DEFENDANT

THE JOURNAL OF THE DEFENSE ASSOCIATION OF NEW YORK, INC.

President's Message

*by John McDonough **

I am pleased to report that your Board of Directors continues to make substantive progress on several major initiatives.

The DANY web page can now be accessed on the internet at www.dany.org. Our web page will be used to announce upcoming events, provide members with a communication link to your Board Members and contain a hyper link to the Defense Research Institute (D.R.I.) expert brief bank which contains information and transcripts on over 50,000 experts.

Our web page will also contain a brief bank which will be supported by the various *amicus* briefs, produced by our *amicus* brief committee headed by Frank Kelly and Andrew Zajac. Coming off their hard work and great success in the Trincere v. County of Suffolk matter, Frank and Andy have now turned the committee's attention to two Court of Appeals cases involving premises security and products liability. All of the brief produced by this committee will be available on our web page.

Senator Daniel P. Moynihan has co-sponsored federal legislation that, for the time, would regulate Automobile insurance. This so-called Auto-Choice legislation would provide premium returns of 25 to 35%, according to its sponsor. This savings would be achieved by insureds waving their right to non-economical (pain and suffering) damages were they ever to be involved in an accident. An Auto Choice insured would thus relinquish his/her right to sue an adverse operator following an accident as he/she would be reimbursed by his/her own insurer for medical bills and lost wages. Were this legislation to become federal low, it would virtually eliminate all automobile tort claims.

Your association stands firmly behind the preservation of the civil justice jury system and the right of an injured person to pursue their right to claim monetary relief for claimed injuries and retain the traditional state regulation of automobile insurance.

Automobile insurance tort reform would best be achieved by eliminating the collateral source rule. This rule prevents juries from hearing evidence of compensation and what plaintiffs receive from health insurance, wage continuation programs, and other sources. The collateral source rule was

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Charles C. Pinckney – *Award*

Judge James Mangano

The coveted Charles C. Pinckney Award will be presented to Mr. Justice Guy James Mangano on the 3rd of March, 1998 at the Down-town Athletic Club.

This award, created in 1976, is the Association's most prestigious award. It is given to individuals who contribute significantly to the Defense Association or make oustanding contribution to the praticing bar.

Judge Mangano is indeed worthy of this tribute.

The Justice presides at the Appellate Division,, Second Departament since March of 1990. He was appointed in 1979. His election to the Supreme Court was iniatially in 1969 and was re-elected in 1982.

Justice Mangano resides at 85 Livingston Street in Brooklyn with his wife Anne, The Mangano's have two children James Vincent and Guy James, Jr.

A graduate of St. John's University School of Law in 1955, Judge Mangano was subsequently addmitted to the bar of the State of New York as well as the Eastern District of the Federal Court and the U.S. Supreme Court.

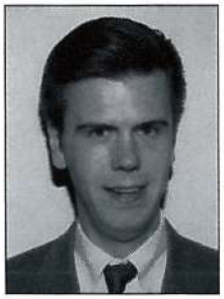
In 1983, he received an Honorary Degree from St. John's University. A member of many committees and organizations, Judge Mangano has given generously of his time, his energy and creativity, his many contributions set him apart from his peers.

In addition to being an active member of the Alumni Association at St. John's, he has taught as Adjunct Professor, as well as Guest Lecturer on various ocassions.

Indeed, Judge Mangano does the Defense Association an honor by being the recipient of the 1998 Charles C. Pinckney Award.

Discovery of Non-Parties' Educational Records are essential for an effective lead-paint defense

*by Jeffrey D. Fippinger **



Lead has long been known to be a neurotoxin.[1] Lead is absorbed into the human body predominantly through the gastrointestinal and respiratory tracts.[2] In metropolitan areas, human ingestion of lead usually occurs through the inhalation of, lead dust from deteriorated paint, from demolition and renovation. However, lead may also be ingested through other sources, such as water, solder for cans, and so forth.[3] Lead typically enters an infant's body through the inhalation of lead dust and through the physical ingestion of paint chips.[4] In general, approximately 1.7 million children have elevated blood lead levels high enough to raisre health concerns to the forefront of public awareness[5] Various studies indicated that elevated blood lead levels result in behavioral and cognitive childhood disorders, even at low level exposure.[6] These studies have fueled a proliferation of lawsuits against multiple dwelling owners and their managing agents.[7] As lead is viewed as having a deleterious effect on behavioral and cognitive development,[8] plaintiffs', attorneys distinctively allege that an infant plaintiff suffered injuries, including "decreased cognitive ability and potential," "decreased intellectual ability," "decreased I. Q.," and other developmental deficiencies and delays.

An effectual defense of a lead paint injury case depends upon the discovery of alternate causations. As many of the alleged cognitive injuries may be congenital, the school records of the infant's parents and siblings would best reveal cognitive problems attributable to a source other than lead.[9] Therefore, the truly effectual defense based upon alternate causations should include the review of parents' and siblings' educational records, scholastic performance and related I.Q.

Plaintiffs' attorneys may rely on studies such as the one conducted by Dr. Herbert L. Needleman of the University of Pittsburgh School of Medicine, which attempts to correlate infants' lead exposure to lower I.Q. scores.[10] Dr. Needleman conducted an extended follow-up study, which concluded that persistent toxicity of lead resulted in significant and serious impairment of academic success. Specifically, the study found a seven-fold increase in the failure to graduate from high school, lower class standing, greater absenteeism, impairment of reading skills, and deficits in vocabulary and grammatical reasoning, as well as deficits in fine motor skills, reaction time and hand-eye coordination.

Dr. Needleman also noted that many variables were important contributors to performance in the infant's early

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Report from Committee on the Development of the Law for DANY

*by Andrew Zajac * and Frank V. Kelly**

In the December 1997 issue of The Defendant, we reported on our efforts in submitting an amicus brief to the Court of Appeals in the case of Trincere v. County of Suffolk. We are pleased to announce that on October 21, 1997, the Court of Appeals issued its decision in that case which upheld the position that we advocated on behalf of DANY (_ N.Y.2d_,_N.Y.S.2d _, 1997 WL 668291).

Briefly, Trincere involved a plaintiff who fell due to a raised cement slab on a walkway. The slab was elevated at an angle slightly more than a half-inch above the surrounding slabs. The trial court directed a verdict in the defendant's favor, and, in a 3-2 decision, the Appellate Division, Second Department affirmed. The Appellate Division held that differences in elevation of approximately one inch, without more, are not actionable.

The case proceeded to the Court of Appeals, where it became hotly contested. In addition to the amicus brief that was filed on behalf of DANY, the firm of Schneider, Kleinick, Weitz, Damashek & Shoot filed an amicus brief on behalf of the New York State Trial Lawyers Association.

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DEFENDANT

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Worthy of Note

*compiled by John J. Moore**

GENERAL MUNICIPAL LAW - NOTICE OF CLAIM – Late Notice in Affleck v. County of Nassau (_ A.D.2d_ 660 N.Y.S.2d 131) the Second Department ruled that an executor's petition for leave to file a late notice of claim against the County alleging that its negligence in failing to install a traffic light caused the accident which lead to the decedent's death was properly granted where the County had investigated the circumstances of the decedent's accident within four months of its occurrence and the delay did not substantially prejudice the County.

The court indicated that the absence of a reasonable excuse for the administrator's delay in filing the notice of claim was not fatal to his application for leave to file the late notice.

NEGLIGENCE - ASSUMPTION OF RISK - ELEMENTS – The Second Department recently indicated that although the doctrine of assumption of risk is not an absolute defense in New York, it is necessary and proper to consider the risks assumed by the injured plaintiff when assessing defendant's duty of care (Gahan v. Mineola Union Free School District._ AD.2d _, 660 N.Y.S.2d 144).

Those who voluntarily participate in sports activities generally consent, by their participation, to those injury-causing events and conditions which are known, apparent or reasonably foreseeable consequences of the participation. The participants do not, however, consent to reckless or intentional acts.

MALPRATICE LIMITATIONS – In Karasek v. LaJoie (_A.D.2d_, 660 N.Y.S.2d 125), the First Department indicated that inaction in which the patient alleged that a licensed psychologist misdiagnosed her as suffering from multiple personality disorder, and in reliance of the diagnosis rendered treatment that was not only inefficacious but harmful, alleged a medical malpractice matter for limitation purposes and thus was governed by the medical malpractice statute of limitations rather than the negligence limitations. The gravamen of the complaint was that the psychiatric misdiagnosis which bore substantial relationship to the rendition of medical treatment.

The dispositive condition in determining which area the action sounds in for purposes of limitations does not depend upon the vocational title of the alleged tort feasor but upon whether the alleged tortious act or omission constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.

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Recent Development in Mass Tort and Toxic Tort Litigation

*by Suzanne M. Halbardier **

New types of mass torts surfaced in 1997 with Fen Phen and latex claims promising to flood the courts. In the meantime, other toxic tort lawsuits such as asbestos continued with large numbers of new filings. In the federal courts, the Multi District Panel has managed the asbestos and latex exposure cases from Philadelphia, while repetitive stress injury cases have been handled by the individual judges. The state court is considering a special toxic tort part to manage the asbestos, Fen Phen and breast implant cases.

