VOL. 2 NO. 1 SPRING 1999

DEFENDANT

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

FEATURING:

THERE ARE NO BAD DOGS: RECENT RULINGS IN DOG BITE CASES

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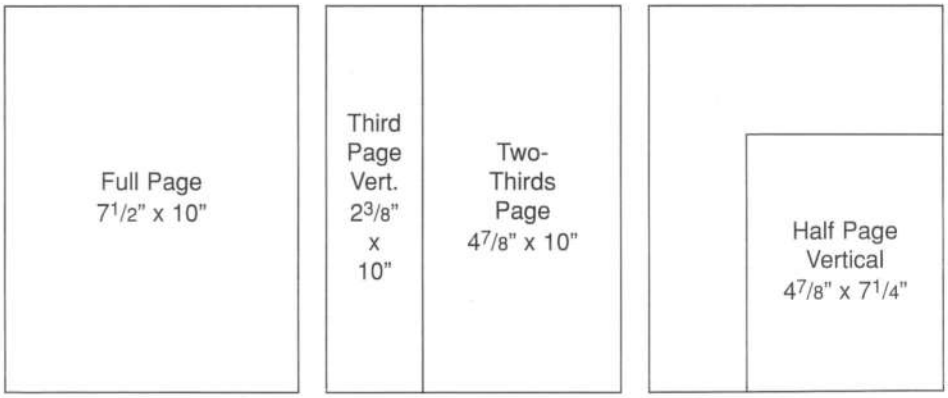

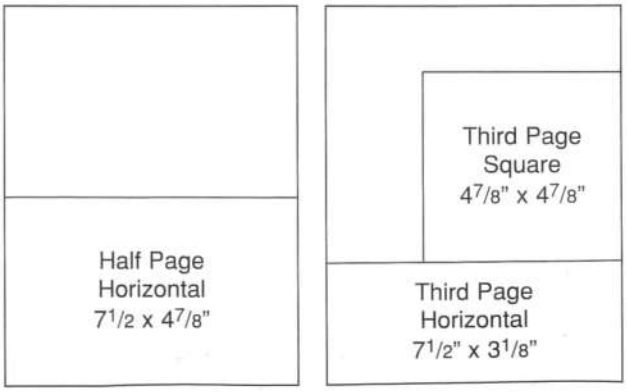

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PRESIDENT'S MESSAGE

*by Edward A. Hayes **

The practice of law can be stressful. Much of the stress is unnecessary and could be avoided if there were more professional courtesy. Too often, we have harsh letters instead of telephone calls, or motions instead of letters. For some practitioners, it has become routine to seek sanctions in every motion, no matter how trivial the demand.

We can all vigorously defend our client's rights without unreasonably offending our adversaries.

Although it may appear that Judges in the Metropolitan area are more inclined to be unduly sensitive to the interests of plaintiffs, nobody has a monopoly on virtue, and defense lawyers can be as guilty as plaintiff's attorneys.

Wise attorneys observe that what goes around, comes around. Civil lawyers can be civil to each other and the Court, without compromising the best long term interests of their clients.

In many ways the practice of law has advanced much in the past 20-30 years, but I wonder if everyone would not be better off if we still had the professional courtesy that used to be common.

I wish to health, happiness, and success in 1999.

Edward A. Hayes

EDWARD A. HAYES

President

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FEDERAL REMOVAL

*by John J. McDonough **

A valuable tool in the defense attorneys arsenal to assist in controlling runaway verdicts, removal to Federal Court pursuant to 28 U.S.C. §1446(6), may be severely curtailed if the United States Supreme Court follows the recent ruling by the Eleventh Circuit in ***Murphy Brothers, Inc. v. Michetti Pipe Stringing Inc. 125 F3d 1396.*** There have been numerous attempts in recent years to curtail or eliminate access to Federal Court for State Court claims based solely on diversity subject matter jurisdiction. If the Eleventh Circuit "receipt role" is adopted, significant further erosion of such rights will take place.

Removing a case to Federal Court must be done within Thirty (30) days "after the receipt by the defendant, through service or otherwise, of a copy of the initial pleadings...." Michetti sued Murphy in an Alabama State Court. Within a few days of filing suit, Michetti's counsel faxed a copy of the complaint to Murphy's Vice President of Risk Management. Two weeks later, Michetti formally served Murphy by certified mail. Thirty days after that, Murphy filed a motion to remove the lawsuit to Federal Court, pursuant to 28 U.S.C. §1446(6), which prescribes the 30 day limit cited above. Michetti moved the Federal District Court to remove the matter to State Court on the grounds that the notice of removal was untimely. The district court denied the motion, but the Eleventh Circuit Court of Appeals reversed it, holding that the Thirty (30) days began to run when the defendant received the faxed copy of the complaint, rather than later when the defendant was formally served.

