URB INSIDER

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U.S. Supreme Court Case Notes

The Supreme Court recently ended its term. Information about some of the cases the Court ruled on is provided below.

- Millionaire's Amendment—In *Davis v FEC*, the High Court struck down the Millionaire's Amendment to the 2002 campaign finance law in a 5-4 decision.

Jack Davis argued that the law, which basically raises the contribution cap for people running against self-financed candidates, violated the First Amendment and the Fifth Amendment's Equal Protection Clause.

Writing for the majority, Justice Samuel Alito stated, "The burden is not justified by any governmental interest in eliminating corruption or the perception of corruption."

- Ban of Guns—In *District of Columbia v Heller*, a gun ban case, the Supreme Court ruled that there is a right on the part of Americans to own guns for self-defense and hunting.

This was a 5-4 ruling that struck down the District of Columbia's ban on handguns. The case held that the ban was incompatible with Second Amendment gun rights.

The central issue in the case was whether the Second Amendment protects the right to own guns, no matter what or whether the right is associated with service to the militia of a state.

In writing for the majority, Justice Antonin Scalia stated that an individual right to bear arms is supported by "the historical narrative."

- Judgment Reduction—In *Exxon Shipping Co. v Baker*, the High Court reduced the amount that the Exxon Corporation must pay for the accident that resulted in the Exxon Valdez spilling 11 million gallons of oil into Prince William Sound in 1989.

Exxon was held liable for the accident because of knowledge that the ship's captain was drinking and yet he was allowed to continue his command. After granting a multi-million dollar compensatory damages award, the jury awarded punitive damages of $5 billion. Exxon appealed that award. After appeals in the Ninth Circuit, the punitive damages award stood at $2.5 billion.

The Supreme Court vacated the decision of the Ninth Circuit, cutting the punitive damages award to $507.5 million.

In a 5-3 majority opinion, Justice David Souter recognized that the Court is "equally divided" on the owner's derivative liability, and hold federal statutory law does not bar a punitive damage award on top of damages for economic loss, but that the award here should be limited to an amount equal to compensatory damages."

- Age Bias—In *Meacham v Knolls Atomic Power Laboratory*, the Supreme Court took the side of older workers and held that the employers, not employees, bear the burden of proving layoffs did not discriminate against older workers.

The case resulted from an involuntary reduction in work force in which supervisors were instructed to rank employees based on three factors. The jury sided with the employees and the case was appealed.

For the 7-1 majority, Justice David Souter wrote, "An employer defending a disparate-impact claim (under the Age Dis-

From the Court of Appeals

Substantial Factor Analysis

Defendant Lee Weidl, a Suffolk County police officer, was driving his marked police vehicle on the service road of the Long Island Expressway during morning rush-hour traffic. According to the testimony, while traveling in the middle lane of the three-lane highway, he abruptly decelerated from approximately 40 miles per hour to 1 or 2 miles per hour while changing lanes. Plaintiff, traveling immediately behind the officer, slammed on her brakes and was able to stop within "a half a car length" of Officer Weidl's vehicle without striking it. Seconds later, plaintiff's vehicle was rear-ended by a vehicle driven by defendant Darlene Maldonado.

A jury found that Officer Weidl's reckless conduct and Maldonado's negligence were each a substantial factor in causing plaintiff's injuries and apportioned fault at 50% each. The Appellate Division reversed the judgment entered upon the jury's verdict, holding, as a matter of law, that Officer Weidl's conduct was not a proximate cause of the accident because "plaintiff was able to come to a complete stop without hitting Officer Weidl's vehicle" (42 AD3d 496, 497 [2007]). We now reverse.

On this record, the jury could have rationally found that the officer's conduct was a substantial cause of the collision between plaintiff and Maldonado even though there was no contact between plaintiff's vehicle and the Weidl vehicle (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Officer Weidl abruptly slowed his vehicle to a near stop in a travel lane of a busy highway where vehicles could reasonably expect that traffic would continue unimpeded. Thus, the jury could have rationally found, as it did here, that his conduct "set into motion an eminently foreseeable chain of events that resulted in [the] collision" between the vehicles driven by plaintiff and Maldonado (*Sheffer v Critoph*, 13 AD 3d 1185, 1187 4th Dept 2004], quoting *Murtagh v Beachy*, 6 AD 3d 786, 787 [3d Dept 2004]). Indeed, in light of the fact that the accident occurred within seconds of Officer Weidl's abrupt deceleration, his "actions were not so remote in time from plaintiff's injury as to preclude recovery as a matter of law" (*McMorrow v Trimper*, 149 AD2d 971, 972 [3d Dept 1989], *affd* 74 NY2d 830 [1989]; *cf. Gralton v Oliver*, 277 App Div 449 [3d Dept 1950], *affd* 302 NY 864 [1951]). Under these circumstances, it is irrelevant that plaintiff was able to stop her vehicle without striking Officer Weidl's vehicle.

