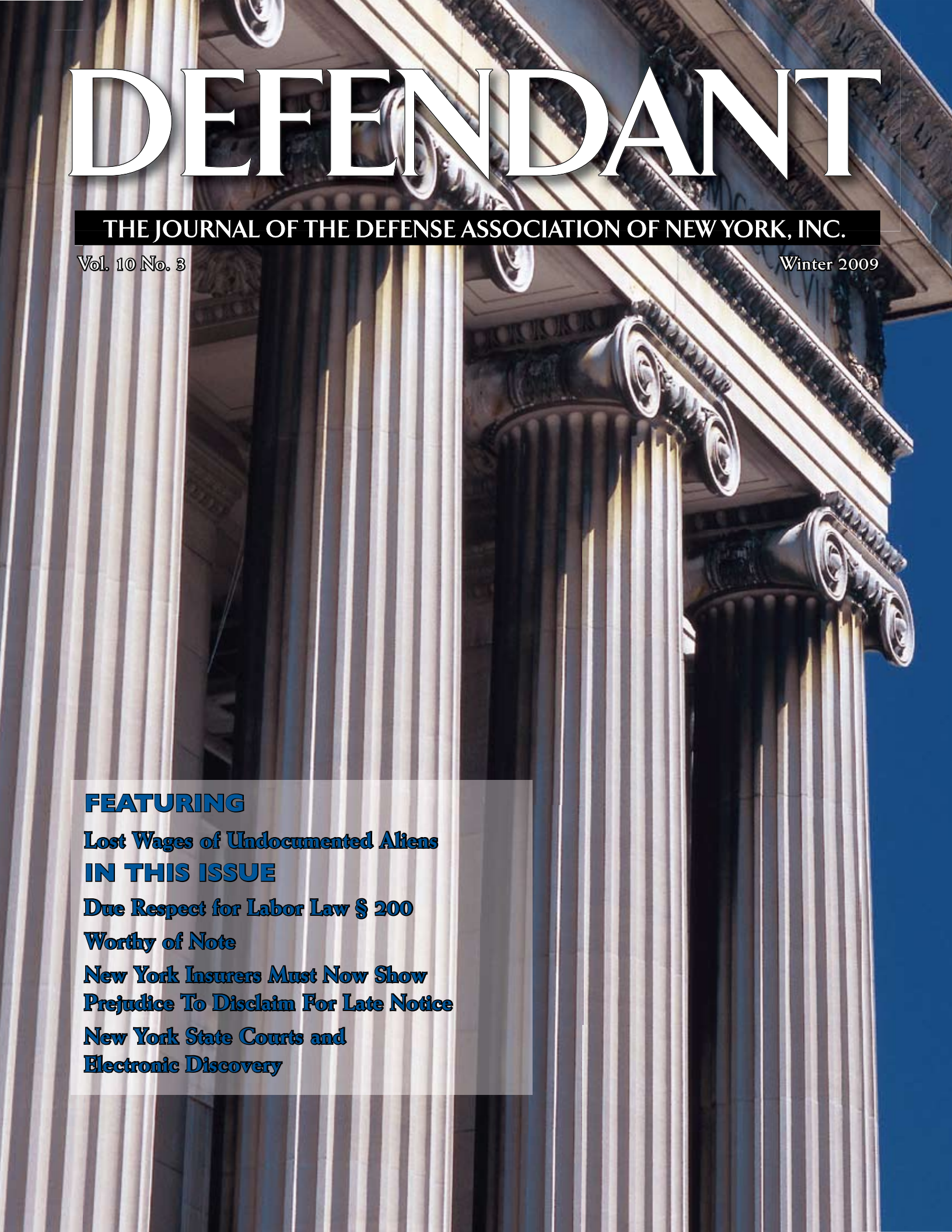

DEFENDANT

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FEATURING

Lost Wages of Undocumented Aliens

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President's Column

THOMAS J. MARONEY, ESQ.*

I wanted to start off this column by recognizing the most important asset that The Defense Association of New York has, its' membership. Many of us are members of other professional associations and there are some that are great to join for various professional and social reasons, but what is impressive about The Defense Association of New York is that it has a working membership that actively contributes in many ways.

One of those ways is the publication that you are reading right now. The Defendant is a great read to stay current with interesting articles and recent cases. This issue is no different except that it just gets better. Articles submitted have increased dramatically and we have the membership to thank for that.

We also have a Board of Directors that is not an Honorary Board but a Working Board. Throughout the year the Board does the work to coordinate and host the various Dinners, Golf Outing and CLE Lectures.

The Past Presidents Dinner that many of you attended at the Downtown Association was a great success, well attended and a great evening. We were privileged that so many of our Past Presidents could attend. We were honored that Dan Gerber, the Chair of the Torts, Insurance and Compensation Law Section of the New York State Bar Association could attend and offer some remarks. The Torts, Insurance and Compensation Law Section has great synergy with The Defense Association of New York and has over three thousand members statewide. Many of our members participate in both organizations.

The Annual Charles C. Pinckney Dinner is a great tradition of the Defense Association of New York. This year is our 33RD Annual Pinckney Dinner and will be held on April 7, 2009 at the Marriot Downtown Financial Center Hotel.

The CLE that will precede the Pinckney Dinner

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* *Thomas J. Maroney is a partner with Maroney O'Connor LLP with offices in Lower Manhattan. Tom's firm is National Coordinating Counsel for Products Liability cases throughout the United States and Canada.*

Lost Wages of Undocumented Aliens

JOHN J. MCDONOUGH, ESQ.*

This article is the fourth in this column that has discussed the evolving decisional law in New York on the issue of whether and to what extent an undocumented alien may assert a claim for future lost wages. Framed differently, what lost wage damages are recoverable by an undocumented alien who has either obtained employment illegally by proffering false documentation or who has been hired illegally and who, but for his injuries, would have continued earning, illegally, wages in this country.

The continuing debate on this issue has at its origin in the Immigration Reform and Control Act ("IRCA") enacted into law in 1986, which made it illegal for an undocumented alien to obtain employment in this country (8 U.S.C. §1324a et seq.). The goal of this legislation was to disincentivize illegal immigration by eliminating job opportunities. To attain this goal, the most important component of the IRCA scheme was the creation of a new employment verification system designed to deter the employment of aliens who are not lawfully present in the United States and those who are lawfully present, but not authorized to work. Under this system, aliens legally present and approved to work in the United States are issued formal documentation of their eligibility status by federal immigration authorities, usually in the form of a "green card," a registration number or some other document issued by the Bureau of Citizenship and Immigration Services. Before hiring an alien, an employer is required to complete an employment eligibility verification form (Form I-9) that requires a review and analysis of the government-issued work authorization. If the required documentation is not presented, the alien cannot be hired. The IRCA makes it a crime for an alien to provide a potential employer with documents falsely acknowledging receipt of governmental approval of the alien's eligibility for employment. Notably, the IRCA does not penalize an alien for attaining employment without having

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* *John J. McDonough is a shareholder with Cozen O'Connor and is Vice Chair of the firm's General Litigation Group.*

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proper work authorization, unless the alien engages in fraud such as presenting false documentation to a potential employer. An employer who knowingly violates the employment verification requirements (Form I-9), or who unknowingly hires an illegal alien but subsequently learns that an alien is not authorized to work and does not immediately terminate the employment relationship, is subject to civil and/or criminal prosecution.

The United States Supreme Court examined the right of an illegal alien who obtained his job by proffering fraudulent documents to seek an award for past lost wages in Hoffman Plastic Compounds Inc. v. National Labor Relations Board, 535 U.S. 137, 122 S. Ct. 1275 (2002). In Hoffman, the Supreme Court reviewed a National Labor Relations Board award of back pay to an undocumented worker who was terminated because of his participation in organizing a union in violation of §8(a)(3) of the National Labor Relations Act. The Court determined that an award of back pay was contrary to the purposes underlying the IRCA. Under the IRCA, it is "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." Id. at 147. Consequently, the Court held that the NLRB could not award back pay to an undocumented alien, ruling that such an award was beyond the Board's remedial discretion and "trivializes" the immigration laws. Id. at 150.

A series of cases in New York began interpreting Hoffman with the New York Court of Appeals finally tackling the issue in consolidated appeals in Balbuena v. IDR Realty LLC, et al., 6 N.Y.3d 338, 812 N.Y.S.2d 416 (2006). Judge Graffeo expressed the majority's view that despite the fact the plaintiffs in the underlying cases did not have the appropriate federal work authorizations each was entitled to assert claims for lost wages. The Court of Appeals is of the view that Federal immigration law does not preempt a state's right to develop and maintain laws affecting occupational health and safety, a reference to New York's Labor Law and the common-law that has developed to allow injured workers to collect future lost wages, to the extent their injuries prevent them from returning to work. Furthermore, the Court of Appeals reasoned that permitting an undocumented alien a claim for future lost wages would reward employers who knowingly disregard the IRCA employment verification system. The Court stated that this "reward" would make it more financially attractive for unscrupulous employers to hire undocumented aliens. This latter reasoning of course ignores the fact that in the overwhelming number of personal injury actions in New York, the plaintiff's employer is never a party to the action. Indeed, in New York, as in most states, an employee is precluded from asserting a direct action against his/her employer by virtue of the Worker's Compensation statutes. Additionally, those instances in which the employer can be impleaded into an action have been considerably narrowed by the Antisubrogation Rule established by the Court of Appeals in Northstar v. Continental, 82 N.Y.2d 510, 604 N.Y.S.2d 510 (1993) and by the adoption of the "Grave Injury Rule" to section eleven of the Worker's Compensation Laws enacted several years ago. Thus, although the chief rationale for the Court's decision is to disincentivize an unscrupulous employer from hiring illegal aliens the decision is not clear on how this is to be accomplished in the vast majority of cases in New York as the employer can never be brought into

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Due Respect for Labor Law § 200

JULIAN D. EHRLICH *

Labor Law § 200[2] - the safe place to work statute - has long been referred to as "merely" the codification of common law negligence.[3] This may have left an impression that § 200 is less worthy of consideration by parties especially when compared to the often simultaneously plead Labor Law § 241(6) and § 240 with their nondelegable duties on owners, contractors and their agents for construction work accidents.[4]

However, those who overlook § 200 may be surprised to know that there are decisions of each of the four Departments of the Appellate Division in which negligence claims were held to be viable even where the § 200 claims were properly dismissed against the same defendant under the same facts.[5] In addition, because § 200 warrants its own jury charge, NY PJI 2:216, which is separate from the negligence charge, this statute potentially provides plaintiffs with an opportunity to persuade a jury to find liability.

Moreover, § 200 is not limited to construction work, unlike §§ 240 and 241(6), but rather applies to all work places.[6] Additionally, unlike §§ 240 and 241(6), which are exclusively vicarious,[7] § 200 also applies to employers[8] and is thus properly pleaded against employers in third party complaints and cross claims.[9] Also, unlike §§ 240 and 241(6), § 200 does not have any exemption for one and two family homeowners.[10]

Given the foregoing, Labor Law § 200 merits serious consideration by both plaintiffs and defendants.

This discussion will examine some of the subtle but meaningful nuances that characterize § 200 and then analyze recent cases interpreting it.

§ 200 AND NEGLIGENCE

So, how and why can a negligence theory survive when a § 200 claim is dismissed against the same defendant under the same facts?

As stated by the Court of Appeals in *Russin v. Louis N. Picciano & Son,* 54 N.Y.2d 311, 317, 445 N.Y.S.2d 127, 129 (1981), "[a]n implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to *control the activity bringing about the injury* to enable it to avoid or correct an unsafe condition *(emphasis added).*"[11]

However, the appellate decisions that have dismissed § 200 claims while permitting negligence claims to survive, have repeatedly cited a stricter requirement that the defendant have *control over the plaintiff's work*.

