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FEATURING:

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DISCOVERING ELECTRONIC EVIDENCE

PART II

*by John J. McDonough **

IV. HOW TO PROTECT ELECTRONIC FILES

A. Methods to Prevent Unwanted Accumulation of Files

1. 'Knowledge Management', Records Retention Program

"The best defense is to plan long in advance of the discovery request for the contingency of litigation and the likelihood that computer-based evidence will be discoverable. It would be prudent to have in effect a systematic plan for the management of records."[45] The increase in litigation over discovery of electronic evidence has led a growing number of organizations to admit that they do not know what information they possess, or where it is kept. A number of industries now advocate the use of 'knowledge management.' The concept is for the organization to create a process by which all electronic information possessed is eventually identified, indexed and made available as a cohesive entity.

The first step is to learn how the system works, and the locations in which the data is stored. The second step is to create a valid records retention program. A carefully constructed and implemented program ensures that unwanted documents are not inadvertently, or unnecessarily, stored. A valid program has the added advantage of avoiding the implication that harmful documents have been destroyed in order to prevent damaging production in response to pending litigation.[46] An organization embarking on a records retention program, however, must be careful not to conduct the program on an *ad hoc*, or selective destruction, basis — as either could result in adverse negative inferences.[47]

a) Fundamental Components of a Valid Records Retention Program

Systematically develop the records retention program.

1) Address all your records in the records retention schedules, including reproductions.
2) Address all media in the records retention schedules, including microfilm and machine-readable computer records.
3) Obtain written approvals for the records retention schedules and the program procedures.
4) Systematically expunge records when permitted by the records retention program.
5) Control and manage the operation of the records retention program.
6) Stop expunging the records, even when permitted by the program, when litigation, a government investigation or an audit is pending or imminent.
7) Maintain documentation supporting the development and implementation of the records retention program, including records retention schedules, procedures, changes in procedures, approvals, legal research and listing of records expunged.[48]

b) Guidelines for Developing a Records Retention Policy

1) Preserve, for as long as necessary, in any event for a term not to exceed a specified number of years, all documents maintained in accordance with applicable laws and regulations.
2) File, in a systematic and accessible manner, all documents required for the conduct of business.
3) Identify and preserve all documents relevant to foreseeable or pending litigation and other judicial or governmental investigations or proceedings.
4) Catalogue and reduce to electronic media all documents required to be permanently maintained, for convenient and economical storage and access.
5) Purge all other documents.
6) Conduct regular audits of all electronic data to assure compliance with the retention policy provisions.
7) Establish a mechanism which assures the immediate suspension of data destruction occurring pursuant to provisions of the retention policy.
8) Always resolve any uncertainty as to the application of the retention policy in favor of retention of documents.[49]

c) E-mail

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Discovering Electronic Evidence–PART II

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E-mail provides particular concern for a record retention policy. "It is important for companies to train their employees to understand that e-mail is a business document — that you should keep it only while you need it, destroy it when you don't and don't destroy it if you've been ordered by the court to retain those records."[50] Email should be organized and archived so that important and potentially privileged information can be easily retrieved.[51] Finally, a company wide e-mail policy should be instituted, and employees should be trained in its use.

1) The e-mail system is the property of employer.
2) E-mail is to be used only for valid business purposes.
3) E-mail must not be used for personal matters or comment about others.
4) E-mail correspondence and messages are to be kept confidential by the employee/user.
5) The employee agrees, and is aware, that e-mail may be monitored and disclosed by the employer.
6) Employees should be educated to recognize common email misconceptions. Humor and sarcasm should not be communicated in e-mail, it can be easily misinterpreted and offensive.
7) Do not compose e-mail messages when angry.
8) E-mail message recipient lists and text should be thoroughly reviewed by the composer for accuracy before being sent.
9) Employees should archive important and critical messages by subject, and delete groups when no longer used or needed.
10) Archived and current messages will be subject to review and production in litigation.
11) E-mail messages that are not archived will be deleted in a specified number of days after being sent.[52]

Approximately 40% of U.S. Corporations now have policies deleting e-mail after 30, 60, or 90 days.[53] A further option, employed by a number of large corporations, is the use of investigative e-mail software that is capable of catching "hot words" and phrases.[54]

d) Inadvertent Deletion of Relevant Data Through Application of a Records Retention Program: 'Reasonableness Standard'

If a document is destroyed according to a document retention policy, the court will look to see how reasonable the retention policy was given facts and circumstances, how relevant the information was, and how foreseeable the need for the requested documents would be. The court may also consider the frequency and magnitude of other complaints against the party, and whether the party acted in bad faith.[55]

e) Argument Against Knowledge Management

It should be noted that whilst a knowledge management policy makes detection of unwanted, unnecessary and potentially harmful information easier, it also makes detection of illegal deletion or alteration easier, and may help your opponents find the critical document invaluable to their case.

2. Employee Education

A survey of 800 corporate human resource managers in November 1997 found that only 52% had written policies on e-mail use, of these only a quarter were enforcing them. 51% were training workers in appropriate e-mail use, but only 15% of e-mail users treat it the same way as paper documents.[56] Despite a growing number of companies implementing record retention policies, therefore, only a small minority have yet to make them effective. Once a knowledge management plan has been developed, it is essential to educate employees in its use.

Identify employees unnecessarily copying files onto disk, or desktop hard drive. In particular, a company should be aware of unnecessary e-mail retention. Employees should be educated on the potential liability of the company resulting from the misuse of electronic information, including abuse of e-mail. One New York firm[57] uses an artificial intelligence program called Mail Corp that warns employees when they send or receive e-mail that may violate company rules. In general, it is worth reminding employees that e-mail is not always a good alternative to an old-fashioned conversation.

3. Automatic Deletion

Software that will really 'delete' electronic data when you tell it to is now readily available.[58] Large corporations, including Citibank, Lockheed Martin and General Electric have begun using Cipher Logics Corp.'s Secure Delete, an electronic shredding program, on all company laptops.[59] Also, a San Francisco based company has developed an encryption code for e-mail that destroys the message, and any copies, after a period of time set by the sender.[60]

A foreseeable problem with automatic deletion programs is that, unless stopped, they will continue after a party has been served with a request for production, possibly leading to sanctions for inadvertent destruction of evidence. A safer way to ensure deletion of records, perhaps, may be deletion as part of a valid records retention policy.

4. Encryption

Encryption is essentially a way of putting e-mails inside an electronic envelope which can only be opened by the intended recipient. The most internationally popular encryption device is called "PGP", or "pretty good protection," invented by Mr. Philip Zimmerman, though using it may be illegal within the United States. The United

States government currently classifies the device, which may be downloaded off any number of sites, as weapons or "munitions" under 22 U.S.C. § 2778 (1995), and Zimmerman has faced serious charges.

Some form of encryption should definitely be considered in the context of avoiding waiver of privilege,[61] particularly if the e-mail involves communication between attorney and client. If an encryption device is used then the organization should be careful not to loose the password to the code, or they should ensure that someone maintains a master key. Without a valid password the data will become useless, and the organization may face sanctions for spoliation.[62]

B. Methods to Prevent Discovery by an Adversary

1. Undue Burden

Federal Rule of Civil Procedure 26 provides protection from unreasonable discovery requests. Under Rule 26(b)(2) the court can shift costs by reference to certain criteria, including whether the information sought "is obtainable from some other source that is more convenient, less burdensome, or less expensive," and whether the expense of production "outweighs its likely benefits." Under Rule 26(c) the court can limit the scope of discovery "to protect a party or person from...undue burden or expense." The undue burden objection is the most common approach used to avoid discovery. However, it rarely succeeds.[63]

Courts will probably not require a company to submit to burdensome, intrusive or expensive discovery, where the burden is not justified by the relevance of the evidence likely to be discovered, the size of the case, and the availability of less burdensome alternatives for obtaining the information.[64] Yet discovery requests for electronic data involving six figure expenses have become increasingly common and, in most cases, an electronic discovery request can cause further financial hardship resulting from the interruption of business. Courts have consistently held, however, that merely because a request is costly or time consuming does not render discovery impossible,[65] and courts have been reluctant to find an undue burden on a requested party.

In *Baine v. General Motors Corp.*,[66] the Alabama court expressed concern that reliance on technology should not create a shield or become a hindrance to the discovery of information. The cost inherent in electronic discovery is generally considered to be a necessary and foreseeable business expense, which a party assumes the risk of when it decides to utilize electronic data. "On the one hand it seems unfair to force a party to bear the lofty expense attendant to creating a special computer program for extracting data responsive to a discovery request. On the other hand, if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk... the costliness of the discovery procedure involved is a product of the defendant's record-keeping scheme over which the [plaintiffs have] no control."[67] A more effective way of couching the undue burden objection may be to suggest that the opponent party is attempting to increase the cost of litigation without any real hope of discovering useful information.[68]

2. Relevance: the 'Fishing Expedition'

Overly broad requests, especially where data sought is old and allegedly deleted, may face a relevance objection. In the context of paper storage, the Second Circuit noted that it is not enough to show relevance that the documents relating to the litigation may be somewhere hidden in the file cabinet.[69] The same argument may be applied to unfocused requests for hardware, where a request for individual files, or file categories, would suffice.

In In re Grand Jury Subpoena Duces Tecum Dated November 15, 1993,[70] a New York court quashed a subpoena issued by the grand jury for all computer hard disk drives and floppy diskettes. The court held that the subpoena was unreasonably broad, focusing on the failure to seek production of specific categories of information. Consequently, when facing an overly broad discovery request, the court may require the requesting party to show a "particularized likelihood of discovering appropriate information."[71]

In the majority of cases, however, a relevance objection will probably fail as courts favor broad discovery of electronic documents. In particular, authenticity, earlier versions, and 'deleted' files may only be discovered through broad examination of the entire computer system. To such extent, the entire system is implicitly relevant to discovery.

3. Privilege and the Work Product Doctrine

Attorney-client privilege protects privileged electronic records to the same extent that paper documents reflecting similar-types of information are protected.[72] Consequently, it is possible to object to a broad hard drive search on the grounds that if files are to be provided in their native form then too much information would be revealed. Even the organization of files, or the method of storage may reveal attorney work product, by showing, for instance, which files the attorney considers important. As with the undue burden and relevance objections, however, the application of the attorney-client privilege and work product doctrines has been narrowly construed.

a) "Substantial Need" and "Undue Hardship" Exception

The work product doctrine is more of a qualified immunity than a privilege. Under Federal Rule of Civil Procedure 26(b)(3), a party seeking discovery can obtain certain work product upon a showing of substantial need of the materials in preparation of the case, and an inability to obtain the substantial equivalent of the materials by other means without undue hardship. Both "substantial need" and "undue hardship" have been broadly interpreted to allow discovery in most cases.

To show "substantial need", a party need only show that

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production of the requested evidence will save significant time and money in preparation of case.[73] "Undue hardship" is a relative term that depends on the financial abilities of the parties. Courts have held that it may be synonymous with extensive effort and cost, which the opponent, ironically, often proves by making objections to production on the basis of how much work went into compiling the electronic evidence.[74]

b) Accidental Waiver

A requested party must be very careful not to waive potentially privileged information. The temptation to "data-dump" the information on the opponent's desk in the hope of swamping the adversary should be avoided in the context of electronic discovery. "[W]aiver of the privilege covering a single electronically-stored file can lead to waiver of the privilege for many other documents concerning related subject matter, including other electronically-stored information as well as traditional documentation thought to be safe because previously found to be privileged."[75]

In the majority of cases, courts have been quick to find inadvertent waiver of privilege where a requested party turns over electronic data sources without first doing an extensive check of the data produced.[76] In *CIBA-Geigy Corp. v. Sandoz*,[77] the defendants waived attorney-client privilege regarding certain documents by inadvertently producing them. The court held that, absent reasonable precaution to preserve confidentiality, there is a presumption that inadvertent disclosure of a document falling within the attorney-client privilege is the result of gross negligence or intentional conduct, thereby waiving the privilege.

Privilege may also be waived by sending confidential documents over e-mail, when outside parties can readily monitor the communication. A number of state bar organizations, however, have determined that a lawyer does not breach client confidence by using e-mail,[78] as unauthorized interception of e-mail is generally illegal under the Electronic Communications Privacy Act.[79]

Finally, electronic data compiled by a testifying expert can be discovered.[80] If an expert relies on a party's entire database to support a claim, then the entire database may have to be turned over to the opposition, including any work product that the expert may have relied upon.

c) Decline of the "Strict Responsibility" Rule

The strict responsibility rule of cases such as CIBA is gradually being abandoned by a majority of courts in favor of a new approach to inadvertent disclosure that focuses on the facts surrounding the disclosure on a case by case basis.[81] Also, under the modern Rules of Professional Conduct, an attorney who receives e-mail that has been inadvertently sent to the wrong person, and realizes that she is not the intended recipient, should refrain from reading the document and should contact the sender regarding the return or destruction of the information.

4. Trade Secrets

Federal Rule of Civil Procedure 26(c)(7) expressly authorizes a court to protect trade secrets or other confidential information. In *United States v. IBM*,[82] the New York court held that certain specifications relating to computer systems need not be disseminated if the information rises to the level of trade secret. Where information may be protected under Rule 26(c)(7), the court will look to see if disclosure will work a clearly defined and very serious injury to the defendant.[83]

5. Arguing Under the ABA Civil Discovery Standards and Manual for Complex Litigation, Third

Both the Manual for Complex Litigation 3rd, and the ABA's August 1999 Civil Discovery Standards, in comparison to the courts, are more balanced in approaching discovery of electronic files. They are rarely cited by the courts,[84] but the ABA standards in particular are still relatively new. They may prove useful in pre-trial negotiation, and some of the points raised may provide some help in argument.

a) Scope of Discovery Under ABA Civil Discovery Standards "Substantial Need" Standard

ABA Civil Discovery Standards §29(a)(iii) provides that:

> [u]nless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have the duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory.

