LEGAL INSIGHTS

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INSURANCE COVERAGE CORNER

Post-*Burlington*: Courts Still Expansively Apply Some Additional Insured Endorsements

By Brian A. Bonser

The Court of Appeals' decision in *Burlington Ins. Co. v. NYC Transit Authority*, 29 N.Y.3d 313 (2017) was widely interpreted by commentators and practitioners as a significant new restriction on the scope of additional insured coverage in New York. After the Court issued the *Burlington* decision, it was often reported that the Court had held that additional insured coverage applies only "to injury proximately caused by the named insured" and that "an additional insured may [not] collect for an injury caused solely by its own negligence." That was true, of course. Often overlooked in the analysis, however, was the fact that the Court's decision only applied to the language used in one specific ISO form—a form that is not in universal use.

In *Burlington*, the Court interpreted "the latest" ISO additional insured

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Divided Court of Appeals Removes Hurdle for Tort Plaintiffs to Obtain Summary Judgment

By Lori F. Graybow

On April 3, 2018, the New York Court of Appeals reversed the Appellate Division, First Department in *Rodriguez v. City of New York*, 2018 N.Y. Slip Op 02287, and appears to have departed from its own long-standing precedent as to the burdens a plaintiff moving for summary judgment bears. In a 4-3 decision, the majority held plaintiffs seeking *partial* summary judgment in comparative negligence cases, no longer bear the burden of establishing the absence of their own comparative negligence.

Briefly, plaintiff Carlos Rodriguez, a New York City Department of Sanitation garage utility worker, was injured when a sanitation truck, backing up into the Manhattan 5 facility in order to be outfitted with tire chains and a plow, skidded several feet, hit a parked car and pinned the plaintiff up against the rack of tires. At the trial court

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The "Next Battle" Against Ticket Resellers: New York Yankees Strike Out in Ticketing Case

By Carla Varriale

The Supreme Court, Bronx County recently issued a preliminary injunction and blocked the New York Yankees Partnership (NYY) from reclaiming tickets purchased by Maryland-based ticket brokers, ASC Ticket Co. Citing the "illegal war that New York sports teams have been waging against ticket resellers" and "false propaganda that ticket resellers are evil and the cause of inflated prices,"[1] the plaintiffs successfully argued that NYY caused irreparable harm to them and, potentially, to the ticket-buying public. The case was subsequently resolved and is subject to a confidentiality agreement, according to the plaintiffs' attorney.

In November 2017, the plaintiffs purchased 52 season tickets from NYY for the sum of $440,885. In February 2018, three months after the plaintiffs purchased the season tickets and after they had received a confirmation of their purchase, NYY advised the plaintiffs that the season tickets had been "released." NYY further advised the plaintiffs that its analytics team had determined that the plaintiffs' buying behavior did not fit unspecified NYY criteria. No further explanation was provided.

Plaintiffs claimed that one day later, NYY reimbursed them for the purchase price of the season tickets (without interest, despite the fact that NYY held the purchase sum for approximately three months). Plaintiffs immediately wrote to NYY and advised NYY that releasing the season tickets purchased violated New York law and demanded that the season tickets not be resold. NYY never responded. Plaintiffs commenced an action against NYY and promptly sought an injunction.[2]

The plaintiffs argued that NYY rescinded the season tickets because of the plaintiffs' intention to resell them. They further alleged that NYY intended to keep the tickets and charge artificially inflated prices, to the detriment of the plaintiffs and the ticket-buying public. Employing a mixed metaphor, the plaintiffs contended that NYY attempted to make an "end

1. The plaintiffs alleged that the sports teams *themselves* have sought to monopolize ticket sales and to create price floors in order to prop up the value of a ticket. The plaintiffs gave an example of NYY's venerable "Legends" seats, which they claimed can be purchased on the open market for significantly less than their $1,000 face value, which was "abhorrent" to NYY and to the detriment of NYY's efforts to market those seats as exclusive seating.

2. Plaintiffs alleged three causes of action in their complaint and sought reasonable attorneys' fees, as permitted under Article 25 of New York's Arts and Cultural Affairs Law (ACAL). Plaintiffs sought injunctive relief for alleged violations of ACAL §25.30 (1)(a) based on NYY's express prohibition on restricting the resale of tickets as a condition of its purchase, and breach of contract based on NYY's putative order confirmations for each of the season tickets before NYY rescinded the plaintiffs' order for the season tickets. Plaintiffs' complaint noted at Paragraph 41 that the terms and conditions that the plaintiffs agreed to when purchasing the season tickets did not permit NYY to revoke the season tickets based on unspecified "buying behavior." Plaintiffs also claimed, at Paragraph 45, NYY's "criteria" concerning the plaintiffs' alleged "buying behavior" was nothing more than a guise for its illegal policy of targeting and taking inventory away from ticket resellers. Plaintiffs alleged, at Paragraphs 46 through 49, that NYY's actions harmed the plaintiffs (who could not fulfill orders for tickets, thereby harming their business and reputation in a manner that could not be remedied by money damages alone) as well as the ticket-buying public. Given the undisputed public interests implicated, the plaintiffs contended that they required injunctive relief.

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House Bill HR 620 and Its Potential Effect on ADA Litigation

By Tara C. Fappiano and Jonathan W. Greisman

On February 15, 2018, the United States House of Representatives passed the ADA Education and Reform Act (HR 620) by a vote of 225 to 192. This represents a significant step forward in legislative efforts in dealing with the scope and application of litigation involving the Americans with Disabilities Act (ADA).

The ADA was enacted in 1990 and amended in 2008. Expanding from the foundations of the Rehabilitation Act of 1973, the ADA was enacted to further expand the protections offered to individuals with qualified disabilities. The ADA prohibits discrimination based on disability in: employment (Title I), accessing public entities (Title II) and accessing public accommodations (Title III).

Title II of the ADA typically governs the disability accessibility of state and local entities as well as housing programs operated by public entities. *See* 28 CFR 35.151. Title II, in conjunction with Section 504 of the Rehabilitation Act, the Fair Housing Act and the New York State Human Rights Law, may form the basis in lawsuits against private apartment complexes. Title III of the ADA, on the other hand, governs all private entities that provide public accommodations. This has ben defined by the courts to include many commercial entities, such as restaurants, shops and bars. Therefore, if you are operating a business, chances are you will be affected by the ADA.

Small business owners are affected by the ADA and the need to comply with its provisions. Older buildings, especially those in the New York City area, usually do not conform to the stringent standards set forth under the ADA. Many lawsuits are commenced in good faith, but there has been a trend over the past decade toward serial ADA litigation. Not only does this type of litigation create problems for small business owners, it undermines the merit of many legitimate lawsuits and the intent of the ADA to protect against discrimination.

The ADA Education and Reform Act, Bill HR 620, is a legislative response to curtail the effects of serial ADA litigation, while at the same time supporting legitimate claims. ADA litigation is a long and complicated process. ADA violations require extensive expert discovery as to the specific violations. The ADA also contains a fee-shifting statute that gives courts discretion to allow the prevailing party to collect attorneys' fees from the losing party. In addition, a successful defense to ADA litigation requires the collaboration of the insured and their defense counsel. Many times these suits are covered under general liability policies, but knowledge of the intricacies of the ADA is necessary to mount a successful defense.

HR 620 puts some prerequisites to litigation in place. If passed, a plaintiff may not commence litigation, until he or she has (1) provided to the owners or operators a written notice specific enough to identify the barrier, and (2) the owners or operators fail to provide the person with a written description outlining improvements that will be made to improve the barrier within 60 days of receipt of the written notice. The bill gives business owners time to remedy the defect, potentially avoiding litigation, but also encourages early and effective compliance with the ADA. The question will be whether the law will discourage the type of complaints previously based on boilerplate allegations, rather than "specific identification of [the] barrier." Some states, such as California, have passed similar bills into law. *See, e.g.,* SB 1186.

Unsurprisingly, as soon as HR 620 was passed by the House of Representatives, it faced staunch opposition from disability advocates and the Democratic Party. In March, 43 Democratic senators, led by Sen. Tammy Duckworth (D-IL), pledged to block a Senate vote on HR 620 via filibuster. As a result, HR 620 has not yet been heard on the Senate floor, rendering the future of the bill uncertain. Regardless of whether HR 620 ultimately becomes law, the bill represents the furthest that a bill of its nature has gone on the federal level.

If HR 620 overcomes the filibuster and becomes law, it will undoubtedly offer significant benefits to business owners. Nevertheless, the best deterrent to ADA litigation is always proactive compliance with the ADA, whether at the time of an initial complaint, or even before the complaint is made. Faced with litigation, early assessment of the claim by an attorney knowledgeable about the ADA is a good first step toward building a defense and possibly early resolution.