For example, in *Bell v. Bengomo Reatly, Inc.*, 36 A.D.3d 479, 829 N.Y.S.2d 42 (1st Dept. 2007), the plaintiff, an electrician, was injured when he fell into a trench created by an excavator, Astrov Contractors Inc., which had left the site the day before and was not responsible for maintaining it. The Court found that the negligence claims against the excavator for improperly shoring and bracing were sustainable.[12] However, in dismissing the § 200 claim, the court stated, "[t]o impose liability under section 200, it is necessary to show authority and control over plaintiff's 'work' (*citations omitted*). Astrov, an excavator, had no control over plaintiff, an electrician."[13]

Similarly, in *Kelarakos v. Massapequa Water Dist.*, 38 A.D.3d 717, 832 N.Y.S.2d 625 (2d Dept. 2007), the general contractor hired separate trade contractors for brick work and for the installation of roof trusses. An employee of the truss subcontractor was injured when several trusses fell on him.[14] In dismissing the § 200 claims against the brick-laying subcontractor, the Court reasoned that this subcontractor "neither controlled nor supervised the injured plaintiff's work since [it] had completed its work and left the construction site before the injured plaintiff even began to work on installing the trusses."[15] Nonetheless, the court found the negligence claim was valid since the accident could have been caused by the bricklayers leaving uneven mortar mounds on the top of the walls.[16]

Other cases that requiring that the defendant have an ability to control *plaintiffs' work* in order to dismiss a § 200 claim but not a negligence claim include those where trade contractors built walls[17] and flooring[18] that collapsed.

Support for this approach might be found in the Court of Appeals decision in *Dunham v. Hilco Const. Co.*

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* *Julian D. Ehrlich is Senior Vice President of Claims at Allied North America of New York, LLC.*

Worthy Of Note

VINCENT P. POZZUTO*

1. LABOR LAW

"Falling Object" Cases Not Limited to Objects in the Process of Being Hoisted or Secured

Quattrocchi v. F.J. Sciame Const. Corp.
866 N.Y.S.2d 592 (2008)

Plaintiff was injured when struck by falling planks that had been placed over open doors as a makeshift shelf to facilitate the installation of an air conditioner above a doorway during construction. The Court of Appeals held that "falling object" liability under Labor Law §240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured. The Court found that an issue of fact existed as to whether the planks were adequately secured in light of the purposes of the plank assembly. The Court further held that an issue of fact existed as to whether plaintiff caused the accident by jostling the doors and disregarding a warning not to enter the doorway.

2. CONTRACTUAL INDEMNITY/ COVERAGE

Employer was Contractually Liable to Indemnify Owner and Lessee of Premises for Labor Law Case

Kielar v. Metropolitan Museum of Art
866 N.Y.S.2d 629 (1st Dept. 2008)

In construction accident case, plaintiff was granted summary judgment on liability pursuant to Labor Law §240(1). Plaintiff's employer moved to dismiss the third-party claim by the owner and lessor of lessee of the premises as violative of the anti-subrogation rule. The Court held that since the employer's primary and excess carrier had disclaimed coverage to the employer, it was premature to determine whether the anti-subrogation rule barred the owner and lessee's contractual indemnity claim. The Court further held that the owner and lessee were entitled to summary judgment on the contractual indemnity claim as the record established that the lessee did not have actual or constructive notice of any unsafe practices of the employer and there were no issues of fact as to whether the lessee was affirmatively negligent.

3. PROCEDURE

Plaintiff Demonstrated Proper Service of Process

Poree v. Bynum
866 N.Y.S.2d 663 (1st Dept. 2008)

The Court held that a traverse hearing was warranted where the parties' conflicting affidavits disputed whether service had properly been effectuated. Plaintiff's process server testified at the hearing that he personally served defendant's mother with the summons and complaint at the address listed on defendant's driver's license, and then mailed a copy to the same address. The Court held that defendant's statements that he did not live at that address and that neither he nor his mother were ever served with papers was not corroborated by any evidence. Although his mother stated as such in an affidavit, defendant failed to call his mother at the traverse hearing. The Court held that proper service of process had been established.

4. PREMISES SECURITY

Genuine Issue of Material Fact Precluded Summary Judgment as to Whether Owner Assumed and Breached Duty to Maintain Security Cameras

Ruth B. v. Whitehall Apartment Co., LLC
866 N.Y.S.2d 668 (1st Dept. 2008)

Infant – Plaintiff commenced action against landlord to recover damages for injuries sustained when she was sexually assaulted in elevator. Plaintiff's third cause of action alleged that defendant assumed and breached a duty to plaintiff to maintain and monitor security cameras in the elevator in which plaintiff was assaulted. The infant-plaintiff's mother testified that employees of the landlord, including the superintendent, told her prior to the assault that the elevator was equipped with a security camera that was constantly monitored. The Court found that defendant did not address this third cause of action in its motion papers, and thus issue of fact precluded summary judgment.

5. INSURANCE COVERAGE

45-day Disclaimer was Unreasonable as a Matter of Law

Pav-Lak Industries, Inc. v. Arch Ins. Co.
866 N.Y.S.2d 671 (1st Dept. 2008)

The Court held that Arch's 45-day delay in disclaiming coverage was unreasonable as a matter of law. There was

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* *Vincent P. Pozzuto is a member in the Manhattan office of Cozen O'Connor.*

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Inc., 89 N.Y.2d 425, 654 N.Y.S.2d 335 (1996).

In *Dunham*, plaintiff, an employee of subcontractor Louis Calhoun, was injured when an employee of another trade contractor, Hilco, suddenly "snatched" his end of rebar that they were both lifting which caused the plaintiff to lose his balance and stumble.[19] After depositions, the plaintiff consented to dismissal his § 200 claims against the owner and general contractor.[20] A review of the Second Department decision reveals that the plaintiff also consented to a dismissal of the § 200 claim against Hilco.[21] The Second Department searched the record and, based on the dismissal of § 200, dismissed the plaintiff's negligence claims against the owner, general contractor and Hilco.

The Court of Appeals agreed that plaintiff's consent to dismissal of the § 200 claims warranted dismissal of the negligence claims as to the owner and general contractor. However, the Court reinstated the negligence claims against Hilco since plaintiff's theory against Hilco was based on vicarious liability of its employee, rather than failure to provide a safe place to work. Thus, the Court of Appeals implicitly recognized that a negligence claim can survive even where a § 200 claim is properly dismissed.

Interestingly, however, other courts have not taken this approach.

For example, in *Tabickman v. Batchelder Street Condominiums By the Bay LLC*, 53 A.D.2d 593, 595, 859 N.Y.S.2d 721, 723 (2d Dept. 2008) the Court stated that the subcontractor "may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area."

In addition, in *Mendez v. Union Theological Seminary in City of New York*, 17 A.D.2d 271, 793 N.Y.S.2d 420 (1st Dept. 2005), the Court stated that, "for the purposes of assigning liability under Labor Law § 200, the fact that [the scaffold erector] did not supervise plaintiff's work does not mandate summary judgment dismissing the claim where there are issues of fact as to whether the defective condition resulted from the installation of the scaffold."

Clearly, many injuries are caused by trade contractors who do not have control over the plaintiff but still create dangerous conditions which result in accidents. For now, whether § 200 applies to these defendants remains an important open question. What can be said is that, while negligence and § 200 might share a common seminal heritage as siblings, they are not identical twins.

SETTINGS

Because liability under § 200 applies to a narrower category of settings, i.e., work places, than common law negligence, it follows that the duty set forth by § 200 applies to a more select category of defendants.

Case law interpreting § 200 differentiates the following three types of instrumentalities causing injuries: 1) dangerous conditions on premises; 2) dangerous methods of work; and 3) dangerous equipment provided to a plaintiff. The concepts of notice and control of these instrumentalities determine defendants' duties under the statute.

Where the accident is caused by a dangerous condition of the premises, an owner will not be liable without actual or constructive notice of the condition.[22]

Where the accident and injury are caused by the contractor's method, an owner will not be liable without authority to control the work, regardless of the owners' actual or constructive notice those methods.[23]

The Second Department recently clarified defendants' duty when dangerous equipment causes the injury in two cases.

In Ortega v. Puccia, 2008 WL 4742195 (2d Dept. 2008), the Court found that when defective equipment is provided by the employer and causes injury, an owner can be liable under § 200 only where it has authority to supervise or control the work. Again notice to the owner that the trades provided their subcontractors defective equipment without owner authority to supervise or control does not trigger liability. *Id.*

Shortly thereafter, in *Chowdhury v. Rodriquez, 2008 WL 4816553, the Appellate Division* held that, where the owner provides - or more commonly - the worker borrows, defective equipment, the owner will be liable only where it created or had notice of the defect.

Finally, although comparative negligence is a defense to a § 200 claim, at least one court found that summary judgment for plaintiff under § 200 was proper where the defendant failed to raise evidentiary proof sufficient to raise an issue of fact.[24]

CONCLUSION

When the commonly pleaded trio of Labor Law sections leads to inevitable motion practice, § 200 may not initially grab the parties' interest but, often enough, § 200 will be the last argument left. Parties must realize that common law negligence and Labor

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New York Insurers Must Now Show Prejudice To Disclaim For Late Notice

ANDREW M. ROHER, ESQ*

A big change is coming to New York Insurance Law. Early last year, the legislature passed Senate Bill 8610 and Assembly Bill 11541. These abolished New York's long-standing "no prejudice" rule that governs an insurer's right to disclaim coverage where it receives "late notice" from its insured regarding a claim. For decades, New York has permitted an insurer to disclaim coverage for late notice even in the absence of a showing that its ability to investigate, defend, or settle the claim is impaired. New York has been one amongst a minority of jurisdictions in which prejudice is presumed as a matter of law. As recently as April 5, 2005, the New York Court of Appeals declined to alter the law, holding that timely notice allows the insurer "…to take an active, early role in the litigation process and in any settlement discussions." Argo Corporation v. Greater New York Mutual Insurance Company, 4 N.Y.3d 332 (2005). The Court of Appeals in Argo further cited that late notice of a lawsuit in the liability insurance context is "… so likely to be prejudicial to these concerns as to justify the application of the no-prejudice rule." Insurers have long supported the "no-prejudice" rule as fundamentally fair and a useful tool to hold down insurance costs and premiums. Trial lawyers and others argued that the rule can unfairly and arbitrarily result in the loss of insurance coverage, with devastating consequences for the insured, where the delay in reporting is as little as two months.

On July 21, 2008, Governor Patterson signed the new law, which will take effect on January 17, 2009.[1] New York joins the majority of jurisdictions, including its cross-river neighbor New Jersey, that require the insurer to show prejudice to disclaim coverage on the grounds of late notice. The focus of a substantial body of litigation will shift from arguments about the timeliness of notice to arguments about the prejudice standard.[2] The critical "prejudice" term is defined in the new law as follows:

The insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim.

