than 100 feet away from home plate and the shelter of the protected area. The court held that the plaintiff assumed the risk of injury as a spectator in an unprotected area of Yankee Stadium "where he declined to exercise the various options available to him." The court focused on the announcements and language on the back of the ticket that apprised spectators such as the plaintiff that they could move their seats. However, in doing so, the court blurred the distinction between the Baseball Rule and an assumption of the risk defense and also relied on a spectator's supposed options to move his or her seat, although the court acknowledged of the "unpredictability" of the path of a baseball.

The Baseball Rule provided a unique basis for the court to dismiss this action. Pursuant to the Baseball Rule, the owners and operators discharge their duty of care by providing a protected area **behind home plate** for those spectators who may wish to avail themselves of that protection. The Baseball Rule provided a primary defense to this personal injury action long before the court needed to wade into questions of inherent or obvious risks and whether the plaintiff appreciated those risks or was apprised of them by redundant signage and warnings. Since the plaintiff admitted he was not seated in the protected area (and that he never requested to move there), the court did not need to make any further inquiry. The Baseball Rule eliminated any duty of care owed to him as a matter of law.

Moreover, in *Zlotnick*, the court noted that the defendants somehow owed a "duty of reasonable care to caution spectators seated in the un-netted part of the stadium, which duty was met by an abundance of repetitive written, auditory and visual warnings and the possibility of alternative seating." The court misstated the law in this respect, too. There is no "duty of reasonable care" to protect or to warn of obvious and inherent risks because the obviousness of the risk serves as a warning. *See e.g. Wade-Keszey v. Town of Niskayuna,* 4 A.D. 3d732, 772 N.Y.S.2d 401 (3rd Dep't 2004) ("Accordingly, as defendants established that they owed plaintiff no duty to provide screens or nets above the six-foot sideline fence to protect her from this injury and they had no duty to warn plaintiff of the open and obvious danger presented by foul balls at a baseball park (*see Soich v. Farone,* 307 A.D.2d 658, 659 [2003]), they are entitled to summary judgment dismissing the complaint").

While the outcome of the *Zlotnick* decision and order is sound, the court's logic is flawed. There is no duty to warn of an obvious danger, and whether a plaintiff could have moved his or her seat is irrelevant. Spectators who occupy unprotected areas are not owed a duty of care and certainly assume the risk of injury.[1]

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1. NY Yankees established that "Be Alert for Bats and/or Balls" warning signs are posted on the field access gate, the 30-inch high wall in Section 12 and the back of all Section 12 seats, where the plaintiff was seated.

One the date of the incident, a public address/video announcement was broadcast three times on the Stadium's high-definition screen. New York Yankees players read the first half of the scripted warning: 1) at 11:45 a.m. during batting practice, 2) at the end of the first inning and 3) at the end of the second inning. The plaintiff was struck during the third inning.

Additionally, a warning on the back of tickets stubs issued in 2011 stated:

WARNING: DURNING ALL BATTING PRACTICES, FIELDING PRACTICES, WARM-UPS AND THE COURSE OF THE GAME EXPERIENCE, HARD HIT BASEBALLS AND BATS AND FRAGMENTS THEREOF MAY BE THROWN OR HIT INTO THE STANDS, CONCOURSES AND CONCESSION AREAS.

FOR EVERYONE'S SAFETY, PLEASE STAY ALERT AND BE AWARE OF YOUR SURROUNDINGS. ANY GUEST WHO IS CONCERNED WITH HIS OR HER SEAT LOCATION SHOULD CONTACT ANY CUSTOMER SERVICE REPRESENTATIVE FOR AN ALTERNATIVE SEAT LOCATION.

The bearer of this Ticket assumes all risk and danger incidental to the sport of baseball and all warm-ups, practices and competitions associated with baseball, including specifically (but not exclusively) the danger of being injured by thrown bats, fragments thereof, and thrown or batted balls and agrees that neither the Yankees, the State and City of New York and their various Agencies, Departments and Subdivisions, the Office of the Commissioner of Baseball, MLB Enterprises Inc., MLB Advanced Media, L.P., the Major League Clubs nor any of their respective agents, players, officers, employees and owners shall be liable for injuries of loss of personal property resulting from such causes.

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was too trivial a defect to constitute a dangerous or defective condition). The Appellate Division had noted in *Trincere* that case law reflected a prevailing view to the effect that differences in elevation of about one inch, without more, are not actionable. *See Trincere v. County of Suffolk*, 232 A.D.2d 400, 648 N.Y.S.2d 126 (2d Dep't 1996).

The Appellate Division, Second Department has also stated that "a trivial defect on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip on a raised projection, is not actionable." *See Riser v. New York City Hous. Auth.*, 260 A.D.2d 564, 688 N.Y.S.2d 645 (2d Dep't 1999). "[N]ot every injury allegedly caused by an elevated sidewalk slab need be submitted to a jury, and a trivial defect on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip on a raised projection, is not actionable." *Id*. The Court in *Riser* held that where the plaintiff had tripped and fallen on the edge of a segment of pavement in the sidewalk that "was a few inches in length, and was raised, at its highest point, approximately one inch above the adjacent segment of pavement" it was not actionable. 260 A.D.2d at 564, 688 N.Y.S.2d at 646.

The Court of Appeals decision in *Hutchinson* confirms that in determining whether a condition is a trivial defect, courts will closely examine the condition itself as well as all surrounding circumstances.

Although there is no per se rule as to what constitutes a trivial defect, a review of all the facts and circumstances of the case may render a condition to be trivial and not actionable as a matter of law. *See Iadarola v. Meadows Plaza Dev. Corp.*, 271 A.D.2d 650, 707 N.Y.S.2d 872 (2d Dep't 2000); *Palminteri v. Massapequa Shopping Assocs.*, 264 A.D.2d 412, 693 N.Y.S.2d 444 (2d Dep't 1999); *Santiago v. United Artists Comms., Inc.*, 263 A.D.2d 407, 693 N.Y.S.2d 44 (1st Dep't 1999). "In determining whether a defect is trivial, a court must examine all the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury." *Friedman v. Beth David Cemetery*, 19 A.D.3d 365, 796 N.Y.S.2d 167 (2d Dep't 2005). *See also Trincere*, 90 N.Y.2d at 978, 665 N.Y.S.2d at 616; *Riser v. New York City Hous. Auth.*, 260 A.D.2d 564, 688 N.Y.S.2d 645 (2d Dep't 1999); *Outlaw v. Citibank, N.A.*, 35 A.D.3d 564, 826 N.Y.S.2d 642 (2d Dep't 2006).

In *Hutchinson*, the Court of Appeals, in analyzing how the lower courts handle trivial defect cases, stated that "[o]ur survey of such cases indicates that the lower courts, appropriately, find physically small defects to be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or identify as hazards or difficult to traverse safely on foot . . . . [a]ttention to the specific circumstances is always required . . . ."

Hutchinson v. Sheridan Hill House Corp.

The plaintiff was walking in the Bronx on concrete sidewalk on April 23, 2009 when his right foot got caught on a metal object protruding from the sidewalk. The plaintiff allegedly tripped and fell and commenced a personal injury action against Sheridan Hill House Corp., which owned the building adjacent to the sidewalk.

In December 2010, an employee of Sheridan's counsel visited the location and took photographs and measurements of the metal object, describing it as cylindrical in shape, between one-eighth and one-quarter of an inch above the sidewalk and about five-eighths of an inch diameter.