The ABA Commentary argues further that:

> [j]ust as a party ordinarily has no duty to create documents, or to re-create or retrieve previously discarded ones, to respond to a document request, it should not have to go to the time and expense to resurrect or restore electronic information that was deleted in the ordinary course of business.

Clearly, both these statements go against the trend of most modern decisions. There also appears to be a slight logical fallacy in the commentary's argument: given the nature of resurrecting or restoring electronic data it is difficult to provide a persuasive analogy to recreating or retrieving previously destroyed paper documents. It is difficult to imagine a court refusing to order production of paper documents merely because the requested party had written the word "delete" on the top of every page.

b) Scope of Discovery Under Manual for Complex Litigation, Third

Unlike the ABA standards, the Manual for Complex Litigation, third, limits itself to a call for increased specificity in discovery plans. Section 21.446 suggests that a discovery plan should address issues such as the search for, location, retrieval, form of production and inspection, preservation, and use at trial of electronically stored evidence.

c) Allocation of Costs Under ABA Civil Discovery Standards

ABA Civil Discovery Standards §29(b)(iii) provides that:

> The discovering party generally should bear any expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.

In suggesting that the responding party should not be forced to bear the costs of producing electronic information, §29(b)(iii) is clearly at odds with most modern case law, including *Linnen*[85] and *In re Brand Name*.[86]

d) Allocation of Costs Under Manual for Complex Litigation, Third

The Manual for Complex Litigation § 21.433 interprets the Federal Rules of Civil Procedure 26(b)(2) and 26(c). By reading the rules together, it infers that the court has broad authority to control the cost of discovery. Under the Manual's interpretation, the court may require a discovering party to pay all or part of the cost of discovery as a condition of permitting it to proceed. This gives the parties an incentive to use cost-effective means of obtaining information.

The Manual also suggests a number of factors that a court should consider in allocating the costs of production in electronic discovery cases:

1) What is the most efficient and economical way of obtaining the requested information?
2) Is the information of sufficient importance to warrant the expense of production?
3) Can one party obtain the information with less time and expense than other?
4) Should some or all of the costs be shifted between the parties?

C. Reducing Expenses

In *Sattar v. Motorola, Inc.*,[87] the Court of Appeals upheld the lower court's plan to provide e-mails in electronic, as opposed to hard copy, format. If the electronic production was not sufficient, the court was to allocate the costs of production of hard copies equally between both parties. Providing only an electronic version of the information can result in substantial reduction of discovery costs.

There are a number of ways of reducing costs through careful planning of the discovery process. Parties can eliminate excessive duplication of information. If files have the same name, the same "byte size" and have nearly identical time stamps, then they are probably the same file. There are also a number of ways in which to reduce the scope, and thereby the cost, of the search. The time frame of the search, the number of users or departments searched and the types of file searched, for instance a search of only user-created files, may all be narrowed. Careful planning of a detailed search term list can significantly reduce time and expense.

D. The Possibility of Sanctions or Expenses

1. Incomplete Compliance with Discovery Request

Generally, a hard copy response to a request for production is no longer sufficient, and, in certain circumstances, may lead to the imposition of sanctions. In *American Bankers Ins. Co. of Florida v. Caruth*,[88] the ABI argued that the information requested was stored in over 30,000 boxes in an out-of-state warehouse. A subsequent deposition of an information services representative revealed that the information could be obtained in just forty hours from ABI's sophisticated database. ABI eventually admitted failure to comply properly with the discovery requests and the court entered default judgment.

In another similar case,[89] evidence was produced that one party maintained a database that it had failed to produce in response to a request for production. Again, the trial court imposed sanctions that were tantamount to default judgment. The court rejected the contention that "written documents" referred only to printouts and not to magnetic media.

2. Spoliation

Spoliation of relevant electronic information is a major risk for modern technologically advanced organizations. Inadvertent spoliation, in particular, is easy in the electronic context. Even turning on a computer will often modify dates and times of files on the hard drive, without keyboard input. Spoliation of relevant data will inevitably lead to sanctions. "[S]anctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information."[90]

a) Pre-Discovery Duty to Preserve

Federal Rule of Civil Procedure 26(a)(1)(B) requires initial disclosure, even before a discovery request, of "all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to disputed facts alleged with particularity in the pleadings." A responding party, therefore, must anticipate having to produce relevant documents very early in the dispute, and must take pains to preserve them.[91]

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While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.[92]

All parties have a duty, therefore, to save all data that may be requested in the future, even if they haven't received a request for production.[93] Even inadvertent destruction may lead to sanctions.

b) Inadvertent Spoliation

In *Linnen v. A. H. Robins Co.*,[94] a Massachusetts court held that inadvertent spoliation can have severe consequences for the requested party. The court initially granted an *ex parte* order requiring all computer records to be preserved at the time of filing. The plaintiffs subsequently learned that the defendant maintained backup systems, designed to recover lost data in event of a computer crash or catastrophic disaster. The defendant utilized a "widely-accepted business practice" of recycling tapes, which it continued after the court order resulting in the inadvertent destruction of information on the tapes. The court held that the spoliation was a 'clear violation' of the defendant's obligation to preserve evidence, and ordered that the defendant be made to bear the cost of restoring the tapes. The court also allowed an adverse inference instruction to be made at trial.

In *In re Prudential Insurance Co. Sale Practices Litigation*,[95] Prudential ordered employees to preserve information pursuant to a court order, but some information was still negligently destroyed due to a "haphazard and uncoordinated approach to document retention."[96] Consequently, the court fined Prudential $1 million and ordered the payment of plaintiff's attorney fees. The court then ordered Prudential to promulgate a formal, company-wide document retention policy.

As part of a valid document retention program, a party, when faced with pending litigation, should either take steps to preserve backup data or should seek permission to continue recycling in accordance with the existing technology plan.

3. Default Judgments

Although courts have been willing to impose sanctions in the event of inadvertent spoliation of electronic data, they are far more reluctant to find bad faith. The courts appear to be recognizing the complex nature of electronic discovery issues and, though they are keen to encourage careful management of electronic records, they have been willing to give parties the benefit of the doubt in most cases.

In *Proctor & Gamble Co. v. Haugen*,[97] the court could not determine on the record that Proctor and Gamble had acted in bad faith in destroying e-mails, but the company's failure to search for or preserve e-mails generated by five employees that Proctor and Gamble had identified as having relevant information was a sanctionable breach of their discovery duty to preserve relevant information. Proctor and Gamble was fined $10,000 per employee. In *In re Cheyenne Software, Inc. Securities Litigation*,[98] the defendant's destroyed documents stored in its desktop hard drives. The court refused to make a 'spoliation inference' as no prejudice to the plaintiff was shown. However, the court did fine the defendant $15,000.

Even absent a finding of bad faith, however, the court may award default judgment to a requesting party where the evidence destroyed was of a sufficiently important character.[99] In *Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*,[100] the defendant's willful destruction of a computer program's source code rendered it impossible for the plaintiff to prove its claim that its own copyrighted program had been illegally copied by the defendant. The court entered a default judgment against the defendant.

In *Telectron, Inc. v. Overhead Door Corp.*,[101] the Florida court noted that "deeply rooted in the common law tradition is the power of any court to manage its affairs, 'which necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.'"[102] In particular, the court added, "courts have the inherent power to enter a default judgment as punishment for a defendant's destruction of documents."[103] The power to enforce a default judgment, therefore, can be found both within the Federal Rules of Civil Procedure and within the court's inherent powers.

4. How to Avoid Sanctions

A number of steps may be taken to ensure full compliance with a request for production, thereby avoiding sanctions and at the same time preserving privileged or sensitive information. Steps should be taken early on to assess client systems for possible relevance to litigation. Attorneys should ensure preservation of evidence early, then collect client data responsive to discovery requests. Once collected, review the data for privilege, responsiveness and confidential information then prepare redacted sets of privileged information for production.

E. Preventing Use at Trial: the Hearsay Exception

Once produced, electronic documents, particularly e-mail, are often objected to on grounds of hearsay. Unfortunately, there are a number of ways in which a hearsay objection may be circumvented when considering electronic data.

The easiest way around the hearsay objection is to claim that the information produced, particularly e-mails,

represent communications made and retained in the ordinary course of business, under the Federal Rules of Evidence 803(6). Printouts of general ledger are admissible as business records. "Fed. R. Evid 803(6), the business records exception, specifically allows for the admission of a 'data compilation, in any form,' which meet the requirements of the rule."[104] One 9th circuit case has held that, to the contrary, e-mail does not fit the business records exception. The court noted that ongoing electronic message and retrieval systems are far less of a systemic business activity than are record keeping printouts.[105] The case was decided in 1994, however, and came before the e-mail and internet revolution had really taken hold.

The business records exception has been broadly interpreted by the courts to include most electronic information. Where each point of data in an electronic source is made in the regular course of business, then the output from a computer is not hearsay even if it (a) was not printed out at, or near, the time of the events recorded, (b) was not prepared in the ordinary course of business (but, for example, for trial), and (c) is not in the usual form[106]

Other possible arguments are that the documents represent admissions, present sense impressions, or declarations against interest, admissible under Rule 803(1), or public records, admissible under Rule 803(8). An attorney should also be aware that if an employee is typing something that he or she has been told then this may constitute hearsay within hearsay under Rule 805. Finally, even where no hearsay exception is applicable, then relevant data may still be admissible if the documents can be used as evidence that a communication was made.

V. CONCLUSION

Electronic evidence has become so pervasive in modern society, that to ignore its existence in any litigation context could prove disastrous. Even organizations that believe they have addressed the issue of electronic evidence can fall foul to embarrassing discovery through misapplication of records retention policies, or poor employee education. For the modern organization, it is essential to implement a valid records retention policy, and take steps to apply the policy to all usage of electronic data. For the modern lawyer, it is essential to seek electronic discovery as early and as often as possible. The use of electronic discovery in litigation is fast becoming the norm, not the exception.

Notes

[45] Pechette, *supra* n.25.

[46] "The best way to avoid any appearance that documents have been destroyed in order to avoid production in litigation is to establish a document retention program that is designed for the selective retention and destruction of documents."L. Youst & H. Koh, *Management and Discovery of Electronically Stored Information*, COMPUTER L. REV. AND TECH. J. at 86 (Summer 1997).

[47] Youst & Koh, *supra* n. 48, at 86-7.

[48] *See* D. Skupsky, *Recordkeeping Requirments*, §§2-10 (1991).

[49] *See* W.F. Reinke, *Limiting the Scope of Discovery: The Use of Protective Orders and Documentation Retention Programs in Patent Litigation*, 2 ALB. L. J. SCI. & TECH. 175 (1992).

[50] *See* Roberta Fusaro, *Cases Highlight Need for E-mail Policies*, Computerworld, Oct 5, 1998 (*quoting* Theodore Banks, general counsel at Kraft Foods, Inc., Northfield, Michigan).

[51] Heidi L. McNeil, *Discovery of E-Mail: Electronic Mail and Other Computer Information Shouldn't Be Overlooked*, 56 OR. ST. B. BULL. 21, 23 (1995).

[52] Sheila J. Carpenter and Shaundra A. Patterson, *Discovery of Electronic Documents*, Practical Tips, COMMUNICATION NEWS, Winter 2000, at 5. See *also* Lacouture, *supra* n.13.

[53] *See* Roberta Fusaro, *CasesHighlight Need for E-mail Policies*, COMPUTERWORLD, Oct 5, 1998 (*quoting* Michael R. Overly of Foley & Lardner, San Francisco).

[54] *See* Thomas Hoffman, *Brokers Can Monitor E-mail More Easily*, COMPUTERWORLD, July 20, 1998, at 39.

[55] Lewy v. Remington Arms Co., 836 F.2d 1104 (8th Cir.(Mo.) 1988).

[56] Business Week - June 8, 1998, *Office E-mail: It Can Zap You — In Court.*

[57] Hughes Hubbard & Reed, LLP.

[58] *See* Electronic Evidence Discovery, Inc.

[59] *See* Stepanek, *E-mail: It Can Zap You — In Court.*

[60] Jacob P. Hart and Anna Marie Plum, *Your Opponent's Electronic Media: Some "Disk-Covery" Disputes for the 21st Century*, ALI-ABA COURSE STUDY MATERIALS, Vol. II Course No. SE63, Dec.1999.

[61] *See infra* at p.24.

[62] *See infra* at p.30.

[63] Saperstein, *supra* n.6.

[64] *See* Murlas Living Trust v. Mobil Oil Corp., 1995 WL 124186 (N.D. Ill. 1995).

[65] *See* Dunn v. Midwestern Indem., 472 F. Supp. 1106 (S.D. Ohio 1980).

[66] 141 F.R.D. 328 (M.D. Ala. 1991).

[67] 1995 WL 360526 (N.D. Ill. 1995); *see also* Linnen v. A. H. Robins Co., 10 Mass.L.Rptr. 189, 1999 WL 462015 (Mass. Super. 1999): "While the court certainly recognizes the significant cost associated with restoring and producing responsive communications from tapes,... this is one of the risks taken by companies which have made the decision to avail themselves of the computer technology now available to the business world."

[68] *See* Saperstein, *supra* n.6.

[69] In re Horowitz, 482 F.2d 72, 79 (2d Cir.(N.Y.) 1973), *cert. denied*, 414 U.S. 867 (1973), *reh'g denied*, 414 U.S. 1052 (1973).

[70] 846 F. Supp. 11 (S.D.N.Y. 1994).

[71] Fennell v. First Step Designs, Ltd., 83 F.3d 526 (1st Cir.(Me.) 1996).

[72] *See* National Employ. Serv. v. Liberty Mutual Ins. Co., 3 Mass.L.Rptr. 221, 1994 WL 878920 (Mass. Super. 1994).

[73] In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846 (8th Cir.(Mo.) 1988), *see* also Washington Bancorporation v. Said, 145 F.R.D. 274, 279 (D.D.C.,1992).

[74] *See* Michael Owen Miller and Brenden J.Griffin, *Computer Databases: Forced Production Versus Shared Enterprise*, 23 LITIGATION 40 (Summer 1997).