Since the law has just recently taken effect, it will be some time before there is guidance as to the standards and factors New York courts will apply to determine whether a defense is "materially impaired." In the interim, New York lawyers may look for guidance to case law from a majority of states, such as New Jersey, that have long required the insurer to show prejudice. In Kitchnefsky v. National Rent-A-Fence Of America, Inc., 88 F. Supp.2d 360, 2000 U.S. Dist. LEXIS 4300 (D.N.J. 2000), the federal court noted that the prevailing New Jersey requirement to show "appreciable prejudice" is not satisfied where the insurer is merely unable to employ its normal procedures in investigating and evaluating the claim. It must rather show that substantial rights have been "irretrievably lost". Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co., 817 F. Supp. 1136, 1158 (D.N.J. 1993). Further factors considered in New Jersey are the preservation of evidence and availability of witnesses, or any significant loss of the insurer's rights to deny, revise, or otherwise address liability and settlement issues. CSR Limited v. Cigna Corporation, 2006 U.S. Dist. LEXIS 8149 (D.N.J. 2006). Mere conjecture or suspicions may not form the basis for satisfying the prevailing New Jersey standard of "appreciable prejudice". Molyneaux v. Molyneaux, 230 N.J. Super. 169, 553 A.2d 49, 54 (App. Div. 1989).

A survey of laws from other jurisdictions reveals a wide variety of factors that the courts evaluate. An adverse effect on the ability of the insurer to assess coverage issues has been found an adequate basis to satisfy the prejudice standard. International Flavors & Fragrances v. Valley Forge Ins. Co., 738 N.W.2d 159 (Wis. 2d App 2007). It has been held that there is a triable issue of fact as to prejudice where late notice prevented an insurer from compromising a claim prior to judgment. Select Insurance Co. v. Superior Court, 226 Cal. App 3d 631, 276 Cal Reporter 598 (4th Dist 1990). The availability of witnesses to the accident and the ability of the insurer to discover information regarding conditions at the accident scene have been cited. Great Am Ins. Co v. C.G. Tate Constr. Co., 303 N.C. 387, 279 S.E.2d 769 (1981). Prejudice

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Andrew M. Rober is an associate at the law firm of Herzfeld & Rubin, P.C. in New York.

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Law § 200 are not the same and do not necessarily stand or fall together. Moreover, the differences between common law negligence and § 200 are so highly nuanced as to deserve attention.

While one may be tempted to refer to section 200 as the "Rodney Dangerfield" of the commonly pleaded sections of the Labor Law since it does not trigger strict or absolute liability, the statute has garnered significant respect, as is evidenced by the legions of decisions addressing it.

(Endnotes)

[1] Julian D. Ehrlich is Senior Vice President at Allied North America Insurance Brokerage of New York, LLC in Jericho, N.Y.

[2] Labor Law § 200 (1) provides, *inter alia,* (1) *All places … shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places.*

[3] *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316, 445 N.Y.S.2d 127, 129 (1981).

[4] *Ross v. Curtis-Palmer Hydro Electric Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).

[5] *Bell v. Bengomo Realty, Inc.*, 36 A.D.3d 479, 829 N.Y.S.2d 42 (1st Dept. 2007); *Kelarakos v. Massapequa Water Dist.*, 38 A.D.3d 717, 832 N.Y.S.2d 625 (2d Dept. 2007); *Ryder v. Mount Loretto Nursing Home, Inc.*, 290 A.D.2d 892, 736 N.Y.S.2d 792 (3d Dept. 2002); *Davis v. Manitou Const. Co.,* 299 A.D.2d 927, 751 N.Y.S.2d 136 (4th Dept. 2002).

[6] *Izzarary v. State*, 35 A.D.3d 65, 828 N.Y.S.2d 113 (2d Dept. 2006); *Yong Ju Kim v. Herbert Const. Co.*, 275 A.D.2d 709, 712, 713 N.Y.S.2d 190, 193 (2d Dept. 2000) stating, "The protection of Labor Law § 200 is not confined to construction work but codifies the common-law duty of an owner or employer to provide employees with a safe place to work."; *Agli v. Turner Const. Co., Inc.*, 246 A.D.2d 16, 676 N.Y.S.2d 54 (1st Dept. 1998) applying 200 to maintenance worker; *Jock v. Fien*, 80 N.Y.2d 965, 967, 590 N.Y.S.2d 878, 880 (1992) stating that § 200 covers all places to which the Labor Law applies which may include factories *c.f. Castleton v. Broadway Mall Properties, Inc.*, 41 A.D.3d 410, 411, 837 N.Y.S.2d 732, 733 (2d Dept. 2007) dismissing § 200 as the accident did not occur in a place to which Labor Law 200 applies where plaintiff restaurant manager slipped on water in a kitchen that had been recently renovated but prior to the certificate of occupancy being issued.

[7] NY PJI 2:216A and 2:217.

[8] NY PJI 2:216.

[9] *Charney v. Muss*, 149 A.D.2d 393, 539 N.Y.S.2d 752 (2d Dept. 1989).

[10] *Ortega v. Puccia*, WL 4742195 (2d Dept. 2008).

[11] *Russin,* supra, at 318.

[12] *Bell v. Bengomo Realty, Inc.*, 36 A.D.3d 479, 481, 829 N.Y.S.2d 42, 45 (1st Dept. 2007);

[13] *Id.*

[14] *Kelarakos v. Massapequa Water Dist.*, 38 A.D.3d 717, 718, 832 N.Y.S.2d 625, 626 (2d Dept. 2007).

[15] *Id.* at 626-627.

[16] *Id.* at 627.

[17] *Davis v. Manitou Const. Co.,* 299 A.D.2d 927, 751 N.Y.S.2d 136 (4th Dept. 2002).

[18] *Ryder v. Mount Loretto Nursing Home, Inc.*, 290 A.D.2d 892, 736 N.Y.S.2d 792 (3d Dept. 2002), *cf Mendez v. Union Theological Seminary in City of New York*, 17 A.D.2d 271, 793 N.Y.S.2d 420 (1st Dept. 2005) where the court stated that "for the purposes of assigning liability under Labor Law § 200, the fact that [the scaffold erector] did not supervise plaintiff's work does not mandate summary judgment dismissing the claim where there are issues of fact as to whether the defective condition resulted from the installation of the scaffold." *Tabickman v. Batchelder Street Condominiums By the Bay LLC*, 53 A.D.2d 593, 859 N.Y.S.2d 721 (2d Dept. 2008).

[19] *Dunham v. Hilco Const. Co. Inc.,* 89 N.Y.2d 245, 426-7, 654 N.Y.S.2d 335 (1996).

[20] Id. at 428, 654 N.Y.S.2d at 336.

[21] *Dunham v. Hilco Const. Co. Inc.,* 221 A.D.2d 586, 634 N.Y.S.2d 208, 209 (2d Dept. 1995) *reversed* , 89 N.Y.2d 245, 426-7, 654 N.Y.S.2d 335 (1996).

[22] *Ortega v. Puccia,* 2008 WL 4742195 (2d Dept. 2008).

[23] *Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876, 877-8, 609 N.Y.S.2d 168, 169 (1993).

[24] *Pichardo v. Urban Renaissance Collaboration Ltd. Partnership,* 51 A.D.3d 472, 857 N.Y.S.2d 144 (1st Dept. 2008).

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John J. McDonough

EDITOR IN CHIEF

STAFF

Anthony Celentano

Denise LaGrua

Alexandra M. McDonough

Julian D. Ehrlich, Thomas J. Maroney, Vincent P. Pozzuto, Andrew M Roher, and Cary Stewart Sklaren

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New York State Courts and Electronic Discovery

CARY STEWART SKLAREN *

Just like Kansas City in the Rogers and Hammerstein song from *Oklahoma*, everything is up-to-date with respect to electronic discovery in the courts of the State of New York. Yet because there are not any provisions in the CPLR or other statutes,[1] or the general court rules,[2] and because no appellate court has addressed the issue, so far, unlike the city on the edge of the Great Plains, New York law has not "gone as far as they can go." Nevertheless, New York lawyers need to know where the state courts are now, at this particular point in time, and how New York differs from the approach taken pursuant to the Federal Rules of Civil Procedure[3] and the many states which have derived their own approach to electronic discovery from the Federal Rules.[4]

NEW YORK COURTS PERMIT ELECTRONIC DISCOVERY

Although the opinions arrived somewhat late,[5] in comparison to federal cases discussing the issues,[6] New York courts have accepted the premise that electronic record and documents, including the ubiquitous e-mails, are potentially discoverable.[7] The courts, however, have not, so far, permitted unfettered romps through a party's data but instead have properly insisted upon compliance with the familiar discovery parameters as set forth in the CPLR and interpretive case law. In the case discussions below, the phrase "requesting party" is sometimes used to describe the plaintiff, defendant or other litigant seeking electronic discovery, while the term "producing party" is often used to described the individual or entity from whom discovery is sought, including non-parties.

NEW YORK'S FIRST "ELECTRONIC" DISCOVERY OPINION

The case which is arguably New York's first electronic discovery opinion, perhaps inevitably, involved a matrimonial dispute.[8] It concerned a husband's laptop computer, owned by Citibank, the husband's employer, who permitted him to use it for personal matters at home as well as in his employment. It was in the marital residence when "confiscated" by the wife, and wisely given to her attorney, who properly gave it to the court. The wife sought discovery of the information on the computer, while the husband resisted. In incorrectly, but understandably, analogizing the laptop to a "filing cabinet,"[9] the court permitted discovery regarding the husband's finances and personal business records, subject to privilege and any application for a protective order.[10]

NEW YORK'S FIRST MEANINGFUL ANALYSIS OF ELECTRONIC DISCOVERY ISSUES

The first New York opinion to discuss electronic discovery in any meaningful way was *Lipco Elec. Corp. v. ASG Consulting Corp.*,[11] involving a complex joint venture to bid on various public works. In essence, after the producing party responded with paper discovery to the requesting parties' discovery, the requesting parties sought electronic data, insisting that the only way to confirm the truth of the produced hard copies was by reviewing the raw data in computerized form.

After indicating that electronic data was discoverable,[12] Justice Austin announced that the most pressing issue in such regard was who should bear the cost, the requesting party or the producing party? "Retrieving computer based records or data," he wrote, in contrast to the first electronic discovery opinion, *Byrne v. Byrne*,[13] "is not the equivalent of getting the file from a file cabinet or archives."[14]

CONTRAST BETWEEN "PAPER" AND ELECTRONIC DISCOVERY

The Court contrasted traditional paper discovery with electronic discovery and enumerated some of the distinct differences.[15] For example, while paper is being maintained in "filing cabinets," and, therefore, is "generally stored in a usable and obtainable form," storage costs are often "significant," while the costs for electronic data, on the other hand, especially when on a computer hard drive or server, are "nominal." At other times, however, when the data "has been removed and stored on back-up media, or even worse, deleted all together," the costs may be significant. "Once a paper document is destroyed, it cannot be produced." Data deleted from a hard drive, however,

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* *Cary Stewart Sklaren is a member at the law firm of Herzfeld & Rubin, P.C. in New York.*

New York Insurers Must Now Show Prejudice

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has been found where late notice prevents the insurer from determining whether an affirmative defense is available. Kermans v. Pendleton, 62 Mich. App 576, 233 N.W.2d 658 (1975). Prejudice has been found where late notice prevents an insurer from adequately participating in settlement negotiations or remediation efforts. Uphohn Co. v. Aetna Casualty & Surety Co., No., 456 Mich. 944, 575 N.W. 560 (1998). The loss of opportunities to settle or compromise a claim has been found prejudicial to insurers. West Bay Exploration Company v. AIG Specialty Agencies of Texas, Inc., 915 F.2d 1030, 1990 U.S. App. LEXIS 17372 (6th Cir 1990). Conversely, an insurer has been found not prejudiced even where it received notice of a claim only shortly prior to commencement of trial. American International Surplus Lines Insurance Company v. City Of San Diego, 130 Fed. Appx 91, 2005 U.S. App. LEXIS 29568 (9th Cir 2005). See Insurance Coverage Disputes Handbook, Ostrager & Newman, 14th Edition, at 177-181, for a discussion of the "prejudice" standard in various jurisdictions.