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HRRV works with its clients every step of the way, from prevention, claim notification, service of lawsuit, discovery, resolution and post-resolution remediation to provide sound guidance in navigating through complex issues such as ADA litigation.

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level, the plaintiff moved for partial summary judgment on the issue of the defendant's liability. The defendant, in turn, opposed the motion and cross-moved for summary judgment in its favor. The Supreme Court denied both motions, finding triable issues of fact regarding foreseeability, causation and the plaintiff's comparative negligence. The plaintiff subsequently appealed. The First Department, with two justices dissenting, affirmed, relying on *Thoma v. Ronai*, 82 N.Y.2d 736 (1993), that the plaintiff was not entitled to partial summary judgment on the issue of liability because he failed to make a prima facie showing that he was free of comparative negligence. The dissent, relying on the language and purpose of CPLR article 14-A, would have held that the plaintiff does not bear the burden of disproving the affirmative defense of comparative negligence, and thus, the plaintiff should have been granted partial summary judgment on the issue of the defendant's liability. The First Department subsequently granted leave to appeal to the Court of Appeals.

According to the Court of Appeals, placing the burden on the plaintiff to show an absence of comparative fault is inconsistent with the plain language of CPLR 1412. In 1975, New York adopted a system of pure comparative negligence and, in so doing, directed courts to consider a plaintiff's comparative fault only when considering the amount of damages a defendant owes to the plaintiff. The Court of Appeals indicated that the approach urged by the defendant is, therefore, at odds with the plain language of CPLR 1412, because it flips the burden, requiring the plaintiff, instead of the defendant, to prove an absence of comparative fault in order to make out a prima facie case on the issue of defendant's liability. The defendant pointed to CPLR 3212(b), which provides, "[a] motion for summary judgment shall . . . show that there is no defense to the cause of action." The defendant's approach would require the courts to consider comparative fault a defense. But, the majority held that, although comparative negligence is an affirmative defense, it is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence, and, as CPLR 1411 plainly states, it is not a bar to the plaintiff's recovery, but rather a diminishment of the amount of damages.

The Court of Appeals, in rejecting the defendant's contention that granting a plaintiff partial summary judgment on a defendant's liability served no practical purpose, noted it narrowed the number of issues presented to a jury. The court further stated that:

In a typical comparative negligence trial, the jury is asked to answer five questions:

1. Was the defendant negligent?
2. Was the defendant's negligence a substantial factor in causing [the injury or the accident]?
3. Was the plaintiff negligent?
4. Was the plaintiff's negligence a substantial factor in causing (his or her) own injuries?
5. What was the percentage of fault of the defendant and what was the percentage of fault of the plaintiff?

The decision is clear that, even when a plaintiff obtains partial summary judgment, only the first two questions above are established as a matter of law. There still must be a determination made at trial, by the trier of fact, as to a plaintiff's comparative negligence and the percentage of liability to be borne by a plaintiff and a defendant.

Although this is an important holding by the Court of Appeals, note that this decision only pertains to instances where the plaintiff is seeking *partial* summary judgment regarding the defendant's liability—as opposed to complete liability, where, in that instance, the plaintiff should still have to bear the burden of establishing the absence of his or her own comparative liability. As defense counsel, we must be aware that plaintiffs may be inclined to improperly rely on or misconstrue the holding of this case when seeking summary judgment on the issue of liability or later argue that the grant of partial summary judgment does away with the liability portion of a trial—defendants should take the position that it does not.

Despite the doctrine of *stare decisis*, the Court of Appeals took a marked departure from its precedent. The holding in *Thoma, supra,* (a 6-0 decision with one judge abstaining) stood as binding authority for approximately 25 years and has not been altered by legislation. The dissent astutely pointed out that legislation was proposed, but was not passed (2017 A.2776), seeking to alter CPLR 1412 to shift the burden of interposing proof of culpable conduct when asserting such a defense on a motion for summary judgment or at trial. However, the Court of Appeals took it upon itself to legislate from its bench when it knew of the pending legislation. As the dissent pointed out, "[t]he majority's approach goes well beyond these proposals, enabling a plaintiff

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to obtain summary judgment even where . . . a defendant has demonstrated that plaintiff's comparative fault may be significant."

While the majority posits that the grant of partial summary judgment will result in the limiting of issues to be resolved at the time of trial, it appears that the decision: (1) fails to achieve any judicial economy; (2) creates more questions than answers; and (3) prejudices defendants. The three-judge dissenting opinion makes many salient points to illustrate the aforementioned deficiencies. For example, a trial will still be needed to assess a plaintiff's comparative negligence and "a jury cannot fairly and properly assess a plaintiff's comparative fault without considering the defendant's actions." As the dissenting judges correctly indicated, "Few, if any, litigation efficiencies are achieved by the entry of partial summary judgment in this context because the defendant would still be entitled, at trial, to present an all-out case on the plaintiff's culpable conduct." There is no judicial economy by granting partial summary judgment, as a liability trial would still be required in order to assess both parties' respective percentages of liability.

There is no judicial economy by granting partial summary judgment, as a liability trial would still be required in order to assess both parties' respective percentages of liability.

The grant of partial summary judgment creates more questions than answers. As some liability on the part of the defendant would have been established as a matter of law, and given that CPLR 1412 requires the affirmative defense of comparative negligence to be pleaded and proved by the party asserting the defense, does the grant of partial summary judgment alter the liability phase of trial? Would there still be a liability portion of the trial to apportion percentages of fault? It would only be fair. Would the defendant be required to put on his or her evidence as to the apportionment of liability before the plaintiff puts on his or her case for damages? It would seem so. How would jury instructions have to be altered? Could jury instructions even be crafted in such a manner as to not prejudice the defendant? Could a jury be instructed that, while the defendant has been found to be some percentage at fault, it can still find the plaintiff 99.99% at fault? These questions are just the tip of the iceberg.

Additionally, does the grant of partial summary judgment give rise to prejudgment interest? CPLR 5002, which was enacted long before the *Rodriguez* decision, allows for interest to accrue after a decision establishing liability, arguably intended to be reserved for complete liability situations. However, defendants should be cognizant of the possibility that plaintiffs will argue that prejudgment interest accrues from the date a decision is rendered granting partial summary judgment. As CPLR 5004 presently provides for interest at a rate of 9% per annum, the date of accrual is pertinent. This will likely be an area of contention in the near future as the accrual of interest may have a significant monetary impact.

While the *Rodriguez* decision brings with it many questions, what is virtually assured is that it puts defendants behind the eight ball. The likelihood of prejudice was not lost on the dissent, which stated, "Determinations of degrees of fault should be made as a whole, and assessing one party's fault with a preconceived idea of the other party's liability is inherently unfair." Similarly, the majority in the First Department Appellate Division characterized the problems associated with apportioning a plaintiff's comparative negligence at trial following the granting of partial summary judgment, as akin to a defendant "entering the batter's box with two strikes already called."

As a parting thought, following the majority's logic, would a defendant be entitled to a conditional partial summary judgment as to a plaintiff's comparative negligence without having to demonstrate that it is free from negligence? Again, following the majority's logic, wouldn't the granting of a defendant's partial summary judgment motion narrow the number of issues presented to a jury by eliminating questions three and four above from having to be decided by a jury, leaving only question five (apportionment of the parties' liability) to be decided? Wouldn't question five have to be part of the liability portion, and not the damages portion, of a trial? While the decision brings with it many uncertainties, what is certain is that, unless legislation is enacted in response to this decision, there will likely be a substantial amount of motion practice which will place heavy burdens on the already-overwhelmed trial courts.

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form, which first came into use in 2004. That form provides coverage to the additional insured "only with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by [the named insured's] acts or omissions." The Court held that coverage under the phrase "caused, in whole or in part" is triggered only when the named insured was the "proximate cause" or "legal cause" of the injury—and that any "causal link to the injury" is not sufficient. Stated more simply, that additional insured endorsement is only triggered if the injury was caused, in whole or in part, by an act for which the named insured may be held legally liable.

For underwriters who wish to limit the risk assumed under an additional insured endorsement, it is important to consider using an endorsement extending coverage only to injuries "caused in whole or in part by" the named insured—because that language creates significantly less risk.