The trial court granted Sheridan's motion for summary judgment, holding that Sheridan did not have notice of the alleged defect. The Appellate Division, First Department affirmed based on the fact that Sheridan lacked notice and because "a minor height differential alone is insufficient to establish the existence of a dangerous or defective condition."

The Court of Appeals affirmed the dismissal of the action. The Court of Appeals found that Sheridan met its burden of showing that the cylindrical projection was trivial by producing measurements showing that it was only about one-quarter of an inch in height and five-eighths of an inch in diameter. The Court held that the abruptness of the projecting edge was not dispositive and rather relied upon the fact that it protruded only a quarter of an inch, was in a well-illuminated area in the middle of the sidewalk where a pedestrian would not be likely to look only ahead and the surrounding surface was even. Thus, the Court of Appeals held that "[t]aking into account all the facts and circumstances presented, including but not limited to the dimensions of the metal object, we conclude that the defect was trivial in nature."

Zelichenko v. 301 Oriental Boulevard, LLC

On May 2, 2010, the plaintiff was descending a staircase in

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Trivial Matters? The New York Court of Appeals Examines Trivial Defects

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the lobby of a residential building in Brooklyn that he was visiting for the first time. The staircase had five risers, four step treads made of terrazzo, each twelve inches in horizontal depth with a one-inch nosing. The stairs had a handrail on each side. The plaintiff fell when he stepped on the second step from the bottom and his leg allegedly got caught on a chipped piece of the nosing. The plaintiff sued the building owner, 301 Oriental Boulevard, LLC.

At his deposition, the plaintiff identified several photographs depicting the subject stair. One of the photographs depicted a person's shoe, with his or her toe projecting over the nosing of the step.

301 Oriental moved for summary judgment, arguing that the defect was trivial and that it did not have notice of the alleged condition. It relied upon, among other things, an affidavit of an engineering consultant that measured the condition in May 2011 as three inches in width and a half inch deep. The engineering consultant opined that the chipped step was not a tripping or slipping hazard and that there was sufficient space behind the chip for an individual to safely place his foot. In opposition, the plaintiff relied upon the opinion of another engineer, who agreed that the chip was three inches wide but determined that based on the photographs the depth of the chip was one inch.

The trial court denied 301 Oriental's summary judgment motion finding that there were issues of fact concerning whether the defendant had notice and whether the condition was trivial in nature as a matter of law. The Appellate Division, Second Department reversed and granted the motion.

The Court of Appeals reversed the Appellate Division and held that the motion should have been denied. First, the Court noted that contrary to the plaintiff's arguments, the trivial nature of a defect could be applied to stairways, including those in privately owned buildings. However, the Court of Appeals found that, according to the plaintiff's expert, when walking down stairs, a foot can contact with the end of the nosing and thus the step's walking surface extends to the nosing. Moreover, the Court of Appeals opined that just because a person could step to avoid the nosing did not mean that every person would. Thus, the Court held that since the step tread was missing an irregular piece—three inches wide and at least a half inch deep on the nosing where a person might step—there were questions of fact whether the defect was trivial.

Adler v. QPI-VIII LLC

The plaintiff fell while on the interior staircase of her apartment building on March 30, 2010. She claimed that her foot "got caught" on a "big clump in the middle of the stair" that had been painted over. She commenced a lawsuit against CPI-VIII LLC and Vantage Management Services, LLC, the respective owner and manager of her apartment building.

At her deposition, the plaintiff identified photographs that fairly and accurately represented the stairway and "the clump." She testified that the stairway was illuminated by a sixty watt light bulb, that she was looking down as she walked down the stairs, that there was no dirt or debris on the stairs, that the stairs were not slippery or cracked and that she was very familiar with the stairs and had observed "the clump" before. The building superintendent testified that he had not noticed any uneven surfaces on the stairs, was not aware of any prior accidents or complaints and that the stairs had been painted three or four years before.

The defendants moved for summary judgment, arguing that the defect was trivial and that they did not create or have notice of the condition. They did not produce any measurements of the dimensions of "the clump."

The trial court denied the motion and the Appellate Division, Second Department reversed and granted the motion holding that "[t]he evidence . . . established that the alleged defect was trivial as a matter of law and did not possess the characteristics of a trap or nuisance, and, therefore, was not actionable."

The Court of Appeals reversed the Appellate Division and held that the defendants' summary judgment motion should be denied. The Court held that without any evidence of the dimensions of the "clump" it was impossible to determine whether it was a trivial defect. The Court did note that in certain instances through photographs alone, a defendant could establish the trivial nature of the condition.

Summary

The Court of Appeals decision in *Hutchinson* confirms that in determining whether a condition is a trivial defect, courts will closely examine the condition itself as well as all surrounding circumstances, including whether the parties produced reliable measurements and clear, accurate photographs of the condition, the lighting in the area of the accident, how crowded the area is, the ability of the plaintiff to look down where he or she is walking and the possibility whether a person could step on the condition notwithstanding the fact that the condition could be avoided.

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Knockouts and Drug Tests: The Cautionary Tale of Wanderlei Silva

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fought in the promotion on three occasions before becoming a champion in PRIDE—would ultimately come against former champion Chuck "The Iceman" Liddell in December 2007 in one of the most heavily anticipated bouts in mixed martial arts history. He would lose a close decision in an exciting, back-and-forth bout that would be deemed the "Fight of the Year" by numerous media outlets. Although Silva would never regain his championship form, he continued to be a popular figure and headliner throughout his UFC tenure.

There is perhaps no better example of Silva's enduring popularity than his March 2013 UFC bout with Brian "The All American" Stann, which occurred at the site of so many of Silva's greatest moments, the Saitama Super Arena. Stann was a decorated United States Marine. He was awarded the Silver Star after leading a platoon of soldiers who were ambushed by insurgents in Iraq for six straight days. Based in part on strategic decisions made by Stann, all 42 soldiers under his command survived the assault. He then entered mixed martial arts, where he earned a reputation as a heavy-hitting knockout artist and quickly gained popularity. Based on Stann's military career and exciting fighting style, one might expect that he would have been the fan favorite against Silva. However, the majority of the mixed martial arts fan base was supporting Silva in the bout, which ultimately ended via knockout with less than a minute left in the second round. "The Axe Murderer" had once again earned a highlight reel-finish in front of the Japanese fans.

And then came May 2014. Silva was scheduled to fight former middleweight and light-heavyweight contender Chael Sonnen in a highly anticipated bout at UFC 175, which was scheduled to be held in Las Vegas in July 2014. However, the Brazilian was pulled from the fight after a refusal to undergo a random drug test at the request of the Nevada State Athletic Commission (NSAC). A representative of the NSAC arrived at Silva's gym in order to conduct a random blood and urine test. After learning of the drug test, Silva escaped out of a back door and left the gym. The UFC subsequently learned of this and immediately pulled "The Axe Murderer" from the bout with Sonnen, who subsequently tested positive for performance enhancing drugs (PEDs) and was suspended before ultimately retiring from the sport completely.

The NSAC was not pleased with Silva's decision to flee the scene of a random drug test. During a disciplinary hearing in June 2014, "The Axe Murderer" attempted to explain himself by saying that he had been taking a diuretic and wanted to avoid a positive test. Although diuretics are not technically performance enhancing in their own right, their use is banned

Fighters have a relatively short window of time to maximize their earnings potential, which can be reduced significantly by fighting an athletic commission in court to overturn a suspension when they would rather be fighting trained combatants in a cage.

in the NSAC's guidelines as PED users can utilize diuretics in an attempt to flush illegal substances out of their system.