Some elements of the old New York rule are preserved. The new law establishes a presumption of prejudice that cannot be rebutted where the insured resolves the claim by settlement or other compromise prior to giving notice to the insurance carrier. There is similarly a presumption of prejudice that cannot be rebutted where, prior to notice, the insured's liability "…has been determined by a court of competent jurisdiction or by binding arbitration." The new law exempts claims-made policies which, by their nature, require reporting within the policy period or very shortly thereafter, depending upon policy language. The new law establishes a presumption of prejudice for claims where the insured's delay in reporting is greater than two years.

The new law may produce a shift in the focus of a significant number of declaratory judgment insurance actions. It is not uncommon for the defense lawyer to represent the interests of the insured while separate counsel, retained by the same insurance carrier, litigate the issue of late notice against the insured. Under the new law, coverage counsel may instead be litigating against the insured to prove that the "prejudice" standard is satisfied. Any conflict in interest, whether arising under the old or new rule (i.e., "late notice" or "prejudice", respectively), requires retention of separate counsel. Public Service Mutual. Ins. Co. v. Goldfarb, 53 N.Y.2d 392 (1981).

(Footnotes)

[1] A similar bill was vetoed in June of 2007 by then Governor Eliot Spitzer.

[2] The new law is effective only prospectively.

President's Column

will be on a current topic of particular interest to our membership. The Office of Court Administration Statewide Coordinator for E-Filing, Jeffrey Carucci will present the new E-Filing Project being rolled out throughout the New York State Court System. The presentation promises to be interesting and informative with materials you can bring back to share with your offices.

This year we are privileged to honor the 53RD Governor of the State of New York, The Honorable George E. Pataki with the Pinckney Award. We are also honored that Herbert Rubin will be the recipient of the James S. Conway Achievement Award. Jim Conway gave so much to our organization so it is appropriate that we recognize and honor Herbert Rubin for those same qualities. We look forward to a great evening.

The 2009 DANY Golf Outing will return June 22, 2009 to the Village Club of Sands Point located on Long Island. The Village Club of Sands Point is one of the premier private golf courses on the North Shore of Long Island. All those that attended last year enjoyed some great golf and great food. Mark your calendars and more to follow.

There are various sponsorship opportunities available for the Pinckney Dinner and 2009 DANY Golf Outing. Many of our vendors show their support to The Defense Association of New York through their sponsorship. If there is a vendor that you would recommend, you can email events@maroneyoconnorllp.com

In conclusion, although membership is approaching an all time high, the best new members are recommended by present members. Ask around and promote our organization and our events.

It has been my privilege to serve as President of The Defense Association. I look forward to seeing all of you at the Pinckney Dinner on April 7, 2009.

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is potentially retrievable by someone with "sufficient computer savvy," unless it has been expunged.

In addition, unlike paper, which can be read (and, by implication, if necessary, translated into English or some other language), electronic data needs software to make it readable.[16] This software may be commercially available, or it may be customized or proprietary and not readily available. Finally, a determination can be made whether computer data has been altered, and the original data restored.[17]

NEW YORK CPLR 3101 EQUALLY APPLICABLE TO ELECTRONIC DISCOVERY

Despite these differences, however, the Court indicated that it still had to determine under CPLR 3101 whether the information sought was "material and necessary" to the prosecution or defense of the action, precisely the same determination that would have to be made for paper discovery.[18] Yet here, that issue had been conceded by the producing parties, apart from one request to produce data that would be "sorted" by electronic means. Nevertheless, the producing parties resisted production by asserting that the paper production was sufficient because the extraction of the electronic information would be "extremely difficult, time consuming and expensive."

The Court discussed at length the steps that compliance would entail, including hiring a computer consultant to retrieve the now unreadable data from proprietary software, the difficulty entailed in collecting the raw data from many different sources with the software, the necessity to create a new relational database of the retrieved data by, presumably, another computer consultant, the necessity to purchase and install new software to read and collect the data, and the necessity of review of the data to determine whether it was subject to discovery. This, presumably also would include a determination of possible privilege.[19]

NO COST SHIFTING FOR ELECTRONIC DISCOVERY IN NEW YORK

After discussing the way in which some federal courts, at that time,[20] handled electronic discovery costs,[21] the court indicated that cost shifting is not an issue under the CPLR. In New York, the requesting party pays.[22] CPLR 3103(a) specifically grants the court authority to issue a protective order to prevent a party from incurring unreasonable expenses in complying with discovery demands.

Therefore, the analysis of whether electronic discovery should be permitted in New York is much simpler than it is in the federal courts. The court need only determine whether the material is discoverable and whether the party seeking the discovery is willing to bear the cost of production of the electronic material. This is especially true in this case where the requesting party has been provided with hard copies of the electronically stored data.

WHAT MUST A PARTY DO TO COMPLY WITH E-DISCOVERY REQUESTS?

How far must a producing party go in order to comply with electronic discovery requests and must it include backup media created for the purposes of disaster recovery? In *Delta Financial Corp. v. Morrison,*[23] Justice Warshawsky examined in considerable depth what a producing party had already done, the extent to which it needed to do more, and who would pay.

Delta Financial sued several defendants alleging that they had committed fraud with regard to the exchange of certain assets in the amount of $110 million.[24] Thereafter, a dispute arose between the defendants (requesting parties) and plaintiff Delta Financial Corp. (producing party) with regard to production of three categories of non-email electronic documents, as well as e-mails, some of which were only available on disaster recovery back-up tapes.

In essence, the requesting party, asserted they were entitled to the discovery because it was relevant, and further claimed that any information on back-up tapes was by definition accessible and therefore should be produced, citing the decision in *Zubulake I*.[25] This was an influential 2003 Southern District opinion written by District Judge Shira Scheindlin, holding, among other things, that "regardless of the purpose for creating backup tapes, '[a]s long as the data is accessible, it must be produced.'"[26]

The requesting parties also asserted that because restoration of some of the backup tapes, except for e-mails, had already been accomplished by the producing party, the costs would be limited. Further, because most of the previously restored data was on hard disks (including both e-mail and non-email), the usual CPLR discovery rules applied. The producing party should search the data for documents, using the search terms of the requesting parties, and produce non-duplicative materials which were responsive and relevant, citing *Zubulake III*.[27]

The requesting parties also agreed initially to pay the cost of the process, and "offered to begin each search with a sampling, to the extent possible, to ascertain

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whether a full search is a worthwhile endeavor." They asserted that the additional searches should be run because the "prior production of electronic documents have clearly yielded responsive, highly probative documents," and that its current search request "seeks to capture fundamentally similar documents to the documents already produced."[28]

The producing party responded that it had to neither identify specific missing documents "nor need to demonstrate that a gold mine lies within the universe of yet-to-be-searched documents to have the searches run."[29] No further electronic discovery should be permitted, it claimed, because the "backup tapes are maintained for disaster recovery purposes, not storage of electronic information for routine retrieval."[30]

The producing party also cited a great deal of case law supporting its position, which discussed the difficulty of producing "useful information from backup tapes," and the duplicative nature of information on such tapes. The producing party argued it did not have an "automatic duty "to come forward with such data.[31]

Justice Warshawsky, while acknowledging New York courts are not controlled by the Federal Rules, found them and "the case law interpreting them instructive and quite useful, especially in light of the absence of CPLR guidance."[32] It must also be noted that the court was referring to the Rules prior to the adoption of the December, 2006 amendments regarding electronic discovery, although the judge may, of course, have been referring to the proposed amendments which were in virtually their final form at the time the opinion was published in August, 2006.

As a result, the court held that the requesting parties were entitled to the relevant electronic documents, but with a "caveat" that "the request for additional searches must also be reasonably likely to lead to the discovery of relevant evidence. In other words, a demanding party must have some basis that is not pure conjecture, for its assertion that additional searches may lead to the discovery of relevant documents."[33]

Adopting a concept set forth in another federal case cited in *Zubulake I*, *McPeek v. Ashcroft,*[34] rather than order a total restoration of the backup tapes, the court first ordered production of documents from the previously restored tapes, and then ordered production for specific, limited periods from the newly restored tapes. Justice Warshawsky also provided that the requesting party was to bear initially 100% of the costs of the restoration, search, deduplication (elimination of duplication), and review processes for all its requests, including the review with respect to privilege. Only then, if it were determined that more expansive searches were necessary, would the court determine if further cost-shifting was warranted.[35]

PRESERVATION OF ELECTRONIC DOCUMENTS

A New York court will issue a preservation order and prohibit the destruction of material and necessary electronic documents. Shortly after issue was joined in a putative class action involving disability insurance claims handling procedures, plaintiff, in *Weiller v. New York Life Ins. Co.,*[36] asked defendants to stipulate to an electronic document preservation order. While defendants' counsel agreed to preserve, he refused to stipulate to an order. Subsequently, plaintiff moved, "in substance," for a preliminary injunction "nearly identical" to one in effect in a related Multi-District Litigation pending in the in the United States District Court for the Eastern District of Tennessee. A preservation order was necessary, plaintiff asserted, because in the past, there was "alleged 'destruction' of e-mail messages."[37]

Justice Cahn, however, noted that he could "envision one or more scenarios in which the federal preservation orders might not be sufficient protection for plaintiff in this state action. For example, if the federal court did not require the production of certain materials or documents, and this court did require such production."[38] Consequently, he believed that a separate preservation order would be necessary because "the allegations in this action might well diverge from those in the federal actions, causing a divergence in the scope and details of discovery," and granted the motion.[39]

The Court also examined the scope of the proposed preservation and found it, for the most part, proper. In particular, Justice Cahn stated that a request seeking to preserve "all databases, electronic material, tape media, electronic media, hard drives, computer disks and documents" relating to a number of different documents categories of documents "is proper, in light of today's technological realities,"[40] citing *Zubulake I.*[41]

With regard to the costs of preservation, defendants asserted that preservation of computer hard drives under the MDL preservation order cost the defendants in excess of one million dollars. After asserting that the court was "not insensitive to the cost entailed in electronic discovery,"[42] Justice Cahn indicated that when "appropriate," he would permit a request from defendants in this case to obligate the requesting party

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to absorb all or a part of the cost of the e-discovery, although "the court will not constrain the production of possibly relevant evidence on account of the later need to allocate the cost."[43]

SANCTIONS FOR VIOLATION OF PRESERVATION ORDER

The case of *Hunts Point Realty Corp. v. Pacifico*,[44] is one of those unusual situations where a party wins the war but loses the battle. Plaintiffs brought suit seeking damages for breach of a covenant not to compete in a sale of stock agreement. During discovery, the court issued an order to defendant Pacifico to preserve electronic communications between himself and another defendant, but notwithstanding, the court found that Pacifico willfully and intentionally disobeyed such order. Subsequently, the court found for plaintiff after four days of trial.

Thereafter, as part of a determination as to causation of damages, despite the earlier finding of liability, the court awarded the plaintiff zero damages. Nevertheless, because "the Defendant's unabashed flaunting" of the court's preservation order resulted in additional work by plaintiffs' counsel and the court, as sanctions, the court awarded to plaintiffs its counsel fees and costs for all work done by its attorneys related to defendant's failure to preserve e-mail.[45] There have also been other electronic discovery opinions dealing with discovery misconduct.[46]

SEEKING ELECTRONIC DISCOVERY FROM NON-PARTIES

In re Estate of Maura[47] involved e-discovery requested of a non-party law firm and is indicative of the way in which courts will try to protect the data of those not directly involved in the lawsuit as litigants. This case involved the validity of a right of election by the respondent surviving spouse (requesting party) who had signed a prenuptial agreement renouncing such right and the court was asked to determine whether a non-party law firm which had prepared the agreement was subject to electronic discovery, and if so, the extent and manner of conducting such discovery.