ASBESTOS LITIGATION

Justice Helen Freedman continues to manage the New York City state court asbestos cases. Several national plaintiff firms have opened offices in New York, and this has resulted in a large number of new filings. In addition, plaintiffs with minimal exposure in New York (and substantial exposure, elsewhere) have been allowed to maintain suit in New York. Under the Case Management Order, plaintiffs continue to obtain expedited trials for living cancer cases in May and November. When originally established two years ago, it was anticipated that the number of cases would remain constant at a dozen. There are over sixty cases scheduled for this May, which is roughly the same number that were scheduled in November 1997. Jusfices Schlesinger, Lippman, Lebedeff and Moskowitz were assigned trial groups in November 1997, grouped according to the plaintiff firm.

In February 1997, the Court of Appeals decided Maltese v. Westinghouse, 89 N.Y.2d 955, 956-57, 655 N.Y.S.2d, 855, 678 N.E.2d 467 (1997), wherein the Court upheld the setting aside of recklessness against Westinghouse. Under Article 16, a tortfeasor is limited to its percentage share of liability for non-economic loss (or pain and suffering), if that percentage is less than 50%. One of the exceptions to Article 16 is a finding that a defendant was "reckless" in its conduct; such a finding would make the tortfeasor jointly and severally liable. CPLR 1602(7). This excepfion has traditionally been applied in the asbestos litigation against defendants. In Maltese, a jury concluded that Westinghouse had acted recklessly when it failed to warn of the dangers associated with exposure to asbestos to two Con Edison workers employed from 1946 to the early 1980's. Westinghouse manufactured asbestos-insulated turbines which were sold to Con Edison; these two plaintiffs alleged exposure while repairing and maintaining the turbines and other equipment at Con Edison power plants.

The trial court set aside the recklessness finding, and the plaintfff appealed. The Court of Appeals upheld the trial court's decision, concluding that "at most, the evidence reveal(ed)

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The Continued Care Exception to the Medical Malpractice Statue of Limitations -A Defense

*by Jeffrey R. Miller **

Ask any law student, and they will tell you that a medical malpractice claim generally accrues on the date of the alleged wrongful act or omission and is governed by a two and one half year statute of limitations. While law students may enjoy the concept of "black letter law", practitioners understand that borne with every statute is series of exceptions that are often ill applied and misunderstood. The continuing care exception of the medical malpractice statute of limitations is one such doctrine.

Pursuant to the C.P.L.R., "an action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failute." [1]

Under the continuing care exception, the time in which a plaintiff must bring an action alleging medical malpractice is stayed "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint." [2] The court of Appeals has repeatedly explained that, "the policy underlying the continuous treatment doctrine seeks to maintain the physician-patient relationship in the belief that the most effacious medical care will be obtained when the attending physician remains on a case from onset to cure . . . Implicit in the policy is the recognition that the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so." [3] In the absence of continuing efforts by a doctor to treat a particular condition, none of the policy reasons underlying the doctrine justify the patient's delay in bringing the lawsuit. [4]

While the court of Appeals' rationale for this exception is a narrow one, when confronted with the possibility of a stale claim, the plaintiff will attempt to invoke this doctrine regardless of its modest and provincial underpinning. As members of the defense bar, we are obligated to ensure that the continuing care doctrine remains the exception and not the rule.

When an action for medical malpractice is commenced more than two and one half years after the act or omission complained of, a motion to dismiss [5] should be made and the affirmative defense of statute of limitations should be interposed. Once the defendant proves the affirmative defense of

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President's Message

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developed in the common law during an era when few employers offered health insurance coverage or sick pay and before government programs like Social Security disability insurance had been enacted.

In most cases, health insurers will file a subrogation lien, entitling them to reimbursement for payments from the tortfeasor. But far too frequently in routine auto cases, health insurers neglected to file their liens. Seldom, if ever, does an employer file a lien for the plaintiff's "sick pay". Federal disability benefits and State rehabilitation benefits are not subject to subrogation at all. The result is double recoveries for many plaintiffs, and "double taxation" for the rest of us, who pay taxes to provide government benefits while paying higher premiums to fund extra recoveries.

Because auto accident claims are generally settled at an amount three times the plaintiff's economical damages, abolishing the collateral source rule could reduce payments in individual cases by as much as one third. Payments could be reduced even further if juries were informed that the personal injury damages are not taxed.

The Officers of your Board are now seeking a meeting with Senator Moynihan to discuss this important piece of legislation. I will continue to update you with respect to our progress in this matter.

Discovery of Non-Parties' Educational Records are essential for an effective lead-paint defense

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years, such as the mother's I.Q. and the mother's educational level. These variables were found to have less effect on the infant's performance in young adulthood. This study seems to note, therefore, that the mother's I.Q. and educational level influences an infant's performance in the first or second grade while in school.

Although Dr. Needleman's study offers alarming results, Stuart J. Pocock, Marjorie Smith and Peter Baghurst conducted a systematic review of twenty-six epidemiological studies since 1979 (the "Pocock study") which revealed many inconsistencies in findings.[11] The Pocock study analyzed five prospective studies (including over 100 children), fourteen cross sectional studies (including 3499 children) and seven cross sectional studies of tooth lead (including 2095 children).

The Pocock study's analysis of the five prospective studies revealed that although blood lead levels tend to reach its peak concentration around 2 years of age, blood lead at around age 2 had a small and significant inverse association with I.Q. The analysis of the fourteen cross sectional studies

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revealed a significant inverse association overall, but showed more variation in their results and the seven cross sectional studies of tooth lead were more consistent in finding an inverse association, although the estimated magnitude was somewhat smaller. In conclusion, the comprehensive Pocock study reported that the magnitude of cognitive effects of lead are quite low, with an average deficit of one to two I.Q. points associated with a typical doubling of blood lead from 10 to 20 micrograms per decaliter (ug/dL).

Even more important than the Pocock study's analyses, however, are the authors' comments. The comments reflected inconsistencies in findings, the failure to control fully for confounding influences in many studies, and the very real possibility of reverse causality (i.e.., the risk that children of lower intelligence are more likely to access and ingest lead).[12] The Pocock study stated that while low level lead exposure may cause a small I.Q. deficit, other explanations need considering. For example, the study revealed that parental and social factors influence the I.Q. adjustment and that family and home environments played an influential role in the I.Q. deficit.

The Pocock study undermines a plaintiff's counsel allegations that an infant's decreased cognitive behavior is directly related to the blood lead level, and strengthens the defense counsel's argument that it is unlikely that there is a causal link between low level lead exposure and the child's I.Q. Defense counsel can support their position by reliance upon various studies which have found that parental education and maternal cognitive skills are closely related to a child's mental development. A key factor related to the infant's I.Q. is maternal I.Q.,[13] which raises the possibility that a low I.Q. in a child exposed to lead might be due in part to low maternal I.Q.[14]

There is a high concordance between maternal and child intelligence. For example, it has been reported that the majority of children with I.Q.s in the retarded range had mothers with I.Q.s less than 80.[15] The infant's parents' and siblings' educational records, scholastic performance and related I.Q.s are therefore clearly relevant to discovering alternative causations which may affect the infant's cognitive and developmenta l abilities.[16]

Educational records are rarely subject to any statutory privilege, and they contain less private material than medical records.[17] Defense counsel should therefore argue that there is no absolute privilege that one can assert in regard to school records of non-parties, and should demonstrate good cause for disclosure of same.[18] This good cause showing should include attached affidavits of experts who can attest to the possible causation for childhood cognitive disability.[19]

Various Courts have held that the academic records of the plaintiff's non-party siblings are not privileged, [20] and even material to establish the defense that the plaintiff's injuries had a genetic cause.[21] Furthermore, the Appellate Division, Second Department, held that not only are the infant's mother's academic records non-privileged, but she may also be compelled to undergo I.Q testing herself.[22]

In sum, certain of the infant plaintiffs' alleged cognitive injuries may be congenital. Studies attempting to definitively link elevated blood lead levels to a diminished I.Q. inconclusively establish lead as the sole causation of decreased academic performance. Furthermore, various studies have found that parental education and maternal cognitive skills are closely related to a child's mental development, therefore supporting the defense argument that alternate causations, including maternal I.Q., are responsible for the infant's alleged diminished cognitive development. The mother's/siblings' academic records are material to ascertain any similar cognitive dysfunction which may be the product of something other than lead poisoning, and the non-parties' educational records may not be privileged upon the argument of alternative causation for the cognitive disability.

[1] It should be noted, however, that although this provides an important argument for defense attorney to compel disclosure of the mother's/ siblings' educational records, "(a)"s a group, the children of mentally retarded parents have scored significantly . . . higher than their parents on traditional measures of intelligence." Robert L. Hayman, Jr., Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent, 103 Harv. L. Rev. 1201, 1271 n.75 (1990) (citing S. Haavik and K. Menninger II, Sexuality, Law and the Developmentally Disabled Person, 75-78 (1981).

FOOTNOTES

1. Sandler, Howard M., M.D., Medical Session: The Confounders Lead and Alternative Causes For Hyperactivity, Cognitive Deficit and Developmental Delay, Mealey's Lead Litigation Conference 1997.