Silva's attorney argued that the NSAC did not have jurisdiction over him at the time of the test as he had not been officially licensed for the UFC 175 bout, and therefore the NSAC had no legal authority to punish him for refusing to take the test. This argument was largely based on two statutes—NRS 467.110 and NAC 467.922(1)—both of which conferred authority on the NSAC to institute disciplinary actions against those persons licensed to fight in Nevada. Silva's attorney essentially argued that, despite the fact that Silva had signed a contract to fight Sonnen at UFC 175 and was already being advertised for the event, he had not been formally licensed by the NSAC. The NSAC, therefore, did not have jurisdiction over Silva, the reasoning went, and could not render any form of punishment against him.

At a September 2014 hearing before the NSAC, this jurisdictional argument was rejected. The commissioners reasoned that Silva was subject to the NSAC's authority the moment

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Knockouts and Drug Tests: The Cautionary Tale of Wanderlei Silva

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he agreed to participate in a bout in Nevada. The mixed martial arts legend then received an unprecedented lifetime ban from competing in Nevada as well as a $70,000 fine. The severity of the punishment was shocking, as a lifetime ban in Nevada essentially equates to a lifetime ban from fighting in North America as most athletic commissions on the continent honor the decisions of other commissions. The UFC also will not promote a fighter who is under suspension by any commissioner, meaning that Silva's UFC contract prevented him from fighting for any other promotion yet his suspension prevented him from being promoted in a bout for the UFC.

To place things in perspective, athletes who tested positive for steroids or other PEDs in Nevada in 2014 typically received suspensions of nine months to a year if it was their first offense. Silva, who may have exercised poor judgment in running from the test, had not actually tested positive yet was issued a lifetime ban. It appeared to many that the NSAC was making an example out of him. Practically overnight, he went from beloved fighter and a legend in his sport to an outcast.

Following his suspension, and after a public dispute, it became clear that the UFC's relationship with Silva had deteriorated. He was ultimately released from his contract.

Silva, through his attorney, appealed the NSAC's decision in Nevada District Court. He again set forth the jurisdictional argument, while also asserting that the NSAC's punishment, even if it did have jurisdiction, was arbitrary and capricious and therefore subject to vacatur.

On May 15, 2015, over two years after Silva's bout against Stann, Judge Kerry L. Earley ruled that the NSAC possessed jurisdiction over Silva at the time of the attempted drug test. However, with regard to the extent of the punishment, Judge Earley was required to determine whether the NSAC's decision was an "arbitrary or capricious abuse of discretion." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 184 P.3d 378 (Sup. Ct. Nev. 2008). In noting that the record before her was "replete with the [NSAC's] own concerns that the sanction [was] indeed arbitrary and not supported by any type of sentencing guidelines or within standard norms," Judge Healey determined that both the lifetime ban and the $70,000 fine were arbitrary and capricious. She then ordered the matter remanded to the NSAC for a rehearing on the appropriate punishment to be imposed.

Silva was ultimately granted a rehearing in February 2016. The NSAC retracted the $70,000 fine it had levied against "The Axe Murderer," reasoning that since he failed to actually fight at UFC 175, the athletic commission had no right to impose a monetary fine. More importantly, Silva's lifetime ban was reduced to a three-year suspension retroactive to May 2014, giving the former PRIDE champion the right to return to

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HRRV'S Carla Varriale to Lead Columbia MMA Symposium "Fight Card"

Columbia University's School of Professional Studies is hosting a symposium to discuss the challenges and the opportunities the sport of mixed martial arts (MMA) faces now that it has been legalized in New York. Panelists, including representatives of both professional and amateur MMA and New York venue operators, will address the regulatory and safety issues as well as their vision for the growth of the sport. The symposium, "Fight Card," will be held on Columbia University's campus on August 16, 2016 from 6:00–9:00 p.m. in Room 515 in Schemerhorn Hall. The symposium will be moderated by noted MMA journalist and author Jim Genia.

HRRV Partner Carla Varriale is an adjunct professor who teaches Sports Law and Ethics in the Columbia University Sports Management program. The symposium is the result of Varriale's class, the first of its kind in a law school or sports management program setting. The class studies the unique legal and political challenges MMA has faced since it was banned in New York. In 1997, New York banned professional MMA; however, amateur MMA was not banned and it existed with scant oversight and regulation. After years of legal and political wrangling, the ban was lifted last year.

"MMA has significant untapped potential in New York, and the symposium will be a thoughtful exchange of ideas, hopes and aspirations for the sport now that it is legal in New York," said Varriale. "Is it without its challenges? Of course not, no sport is. But MMA has made great strides in a short period of time, and it is fascinating to study its growth both from a business perspective as well as from the octagon."

The symposium is open to the public. For information, please contact carla.varriale@hrrvlaw.com.

Knockouts and Drug Tests: The Cautionary Tale of Wanderlei Silva

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active competition in the spring of 2017. He will be almost 41 years old.

Subsequent to the rehearing, Silva signed a contract with the number two mixed martial arts promotion in the world, Bellator MMA. Like the UFC, Bellator MMA typically does not promote fighters who are under suspension with a state athletic commission. The company will likely not announce a bout for Silva until his suspension is over, or at least is near its end. "The Axe Murderer" has also signed a contract with Rizin MMA, a Japanese promotion that has a working relationship with Bellator MMA. His first bout for Rizin MMA will not be in a mixed martial arts contest, but instead in a "special grappling tag match" where he will team up with a yet-to-be announced fighter against Kazushi Sakuraba, a former opponent, and Hideo Tokoro. It is unclear if Rizin MMA will attempt to promote Silva in a mixed martial arts bout during the pendency of his suspension.

Silva's story is a cautionary tale for fighters: it is never a good idea to run from a drug test. Cooperating with the athletic commissions is generally preferable to the alternative. Even if an athletic commission steps beyond its legal boundaries, the time, money and effort necessary to overturn an arbitrary and capricious decision is an extraordinary burden. Fighters have a relatively short window of time to maximize their earnings potential, which can be reduced significantly by fighting an athletic commission in court to overturn a suspension when they would rather be fighting trained combatants in a cage. The risks of consuming banned substances outweigh the possible benefits, and running from a drug test should never be an option. Just ask Wanderlei Silva.

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This article originally appeared in Sports Litigation Alert (www.sportslitigationalert.com).

Tara Fappiano Speaks at Women Leaders in Insurance Defense, Claims and Compliance Conference

HRRV partner Tara C. Fappiano spoke at the Women Leaders in Insurance Defense, Claims, and Compliance Conference held July 20–21, 2016 in New York City. Fappiano was a member of a panel discussing "Trends and Best Practices for Negotiations, Arbitration and Settlements for Companies and Carriers."

HRRV, the third largest woman-owned law firm in New York state, was well-represented at the annual conference, sending 12 woman attorneys to the conference.

Steve Rosenfeld Speaks at North American Contingency Association Conference

On May 12, 2016, HRRV's Steve Rosenfeld presented a multimedia program titled "Risk Assumed. Or Not?" to the annual NACA Conference in Nassau, Bahamas. The presentation explored the critical issue of assumption of risk as a defense when litigating spectator injury claims arising at live entertainment, sports, recreation and amusement venues.