The requesting party sought all existing and deleted computer records of the prenuptial agreement, billing records of the decedent relating estate planning and the agreement, all other estate planning records, and sample copies of other prenuptial agreements prepared by the firm, with privileged materials redacted. She also submitted a proposal from her computer expert seeking the right to remove the law firm's computer hard drive off-site to make a clone at her expense. Downloaded documents would then be printed and submitted to the court in a sealed envelope for privilege determination.

The producing law firm opposed because of the "invasive" nature of the request and the bias of the respondent's expert. Further, it asserted it had already produced hard copies of the documents, but that if such discovery is proper, the information sought should be acquired from the firm's back-up tapes, which would protect pending matters from disclosure. It was conceded, however, that the back-up tapes would not provide information on alterations or deleted materials. In addition, it asserted that the requesting party should bear all of the costs.

In its analysis, the court found that billing records relating to estate planning had no bearing on the controversy and denied the request. The court also denied the request for all estate planning documents because hard copies had already been provided, and there was no need to determine whether the documents had been altered or deleted. Likewise, the request for sample prenuptial agreements was denied as having no bearing on the authenticity of the agreement at issue, as well as being subject to attorney-client privilege. The billing records regarding the prenuptial agreement, as well as all existing and deleted records of such agreements, in contrast, the court found to be material and necessary.

The Court also found that the approach suggested by the respondent for retrieving the data by off-site cloning by its expert was flawed, as was the back-up tape methodology suggested by the law firm which will not yield deleted or altered information. Since the requesting party should incur the cost of production, the law firm was directed to select its own expert to conduct the cloning process, and upon receiving a proposal as to cost, it should inform respondent's counsel. If respondent wished to proceed, it had to notify the firm within 10 days, in writing. Further, representatives of counsel for both respondent and petitioner, as well as the law firm, may be present during the cloning. Hard copies of all retrieved data shall then be submitted to the court within 10 days and law firm had to advise the court within 10 days of any privilege issues or other objections.

ELECTRONIC DISCOVERY REQUESTS MAY BE DEEMED ABANDONED

In *Consolidated Sewing Machine Corp. v. Sandford*,[48] a commercial lawsuit involving several individual defendants and a West Virginia company, the requesting party moved to strike the producing party's answer for failure to comply with both non-electronic and electronic discovery. In response, producing party sought to show compliance with discovery demands through e-mail communications by its counsel.

As the result of a prior motion before, a different

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justice, on behalf of the producing party, counsel had agreed to maintain custody and control of the computer of one of the individual defendants in his office to enable the requesting party to copy its hard drive for evaluation. Producing party further asked opposing counsel to provide the name of the expert for the requesting party and arrange to copy the hard drive within two weeks or the computer would be returned.

Requesting party's counsel asserted that the costs to evaluate the hard drive would probably outweigh any meaningful information to be gained from this exercise. As a consequence, after two weeks, defense counsel asserted that he deemed requesting party's right to such discovery waived, the computer would be returned and that compliance with the prior order was not required. The court agreed and it held that the producing party no longer had to comply with the earlier order.

DENIAL OF REQUEST FOR E-DISCOVERY AS NOT MATERIAL AND NECESSARY

In a matrimonial action, *R.C. v. B.W.*,[49] the husband had sought production of any computers regularly maintained at the former marital residence, regarding financial disclosure, contending they were material and necessary to the determination of his wife's application for counsel fees and maintenance. He claimed that his wife, a lawyer, has been doing most, if not all, of the legal work in this matter and therefore any applications for large sums of counsel fees could only be countered by the information on his wife's computer. Further, the husband claimed that the factual data regarding the creation of these files, when they were created and the time spent, were not privileged.

The wife objected "most vehemently" asserting that this was yet another attempt by the husband to wear her down with intimidation and threats, and asserted violation of her constitutional rights to due process and privacy, as well as the rights of her children who also used the computers. She argued that her husband's application was a fishing expedition to harass her and that almost all of the information contained on the three computers was private and irrelevant to the action. Moreover, the information sought related to documents that did not exist, had been produced or would be produced prior to trial. She argued that the request was the husband's attempt to prove she was not looking for work. She also stated that the disclosure of information in the computers was duplicative and burdensome as she had already provided the information requested, when relevant, in paper form and been deposed three times.

In denying the request, the court found that while the issues raised by the husband were certainly important to the case, and that should any documents exist which shed light on the matters, he would be entitled to them. Nevertheless, the husband had not proved to the satisfaction of the court that what was sought from the wife's computers would in any way assist him.

Likewise, in a Labor Law and common law negligence personal injury case involving a construction accident, supposedly involving brain injuries, *Karim v. Natural Stone Indus., Inc.*,[50] the requesting party sought a clone of the hard drive from the plaintiff's computer to prove that he was able to return to employment and thus had not suffered a "grave injury"[51] as claimed in the third party action against the plaintiff's employer.

The Court, however, held that the computer hard drive was not relevant and material to any determination regarding plaintiff's ability to return to employment. The computer was also used by several members of plaintiff's household, and it contained both private communications and the communications of plaintiff and his family that had nothing to do with the limited issue of plaintiff's employability. Further, it would not be possible for the requesting party to discern plaintiff's computer usage beyond what plaintiff testified to at his deposition.[52] The issue of plaintiff's employability was ascertainable by other means, including an examination by an occupational therapist.

USE OF AN EMPLOYER'S EMAIL MAY WAIVE ANY POTENTIAL PRIVILEGE

In *Scott v. Beth Israel Medical Center, Inc.*,[53] a physician who was fired by his employer asserted that he was entitled to severance pay pursuant to an employment agreement.[54] In the course of discovery,[55] the physician moved for a protective order seeking the return of all email correspondence between him and his attorney which may have been on his employer's computer claiming they were subject to attorney client privilege and the work product doctrine. All e-mails were sent using the physician's employee email address and sent over the server at Beth Israel Hospital.

Beth Israel had a "no personal use" e-mail policy, in addition to a stated policy allowing for employer monitoring of the email system.[56] While the plaintiff claimed he had no knowledge of the policy, and his counsel asserted they had no notification from the hospital that its emails to its client were being monitored, the hospital argued that the physician's emails were not made in confidence and were not protected by attorney client privilege as codified in CPLR 4503.

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The plaintiff argued that pursuant to CPLR 4548[57] his emails were "made in confidence," but while the court acknowledge that the statute was enacted "to recognize the widespread commercial use of e-mail," it also indicated that "some supporters of the bill warned that there are some types of information that are just too sensitive to be transferred over e-mail, such as confession of a crime or trade secret, and thus could not expect to retain the privilege."[58] Thus, the court held that "this statute does not absolve an attorney of his or her responsibility to assess the risk of communicating by e-mail with a client."[59]

Further, the court asserted that CPLR 4548 does not mean that an employer cannot adopt a "no personal use policy" with respect to email.[60] As a consequence, the court had to determine whether the physician's use of his employer's "e-mail system to communicate with his attorney in violation of BI's policy renders the communication not made in confidence and thus destroys the attorney-client privilege if it ever applied."[61]

Not finding any New York case law, the court looked to a federal bankruptcy case, *In re Asia Global Crossing, Ltd.*,[62] which it considered "virtually identical," noting that attorney-client privilege would not apply if:

(1) . . . the corporation maintain[s] a policy banning personal or other objectionable use,

(2) . . . the company monitor[s] the use of the employee's computer or e-mail,

(3) . . . third parties have a right of access to the computer or e-mails, and

(4) . . . the corporation notif[ies] the employee, or was the employee aware, of the use and monitoring policies?[63]

In *Scott*, the court found that the defendant's policy satisfied the first and second requirements, and the third requirement was not relevant. As to the fourth requirement, the court determined that the plaintiff had both actual and constructive notice of the policy.

Plaintiff's use of defendant's e-mail system to communicate with his attorney in violation of defendant's e-mail policy rendered any communication not made in confidence, thereby destroying any attorney-client privilege, including a work product privilege.

In light of the holding, counsel should be alert to confidential communications with clients by email who are using an obvious corporate or commercial domain name, as opposed to one of the many personal email addresses (e.g., gmail.com, yahoo.com, att.net, aol.com, verizon.net), and should confirm with clients the client's expectation of email privacy. Further, for those corporations and commercial entities that have not yet adopted a policy that their employees be told they have no expectation of email privacy, it may be time to do so.

FUTURE DECISIONS

It is beyond any doubt, that more and more decisions with respect to electronic discovery will be issued by the courts of New York, and there may also be amendments to the CPLR[64] and other statutes, or court rules. As a consequence, New York lawyers must remain vigilant in order make certain that it is always know how far "they" have gone with respect to electronic discovery.

(Endnotes)

[1] *See Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345, 2004 N.Y. Misc. LEXIS 1337 at ***15 (Sup. Ct. N.Y. County. 2004) (Austin, J.) ("Electronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR.)

[2] *But see* 22 N.Y.C.R.R. § 202.70, Rule 8(b) of the Commercial Division of the Supreme Court which states:

(b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts.

[3] Fed.R.Civ.P. 16, 26, 33, 34, 37, and 45, and Form 35.

[4] See *generally* http://www.ediscoverylaw.com/articles/resources/ for a list of state electronic discovery statutes. Website last visited Nov. 14, 2008.

[5] "Neither the parties nor the Court have been able to find any cases decided by New York State Courts dealing with the issue of electronic discovery." *See supra* note 1 *Lipco Elec. Corp.* 2004 N.Y. Misc. LEXIS 1337 at ***15.

[6] *See, e.g.,* Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2 (2000) (historical perspective as of the date of its publication).

[7] "Raw computer data or electronic documents are discoverable." *See supra* note 1 *Lipco Elec. Corp.* 2004 N.Y. Misc. LEXIS 1337 at ***17, citing *Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake I*"), Playboy *Enterprises, Inc., v. Welles,* 60 F. Supp. 2d 1050 (S.D. Cal., 1999), and *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y.). *See also R.C. v. B.W.,* 2008 N.Y. Misc. LEXIS 2193 at *4, 239 N.Y.L.J. 64 (Sup. Ct. Kings County 2008) (Adams, J.) ("The law is clear that electronic records and information are subject to disclosure.")

[8] *Byrne v. Byrne,* 168 Misc.2d 321, 650 N.Y.S.2d 499 (Sup. Ct., Kings County 1996) (Rigler, J.). For other e-discovery cases involving matrimonial actions or involving a spouse, *see, In re Estate of Maura*, 17 Misc. 3d 237, 842 N.Y.S.2d 851 (Surr. Ct. Nassau County 2007) (Riordan, Surr.), *infra* text accompanying note 47; *R.C. v. B.W.*, 2008 N.Y. Misc. LEXIS 2193, 239 N.Y.L.J. 64 (Sup. Ct. Kings County 2008) (Adams,

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no need for investigation as the basis for disclaimer was readily apparent in the tender letter. The Court further held that the $1 million deductible in the Arch policy was not waived as it did not bar coverage or implicate policy exclusions and therefore, was not subject to the time requirements of Insurance law §3420(d).