Importantly, that narrow interpretation does not apply to the language in many other additional insured endorsements. Most notably, many additional insured endorsements extend coverage for occurrences that "arise out of" the work or tenancy of the named insured. Courts have interpreted the phrase "arising out of" to provide more expansive coverage than the phrase "caused by." In fact, the phrase "arising out of" has been interpreted to provide coverage to the additional insured even in instances where the named insured is not legally liable. The *Burlington* Court itself made that distinction clear. Further, just last month, the Appellate Division, First Department plainly stated that the policy language "caused, in whole or in part" is simply "not the same as policies containing the phrase 'arising out of'." *Hanover Ins. Co. v. Philadelphia Indem. Ins. Co*., 2018 N.Y. Slip Op 02121 (1st Dep't 2018). In other words, *Burlington* did not create any new restriction on additional insured coverage for liability "arising out of" the named insured's conduct.

In short, the newer ISO form providing coverage to the additional insured for acts "caused, in whole or in part" by the named insured does, in fact, significantly restrict the risk underwritten by the carrier with respect to its additional insured. However, other forms providing coverage for occurrences "arising out of" the business of the named insured—forms which remain widely used—are still interpreted expansively.

This distinction raises two important points for consideration. First, for underwriters who wish to limit the risk assumed under an additional insured endorsement, it is important to consider using an endorsement extending coverage only to injuries "caused in whole or in part by" the named insured—because that language creates significantly less risk. Second, for claims professionals who are adjusting a claim that may involve two or more policies, it is important to consider that an insurer may be entitled to shift primary coverage to another carrier under the other policy's additional insured endorsement—even if the named insured on the other policy is not legally liable for the loss.

The second point is illustrated in three recent cases discussed in this article. In each case, HRRV obtained summary judgment establishing additional insured coverage—shifting the burden of indemnity to other carriers and recovering expended legal fees—without any showing that the named insured was liable for the loss.

HRRV Successfully Navigates the Treacherous Waters of Additional Insured Coverage—Obtaining Coverage Under Additional Insured Endorsements Without any Showing of Liability of the Named Insureds

Public Service Mutual Insurance and Forward Realty v. National Specialty Insurance

HRRV obtained summary judgment in *Public Service Mutual Insurance Company and Forward Realty Corp. v. National Specialty Insurance Company, Inc.* (New York Co., Index No. 651404/16). This coverage dispute arose from an underlying action commenced by Ulanda Williams, which related to an internationally publicized incident that occurred on a New York City sidewalk. Specifically, Williams suffered serious injuries when she had sought shelter under an awning immediately in front of a retail store during a rainstorm. After only approximately 15 seconds standing under the awning on the concrete sidewalk, a large section of concrete completely collapsed, causing Williams to fall into the basement of the adjacent building. Williams commenced a negligence action against both the landlord and tenant of the building where the sidewalk gave way.

Public Service Mutual Insurance Company (Public Service) insured the landlord. National Specialty Insurance Company (National Specialty) insured the tenant. The National Specialty policy contained an additional insured endorsement extending coverage to the landlord "but only with respect to liability arising out of the ownership, maintenance or use of that part of the

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premises leased to [the tenant].” Public Service commenced an action seeking a declaration that the landlord was entitled to coverage for the Williams action under the additional insured endorsement of the National Specialty policy.

National Specialty vigorously disputed Public Service’s position. Specifically, National Specialty argued that: (1) the site of Williams’s accident was outside the leased premises; (2) Williams was not a customer of the tenant; (3) the tenant was not required or permitted to make structural repairs to the building such as maintaining the structural integrity of the sidewalk; and (4) it was unclear if the nearby vault access point to the basement was even part of the leased premises. In short, National Specialty argued that Williams’s accident could not result in “liability arising out of the ownership, maintenance or use of that part of the premises leased to [the tenant].”

HRRV filed a motion for summary judgment on behalf of Public Service and the landlord. Specifically, we argued that, pursuant to the Court of Appeals holding in *ZKZ Assocs. LP v. CNA Ins. Co.*, 89 N.Y.2d 990, 657 N.Y.S.2d 390 (1997) and subsequent Appellate Division holdings, areas adjacent to the leasehold that are used to access the leasehold, or where the tenant is required to maintain, are “by implication” part of the leased premises for the purposes of determining additional insured coverage under the endorsement at issue. This is true, we argued, regardless of whether the injured claimant was a customer of the tenant, regardless of whether the defect was structural in nature, and regardless of whether the lease required the tenant to maintain the specific area of the defect. In other words, we argued that liability of the tenant (National Specialty’s named insured) was not required in order to trigger coverage under the additional insured endorsement.

The Court agreed with HRRV. The Court held that “the additional insured endorsement covers claims arising out of a collapsed sidewalk.” Furthermore, the Court held that the “use of the sidewalk was included in the scope of the Premises” simply because the lease required the tenant to “keep each and every part [of the leased premises] in good order, condition and repair . . . including all areas abutting the [leased premises].” The Court did not require a showing that the tenant (as named insured) was legally liable for any of Williams’s injuries. In fact, the Court did not consider the holding in *Burlington* at all.

As a result, HRRV was able to obtain summary judgment on behalf of Public Service, shifting hundreds of thousands of dollars in indemnity risk to National Specialty and obtaining reimbursement of tens of thousands of dollars in previously expended defense costs.

Paramount Insurance v. Federal Insurance

HRRV obtained partial summary judgment in *Paramount Insurance Company and David Ellis Real Estate, L.P. v. Federal Insurance Company* (New York Co., Index No. 650576/16). This coverage dispute arose from a fall that caused serious injuries on a New York City sidewalk. Specifically, the underlying plaintiff fell on a sidewalk near a restaurant in Manhattan and alleged that the landlord and the tenant were jointly negligent in maintaining the accident site. Discovery in the underlying action revealed that the location of the accident was not actually adjacent to the leasehold, but was instead near an alleyway that was used by multiple tenants to access other leaseholds in the building. Further, the lease agreement and underlying testimony raised questions as to whether the landlord or tenant had a duty to maintain the site of the injury.

Paramount Insurance Company (Paramount) insured the landlord. Federal Insurance Company (Federal) insured the tenant. The Federal policy contained an uncommon additional insured endorsement. The endorsement extended coverage to the landlord, but “only with respect to the ownership, maintenance or use of that particular part such premises leased to [the tenant] and only if [the tenant is] contractually obligated to provide [the landlord] with such insurance as is afforded by this contract. However, [the landlord is not] an insured with respect to any damages arising out of their sole negligence.” Paramount commenced an action alleging that Federal was obligated to provide coverage to the landlord in the underlying action. HRRV filed a motion for summary judgment.

Federal set forth a multifaceted defense. First, Federal argued that the additional insured coverage could not be triggered because discovery in the underlying action showed that the accident occurred outside the leased premises and outside a common alleyway, rather than adjacent the leasehold—and therefore the accident did not arise from “that particular part of such premises leased to [the tenant].” Second, Federal argued that it had not been determined whether the damages arose from the landlord’s “sole negligence” and, therefore, it was premature to determine whether the coverage was triggered under the additional insured endorsement. Lastly, Federal argued that its coverage may be excess based upon an “other insurance” provision making the Federal policy excess in all cases unless another policy was “negotiated specifically to apply in excess”—and thus without discovery in the coverage action concerning any such “negotiations,” it could not be determined whether there was any

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possible defense obligation at all.

HRRV persuaded the Court to reject each of Federal's arguments. First, the Court firmly rejected Federal's attempt to rely upon discovery in the underlying action to avoid its duty to defend, making clear that the duty to defend arises solely from the allegations in the underlying complaint—thus Federal could not use later testimony or evidence about the location of the injury to escape the duty to defend. Second, the Court noted that the allegations in the complaint must be accepted as true for the purposes of determining a duty to defend—thus Federal could not escape its coverage obligation under the "sole negligence" provision of the additional insured endorsement because the complaint alleged that the landlord and tenant were jointly and severally liable for the negligently maintained sidewalk. Finally, the Court held that the landlord's coverage was "negotiated specifically to apply in excess" because it was required by the parties' lease agreement and, pursuant to New York case law, a contract requiring procurement of insurance is presumed to require primary insurance. Again, the Court did not consider the holding in *Burlington* or require a determination that the named insured bore any liability to establish additional insured coverage.

As a result, HRRV obtained partial summary judgment, establishing that Federal had a duty to defend the landlord and to reimburse Paramount for tens of thousands of dollar in legal fees expended in defending the action.

Public Service Mutual Insurance v. Nova Casualty

HRRV obtained summary judgment in *Public Service Mutual Insurance Company and Japas Enterprises, Inc. v. Nova Casualty Company* (New York Co., Index No. 652532/16). This coverage dispute arose from an underlying personal injury action where the plaintiff alleged that he fell on a stairwell leading to a second floor restaurant in Manhattan. The underlying plaintiff alleged that both the landlord and tenant were jointly liable for failure to properly maintain the stairs.