2.Wilkens, James F., Proof of Exposure/Ingestion: Blood Lead Levels, Biologic Markers, Lead Paint Poisoning Litigation, New York State Trial Lawyers Institute, November 1996.

3.Id.

4.Id.

5.Kardisch, Josh H., Trying the Lead Poisoning Case: The Defense Perspective, Lead Paint Poisoning Litigation, New York State Trial Lawyers Institute, November 1996.

6.Id.

7.Id.

8.Bornschein, Robert L. , Influence of Social Factors on Lead Exposure and Child Development, ENVIRONMENTAL HEALTH PERSPECTIVES, Vol. 62, pp. 343-351, 1985.

9.Carter, David A. and Kathleen D. Leslie, Legal Hurdles to the Investigation and Discovery of Lead-Based Paint Cases, PRODUCT SAFETY & LIABILITY REPORTER, The Bureau of National Affairs, Jan. 6, 1995.

10.Needleman, Herbert L.; Schell, Alan; Bellinger, David; Leviton, Alan; Allred, Elizabeth N., The Long-Term Effects of Exposure to Low Doses of Lead in Childhood: An 11-Year Follow-up Report, THE NEW ENGLAND JOURNAL OF MEDICINE, pp. 83-88, Jan. 11, 1990.

11.Pocock, Stuart J.; Smith,Marjorie; Baghurst, Peter, Environmental Lead and Children's Intelligence: A Systematic Review of the Epidemiological Evidence, BRITISH MEDICAL JOURNAL, Vol. 309, No. 6963, Nov. 5, 1994.

12.Ernhart, Claire B. ; Hebben, Nancy, Intelligence and Lead: The "Known" Is Not Known, AMERICAN PSYCHOLOGIST, p.74, Jan 1997.

13.Carter, supra note 9.

14.Bornschein, supra note 8.

15.Id.

16.Carter, supra note 9.

17.See Rodriguez v. The City of New York Housing Authority, No. 09340/92, N.Y.Sup., N.Y.Co., reported in Mealey's Litigation Report:Lead, Vol. 6, No. 7, January 8, 1997.

18.Carter, supra note 9.

19.Id.

20. Lezell by Lezell v. State, 142 Misc.2d 837, 538 N.Y.S.2d 902 (Ct.Cl. 1989) ; Dalley v. LaGuardia Hospital, 130 A.D.2d 543, 515 N.Y.S.2d 276 (2d Dep't 1987).

21.Baldwin by Baldwin v. Franklin General Hospital, 151 A.D.2d 532, 542 N.Y.S.2d 667 (2d Dep't 1989).

22.Salkey v. Mott, No. 35200-94 (Sup. Ct., Nassau County, Aug. 9, 1996), aff'd No. 96-07797 (App. Div., 2d Dep't, March 24, 1997).

Report from Committee on the Development of the Law for DANY

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The Court of Appeals affirmed in a unanimous decision. The Court held that not every injury resulting from an elevated brick or slab should be submitted to a jury. The Court stated the trial court and Appellate Division were both correct in holding that the defect which caused Ms. Trincere to fall was not actionable, since the trivial nature of the defect overshadowed all other elements.

Interestingly, in the short time since the Trincere decision was rendered, the Appellate Division, Second Department has cited the Court of Appeals' decision twice in order to support dismissals of cases where the injuries were the result of falls caused by minor defects. Marinaccio v. LeChambord Restaurant, _ A.D.2d _, _ N.Y.S.2d_,1998 WL 7920 (2d Dep't 1998); Lopez v. New York City Housing Authority, _A.D.2d_,_ N.Y.S.2d_.1997 WL 770535 (2d Dep't 1997). In Marinaccio, the Second Department stated that trivial defects are not actionable unless they have the characteristics of a trap or snare. That is precisely the position that was advocated in DANY's brief to the Court of Appeals.

The Court of Appeals'published decision in Trincere states that DANY submitted an amicus brief. In addition, it lists all of the members of our committee, namely John McDonough, the President of DANY, Frank V. Kelly (co-chair), Andrew Zajac (co-chair), Elizabeth Fitzpatrick of Feeney, Gayoso & Fitzpatrick, and Carol R. Finocchio, of the Law Offices of Carol R. Finocchio.

We are pleased to report that, since the Trincere decision was rendered, two new members have recently been added to our committee: Elizabeth Anne Bannon of the Law Office of Michael J. Ross, and Dawn C. DeSimone of Alio, Ronan, Ritzert, McDonnell & Kehoe. We feel that Ms. Bannon and Ms. DeSimone will provide immense assistance in our committee's future endeavors.

The next two cases in which we will be moving in the Court of Appeals for amicus relief are Borrero v. New York City Housing Authority, 236 A.D.2d 262, 653 N.Y.S.2d 581 (1st Dep't 1997) and Liriano v, Hobart Corp., _ F.3d _, 1998 VVL 786 (2d Cir. 1998). In Borrero, the plaintiff was injured by an assailant on premises owned by the Housing Authority as a result of an alleged lack of security.

The Supreme Court, Bronx County denied the Housing Authority's motion for summary judgment. The Appellate Division, First Department reversed and dismissed the complaint. The Appellate Division held that the plaintiff failed to establish that the alleged lack of security was the proximate cause of the occurrence, since it was not demonstrated that the assailant gained access to the premises through the unsecured front door, or that the assailant was not a resident of the building or the guest of a resident.

The Court of Appeals granted the plaintiff's motion for permission to appeal on November 25, 1997. Obviously, the rule that the Appellate Division applied in Borrero is extremely beneficial to defendants, especially since it has been applied by the Appellate Divisions to support dismissals in numerous cases brought under the theory of inadequate security. It is anticipated that the Court of Appeals' decision in Borrero will be of critical importance to the defense bar and the liability insurance industry.

In Liriano v. Hobart Corp., the United States Court of Appeals for the Second Circuit certified the following question to the New York Court of Appeals.

Can manufacturer liability exist under a failure to warn theory in cases in which the substantial modification defense would preclude liability under a design defect theory, and if so, is such manufacturer liability barred as a matter of law on the facts of this case, viewed in the light most favorable to the plaintiff?

In Liriano, the plaintiff was a 17-year-old employee in the meat department of a grocery store. His right hand and lower forearm were amputated when he was feeding meat into a meat grinder whose guard had been removed. The grinder, which was manufactured by the defendant Hobart Corp., was sold in 1961. At the time of the sale, a safety guard was in place. No warnings were present on the machine which indicated that it was dangerous to remove the guard. Subsequently, Hobart became aware that a significant number of purchasers of its meat grinders had removed the safety guard. In 1962, Hobart commenced affixing warnings to its meat grinders concerning the danger of removing the guard.

The plaintiff sued Hobart under theories of negligence and strict products liability, based upon design defect and failure to warn. Hobart impleaded the plaintiff's employer. The jury found Hobart to be liable for failure to warn, and it apportioned liability among the plaintiff, Hobart and the employer.

Hobart appealed to the Second Circuit, arguing that the question of whether it had a duty to warn should have been decided in its favor as a matter of law. The Second Circuit stated that New York law is unsettled as to whether a manufacturer may be held liable for failure to warn of the dangers associated with substantial modifications of its products.

The New York Court of Appeals has accepted the Second Circuit's certification, and it is anticipated that it will issue an opinion that should have a significant bearing on the substantial modification defense in products liability cases. Thus, we will move in the New York Court of Appeals for permission to submit an amicus brief.

Worthy of Note

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PROCESS - FAILURE TO PAY PROPER FEES – In Arbisser v. Gelbelman (_A.D.2d _, 660 N.Y. S.2d 133), the Second Department ruled that a plaintiff's failure to timely pay the index number fee as required pursuant to the New York Commencement-by-Filing System resulted in a dismissal which was automatic and self-executing without the need for any court action. Accordingly, at the time the defendant moved to dismiss for nonpayment of fee, there was no longer any action pending which the trial court could deny the motion and deem the index number fee paid non pro tunc.

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Worthy of Note

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ARBITRATION WAIVER – In Commerce and Industry Ins. Co. v. Nester (90 N.Y.2d 255, 660 N.Y.S.2d 366), the Court of Appeals ruled that a party foregoes its opportunity for appellate review of a denial of an application to stay contractual arbitration when it proceeds to arbitration without seeking temporary judicial relief pending the determination of an appeal, even if it believes that its request for such an interim stay will result in a summary denial.

Once a party participates in the proceeding without availing itself of all of its reasonable judicial remedies, it should not be allowed thereafter to upset the remedy emanating from that alternative dispute resolution forum.

INDEMNIFICATION - CONTRACTUAL COMMON LAW LIMITATIONS – The Court of Appeals recently concluded that the ability of a contractor to limit its contractual obligations to indemnify does not necessarily effect its duty to provide indemnification pursuant to the Common Law.

A painting subcontractor supervised and controlled the work of a painter who was injured when he fell over an 8 foot alcove wall and through a suspended ceiling to the floor below, and thus the general contractor was entitled to Common Law indemnification from the subcontractor even though the subcontractor had limited its contractual obligation to indemnify the general contractor (Felker v. Corning Inc., 90 N.Y.2d 219, 660 N.Y.S.2d 349).