[75] Pooley and Shaw, *supra* n.27, at 11.

[76] One Ninth Circuit case does not follow the trend. See In re IBM Peripheral EDP Devices Antitrust Litigation, 459 F. Supp. 626 (N.D.Cal. 1978): the court was reluctant to find waiver resulting

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from inadvertent production of privileged electronic files. Given the changes in electronic discovery since 1978, and the trend towards broad discovery, it is unlikely that this case would have been decided the same way today.

[77] 916 F. Supp. 404 (D.N.J. 1995).

[78] For example, South Carolina Bar Assn., 97-08 (June, 1997); New York State Bar Assn., ADVISORY OPINION CPLR 4547 (January 24, 1997); Illinois State Bar Assn., ADVISORY OPINION 96-10 (1996).

[79] 18 U.S.C. §§ 2701(a), 2792(a).

[80] City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F. Supp. 1257 (N.D. Ohio 1980).

[81] Hart and Plum, *supra* n.62; *see also* Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir., 1993), *see also* United States v. Keystone Sanitation Co., 885 F. Supp. 672, 674 (M.D. Pa. 1994), *cert. denied*, 516 U.S. 928 (1995).

[82] 67 F.R.D. 40 (S.D.N.Y. 1975).

[83] *Id.*

[84] 1995 WL 360526 (N.D. Ill. 1995), supra n.18: CIBA cited the Manual for Complex Litigation, this is one of the few cases.

[85] *supra* n.70.

[86] *supra* n.86.

[87] 138 F.3d 1164 (7th Cir.(Ill.) 1998), cert. denied, 516 U.S. 928 (1995).

[88] 786 S.W.2d 427 (Tex. App.-Dallas 1990).

[89] 995 F.2d 1376 (7th Cir. 1993), *supra* n.9.

[90] National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 556 (N.D. Cal. 1987).

[91] Pechette *supra* n.25.

[92] William T. Thompson Co. v. General Nutrition Corp., Inc., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (*citations omitted*).

[93] See Capellupo v. FMC Corp., 126 F.R.D. 545, 551 (D. Minn. 1989), *but see*, Skeete v. McKinsey & Co., Inc., 1993 WL 256659 (S.D.N.Y. 1993).

[94] 10 Mass.L.Rptr. 189, 1999 WL 462015 (Mass. Super. 1999), *supra* n.70.

[95] 169 F.R.D. 598 (D.N.J., 1997), *rev'd on other grounds*, 133 F.3d 225 (3d Cir. (N.J.) 1998).

[96] *Id.* at 615.

[97] 179 F.R.D. 622 (D. Utah 1998).

[98] 1997 WL 714891 (E.D.N.Y. 1997).

[99] *See* 995 F.2d 1376 (7th Cir. 1993), *supra* n.9, *and* 138 F.3d 1164 (7th Cir. 1998), *supra* n.90.

[100] 133 F.R.D. 166 (D.C. Cir. 1990).

[101] 116 F.R.D. 107 (S.D. Fla. 1987) (*citations omitted*).

[102] *Id.* at 126.

[103] *Id.* at 126.

[104] United States v. Catabran, 836 F.2d 453 (9th Cir.(Cal.) 1988).

[105] Monotype Corp., P.L.C. v. Int'l Typeface Corp., 43 F.3d 443 (9th Cir.(Wash.) 1994).

[106] United State v. Russo, 480 F.2d 1228, 1240 (6th Cir.(Mich) 1973), *cert. denied*, 414 U.S. 1157 (1974).

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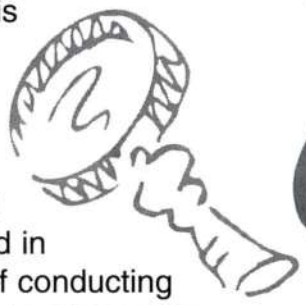

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*by John J. Moore **

WORTHY OF NOTE

*Christine Moore ***

NEGLIGENCE - EMERGENCY DOCTRINE - ELEMENTS

In Pawlukiewicz v. Boisson, (___ A.D.2d ___ 712 N.Y.S.2d 634), the Second Department ruled that the "Emergency Doctrine" recognizes that when an actor Is faced with a certain and unexpected circumstances not of his or her own making, which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed. that the actor must make a speedy decision without, weighing alternative courses of conduct, the actor may not be held negligent, if the actions taken are reasonable and prudent in the emergency context, even if it later appears that the actor made a wrong decision.

NEGLIGENCE - PROXIMATE CAUSE - CLOSING OF STREET

In Goldberg Weering Ustin, LLP Tishman Constr. Corp. (___ A.D.2d ___ 713 N.Y.S.2d 57), the First Department Indicated that a business owner who suffered no physical damage to his property when the City closed 'the, surrounding area following a collapse: of a construction elevator tower could not being an action for purely economic loss against the construction company; the causal connection between the construction company's activities and the business owner's losses resulting from-the City's action was too tenuous and remote to permit a recovery.

DAMAGES - LEGAL MALPRACTICE - ELEMENTS

In Wolkstein v. Morganstern, (___ A.D.2d ___ 713 N.Y.S.2d ___ 171), the First Department submitted that a cause of action for infliction of emotional distress generally is not allowed if essentially duplicative of a tort or contract causes of action. A matter seeking recovery for legal malpractice does not afford recovery for any Item for damages other than the pecuniary loss so that there may be no recovery for emotional or psychological Injury.

DISCLOSURE - RECORDS OF SIBLINGS

In Montgomery v. Taylor, ___ A.D.2d ___, 713 N.Y.S.2d. 188), the Second Department ruled that academic records of the siblings of an infant who allegedly suffered injuries from exposure to lead while residing in owners' premises were likely to lead to the discovery of admissible or relevant evidence in the infant's personal injury suit against the owners,. and thus, denial 'of the owners' motion to compel authorizations for the release, of those academic records was an -improvident exercise of discretion.

NEGLIGENCE - SLIP AND FALL - ELEMENTS

In Chemont v. Pathmark Supermarkets, Inc., (___ A.D.2d ___ 720 N.Y.S.2d 148), the Second Department held that to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant's. employees to discover and remedy the condition.

The store owner was not liable to a patron who slipped and fell on a puddle of rain water in the store's entrance following a severe and sudden thunderstorm where the rain water had not accumulated on the floor of the vestibule for a sufficient length of time before the patron fell so as to permit the store to discover and remedy the condition, and there was no evidence that water on the floor was a recurrent dangerous condition, or that the store owner had actual knowledge of the allegedly dangerous condition, or that the store owner had actual knowledge of the allegedly dangerous condition.

JURISDICTION - NONRESIDENT - ELEMENTS

In LaMarca v. Pak-Mor Manufacturing Co., (95 N.Y.2d 210, 713 N.Y.S.2d 304), the Court of Appeals submitted that to determine whether a nonresident defendant may be sued in State, the court first determines whether the long-arm statute confers jurisdiction over the defendant, in light or its contacts with the State, and it so, then determines whether the exercise of jurisdiction comports with due process.

Conferral of jurisdiction over a nonresident defendant pursuant to the long-arm statute rests on five elements: (1) that the defendant committed a tortious act outside the State, (2) that the cause of action arises from that act, (3) that the act caused injury to a person or property within the State, (4) that the defendant expected or should rea-

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sonably have expected the act to have consequences in the State, and (5) that the defendant derived substantial revenue from interstate or international commerce.

The test in determining whether the nonresident had sufficient minimum contacts with the forum state that exercise jurisdiction over the defendant and will not violate the due process clause rests on whether the defendant's conduct in connection with the forum state are such that it should reasonably anticipate being brought into court.

EVIDENCE - POST INCIDENT REPORT

The Second Department most recently concluded that a memorandum concerning security at a hospital when the victim was stabbed, which included discussion of post-incident remedial measures, was inadmissible in victim's personal injury action in Platovsky v. City of New York, ___ A.D.2d ___, 713 N.Y.S.2d 358).

RES JUDICATA - SCOPE

In Buechel v. Bain, (___ A.D.2d ___ 713 N.Y.S.2d 332), the First Department ruled that the doctrine of Res Judicata embraces not only those matters which are actually litigated before a court, but also those relevant issues which could have been litigated, including jurisdiction.

NEGLIGENCE - PRIOR OWNERSHIP AND/OR CONTROL

It was recently held by the First Department that a company which previously serviced an elevator was not liable for - injuries sustained by an elevator mechanic when protruding pin caught his shirt sleeve and drew his arm into a moving mechanical motor parts, even though the pin was not part of the elevator's original design, but had been added by an unknown party at an unknown time prior to the accident, where the company's tenure as the elevator maintenance, contractor had ended five years before the accident, and there was no evidence that the company was responsible for installing the pin (Cornwell v. Otis Elevator Co., ___ A.D.2d ___ 713 N.Y.S.2d 321).

EVIDENCE - ILLEGAL POSSESSION OF DOCUMENT

The Second Department recently concluded that cross examination as to whether a stabbing Victim had improperly kept a public document was relevant on the issue of the victim's credibility in his personal injury action, as such an act would have some tendency to demonstrate moral turpitude (Platovsky v. City of New York, ___ A.D.2d ___ 713 N.Y.S.2d 358).

NEGLIGENCE - SLIP AND FALL - SCHOOL - ELEMENTS - NOTICE

It was recently held by the Second Department in Rivera v. City of New York (___ A.D.2d ___, 713 N.Y.S.2d 196), that an infant allegedly injured when he slipped and fell in the hallway of a junior high school failed to submit proof that the specific substance upon which he slipped. was present in the hall for a sufficient period of time prior to the accident to permit the employees of the defendant City and others, who operated and maintained the school, to discover and remedy the hazardous condition, thus defeating the infant's personal injury suit.

AUTOMOBILES - NO FAULT - SERIOUS INJURY

The Second Department recently indicated that a disc herniation may constitute a "serious injury" within the meaning of, No-Fault Law (Caulfield v. Metten, ___ A.D.2d ___ 713 N.Y.S.2d 551).

INSURANCE - EXCLUSION - BURDEN OF PROOF

In Roofers' Joint Training Apprentice And Educational Committee of Western New York v. General Accident Ins. Co. of America, ___ A.D.2d ___, 713 N.Y.S.2d 615), the Fourth Department concluded that an insurer bears a heavy burden of showing that the policy exclusion applies in a particular case and is subject to no other reasonable interpretation.

LIMITATIONS - LEGAL MALPRACTICE

It was recently indicated by the Second Department that the six-year statute of limitations applied to a legal malpractice matter commenced prior to the September 1996 Amendment which shortened the applicable period to three years (Berman v. Cullen & Dykman, ___ A.D.2d ___, 713 N.Y.S.2d 762).

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DEFENDANT

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GENERAL MUNICIPAL LAW - LATE NOTICE OF CLAIM - DENIED

In Braine v. City of New York, ___ A.D.2d ___, 713 N.Y.S.2d 754), the Second Department concluded that a police officer's motion to serve a late notice on the City of a claim for injuries allegedly sustained when he tripped over debris while pursuing a perpetrator was properly denied. The officer did not show a reasonably excuse for the delay, his incident report did not place the City on notice of a possible claim because it gave the wrong address and failed to allege the City's ownership of the, premises in question or the City's negligence, and the passage of 14 months precluded the City from investigating a transitory condition that allegedly caused the fall.

PLEADINGS - AMENDMENT - RELATION BACK - ELEMENTS

The Second Department recently concluded that the relation back , doctrine allows a claim asserted against a defendant in an amended filing to relate back to the claims previously asserted against a codefendant for statute of limitations purposes, where the two defendants are united In interest (Ramos v. Cilluffo, ___ A.D.2d ___, 714 N.Y.S.2d 88).

To establish the applicability of the doctrine, a plaintiff is required to prove that (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution-of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have. known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well.

DISCLOSURE - DEPOSITION - FAILURE TO APPEAR - COSTS

In DeCintio v. Ahmed, ___ A.D.2d ___, 714 N.Y.S. 2d 101), the Second Department ruled that attorneys for defendants in a medical malpractice matter entitled to $500 in costs for a short notice they received of plaintiff's cancellation of the deposition.

The harsh penalty of striking the pleading should not be imposed as the conduct displayed was shown to be non willful or contumacious.

INDEMNIFICATION - COMMON LAW OWNER

It was recently indicated by the. Second Department that an owner of a building on. which a worker was performing roof repairs when he fell and was injured was entitled to common law indemnification from the contracting firm which employed the worker with respect to the worker's action pursuant to the Scaffold Law, absent evidence that the owner either supervised or controlled the work (Taylor v. V.A.Q. of America, Inc., ___ A.D.2d ___, 714 N.Y.S.2d 321).

DISCLOSURE - DEPOSITIONS - UNILATERAL ADJOURNMENT - SANCTIONS

n Peycke v. Town Bus Corp., (___ A.D.2d ___, 714 N.Y.S.2d 299), the Second Department ruled that defendants in a personal injury matter did not have the right to unilaterally adjourn their court ordered depositions and their failure to appear as ordered was thus willful. However, striking defendants' answer, rather than imposition of a less drastic sanction against the defendants' was an improvident exercise of discretion under the circumstances, including the fact that the defendants had not received all of the relevant medical records pursuant to outstanding authorized demands.

DEATH OF PARTY - JURISDICTION

In Kelly v. Methodist Hosp., ___ A.D.2d ___, 714 N.Y.S.2d 524), the Second Department ruled that the death of a party divested the court of jurisdiction.

ARBITRATION AWARD - VACATING - ELEMENTS

The Second Department recently submitted that an arbitrator's aware will not be vacated even though his interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy or is totally irrational (In Sheldon E. Goldstein, P.C. (Riverso), ___ A.D.2d ___, 714 N.Y.S.2d 456).