6. QUALIFIED IMMUNITY

State was Entitled to Qualified Immunity Arising out of Highway Plan Decision

Guan v. State

866 N.Y.S.2d 697 (2nd Dept. 2008)

On November 10, 2000, Claimant's decedent was killed when his car veered off the Northern State Parkway in Suffolk County. Decedent's accident reconstruction expert opined at trial that decedent's car hydroplaned and slid off the roadway striking a tree 24 feet from the edge of the roadway. Claimant argued that the state was required to extend the "clear zone" (area without fixed objects) to 30 feet to comply with modern highway design standards. Under the Qualified Immunity doctrine, liability may arise where there is proof that the state's traffic design plan "evolved without adequate study or lacked reasonable basis." The evidence addured at trial established that the state had adopted a 30 foot clearance for new construction or major reconstruction, and a 20 foot clear zone for rehabilitation and minor upgrading. The evidence also showed that the state had conducted an extensive assessment of the parkway system in adopting this policy, and thus, the Qualified Immunity doctrine applied. The Court also held that renovations done to the roadway in 1985 and 1994 did not materially alter the roadway itself and did not constitute significant repair or reconstruction. Finally, the Court held that the state was not on constructive notice of a dangerous condition in that daily traffic volume at the site of the accident was 65,000 to 70,000 cars per day, and there were only 11 collisions with trees in the area from 1991 to 2000.

7. MEDICAL MALPRACTICE

Fact Issues Remained as to whether Physician Acted in Conformity with Good and Accepted Medical Procedures

Grant v. Hudson Valley Hospital Center

866 N.Y.S.2d 726 (2nd Dept. 2008)

The Court held that defendant's experts' affirmation offered only conclusory opinions that the defendant had acted in conformity with good and accepted medical procedures. The affirmation did not address specific claims in plaintiff's verified bill of particulars that defendant failed to safeguard her from intestinal injuries and that her injuries were a direct result of adhesions of the small bowel distal ileum to the anterior abdominal wall that were caused by defendant's actions.

8. ROADWAY CONSTRUCTION LIABILITY

Plaintiff's Engineer's Affidavit was Insufficient to Establish a Triable Issue of Fact

Kleiner v. County of Orange

866 N.Y.S.2d 727 (2nd Dept. 2008)

Plaintiff was injured when he swerved off a roadway to avoid a deer. Plaintiff was able to get his front tire back on the roadway but the rear tire slid into a ditch running parallel to the road. The car flipped over. Plaintiff sued the county alleging negligent roadway construction and maintenance. The Court reversed the lower Court order denying the county summary judgment. The Court held that plaintiff's expert's affidavit did not establish that the County had actual or constructive notice of allegedly dangerous conditions in the roadway as they were not located within an area that the county had improved for vehicular travel.

9. PROPERTY INSURANCE COVERAGE

Property Loss Not Covered by Policy

Mirabelli v. Merchants Ins. Co. of N.H.

866 N.Y.S.2d 729 (2nd Dept. 2008)

Defendant insurance carrier provided evidence establishing that the plaintiffs not only failed to comply with a policy provision requiring that the property have a particular type of fire alarm, but also failed to fulfill their obligations under the policy's cooperation clause.

10. POLICE OFFICER LIABILITY

Issue of Fact Existed as to Whether Police Officer Acted with Reckless Disregard

Britt v. Bustamante

866 N.Y.S.2d 740 (2nd Dept. 2008)

Plaintiff brought action against Police Officer and County of Suffolk for injuries sustained in automobile collision while officer was engaged in an emergency operation. The Court held that the manner in which a police officer operates his or her vehicle in responding to an emergency may not form the basis for civil liability to an injured third party unless the officer acted in reckless disregard for the safety of others. The Court further held that plaintiff created an issue of fact in response to defendants' motion for summary judgment by submitting an affidavit of a non-party witness who stated that the officer did not have the overhead lights or siren on, while he did have his turret lights on. The Court stated that under these circumstances, where it was undisputed that the officer did not stop for the stop sign and that his view of the intersection was partially obstructed by hedges, summary judgment was not warranted.

Continued on next page

11. DAMAGES

Jury Verdict on Damages was not Against Weight of Credible Evidence

Batcho v. 5817 Food Corp.
866 N.Y.S.2d 755 (2nd Dept. 2008)

Plaintiff appealed from the denial of a motion for a new trial on the issue of damages. The jury awarded plaintiff $40,000 for past lost earnings, $10,000 for past pain and suffering and $15,000 for past medical expenses. The Court held that since conflicting evidence was presented at trial, the jury reasonably could have concluded that the majority of plaintiff's injuries resulted from pre-existing conditions with regard to his back and sexual dysfunction.

12. PREMISES LIABILITY

Defendant Home Owner Entitled to Summary Judgment Where Plaintiff Shot with Paintball Gun at Premises

Lanzetta v. Madori
867 N.Y.S.2d 43 (1st Dept. 2008)

Plaintiff was accidentally shot with a paintball gun by Defendant Madori at the home of Defendant Demauro. Midori had left the gun at Demauro's house on a prior occasion. The Court held that defendant Demauro lacked actual knowledge that the paintball gun was in the house. There was also no evidence as to how long the gun was there as to charge Demauro with constructive notice. Demauro was also not liable for negligent supervision of her daughter, defendant Washburn, who was present, since the accident was unforeseeable in light of her lack of awareness of the presence of the paintball gun, nor was there evidence that Demauro was aware of the dangerous proclivities of her daughter's friends.

13. PROXIMATE CAUSE

Insufficient Connection Existed Between City's Alleged Neglect of Fence and Child's Injury

Escalet v. New York City Housing Authority
867 N.Y.S.2d 62 (1st Dept. 2008)

The infant-plaintiff was injured when she fell from the top of a fence that was approximately 10 to 12 feet tall. The fence surrounded a grass area that was not a designated play area. Although the fence was locked, the infant gained access to the area where the accident occurred by crawling through a hole that had allegedly been in existence for more than five years. The infant-plaintiff fell from a different section of the fence after climbing it to retrieve a ball that had become lodged there. Plaintiff claimed that the hole facilitated the accident by failing to prevent her from accessing the grass area in the first place. The Court held that the hole in the fence merely furnished the condition or occasion for the occurrence of the event rather than one of its causes, and thus concluded that the defendant's alleged neglect of the fence and plaintiff's injury was too attenuated to conclude that defendant's malfeasance proximately caused the accident.

14. SETTLEMENT

Defendant Failed to Establish that Attorney had Apparent Authority to Settle Case

Blakney v. Leathers
867 N.Y.S.2d 145 (2nd Dept. 2008)

Plaintiff moved to vacate general release and stipulation of discontinuance asserting that he neither authorized nor consented to the settlement, that the signature and the general release was a forgery and that he never received any proceeds. The Court held that Defendants failed to satisfy their burden of showing that the attorney representing plaintiff had the apparent authority to settle the case.

15. WAGES

Undocumented Alien was not Precluded from Obtaining Lost Wages

Coque v. Wildflower Estates Developers
867 N.Y.S.2d 158 (2nd Dept. 2008)

Plaintiff, an undocumented alien worker, submitted a false social security card to gain employment, and was injured in performance of the work. The jury awarded damages for past and future lost wages. Defendants argued that the submission by plaintiff of the false social security card barred the lost wages claim under the Court of Appeals holding in Balbuena. The Second Department held that even assuming that Balbuena stands for the proposition that the submission of false documentation upon being hired is alone a sufficient basis for denying a plaintiff damages for lost wages, that rule is limited to situations in which an innocent employer is duped by fraudulent documentation into believing that the employee is a U.S. Citizen. The Court held that the false document must actually induce the employer to offer employment to plaintiff. If the employer violates the Immigration Reform and Control Act of 1986 by failing to verify additional documentation when the I-9 Form is completed, as required by the form, plaintiff's lost wage claim is not barred.

16. PRODUCTS LIABILITY

Plaintiff Failed to Show that Exposure to Manufacturer's Products was Cause of his Ailments

Coratti v. Wella Corporation
867 N.Y.S.2d 421 (1st Dept. 2008)

Plaintiff hairdresser brought action against manufacturer of hair coloring products alleging personal injuries from exposure to chemicals within products. In affirming the motion Court's grant of summary judgment, the Court held that plaintiff failed to raise a triable issue of fact in response to defendants' showing that the scientific community has not generally accepted that his ailments could be caused by daily, occupational exposure to the chemical contained in hair dyes. The Court further held that plaintiff's experts did not even attempt to show how

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much exposure to which chemicals will render an individual susceptible to toxic poisoning or the quantity of each chemical in defendants products. The Court further noted no objective tests were performed on plaintiff to determine the extent of his exposure.

17. LEGAL MALPRACTICE

Plaintiff's Failed to State a Claim for Legal Malpractice or Negligent Infliction of Emotional Distress

Yong Wong Pack v. Wolff and Samson, P.C.
867 N.Y.S.2d 424 (1st Dept. 2008)

Plaintiffs claimed that defendants committed legal malpractice by advising plaintiff Yong Wong Park to plead guilty to a federal charge of trafficking in counterfeit goods without advising him of immigration consequences of his plea. The Court held that the claim was barred by Park's undisturbed guilty plea and the malpractice related to a collateral matter (deportation) rather than the core of the criminal action. Further, the claim did not allege that "but for" the alleged malpractice Park would have not pled guilty. In addition, Park's claim that the advice was wrong conflicted with factual findings in the federal proceeding where Park sought to vacate his plea based on ineffective assistance of counsel. The negligent infliction of emotional distress claim brought by Park's family members was properly dismissed for the lack of an allegation showing any kind of duty owed by defendant to Park's wife and children, and also because the alleged malpractice was not so extreme and outrageous as to be utterly intolerable in civilized society.

18. CHOICE OF LAW

Michigan law Governed Product Liability Action

Devore v. Pfizer, Inc.
867 N.Y.S.2d 425 (1st Dept. 2008)

Consumers, Michigan Residents, brought separate products liability actions against New York-based pharmaceutical company alleging that cholesterol lowering drug caused unwarned of side effects. Defendant moved to dismiss and lower Court granted the motion. The First Department held that Michigan statute that created immunity against any claim of defect concerning a drug approved by the FDA was "conduct-regulating," and thus Michigan law governed. The Court held that when the purpose of the statute is conduct-regulating, the law of the jurisdiction where the tort occurred will generally apply. The Court further found that Michigan had far greater contacts with the litigation than New York.

19. LABOR LAW

Plaintiff Entitled to Summary Judgment in Labor Law 240(1) Cause of Action

Mihelis v. I. Park Lake Success, LLC
867 N.Y.S. 2d 438 (1st Dept. 2008)

Plaintiff and his co-worker were working on a construction project when the roof panel on which they were standing snapped in half and collapsed. The Court held that the evidence establishing that plaintiff was not provided with any safety devices demonstrated his entitlement to summary judgment as a matter of law on his Labor Law §240(1) claim. Defendant's claim that there may have been safety devices somewhere at the work site did not establish proper protection.

20. LABOR LAW

Issue of Fact Existed on Plaintiff's Labor Law §200 Cause of Action

Van Salisbury v. Elliott-Lewis
867 N.Y.S.2d 454 (2nd Dept. 2008)

Plaintiff, an operating engineer, was injured when he fell on a pile of electrical cables blocking access to a supply shelf during a repair project. The Court held that where plaintiff's injuries stem not from manner in which work is being performed but rather from dangerous condition on the premises, a general contractor may be liable in common law negligence and under Labor Law §200 if it has control over worksite and actual or constructive notice of defective condition. The Court further held that the general contractor failed to establish that it lacked control over the condition of the work site, and that it neither created or had actual or constructive notice of the alleged dangerous condition.

21. CONTRACT INTERPRETATION

Contract did not Require Service Provider to Evaluate how HVAC system Would Operate in Event of Fire.