INSURANCE BROKER DUTIES – In Murphy v. Kuhn (90 N.Y.2d 266, 660 N.Y.S.2d 371), the Court of Appeals ruled that generally an insurance agent has the common law duty to obtain the requested coverage for its clients within a reasonable time or inform the client of the inability to do so. The agent has no duty to continue to advise, guide, or direct the client to obtain additional coverage.

Exceptional and particularized situations may arise in which the insurance agent through its conduct or by express or implied contract with the customers and client may assume or require duties in addition to those fixed at common law.

Whether to impose on the agent responsibilities in addition to the common law duty to obtain the requested coverage within a reasonable time or to inform the client the inability to do so is governed by the particular relationship between the parties and is best determined on a case by case basis.

NEGLIGENCE - SCAFFOLD LAW - ELEMENTS – It was recently indicated by the First Department that the Scaffold Law imposes an absolute liability on owners, contractors and their agents for any breach of statutory duty to provide adequate safety devices which has proximately caused the injury. The duty imposed is nondelegable and the owner of the situs is liable for a violation of the Scaffold Law even though the job was performed by independent contractors over which it exercised no supervision or control.

In evaluating the claim, the courts closely adhere to the distinction between elevated hazards, which come within the scope of the law and the type of peril construction workers usually encounter on a job site which is outside the scope of the law. In the case under consideration, injuries suffered by a worker who was demolishing a ground level structure when he was struck a falling brace which was an integral part of the structure he was demolishing, did not come within the scope of the Scaffold Law. The height from which the brace fell was irrelevant since it was part of the structure and was not an improperly operated safety device (Amato v. State,_AD.2d _,660 N.Y.S.2d 576).

CONFLICTS OF LAW - ELEMENTS – The First Department recently indicated in Rivera v Pocono Whitewater Adventures (_ A.D.2d _, 660 N.Y.S.2d 723) that in resolving a conflict of law question, the courts must apply the law of the jurisdiction which, because of its relationship or contact with the occurrence or parties has a greatest concern with the specific issued,raised in the litigation. New York has an important interest in protecting its own residents in a foreign state against unfair or anachronistic statutes of that state. Pursuant to the New York Conflict Rules of Law, New York as opposed to Pennsylvania Law governed the action because of New York's interest in protecting its domiciliary and because of defendant's solicitation of business in New York.

STAY - DEATH OF PARTY - The Second Department recently concluded that the death of a party terminates his attorney's authority to act and stays the action as to him, pending a substitution of a legall representative and any determination made without such substitution is generally deemed a nullity. (Meehan v. Washington,_ A.D.2d_, 660 N.Y.S.2d 737).

ARBITRATION AWARD CHALLENGE - The Court of Appeals recently indicated that the challenge to an arbitration award on public policy grounds may be raised in a motion to vacate or confirm the award (Matter of Professional Clerical Technical Emplovees Ass'n (Buffalo Board of Educ), 90 N.Y.2d 364, 660 N.Y.S.2d 827).

INSURANCE PROCUREMENT - MASTER CONTRACT – In Nitis v. The City of New York (_AD.2d _,661 N.Y.S.2d 44), the Second Department ruled that a subcontractor on a City construction project was required to procure liability insurance naming the City as an insured where the subcontract specifically required the subcontractor to obtain "any and all other forms of insurance required" of primary contractor and primary contractor's agreement with the City obligated it to procure such insurance for the City.

RES IPSA LOQUITOR ELEMENTS – In Ruggiero v. Walbaums Supermarkets, Inc. (_ A.D.2d_, 661 N.Y.S.2d 31), the Second Department ruled that the submission of a case to the jury on the theory of res ipsa loquitor is warranted only when the plaintiff can establish that (1) the event is of a kind which ordinarily does not occur in the absence of someone's negligence, (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the event was not due to any voluntarily action or contribution on the part of the plaintiff.

The supermarket did not have exclusive control of a six-pack of apple juice cans on the top shelf of a store which fell and struck the customer in the head so that the doctrine was

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inapplicable to the action. The manager testified that the supermarket had been open for approximately 10 hours before the accident and the cans may have been dislodged by one or more prior shoppers.

DISCOVERY, DEPOSITIONS, RULINGS – The Second Department recently indicated that rulings made upon an objection to questions posed in the course of examination before trial are not appealable as of right (Mann v. Alvarez,_ AD.2d_, 661N.Y.S.2d 250).

DISCLOSURE - FAILURE TO COMPLY-SANCTION – In Arcuri and Sons, Inc. v. Alfonsi, (_ A.D.2d_, 661 N.Y.S.2d 252), the Second Department ruled that while a dismissal of an action for failure to obey disclosure order is drastic, the court may impose such a penalty in the exercise of its sound discretion where the conduct of the recalcitrant party is willful and contumacious.

VOUCHING IN - NOTICE - ELEMENTS – It was recently held by the Appellate Division,Second Department that a notice of vouching in was untimely where the notice was served four months after the note of issue and certificate of readiness for trial were served and ten months after all depositions had been completed. In order for a party to vouch in another individual or entity, the notice must be timely and proper and it must offer to grant control to the vouchee of defense of litigation (Castignoli v. Van Guard,_ A.D.2d _,661 N.Y. S.2d 280).

NEGLIGENC - CONSTRUCTIVE NOTICE - ELEMENTS – It was recenty indicated by the Second Department that in order to constitute "constructive notice" for purposes of a negligence action against a proprietor for injuries caused by the defective condition, the defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the proprietor employees to discover and remedy it.

A grocery store owner did not have "constructive notice" that a piece of wax paper on the floor of the bakery aisle, and thus the store was not liable for injuries the customer sustained when she slipped and fell on the wax paper where the customer did not observe the paper even though she had passed through the bakery aisle shortly before the accident, and there was no indication that anyone else observed the paper prior to the accident or that the paper itself was dirty or worn (Dardzinski v. Great Atlantic and Pacific Tea Co.,_ A D.2d_,661 N.Y.S.2d 284).

TRIAL CHARGE - LAW OF CASE – In Kroupova v, Hill, (_A.D.2d _, 661 N.Y.S.2d 218), the First Department ruled that where a party fails to preserve its objection to a jury charge, the law as stated in the charge becomes the law applicable to the rights of the parties in the litigation, and the trial court is not entitled to set the verdict aside based upon legal principles which it later decides should have been included in the charge.

INSURANCE - LATE NOTICE – The Court of Appeals recently stated that absent a valid excuse, a failure to satisfy the notice requirement of an insurance policy vitiates the policy, even if the insurer is not prejudiced. (American Home Assur. Co. v. International Ins. Co., 90 N.Y.2d 433, 661 N.Y.S.2d 584).

LIMITATIONS - RELATIONS BACK - CPLR 203 (f) – The First Department recently indicated that generally, a relation back of claims of an intervening party will be permitted where the party is imposing claims which are the same as or similar to those set forth in the original complaint. Among the factors that may be considered in the making of a determination are whether the substance of the new claims is the same as those asserted in the original complaint or petition, whether the addition of the new claims does not change the potential liability of the defendants, and whether the new party is related to the original plaintiff or petitioner (Greater New York Healthcare and Facilities Ass'n v. DeBuono,_AD.2d_661 N.Y.S.2d 618).

NEGLIGENCE - SNOW AND ICE - NOTICE – In DeCurtis v. T.H. Associates, _A.D.2d_ , 661 N.Y.S.2d 642), the Second Department ruled that a snow removal contractor was not liable for injuries a pedestrian sustained in a slip and fall on an icy parking lot, even though the contractor removed the snow from that parking lot five days before the accident, where there was no evidence that the icy condition existed at the time the contractor removed the snow or that the contractor was notified of the icy condition, and there was no evidence concerning the origin of the ice upon which the pedestrian allegedly slipped.

The contractor did not assume a duty to exercise reasonable care to prevent foreseeable harm to the pedestrian, by virtue of its contractual duty to remove the snow from the parking lot.

AUTOMOBILE - A SEATBELT PASSENGER – In Calandrillo v Alessi (_A.D.2d_,662 N.Y.S.2d 92), the Second Departament indicated that an operator of a vehicle in which an adult plaintiff was a front seat passenger did not have the duty to insure that the passenger was restrained by the safety belt before operating the vehicle.

INSURANCE - ANTI-SUBROGATION – The Second Department recently ruled that a cause of action for common law indemnification and contribution which was, in part, a cause of action by the insurer effectively seeking subrogation against its own policyholder for a claim arising out of a risk for which the policyholder was insured was barred by the anti-subrogation rule (Small v. Yonkers Contracting, Inc.,_ A.D.2d_, 662 N.Y. S.2d 67).

PLEADINGS - AMENDMENT - STATEMENT OF READINESS - ELEMENTS – It was recently indicated by the Second Department that where the action has long been certified as ready for trial, judicial discretion in allowing amendments to the pleadings should be discrete, circumspect, prudent, and cautious (Clarkin v. Staten Island University Hospital, _ A.D.,2d_, 662 N.Y.S.2d 91).

The trial court providently exercised its discretion in denying the motion to amend where the application was made approximately two years after the filing of the note of issue and certificate of readiness. The proposed amendment was based upon factual circumstances known at the time the action was commenced and the defendant failed to show a reasonable excuse for its inordinate delay in moving to amend.