Using a multitude of video clips depicting spectator injury-creating incidents arising from or at live entertainment, sports and recreation events and or amusement venues, Rosenfeld led discussions about the risk at issue geared toward determining whether the risk was or was not assumed—the former of which would relieve the owner or operator of liability.

HRRV Hosts Women Attorneys Rainmaking Event

For the second year in a row, on April 8, 2016, HRRV's White Plains office hosted ABA Women Rainmakers Spring 2016 Local Programming Event. This year's topic was "Don't Be Afraid to Persuade: Using Persuasion to Win." The workshop explored the art of persuasion in depth, using sound principles and group exercises to help the participants gain the confidence needed to succeed at appropriately influencing others. Among the topics discussed were the importance of persuasion, what motivates people to be influenced and developing persuasion skills.

SCHEDULED PRESENTATIONS

- **Litigating Slip, Trip and Fall Cases in New York**
  National Business Institute
  Plainview, New York
  Carla Varriale
  November 18, 2016
  7.0 NY CLE credits
  www.nbi-sems.com

- **Uninsured and Underinsured Motorist Law Made Simple**
  National Business Institute
  Plainview, New York
  Gail Ritzert
  December 12, 2016
  7.0 NY CLE credits
  www.nbi-sems.com

HRRV DECISIONS OF INTEREST

Summary Judgment Granted to Valet Parking Company Based on Plaintiff's Disregard of Open and Obvious Descending Parking Lot Gate Arm

Wexelbaum v. Curbside Hospitality
Supreme Court, Nassau County
Index No. 600636/2013
October 14, 2015

Debra Wexelbaum alleged that on March 10, 2012 she sustained a head injury and concussion, ultimately resulting in a traumatic brain injury, after being struck by a descending parking lot gate arm while leaving Winthrop University Hospital in Mineola, New York. Curbside Hospitality provided valet parking services to the hospital, including employing the attendant who operated the automatic parking gate arm.

Photographs exchanged during the discovery phase revealed that the automatic parking gate arm was painted bright red and white and that the arm also had a bright yellow sleeve, which read "Not a Walkway" in bold red lettering. Additionally, the curb in the area of the automatic parking gate arm was painted bright red, further signifying to pedestrians the dangers of the descending parking gate arm.

The plaintiff testified that as she approached the area of the parking gate arm, she stopped on the sidewalk to allow a vehicle to enter the restricted parking lot, which required the automatic gate to elevate. Immediately after the vehicle passed and while the gate was still elevated, the plaintiff alighted from the sidewalk and proceeded into the area where the gate descends.

Further testimony elicited from the plaintiff confirmed her familiarity with the parking gate arm as the plaintiff had visited her mother at the hospital frequently and the plaintiff admitted to parking in the restricted lot, controlled by the automatic parking gate arm, more than 10 times prior to the date of the alleged incident.

Using the plaintiff's unequivocal testimony that she chose to proceed through the area where the gate descended after a vehicle had just passed, coupled with her testimony that she was familiar with the automatic parking gate arm, Curbside Hospitality moved for summary judgment. Photographs, which the plaintiff conceded fairly and accurately depicted the area of the parking gate arm and clearly showed the numerous warnings visible to pedestrians concerning the descending gate, were submitted in support of the motion.

Curbside Hospitality argued that summary judgment was warranted given the "open and obvious" nature of the parking gate arm, and that the plaintiff was the sole proximate cause of the incident as she alighted from the safety of the sidewalk when only seconds prior she had observed the parking gate elevate. Furthermore, Curbside Hospitality argued that it did not owe a duty of care to the plaintiff.

In granting summary judgment to Curbside Hospitality, Nassau County Supreme Court Justice Roy Mahon found Curbside Hospitality established its entitlement to summary judgment as the automatic parking gate arm was readily observable and that the plaintiff chose to proceed after the gate was raised and the vehicle passed. The court further expressly held that Curbside Hospital did not owe the plaintiff a duty of care.

Despite the significant allegations of a traumatic brain injury, the plaintiff's counsel did not appeal the order.

Contact

Gail L. Ritzert and Amol N. Christian represented Curbside Hospitality.

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HRRV DECISIONS OF INTEREST

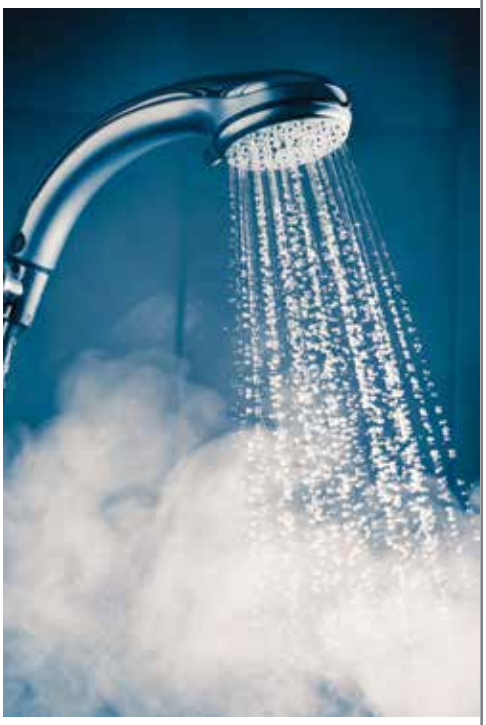
Denial of Summary Judgment on Boiler Case Reversed

Frassinelli and Conti v. 120 East 73rd Street Corp.
Appellate Division, First Department
Index No. 118093/2009
February 9, 2016

Plaintiff alleged that she sustained burn injuries while inside an apartment she had rented for a few weeks in Manhattan, while on holiday from Italy. The building is owned and managed by 120 East 73rd Street, Inc., and Ocram, Inc. The claim was that there was a failed mixing valve, which caused a hot water surge in the building, right as the plaintiff was taking a shower. Plaintiffs also alleged that the bathroom and bathroom fixtures were negligently designed and maintained. 120 East 73rd Street and Ocram moved for summary judgment in the lower court. Despite finding that the moving defendants met their prima face burden, the lower court denied the motion. The court found that there was a question of fact about the moving defendants' maintenance procedures of the boiler and such could be seen as "creation" of a hazardous condition, and also gave credence to the plaintiff's expert opinion about some inapplicable codes. The court granted summary judgment to the boiler inspection company, while at the same time stating that there was a question of fact about whether the actual inspector was properly licensed to do the inspection. The court went on to say that this spoke to whether the building was maintained properly.

120 East 73rd Street and Ocram appealed the court's decision to the Appellate Division, First Department. After hearing oral argument on the appeal, the First Department granted the defendants' motion for summary judgment and dismissed all claims against the defendants. The Appellate Division held that 120 East 73rd Street and Ocram established entitlement to judgment as a matter of law, by submitting evidence that the boiler system was regularly inspected, and that there was no prior notice of fluctuating water temperatures. Plaintiffs failed to raise a triable issue of fact.

The First Department explained that the plaintiffs' reliance on the 1968 NYC Building Code and 2008 NYC Plumbing Code was misplaced, since the building was not subject to these codes. There was also no proof that the bathroom was negligently designed. The Court also held that the plaintiffs' experts opinions were conclusory and insufficient to raise a triable issue of fact. The Court did affirm the dismissal of the claims against the boiler company because, as all parties agreed, there had been no problems with the boiler in the month between when it was inspected and the time of the accident. Also, the plaintiffs' expert did not point to any defect in the valve that actually caused the temperature fluctuation.