Public Service Mutual Insurance Company (Public Service) insured the landlord. Nova Casualty Company (Nova) insured the tenant. The Nova policy contained an additional insured endorsement extending coverage to the landlord "but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the tenant]." Public Service commenced an action alleging that Nova must defend and indemnify the landlord in the underlying action and reimburse Public Service for legal fees expended in the underlying action. HRRV filed a motion for summary judgment based only upon the allegations in the underlying complaint and the Nova policy.

Nova disputed Public Service's position and cross-moved for summary judgment. Nova argued that its coverage obligation was not triggered because: (1) the accident admittedly occurred outside the leased premises; (2) the tenant was not required or permitted to make structural repairs to the stairwell; and (3) there was no evidence of whether other tenants in the building may have caused the defect or were responsible for repairs. In other words, Nova argued the accident could not have "arisen" from the "ownership, maintenance or use of that part of the premises leased to [the tenant]."

The Court granted summary judgment in favor of Public Service. Specifically, the Court held that, pursuant to New York case law, the "staircase where the alleged accident occurred was necessarily used for access in and out of the leased space located on the second floor and was thus, by implication, part of the leased premises." Once again, the Court did not consider *Burlington* and did not require a showing that the named insured tenant was the proximate cause of the injury.

As a result, HRRV succeeded in establishing that the landlord was entitled to coverage under the Nova policy, shifting significant indemnity liability to Nova and obtaining reimbursement of legal fees that Public Service had expended in defending the action.

The Takeaway

The lesson for underwriters and claims professionals is the same: Policy language matters. If underwriters wish to limit the scope of risk assumed under an additional insured endorsement, the underwriter should choose an endorsement limiting coverage to liability "caused, in whole or in part by" the named insured. Claims professionals seeking coverage for their insureds under other policies should look for the "arising out of" language in the other policies and aggressively pursue coverage under those policies.

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HRRV's insurance coverage team regularly litigates issues relating to additional insured coverage. Additional insureds are parties entitled to coverage under the named insured's policy. Whether such coverage is available requires an analysis of the particular language utilized in the policy issued to the named insured, the complaint in the underlying lawsuit, any contract or lease between the named insured and additional insured and a careful application of the relevant law.

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run" around the ACAL provisions prohibiting the operator of a place of entertainment from restricting the resale of tickets. The Supreme Court, Bronx County apparently agreed.

The ACAL and the Regulation of the Sale (and Resale) of Tickets to Sports and Entertainment Events in New York

In 2007, New York's legislature repealed longstanding anti-scalping laws in order to foster a free market that was more beneficial to the ticket-buying public. As a result, Article 25 of the ACAL prohibits venue operators, such as NYY, from "restricting by any means the resale of any tickets included in a subscription or season ticket package as a condition of purchase or as a condition to retain such tickets for the duration of the subscription or season ticket package agreement, or as a condition to retain any contractually agreed upon rights to purchase future subscription or season ticket packages that are otherwise conferred in the subscription or season ticket agreement." *See* ACAL §25.30(1)(a).

In pertinent part, ACAL §25.30(1) confirms that a ticket is a license that is subject to terms and conditions specified by the venue operator. Under New York law, a ticket for admission to a place of public amusement or entertainment is a license, and it is revocable by the owner or operator of the venue. *See Aaron v. Ward,* 203 N.Y. 351, 96 N.E. 736 (1911).

ACAL §25.03 defines "entertainment" broadly: it means all forms of entertainment including, but not limited to, theatrical or operatic performances; concerts; motion pictures; all kinds of entertainment at fair grounds; amusement parks; all types of athletic competitions including football, basketball, baseball, boxing, tennis, hockey, and any other sport; and all forms of diversion, recreation or show. "Operator" is also defined broadly and means any person who owns, controls a place of entertainment or promotes or produces amusement. "Place of entertainment" means any privately or publicly owned and operated entertainment facility such as a theater, stadium, arena, racetrack, museum, amusement park or other place where performances, concerts, exhibits, athletic games or contests are held or which an entry fee is charged. *See* ACAL §25.03.

ACAL §25.30 (1)(b) prohibits the denial of access to a ticket holder who possesses a resold subscription or season ticket to a performance based solely on the ground that such ticket has been resold.

ACAL§25.30 (2) provides that an operator is not prohibited from maintaining and enforcing conduct or behavior at or in connection with their venue and that an operator of a place of entertainment is not prohibited from revoking or restricting season tickets for reasons relating to venue policies and to the extent the operator may deem necessary for the protection of the safety of patrons or to address fraud or misconduct.

ACAL §25.33 provides a private right of action for a person who has been injured because of a violation of the ACAL and empowers him or her to seek injunctive relief and monetary damages (i.e. his or her actual damages or 50 dollars, whichever is greater). The court is empowered to award reasonable attorney's fees to a prevailing plaintiff.

In the *ASC* case, the ticket broker plaintiffs invoked ACAL §25.30 (1)(a) and its legislative history (which expressly stated the intention of the ACAL was to accommodate the resale of all types of tickets, including single performance, subscription and season tickets, in a free and open marketplace) and argued that NYY's decision to revoke the season tickets was "ill-advised, clearly wrong, and in violation of [the ACAL]." Plaintiffs argued that NYY's putative violation of the ACAL mandated injunctive relief and the court agreed, thereby enjoining the NYY's efforts to reclaim the season tickets.

The plaintiffs distinguished NYY's revocation of the season tickets from other per-person ticket limits that have been utilized by other sports and entertainment venues, such as Madison Square Garden (MSG).[3]

In *Smile for Kids*, the plaintiffs purchased tickets from MSG or patrons who wanted to resell their tickets. Their clients were individuals and the general public via a platform like StubHub.com. The plaintiffs also developed a "cloud" platform which enabled ticket holders to list and sell their tickets to the general public. The plaintiffs resold tickets for a profit and received fees for transactions completed on its cloud service. They allegedly controlled more than 700 seats

3. In *Smile for Kids, Inc. v. Madison Square Garden Co.*, 52 Misc.3d 629, 32 N.Y.S.3d 866 (N.Y. Slip Op. 26164), ticket brokers successfully brought action seeking injunctive relief and alleging that MSG's policy limiting the number of tickets individual season ticket holders could purchase violated ACAL §25.30 (1). Plaintiffs sued after MSG notified them that MSG intended to enforce its policy of limiting each individual season ticket holder to a maximum of eight tickets per year: MSG elaborated that no single customer was able to purchase, manage or control more than eight season tickets (directly or indirectly) for 2016–2017. MSG's ostensible purpose was to ensure that a greater number of fans would have access to Knicks and Rangers games and to address the long waiting list for season tickets. Plaintiffs also moved for a preliminary injunction enjoining and restraining MSG from redistributing their season tickets, and compelling it to renew the ticket subscriptions. The ticket broker plaintiffs in *Smile for Kids* and ASC were represented by the same law firm.

▶ continued on page 10

The "Next Battle" Against Ticket Resellers: New York Yankees Strike Out in Ticketing Case

FROM PAGE 9

at MSG, or nearly 31,000 tickets for Knicks and Rangers games.

However, *Smile for Kids* is distinguishable because MSG alerted prospective purchasers of the ticket limit policy *prior* to purchase. Furthermore, MSG distributed its 2016–2017 Knicks Season Ticket Subscription Agreement to plaintiffs and other subscribers affected by the policy via email. The subscription agreement stated that customers will be limited to *purchasing* four tickets per game; its terms did not attempt to limit the resale of those tickets. In addition, MSG reserved the right to strictly enforce its ticket limit policy by limiting new season subscriptions or revoking subscriptions that violated its policy.

In *Smile for Kids*, the Supreme Court, New York County analyzed ACAL §25.30 (1) (a) and noted that, as an operator of a place of entertainment, MSG is prohibited from restricting the *resale* of tickets. However, the *Smile for Kids* court drew a distinction between MSG's policy of restricting the number of tickets that a customer may *purchase.* The court observed that the ACAL does not govern the issuance of season tickets. The court also held that it was consistent with public policy for MSG to limit the number of season tickets that any single customer may purchase. However, the court noted MSG was not permitted to arbitrarily, capriciously and unreasonably determine that different individual season ticket holders should be treated differently or treating certain season ticket holders differently if they chose to do business with plaintiffs or who accepted financing from plaintiffs.

That's The Ticket: Takeaways from *ASC* and *Smile for Kids*

The letter and spirit of Article 25 of the ACAL foster a free market for the sale or resale of tickets to a variety of sports and entertainment venues. The legislative history is unmistakable: it prohibits venues from restricting the ability to resell tickets, including single performance, subscription and season tickets in a free and open marketplace.