The interpretation of 28 U.S.C. §1446(6) adopted by the Eleventh Circuit means that, the Thirty (30) day removal period is triggered whenever a defendant comes into possession of the initial pleading from any source, regardless of whether it is acquired through formal service of process, informal conveyance from the plaintiff or her/his lawyer, or through discovery initiated by the defendant. By triggering legal obligations on such informal receipt rather than formal service, the receipt role has the real and substantial potential of discouraging pre-suit settlement negotiations, penalizing the conciliatory defendant, and rewarding the cunning

Continued on page 16

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WORTHY OF NOTE

*by John J. Moore **

INDEMNIFICATION - COMMON LAW - ELEMENTS

It was recently held by the First Department that a party sued for its own alleged wrongdoing rather than on the theory of vicarious liability cannot asserts a claim for common-law indemnification, (Mathis vs. Central Park Conservancy, Inc., _____A.D.2d_____, 674 N.Y.S.2d 336

INSURANCE - CERTIFICATE - ELEMENTS -ESTOPPEL

The Second Department recently submitted that a certificate of insurance is evidence of a contract for insurance, but is not conclusive proof that the contract exists and not in and of itself the contract to insure. (**Penske Truck Leasing Co., I.P., vs. Home Insurance Ins. Co.**, _____A.D.2d_____, 674 N.Y.S.2d 400).

The doctrine of estoppel may not be evoked to create coverage where none existed under the policy.

INSURANCE - DUTY TO SETTLE - ELEMENTS

In **Smith vs. General Accident Ins. Co.**, (91 N.Y.2d 648, 674 N.Y.S.2d 267), the Court of Appeals indicated that a liability insurer may be held liable for damages to its insured for the bad faith refusal of a settlement offer.

To establish a liability insurer's bad faith in failing to settle a claim, the insured must show that the insurer's conduct constituted a "gross disregard" of the insured's interest, that is, the deliberate or reckless failure to place on equal footing the interest of its insured with its own interest on considering a settlement offer.

The liability insurer's failure to keep its insured informed of settlement negotiations concerning an underlying claim can constitute some evidence that it acted in bad faith in refusing to settle the claim.

Failure of a liability insurer to follow an industry practice for its own standard is relevant in resolving whether it acted in bad faith in refusing to settle an underlying claim.

Continued on page 9

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PROXIMATE CAUSE IN SECURITY CASES: The Predicted Effects of Burgos & Gomez

by Leonard A. Robusto and David Y. Wolnerman**

Over the past two decades, the courts of this state have certainly seen an increase in the number of cases arising out of a landlord's alleged failure to provide minimal security precautions to protect tenants from the foreseeable harm of criminal conduct by third parties. The increase in claims has led to confusion, on both sides of the bar, as to just what is required to establish a prima facie case against an allegedly negligent landlord. The sticky issue has almost always been that of proximate cause. A person who sustains personal injuries must show that the landlord's inadequate security measures were a proximate cause of the injuries.[1] Thus, a number of questions would arise. Who was the assailant? How did he gain access to the premises? Would "minimal precautions" have made a difference?

The Court of Appeals was recently given the opportunity "to create a special rule for premises security cases..."[2] However, showing both wisdom and restraint, the court told us that no "special rules" are required and that we need look no further than the previously established rules regarding proximate cause to ascertain the level of proof required to sustain a plaintiff's burden in these matters.

The court recognized the need to strike a balance between "a tenant's ability to recover for an injury caused by the landlord's negligence" and "a landlord's ability to avoid liability when its conduct did not cause any injury.[3] The court stated that:

> There is no need, however, to create a special rule for premises security cases, since the burden regularly placed on plaintiffs to establish proximate cause in negligence cases strikes the desired balance.[4]

What, then, is required? The Court of Appeals has told us that a plaintiff still must establish that the assailant gained access to the premises ***through*** a negligently maintained entrance.[5] And the court has further told us

Continued on page 6

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THERE ARE NO BAD DOGS: Recent Rulings in Dog Bite Cases

by Kevin G. Faley*

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Be it pit bull or poodle, the First Department has recently ruled that a court may not take judicial notice of an animal's vicious propensities based solely on its breed. ***Carter v. Metro North Associates***, 680 N.Y.S.2d 239 (1st Dept. 1998). Thus, it can be said that there are no bad dogs — at least not inherently and certainly not as a matter of law.