The claim was that there was a failed mixing valve, which caused a hot water surge in the building, right as the plaintiff was taking a shower. Plaintiffs also alleged that the bathroom and bathroom fixtures were negligently designed and maintained.

Contact

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HRRV DECISIONS OF INTEREST

Summary Judgment Granted to Retail Store and Property Owners Based on Workers' Compensation Bar and Absence of Duty

Cleary v. AT&T Mobility LLC
Supreme Court, Erie County
Index No. 13610/2009
September 25, 2015

Jenna Cleary was employed as a sales consultant at an AT&T wireless retail location within the Walden Galleria shopping mall, located in Cheektowaga, New York and alleged that she was injured while opening a manually operated overhead door at the AT&T retail store. She alleged that Walden Galleria, Pyramid Management, Pyramid Walden, AT&T Mobility and New Cingular were negligent in permitting the existence of a defective security gate, failing to properly repair the gate, failing to give the plaintiff notice and/or warning of the dangerous condition, failing to properly maintain and care for the gate, failing to prohibit or restrict use of the gate and failing to test and inspect the gate.

In support of the motion for summary judgment, AT&T Mobility LLC (formerly known as Cingular Wireless LLC), Walden Galleria LLC, Pyramid Management Group, Inc., Pyramid Walden Company, L.P. and New Cingular Wireless PCS, LLC first demonstrated that Walden Galleria did not owe the plaintiff a duty of care as it did not own or manage the mall. The defendants also demonstrated through the undisputed documentary evidence and deposition testimony that the manner in which the gate opened was open and obvious and thus not a dangerous condition. Further, they demonstrated that Pyramid Walden as the lessor of the store to New Cingular, Pyramid Management and Walden Galleria did not create the condition and that none of the aforementioned defendants had actual or constructive notice of the purported gate condition that caused the accident. Although there were prior complaints that the gate was heavy and difficult to lift, there were no complaints that the gate suddenly stopped as it was being opened as it did at the time of the accident. The plaintiff could not and did not dispute that Walden Galleria, Pyramid Management and Pyramid Walden did not owe or breach a duty of care.

With regard to AT&T Mobility and New Cingular, it was demonstrated that the claims against these entities were barred by the exclusive remedy provisions of New York Workers' Compensation Law as the plaintiff had already applied for and received benefits from AT&T Mobility and New Cingular's workers'compensation policy. AT&T Mobility and New Cingular demonstrated the following key facts:

- As demonstrated by payroll records, the plaintiff was hired by Cingular Wireless Employee Services, LLC in September 2006.
- Following the accident, the plaintiff applied for and received workers' compensation benefits from AT&T.
- The named insured on the workers' compensation policy was AT&T Inc.
- Cingular Wireless Employee Services LLC was endorsed onto the workers' compensation policy on December 29, 2006.
- AT&T Mobility was an insured entity on the workers' compensation policy.
- The retail store location where the plaintiff was working at the time of the accident was specifically covered under the workers' compensation policy.

Thus, in sum, the plaintiff designated AT&T Mobility and Cingular Wireless as her employer on her application for benefits, AT&T Mobility was a defendant and both AT&T Mobility and New Cingular are both subsidiaries of the named insured on the workers' compensation policy.

The court granted the motion for summary judgment holding that AT&T Mobility and New Cingular were covered under the same workers' compensation policy under which the plaintiff received benefits and thus the plaintiff's exclusive remedy was workers' compensation. Further, the court held that Walden Galleria, Pyramid Management and Pyramid Walden did not owe or breach a duty of care.

Contact

Carla Varriale and Jarett L. Warner represented Walden Galleria, Pyramid Management, Pyramid Walden, AT&T Mobility and New Cingular.

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HRRV DECISIONS OF INTEREST

Appellate Division, Fourth Department Reverses Trial Court and Reinstates Plaintiff's Labor Law § 240(1) Cause of Action

Jeremiah Cullen v. AT&T
Supreme Court, Oneida County/Appellate Division, Fourth Department
Index No. 13610/2009/Appellate Division No. CA 15-01563
June 10, 2016

In *Jeremiah Cullen v . AT&T Inc. and American Tower, L.P.*, the Appellate Division, Fourth Department reversed the order of the Supreme Court, Oneida County, which granted the plaintiff's motion for partial summary judgment against the defendants on his Labor Law § 240(1) cause of action and held that there were questions of fact whether the defendants violated Labor Law § 240(1).

The plaintiff alleged that his accident occurred on January 20, 2012 at a cellular telephone site located at 3181 Southwest Boulevard, Orchard Park, New York. American Tower owned the cellular telephone tower and leased a portion of it to New Cingular Wireless PCS, LLC, incorrectly sued herein as AT&T. New Cingular's management company, CBRE, then hired the plaintiff's employer, WesTower Communications, to perform maintenance work at the location. The plaintiff claims that while working as a climber for WesTower, he "had to utilize slings to pull himself up in the course of repairing the TMA box . . . [when] [h]e slipped and fell downward until jerked to a stop." A TMA (tower mounted amplifier) box amplifies and receives the signal that the cell phone tower receives. The plaintiff claims he injured his right and left shoulders, right and left arms and biceps, neck and back in the accident.

The Supreme Court, Oneida County denied the defendants' motion for summary judgment to dismiss the plaintiff's Labor Law § 240(1) cause of action and instead granted the plaintiff's cross-motion for partial summary judgment. The trial court summarily determined that because Labor Law § 240(1) requires that "the defendant must provide proper safety equipment as to give proper protection to the person performing such work" and "if the plaintiff used the equipment as instructed, which is what the evidence shows, then the Court cannot say that the equipment was proper equipment to provide the proper protection for the plaintiff."

In other words, the lower court determined that because Labor Law § 240(1) requires that proper equipment be provided to the worker and because the plaintiff was injured while using the equipment that was provided, it must mean that proper equipment was not provided.

On appeal, New Cingular and American Tower argued that they demonstrated through the only admissible evidence in the case that the plaintiff was provided with proper and adequate safety equipment at the time of his accident. Thus, they posited that the Supreme Court erred in denying their motion for summary judgment, and at the very least, they demonstrated that questions of fact existed as to whether proper and adequate safety equipment was provided. Thus, the lower court also erred in granting the plaintiff's motion for partial summary judgment. Specifically, the defendants demonstrated through the testimony of WesTower's safety manager and the defendants' tower climbing safety expert that the equipment provided to the plaintiff, which included synthetic chokers cables, was adequate to perform the work.

The Appellate Division reversed the Supreme Court's decision and stated in its decision that:

> [T]here are issues of fact whether the safety devices provided proper protection, and whether the absence of additional safety devices provided proper protection, and whether the absence of additional safety devices was a proximate cause of plaintiff's injuries. . . . In opposition to plaintiff's cross-motion [for summary judgment], defendants submitted an expert affidavit sufficient to raise an issue of fact whether the safety devices provided to plaintiff were adequate for his work. . . . Although the deposition testimony of plaintiff and his coworker and the affidavit of plaintiff's expert indicated that additional safety devices should have been provided, we conclude that the conflicting opinion of the defendants' expert raises an issue of fact whether the absence of other safety devices proximately caused the plaintiff's injuries.