Given the broad definition of "entertainment" and "operator" set forth in the ACAL, sports and entertainment venues (including amusement parks and movie theaters, all of which fall within the purview of Article 25 of the ACAL) would be wise to take note of the *ASC* and *Smile for Kids* cases. This is particularly true because the ACAL permits injunctive relief and the recovery of reasonable attorney's fees to the prevailing party.

While §25.30 (2) provides that an operator is *not* prohibited from maintaining and enforcing conduct or behavior at or in connection with a venue and that an operator of a place of entertainment is not prohibited from revoking or restricting season tickets for reasons relating to venue policies and to the extent the operator may deem necessary for the protection of the safety of patrons or to address fraud or misconduct, venue owners and operators should take care not to use that portion of the ACAL as cover for a violation of its free market mandate. Absent a genuine and demonstrable concern about the protection of the safety of patrons or to address fraud or misconduct, venue owners and operators should be cautioned about revoking or restricting season tickets or tickets for admission in general. In other words, a venue owner or operator cannot exercise its discretion with respect to a ticket/license in violation of statutory protections, including ACAL §25.30 (1)(a).

ASC is a particularly instructive case because the proffered reasons for rescinding the season tickets sold to the ticket broker plaintiffs were unsupported and smacked of a pretext: nowhere in the NYY ticket materials or terms and conditions were any ticket-buying "criteria" or acceptable "buying behavior" disclosed. Moreover, the plaintiffs successfully seized upon the fact that these terms were undefined and that their purchase of the season tickets did not violate any written policy, term or condition of purchase. Moreover, putting aside the lack of initial notice to potential ticket purchasers regarding the phantom criteria for scrutinizing ticket purchases, the fact that NYY waited *months* before advising the plaintiffs it was rescinding their ticket order without prior notice was problematic.

In contrast, *Smile for Kids* did not involve the *resale* of tickets, but the *purchase* of tickets and MSG demonstrated that it alerted ticket purchasers of its new ticket limit policy *prior* to their purchase. In fact, the new policy was part of MSG's season ticket agreement, and it was in place at the time of the actual purchase of the subject tickets. *Smile for Kids* established that in order for a venue's ticket purchase limit to be enforceable, and not in violation of the ACAL, the ticket purchase limit must be applied uniformly across all prospective purchasers, i.e., the policy could not treat tickets being sold to ticket brokers differently. The takeaway from these cases is that simply taking tickets away from resellers, particularly if based on a precarious policy, is prohibited by the ACAL and will only invite litigation.

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HRRV DECISIONS OF INTEREST

Federal Court Rejects Effort to Couch Time-Barred Negligence Claims as Contract Claims

Etman v. Greater Grace World Outreach, Inc.
United States District Court, Northern District of New York
1:17-CV-473
February 21, 2018

By way of a motion to dismiss in lieu of an answer, HRRV recently obtained dismissal of a federal court action filed in the United States District Court for the Northern District of New York.

Plaintiff Scott D. Etman, a youth pastor, was allegedly injured on May 4, 2013, at an event held at Camp Canadensis in Pennsylvania, a facility owned by Camp Canadensis, L.P. He served as an adult supervisor to a religious youth group from his own congregation, Greater Grace Church in Malta, New York. The event was sponsored by Greater Grace World Outreach, Inc. Pastor Etman's church in Malta was a local affiliate of Greater Grace. While participating in the event, the pastor took part in a rock-climbing activity and fell to the ground, sustaining injuries.

Pastor Etman—along with his wife, who asserted a derivative claim—filed suit against Greater Grace on May 2, 2017, almost four years after the alleged accident. He couched his claims as contractual in nature, alleging that he was a third-party beneficiary to an agreement between Greater Grace and nonparty Camp Canadensis that made Greater Grace liable for the injuries he sustained during the event. He did not set forth any specifics of the contract in his pleading.

In its motion to dismiss on behalf of Greater Grace, HRRV argued that Pastor Etman's action was, in actuality, a negligence action, despite his attempts to assert contract claims. Regardless of whether the two-year Pennsylvania statute of limitations for negligence actions or the three-year period applicable to such actions under New York law applied, HRRV argued that the action was subject to dismissal for being untimely.

Furthermore, HRRV argued that Pastor Etman's contract claims were subject to dismissal on their face for failing to annex a copy of the pertinent contract to his pleading or even set forth the specific provisions which allegedly allowed him to assert an action as a third-party beneficiary. HRRV also provided a copy of the contract to the court with its motion and argued that it did not give rise to any third-party beneficiary rights to Pastor Etman. The indemnification language upon which the pastor appeared to rely upon merely contained a risk transfer agreement as between the parties to the contract, and did not confer any intended benefit upon Pastor Etman or any other nonparty.

Judge Thomas J. McAvoy, a senior United States District Court judge, agreed with HRRV's arguments and dismissed all claims against Greater Grace with prejudice. The judge noted that the primary question was whether Pastor Etman's action was based in negligence or was instead contractual in nature, in light of the expiration of the negligence limitations period under both New York and Pennsylvania law. On this point, he relied in part on Pennsylvania's "gist-of-the-action" doctrine, and held that the pastor's "claim sounds in negligence, not contract." He also held that Pastor Etman was not an intended third-party beneficiary of the pertinent contract, noting that the indemnification provision in question "simply explain[ed] who would be responsible for damages if Etman prevailed on a tort claim against either party to the [contract]."

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HRRV DECISIONS OF INTEREST

Claims in Parking Lot Trip and Fall Case Defeated by Open and Obvious Defect Defense

Costidis v. City of New York
Appellate Division, Second Department
Index No. 701929/12
March 21, 2018

The Appellate Division, Second Department affirmed HRRV's summary judgment win in a trip and fall accident at Citi Field in a decision which illustrated the elastic boundaries of the "open and obvious" defect defense and why it is useful for property owners.

In *Costidis*, the plaintiff alleged that he stumbled while walking on a walkway after parking his car: he fell because of the elevation difference between patio pavers and an abutting tree bed located at the stadium. He claimed that the crowd of pedestrians obscured his ability to observe the sudden narrowing of a walkway and of the change in elevation between the surface of the walkway and the tree bed. He sustained personal injuries when he tripped and fell over the tree bed as he walked to the stadium. Plaintiff claimed that the defendants were negligent in their ownership, operation, maintenance, inspection, design, construction and control of the stadium. He argued that the motion overlooked the 2015 Court of Appeals decision in *Hutchinson v. Sheridan Hill House Corp. Hutchinson* addressed the trivial defect defense and held that a defect which, under other circumstances may be deemed trivial, would be rendered a trap because of the presence of "crowds" or similar distractions to a pedestrian.

The Supreme Court, Queens County granted summary judgment because the plaintiff failed to demonstrate that a defective or dangerous condition existed at Citi Field and because it was, at best, a trivial defect. Plaintiff had argued the circumstances of this accident (including the fact that the walkway was crowded with spectators on their way to the stadium) and the intrinsic characteristics of the defect (the sudden narrowing of the walkway) obscured the height differential between the walkway and the dirt tree bed and rendered it neither trivial nor open and obvious.

However, the defendants submitted evidence including the plaintiff's undisputed sworn testimony that demonstrated the condition was trivial and not actionable. The plaintiff's own photographs and his sworn testimony (from his General Municipal Law §50 hearing and his deposition) and the sworn testimony of the plaintiff's girlfriend (a nonparty) established that: on the date of the accident, the weather was sunny and clear; there was no debris or garbage on the walkway; the walkway itself was free of defects; and there was significant visual contrast between the light walkway and the dark tree bed. The purported condition was, therefore, of an open and obvious nature and would have been detected with a reasonable person's senses.

The Appellate Division, Second Department determined that an owner of property or tenant in possession of real property has a duty to maintain the property in a reasonably safe condition. However, there is no duty to protect or warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses.

The Appellate Division, Second Department affirmed summary judgment on different grounds, ruling instead that the allegedly "dangerous" condition was not inherently dangerous and was readily observable by the reasonable use of one's senses. Therefore, the plaintiff's negligence action was properly dismissed because there was no duty to protect or to warn the plaintiff of the same. Therefore, the Appellate Division, Second Department did not apply the factors set forth in *Hutchinson* and dismissed the case because the purported defect was open and obvious, not because it was trivial.

The Appellate Division, Second Department determined that an owner of property or tenant in possession of real property has a duty to maintain the property in a reasonably safe condition (*see Kellman v. 45 Tiemann*, 87 N.Y.2d 871, 872; *Basso v. Miller*, 40 N.Y.2d 233, 241). However, there is no duty to protect or warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses (*see Capasso v. Village of Goshen*, 84 A.D.3d 998, 999; *Cupo v. Karfunkel*, 1 A.D.3d 48, 51). Defendants established that the purported difference in elevation between the surface of the walkway and the surface of the tree bed was not inherently dangerous and was readily observable by the reasonable use of one's senses (*see Witkowski v. Island Trees Pub. Lib*., 125 A.D.3d 768, 770; *Capasso v. Village of Goshen*, 84 A.D.3d at 999-1000; *Seelig v. Burger King Corp*., 66 A.D.3d 986). In opposition, the plaintiff failed to raise a triable issue of fact.