This Article will discuss the ***Carter*** case and other recent rulings in Dog Bite cases as well as the essential elements necessary to plead and prove such a case.

ELEMENTS AND BURDENS OF PROOF

In order for a plaintiff to recover under strict liability for an injury inflicted by a domestic animal, she must establish (1) that the animal had vicious propensities and (2) that the defendant knew or should have known of the animal's propensities Carter, supra; ***Gibbs v. Grenadier Realty Corp.***, 173 A.D.2d 171 (1st Dept. 1991).

The term "vicious propensities" has been broadly interpreted by New York courts as "a propensity to do any act which might endanger another" ***Lagoda v. Dorr,*** 28 A.D.2d 208 (3rd Dept. 1967), quoting ***Shuffian v. Garforla***, 9 A.D.2d 910 (2nd Dept. 1959). A defendant seeking summary judgment must establish that the defendant did not have actual or constructive notice of the dog's vicious propensities ***Fazio v. Martin***, 227 A.D.2d 809 (3rd Dept. 1996); ***Sorel v. Iacobucci***, 221 A.D.2d 852, 853 (3rd Dept. 1995). The burden then shifts back to plaintiff to come forward with admissible evidence creating a triable issue of fact that the defendant did have or should have had knowledge of its dog's vicious propensities ***Rogers v. Travis***, 229 A.D.2d 879 (3rd Dept. 1996).

THE BARK MAY BE WORSE THAN THE BITE

At common law, the prevailing rule was that every dog was entitled to one free bite, meaning that a dog was not considered to be dangerous or vicious until it had actually bitten someone. However, this "one free bite" rule should not be taken literally, as under New York law, a bite alone does not constitute vicious behavior, and on the flip side, a dog's actions do not need to rise to the level of a bite in order for it to be deemed a vicious animal.

In ***Rogers v. Travis, supra***, a case brought by an infant against the owners of a dog that had bitten her, the Third Department reversed the trial court and granted the defendant dog owners' motion for summary judgment on the grounds that even assuming that the dog had earlier nipped its owner's granddaughter on her foot and caused a slight scratch, that incident did not put the owners on notice of the dog's vicious propensities so as to subject them to liability for the subsequent incident in which the dog bit another infant on the cheek. The court reasoned that a dog nip is a "minor event" which cannot serve to establish a dog"s vicious propensities as a matter of law or put the defendants on notice that the dog possessed such propensities. ***Rogers, supra***, citing ***Tessiero v. Conrad***, 186 A.D.2d 330 (3rd Dept. 1992).

Furthermore, in ***Sorel v. Iacobucci, supra***, a case involving an alleged attack by a German Shepherd, the Third Department affirmed the lower court's order rendering a verdict in favor of defendants, holding that (1) there is no authority for the proposition that judicial notice must be taken that German Shepherd dogs are as a breed vicious and (2) the evidence was sufficient to support the jury's conclusion that the dog was not vicious.

There had been testimony at trial which showed that the dog was known to bark and sometimes lunge at defendants' fence or front door in response to the presence of strangers; however, there was no evidence contradicting defendant dog owner's testimony that the dog had never been known to attack, bite or harm people with whom he came into contact. Therefore, the court reasoned that even though the dog exhibited "protective tendencies" there was sufficient evidence to support the jury's conclusion that the dog was not vicious.

It should be noted that although there is no clear cut rule with respect to which activities rise to the level of viciousness, certain actions have been held sufficient so as to raise a question of fact regarding whether the subject dog was vicious or that the owners had or should had knowledge of the dog's vicious propensities. Therefore, in

Continued on page 4

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THERE ARE NO BAD DOGS: Recent Rulings in Dog Bite Cases

Continued from page 3

Coon v. Holmes, 677 N.Y.S.2d 800 (2nd Dept. 1998) the Second Department held that genuine issues of fact as to whether the dog possessed vicious propensities existed in light of the fact that there was deposition testimony of the parties which indicated that there was at least one prior incident when the dog either nipped or scratched another child; there was a "Beware of Dog" sign on the property; the dog was regularly kept in a cage during the day; and the dog had chased a telephone repairman, regularly growled at landscapers and had previously escaped its choker collar.