Contact

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HRRV DECISIONS OF INTEREST

Assumption of Risk Applied to Defeat Negligence Claims in Overturned Raft Case

Juanita Thomas v. Splish Splash at Adventureland, Inc. d/b/a Splish Splash and Festival Fun Parks, LLC
Supreme Court, Nassau County
Index No. 600287/14
July 22, 2016

Juanita Thomas sustained personal injuries when the multi-person raft she was riding on flipped over at the attraction known as "Hollywood Stunt Rider." She later sued the water park, Splish Splash at Adventureland, operated by Festival Fun Parks, LLC.

The defendants established that the risk of becoming separated from the raft, making contact with the wall or other aspects of the attraction was an obvious and inherent part of the attraction. They also proffered an affidavit from an expert in the analysis and reconstruction of water park accidents who performed an inspection of the ride and opined that it was properly operated and had redundant means of prudent and appropriate warnings for water patrons.

The plaintiff argued that the rafts were dangerous and defective, that she was not properly supervised and that there was an insufficient amount of water in the ride. She also claimed that she was not sufficiently warned that she could be forcibly thrown from the raft. She argued that the risks associated with Hollywood Stunt Rider were concealed because the ride is enclosed and not open.

The Supreme Court, Nassau County held that the plaintiff's negligence action was barred by her assumption of the risk. As an adult who voluntarily rode Hollywood Stunt Rider, the plaintiff assumed the risk inherent in that activity, including the risk that she could become separated from her raft and injured. The court further held that the plaintiff offered no countervailing expert opinion, no evidence of a defective and dangerous condition over and above the risk inherent in the subject activity or evidence of any action that unreasonably increased the "clearly open and obvious risk inherent in riding on the Hollywood Stunt Rider attraction." Therefore, the court granted the summary judgment motion and dismissed the plaintiff's negligence action.

Contact

Carla Varriale represented Splish Splash at Adventureland, Inc. and Festival Fun Parks, LLC.

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Federal Court Dismisses RICO/ Sherman Act Case Against Appraisal Company Based on Plaintiff's Apparent Dissatisfaction with Divorce Trial

Courboin v. Scott
United States District Court for the District of New Jersey Civ. No. 15-cv-2639 (KM)
March 3, 2016

Plaintiff alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, et seq. and the Sherman Act of 1890, against all defendants. The claims were based on the plaintiff's apparent dissatisfaction with the outcome of his previous divorce trial, which was held in New Jersey Family Court in 2009. As to defendants Arthur J. Smith and Arthur J. Smith Appraisals, LLC, the plaintiff's allegations of wrongdoing stemmed from an appraisal of the plaintiff's marital residence performed in connection with a divorce proceeding. Plaintiff alleged that the Smith defendants charged $550 for the appraisal, $200 more than New Jersey Appraisals, Inc. (a competing appraiser) apparently charged to appraise the same property. Plaintiff further alleged that the Smith defendants used "illegal, antique" forms for the appraisal and that the New Jersey Yellow Pages did not contain a listing for its company.

The court dismissed the case against the Smith defendants based on lack of jurisdiction and failure to state a claim. The court based its decision largely on the Rooker-Feldman doctrine, in which lower federal courts cannot entertain federal claims previously adjudicated in state court or inextricably intertwined with a state court action. Here, the plaintiff's claims that his ex-wife's attorneys retained experts for trial at exorbitant rates depleting the marital estate were found to be inextricably intertwined with the state divorce proceedings. Further,the plaintiff previously asserted similar claims in a prior New Jersey state court action. Lastly, there was no basis for the plaintiff's civil RICO and Sherman Act claims.

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HRRV DECISIONS OF INTEREST

Appellate Division Deflates Spectators' Airborne Bouncy House Claims

Stanton v. Oceanside Union Free School District
Supreme Court, Nassau County
Index No. 1925/12
June 1, 2016

Multiple lawsuits, ultimately consolidated, were commenced against the Oceanside Union Free School District, the Oceanside United Soccer Club and the Eastern New York Youth Soccer Association, Inc. seeking recovery for injuries allegedly sustained at the Soccer Club's annual year-end soccer festival. At the festival, which took place at the Oceanside Middle School athletic field, several inflatable rides became airborne due to a high, unpredictable gust of wind. The airborne inflatable rides then came into contact with the plaintiffs, who were spectators at the event. The school athletic fields were owned by the defendant Oceanside Union Free School District. The Soccer Club obtained a permit to use the school athletic field for the limited purpose of holding its year-end event there. The Soccer Club rented inflatable rides used at the festival from the defendant Affordable Inflatables and Party Rentals, Inc., which also delivered the inflatable rides, set them up, and staffed them.

The defendants' motion for summary judgment was denied by the Supreme Court, Nassau County which found that there were issues of fact as to: (1) whether the Oceanside School District and Soccer Club breached their "non-delegable common law duties" to maintain the premises in a reasonable safe condition for the public and to those persons invited to the premises; (2) whether the defendants directed the manner or method of securing the inflatable rides; and (3) whether an indemnification clause, which allegedly required the Soccer Club to indemnify Affordable Inflatables for any liability arising from the incident was enforceable.

On appeal, the Appellate Division, Second Department unanimously reversed the denial of summary judgment, dismissing all claims and cross-claims against the Soccer Club, based primarily on the general rule that one who hires an independent contractor may not be held liable for the negligent acts of the independent contractor. While the Court recognized the non-delegable duty exception to the independent contractor rule where the party is under a duty to keep premises safe, the Court determined that the Soccer Club was a licensee, not exercising control over the school's premises, and thus owed no such duty to the plaintiffs. In opposition to the Soccer Club's prima facie showing of entitlement to summary judgment, the plaintiffs and the other defendants failed to raise a triable issue of fact.

The Court further held that the Oceanside School District also was entitled to summary judgment dismissing all claims and cross-claims asserted against it. "The School District established, prima facie, that it did not create or have actual or constructive notice of the alleged dangerous condition" and "in opposition, the plaintiffs and the codefendants failed to raise a triable issue of fact."

Lastly, the Court held that the Soccer Club was entitled to summary judgment dismissing the cross-claims for contractual indemnification asserted against it by Affordable Inflatables. While the Court was mindful of the principle that a contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous, the Court determined that any intent for the Soccer Club to assume the role of indemnifying Affordable Inflatables was not sufficiently clear and unambiguous, based upon the language of the agreement. No triable issue of fact was raised in opposition.

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HRRV DECISIONS OF INTEREST

Injured HVAC Maintenance Worker's Labor Law §§ 240(1) and 241(6) Claims Dismissed—Work Performed Was Deemed Routine Maintenance and Did Not Qualify as an Activity Covered under the Labor Law

Nielson v. Vornado Forest Plaza LLC
Supreme Court, New York County
Index No. 160372/2013
July 7, 2016

George Nielsen was allegedly injured when he fell from an interior ladder leading to the roof of a Planet Fitness gym located in Staten Island, New York. Nielsen—a heating, ventilation and air conditioning (HVAC) technician—was at the gym to perform routine maintenance on its rooftop HVAC units, in conjunction with a written maintenance contract. He successfully ascended the ladder and opened a roof hatch to gain access to the roof, leaving the hatch open behind him. It then began raining. While inspecting the units prior to performing his maintenance work, he observed that the inducer motors in two of the units were not turning on. He decided to obtain a testing device from his truck to determine what, if anything, was wrong with the motors. Nielsen slipped and fell while descending the interior ladder, the rungs of which were wet due to the fact that he had left the roof hatch open while it was raining. He allegedly sustained injuries to numerous body parts, including his neck, requiring two cervical spine surgeries. He also claimed to have been rendered permanently unable to work.