It is well settled that a "rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle" (*Stalikas v United Materials*, 306 AD2d 810, 810 [4th Dept 2003] [internal quotation marks and citation omitted], *affd* 100 NY2d 626 [2003]). However, Maldonado's negligence in rear-ending plaintiff's stopped vehicle does not absolve Officer Weidl of liability as a matter of law. Clearly, Officer Weidl's actions created a foreseeable danger that vehicles would have to brake aggressively in an effort to avoid the lane obstruction created by his vehicle, thereby increasing the risk of rear-end collisions (*cf. Ventricelli v Kinney Sys. Rent A Car*, 45 NY2d 950, 952 [1978]). That a negligent driver may be unable to stop his or her vehicle in time to avoid a collision with a stopped vehicle is "a normal or foreseeable consequence of the situation created by" Officer Weidl's actions (*Derdiarian*, 51 NY2d at 315). *Tutrani et al., v County of Suffolk, et al.*, 2008 NY Slip Op 05349. ◆

Tree Well Not Part of Sidewalk in NYC

In this personal injury action, the Court of Appeals concluded that a tree well is not part of the "sidewalk" for purposes of section 7-210 of the Administrative Code of the City of New York, which imposes tort liability on property owners who fail to maintain city-owned sidewalks in a reasonably safe condition. The Court of Appeals therefore affirmed the order of the Appellate Division dismissing the complaint.

At about 10:30 p.m. on a clear, dry evening on January 31, 2004, plaintiff Dzafer Vucetovic was walking down East 58th Street in Manhattan between Second and Third Avenues when he stepped into a tree well and tripped on one of the cobblestones surrounding the dirt area containing a tree stump. The tree well was located in front of a building owned by defendant Epsom Downs, Inc., but the tree well apparently was installed prior to Epsom's acquisition of the building. Approximately four months before the accident, the City of New York had cut down the tree.

Plaintiff and his wife, suing derivatively, brought this action for personal injuries against Epsom alleging that the property owner failed to maintain the sidewalk in a reasonably safe condition in violation of section 7-210 of the Administrative Code of the City of New York. Epsom moved for summary judgment dismissing the complaint, contending that section 7-210 did not apply because the tree well was not a part of the sidewalk as defined in the Administrative Code.

Supreme Court granted the motion and dismissed the complaint, agreeing with Epsom that section 7-210 was inapplicable. A divided Appellate Division affirmed and plaintiff now appeals as of right.

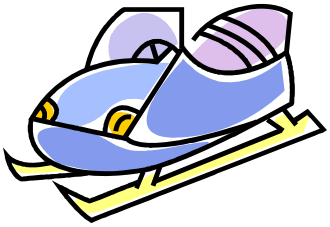
The City Council enacted section 7-210 in an effort to transfer tort liability from the City to adjoining property owners as a cost-saving measure, reasoning that it was appropriate "to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them — the property owners" (Rep of Comm on Transp, at 5, Local Law Bill Jacket, Local Law No. 49 [2003] of City of NY). Notably, the language of section 7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code sections 19-152 and 16-123" (*id.* at 4; *see also* Office of Mayor Mem in Support, Local Law Bill Jacket, Local Law No. 49 [2003] of City of NY). Acknowledging that this case presents a close question, we are constrained to agree with the courts below that section 7-210 does not impose civil liability on property owners for injuries that occur in City-owned tree wells. In reaching this result, we are guided by the principle that "legislative enactments in derogation of common law, and especially those creating liability where none previously existed," must be strictly construed (*Blue Cross & Blue Shield of NJ, Inc., v Philip Morris USA Inc.*, 3 NY3d 200, (206 [2004] [internal quotation marks and citation omitted]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 301 [c]). Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210. If the City Council desired to shift liability for accidents involving tree wells exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal. Ac-

NY Cases

Assumption of Risk Jury Question

Plaintiff suffered a back injury while riding as a passenger on a snowmobile driven by defendant Brittany Talcott. Defendant Stanley Kucel owned the snowmobile and permitted Talcott to operate it. To recover for her injuries, plaintiff commenced this action. Talcott and Kucel (hereinafter collectively referred to as defendants) moved for summary judgment dismissing the complaint against them based upon the doctrine of assumption of risk. Supreme Court denied the motion. Defendants appeal.