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NOTICE TO ADMIT - ELEMENTS – In National Union Fire Insurance Co. of Piftsburgh, Pennsylvania v. Allen (_A.D.2d _, 662 N.Y.S.2d 8), the First Department ruled that a notice to admit is designed to elicit admissions on matters about which the requesting party reasonably believes there can be no substantial dispute. The notice should not be used to seek admissions on matters which go to material or ultimate issues in the case.

A notice served by the Bank's subrogee in an action to recover on promissory notes, in which the subrogee asked the makers to admit that the interest rate provision was not, as the makers allege, added to the notes after they had signed but was present from the beginning improperly sought admissions of matters going to the heart of the makers' material alteration defense. Accordingly, the makers did not have to respond to the notices, and their failure to respond in timely fashion did not require a finding of liability (National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Allen, _A.D.2d _,662 N.Y.S. 2d 8)

INSURANCE - EXCLUSIONS - ELEMENTS – In Willard v. Preferred Mut. Ins. Co.,(_A.D.2d_, 662 N.Y.S.2d 342), the Fourth Department ruled that in determining that whether a policy exclusion applies, the facts alleged in the complaint, rather than conclusory assertions found therein are controlling.

INSURANCE - COLLATERAL ESTOPPEL - INAPPLICABLE – The First Department recently concluded that a finding in a prior proceeding that the vehicle was insured by the insurer at the time of the accident did not collaterally estop the insurer from late asserting otherwise in an insurer's action to determine the duty to defend and indemnify with regard to the negligence action against the vehicle owner and driver. The prior finding of coverage was made on a default in a proceeding that in a proceeding that involved potential financial exposure that was inconsequential compared to the damages sought in the negligence action. (American Transit Ins. Co. v. Val-Roc Trucking Inc., _A.D.2d_,662 N.Y.S. d 309).

PLEADINGS - AMENDMENT OF BILL OF PARTICULARS - ELEMENTS – It was recently indicated by the Second Department at the trial court did not abuse its discretion in denying a personal injury plaintiff's application to amend his Bill of Particulars to assert a new theory of recovery based upon a purported design and/or construction defect where the plaintiff did not offer a reasonable excuse for his extensive delay in seeking leave to amend, the proposed amendment was not supported by any affidavit of an expert or other statement of merit, and the granting of the application at such a late stage would prejudice the defendant (Gahroug v. Trifon, _A.D. 2d _, 662 N.Y.S.2d. 321).

SUBPOENA DUCES TECUM SCOPE - ELEMENTS – In Reuters Ltd. v. Dow Jones Telerate, Inc., (_A.D. 2d_, 662 N.Y.S. 2d. 450), the First Department submitted that the broader view of relevance may be applied when the subpoena is issued by an administrative or legislative investigatory body as relevant of such "office subpoena" depends upon the authorized breath of the investigation itself.

A person who is served with a non-judicial subpoena cannot be held in contempt for failure to comply unless and until the court has issued an order compelling the compliance, which order has been disobeyed.

EVIDENCE - EXPERT OPINION - ELEMENTS – It was recently indicated by the First Department that the plaintiff's expert presented sufficient foundation to allow an expert opinion, including the opinion as to how the plaintiff's hand could had made contact with a locating blade of a radial arm saw, to be presented to the jury in a products liability action against the manufacturer of the saw. The expert gave his opinion as to the safety of the design of the saw and the feasibility of manufacturing a safer yet cost effective design, based upon the examination of the machine, the comparison between different types of blade guards, plaintiff's account of the accident, angles of cuts to the plaintiff's fingers and location of the blood and severed fingertips (McKeon v. Sears Robuck & Co. (_A.D. 2d _, 662 N.Y.S.2d 496).

NEGLIGENCE - FALLEN TREE - DUTY - In Golan v. Astuto, (_ A.D.2d_, 662N.Y.S.2d. 576), the Second Department submitted that neighbors did not have a duty to take reasonable steps to prevent any potential harm that may have occurred to plaintiff on his property as a result of his attempting to saw a tree that had fallen onto his property from the neighbor's adjoining property where there was no evidence that the tree was defective or that the neighbors had actual or constructive notice of any defective condition in the tree before it fell.

ASSUMPTION OF RISK - ELEMENTS - In Morgan v. State, (90 N.Y.2d 971, 662, N.Y.S.2d 421), the Court of Appeals recently indicated that the assumption of risk is not an absolute defense in a negligence, but rather a measure of defendant's duty of care and thus survives the enactment of a comparative fault statute.

A thirty year old martial arts student assumed the risk of landing incorrectly in attempting to "jump roll' over an obstacle, though the obstacle was set at a higher level than the student had previously attempted, where the student had attended school for fifteen months and had performed the maneuver numerous times in the past. The operator of the school was not liable for the spinal injury sustained by the student in the landing.

NEW TRIAL - COURT INTERFERENCE - In Taromina v. Presybterian Hosp., In The City of New York, (_A.D.2d_, 662 N.Y.S.2d 491), the First Department held that a new trial was mandated by the trial court's excessive, bias intervention, into the trial proceedings favoring the plaintiff, resulting in a denial of a fair trial to defendants, where the court shepherded plaintiff's counsel through the proceedings by assuming the examination of witnesses and eliciting evidence critical to the plaintiff's case, prompting plaintiff's counsel to make key objections, and making repeated disparaging comments to and about defense counsel in front of the jury. Such conduct was a violation of the fundamental tenant of due process that the judge presiding over the trial must remain impartial.

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DISCLOSURE - FILING 0F STATEMENT OF READINESS - In Tunstall v. Sol Seifer & Co., Inc., (_A.D.2d _,622 N.Y.S.2d 481), the First Department held that former employee who had filed a note of issue and statement of readiness was not entitled to additional discovery to obtain evidence supporting her age discrimination claim arising out of allegations that the employer hired younger workers for a position for which the employee was qualified, where the employee had never sought to compel compliance with her oral discovery request during an almost ten year period that the action had been pending.

PROCESS - FAILURE TO FILE - The Second Department recently held that a failure to file proof of service with the clerk of the court within 120 days after the filing of the summons and complaint results in an automatic dismissal of the action. (Midamerica Federal Savings Bank v. Gaon, (_A.D.2d_,662 N.Y.S.2d 562).

PRODUCTS LIABILITY - ANSI VIOLATION - The First Departament recently directed that compliance with the requirements of the American National Standards Institute ("ANSI"), was not evidence of negligence in a products liability action alleging that the radial arm saw was defectively designed (McKeon v. Sears Robuck & Co ., _A.D.2d_, 662 N.Y. S. 2d 496).

ASSUMPTION OF RISK - NO LIABILITY - In Morgan v. State (90 N.Y.S.2d 471, 562 N.Y.S.2d 421), the Court of Appeals maintained that injuries sustained by a bobsled rider when the bobsled went through an opening in the exit run and crashed into a concrete abutment was solely the result of dangers and calculations inherent in a highly dangerous sport and not the result of any demonstrable defect in design of the bobsled course itself. Thus the rider was deemed as a matter of law to have assumed the risk of those injuries, relieving the courses owner and operator of liability. Many illustrations of assumption of risk are illustrated in the cited case.

INSURANCE - PROCUREMENT - EXTENT OF LIABILITY - The Second Department recently provided that a contractor which failed to name a second contractor as an additional insured on its liability policy, as was required in the contract between the parties, was required to provide indemnification to the second contractor up to the limits of the policy in the personal injury action arising from the construction accident. (Schumann v. City of New York, _A.D. 2d _, 662 N.Y.S.2d 777). See also, Isnardi v. Genovese Drug Stores, Inc.,(_A.D..2d _,662 N.Y.S.2d 790).

INSURANCE - POST JUDGMENT INTEREST - In Fama v. Metropolitan Property & Cas. Ins. Co., (_A.D..2d _, 622 N.Y.S.2d 784), the Second Department held that an insurer that failed to make an unconditional tender of its policy limits during the settlement negotiations was liable for a post judgment interest only on that portion of the judgment against its insured that represented its policy limits.

NEGLIGENCE - CONSTRUCTION - DELIVERY OF MATERIAL - It was recently provided by the Second Department that a steel company which manufacturer and delivered structural steel to a construction site was not a statutory agent of either the owner or general contractor and thus could not be held liable under work safety practices statute for injuries to plaintiff sustained while working at the site where there was no evidence that the steel company exercised any authority or control over the work site or work giving rise to plaintiff's injuries (Brooks v. Harris Structural Steel, _ A.D.2d _, 662 N.Y.S.2d 781).

PROCESS - FAILURE TO FILE - In Mandel v. Waltco Truck Equipament Co., (_ A.D.2d_, 663 N.Y.S.2d 106), the Second Department recently indicated that a defendant in a personal injury action did not waive the defect in the commencement of the action based upon the failure of plaintiff to purchase an index number and a failure to file a copy of the summons and complaint with the clerk of the court, even though the defendant did not raise any jurisdictional defense in the answer.

Plaintiff's who failed to purchase the required index number and failed to file the summons and complaint were not entitled to a non pro nunc ruling after subsequently purchasing the index number. The action had not been properly commenced therefore, there was no action pending for which non pro nunc relief could be granted.