Schools Ins. Reciprocal v. Honeywell, Inc.
867 N.Y.S.2d 456 (2nd Dept. 2008)

In a subrogation action, first party property insurer, sought to recover $13 million paid to School District for property damage caused by fire from School's HVAC inspection company, Honeywell. The court held the issue was a matter of contract interpretation for the Court to decide. The Court held that the School District's contract with Honeywell was unambiguous and that Honeywell's duties had nothing to do with the fire alarm system. The service agreement did not require Honeywell to check how the HVAC system would operate in the event of a fire.

22. LABOR LAW

Plaintiff was Engaged in Enumerated Activity

Wade v. Atlantic Cooling Towing services
867 N.Y.S.2d 489 (2nd Dept. 2008)

Plaintiff was disassembling the pipes of a defunct sprinkler system attached to a cooling tower located on

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the roof of an office building leased by defendant. He fell through the floor of the tower and sustained injuries. The Court held that this activity constituted "altering" within the meaning of Labor Law §240(1) finding that the sprinkler system consisted of numerous metal pipes and was not a temporary installation. The Court found that the dismantling of the sprinkler system constituted a significant physical change to the configuration or composition of the building. The Court also found that the activity constituted "demolition" for purposes of Labor Law §241(6).

23. SNOW AND ICE LIABILITY

Owner's Agent did not Make Naturally-Occurring Condition on the Sidewalk More Hazardous

Cruz v. County of Nassau
867 N.Y.S.2d 523 (2nd Dept. 2008)

Plaintiff allegedly slipped and fell on ice on a public sidewalk abutting a premises owned by the defendants. The court held that the applicable village of Freeport ordinance did not specifically impose tort liability on abutting landowners for naturally accumulating snow. The Court held that in the absence of such an ordinance, abutting property owners could be liable if their snow removal efforts made the naturally-occurring conditions more hazardous. The Court further held that the failure to remove all of the snow and ice from the sidewalk does not constitute negligence.

24. PROCEDURE

Lower Court Improvidently Exercised its Discretion in Denying Defendant's Renewed Summary Judgment as Untimely

Alvarez v. Eviles
867 N.Y.S.2d 528 (2nd Dept. 2008)

The lower Court denied the defendant Honeywell's renewed notice for summary judgment as untimely. The Second Department held that under the circumstances, Honeywell demonstrated "good cause" for the delay in making the renewed motion since significant discovery was still outstanding and Honeywell's expert witnesses needed to consider the additional discovery in preparing the affidavits submitted on the motion. The court remitted the matter to the Supreme Court for a determination of the renewed motion on the merits.

25. MEDICAL MALPRACTICE

Continuous Treatment Doctrine did not Operate to Toll Statute of Limitations

Anerson v. Central Brooklyn Medical Group
867 N.Y.S.2d 532 (2nd Dept. 2008)

The Court held that for the continuous treatment doctrine to apply, further treatment must be explicitly anticipated by both the physician and patient, as demonstrated by a regularly-scheduled appointment for the near future, which was agreed upon at the last visit and conforms to the periodic appointments relating to the treatment in the immediate past. Plaintiff failed to demonstrate that future visits were anticipated after defendants Lee and Tang referred the decedent to specialists.

26. PREMISES LIABILITY

Defendant did not Have Actual or Constructive Notice of Condition and Res Ipsa Loquitur Did Not Apply

Miles v. Hicksville U.F.S.D.
867 N.Y.S.2d 537 (2nd Dept. 2008)

Plaintiff, a student, was injured when she scraped her leg against a broken metal rod under her desk at school. The Court held that the defendant school established that it did not create the condition or have actual or constructive notice of same. The Court further held that the doctrine of res ipsa loquitur did not apply because numerous students had access to the desk and thus plaintiff could not establish that defendants had exclusive control over it.

27. INSURANCE COVERAGE

Insurer Had no Duty to Defend or Indemnify

Nationwide Mutual Ins. Co. v. Posa
867 N.Y.S.2d 591 (4th Dept. 2008)

Defendant Posa was involved in an underlying auto accident. He left the scene without providing any information to police or the other driver, Baughman. He also submitted a claim to Nationwide for property damage to his vehicle stating that he drove the car into a garden tractor. Posa pled guilty to leaving the scene of an accident. Baughman brought suit for injuries. Nationwide denied coverage to Posa and brought a declaratory judgment action seeking a declaration that it did not have to indemnify Posa in the underlying suit brought by Baughman. The Court held that Nationwide was entitled to summary judgment on the grounds that Posa's actions constituted a breach of the cooperation clause in the policy as a matter of law.

28. INSURANCE COVERAGE

Opening Door of Vehicle Constituted Use and Operation

Henderson v. New York Cent. Mut. Fire Ins.
867 N.Y.S.2d 628 (4th Dept. 2008)

Plaintiff commenced a declaratory judgment action seeking coverage for an underlying accident during which plaintiff allegedly injured another person by negligently opening the door of his own automobile. The court rejected defendant's contention that the underlying complaint did not fall within the meaning of an "automobile accident." The court noted that the policy did not define that term. In addition, the Court held that the act of opening the car door constituted the use and operation of a motor vehicle.

29. NAVIGATION LAW

Summary Judgment Erroneously Awarded to Plaintiffs

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Kramer v. Oil Services, Inc.
868 N.Y.S.2d 246 (2nd Dept. 2008)

In an action to recover damages for injury to property, plaintiffs were granted summary judgment pursuant to Navigation Law §181. Plaintiffs sought recovery for damages resulting from a discharge of oil. The Second Department held that the affidavit of plaintiff Kramer wherein she stated that a technician employed by defendant told her that his hand pumping of the oil line had caused a rupture in the pipe was hearsay and insufficient to satisfy plaintiff's burden on a motion for summary judgment. The Court further held that plaintiff's reliance on handwritten notes of the technician was also insufficient in that plaintiffs failed to establish the admissibility of the notes. Finally, the Court held that plaintiffs presented no evidence that defendant was a "discharger" pursuant to Navigation Law §181.

30. DENTAL MALPRACTICE

Tolling of Statute of Limitations Under Doctrine of Equitable Estoppel was not Warranted

Keselman v. Webber
868 N.Y.S.2d 254 (2nd Dept. 2008)

Plaintiff alleged that he underwent a root canal performed by defendant, after which he suffered severe pain around the tooth. Two months later the defendant told him that the root canal was "not straight" and that he could not treat it any further. Plaintiff commenced a dental malpractice action more than two and a half years after the root canal procedure. The Court held that the action was time barred. The Court found that plaintiff was fully aware that defendant would provide no further treatment, and thus it could not be said that defendant's "fraud" caused plaintiff to delay the commencement of the action. The Court further held that plaintiff could not avoid the statute of limitations by attempting to phrase his claim as a breach of contract. The plaintiff failed to allege damages for breach of contract that were distinct from those of his malpractice claim.

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J.), *infra* text accompanying note 49; and Etzion v. Etzion, 7 Misc.3d 940, 796 N.Y.S.2d 844 (Sup. Ct. Nassau County 2005) (Stack, J.).

[9] *See infra* at note 13 and accompanying text.

[10] The judge analogized that this disclosure "process is very similar to the commonly undertaken inventory of a safe-deposit box." *Id.* at 322, 650 N.Y.S.2d at 500.

[11] *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345, 2004 N.Y. Misc. LEXIS 1337 (Sup. Ct. N.Y. County 2004) (Austin, J.).

[12] *Lipco,* 2004 N.Y. Misc. LEXIS 1337 at ***20.

[13] *See supra* at note 8 and accompanying text.

[14] *Lipco,* 2004 N.Y. Misc. LEXIS 1337 at ***21.

[15] *Lipco,* 2004 N.Y. Misc. LEXIS 1337 at ***20-***21.

[16] *Lipco,* 2004 N.Y. Misc. LEXIS 1337 at ***21.

[17] Justice Austin did not appear fully persuaded that some deleted data could be retrieved by computer experts. "[C]omputer experts can allegedly determine if data has been altered and reconstruct the originally entered data. *Id.* Today, that is no longer a matter of any controversy. *See, e.g.,* Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata,* 13 B.U. J. Sci. & Tech. L. 1 (2007); Mike Breen, Comment, *Nothing to Hide: Why Metadata Should Be Presumed Relevant*, 56 Kan. L. Rev. 439 (2008).

[18] *Lipco,* 2004 N.Y. Misc. LEXIS 1337 at ***17.

[19] *Lipco,* 2004 N.Y. Misc. LEXIS 1337 at ***17-19.

[20] The most influential of these opinions was *Zubulake v. USB Warburg, LLC,* 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (*Zubulake I*) (utilizing a seven factor test for cost shifting).

[21] There were differences in the approach to cost shifting before the effective date of the December 2006 Federal Rules amendments, and thereafter. *See, generally,* Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(B)(2)(B) Fulfilled Its Promise?* 14 Rich. J.L. & Tech. 7, P 40-P 45, http://law.richmond.edu/jolt/v14i3/article7.pdf. (2008); Ross Chaffin, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 Okla. L. Rev. 115 (2006); Mia Mazza, Emmalena K. Quesada & Ashley L. Sternberg, *In pursuit of FRCP 1: Creative Approaches to Cutting and Shifting Costs of Discovery of Electronically Stored Information*, 13 Rich. J.L. & Tech. 11 (2007); Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation*, 14 Rich. J.L. & Tech. 9, P 10-P 28, http://law.richmond.edu/jolt/v14i3/article9.pdf. (2008) (the authors contrast the approach to cost shifting before and after the Federal Rules amendments); The Philip D. Reed Lecture Series: *Panel Discussion: Managing Electronic Discovery: Views From The Judges,* 76 Fordham L. Rev. 1, 20-25 (2007); Christopher Boehning & Daniel J. Toal, *'Peskoff' Cost-Shifting and Accessible Data*, N.Y.L.J., June 26, 2007, at 5; David Lender, *Cost Shifting Under the New Rules: Is The Landscape Changing?*, The Fed. Law., Aug. 2007, at 4, 5-6.

[22] *See See supra* note 1 *Lipco Elec. Corp.* 2004 N.Y. Misc. LEXIS 1337 at 23, citing *Schroeder v. Centro Pariso Tropical*, 233 A.D.2d 314, 649 N.Y.S.2d 820 (2d Dep't, 1996), and *Rubin v. Alamo Rent-a-Car,* 190 A.D.2d 661, 593 N.Y.S.2d 284 (2d Dep't, 1993).

[23] *Delta Financial Corp. v. Morrison,* 13 Misc. 3d 604; 819 N.Y.S.2d 908 (Sup. Ct. Nassau County 2006) (Warshawsky, J.).

[24] Subsequently, the defendants sued KMPG, an accounting firm, with regard to misconduct during an audit for the same amount and both cases were consolidated. KMPG was not involved in the electronic discovery dispute.

[25] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

[26] *Delta Financial Corp. v. Morrison,* 13 Misc. 3d at 606, 819 N.Y.S.2d at 910, citing *Zubulake I*, 217 F.R.D. at 322.

[27] *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*").

[28] *Supra* note 23, *Delta Financial Corp.*, 13 Misc. 3d at 607, 819 N.Y.S.2d at 911.

[29] *Id.*

[30] *Id.* The producing party cited the 2005 issue of the highly influent Sedona Principles for electronic document production, principle 8, for the proposition that backup tapes maintained for disaster recovery purposes should not be searched as part of discovery unless the requesting party can demonstrate a "need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources."