Supreme Court properly denied defendants' motion. The doctrine of primary assumption of risk completely bars recovery to a plaintiff who was injured during voluntary participation in a recreational activity (*see Connor v Tee Bar Corp.*, 302 AD2d 729, 730 [2003]). Voluntary participants in sports or recreational activities consent "to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *see Turcotte v Fell*, 68 NY2d 432, 439 [1986]). Correspondingly, participants do not consent to conduct that is reckless, intentional or so negligent as to create an unreasonably increased risk (*see Connor v Tee Bar Corp.*, 302 AD2d at 730; *Kaufman v Hunter Mtn. Ski Bowl*, 240 AD2d 371, 372 [1997]; *see also Turcotte v Fell*, 68 NY2d at 439). Application of the doctrine is generally considered a question of fact for the jury (*see Connor v Tee Bar Corp.*, 302 AD2d at 730).

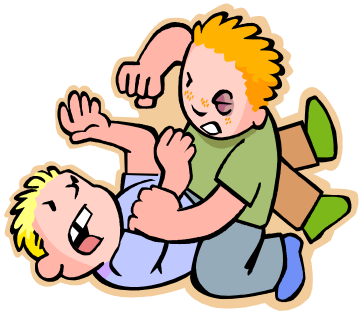


Here, plaintiff rode on the back of the snowmobile as Talcott, who was 15 years old and had previously driven this snowmobile less than 10 times, operated the machine at a high rate of speed, possibly 50 miles per hour. Talcott continued at this speed even when her vision became impaired by sun glaring off the snow and ice. She acknowledged that she did not see the knoll due to the glare, and she did not slow down or brake when approaching bumps or the knoll which caused the incident (*see* PRHPL 25.03 [1], [2]). After hitting the knoll, which plaintiff estimated as three to four feet high, the snowmobile became airborne before crashing to the ground on the other side. Viewing the evidence in a light most favorable to plaintiff, the nonmoving party, we agree with Supreme Court that questions of fact exist, requiring a jury to determine the application of the doctrine of assumption of risk (*see Connor v Tee Bar Corp.*, 302 AD2d at 730-731; *Morgan v Ski Roundtop*, 290 AD2d 618, 620 [2002]; *Rios v Town of Colonie*, 256 AD2d 900, 901 [1998]). *Pantalone v Talcott*, 2008 NY

No Insurer Duty

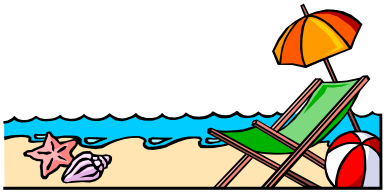
Supreme Court properly granted the cross motion of plaintiff seeking summary judgment declaring that it has no duty to defend or indemnify Matthew Whiting (defendant) in the underlying action. According to the complaint in the underlying action, defendant assaulted Evan Lang while Lang was attending a party at defendant's home. We agree with the court that plaintiff has no duty to defend or indemnify defendant with respect to the cause of action alleging an intentional tort. We conclude that the incident herein was not an "occurrence" within the meaning of the policy and, in our view, the dissent's reliance upon *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131) in reaching a contrary conclusion is misplaced. Under the terms of the policy, an occurrence is defined as "an accident." We note at the outset that an incident is an occurrence, i.e., an accident, if, " from the point of view of the insured, . . . [the incident resulting in injury] was unexpected, unusual and unforeseen' " (*Miller v Continental Ins. Co.*, 40 NY2d 675, 677; *see Cook*, 7 NY3d at 137-138; *Essex Ins. Co. v Zwick*, 27 AD2d 1092).

Defendant herein testified at his deposition that he intended to hit Lang, who had shoved him and was again advancing toward him, and defendant knew when he hit Lang that Lang "could be hurt from the punch."