DISCLOSURE - DESTRUCTION OF DOCUMENTS - SANCTIONS - In Reddy v. General Cinema Corp. of New York, Inc., (_A.D. 2d _, 663 N.Y.S. 2d 54), The Second Department concluded that the Supreme Court improvidently exercised its discretion in imposing the extreme sanction of striking the defendant's answer. Although the defendant may have destroyed documents when it went out of business, that fact alone was not sufficient to conclude that the defendant engaged in the willful destruction of documents to thwart the pretrial discovery in an action to recover damages for alleged false arrest and malicious prosecution.

NEGLIGENCE - ASSUMPTION OF RISK - FALL FROM HORSE - In Freskos v. City of New York , _A.D. 2d _, 663 N.Y.S.2d 174), The First Department held that in its experienced equestrian who was riding a horse on a bridal path in the City park assumed the risk associated with reasonably foreseeable consequences of the activity and thus could not recover for injuries sustained when she was thrown from the horse after it became "spooked" and slipped.

DEFAULT - DISMISSAL - CPLR 3215 - It was recently indicated by The Second Department that in order to avoid a dismissal of a complaint as abandoned when the default occurred and plaintiff failed to seek a default judgment within one year after the default, the plaintiff must offer a reasonable excuse for the delay and demonstrate the merits of the complaint (Richards v. Lewis,_ A.D.2d_, 663 N.Y.S.2d 233).

The plaintiff failed to establish the merits of the complaint as the verification of the complaint was made by plaintiff's counsel, rather than plaintiff himself and thusly, defendant was entitled to have the complaint dismissed as abandoned for failure to seek a default judgment.

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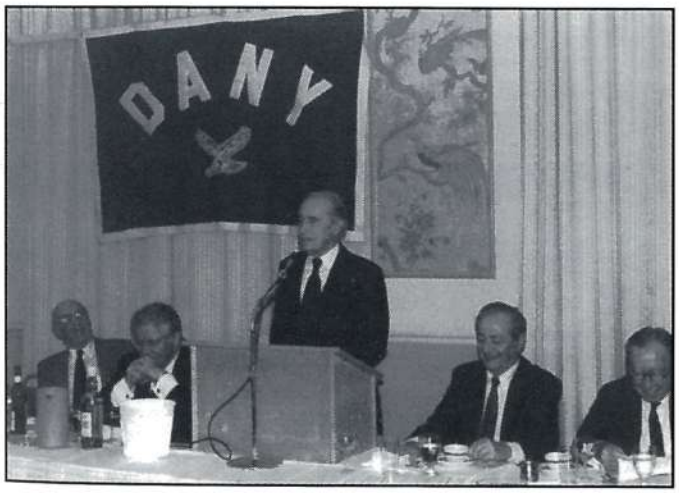
"Pictures Out Of The Past"



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APPEAL - MEDICAL RECORDS - INCLUSION - It was recently held by the First Department in Serpe v. Eyris Productions, Inc.,_ A.D.2d_ 663 N.Y.S.2d 542), that a claim for future damages awarded should be vacated because of the trial court permitted the plaintiff to offer medical evidence concerning the permanences of his injuries that was not included in the medical reports previously exchanged, in violation of the court rule was unreviewable on appeal where the appellant failed to include the report in the record on appeal.

PROXIMATE CAUSE - TRUCK ACCIDENT - In Hyland v. Calace, (_AD.2d _, 663 N.Y.S.2d 890), The Second Department ruled that even assuming that the owner of a trailer had illegally stopped the trailer on a shoulder of the roadway without an adequate number of barricades to wam of its presence, the manner in which the automobile was being operated by a motorist who had a blood alcohol level of 15 % rather than the conduct of the owner, was the sole proximately cause of the accident in which the motorist was killed after he drove off the roadway and struck a trailer without skidding.

ANIMALS - VICIOUS PROPENSITIES - ELEMENTS - It was recently held by the Second Department that a child who was injured when he collided with a dog who ran at the child when the child was playing in the yard of the dog owners failed to establish that the dog had vicious propensities or that the owners knew of any such vicious propensity, as required to recover in an action against the owners, (Butler Utler v. Prischoux, _ A.D.2d _, 664 N.Y.S.2d 128).

SANCTIONS - ELEMENTS - In Bosco v. U-Haul of Flatbush (_ A.D. 2d _,664 N.Y.S.2d 92) the Second Department indicated that the imposition of a sanction for frivolous conduct against the defendant in a personal injury action was improper where the trial court failed to set forth in a written decision of the offending conduct, why the court found the conduct frivolous conduct, and why the amount of the sanction was appropriate and did not afford defendants counsel an opportunity to be heard on the matter of sanctions.

DAMAGES - EMOTIONAL DISTRESS - ELEMENTS - The First Department recently held that a bank customer failed to establish that the bank's conduct was so outrageous in character and so extreme as to go beyond all possible bounds of decency and to be regarded as atrocious, as required to allow recovery for intentional infliction of emotional distress (Yunis v. First U.S.A Bank, _ A.D.2d _, 664 N.Y.S.2d 24).

INSURANCE - LATE NOTICE - DISCLAIMER - TIMELY - In DeSantis Bros. v. Allstate Insurance Co., (_A.D.2d _ , 644 N.Y.S.2d 7) the First Department held that the liabilities insurer's letter advising the insured of its violation of the policies prompt notice requirement and stating that "(t)herefore... we must disclaim coverage" was a disclaimer letter, even though it also contained an offer to defend the insured under a reservation of rights.

For thirty one (31) days it took the liability insurer's attorneys to review the five hundred page file and conduct legal research before notifying the insured of the disclaimer of coverage was not unreasonable under the statute governing such disclaimers.

INSURANCE - PROCUREMENT - RELITIGATION - In Maheu v. Long Island R.R.(_ A.D. 2d _,664 N.Y.S.2d 115) the Second Department held that a determination during an adjudication of the owner's claim against the contractor for breach of contract to procure liability insurance, that the owner was not covered under the contractor's policy collaterally, estopped the contractor from relitigating the issue in later action against its insurer.

GENERAL MUNICIPAL LAW - PROXIMATE CAUSE - In Price v. New York Citv Housing Authority (_A.D.2d _, 664 N.Y.S.2d 9) the First Department submitted that the records supported the jury's verdict that the Housing Authority's alleged negligence in failing to install locks was not a proximate cause of injuries tenant sustained when she was raped in a building by a serial rapist, where the tenant did not establish how or when the serial rapist entered the building, that his ability to enter would have been substantially effected had the locks been installed, or that the presence of locks would have deterred the rapist from attacking the tenant.

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Westinghouse's general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury, but not that workers such as (these plaintffs) were at risk at any time it could have warned them." Id. at 956-57. The Court applied the standard used in Saarinen v. Kerr, 84 N.Y.2d 494, wherein the Court required a showing of gross negligence to hold a defendant in "reckless disregard for the safety of others " under Vehicle and Traffic Law Section 1104(e).

This decision has been followed by Justices Lehner and Moskowitz in setting aside jury verdicts against other defendant manufacturers.

There have been recent trials in federal court as well, with groups of cases being remanded by Judge Weiner of Phfladelphia. Judge Sweet was assigned to try four cases, which resulted in one defense verdict (Strafford) and three plaintiff verdicts against Raymark, a manufacturer of asbestos cloth. John Crane, a defendant in Strafford and McPadden obtained a defense verdict in both cases. Another group of 89 cases have been remanded to Judge Sifton in the Eastern District of New York, with small groups to begin trial in March 1998. A group of five cases may shortly be remanded to Judge Sweet in the Southern District of New York.

LEAD LITIGATION – Recent decisions have allowed defendants to obtain discovery from other family members in order to refute claims of learning disabilities as a result of lead ingestion. For example, in Sendra v. Robinson (Oueens Cty, Polizzi, J.) (9/2/97 N.Y.L.J. 34), a defendant obtained an order permitting the defense examining psychiatrist to inquire about the academic performance of the non-party siblings of an infant plaintiff. Similarly, prenatal and academic records are "clearly material" and are thus discoverable. Steven Lantigua, et al. v. Rick Mallic, et al.,(No. 667/97 Dec. 19, 1997) (Kings Cty, Vinik, J.). Finally, a mother was ordered to undergo an IQ test and release the her own academic records as well as another non-party child. Roniece Atkins v. New York City Housing Authority (No. 154601/95) (Kings Cty, Rappaport, J.).See also Rodriguez v. New York City housing Authority (No. 09340/92) (N.Y. Cty, Wilk J) (Plaintiff ordered to release school records of two non-party siblings of infant plaintiff based on defense expert affidavit demonstrating relevance in light of children sharing genetic and social environments but not lead exposure histories) relying on Wepy v. Shen, 175 A.D.2d 124 (2d Dep't. 1991).