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HRRV DECISIONS OF INTEREST

Defendants Established Prima Face Case that the Muddy Condition of the Field was Open and Obvious

Tricia Chiaramonte v. Town of Smithtown and Recreational Sports League
Supreme Court, Suffolk County
Index No. 3985-2015
March 15, 2018

Plaintiff Tricia Chiaramonte, a Suffolk County resident, alleged two causes of action premised in negligence against the Town of Smithtown and the Recreational Sports League, respectively. The plaintiff alleged that on May 10, 2014, she was present for a charity softball tournament at the Flynn Complex in Smithtown. It is alleged that the defendants' representatives inspected the baseball field where the plaintiff's game would occur and approved that it was safe for use prior to the accident. The plaintiff also alleged that Recreational Sports League supplied umpires for the event and contracted with the Town of Smithtown to organize the charity event.

During the second game of a scheduled double-header that day, the plaintiff was allegedly injured after falling in a muddy area located between second and third base. It is alleged that her fall was the result of the field being unsuitable for play due to the muddy conditions at the time of the incident.

HRRV, on behalf of the Town of Smithtown and Recreational Sports League, moved for summary judgment on the basis that the defendants did not owe the plaintiff a duty of care with respect to the open and obvious field conditions (*i.e.* mud in the infield), as the plaintiff was aware that it had rained the day before her accident as well as the morning of, and admitted to observing mud on the entire field prior to the accident. The muddy condition of the field was known to the plaintiff and was not in any way concealed. Furthermore, there was no actionable inherently dangerous or defective condition at the subject premises giving rise to the alleged incident, and thus the defendants had no duty to warn the plaintiff. To say that mud, a naturally occurring geographic condition, is dangerous, is entirely nonsensical.

Furthermore, the plaintiff was a seasoned softball player with years of experience and knowledge as both a player and a coach. She admitted that she was aware of the risk of being injured while playing softball, and despite observing the muddy field conditions before the softball game started, the plaintiff voluntarily played in the game notwithstanding same. Furthermore, the subject ball field was well-maintained in reasonably safe condition at the time of the accident, and there was no record of prior complaints or similar accidents.

HRRV's motion was granted by Judge William G. Ford of the Supreme Court, Suffolk County. Judge Ford determined that the defendants had established their prima facie case of entitlement to summary judgment. The evidence established that the plaintiff was aware of the risks inherent in the sport of softball as well as the condition of the playing fields on the date of her accident. Further, the defendants established that the Town of Smithtown employees were diligent in their inspection of the fields and took measures to remedy any deficiencies. The Town of Smithtown also demonstrated that there were no complaints made on the date of the plaintiff's accident regarding the fields and no other players were injured.

The Court went on to find that the plaintiff's submissions in opposition did not raise a triable issue of material fact. The plaintiff was aware of the muddy conditions and voluntarily chose to play on the field. Therefore, the Court held that the plaintiff assumed the risk of slipping on the mud. Additionally, none of the field's conditions rose to the level of being "unassumed, concealed or enhanced risks." Finally, the Court further found there is also no evidence that defendant Recreational Sports League owed any duty to the plaintiff as it did not organize or sponsor the charity tournament, nor did it own, operate, manage or have any other responsibilities with respect to the field at Flynn Memorial Park.

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HRRV DECISIONS OF INTEREST

Plaintiff's Inability to Identify the Cause of Her Fall Results in Summary Judgment Dismissing Claims

Lishnevski v. Weylin Seymour and Driggs Broadway
Supreme Court, Kings County
Index No. 503740/2015
March 26, 2018

Plaintiff Mariana Lishnevski was allegedly injured on May 6, 2016, when she tripped and fell down exterior stairs of the former Williamsburg Savings Bank in Brooklyn, New York. She alleged that there was no handrail on the exterior stairs and that defendants Weylin Seymour and Driggs Broadway were negligent in maintaining the stairway.

The plaintiff commenced an action in Supreme Court, Kings County against Weylin Seymour, the operator of a banquet facility in the former Williamsburg Savings Bank, and Driggs Broadway LLC, the owner of the building. The plaintiff testified at her deposition that she had attended the Lucy G. Moses Preservation Awards at the premises and entered the banquet hall via the exterior stairway located at 175 Broadway without any difficulty. Following the event, she left and descended the same exterior stairway at 175 Broadway. The plaintiff further testified that while leaving she "lost her balance" and fell down the second to last step. She admitted that there was a stone side wall along the stairs, but she did not hold onto this stone wall while walking up or down the stairs.

HRRV moved for summary judgment on behalf of Weylin Seymour arguing that the exterior stairway was not defective and that because the building was not subject to landmark protection pursuant to the New York Landmarks Conservancy, a handrail was not required. Alternatively, we argued that the lack of the handrail was not the proximate cause of the plaintiff's fall and that her own negligence and culpable conduct was the cause of her fall. Co-defendant Driggs also moved for summary judgment.

HRRV's expert engineer inspected the exterior stairway and opined that the building had a landmark designation and was in compliance with the New York City Building Code, as evidenced by the certification of occupancy. The engineer further opined that the landmark designation of the Williamsburg Savings Bank, including the exterior stairway at the 173 Broadway entrance, takes precedence over the New York City Building Code as it is a protected architectural feature, and that the stairway at 173 Broadway where the plaintiff fell was not defective.

The plaintiff opposed the motion arguing, through her expert engineer, that the premises, and exterior stairway, were defective because the absence of a handrail violated the applicable Building Code. The plaintiff's engineer disagreed that a Certificate of Occupancy was evidence that a building was in compliance with the Building Code.

HRRV's summary judgment motion was granted by Judge Wavny Toussaint, who acknowledged the defendants' arguments that a handrail was not required because of the landmark status. However, her decision sidestepped this issue and she declined to make a ruling based upon the landmark issue. Instead, the judge held that the plaintiff failed to identify the cause of her fall. She wrote that conclusory statements and unsubstantiated allegations are insufficient to defeat a motion for summary judgment and a plaintiff's inability to identify the cause of his or her fall are fatal to a claim of negligence in a slip and fall action. The court granted summary judgment finding that the plaintiff's conclusory assertion that the absence of handrail constituted a building code violation was insufficient to sustain her claims.

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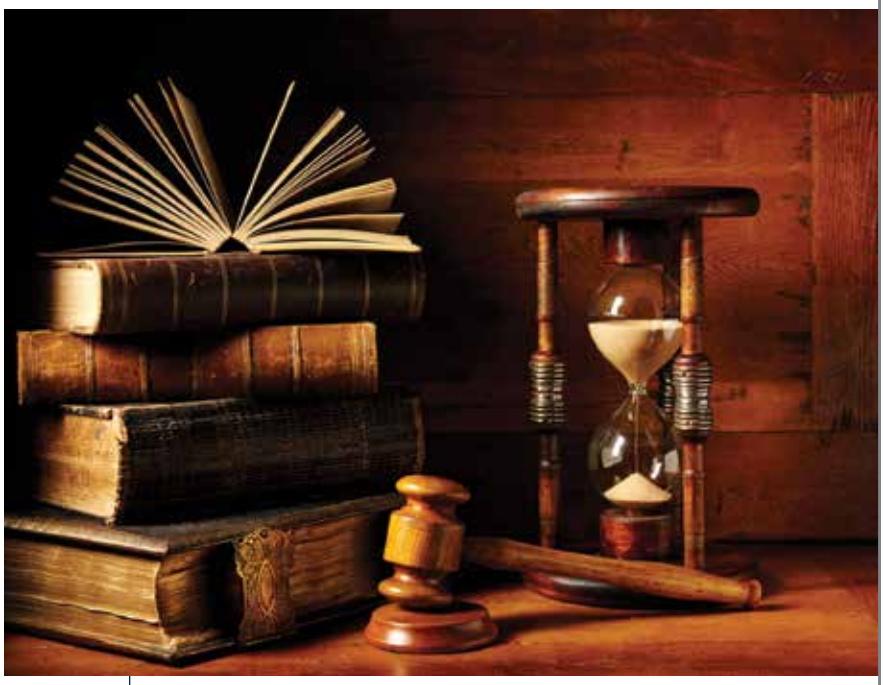
HRRV DECISIONS OF INTEREST

Appellate Court Rejects Attempt to Frame Time-Barred Assault Claim in Negligence

Williams v. 268 West 47th Street Rest. Inc.
Appellate Division, First Department
Index No. 155569/16
March 21, 2018



New York's Appellate Division, First Department rejected a plaintiff's appeal and agreed with the argument advanced by HRRV on behalf of the defendant that a claim for assault carried a one-year statute of limitations and could not be masked as a negligent assault claim with a three-year statute of limitations.