Nielsen thereafter commenced suit against Planet Fitness, among other defendants, alleging that the ladder and the hatch were defective or otherwise contained insufficient safety measures, such as nonslip tape on the ladder's rungs, thereby causing his accident. He asserted that Planet Fitness was liable under a theory of common law negligence as well as under the provisions of Labor Law §§ 200, 240(1) and 241(6).

At the close of discovery, HRRV moved for summary judgment on behalf of Planet Fitness, seeking dismissal of Nielsen's Labor Law and negligence action. In particular, HRRV sought dismissal of his claim pursuant to Labor Law § 240(1), which serves to protect workers from certain height-related accidents and does not allow for a plaintiff's comparative negligence to be considered when awarding damages once a statutory violation has been established. HRRV argued that Nielsen's work at the time of the accident was mere routine maintenance, which did not qualify as an activity covered by § 240(1), such as building repair or alteration.

HRRV also argued that the fact that Nielsen was in the midst of going to his truck to obtain a testing device to determine what the issue with the motors was did not transform his routine maintenance work to repair work, as one could draw a bright line between the two types of work. This argument was supported by the fact that Nielsen did not have the equipment needed to repair or replace the motors on his truck, even if he had been able to diagnose the issue with the motors. HRRV also argued that the work Nielsen would have potentially performed to replace the motors if his accident had not occurred was relatively simple and easy, such that it could not possibly have qualified as repair work. In support of this latter argument, HRRV submitted the affidavit of David Bruhns, P.E., an expert in HVAC systems, who opined as to the specific work involved in replacing motors such as those at issue.

Additionally, HRRV argued that Law § 241(6) only covers work involving construction, excavation or demolition, and the work at issue clearly fell into none of those categories. HRRV also argued that the Industrial Code provisions alleged by Nielsen to support his § 241(6) claim were either too general to establish a statutory violation or irrelevant to the facts of the case, and that alleged violation of regulations promulgated by the Occupational Safety and Health Administration (OSHA) could not support a claim under the statute.

Justice Arthur Engoron of Supreme Court, New York County, issued an order dismissing Nielsen's Labor Law §§ 240(1) and 241(6)claims. The court held that Nielsen's routine maintenance work did not qualify for the protection of § 240(1) as a matter of law. He agreed with HRRV that there was a bright line separating Nielsen's work at the time of the accident, which qualified as routine maintenance, from the potential repair work that may have been necessary if he had been able to diagnose the issue with the motors. In dismissing Nielsen's § 241(6) claim, Justice Engoron held that the Industrial Code provisions alleged were not sufficiently specific or were wholly inapplicable to the facts of the case. The court also held that violations of OSHA regulations could not support a claim under the statute, thereby warranting dismissal of Nielsen's § 241(6) claim.

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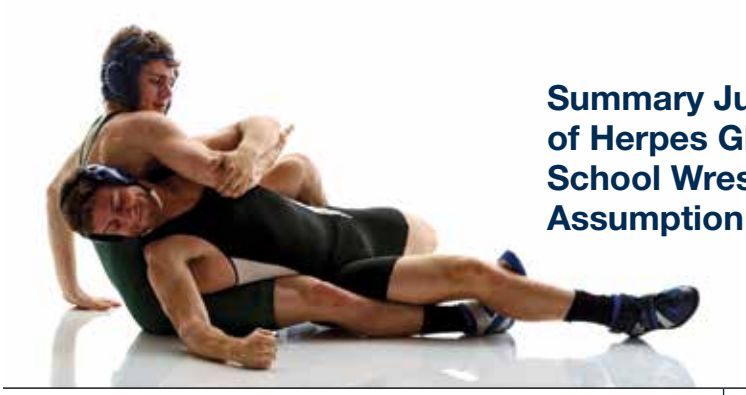
HRRV DECISIONS OF INTEREST



Summary Judgment Granted in Favor of Herpes Gladiatorum Claims by High School Wrestlers Dismissed Based on Assumption of the Risk

Biondo and Candino v. NYSPHSAA, Inc.
Supreme Court, Erie County
Index No. 1443/12
May 19, 2016

In two separate actions commenced on behalf of high school wrestlers stemming from the same wrestling tournament in February 2011, Justice Diane Devlin of the Supreme Court, Erie County granted the defendants' motions for summary judgment. The plaintiffs alleged that they had contracted herpes gladiatorum and MRSA from another wrestler while competing in a wrestling tournament at Starpoint High School, sponsored and coordinated by Section VI of the NYSPHSAA. Plaintiffs brought the lawsuit against Section VI of the NYSPHSAA and NYSPHSAA, Inc. as well as several school districts, a tournament physician, the high school wrestler from whom the plaintiffs alleged they contracted the communicable skin diseases, the wrestler's parents and his primary case physician.

In support of their motion for summary judgment, defendants argued that the plaintiffs' assumption of the inherent, obvious risks of contracting communicable skin diseases including herpes gladiatorum and MRSA while wrestling, notwithstanding their awareness that they could generally contract communicable skin diseases (but denial of being aware of the risk of contracting herpes), negated the defendants' putative duty of care. In arguing that communicable skin diseases, including herpes, are an inherent risk of the sport of wrestling, HRRV highlighted the persuasive case law of *Farrell v. Hochhauser,* 65 A.D.3d 663, 884 N.Y.S.2d 261 (2d Dep't 2009), the expert opinion of the defendants' wrestling and medical expert, Dr. BJ Anderson, which went unrefuted in opposition, as well as the testimony of the plaintiffs, in which they admitted their awareness of contracting certain communicable skin diseases in wrestling.

Defendants presented the similarities between the plaintiffs' claims and those advanced in the *Farrell* case, which in sum held that wrestlers assume the risk of contracting herpes gladiatorum, an inherent risk in the sport. Moreover, defendants demonstrated how each plaintiff must be held to assume the risk of contracting herpes gladiatorum, based upon the plaintiffs' testimony, their age, experience, skill and knowledge.

Defendants further argued that they had abided by the National Federation of High Schools Rules for Wrestling, in that the suspected student wrestler ruled out a contagious skin disease by using the mandatory Communicable Skin Disease Form, completed by a medical practitioner and reviewed by an on-site physician at a wrestling tournament—and so he was permitted to wrestle.

In opposition, the plaintiffs contended that the defendants failed to warn the plaintiffs of the specific risk of contracting herpes, even though record evidence is to the contrary. They also contended that herpes is in a "different class" of communicable skin diseases and should not be grouped together with the more common communicable skin diseases of ringworm and impetigo, usually associated with wrestling.

On reply, the defendants pointed out the lack of a medical or liability expert to support the plaintiffs' contentions.

The court granted summary judgment to all defendants—based upon the doctrine of assumption of the risk, the Appellate Division, Second Department's holding in *Farrell*, the lack of an expert opinion proffered by the plaintiffs and the absence of a duty of care.

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HRRV DECISIONS OF INTEREST

Application of "Storm-in-Progress" Rule Results in Dismissal of Action Against Property Owner

Hackett v. City of New York
Supreme Court, Bronx County
Index No. 0301370/2011
July 5, 2016

Annabell Hackett alleged that she slipped and fell on the sidewalk abutting the premises located at 476 East 187th Street, New York, New York and that the defendants, The City of New York and Alan Rena Realty Corp., were negligent in that they created a slippery condition by allowing ice and snow to exist on the sidewalk abutting the premises. The incident was alleged to have occurred during the historic blizzard of 2010. Hackett underwent an open reduction internal fixation surgery. The plaintiff's settlement demand was $850,000. Both defendants moved for summary judgment, and the court dismissed all claims .