DISCLOSURE - DEPOSITIONS - FAILURE TO APPEAR - SANCTIONS

In UBS AG v. GEECEE Exportaciones Ltds., (___ A.d.2d ___, 714 N.Y.S.2d 493), the First Department held that the defendants' failure to comply with three court orders issued during a 21/2 year period directing them to appear for depositions, including an order conditionally striking their answers and awarding plaintiff a default judgment in the even they fail to appear for depositions, constituted a willful and contumacious conduct warranting the default sanction.

INSURANCE - CERTIFICATE OF - ELEMENTS

In Progressive Cas. Ins. Co. v. Yodice, (___ A.D.2d___, 714 N.Y.S.2d 715) the Second Department ruled that a Certificate of Insurance for a commercial general liability policy, which included an amusement ride in its description of insured's operation was not binding on the insurer, where it was prepared by an insured's broker, and stat-

ed that it was provided as a matter of information and conferred no rights upon the certificate holder.

Where the certificate of insurance stated that it was provided as a matter of information and conferred no rights upon a holder, the certificate is simply notice to the insured that a policy has been issued.

INSURANCE - NOTICE - BELIEF OF NON-LIABILITY

The First Department recently ruled that a reasonable belief of non-liability may excuse an insured's failure to give timely notice. However, whether an insured's belief of non-liability is reasonable generally presents an issue to be resolved at time of trial (Galaxy Ins. Co. v. 1454 Nicolas Avenue Associates, ___ A.D.2d ___, 715 N.Y.S.2d 27).

RES IPSA LOQUITUR - ELEMENTS

It was recently submitted by the Second Department in Giordano v. TOYS-R-US, Inc., (___ A.D.2d ___, 714 N.Y.S.2d 746), that the doctrine of res ipsa loquitur applies in cases where the event (1) is of a kind which ordinarily does not occur in the absence of someone's negligence, (2) is caused by an agency or instrumentality within the exclusive control of the defendant, and (3) is not due to any voluntary action or contribution of the part of the plaintiff.

A worker injured in a stockroom when an unsecured wooden board or wall panel fell and struck him failed to satisfy the exclusive control element of the res ipsa loquitur doctrine in a personal injury matter against the stockroom owner. The evidence was equally consistent with a finding that the worker or his coworkers could have disturbed the panel causing it to fall.

DISCLOSURE - PROTECTIVE ORDER - EXPERT OPINION

In Jamaica Public Service Co. Ltd. v. La Interamericana Compania De Seguros Generales SA., (___ A.D.2d ___, 715 N.Y.S.2d 3), the First Department concluded that an insurer was entitled to a protective order exempting opinions and conclusions of its expert from disclosure in a coverage dispute predicated upon the basis of its representation that the expert would not be called upon at time of trial.

DISCLOSURE - PROTECTIVE ORDER - WITNESS' STATEMENT

It was recently held by the Second Department that a personal injury plaintiff failed to demonstrate that the substantial equivalent of a non-party eyewitness' statement, taken by the defendant City Transit Authority's claims examiner upon the direction of the Authority's defense counsel, could not have been obtained by other means without undue hardship, and thus, the statement did not have to be disclosed. (Rojas v. New York City Transit Authority, ___ A.D.2d ___, 714 N.Y.S.2d 744).

INSURANCE - MEMBER OF HOUSEHOLD

The Second Department recently held that an insured's daughter was not a resident of the insured's household under the terms of the homeowner's policy, and thus, the insurer was not obligated to defend or indemnify the daughter in an underlying personal injury action, even though the insured and her daughter lived in the same two family house. The insured and her daughter maintained separate apartments and households. (Galanis v. Travelers Property Cas., ___ A.D.2d ___, 715 N.Y.S.2d 80).

APPEALS - TERMINATION OF RIGHT OF APPEAL

In Drug Guild Distributors v. 3-9 Drugs, Inc., (___ A.D.2d ___, 715 N.Y.S.2d 442), the Second Department ruled that the right of direct appeal form an intermediate order terminates with the entry of judgment in the action.

SUMMARY JUDGMENT - CONSTRUCTION - OWNER - ELEMENTS -

The Second Department recently concluded that the Appellate Division of the Supreme Court had the power to grant summary judgment to a non-appealing party.

The court further indicated that it would grant summary judgment to the owner of a home with respect to claims asserted by the worker who was injured while working on a construction project at the house under the Scaffold Law, and the provisions of the Labor Law governing the protection of workmen in or about an elevator shaftways, hatchways, and stairwells, on the basis that the owner was protected by the homeowner's exception to the statutes, in connection with the appeal from the Supreme Court's ruling on motions for summary judgment in an action even though the owner had not filed an appeal. (Stevenson v. Alfredo, (___ A.D.2d ___, 715 N.Y.S.2d 444).

AUTOMOBILE - REAR END - PRIMA FACIE

In Rosa v. Colonial Transit Inc., (___ A.D.2d ___ 715 N.Y.S.2d 426), the Second Department ruled that a rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle.

JURISDICTION - LONG ARM - BURDEN OF PROOF

t was recently held by the Second Department that the burden of proof was on the party asserting jurisdiction pursuant to the Long Arm Statute relating to a non-domiciliary that contracts anywhere to supply goods in the State. (Armouth Intern. Inc. v. Haband Co., Inc., ___ A.D.2d ___, 715 N.Y.S.2d 438).

INSURANCE - ADDITIONAL INSURED - ELEMENTS

A subcontractor's insurer was obligated to defend and indemnify the general contractor in an action for personal injury sustained by a worker at a construction site, where the general contractor was an additional insured under policy issued by the subcontractor's insurer to the subcontractor and the policy contained no language plainly limiting the general contractor's coverage to liability for personal injuries caused by the subcontractor's negligence, so indicated the First Department in

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Fireman's Fund Ins. Co. v. Newark Insurance Ins. Corp., ___ A.D.2d ___, 715 N.Y.S.2d 403).

SIDEWALK LIABILITY - ELEMENTS

The Second Department recently indicated that the owner or lessee of land abutting a public sidewalk owes no duty to the public to keep the sidewalk in a safe condition. The abutting owner or lessee may be held liable if he or she creates a defective condition in the sidewalk (Ritts v. Teslenko, ___ A.D.2d ___, 715 N.Y.S.2d 418).

The owner of the land abutting the public sidewalk was not liable for the injuries allegedly caused by a defective condition in the sidewalk, even though photographs allegedly show that the sidewalk had been improperly repaired with a patching compound, where the owner denied making any repairs to the sidewalk or receiving notification from the City that she was required to do so, and there was no evidence as to when the improper repair was made or that the owner made that repair.

ELEVATOR - RES IPSA LOQUITUR - ELEMENTS

In Petro v. New York Life Ins. Co., (___ A.D.2d ___), 715 N.Y.S.2d 725, the Second Department ruled that the doctrine of res ipsa loquitur did not apply to a case involving an elevator passenger who sustained injuries when he moved a price of heavy equipment on a dolly into an elevator, causing it to drop suddenly, where the elevator was not within the exclusive control of the defendants, who were the elevator owner and company which serviced the elevator, and there was evidence that the passenger's own actions contributed to the accident.

Where the owner and company both made a prima facie showing that they did not have actual or constructive notice of an allegedly dangerous or defective condition, the company's repair records and deposition testimony established that the company properly maintained the elevator, and the passenger only submitted an affidavit of an expert who never examined the elevator in question mandated a holding of non-liability.

SUCCESSOR'S LIABILITY - ELEMENTS

The Second Department recently indicated that as a general rule, a corporation is not liable for injuries caused by a defective product manufactured by its predecessor.

A corporation may have successor's liability for injuries caused by a defective product manufactured by its predecessor, if: (1) the successor corporation expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction was entered into fraudulently to escape such obligations. (Drexler v. Highlift Inc., ___ A.D.2d ___, 715 N.Y.S.2d 722).

EVIDENCE - HOSPITAL RECORDS - BLOOD TEST - ADMISSIBILITY

n Rodriguez v. Triborough Bridge and Tunnel Authority, (___ A.D.2d ___, 716 N.Y.S.2d 24). The Second Department held that a motorist's blood alcohol test results as set forth in a certified hospital record, was admissible as prima facie evidence of the same in a personal injury matter arising out of a motor vehicle accident; abrogating Marigliano v. City of New York, 196 A.D.2d 533, 601 N.Y.S.2d 161).

EVIDENCE - EXPERT OPINION - SCOPE

In Krinsky v. Rachleff, (___ A.D.2d ___, 715 N.Y.S.2d 712), the Second Department ruled that a patient's pulmonologist, a defense witness in the patient's medical malpractice suit, should have been allowed to testify as to whether the abnormality or foreign matter he observed in the patient's lung during a bronchoscopy was a piece of the endotracheal tube inserted into the patient's trachea by the defendant's anesthesiologist.

INTEREST - WRONGFUL DEATH

It was recently submitted by the Appellate Division, Second Department that preverdict interest rate of 9% should not have been applied to the entire damage award for wrongful death in a medical malpractice suit, including undiscounted future damages.

The pre-verdict interest should have been calculated from the date of decedent's death to the date of the verdict, rather than to the date on which the medical malpractice plaintiff expected judgment to be entered. Postverdict interest on a damage award for wrongful death should have been computed until the date the judgment was actually entered. (Krumenacker v. Gargano, ___ A.D.2d ___, 715 N.Y.S.2d 710).

LIMITATIONS - TOLLING - PARENTS

In Smith v. Long Beach City School Dist., (___ A.D.2d ___, 715 N.Y.S.2d (707), the Second Department ruled that the limitations toll for an infant did not apply to the parents' derivative claim.

EVIDENCE - IMPEACHMENT - CONTRADICTION

In Marzuillo v. Isom, (___ A.D.2d ___, 716 N.Y.S.2d 98), the Second Department held that a patient did not have the right, in a medical malpractice action, to impeach the defendant doctors, whom the patient had called at his own expense, and in doing so, rendered them hostile witnesses who could be cross examined.

DEFAULT JUDGMENT - VACATING - ELEMENTS

It was recently held by the Second Department that in order to vacate a judgment on the ground of excusable default, the defendant is required to demonstrate both a reasonable excuse for the default, and the existence of a meritorious defense to the action. The trial court has the discretion to accept law office failure as a reasonable excuse for a default, as will potentially warrant the vacatur of a default judgment. Presbyterian Hospital and City of New York v. New York Cent. Mut. Ins. Co., (___ A.D.2 ___, 716 N.Y.S.2d 84).

NEGLIGENCE - PATRON'S ACTION

In Lewis v. Jemanda New York Corp., (___ A.D.2d ___, 716 N.Y.S.2d 58), the First Department ruled that the owner of a club premises had no duty to a patron to prevent another patron's actions in hitting the patron over the head with a champagne bottle, as the incident was attributable to a sudden, unexpected and unforeseeable act of the assailant.

RESTORATION TO CALENDAR - LAW OFFICE FAILURE

In Cruz v. Volkswagen of America, Inc., (___ A.D.2d ___, 716 N.Y.S.2d 104), the Second Department held that a plaintiff whose action had been dismissed as abandoned was not entitled to have the matter restored to the trial calendar; plaintiff's claim that he was unaware of a conference amounted to a law office failure and there was not an acceptable excuse presented to the court. The plaintiff failed to rebut the presumption of abandonment, and defendant would be prejudiced if the action were restored to the trial calendar over nine years after the plaintiff's accident.

TRIAL - WAIVER OF PRIVILEGE

It was recently held by the Second Department in DeStrange v. Lind, (___ A.D.2d), 716 N.Y.S.2d 105), that by commencing an action to recover damages for medical malpractice, the plaintiff waived the physician-patient privilege with respect to her relevant past medical history.

INSURANCE - CERTIFICATE - SCOPE

In American Motorist Ins. Co. v. Superior Acoustics, Inc., (___ A.D.2d ___, 716 N.Y.S.2d 389), the First Department ruled that a certificate of insurance naming a general contractor as an additional insured on a policy issued to a subcontractor, and similar certificate allegedly issued by the insurer, which contained disclaimers that it was for information only, that it conferred no rights on the holder, that it did not amend, extend or alter the coverage provided by the policy, and that it was subject to all the terms, exclusions and conditions of the policy, were insufficient to raise a triable issue of fact, sufficient to preclude summary judgment, as to whether the general contractor had been named as an additional insured under the subject policies.

STATUTES - INTERPRETATION

In Brothers v. Florence, (95 N.Y.2d 290, 716 N.Y.S.2d 367), the Court of Appeals indicated that while an interpretation must begin with an examination of the language itself, where a statute does not expressly address the issue, the reach of the statute ultimately becomes a matter of judgment upon review of the legislative goal. The key in determining the goal is in ascertaining of legislative intent.

FORUM NON CONVENIENS - ELEMENTS

In Wentzel v. Allen Machinery, Inc., (___ A.D.2d ___, 716 N.Y.S.2d 699), the Second Department ruled that New York Courts are not compelled to retain jurisdiction in any case which has no substantial nexus to New York. A defendant challenging the forum has the burden to demonstrate that a private or a public interest militates against litigation going forward in this state. The doctrine of forum non conveniens rests upon principles of justice, fairness and convenience.

The ruling of the court is addressed to the sound discretion of trial court, and its determination will not be disturbed on appeal unless the court failed to consider all of the relevant factors. The court improvidently exercised its discretion in denying defendants' motion to dismiss on the ground of forum non conveniens, where defendants promptly moved to change the venue, neither party resided in New York, the sales agreements at issue were not negotiated or executed in New York, the main subject of the matter of the agreements involved business transactions which were not to take place in New York, the defendants would have to travel 3000 miles to defend what plaintiff's own attorney characterized as a "very simple" claim, and a more convenient forum was available to the plaintiff in either California or Oregon.

LIMITATIONS - CONTINUOUS TREATMENT

It was recently indicated by the First Department that for purposes of limitations period on a medical malpractice claim, the treatment by defendant's physician did not end with a referral to a radiologist for a mammogram, but continued until the physician contacted the patient over three months later to discuss the radiologist's report and to advise the patient to pick up the mammogram films and a referral form so that she could be seen by a surgeon. (Venson v. Daun, ___ A.D.2d ___, 717 N.Y.S.2d 6).