Typically defendants cannot assert as an affimative defense the parent's failure to properly supervise an infant in lead ingestion cases. Ramesar v. Surooj, 221 A.D. 2d 612, Bracero v. 2780Rlty. Co., 221 A.D.2d 270, Morales v. Felice Props. Corp., 221 A.D.2d 612. However, in Mejia et. al v. D.R. Jacks et al. (N.Y. Cty. No. 13281/96) Justice Norman C. Ryp concluded that a mother's breach of tenant responsibilities under state housing statutes could result in culpable conduct on her part. Plaintiffs had moved to dismiss defendant's affirmative defense of culpable conduct. Defendants argued that there was sufficient evidence to defeat dismissal of the claim, because there was proof that the mother had locked out workers who sought to abate the lead condition. In addition, a broken washing machine may have caused steam to increase a peeling paint condition. Because the workers could not gain access to the apartment for several months, the Court held that the mother's abrogation of her tenant responsibilities could lead to her own negligence, apart from a parental supervision claim. Plantiff's motion to dismiss the affimative defense was denied.

In Espinal v. 570 W 156th Associates-et al. (No. 121914/93) (N.Y. Cty., York,J.) a school was denied summary judgment where plaintiff alleged a day care center as the source of the infant plaintiff's lead exposure. The school sought dismissal since Local Law 1 only applies to owners of a multiple dwelling unit and because there was no prior notice. The court concluded, however, that schools are subject to a higher standard of care. The court concluded there was an issue of prior notice. Because the building may have been constructed prior to 1960, notice of peeling paint creates a rebuttable presumption that the landlord has notice of a lead paint hazard. In addition, the school could have violated laws prohibiting the use of lead-based paint.

The following are some recent verdicts and settlements in lead cases: Esteves v. New York Ciiy Housing Authority , No. 4311/89 (Kings Cty, Schneier, J.). The jury in November 1997 awarded $500,000 to a plaintiff who in 1983 was four years old and diagnosed with elevated lead levels of 51 micrograms per deciliter (ug/dl) by fingerstick and 39 ug/dl by venous sampling. A $1.5 million settlement was reached in November 1997 for a plaintiff diagnosed with a lead level of 67 ug/dl and who was hospitalized for 2 to 3 weeks. Blake v. L.P. 591 Ocean Realty No. 440339/93 (Kings Cty). A $75,000 settlement was reached in Flores v. S S. Enterprises Realty and Kingsley Royce Management No. 12886/91 (Bronx Cty) for an infant diagnosed with an elevated lead level of 26 ug/dl.

RSI LITIGATION - Injuries as the result of keyboard use have not fit easily into the mold of CPLR 214-c. That 1986 amendment sought to remedy the unfairness of the prior statute of limitations for injuries which occur as the result of the latent exposure to toxic substances. The amendment requires a plaintiff to commence his/her cause of action three years from the date he/she discovers the injury, or the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

Commonly symptoms as the result of keyboard can occur over a period of time, with the plaintiff continuing to use the keyboard after diagnosis. Additionally, RSI injuries typically are the result of cumulative and prolonged use of the keyboard, rather than one instance. Finally, the injury is not caused by ingestion or inhalation, but rather by repeated use.

The Court of Appeals on November 25, 1997 rendered a decision in Blanco v. AT&T and addressed the statute of limitations for RSI cases.

Blanco was first decided at the trial level by Justice Stephen Crane, who manages the RSI litigation in New York County. Relying on Wallen v. American Telephone & Telegraph (Sup. Ct. Bronx County, Sept. 17, 1992, Saks, J. Index No.

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12336/9 1, aff'd for reasons stated below, 195 A.D.2d 417, lv. danied 82 N.Y.2d 659), Justice Crane held that accruel of the dcause of action occurred on the date of onset of the symptoms, rather than the date of diagnosis.

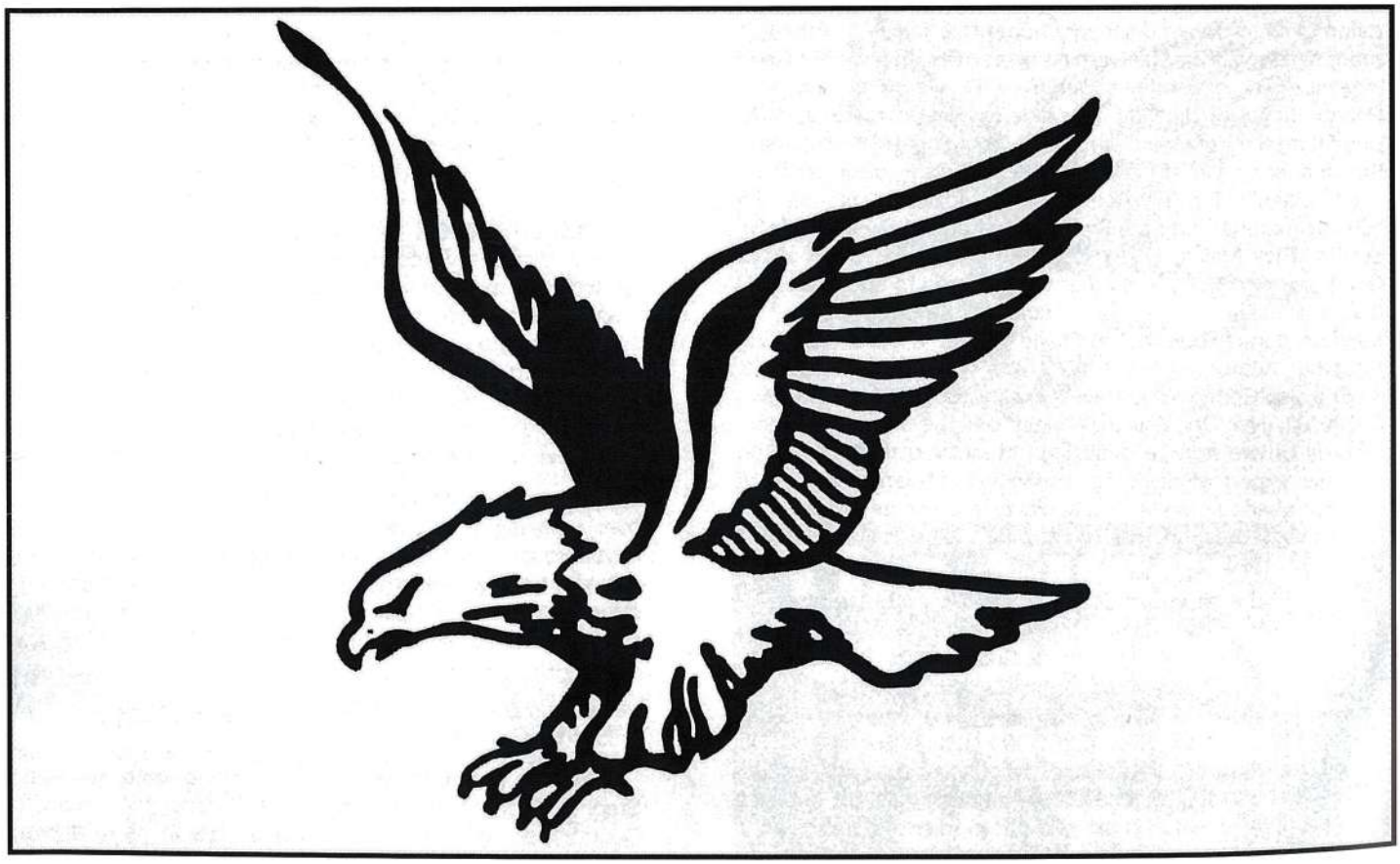
The First Department disagreed with Justice Crane and found CPLR 214-c inapplicable. It held that the cause of action accrued on the date of first use of the keyboard, a decision which if upheld would have resulted in the dismissal of most of the pending RSI litigation.

The Court of Appeals struck a balance in its decision. It too concluded that CPLR 214-c was inapplicable because a keyboard is not a toxic substance. The Court analyzed policy considerations underlying the statute of limitations, including a defendant's ability to defend itself against ancient claims. Also, the Court realized that a plaintiff must have a reasonable opportunity to assert a claim once the injury is known.

Accordingly, the Court held that a claim for repetitive stress injury accrues on the date of last use of the keyboard or onset of symptoms, whichever is earlier.

More to come in future issues.

Legal articles needed. If interested call John J. Moore 212.509.8999



The Continued Care Exception to the Medical Malpractice Statue of Limitations -A Defense

(continued from page 4)

statute of limitations, the burden shifts to the plaintiff to establish that an exception to the two year six months statutory period exists and that the continuous treatment doctrine should apply.[6]

In order to defeat the motion to dismiss and evoke the exception, the plaintiff is required to establish that there has been a particularized course of treatment established with respect to the specific condition that gives rise to the lawsuit. Such proof must, "assemble and lay bare affirmative proof establishing the existence of genuine material issues of fact in this regard."[7] This is intended to be, and should remain, a very high threshold.

The CPLR provides assistance in attempting to limit application of the continued care exception by explaining that, "continuous treatment "shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patients condition."[8] Thus, routine examinations of a healthy patient[9] or return visits by a patient only to have a condition checked[10] are insufficient to invoke the doctrine.