Plaintiff Shanaiah Williams was allegedly assaulted at The Copacabana on April 12, 2015, by unknown employees. The plaintiff alleged that she was violently assaulted, struck, grabbed, battered, beaten and punched without just cause or provocation. The allegations were denied by the defendant. Pursuant to New York CPLR § 215, actions for assault must be commenced within one year of the incident. The plaintiff filed her lawsuit almost three months after the expiration of the one-year statute of limitations.

HRRV initially moved to dismiss the claims on behalf of 268 West 47th Rest. Inc. arguing that the action could not be maintained because the statute of limitations had expired and the plaintiff's complaint alleged only assault. In opposition, the plaintiff argued that her claims sounded in negligence and not intentional tort and, therefore, were subject to a three-year statute of limitations. The plaintiff's argument attempted to mask an intentional tort as negligence. New York courts have held that there is no cause of action for negligent assault, and once intentional offensive contact has been established, the actor is liable for assault and not negligence.

The plaintiff also moved to amend her complaint and add claims for negligent hiring, supervision, training or retention. However, it is well settled that a claim for negligent hiring, retention and training will be dismissed when an employer concedes that the acts were perpetrated by the employee within the scope of the employee's employment. Since there were no allegations that any of the defendant's employees acted outside the scope of their employment, there could be no claims for negligence against the bar. The Supreme Court granted HRRV's motion to dismiss and denied the plaintiff's cross-motion to amend. The Supreme Court also affirmed HRRV's motion to dismiss the claims by denying the plaintiff's motion to renew and reargue.

In affirming the dismissal, the Appellate Division, First Department recognized that the plaintiff's claims that she was "assaulted, struck, grabbed, battered, beaten, punched, thrown and seriously injured" by an employee of the defendant did not sound in negligence and were therefore governed by a one-year statute of limitations. The Appellate Division further recognized that the motion court providently exercised its discretion in denying the plaintiff's cross-motion for leave to amend the complaint and allege a cause of action for negligent hiring and retention because the plaintiff failed to show that the proffered amendment was not "palpably insufficient or clearly devoid of merit." The Court based its decision on the fact that the original complaint sought to impose liability under the principle of *respondeat superior*, and therefore there could be no claim for negligent hiring or retention.

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HRRV DECISIONS OF INTEREST

Court Holds Basketball Facility Not Required to Have AED On-site and Employees Were Protected from Claims of Negligence under Good Samaritan Law

Mohammed v. Hooperstown LLC
Supreme Court, Bronx County
Index No. 25899/2015
April 3, 2018

HRRV represented the Hooperstown basketball facility in Yonkers, New York, relating to a claim brought by the estate of a 31-year-old man who collapsed while playing basketball. The decedent joined a group of friends at the basketball court for a pickup game. During the course of the game, the decedent suddenly collapsed.

While Hooperstown was not a health club, it had automated external defibrillators (AEDs) on-site, and its employees were trained on their use. When the employees responded to the emergency, they observed that the decedent was still breathing, thus, not requiring the use of the AED. Employees called 911, and City Emergency Medical Services personnel responded to the call. As EMS was transporting the decedent to the hospital, he went into cardiac arrest.

The family of the young man commenced a suit against Hooperstown arguing that it was obligated under New York General Business Law (GBL) 627-a(1) to maintain and use an AED in the event of a cardiac emergency. However, GBL §627-a(1) applies to health clubs that have a membership of at least 500 people. It mandates that these health clubs have at least one AED on-site and have in attendance, at all times during staffed business hours, at least one individual employee who holds a valid certification of completion of a course in the study of AED operation and a valid CPR certification. The plaintiff further argued that Hooperstown was liable under the Good Samaritan Law [Public Health Law (PHL) 3000-a(1)] for failing to come to the decedent's aid and use the AED.

In support of a motion for summary judgment, HRRV provided the court with admissible evidence that Hooperstown was not a health club, that it did not offer memberships or have members and that, while the club had AEDs on-site, it had an employee on-site who was trained in the use of an AED, and its employees were CPR certified. We also presented evidence that the employees who responded to the incident confirmed that the decedent was breathing prior to the arrival of medical personnel. Thus, the use of an AED was not warranted.

In deciding the motion in favor of Hooperstown, the court relied on the decisions rendered by the Court of Appeals in *Miglino v. Bally Total Fitness of Greater New York*, 20 N.Y.3d 342, 985 N.E.2d 128, 961 N.Y.S.2d 364 (2013), and *Parvi v. City of Kingston*, 41 N.Y.2d 553 (1977), and held that while GBL 627-a(1) requires a *health club* to have an AED on-site, it does not require the AED to be used (emphasis added).

The court went further to find that the employees provided emergency medical treatment by immediately calling for medical assistance. They could only be held liable for acts of gross negligence under PHL 3000-a(1), which was not displayed in this instance. The court also went on to dismiss the plaintiff's argument that Hooperstown owed a special duty to the decedent by reiterating that the statutory obligation to have emergency medical equipment on-site does not correspond to a duty to use the equipment citing to *Miglino*.

Notably, while the court did not specifically address the issue of whether Hooperstown was obligated under GBL 267-a to have an AED on-site, we believe the court likely determined that the question was moot as Hooperstown, even though it did not have an obligation, was in compliance. Therefore, even if the statute did apply, which we do not believe to be the case, Hooperstown met the statutory requirement.

When faced with a claim arising from a cardiac emergency in a health club and/or recreational facility, it is essential to immediately confirm the identity of the personnel on-site, the available emergency equipment and the training of those present. Armed with this information, defense counsel will be well positioned to file a motion for summary judgment.

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HRRV DECISIONS OF INTEREST

Court Relies on Governmental Immunity and Narrow Reading of New York Public Health Law to Grant Summary Judgment to Ambulance Company

Leftenant v. Bay Shore Brightwaters Rescue Ambulance, Inc.
Supreme Court, Suffolk County
Index No. 60440/2015
April 5, 2018

Plaintiff/executrix asserted that Bay Shore Brightwaters Rescue Ambulance, Inc., failed to provide sufficient emergency care and treatment, and used improper equipment and technique while attempting to intubate her common law spouse, causing and/or contributing to his death.

HRRV filed a motion for summary judgment seeking dismissal of the plaintiff's complaint based upon the doctrine of governmental immunity and New York Public Health Law (PHL) 3013(1). Similarly, counsel for the County of Suffolk moved for dismissal of the complaint based upon the doctrine of governmental immunity, and counsel for Southside Hospital and two attending physicians on the grounds that the medical care provided was at all times in compliance with accepted standards of care. In an 11-page decision, Justice Peter Mayer outlined the facts as presented by all parties and assessed each defendant's position.

With regard to the governmental immunity defense, the court recognized that a "municipality is not required to pay damages to the person injured as the result of the municipality's failure to protect the health and safety of its constituents" in the absence of a special relationship between the claimant and the public entity citing to *Laratro v. City of New York*, 8 N.Y.3d 79 (2006). As presented by the various individuals who testified in this matter, the court found that neither the County nor HRRV's client, the ambulance company, voluntarily undertook an obligation to the decedent beyond what was owed to the general public.

In addition, the court went on to find that the doctrine of governmental immunity extends to the ambulance services provided by a municipality, including community ambulance services. The court went on to find that voluntary emergency medical technicians, under PHL 3013(1), may only be held liable if they were grossly negligent in rendering medical services.

While counsel for the plaintiff argued that the ambulance company's actions in its failed attempts to intubate the decedent rose to the level of gross negligence as it exhibited a failure to provide even slight care or slight diligence, the court reviewed the autopsy report and noted that while the report noted that rare food particles were present in the decedent's lungs, there was no inflammatory reaction noted, nor were these food particles noted as a contributing cause of his death. Therefore, the court found that it could not be said that the ambulance company placed the decedent in a worse position than he would have been in had it never attempted to assist him. In addition, the court found that neither the actions of the County Police Officers nor the ambulance company caused the decedent to forego other available avenues of protection. Based upon these findings, the court granted summary judgment dismissing the complaints against the ambulance company and the County.