NEGLIGENCE - SCOPE OF EMPLOYMENT

The Second Department recently indicated in Acosta v. Loew's Corp., (___ A.D.2d ___, 717 N.Y.S.2d (47), that in determining whether an employee's tort was sufficiently within the scope of his employment to render his employer liable, a court considers the connection between the time, place and occasion for the act, the history for the relationship between the employer and the employees, and whether the act was one reasonably

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anticipated. How to apply these factors involves a factual review. Employers may be held liable for the tortious conduct by employees when the employer's complicity can be established.

ANIMALS - VICIOUS PROPENSITIES

The First Department recently submitted evidence that, at times prior to the attack, the victim had seen a pit bull dog tied in defendants' yard with a "steel thick chain" and that he feared the dog was insufficient to raise an issue of fact as to the dog's known vicious propensities, for the purposes of determining whether the owner could be held liable for the victim's injuries. (Figueroa v. Alex Auto Parts & Cars, Inc., ___ A.D.2d ___, 717 N.Y.S.2d 137).

ORDER - APPEALABILITY

In Re: Jonathan G., (___ A.D.2d ___, 717 N.Y.S.2d 339), the Second Department indicated that an order entered on consent is not appealable, as the party who consents to an order is not aggrieved thereby.

AUTOMOBILE - KEY IN IGNITION - ELEMENTS

In American Transit Ins. Co. v. Baez, (___ A.D.2d ___, 717 N.Y.S.2d 169), the First Department submitted that at common law, an owner of an automobile who leaves her keys in her car is not liable for the negligence of a thief.

The owner, who left the vehicle with her husband seated in the right front passenger seat, who in turn had the vehicle stolen when he momentarily stepped out to prepay the pump attendant for refueling, did not leave the vehicle "unattended", for the purpose of statutory prohibition, and thus was not liable for the negligence of the thief. The owner's liability policy did not provide coverage for the purposes of any subsequent accident. Nor did it provide coverage for the purposes of the victim's uninsured motorist claim.

SIDEWALK LIABILITY - ABUTTING OWNERS

In Bowser v. West 125th Street Tom McAn, Inc., (___ A.D.2d ___, 717 N.Y.S.2d 97), the First Department ruled that abutting owners and their tenant were not liable for injuries sustained by a pedestrian in a slip and fall on the sidewalk where the pedestrian's deposition testimony, that her fall was a result of a think sheet of ice that had been allowed to accumulate on the sidewalk, was contradicted by her affidavit in a prior lawsuit against the City that her accident was not caused by any condition of "transient nature" which solely by design and/or construction defect in the sidewalk, and where there was no evidence presented the abutting owners or their tenant had ever made any repairs to the sidewalk or created any defect therein.

NEGLIGENCE - BEACH UMBRELLA

It was recently ruled by the Second Department that as a matter of law, a beach patron, who did not create or have actual or constructive notice of an allegedly defective condition of a beach umbrella, was not liable for injuries allegedly sustained by another patron when the top half of the shaft of an open umbrella became dislodged, blew away in the wind, and hit her in the face. Barr v. Incorporated Village of Atlantic Beach, ___ A.D.2d ___, 717 N.Y.S.2d 247).

NEGLIGENCE - DOOR SADDLE - TRIVIAL DEFECT

In Hargrove v. Baltic Estates, (___ A.D.2d ___, 717 N.Y.S.2d 320), the Second Department ruled that the evidence established that the front door saddle over which an apartment resident tripped, which was 3/4 of an inch in height, was not a trap or nuisance, but merely a trivial defect which was not actionable as a matter of law, despite the unsigned and unsworn purported affidavit of an engineering expert that the saddle did not conform to "good, accepted and prevailing engineering requirements for safety"; the resident did not show the door saddle violated a statute or a code.

90-DAY NOTICE - PROCEDURE - DISMISSAL

In Moran v. Pathmark Stores, Inc., (___ A.D.2d ___, 717 N.Y.S.2d 302), the Second Department held that having been served with a 90-day notice, it was incumbent upon plaintiffs to comply with the notice by filing a note of issue or by moving, before the default date, to either vacate the notice or to extend the 90-day period.

Plaintiffs failed to demonstrate a justifiable excuse for their failure to prosecute, despite their claims that discovery was not complete and that the parties were engaged in settlement negotiations. The information sought by the plaintiff was not discovery material, but rather, billing records which they hoped would bolster settlement negotiations.

EVIDENCE - ADVERSE INFERENCE - DEFINITION

In Baez v. City of New York, (___ A.D.2d ___, 717 N.Y.S.2d 584), the Second Department submitted that an "adverse inference" is distinguishable from a rebuttable presumption, since a rebuttable presumption shifts the burden of proof while the adverse inference only permits the trier of fact to reach a conclusion.

DISCLOSURE - FAILURE TO ATTEND - SANCTIONS

In Polanco v. Duran, (___ A.D.2d ___, 717 N.Y.S.2d 643), the Second Department directed that the striking of personal injury of defendants' answer as sanction for discovery violations is not an abuse of discretion. The defendants' willful and contumacious conduct could be inferred from their failure to comply with the court's pre-

liminary conference order directing the depositions be held on a date certain, and their continued adjournment of scheduled depositions without adequate excuse.

VENUE - CHANGE - CONVENIENCE OF WITNESSES

It was recently held by the First Department that the transfer of venue from New York County to Suffolk County was warranted in the personal injury action arising from an automobile accident. The accident occurred in Suffolk County, plaintiffs resided there and were treated at the hospitals there, Suffolk County Police Department responded to and investigated the accident, plaintiffs' treating physicians and physical therapists all maintain Suffolk County addresses. (Shedrick v. Asplundh Tree Expert Co., (___ A.D.2d ___, 717 N.Y.S.2d 559).

DOG BITE - ELEMENTS

The Second Department recently held that in order to recover in strict liability in tort for a dog bite, a plaintiff must prove that the dog has vicious propensities and that the owner or the person in control of the premises where the dog was kept, knew or should have known of such propensities. (Maher v. C & A Auto Parts, Inc., ___ A.D.2d ___, 718 N.Y.S.2d 97).

EVIDENCE - CONTRACT - FOUR CORNERS

The First Department recently held that the defendants assertion regarding statements made before the parties reduce their agreement to a written contract, could not be used to vary the terms of the writing. The evidence outside the four corners of the document as to what was really intended, but unstated or misstated, is generally inadmissible to add to or vary the writing. (Town of Hempstead v. Incorporated Village of Atlantic Beach, ___ A.D.2d ___, 718 N.Y.S.2d 360).

AUTOMOBILES - OBSTRUCTION - DUTY

Property owners, whose land abutted intersection, where under no common-law, statutory, or regulatory duty to trim the foliage of the tree located on their property to enhance the visibility of a stop sign posted at the intersection.

Though the tree may have interfered with the visibility of a stop sign, it did not obstruct the intersection, did not violate the town code which required only that no tree which might obscure or obstruct the view of the intersection exceeded the required height, so ruled the Second Department in Szela v. Courtier, (___ A.D.2d ___, 718 N.Y.S.2d 80).

DISMISSAL - CPLR 3215 - ELEMENTS

In Opia v. Chukwu, (___ A.D.2d ___, 718 N.Y.S.2d 71), the Second Department ruled that a personal injury complaint was properly dismissed, for plaintiffs' failure to move for entry of a default judgment within one year of defendant's alleged default in answering or appearing, where plaintiffs failed to demonstrate sufficient excuse why the complaint should not be dismissed.

INSURANCE - EXAMINATION - DUTY TO DISCLOSE

In Petrosky v. Brasner, (___ A.D.2d ___, 718 N.Y.S.2d 340). the First Department submitted that an insurer and its agents were under no duty to disclose, to a prospective insured, an alleged serious medical condition discovered during a pre-insurance physical examination which consisted of heart abnormalities revealed by an electrocardiogram (EKG) test, and were not liable in negligence when a prospective insured died shortly after the test was administered of myocardial infarction. The prospective insured was specifically advised that tests were administered in a routine course of application process, not for the purpose of treatment, and there was no indication that he relied upon the insurer for anything other than approving his life insurance application.

STATUTE OF LIMITATIONS - PURPOSE

The Statute of Limitations is designed to promote justice by preventing surprises through revival of claims that have been allowed to slumber until the evidence has been lost, memories have faded, and witnesses have disappeared. The Statute of Limitations promote repose by giving security and stability to human affairs, serve judicial economy and discourage courts from reaching dubious results, so indicated the Court of Appeals in Britt v. Legal Aid Society, Inc., 95 N.Y.2d 443, 718 N.Y.S.2d 264).

A cause of action accrues for limitation purposes, when the claim becomes enforceable, i.e., when all the elements of the tort can be truthfully alleged in the complaint. The statute begins to run when the cause of action accrues.

NOTE OF ISSUE - VACATING ELEMENTS

In Ayala v. Delgado (___ A.D.2d ___, 718 N.Y.S.2d 295), the First Department ruled that the defaulting defendant was entitled to vacation of a note of issue, given the strong public policy favoring resolution of disputes on the merits and plaintiff's failure to provide any disclosure.

HOSPITAL - DUTY OF CARE - ELEMENTS - ASSAULT

In N.X. v. Cabrini Medical Center, (___ A.D.2d ___, 719 N.Y.S.2d 60), the First Department ruled that a surgical resident's sexual assault on a patient was not within the scope of his employment and could not form the basis for vicarious liability of the hospital, particularly where the resident was not the patient's physician and was not assigned to perform any employment related activity with respect to the patient, even though a doctor's examination of a patient's private parts would be, under other circumstances, a medical procedure.

Vicarious liability could be imposed upon the hospital for a resident's sexual assault on the patient, pursuant to the apparent authority doctrine, where the patient provided no explanation as to how she relied upon a representation by the hospital concerning the resident, who is not her doctor, nor could the patient demonstrate such reliance since she was only semi-conscious when the

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assault began, and immediately upon becoming lucid, did everything in her power to resist.

The possibility that a surgical resident with no history of sexual misconduct would enter a surgical recovery room and sexually assault a patient still feeling the effects of anesthesia was too remote to be considered legally foreseeable, and thus, the recovery room nurse did not have a duty to make inquiry of the resident, who was wearing proper identification, before he approached the patient and to monitor him thereafter, and the hospital was not liable to the patient for the assault because its nurses, who were not aware of the assault until after it occurred, failed to prevent it.

A hospital has a duty to exercise reasonable care and diligence to safeguard a patient from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety, but this duty does not require a hospital to guarantee the patient's security against any possible risk, regardless of how remote. The risk reasonably to be perceived defines the duty.

INSURANCE - PUNITIVE DAMAGES - ELEMENTS

The First Department recently indicated in the case of Fekete v. GA Ins. Co. of New York, (___ A.D.2d ___, 719 N.Y.S.2d 52), that an insured who brought a breach of contract action against the insurer could not assert a claim for punitive damages, where the alleged conduct of the insurer, even if established, did not constitute an independent tort or conduct that was part of a pattern directed at the public generally.

NEGLIGENCE - FORESEEABILITY - ELEMENTS

The First Department recently concluded in N.X. v. Cabrini Medical Center, (___ A.D.2d ___, 719 N.Y.S.2d 60), that the liability for negligence is determined by what is probable, not merely by what is possible. Any claim of negligence requires proof that the harm was reasonably foreseeable, whether there was a heightened duty or not.

DISCOVERY - AFFIRMATION OF GOOD FAITH

In Carrasquillo v. Netsloh Realty Corp., (___ A.D.2d ___, 719 N.Y.S.2d 57), the First Department indicated that a failure to include an affirmation of good faith in an effort to resolve a dispute with a discovery motion was excusable where any effort would have been futile in light of the frequency with which both sides had resorted to judicial intervention in prior discovery disputes during the course of the litigation.

DAMAGES - BRAIN

In Ramirez v. City of New York, (___ A.D.2d ___, 719 N.Y.S.2d 289), the Second Department ruled that damage awards of $200,000 for past pain and suffering and $500,000 for future pain and suffering to the victim of an assault by police were not excessive. The victim sustained permanent brain damage.

INDEMNIFICATION - CONTRACTUAL - ASBESTOS

The Second Department recently held that a clause in an asbestos removal contract relating to the contractor's liability to an owner in the event the contractor's work was defective, or its faulty materials were utilized on the job did not provide contractual indemnification in favor of the owner for claims by the contractor's employee resulting from injuries sustained during the course of performing work under the contract, (Wisniewski v. Kings Plaza Shopping Center of Flatbush Avenue, Inc., ___ A.D.2d ___, 719 N.Y.S.2d 294).

INSURANCE - EXCLUSION - WAIVER

The Third Department recently held in Kokonis v. Hanover Ins. Co., (___ A.D.2d ___, 719 N.Y.S.2d 376), that an insurer waived any defense based upon an exclusion in an insured's umbrella policy by failing to include the exclusion as a ground for disclaimer in its original disclaimer letter, which disclaimed coverage for an accident involving a vehicle owned by one of the insured's children and driven by another on the ground that the children were not "insureds" under the policy.

ASSUMPTION OF RISK - SPORTING EVENT - ELEMENTS

In Bereswill v. National Basketball Assn. Inc., (___ A.D.2d ___, 719 N.Y.S.2d 231) the First Department submitted that for purposes in negligence claims arising from injuries sustained during sporting event, non participants in the sporting event is subject to the defense based on the doctrine of assumed risk.

A professional photographer, by continuing to work from a courtside spot during a game, despite the availability of other media areas, assumed the risk of injury which occurred when the player dove out of bounds in pursuit of a loose ball, where the photographer had taken photos at over four hundred basketball games at the stadium, had seen many instances of players leaving the court and landing in the photographer's area, had been personally involved in four such accidents.