In *Cook*, the insured shot and killed an intruder in his home. He was acquitted of murder and manslaughter charges, and the victim's estate commenced a wrongful death action alleging that the insured in *Cook* negligently caused the victim's death (*see id.* at 135). The insured in *Cook*, who fired the weapon at the lowest part of the victim's body that was visible behind a pool table, testified at his deposition that he knew that the victim would be injured but he did not anticipate that the victim would be killed (*see id.* at 135-136). Although the insured acted intentionally insofar as he fired a weapon at the victim who was advancing toward him, the Court explained that, "if [the insured] accidently or negligently caused [the victim's] death, such event may be considered an occurrence within the meaning of the policy and coverage would apply" (*id.* at 138). We conclude herein that there is no view of the evidence to support a conclusion that the result of defendant's intentional act of punching Lang in the face "accidently or negligently" caused Lang's alleged injuries (*id.*).

We reject the further contention of defendant that he is entitled to coverage based upon plaintiff's failure to disclaim coverage in a timely manner. Because we have concluded that the claim falls outside the scope of the policy's coverage on the ground that the incident is not an occurrence, disclaimer pursuant to Insurance Law 3420(d) is not necessary. Where, as here, "the insurance policy does not contemplate coverage in the first instance, . . . requiring payment of a claim upon failure to timely disclaim would [impermissibly] create coverage where it never existed" (*Matter of Worcester Ins. Co. v Bettenhauser*, 96 NY2d 185, 188). *State Farm Fire and Casualty Company v Whiting*, 2008 NY



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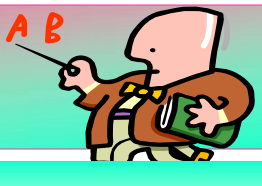


BY PROFESSOR I.M. SMART

Contract Elements

Insurance contracts have usual and unusual characteristics. They must display the four elements of general contracts which are agreement (offer and acceptance), consideration, competent parties, and legality of purpose. Insurance contracts also contain characteristics particular to insurance contracts. For example, they are personal contracts as the interest of the insured is encumbered rather than the property of the insured.

In other words, insurance contracts are not transferable. They are aleatory contracts as they are contracts of unequal value. Insureds may pay $400 in premium and collect nothing, or receive $100,000 for a loss. Since it is a unilateral contract, the insured pays a premium, and gets the promise by the insurer that it will defend and indemnify the insured for covered claims. They are contracts of adhesion, written on a take it or leave it basis by company that insures the risk. Because insurance contracts are contracts of adhesion, any ambiguity found will be construed against the insurer. These insurance contracts may only be amended by endorsement. The insured has greater knowledge of the risk than does the insurer. To equalize these positions, the insurer may draw on defenses in insurance contracts including material misrepresentation, breach of warranty and the doctrine of concealment.◆

Tort Elements

The word tort, no *not torte*, is a word seldom used, or eaten for that matter, by anyone other than attorneys and insurance personnel.

In general, a tort is a civil wrong, other than a breach of contract for which the court will provide a remedy from a suit for legal damages.

This is important to those in the insurance business because a "tort" is a central subject of litigation in which a person who is wronged seeks money damages from a person or company who engaged in the wrongful conduct. That conduct may be negligent and covered on a liability policy held by the party who engaged in the wrongful conduct.

In that manner, the insurer defends and indemnifies their insured, who once sued is known as the defendant against the allegations of the person or persons bringing the suit, known as a plaintiff or plaintiffs.

Once the suit is brought, the plaintiff has the burden of proving the case. There are four elements to prove a tort, all of which must be proven before a court can order a remedy.

These elements are Duty, Breach of Duty, Causation and Damages.

- Duty means a legal duty.
- Breach of duty means conduct that falls short of the standard.
- Causation means the breach was the cause of injury to the person harmed. Proximate cause also known as legal cause must be proved.
- Damages means the sum of money awarded for injury.

Proximate cause is an act from which injury results as an uninterrupted consequence, and without which, the injury would not have occurred. Different tests are applied to determine proximate cause in different jurisdictions and circumstances, including the "but for" test and substantial factor analysis. ◆

From the Department

Re: Opinions of Counsel

Below are excerpts from recent Opinions of Counsel of the New York State Insurance Department that may be of interest to property casualty insurers.

On May 8, 2008, the Office of General Counsel issued an opinion entitled "Conditional Renewal Notice Based on Increased Premium on E&O Liability Insurance Policy."

The question presented in the opinion is: "Must an insurer on an errors and omissions liability insurance policy issue a conditional renewal notice if it increases the renewal premium by greater than 10% after removing a 10% direct bill credit after making a new rate filing with the Department?