However, the court denied the motion for summary judgment served on behalf of Southside Hospital and its doctors. In opposition to the motion submitted by the Southside defendants, counsel for the plaintiff submitted in redacted affidavit of a medical expert which supported counsel's argument that during the initial hospitalization at Southside, one of the doctors failed to properly diagnose the decedent with pneumonia, and had that pneumonia been treated the decedent would not have experienced his deadly asthma attack. That Southside failed to perform a chest x-ray, and/or treat the decedent's pneumonia, raised a sufficient question of fact to defeat its motion for summary judgment.

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HRRV DECISIONS OF INTEREST

Appellate Court Affirms Granting of Summary Judgment to Out of Possession Landlord in Snow and Ice Case

Fuentes-Gil v. Zear LLC
Appellate Division, First Department
Index No. 301746/14
July 5, 2018

Plaintiff was injured as result of a slip and fall from a ladder on a sidewalk adjacent to a bar. Specifically, the plaintiff suffered a left medial malleolus fracture that was subsequently treated with surgery. HRRV represented the out of possession landlord.

At the time of accident, the property was leased to a bar, which employed the plaintiff as a cook. The plaintiff claimed he was injured when a ladder he was climbing to change an exterior lightbulb allegedly slipped on snow and ice.

HRRV moved for summary judgment and argued that there was a storm in progress at the time of the accident, as well that the lease delegated the duty of snow and ice removal to the tenant bar. We also argued that the landlord did not receive any notice or complaints regarding snow and ice on the sidewalk prior to the accident. Further, we explained that the plaintiff, himself, was responsible for snow and ice removal from the subject sidewalk, and the plaintiff admitted in his testimony that he did not shovel the snow or remove ice from the sidewalk, before placing the ladder on the sidewalk. The plaintiff argued that the snow and ice on the sidewalk, on which the plaintiff fell, was from a previous storm and not the storm in progress. He also argued that the landlord, pursuant to Administrative Code of the City of New York 7-210(b), had a non-delegable duty to maintain the sidewalk, including snow and ice removal.

The Supreme Court, in granting the motion for summary judgment, relied on *Bing v. 296 Third Ave. Group, L.P*. 94 A.D.3d 413. Specifically, the Court reasoned that Administrative Code of the City of New York 7-210(b) did not impose a duty upon an out of possession landlord to be responsible for snow and ice removal on the sidewalk, where there is a lease providing for snow and ice removal to be completed by the tenant.

Notably, in *Bing*, the the plaintiff fell on a ramp on the sidewalk. But, in *Bing*, the Court pointed out, even if the ramp was part of the sidewalk, the Court would still have found that the landlord was not responsible for snow and ice removal. Nevertheless, the tenant bar filed a motion to reargue the motion for summary judgment, which was denied. The Court again relied on *Bing*, and also explained that there was a storm in progress at the time of the accident. Thereafter, the plaintiff filed an appeal.

In the plaintiff's appeal he again argued that the snow and ice on which the plaintiff fell was present from a previous storm, and not the storm in progress. Also, the plaintiff argued that the Court was incorrect in its application of Administrative Code of the City of New York 7-210 (b). Thus, the plaintiff argued that the landlord had a non-delegable duty to maintain the sidewalk, including snow and ice removal, even though it was out of possession. In response, HRRV argued not only that there was a storm in progress, but that the plaintiff's application of the Administrative Code was incorrect, due to the plaintiff's application of the statute would imply that there is strict liability. Further, we argued that that Court's reliance on *Bing* was correct.

At oral argument, the plaintiff argued that the landlord, pursuant to Administrative Code 7-210, had a non-delegable duty to maintain the sidewalk and to keep the sidewalk clear of snow and ice. The plaintiff requested that the Court's application of *Bing* be limited to non-sidewalk cases. In response, it was argued that in addition to *Bing*, the First Department has repeatedly held that out of possession landlords are not responsible for snow and ice removal on the sidewalk. It was also explained to the Court that the Administrative Code is not a strict liability statute. Therefore, it is also necessary for the plaintiff to establish that there was negligence on the party of the landlord, which the plaintiff is unable to prove.

In affirming the lower court's decision, the Appellate Division, First Department relied on *Bing*. The Court pointed out that the landlord established that it was out of possession, and had delegated the duty of snow and ice removal to the tenant, pursuant to the lease agreement. Further, the Court explained that the snow and ice removal did not constitute a significant structural or design defect, upon which an out of possession could be found liable. Thus, the lower court's decision, granting the motion for summary judgment, and dismissing the plaintiff's action, was upheld.

Contact

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HRRV DECISIONS OF INTEREST

Appellate Court Applies Assumption of Risk to Dismiss Claims of Youth Soccer Player

O'Toole v. Long Island Jr. Soccer League, Inc.
Appellate Division, Second Department
Index No. 20112/12
May 30, 2018

Plaintiff, an experienced youth soccer player, allegedly was injured during a soccer game when his cleat became stuck in a drainage grate which surrounded the perimeter of and was adjacent to the high school athletic field upon which he was playing. The infant plaintiff, and his mother suing derivatively, brought suit against the soccer organizations under whose auspices the game was conducted and the school district which owned the field.

HRRV, representing the defendants, moved for summary judgment based on the plaintiff's assumption of risk of injury. The Supreme Court granted the motion and the Appellate Division affirmed.

Holding that the defendants established their prima facie entitlement to judgment as a matter of law on the grounds that the doctrine of primary assumption of risk barred the injured plaintiff's recovery, the court relied on testimony of the infant plaintiff that his accident occurred when he ran onto the drainage grate only a few feet from the edge of the field while he was retrieving a ball that had traveled out of bounds during the game. The infant plaintiff had admitted that in order to gain access to the field, he had to walk over the silver-colored drainage grate that surrounded the perimeter of the field. Moreover, photographs submitted in support of the motion confirmed the open and obvious nature of the grate, and there was no evidence that the grate was concealed or defective in any manner.

The court rejected as speculative expert opinions submitted on behalf of the plaintiffs.

Contact

Carla Varriale represented the defendants.

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HRRV ON TRIAL

Rare Bronx County Directed Verdict

Fernando Monzac v. 1141 Elder Towers, LLCI
Supreme Court, Bronx County
Index No. 307395/2013
May 25, 2018

Justice Maryann Briganti-Hughes granted the defendant's motion for a directed verdict in this case where the plaintiff claimed to have been injured as a result that caused him to fall. The plaintiff claimed injuries to the back and neck, resulting in two separate surgeries (a lumbar laminectomy and a cervical spinal fusion) after a fall on a puddle of water in the lobby of 1141 Elder Avenue, Bronx, New York, allegedly from a leaking ceiling. The case proceeded to trial, and after several weeks of testimony, the defendant, represented by Tara C. Fappiano of HRRV, moved for a directed verdict on liability.

Justice Briganti-Hughes granted the motion on the grounds that there was no evidence of constructive notice. Specifically, there was no evidence to support any allegations that the defendant had constructive notice of the specific leak that caused the plaintiff to fall on August 21, 2013. The plaintiff had argued that there was evidence of a recurrent condition, but the court held that there was no evidence to establish an ongoing, recurring condition that resulted in the leak that the plaintiff claims caused him to fall. As such, the case was dismissed.

Contact

Tara C. Fappiano represented 1141 Elder Towers, LLCI.

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HRRV IN THE NEWS

Carla Varriale was a featured speaker at New York Law School's 9th Annual Sports Law Symposium on March 29, 2018. Topics covered included Gender Equity Issues in Sports and Sports Law, Privacy and IP in the Fitness Industry, and Sport as the International Stage. The keynote speaker was Cameron Myler of the Court of Arbitration for Sport and the NYU Tisch Institute for Global Sport, a four-time Olympian.

Carla Varriale

Gail L. Ritzert was among those honored at the Long Island Power Women in Business Awards and Networking Event on May 9, 2018 at Leonard's Palazzo in Great Neck.

Gail L. Ritzert

Steven H. Rosenfeld served as the moderator of Amateur Sports . . . Professional Problems at the 2018 conference of the North American Contingency Association (NACA). The program addressed real-world exposures presented in amateur sports and engaged in a wide-ranging discussion of these exposures and how they impact on players, coaches, sponsoring organizations, venue owners and operators and insurers. The panel addressed responsibilities, defenses, risk management and loss control and coverage requirements and options.

Steven H. Rosenfeld

Carla Varriale's article "Law and Teaching: A Primer" was featured in the spring 2018 edition of *The Woman Advocate* newsletter and is available on the American Bar Association website.

Tara C. Fappiano was a member of Leadership Westchester's 2018 graduating class. Presented by Volunteer New York!, Leadership Westchester is a rigorous nine-month course of study designed to build leadership skills and a deep understanding of nonprofit organizations.

Tara C. Fappiano

Tara C. Fappiano was a presenter at a Special Advocacy Workshop sponsored by Westchester Disabled On the Move Inc. on May 29, 2018.

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