The current home page of the Sedona Conference can be found at http://www.thesedonaconference.org/ [Sedona home] (click on "Publications"). Website last visited, Nov. 14, 2008. The Sedona Conference document categories which are particularly relevant to electronic discovery are those created by Working Group 1 "WG1: Electronic Document Retention and Production" (24 separate documents) , Working Group 2 "WG2: Protective Orders, Confidentiality & Public Access" (6 separate documents), and Working Group 6 "WG6: International Electronic Information Management, Discovery and Disclosure" (1 document, issued in August, 2008). (All working group references have hyperlinks to numerous Sedona Conference publications.)

[31] *Id.*

[32] *Id.* at 608, 819 N.Y.S.2d at 911-912. The court also referred to other, earlier New York opinions which followed pre-December, 2006 federal electronic discovery case law including *Weiller v New York Life Ins. Co.,* 6 Misc. 3d 1038A, 800 N.Y.S.2d 359 (Sup Ct., N.Y. County 2005) (Cahn, J.); *Etzion v. Etzion*, 7 Misc.3d 940, 796 N.Y.S.2d 844 (Sup. Ct. Nassau County 2005) (Stack, J.); and *CreditRiskMonitor.com v. Fensterstock*, 2004 N.Y. Misc. LEXIS 3120, 232 N.Y.L.J. 42 (Sup. Ct. Nassau County 2004) (Warshawsky, J). In addition, the court cited *Ball v. State*, 101 Misc. 2d 554, 421 N.Y.S.2d 328 (Ct. Claims 1979), which is not really an electronic discovery case because all the court ordered the State to do was "to retrieve, from its wealth of information maintained on computer tape, a printout of the five-year accident history of the highway intersection where claimants were injured."

[33] *Id.* at 609, 819 N.Y.S.2d at 912.

[34] *McPeek v. Ashcroft*, 202 F.R.D. 31, 34-35 (D. D.C. 2001). Magistrate Judge Facciola stated:

Given the complicated questions presented [and] the clash of policies . . . I have decided to take small steps and perform, as it were, a test run. Accordingly, I will order DOJ [Department of Justice] to perform a backup restoration of the e-mails attributable to Diegelman's computer during

Continued on next page

the period of July 1, 1998 to July 1, 1999 . . . . The DOJ will have to carefully document the time and money spent in doing the search. It will then have to search in the restored e-mails for any document responsive to any of the plaintiff's request for production of documents. Upon the completion of the search, the DOJ will then file a comprehensive, sworn certification of the time and money spent and the results of the search. Once it does, I will permit the parties an opportunity to argue why the results and the expenses do or do not justify any further search.

[35] *Supra* note 23, *Delta Financial Corp.*, 13 Misc. 3d at 611, 616-617, 819 N.Y.S.2d at 913, 917-918.

[36] *Weiller v. New York Life Ins. Co.*, 2005 N.Y. Slip Op. 50341U, 6 Misc. 3d 1038(A), 800 N.Y.S.2d 359, 2005 N.Y. Misc. LEXIS 473 (Sup Ct., N.Y. County 2005) (Cahn, J.).

[37] *Id.*, 2005 N.Y. Slip Op. 50341U at 4-5.

[38] *Id.*, 2005 N.Y. Slip Op. 50341U at 5.

[39] *Id.*

[40] *Id.*, 2005 N.Y. Slip Op. 50341U at 7.

[41] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).

[42] *Supra* note 36, *Weiller,* 2005 N.Y. Slip Op. 50341U at 7.

[43] *Id.*

[44] *Hunts Point Realty Corp. v. Pacifico.* 2007 NY Slip Op 51543U; 16 Misc. 3d 1122A; 2007 N.Y. Misc. LEXIS 5700 (Sup. Ct. Nassau County 2007) (Warshawsky, J.).

[45] *Id.*, 2007 NY Slip Op 51543U at 17-18.

[46] *See, e.g., CreditRiskMonitor.com v. Fensterstock*, 2004 N.Y. Misc. LEXIS 3120, 232 N.Y.L.J. 42 (Sup. Ct. Nassau County 2004) (Warshawsky, J). Plaintiff alleged that one of the defendants left its employ taking customer names and information to his new employer, thus violating a non-compete clause in his employment contract. The parties subsequently entered into a stipulation of settlement which plaintiff alleged was violated, and brought on a contempt proceeding against the former employee and his new employer. In finding a violation of the stipulation, and holding defendants liable for contempt, the court indicated that it "sat through innumerable hours of testimony and sifted through hundreds of e-mails," noting that these e-mails would not have been discovered without the services of an outside contractor who cloned the defendants' computers and then searched them for material related to defendants. "This was information," the court said, "that allegedly did not exist." Moreover, the court indicated that the only conclusion it could draw was that while everyone else merely deleted their mail, one defendant intentionally wiped out the mail on his own computer sometime before the search began. The court awarded significant compensatory and punitive damages and attorneys' fees.

[47] *In re Estate of Maura*, 17 Misc. 3d 237, 842 N.Y.S.2d 851 (Surr. Ct. Nassau County 2007) (Riordan, Surr.).

[48] *Consolidated Sewing Machine Corp. v. Sandford*, 19 Misc. 3d 1114A, 862 N.Y.S.2d 813 (Sup. Ct. N.Y. County 2008) (Shulman, J.).

[49] *R.C. v. B.W.*, 2008 N.Y. Misc. LEXIS 2193, 239 N.Y.L.J. 64 (Sup. Ct. Kings County 2008) (Adams, J.).

[50] *Karim v. Natural Stone Indus., Inc.*, 19 Misc. 3d 353, 855 N.Y.S.2d 845 (Sup. Ct., Queens County 2008) (Kitzes, J.).

[51] *See* N.Y. Workers' Compensation Law § 11.

[52] *Supra* note 50, *Karim,* 19 Misc. 3d at 356, 855 N.Y.S.2d at 847.

[53] *Scott v. Beth Israel Medical Center, Inc.,* 17 Misc. 3d 934, 847 N.Y.S.2d 436 (Sup. Ct. N.Y. County 2007) (Ramos, J.). The trial court had previously granted summary judgment and dismissed the case, but the Appellate Division, First Department reversed. *Scott v. Beth Israel Medical Center, Inc.,* 41 A.D.2d 222, 838 N.Y.S.2d 521 (1st Dep't 2007).

[54] Plaintiff would be entitled to $14 million if it were found that he was terminated without cause. *Id.* at 935, 847 N.Y.S.2d at 438.

[55] Prior to the Appellate Division decision, the hospital's counsel advised plaintiff's counsel that it had emails between the plaintiff and the counsel relating to the dispute. *Id.*

[56] The court quoted from significant portions of the hospital's email policy. *Id.* at 936-937, 847 N.Y.S.2d at 439.

1. All Medical Center computer systems, telephone systems, voice mail systems, facsimile equipment, electronic mail systems, Internet access systems, related technology systems, and the wired or wireless networks that connect them are the property of the Medical Center and should be used for business purposes only.
2. All information and documents created, received, saved or sent on the Medical Center's computer or communications systems are the property of the Medical Center.

   Employees have no personal privacy right in any material created, received, saved or sent using Medical Center communication or computer systems. The Medical Center reserves the right to access and disclose such material at any time without prior notice.

[57] CPLR 4548 provides: "No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

[58] *Supra* note 53, *Scott,* 17 Misc. 3d at 938, 847 N.Y.S.2d at 440, citing a supporting statement from the New York State Bar Association.

[59] *Id.* 17 Misc. 3d at 9937-938, 847 N.Y.S.2d at 440 citing N.Y. State Bar Ass'n Committee on Professional Ethics Opinion 782 (Dec. 8, 2004).

[60] *Id.* at 939, 847 N.Y.S.2d at 441.

[61] *Id.* at 939-40, 847 N.Y.S.2d at 441.

[62] *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (S.D. N.Y. 2005).

[63] *Id.* at 257.

[64] *See, e.g.,* N.Y.S.B.A., Civil Practice Rules Committee, *Report Recommending Certain Amendments to the CPLR Concerning Electronic Discovery*, N.Y. Litigator, Vol. 13. No. 1 at 52-57 (2008), recommending that New York not adopt all of the changes to the Federal Rules, but nevertheless make certain changes in CPLR 3120, 3122, 3126 and 3131.

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Send proposed articles to:
John J. McDonough
Cozen O'Connor 45 Broadway
New York NY • 10006

Lost Wages of Undocumented Aliens

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the lawsuit. Furthermore, in those limited instances in which the Antisubrogration Rule or the Grave Injury Rule do not apply so as to permit impleader of the employer, the Employer's Liability (1B) portion of the mandatory Worker's Compensation policy will respond to a claim for, *inter alia*, lost wages, thus making the insurer the real party in interest. In the consolidated appeals that resulted in the Balbuena decision, one plaintiff's employer was named a third-party defendant, the other plaintiff's employer was not a party.

As to a personal injury plaintiff's duty to mitigate his/her damages in regard to future lost wages, the Balbuena decision essentially skipped any detailed treatment of this by presuming that each plaintiff in the consolidated appeals could never physically return to work. In those situations where the claim for future lost wages is asserted and the physical ability of an undocumented alien to return to work is an issue, the Balbuena Court's one concession to the defense allows the "jury to consider immigration status as one factor in its determination of the damages, if any warranted under the Labor Law." Balbuena, 812 N.Y.S. 2d at 429. A review of New York's most recent issue of the Pattern Jury Instructions revealed no citation to Balbuena or any mention of how the jury is to be instructed in this regard.

The Court's opinion in Balbuena ended by highlighting the principal difference between the plaintiff in Hoffman and the plaintiffs involved in the Balbuena consolidated appeals. Unlike the claimant in Hoffman, the plaintiffs in Balbuena never tendered false documentation to obtain their respective jobs. The record in Balbuena contained no information in this regard. Thus, the Court concluded "in the absence of proof that plaintiffs tendered false work authorization documents to obtain employment, the IRCA does not bar maintenance of a claim for lost wages by an undocumented alien." Balbuena, 812 N.Y.S. 2d at 430. Unanswered by the Balbuena decision was the question of the viability of a claim for future lost wages by an undocumented alien who violated federal immigration law by proffering false documentation to an employer to obtain a job.

In Coque v. Wildflower Estates, 58 A.D.3d 44, 867 N.Y.S.2d 158 (2nd Dept. 2008), the Second Department dealt squarely with the issue of the consequences of an undocumented alien violating the IRCA by presenting false documentation to obtain a job. In Coque, the plaintiff presented a false Social Security card at the time he applied for a job. During his trial testimony the plaintiff admitted that he was undocumented and that he had submitted a fraudulent Social Security card to his employer at the time he was hired. Despite this admitted violation of the IRCA, Judge Prudenti's opinion seems to place more significance on the actions of the employer in such a situation by now requiring the employer to be an "innocent employer":

> We do not believe that the Balbuena decision should be read so broadly as to stand for the proposition that a worker forfeits his or her right to recover lost earnings merely by virtue of submitting a false document at the time he or she is hired. Rather, the false document must actually induce the employer to offer employment to the plaintiff.

Id. at 165.

Judge Prudenti provided two ways in which the plaintiff's employer will not be deemed "innocent" or to have been "induced" by an undocumented alien's fraudulent work authorization: (1) if the employer hires the employee with knowledge of the employee's undocumented status, or (2) fails to follow the proscriptions of the IRCA's employment verification system (8 USC § 1324a [b]) to the letter. Indeed, the Second Department has developed a new scheme whereby the employee's proffering of fraudulent documents is overlooked altogether if the plaintiff's employer violates the IRCA by failing to properly verify the plaintiff's eligibility for employment, whether the employer is a party to the case or not. Obviously discovery on this issue must be conducted with the foregoing as a guide. Further refinement of the rule of law on this issue seems inevitable.

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John J. McDonough
Cozen O'Connor 45 Broadway
New York NY • 10006

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