The City of New York moved for summary judgment on the grounds that, pursuant to the Sidewalk Law, the City is exempt from liability for failure to remove snow and ice provided no voluntary snow removal efforts created or exacerbated a hazardous condition. The plaintiff attempted to oppose the motion by submitting the affidavit of an expert in response to the motion. The court, in the exercise of its discretion, declined to consider the affidavit in that it was not disclosed previously. The court also noted that had it considered it, it was lacking in probative value and the witness did not qualify as an expert. The expert's opinions were also too speculative to create a question of fact (i.e. that the City's snow removal must have created an improper pathway), and therefore the City's motion was granted.

HRRV moved on behalf of Alan Rena Realty, the property owner, and argued that there was a "storm-in-progress," which suspended the property owner's duty to take reasonable measures to remedy a dangerous condition, and that the insured did nothing to create a hazardous condition. HRRV showed that when the area was last inspected at 6 a.m., the area was clear, and the property owner did not need to shovel because the snow had stopped.

There was, however, an inconsistency in the evidence. A non-party witness stated that he was present at 7 a.m. and there were mounds of snow, spilling onto the sidewalk, with an 18-inch pathway. Additionally, there was new accumulation over the shoveled path, indicating heavy snowfall. He also discussed a thick patch of ice which had melted and refrozen. The plaintiff also described patted down snow and ice, over the pathway, without any salt or sand.

The court explained that the owner could only be held liable if its snow removal efforts were not done with reasonable care. Here, the court found that the owner's efforts were "at worst, incomplete." There was no evidence to establish that the owner made the area more hazardous or dangerous by those efforts. Thus, the claims were dismissed.

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HRRV DECISIONS OF INTEREST

Summary Judgment Granted to Bowling Center Against Claims of Negligent Security and Failure to Warn

Francis v. Grace Lanes d/b/a Jib Lanes
Supreme Court, Queens County
Index No. 10119/2014
February 19, 2016

Tamara Francis commenced an action for personal injuries she sustained while at the defendant's bowling center. An unruly patron, who had been escorted out of the bowling center earlier by a Jib Lanes security guard, returned to the premises and began firing gunshots in the parking lot. Upon hearing gunshots, patrons began to scatter throughout the premises to take safety. Francis alleged that she was directed by a Jib Lanes employee to hide in a utility closet. While hiding in the closet, Francis purportedly stepped in an open drainage hole, injuring her leg. Francis alleged that Jib Lanes was negligent in failing to provide adequate security at the premises, and in failing to warn of the allegedly defective drainage hole in the utility closet.

Jib Lanes moved for summary judgment, arguing that it satisfied all duties owed to plaintiff. It was argued that not only does the shooting constitute a sudden and unforeseeable criminal act by a third party, for which Jib Lanes cannot be held liable, but the evidence confirms that Jib Lanes provided adequate security and satisfied its duty to intervene by ejecting the unruly patron in the first instance. It was further argued that the plaintiff cannot maintain a negligence claim against Jib Lanes based upon her stepping into the open drainage hole in the utility closet, since the utility closet is not an area accessible to patrons under normal circumstances.

Justice Timothy J. Dufficy, sitting in Supreme Court, Queens County, agreed, holding that Jib Lanes had put forward a prima facie showing of entitlement to judgment as a matter of law by submitting evidence demonstrating that the bowling alley operator did not have the ability or opportunity to control the conduct of the shooter in the parking lot.

Justice Dufficy reasoned that: (1) the shooter had been removed from the premises by alley security guards and then suddenly began shooting; (2) the bowling alley manager testified that there had been no other incidents of this nature at the bowling alley; and (3) the bowling alley employee's suggestion that the plaintiff hide in the closet was characterized as an immediate response to an emergency situation. The court concluded that under the unusual circumstances of this case, the factual scenario was too attenuated and unforeseeable to hold the bowling alley liable, and awarded Jib Lanes summary judgment, dismissing plaintiff's complaint in its entirety.

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Bowling Lane Fall Claim Dismissed

Priola v. Herrill Bowling Corp. d/b/a Herrill Lanes
Supreme Court, Nassau County
Index No. 600507/2014
March 15, 2016

Plaintiff, who was bowling with her usual Tuesday league at the defendant's bowling alley, claimed that her foot became stuck to the wooden floor of the approach while she was about to release her ball into the lane. The plaintiff fell forward into the lane.

In sum, the court held that defendant Herrill met its initial burden on moving for summary judgment, which is to tender some evidence establishing that it maintained its property in a reasonably safe manner and did not have notice of or create a dangerous condition posing a foreseeable risk of injury.

Seizing on the plaintiff's inability to identify precisely what caused her to fall, the court held that "when a defendant demonstrates that a plaintiff does not know what caused her to fall, defendant has established its entitlement to summary judgment as a matter of law. Causation cannot be based in speculation."

The court considered the affidavit in opposition of the plaintiff's expert engineer, even though the court had the discretion not to consider it, because the expert had not been disclosed prior to the motion. Notwithstanding the expert's opinion, the court held that the plaintiff failed to raise a triable issue of fact.

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HRRV DECISIONS OF INTEREST

Plaintiff's Failure to Identify Any Alleged Defect in the Premises Causing His Fall Leads to Granting of Summary Judgment in Favor of Defendants

Johnson v. 675 Coster Street Housing Development Fund
Supreme Court, Bronx County
Index No. 301361/2012
June 15, 2016

Oliver Johnson filed a complaint in Supreme Court, Bronx County, seeking damages arising out of an incident that allegedly occurred on January 6, 2011. Johnson said that he was injured at the premises located at 675 Coster Street, Bronx, New York, when he slipped and fell on a stairway, due to a dangerous and defective condition. More specifically, the plaintiff alleged that while descending the stairs between the third and second floors of the defendants' building, his right foot slipped out from under him as he was nearing the second floor. The building was owned by 675 Coster Street Housing Development Corporation (HDFC) and managed by PWB Management.

The defendants moved for summary judgment on the grounds that the plaintiff failed to identify the alleged defect in the defendants' premises that caused his fall. Under the common law, a landowner has a duty to maintain his or her property in a reasonable safe condition, and liability for a dangerous condition requires proof that either the owner created the condition, or, that he had actual or constructive notice of a dangerous condition. *Piacquadio v. Recine Realty Corp.,* 84 N.Y.2d 967, 969 [1994].

In support of their motion, the defendants' submitted Johnson's deposition testimony, wherein he acknowledged that he did not know what allegedly caused his fall until after the fact. In opposition, the plaintiff submitted an affidavit which mirrored the words and description of the defective condition as described by his expert.

The court found that the affidavit by the plaintiff was an attempt to add additional defects never before mentioned and was made to tailor his version of the facts to meet the defects alleged, but not shown by his expert's affidavit, report or photographs. As the plaintiff did not attribute his fall to any defects which might have been afflicting the stairs as determined by his expert, the court held that the defects were not the proximate cause of the plaintiff's accident.

Accordingly, the defendants' motion for summary judgment was granted it its entirety. The plaintiff's settlement demand had been $350,000.

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