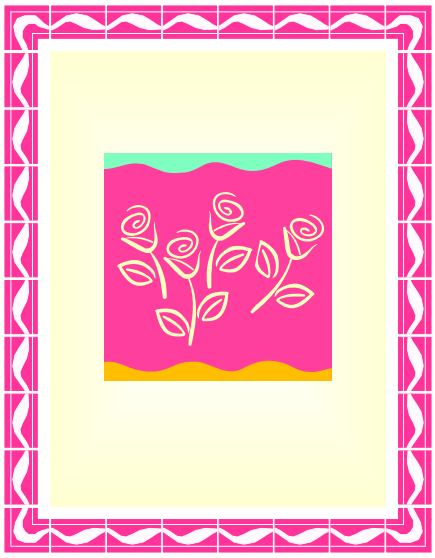
The conclusion reached is as follows: "Yes. Under N.Y. Ins. Law § 3426(c)(1)(B) (McKinney 2007), an insurer on an errors and omissions liability insurance policy must issue a conditional renewal notice if the renewal premium is increased by over 10%, even if generated as a result of removing a direct bill credit upon making a new rate filing with the Department, and not because of increased exposure units, experience rating, loss rating, retrospective rating, or audit."

On May 16, 2008, the Office of General Counsel issued an opinion entitled "Insurer designating a contractor to repair, rebuild or replace."

The question presented in the opinion is: "May a property/casualty insurer designate any contractor to rebuild an insured property that has been partially destroyed by fire, if, pursuant to the policy, the insurer has an option to repair, rebuild or replace the property with other property of like kind and quality?"

The conclusion reached is as follows: "Nothing in the New York Insurance Law prohibits a property/casualty insurer from designating the contractor of its choosing to repair or rebuild an insured property that has been partially destroyed by fire, pursuant to an insurance policy vesting the insurer with an option to repair, rebuild or replace the property with other property of like kind and quality."

On May 30, 2008 the Office of General Counsel issued an opinion entitled "Certificates of Insurance." The question presented in the opinion is: "May a certificate of insurance provide obligations, conditions, or coverages not set forth within the underlying insurance policy?" The conclusion reached is as follows: "No.



Pennsylvania

Insurer Denied Reimbursement

In the case of *American and Foreign Insurance Company, et al. v Jerry's Sports Center, Inc., et al.,* No 1098 MDA 2006, 2008 PA Super 94, the PA Superior Court looked at the issue of an implied contract under an insurance policy for an insurer to recoup costs incurred while it defended a disputed claim before there was a final judgment related to coverage. The policy in question did not give the insurer the right to recover monies it expended.

The insurer issued a reservation of rights letter that addressed the issue of defense costs. It was subsequently determined there was no coverage under the policy.

In this case of first impression, the insurer argued that by virtue of its reservation of rights letter in which the insurer expressly reserved its right to seek reimbursement of defense costs that an implied contract was created on behalf of the insurer. The insurer also argued that the insured was unjustly enriched. After examining the law in other jurisdictions, the Superior Court disagreed with the insurer's arguments and held that the reservations of rights did not create a contract for reimbursement or that the insured was unjustly enriched, and if the insurer wanted to seek reimbursement of attorneys fees, it could have included a provision in the policy.◆

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URB UPDATE

Pending Approval at the Department

- ML-56 Ed. 5/08—Related Private Structures Exclusion
- Homeowners Manual Ed. 6/08

Around the Country

Case Notes

- **Rhode Island**—The Rhode Island Supreme Court has overturned an important lower court ruling that held three manufacturers of lead paint liable for creating a public nuisance in covering up the health hazards created by lead paint. This decision made it clear that the paint manufacturers were not responsible for creating a public nuisance or for remediation of the presence of lead paint.

- **Mississippi**—In another Katrina related case, a Mississippi jury awarded damages to a couple who sued because their insurer took the position that their homeowners insurance policy icy did not cover water, even when it was driven by wind. The couple also made a claim for emotional distress. A punitive damages claim was dismissed.

- **Florida**—A blogger's legal liability has been brought to the forefront in the case of a Florida real estate developer who filed a $25 million dollar lawsuit because of comments made on a real estate blog. There is legislation out there that may protect bloggers under the First Amendment.

- **Montana**—A bystander's claim for bodily injury can be covered in an insurance policy, according to the Montana Supreme Court.

- **New Jersey**—A woman who saw her mother die in an automobile collision is entitled to sue the other driver, according to a ruling by the New Jersey Supreme Court. In a 4-3 decision, the court held this is possible even though the state has a verbal threshold for auto insurance that allows victims to sue for physical injuries. ◆