AUTOMOBILE - STOLEN - LIABILITY OF OWNER

In Burke v. City of New York, (___ A.D.2d ___, 720 N.Y.S.2d 25), the First Department ruled that an owner of a vehicle which was stolen was not liable under the statute prohibiting a motorist from leaving the vehicle unattended, for the negligence of the thief. At the time of the theft, there was an able-bodied adult in the vehicle.

INSURANCE - ADDITIONAL INSURED - NOTICE

It was recently indicated by the First Department that

an insured's forwarding of a summons and complaint in a personal injury action to its commercial general liability insurer constituted timely notice to the insurer of the occurrence involving the additional insured, whether the additional insured was the only insured party against whom the summons and complaint had been served, and the insured's interests were not adverse to those of the additional insured at that time. (New York Telephone Co. v. Travelers Cas. Sur. Co. of America, (___ A.D.2d ___, 719 N.Y.S.2d 648).

NEGLIGENCE - SNOW AND ICE - LIABILITY OF OWNER

In Gerber v. City of New York, (___ A.D.2d ___, 719 N.Y.S.2d 650), the First Department held that a building owner was not liable in tort for injuries sustained by a pedestrian who slipped and fell on snow and ice which naturally accumulated on the sidewalk in front of the premises, because of the landlord owed no duty to the public to remove naturally accumulated snow and ice.

The out-of-possession landlord may incur liability in tort for injuries sustained by the pedestrian if the owner or its agent attempted to remove the snow and ice and made the condition more hazardous.

RES IPSA LOQUITUR - ELEMENTS

The First Department held that the application of the doctrine of res ipsa loquitur requires that the instrumentality responsible for the injury be under the exclusive control of the party to be case in negligence.

The doctrine did not apply to an action brought by a hotel worker against the contractor who had performed renovations at the hotel which the worker sought to recover for injuries sustained when she was struck by a light fixture that fell from the ceiling, where the worker could not show that the contractor, as opposed to one of its subcontractors, had installed the fixture, or that it had not tampered with it after the installation.

The inexplicable fall of the fixture is something that does not ordinarily occur without the negligence, so that the doctrine of res ipsa loquitur may apply to an action arising from such an incident. (Greenidge v. HRH Construction Corp., ___ A.D.2d ___, 720 N.Y.S.2d 46).

NEGLIGENCE - ASSUMPTION OF RISK - INAPPLICABLE

It was recently held by the Appellate Division, First Department that evidence of a student, who was injured while riding a bicycle on a student tour, was compelled by her counselors, over her protestations, to ride the bicycle even though she got off the bike three times, precluded the defense of assumption of risk to the negligence claim asserted against the tour operator. (Pfeifer v. Musiker Student Tours, Inc., ___ A.D.2d ___, 720 N.Y.S.2d 121).

DISMISSAL - VACATING - ELEMENTS

In order to vacate a dismissal of a matter that has been deemed abandoned, the plaintiff must demonstrate (1) a meritorious cause of action, (2) a reasonable excuse for the delay, (3) the absence of prejudice to the opposing party, (4) and a lack of intent to abandon the action.

A construction worker who was allegedly injured from a fall from a ladder was entitled to the restoration of his action to the trial calendar due to his failure to appear at a scheduled status conference; the worker's affidavit of merit established a viable claim, delays in seeking to restore the case to the calendar were caused by confusion stemming from bankruptcy proceedings against the worker's employer and the worker's decision to change law firms, and the worker's motion to restore the action demonstrated a lack of intent to abandon the action; so indicted the First Department in Enax v. New York Telephone Co., (___ A.D.2d ___, 720 N.Y.S.2d 126).

STIPULATIONS OF SETTLEMENT - ELEMENTS

In Royal York Realty, Inc. v. Ancona, (___ A.D.2d ___, 720 N.Y.S.2d 544), the Second Department submitted that stipulations of settlement are favored by the Courts and not lightly case aside. Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident may a party be relieved from the consequences of a stipulation made during the litigation.

DAMAGES - WRIST - SHOULDER AND ANKLE

The First Department recently held that evidence including testimony of an orthopedic expert that the pedestrian who injured her wrist, shoulder and ankle when she fell after slipping into a sidewalk hole, would experience continued pain warranted an increase in a $17,500 jury award for past pain and suffering and $6,000 jury award for future pain and suffering in the pedestrian's personal injury trial. A new trial would be ordered unless within 30 days of service of a copy of the order with notice of entry, the parties stipulate to increase the award for past pain and suffering to $75,000, and for future pain and suffering to $40,000, and to the entry of an amended judgment in accordance therewith. (Claudio v. City of New York, ___ A.D.2d ___, 720 N.Y.S.2d 504).

INDEMNIFICATION - CONTRACTUAL - AUTOMOBILE

In ELRAC, INC. v. Masara, (___ A.D.2d ___, 720 N.Y.S.2d 517), the Second Department held that pursuant to a vehicle rental agreement, a rental agency was entitled to contractual indemnity from a vehicle lessee in connection with an accident involving the rented vehicle. The agreement provided that the lessee would indemnify the agency for all claims arising out of the use of the rented vehicle, and the lessee did not dispute that she rented the vehicle, that the rented vehicle was involved in an accident, and that a third party sustained the damages as a result of the accident.

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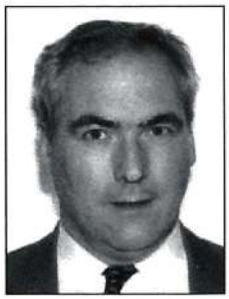
OLBERLY CASE SIGNALS SHIFT IN PERMANENT LOSS EXCEPTION TO NO-FAULT LAW



*by Sean R. Smith**

On May 3, 2001, the Court of Appeals handed down a unanimous decision clarifying the "permanent loss" exception to the No-Fault Insurance statute in New York state. In Olberly v. Bangs Ambulance, 2001 WL 463231 (N.Y.), 2001 N.Y. Slip Op. 0371, the court ruled that only a total loss of use is compensable under this exception to the No-Fault Law. The purpose of this article is to anticipate, to the extent possible, how this change will affect the nature of litigation stemming from motor vehicle accidents in the state of New York.

The No-Fault statute, 5102(d) of the Insurance Law, was originally enacted by the Legislature in 1973 to provide objective criteria for persons claiming injury in motor vehicle accidents to file lawsuits. The statute was also enacted to streamline the processing of medical bills relating to those persons injured in motor vehicle accidents. One of the obvious goals of the Legislature was to reduce the number of cases involving minor injuries. The first version of this statute provided two broad categories of "serious injury". This version was supplanted in 1977 by the current version of the statute, which contains nine separate categories for serious injury. A "serious injury" is currently defined as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use of a organ or member; function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment". (Insurance Law 5102(d)) The general interpretation of the sixth category of serious injury, "permanent loss of use of a organ or member; function or system" has been significantly altered by the Olberly case. The "permanent loss of use" category also bears examination in relation to the seventh and eighth categories, "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system".

The Court of Appeals acknowledged defendant's right to make written motions to dismiss based on plaintiff's failure to meet the serious injury standard in the case of Licari v. Elliot, 57 N.Y. 2d 230, 455 N.Y. S. 2d 570, (1982). Licari was the first case written by the Court of Appeals which focused on the No-Fault statute. The Licari case established the right of defendants to petition courts through motion to determine whether plaintiff's injuries reached the threshold level of serious injury as established in the No-Fault statute. Such motions to dismiss generally fall into two broad categories: one group based on the plaintiff's alleged inability to verify actual physical disability, and the second category predicated on the plaintiff's alleged ability to perform substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury. The focus of defendant's efforts to dismiss cases in the second category revolve primarily around plaintiff's return to work and/or school within a short period of time. In short, the movant's generally attempt to shed attention on the routine aspects of a plaintiff everyday existence.

The first broad category provides three exceptions to the No-Fault statute that constitute a battleground for this hotly litigated topic. The permanent loss of use of a organ or member; function or system; permanent consequential limitation of use of a body organ, or member and, finally, significant limitation of use of a body function or system provide a forum in which battling attorneys, plaintiff and defendant, are oftentimes shoved aside by battling doctors for both sides. Much of the early caselaw in this field focused on various parties' inability to provide the sworn testimony of examining physicians for both plaintiff and defendant. The later cases relating to this specific topic generally touch on the thoroughness of the examinations performed, the time frame of the examination in relation to the accident in question and the absence of verifiable diagnostic examinations to uncover various injuries sustained by plaintiff's in motor

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vehicle accident cases. Appellate cases often discuss the physician's affidavits provided by the plaintiff's in terms of their ability to accurately diagnose and verify those injuries allegedly suffered by the plaintiff.

The case of Olberly v. Bangs Ambulance appears to close one of the convenient loopholes by which plaintiff's avoid dismissal through summary judgment or trial. Plaintiff Richard Olberly, a dentist, was injured while being transported in an ambulance owned by defendant Bangs Ambulance. While in transit, the ambulance struck a curb, and an IV pump toppled from the shelf, onto his right forearm. The plaintiff's pain consisted of pain and cramping in that arm, which allegedly limited the plaintiff's ability to practice as a dentist.

The plaintiff and his spouse commenced a personal injury action for negligence, alleging a serious injury under the No-Fault Law, Insurance Law section 5102(d). In response to the defendant's demand that they particularize the precise nature of the serious injury, plaintiffs identified four of the injury standards under Insurance Law 5102(d): "significant disfigurement", permanent loss of use of a body organ, or member", "significant limitation of use of a body organ or member" and "significant limitation of use of a body function or system." In opposing defendant's motion for summary judgment, the plaintiffs abandoned all of the cited serious injury standards except for the "permanent loss of use of a body organ, member, function or system" claim. The Supreme Court dismissed plaintiffs' action for lack of evidence that he had suffered a serious injury. The Appellate Division, Third Department affirmed, ruling that the statute requires a party claiming a partial loss of use of a body "organ or member" to show that the limitation is "consequential or significant", and that plaintiff had not met that threshold. Interestingly, the two dissenting justices concluded that the nerve damage to plaintiff's arm could constitute a partial loss of use of a body "function or system" for which no proof of significance was required. In their appeal to the Court of Appeals, the plaintiffs contended that the statute does not require proof that a "permanent loss of use" of a body member is significant even if the loss is only partial. Plaintiffs also argued that that the limitation of the use of the plaintiff's arm itself qualified as "permanent loss of use of body member, body function and body system". The Court of Appeals disagreed with these contentions.

The court noted that the statute speaks in terms of loss of a body member without qualification. The court also focused on the fact that the Legislature added two categories in 1977, "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system".

Numerous cases throughout the four departments have held that there need not be a permanent total loss of a body, organ, member, function or system in order to constitute a "serious injury" for purposes of the No-Fault insurance law. In Harris v. St. Johnsbury Trucking Co., 57 A.D. 2d 127, 393 N.Y.S. 2d 611 (1977) the Third Department determined that the trial court erred in concluding that there must be a permanent total loss of use of a body organ, member, function or system in order to constitute a "serious injury". In Miller v. Miller 100 AD 2d 577, 473 NYS 513 the Second Department, Appellate Division considered the difference between the permanent loss standard and the significant limitation of use of body function. The court noted that the essential difference between "these two types of 'serious injury' is that the "significant limitation of use of a body function does not require permanence, but instead requires a fact finding on the issue of whether the dysfunction is important enough to reach the level of significance. Similarly, the permanent loss of a body function or system does not involve in any fashion the element of significance, but only that of permanence." Id at 514. The Miller court evidently stopped short of stating that the plaintiff needed to suffer total loss of use.

The Pattern Jury Instructions for the State of New York also utilizes the prior standard in relation to the permanent loss of use of a body organ, member, function or system. Under section PJI 2:88A jurors in New York are asked the following question for plaintiff's claiming permanent loss of use in motor vehicle accident cases:

> **As a result of the accident, has the plaintiff permanently lost the use of body (organ, member, function, system)?**

The instruction goes on to state that:

> **It is not necessary for you to find total loss of the (organ, member, system, function). It is sufficient that you find that he (organ, member, function, system) no longer operates at all, or operates in some limited way .Id at 421.**

Clearly, the Oberly case mandates the revision of the last instruction and would require. In addition, the Olberly case would appear to overturn those cases from the four departments which hold that plaintiff claiming under the "permanent loss of use" standard need not endure a total loss of use of a body organ, member, system or function to meet the standard set forth by the Legislature .

Will the Olberly case result in fewer plaintiff's bringing personal injury cases as a result of motor vehicle accidents? It would appear that while one of the safe harbors available to plaintiff's in such cases may have been foreclosed significantly, the other criteria for inclusion under the statute have not been affected by the Olberly case. The Court of Appeals notes in the Olberly case that had the Legislature considered partial losses already covered under "permanent loss of use", there would have been no need to enact the two additional provisions ("permanent consequential limitation of use of a body organ, or member" and "significant limitation of

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Olberly Case Signals Shift in Permanent Loss Exception to No-Fault Law

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use of a body function or system"). The gradual adoption of language lessening the fairly obvious intent of the Legislature in regard to the "permanent loss of use" category was negated by the ruling in the Olberly case. It would appear that plaintiff's preferred standards for inclusion under the "serious injury" statute may well "migrate" to the "permanent consequential limitation" and "significant limitation" standards.

The language utilized in the separate categories do not appear to compartmentalize injuries within one specific category. Historically, plaintiff's have defeated motion to dismiss based on failure to meet the serious injury standards through use of key language in the doctor's affidavits. As a result of the Oberly decision, phrases like "permanent partial disability" may well disappear as a term of art in motion papers. Findings of total, permanent loss of use of a body organ, member, function or system might well become a rare criteria for defeating motions to dismiss based on the plaintiff's to meet the serious injury standard in New York. It is worth noting that the two categories of "permanent consequential limitation of use of a body organ or member" and significant limitation of use of a body function or system" effectively cover the physical limitations listed under the "permanent loss of use" standard. However, these criteria provide an easier standard for plaintiff's to defeat claims of less than serious injuries made by defendants in such cases. It would appear unlikely, therefore, under the ruling in the Olberly case, that significant numbers of plaintiffs will find themselves foreclosed from filing or effectively prosecuting lawsuits for personal injuries under the No-Fault statute in New York state.