Although a dog's prior actions and a dog owner's preventive measures, such as keeping a dog in a cage during the day, have been held to raise a question of fact as to the dog's vicious propensities, the actual nature and results of the attack do not create an issue of fact as to whether a defendant should have known of the dog's viciousness. In ***Rodman v. Fuddruckers***, 236 A.D.2d 249 (1st Dept. 1997) the First Judicial Department, New York County, Supreme Court, granted summary judgment to the defendants, the restaurant and landlord of the premises where the attack occurred, by rejecting the plaintiff's assertion that the nature and results of the attack alone created an issue of fact on whether the defendants should have known that the dog was vicious.

RECENT CHALLENGES

In an attempt to bypass the high burden of proof in dog bite cases, plaintiffs have sought other avenues by which to recover, including (1) attempting to assert intentional or negligent infliction of emotional distress as a cause of action; (2) requesting that the court take judicial notice that certain breeds are vicious, as in the ***Carter*** case; (3) asserting a cause of action in common law negligence against dog owners for their alleged failure to comply with local leash law ordinances.

A. *Intentional/Negligent Infliction of Emotional Distress Not Recognized*

In ***Fairman v. Santos***, 174 Misc.2d 85, 663 N.Y.S.2d 779 (2nd Dept. 1997), the Second Judicial Department held that plaintiff was not allowed to amend her complaint to assert intentional and negligent infliction of emotional distress, which was based on her fear of contracting rabies. The court reasoned that the conduct alleged to have been committed by defendants, including falsely telling the plaintiff that the dog had been vaccinated at the time of the biting, is not conduct which is so extreme, outrageous or utterly reprehensible so as to transcend the bounds of decency as to be regarded as atrocious in a civilized society ***Fairman, citing Howell v. New York Post Corp.***, 81 N.Y.2d 115, 121-122 (Ct. of Appeals of NY 1993); ***Freihofer v. Hearst Corp.***, 65 N.Y.2d 135, 143-144 (Ct. of Appeals of NY 1985) ; ***Lauer v. City of New York*** 240 A.D.2d 543, 659 N.Y.S.2d 57 (2nd Dept. 1997).

B. *Courts Will Not Take Judicial Notice of a Dog's Propensities*

Furthermore, as previously discussed, in ***Carter***, the First Department refused to take judicial notice that a pit bull is by its very nature a vicious breed, reasoning that there are alternative opinions on this subject which preclude the taking of judicial notice.

The Court noted that "[w]hile many sources, including the authorities relied on by the IAS court, assert the viciousness of pit bulls in general, numerous other experts suggest that, at most, pit bulls possess the potential to be trained to behave viciously."

The Court further stated that "scientific evidence more definitive than articles discussing the dogs' breeding history is necessary" before determining that pit bulls are vicious merely by their "genetic inheritance."

This reasoning is sound. The premise of judicial notice is that the trier of the facts will assume as true, for the purpose

Continued from page 5

DEFENDANT

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of the case before him, certain acts without requiring proof. The justification for this device being that the trier of the facts possesses, in common with the public, knowledge of facts of common occurrence and notoriety ***People v. French Bottling Works***, 259 N.Y. 4, 7 180 N.E. 537 (Ct. of Appeals of NY 1932); ***People v. City of Buffalo v. Beck***, 205 Misc. 757, 130 N.Y.S.2d 354 (1954). Before judicial notice may be taken, every reasonable doubt upon the subject should be resolved promptly in the negative ***Brown v. Piper***, 91 U.S.37, 23 L.Ed. 200, Since, as the Carter decision points out, there are conflicting expert opinions regarding the nature of the various breeds of dogs, the First Department's decision was sound.

C. *Effect of the Violation of Local Leash Laws*

In addition, in some instances plaintiffs assert an alternative cause of action sounding in common law negligence based upon the dog owner's failure to comply with a local leash law ordinance. However, it is difficult for a plaintiff to prevail on these grounds if the strict liability cause of action fails. In New York, the Courts have been reluctant to award damages to a plaintiff on the negligence cause of action if the trier of fact finds that the offending dog did not have, or if the owner did not/should not have known of its vicious propensities.

In ***Vavosa v. Stiles***, 220 A.D.2d 363 (1st Dept. 1995), the First Department reversed the trial court's decision to set aside a jury verdict in favor of the dog owner, and held that an erroneous omission in plaintiff's negligence theory in the jury verdict sheet did not warrant a new trial since the only evidence of a breach of duty was a leash law violation, which is not dispositive for a finding of negligence against the owner. The Court reasoned as follows:

> Even if it could be said that the trial court's granting of the motion to set aside was a ***sub silentio*** attempt to correct the unpreserved error in the verdict sheet in the interest of justice, in our view, a new trial would still not be warranted. With respect to the negligence theory, the only evidence of breach of duty was the Leash Law violation, which by itself is not necessarily dispositive (see PJI 2:29) . Moreover, there was no evidence that the ordinance violation was the proximate cause of the biting incident. Under these circumstances, the unpreserved verdict sheet omission did not fundamentally affect plaintiff's rights and the motion to set aside the verdict should not have been granted by the trial court. ***Vavosa*** at 363.