Likewise, routine examinations meant to monitor a patient's physical condition may not serve as a pretext for suspending the running of the applicable period of limitations.[11] The Court of Appeals has routinely held that, "neither the mere continuing relation with physician and patient nor the continuing nature of a diagnosis is sufficient to satisfy the requirements of the doctrine.[12] Conversely, the doctrine has been held inapplicable to situations where the patient's continuing visits to the treating physician were not part of a continuing effort to, combat the disease for which the patient sought compensation.[13]

Only under circumstances "where the physician and patient reasonably intend the patient's uninterrupted reliance upon the physician's observations, directions, concern and responsibility for overseeing the patient's progress," are the requirements of the continuous care exception satisfied.[14]

In addition, the lack of an exclusive and ongoing relationship between patient and medical provider removes medical laboratories from the purview of the continuing care exception. As the Court of Appeals observed, "a laboratory neither has a continuing relationship with the patient nor, as an independent contractor, does it act as an agent for the doctor or otherwise act in a relevant association with the physician."[15]

The same logic dictates that an attending physician's continuous treatment cannot be imputed to a hospital pathologist because no expectation of exclusive and ongoing care is intended nor anticipated.[16]

For purposes of the doctrine, "the continuing nature of a diagnosis or misdiagnosis does not (in and of itself) constitute continuous treatment."[17] Where the continuing treatment is provided by someone other than the practitioner alleged to have been negligent, there must be a "an agency or other relevant relationship between the two.[18] Similarly, the courts have rejected application of the continuous care doctrine to doctors with common affiliation with a hospital.[19] Thus, the referral of the patient from one practitioner to another for purposes of ongoing treatment does not create a continuous relationship sufficient to invoke the exception.[20]

The continuous care exception is not even triggered when the failure to diagnose, or the misdiagnosis, is misguidedly relied upon by subsequent practitioners. The fact that a subsequent diagnosis corrects an earlier failure to diagnose does not bring a case within the continuing treatment doctrine "even if a correct diagnosis would have led to an ongoing course of treatment."[21]

Practitioners are forewarned that continued care doctrine cases are fact specific. All material evidencing a cessation in the exclusivity and continuity of the relationship between doctor and patient furthers the defendant's interest in removing the case from the doctrine.

Once a defendant produces competent evidence to establish that there was no continuous treatment for a time exceeding the applicable statute of limitations, the burden shifts to the plaintiff to produce competent evidence that additional medical treatment was in fact administered during this time.[22] Conclusory assertions of alleged continuous care are insufficient as a matter of law to rebut contrary documentary and testimonial evidence and are thus inadequate to establish the plaintiff's entitlement to application of the exception.[23]

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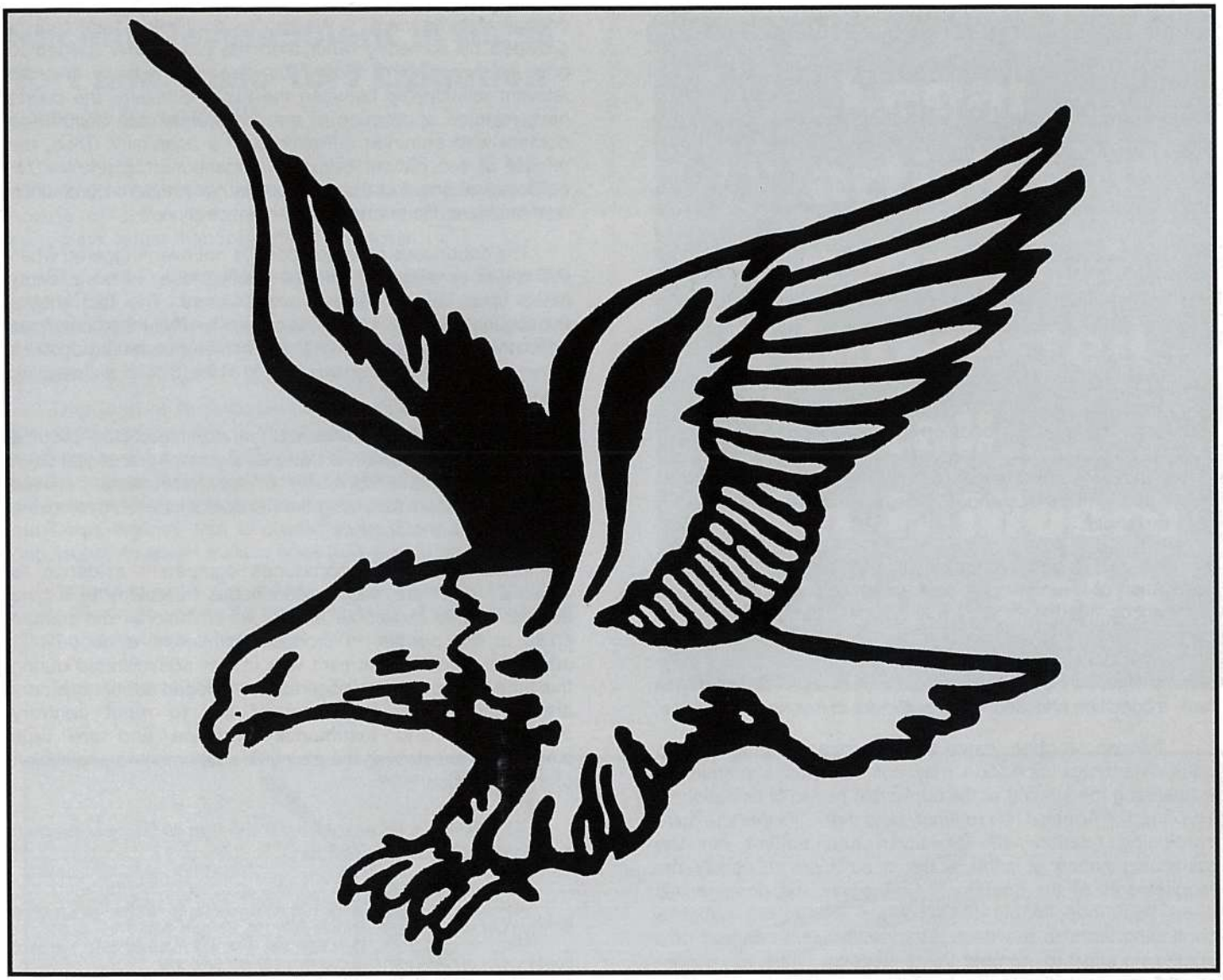
[1] CPLR 214-a.
[2] Ganess v. City of New York, 628 n.Y.S.2d 242, 85 N.Y.2d 733, (quoting Borgia v. City of New York, 12 N.Y.2d 151, 155, 237 N.Y. S.2d 319).
[3] Mc Dermott v. Torre, 56 N.Y.2d 399, 408, 452 N.Y.S.2d 351; see also, Borgia v. City of NewYork,12 N.Y.2d 151, 237 N.Y.S.2d 319.
[4] Ibid.
[5] CPLR 3211.
[6] Pierre-Louis v. Ching Yuan Hwa, 182 A.D.2d 55, 57, 587 N.Y.S.2d 17; see also, Werner v. Kwee,148 A.D.2d 701,702, 539 N.Y.S.2d 449.
[7] Massie v. Crawford,160 A.D.2d 447, 554 N.Y.S.2d 497, 502.
[8] CPLR 214-a.
[9] See, Massie v. Crawford, 78 N.Y.2d 516, 571 n.Y.S.2d 233.
[10] See, Patterson v. Minehan, 180 D.2d 241, 243, 584 N.Y.S.2d 929.
[11] See e.g., Cassara v. Larchmont-mamaroneck Eye Care Group, 194 AD.2d 708, 600 N. Y.S.2d 107; Landau v. Salzman, 129 A.D.2d 774, 514 n.Y.S.2d 767; Grellet v. City of New York, 118 A.D.2d 141, 504 n.Y.S.2d 671.
[12] Nykorchuk v. Henriques, 78 n.Y.2d 255, 259 573 N.Y.S.2d 434 (quoting Mcdermott v. Torre, 56 N.Y.2d 399, 405, 452 N.Y.S.2d 351
[13] Ganess v. City of New York, 616 n.Y.S.2d 510, 207 A.D.2d 765. See also, Cooper v .Kap- lan, 78 N.Y.2d 1103, 578 N.Y.S 2d 124.
[14] Richardson v. Oventreich, 64 n.y.2d 896,898, 487 N.Y.S.2d 731.
[15] McDermott v. Torre, 56 N.Y.2d 399, 408, 452 N.Y.S.2d 351.
[16] Meath v. Mishrick, 68 N.Y.2d 992, 510 n.Y.S.2d 50.
[17] Swift v. Colman, 196 A.D>2d 150, 153 608 N.y.S.2d 717.
[18] Meath v. Mishrick, 68 n.Y.2d 992,994,510 n.Y.S.2d 560.
[19] Ruane v. Niagra Falls Memorial Medical Center, 60 N.Y.2d 908, 470 n.y.S.2d 576.
[20] Florio v. Cook, 48 N.Y.2d 792, 423 n.y.S.2d 917.
[21] Gordon v. Magun, 83 N.Y.2d 881, 612 N.Y.S.2d 373.
[22] See , Massie v. Crawford, 78 n.Y.2d 516, 577 N.y.S.2d 233; Washington v. Elahi, 192 A.D.2d 704, 597 N.Y.S.2d 110; Siegel v. Wank, 183 A.D.2d 158, 589 n.Y.S.2d 934.
[23] Curcio v. Ippolito, 63 n.Y.2d 967, 483 N.Y.S.2d 989.



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