CPLR ARTICLE 16 – SWORD & SHIELD

by Michael Caulfield

CPLR Article 16–is used as a sword to gain apportionment of liability against a non-party and as a shield to in turn limit one's own percentage of liability.

Article 16 applies to "non-economic loss". It begins with § 1600 by defining "non-economic loss" to include "pain and suffering, mental anguish" and "loss of consortium".

Section 1601 creates the sword and shield by modifying the traditional joint and several liability standard.

Significantly, the statute applies to persons, not just parties. Therefore, an apportionment is available against a person even if not a party. However, the "claimant" (plaintiff, third-party plaintiff, cross-claimant) must prove "that with due diligence he or she was unable to obtain jurisdiction over such person". Furthermore, such person may not be an employer with a "grave injury " defense. See Worker's Compensation Law § 11.

This apportionment against non-parties (empty chairs) is an important tool for the defense lawyer to use to reduce his own client's liability. The higher percentage of liability against a non-party, the more likely a lower percentage will be found against your own client.

Of course, if your defense is the comparative negligence of plaintiff, you may need to emphasize that over the liability of the non-party. Where, however, the plaintiff has little, if any, negligence, the more liability placed on the non-party, the less for your client.

The goal is to keep your client's liability at 50% or less, thereby erecting the shield to joint and several liability when it comes to entry and enforcement of Judgment. At 51% or more, your client may be responsible for the full amount of any Judgment. At 50% or less it would be responsible only for its percentage. CPLR § 1601 provides that when "the liability of a defendant is found to be 50% or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed the defendant's equitable share".

CPLR § 1603 places the burden of proving liability of the non-party on the party asserting limited liability. In

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Maria E. v. 599 West Associates (NYLJ, April 27, 2001, Supreme Court, Bronx County) the Court held that a Bill of Particulars was required to be served by the party asserting the limited liability defense. This contrasts with the rule in the Second Department, enunciated in Marsala v. Weinraub, 208 AD2d 689, 617 NYS 2d 809 (2d Dept., 1994) in which the Court held that the limited liability defense will automatically apply.

CPLR § 1602 sets forth several exemptions to the availability of this liability sword & shield. The burden of proving the applicability of an exemption rests with the party asserting the exemption. CPLR § 1603.

Key exemptions found in § 1602 are:

1) Contractual Indemnification Claims:
You cannot benefit from Article 16 limited liability if you are contractually obligated to indemnify another.

2) Non-Delegable Duties:
You cannot avoid joint and several liability where you have a non-delegable duty, for example, under Multiple Dwelling Law § 78. However, you may still seek apportionment from another tortfeasor. The New York Court of Appeals recently clarified this issue in two cases decided on March 29, 2001: Rangolan v. County of Nassau (2001 W.L. 301932) and Faragiano v. Town of Concord (2001 W.L. 301972).

3) Respondeat Superior:
You cannot avoid joint and several liability where you have liability by reason of the doctrine of respondeat superior. See Rangolan and Faragiano, supra.

4) Where the Plaintiff has Sustained a "Grave Injury" as Defined in Worker's Compensation Law § 11.

5) Intentional tort cases (not to be confused with negligence claims against landlords, arising out of security lapses). See Siler v. 142 Montague Associates, 228 AD2d 33, 652 N.Y.S. 2d 315 (2d Dept., 1997), appeal dismissed 90 N.Y 2d 927 (1997).

6) Motor vehicle and motorcycle cases.

7) Statutory Liability under Labor Law § 240 et seq.

8) Products Liability cases where manufacturer is not a party and plaintiff proves that jurisdiction over manufacturer could not be obtained. This exemption will often apply where a product is made by a foreign manufacturer.
Historically, Article 16 appeared in 1986 as a product of tort reform. The several exemptions are no doubt the product of the legislative process. Since 1986 plaintiffs have routinely pleaded exemptions. The Court of Appeals in Morales v. County of Nassau, 94 N.Y. 2d 218, 703 N.Y.S. 2d 61 (1999) and 94 N.Y. 2d 218, 703 N.Y.S. 2d 61 (1999) and Cole v. Mandell Food Stores, 93 N.Y. 2d 34, 687 N.Y.S. 2d 598 (1999) has mandated that plaintiff plead applicable exemptions.

In Zylinski v. Marine Drive Apartments, 680 N.Y.S. 2d 830 (Supreme Court, Erie County, 1998) one upstate trial court strictly applied the pleading and proof requirements of Article 16 to deny defendant's request for apportionment against a non-party. The Court held that a "bare assertion" of limited liability in an Answer was insufficient. This was an elevator accident case in which the landlord sought apportionment against the non-party elevator manufacturer. No expert testimony was offered to properly implicate the non-party manufacturer. The Court refused to submit to the jury for determination a question concerning the culpability of the non-party elevator manufacturer. See also Ryan v. Beavers, 170 AD2d 1045, 566 N.Y.S. 2d 112 (4th Dept., 1991).

The practical conclusions for defense counsel to draw from any study of CPLR Article 16 are:

1) View your case in the light of all persons, not just parties, who could be liable.

2) Plead with specificity, including a Bill of Particulars, if demanded, the liabilities of the persons liable. (This may not be necessary in the Second Department under Marsala v. Weinraub, supra, but cannot do any harm.)

3) Prove your case at trial, using expert testimony, if necessary.

CERCLA UDATE - Recent Second Circut Decisions[1]

*by Steven R. Kramer**

Within the Second Circuit this year, a number of important decisions were rendered concerning the scope of CERCLA's liability, remedies and available defenses. These decisions should provide the basis for summary judgment motions dismissing claims and limiting exposure.

In Commander Oil Corp. v. Barlo Equipment Corp.[1], the Second Circuit broke new ground holding that a lessee is generally *not* an "owner" for purposes of CERCLA. The Second Circuit reasoned that site control itself is not a sufficient indicator of ownership. Rather, the Court held that the following non-exclusive factual inquiry must be undertaken in each case:

> (1) whether the lease is for an extensive term and provides no right to the owner/lessor to determine how the property is used; (2) whether the lease can be terminated by the owner before it expires; (3) whether the lessee has the right to sublet without notifying the owner; (4) whether the lessee is responsible for taxes and assessments; and (5) whether the lessee is responsible for making all structural and other repairs.[2] Despite ruling that site control alone will not result in "owner" liability, the Second Circuit cautioned that certain arrangements such as a sale-leaseback or long-term lease may create owner liability. The Court, in a footnote, also cautioned that escaping "owner" liability may be just the first hurdle for a lessee because a plaintiff could pursue a separate theory — that the lessee is subject to "operator" liability.[3]

Next, in Gussack Realty Co. v. Xerox Corporation[4], the Second Circuit issued an instructive decision concerning the recovery of past and future response costs. Gussack Realty owned property near a site contaminated by Xerox Corp. During the course of complying with DEC consent orders, Xerox drilled monitoring wells on Gussack Realty's property. Xerox claimed that water from the wells met New York State drinking water standards, but Gussack Realty claimed that its property had been contaminated by Xerox. The case went to trial and the jury awarded Gussack Realty over $1,000,000 under a future CERCLA response cost and negligence theory.

The Court first addressed a seemingly simple question — when can a party maintain a CERCLA claim? The Court reaffirmed that, before a party can commence a CERCLA action, the party must have first incurred costs responding to an environmental hazard.[5] The Court then considered what type of "costs" are recoverable as past response costs. Although the U.S. Supreme Court in Key Tronic Corp.[6] approved of past response costs for identifying and locating potential responsible parties ("PRP's")[7], the Second Circuit rejected plaintiff's argument on this ground because the plaintiff should have been able to identify the PRP, here Xerox, without any consultation services.[8] The Second Circuit then rejected Gussack Realty's attempt to recover its pre-suit attorneys' fees. Once again, although the Supreme Court in Key Tronic authorized recovery when attorneys' work is directly related to the actual cleanup[9], the Second Circuit held that Gussack Realty's lawyers' work failed to have such a nexus. In light of the Second Circuit's fact specific rationale for rejecting Gussack Realty's consultation and expert fees, defense counsel should engage in thorough discovery concerning the specific nature and timing of the activities which formulate the basis of a plaintiff's consultant/attorney fee claim.

The Second Circuit then considered what type of "costs" are recoverable as future response costs. The Court vacated the jury's $1 million dollar award for future remediation costs on the theory that CERCLA does not authorize a lump-sum award, but only a declaratory judgment award dividing future response costs among responsible parties.[10]

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Another important CERCLA decision, this time by a district court, concerned the application of CERCLA's divisibility defense which provides that a defendant can limit its liability by proving that it contributed a divisible portion of the harm and that there is a reasonable basis to apportion liability for that harm. In U.S. v. Alcan Aluminum Corporation[11], the district court on remand in a long-running case demonstrated how difficult that standard really is for a defendant. Prior to remand, the Second Circuit had held that evidence relating to toxicity, migratory potential, degree of migration and synergistic capacities of a hazardous substance is relevant to whether a hazardous substance is truly divisible.[12] Moreover, the Second Circuit had even held that the fact that a hazardous substance commingled with other wastes does not create a per se defeat of the divisibility defense.[13] Despite these favorable guideposts, the District Court held that Alcan could not rely on the defense because its emulsion had a "mobilizing" effect on other substances, which increased the probability of migration,[14] and the emulsion combined to "[c]ause an aggregate harm which exceeds the sum of the individual harms such that the harm attributable to each PRP becomes indistinguishable..."[15] In sum, this defense involves a relatively straight-forward legal standard but a highly detailed battle between environmental consultants.

CONCLUSION

Although the Second Circuit views CERCLA as a remedial statute rife with "miasmatic provisions,"16 the Second Circuit has recently limited CERCLA's reach and remedies. Because the decisions are fact driven, defense counsel must engage in thorough discovery to take advantage of these rulings.

Notes

1. 215 F.3d 321 (2d Cir. 2000).
2. *Id.* at 330-331.
3. 42 U.S.C. 9607(a)(1). This section, inter alia, imposes liability upon entities that manage, direct or conduct operations relating to the leakage or disposal of hazardous wastes. See U.S. v. Bestfoods, 524 U.S. 51, 66-67, 118 S.Ct. 1876, 1886 (1998).
4. 224 F.3d 85 (2d Cir. 2000).
5. *Id.* at 91.
6. 511 U.S. 809, 114 S.Ct. 1960 (1994).
7. 511 U.S. at 820, 114 S.Ct. at 1967 ("[t]racking down other responsible polluters increases the probability that a cleanup will be effective and get paid for...These kinds of activities are recoverable costs of response....").
8. 224 F.3d at 91-92.
9. 511 U.S. at 820, 114 S.Ct. at 1967 ("[s]ome lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost in response in and of itself....").
10. *Id.* at 92. Xerox's CERCLA victory was short-lived because the Second Circuit affirmed the jury's $1,000,000 negligence verdict.
11. 97 F.Supp. 248 (N.D.N.Y. 2000).
12. U.S. v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993).
13. *Id.*
14. 97 F.Supp.2d at 269-70.
15. *Id.* at 270-71.
16. Commander Oil, 215 F.2d at 326.

by James K. O'Sullivan*

Andrew Zajac**

THE SCAFFOLD ACT: Recent Developments, Including the Successful *Amicus Curiale* Brief Submitted by the Committee on the Development of the Law

The Committee on the Development of the Law submitted an *amicus curiae* brief to the New York Court of Appeals in a case entitled Capparelli v. Zausmer.[1] On May 10, 2001, the Court of Appeals issued a decision whereby it decided Capparelli jointly with another case, Narducci v. Manhasset Bay Associates[2]. The Court's opinion was a significant pronouncement concerning Labor Law §240(l) and falling objects. We are pleased to advise that the decision was highly beneficial to the defense community. This article will discuss both cases and their import, and it will examine several other recent Court of Appeals decisions which have construed the statute.

Labor Law §240(l), the statute which imposes absolute liability on owners and contractors for certain gravity-related injuries suffered by workers at construction and renovation sites, has been subjected to increasing strident calls for its legislative repeal.[3] Critics contend that the statute has been construed too broadly by the courts, resulting in increased insurance costs and consequent harm to the construction industry in New York. Many of its critics, however, may be failing to take note of the increasing trend of the Court of Appeals in recent years to, if not narrow the reach of the statute, at least reject the invitation of workers' advocates to continue its expansion. The most recent decision of the Court of Appeals in Narducci and Capparelli continues this trend.

The statute has been construed to protect workers from the "extraordinary risks" associated with construction sites, such as the danger of falling from a height, or the danger that "materials or load" will fall on them. These two types of risks are generally referred to in case law as the "falling object" and the "falling worker" tests.[4] As stated above, Narducci and Capparelli concerned the "falling object" test.

In Narducci, plaintiff was injured while standing on an extension ladder about six feet from the ground, removing the first of several damaged window frames, when a pane of glass from the adjoining window fell towards him. He turned to avoid being hit by the glass, but was severely cut on his right arm. Plaintiff did not fall from his

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ladder, nor did the ladder malfunction in any way. Plaintiffs claim under Labor Law was premised on the contention that if he had been provided with a type of moveable scaffold, he would have been able to begin his work at the top of the windows, and would not have been subject to the risk of injury from falling glass. The Supreme Court denied motions by defendants for dismissal of the §240 cause of action. A divided First Department panel affirmed.

In Capparelli, plaintiff was installing a light fixture onto the grid work of a dropped ceiling. The fixture was approximately four feet long, two feet wide and five inches high. Plaintiff was provided with an eight foot stepladder in order to reach the grid work, which was approximately ten feet above the floor. After placing the fixture onto the grid work, plaintiff began to proceed down in order to move the ladder so he could secure the fixture. After plaintiff took one step down the ladder, the fixture fell. To prevent the fixture from striking him, plaintiff attempted to catch it. In so doing, the plaintiff sustained a laceration to his wrist. By plaintiffs own testimony, the fixture fell only a foot to a foot-and-a half As in Narducci ' plaintiff did not fall from the ladder. Plaintiff moved for summary judgment on the issue of §240 liability and third-party defendant cross-moved to dismiss that claim. The Supreme Court denied both motions. The Fourth Department modified by dismissing the Labor Law §240(l) claim, holding that plaintiffs injuries stemmed from the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law §240.

Neither of these plaintiffs could recover under Labor Law §240, the Court of Appeals held. In Narducci, the Court of Appeals rejected plaintiff s claim by ruling that the pane of glass could not be considered "material or load being hoisted or secured," the *sine qua non* of a "falling object" claim under the statute. For the statute to apply, plaintiff must show more than simply that an object fell causing injury to a worker. "A plaintiff must show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute."[5]

The decision does not precisely define the term "material or load being hoisted or secured" but it hints that the falling object must be something that has been brought to the structure in furtherance of the construction or renovation. The Court took great pains to note that the glass that fell "was part of the pre-existing building structure as it appeared before the work began. This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected."[6]

Nor was the fact that plaintiff was working at an elevation sufficient to bring the scenario within the ambit of the statute. Plaintiff did not contend that the ladder on which he was standing malfunctioned, and he was not injured as the result of a fall. Therefore, the ladder had no legally sufficient causal connection to the injury to invoke §240 protection.

In Capparelli, the light fixture apparently would have qualified as "material or load being hoisted or secured" under this test, as it was something being added to the renovated structure, not a part of the pre-existing premises. However, plaintiff had no "falling object" claim because of the *de minimis* height differential between plaintiff and the falling object. The mere fact that gravity contributed to the occurrence of the accident did not render this one of the "extraordinary" risks common in construction sites that the statute was enacted to prevent.

Narducci appears to be the latest in a series of decisions by the Court which construe the statute narrowly so as not to go beyond the Legislatures intended purview. For example, in Misseritti, supra, note 3, plaintiff was severely injured while working at ground level when a fire wall collapsed onto him. Plaintiff premised his Labor Law §240 claim on the absence of "bracing" on the wall. Notwithstanding that a "brace" is a safety device enumerated in the statute, the Court of Appeals dismissed the claim. The Court construed "braces" referred to in the statute as those used to provide support for elevated work sites, not braces designed to shore up completed structures. Thus, the Court held that the plaintiff was not faced with the extraordinary perils contemplated by the statute. Rather, plaintiffs injuries were the "type of peril a construction worker usually encounters the job site."[7] The quoted language amounts to a highly significant exception to the protection of the statute.

In construing §240 narrowly in recent years, the Court of Appeals has engrafted terms and conditions onto the statute that do not appear on its face. In Brown v. Christopher Street Owners' Corp.[8] the plaintiff was injured when he fell while cleaning windows of a residential cooperative apartment . Notwithstanding that "cleaning" is one of the enumerated protected activities in Labor Law §240, the Court held that the statute did not apply to "routine, household window washing."[9] The Court differentiated this situation from the painting of a house or the cleaning of all of the windows of a large, nonresidential building, which the Court stated are activities covered by the statute. In Joblon v. Solow[10] the Court was faced with the question as to how extensive an alteration to a building or structure must be in order to trigger the protection of the statute." Altering" is one of the statute's pro-

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tected activities. The Court held that in order for the statute to apply, the alteration "requires the making of a *significant* physical change to the configuration or composition of the building or structure," notwithstanding that such a condition does not appear on the face of the statute.[11] However, it should also be noted that certain aspects of the *Joblon* holding were favorable to injured workers. The Court held that the seemingly routine task of the plaintiff in *Joblon* of chopping a hole through a block wall to route conduit pipe and wire through a hole to mount a clock was a statutorily-protected alteration. The Court also held that the statute's reach is not limited to accidents occurring at construction sites.

In Melber v. 6333 Main Street, Inc.,[12] plaintiff utilized 42-inch stilts in order to accomplish his work of installing metal studs on top of a drywall. Nothing out of the ordinary occurred while he performed his work. However, because he needed a clamp which was a distance away, he ambulated down a hallway without removing his stilts. In so doing, he tripped and fell over an electrical conduit protruding from the floor. In reversing the Appellate Division and dismissing the §240(l), claim, the Court of Appeals held that this case fell outside of the limited class of hazards covered by the statute. The Court noted that a different situation would have been presented had the stilts failed while he was working on the drywall. However, since the plaintiffs injuries were unrelated to the need for the stilts in the first instance, i.e. the work at the top of the wall, the statute did not provide the plaintiff with a remedy for his fall of three and-a-half feet.

Finally, it is noteworthy that in the Court's most recent pronouncement concerning the statute in Narducci and Capparelli, discussed above, the Court cited with approval a law review article that questions the Court's decision in Joblon v. Solow, supra, specifically with respect to the holding that the scope of Labor Law §240 is not limited to construction sites[13] The author states the following with respect to §240 and the Court's holding in Joblon:

> [I]t appears that the most faithful rendering of the legislative intent would be to provide coverage under Section 240 for all height-related work, however routine and humble, at a construction site, and to require workers in a non-construction setting to prove negligence in order to recover.
>
> * * * *
>
> The Court of Appeals' 1998 decision in Joblon has removed the requirement that an accident take place on a traditional construction site in order to qualify for Section 240 coverage, thereby expanding the scope of absolute liability to protect any worker who sustains a height-related injury while making a significant alteration to a building or structure. The Legislature should consider whether the Court of Appeals has interpreted the Labor Law too broadly, beyond the original intent to protect construction workers who ascend scaffolds at building construction sites.

The Court's citation to the article is intriguing. Perhaps it is a signal that it is willing to reconsider its holding in Joblon, or, perhaps it is an implicit invitation to the Legislature to revisit the statute in light of the Courts decisions.[14]

■

Notes

[1] The brief was authored by Andrew Zajac, Dawn C. DeSimone, Elizabeth Anne Bannon, Kathleen D. Foley and Richard B. Polner

[2] ___N.Y.2d____, ____N.Y.S.2d____, 2001 WL 4992573

[3] *See Hargobin v. K.A.F.C.I. Corp.*,____A.D.2d____ .Y.S.2d____2001 WL 463238(lst Dep't)

[4] *Misseritti v. Mark IV Const. Co.*, 209 A.D.2d 931, 932, 619 N.YS.2d 473, 473, (4th Dept 1994), *affd*, 86 N.Y2d 487, 634 N.YS.2d 35 (1995) (court's emphasis, citations omitted

[5] *Narducci v. Manhasset Bav Associates, supra*

[6] Id. The opinion also indicates that the court that no one was working above plaintiff was a factor militating against a finding that the glass was a "falling object"

[7] 86 N.Y2d at 491, 634 N.YS.2d at 38

[8] 87 N.Y2d 938,641 N.YS.2d 221 (1996)

[9] Id. 87 N.Y2d at 939,641 N.YS.2d at 221

[10] 91 N.Y2d 457,672 N.YS.2d 286 (1998)

[11] Id. 91 N.Y2d at 465, 672 N.YS.2d at 290 (court's emphasis)

[12] 91 N.Y2d 759, 676 N.Y.S.2d 104 (1998)

[13] Barry R. Temkin, New York's Labor Law 240: Has it Been Narrowed or Expanded by the Courts Beyond the Legislative Intent? 44 New York Law Sch. L.Rev. 45 (2000). Mr. Temkin is associated with the law firm of Jacobowitz Garfinkel & Lesman, New. York, New York

[14] 44 New York Law Sch.L.Rev. at 67-68

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Half Page (Horizontal)	7 1/2" 4 7/8"
Third Page (Vertical)	2 3/8" 10"
Third Page (Square)	4 7/8" 4 7/8"
Third Page (Horizontal)	7 1/2" 3 1/8"

Advertising Copy:

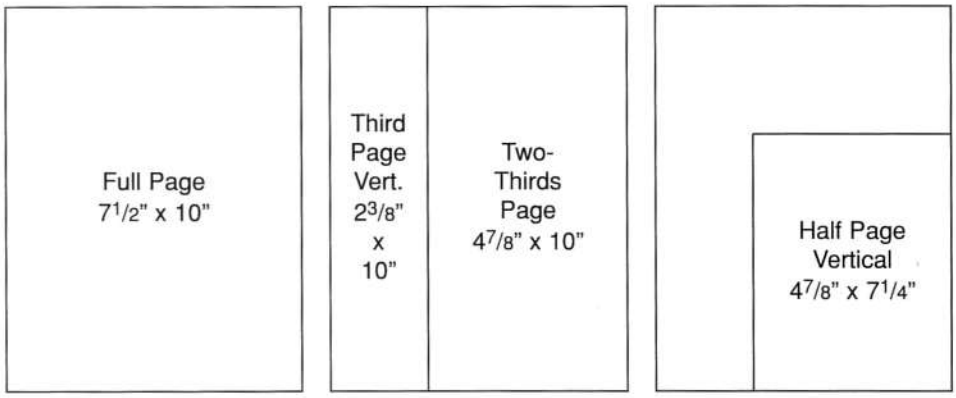
Publisher requires "Camera Ready" art conforming to sizes shown at left. Stats, veloxes or negatives are acceptable BUT NOT FAXED COPY. Publisher provides art if required (see item "Art Charge").

Color:

Specify PMS color. For best results use 133 line screen negatives, right reading, emulsion side down - offset negatives only. For 4-color ads, progressive proofs or engraver's proofs must be furnished.

Bleed:

The trim size of the publication is 8 1/2" x 11". For bleed ads, allow an additional 1/2 inch on each side for trimming purposes.



THE DEFENDANT

25-35 Beechwood Ave.
P.O. Box 9001
Mt. Vernon, NY 10553
Tel.: (914) 699-2020
Fax: (914) 699-2025

APPLICATION FOR MEMBERSHIP*

THE DEFENSE ASSOCIATION OF NEW YORK
Executive Office
25 Broadway - 7th Floor
New York, New York 10004
(212) 509-8999

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $_____

Rates are $50.00 for individuals admitted to practice less than five years; $150.00 for individuals admitted to practice more than five years; and $400.00 for firm, professional corporation or company.

Name _____

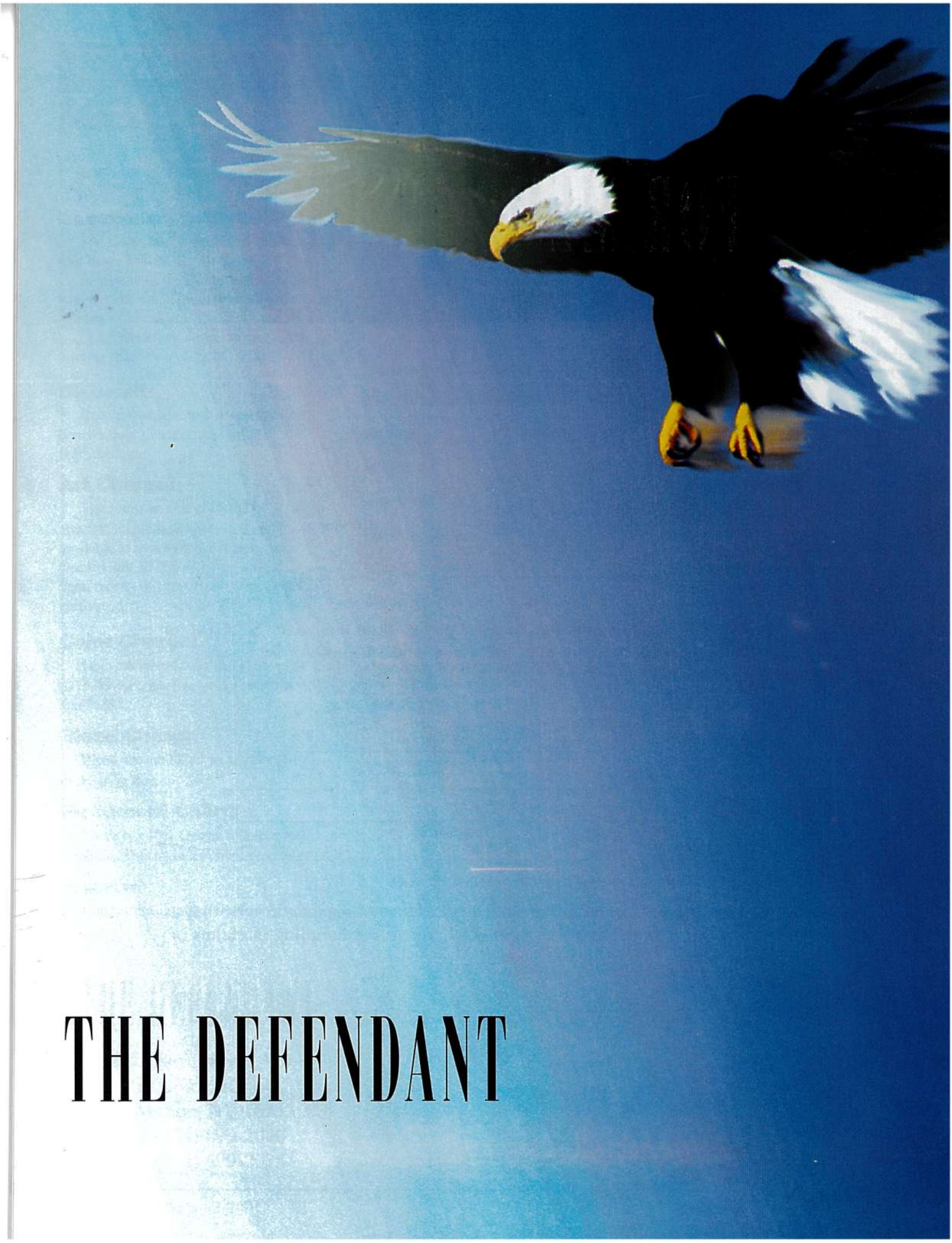
Address _____

_____

Tel. No._____

I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions.

*ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS.


THE DEFENDANT