This holding is significant in that the First Department clearly set forth that even where there is a leash law violation, that by itself is not dispositive in finding a breach of duty on the part of the dog owner.

Furthermore, in ***Arcara v. Whytas***, 219 A.D.2d 871 (4th Dept. 1993), a case brought by a meter reader who was bitten by a German shepherd, the Fourth Department reversed the trial court and held that the plaintiff failed to raise a genuine issue of fact regarding the dog's vicious propensities, citing the facts in the record which included that the dog had never before bitten anyone and it never growled or bared its teeth when someone approached.

The Court in ***Arcara*** further rejected plaintiff's contention that defendants' violation of the local leash law constituted evidence of negligence, reasoning as follows:

> We reject the contention of plaintiff that defendants' violation of the Cheektowaga Town ordinance requiring the leashing of dogs is some evidence of negligence. It is uncontested that the dog was tethered in the yard and thus was restrained in compliance with the Town Ordinance. But ***even if the manner in which the dog was tethered violated the Town Ordinance, that would not affect the essential issue whether the dog was vicious and, if so, whether defendants had knowledge thereof.*** ***Arcara*** at 871 (Emphasis added.)

Therefore, the violation of a leash law not only does not rise to the level of ***prima facie*** evidence of negligence, but it is secondary to the essential issue of whether the dog had vicious propensities and if its owner should have knowledge of such propensities.

However, if there is a violation of the leash law and the unleashed dog interferes with bicycle traffic causing an injury to the cyclist, then, the Third Department states, the violation can constitute some evidence of negligence and the case should go to a jury.

In ***Clo v. McDermott***, 239 A.D.2d 4 (3rd Dept. 1998), "Troubles," an aptly named cocker spaniel, ran out in front of a cyclist and the plaintiff was caused to catapult over the handlebars when he struck the dog with the front wheel of his bicycle.

The Court noted that "absent evidence that the defendant was aware of the animal's vicious propensities or of its habit of interfering with traffic," a plaintiff cannot recover for injuries resulting from the presence of a dog in the highway.

There was no evidence adduced on the summary judgment motion by defendant that defendants were aware of any such vicious propensities or habit of interfering with traffic, but the Court's inquiry did not stop there.

The Court, applying a straight negligence analysis rather than relying on whether there was notice of vicious propensities, determined that there was evidence in the record to support a finding that the leash law was violated and that such a violation could constitute some evidence of negligence. The evidence of negligence could not support a claim on whether the dog had "vicious propensities," but could support a common law negligence claim.

Continued on page 6

THERE ARE NO BAD DOGS: Recent Rulings in Dog Bite Cases

Continued from page 5

It would appear, ***Clo*** notwithstanding, the violation of the leash law would still not enable a plaintiff to bootstrap the violation onto a "vicious propensity" claim as one certainly has nothing to do with proving the other. Therefore, the reasoning of ***Arcara, supra***, and ***Vavosa, supra***, would still apply. But, in a similar fact pattern to that of "Troubles," the violation of the leash law could strengthen an otherwise weak or non-existent negligence claim.

Plaintiffs have also raised the issue of defendants' negligence in violating local leash laws in attempts to recover punitive damages in dog bite cases. These requests for punitive damages jury charges are largely denied.

In ***Costa v. Olympia & York Properties, Inc.*** (1st Dept. 1994), the First Department refused to charge the jury on punitive damages where the evidence on record included that the dog had been held on a leash and the evidence did not indicate that the dog had bitten anyone else prior to the underlying incident.

The Court in ***Costa*** denied plaintiff's request to charge the jury on punitive damages because it found that the defendants' conduct did not rise to the level of egregious conduct required for recovery of punitive damages. Furthermore, it found that the plaintiff did not sustain its burden of proving that the wrong complained of was morally culpable or was actuated by evil and reprehensible motives, and that such damages would be assessed not only to punish the defendants but to deter them, as well as others, from indulging in such conduct in the future.

Similarly, in ***Amando v. Estrich***, 583 N.Y.S.2d 85 (4th Dept. 1993), the Fourth Department ruled that the owners' indifference to its dog's roaming, in violation of the local leash law, did not rise to the level of egregious conduct required for the recovery of punitive damages.

FINAL NOTE

The current state of New York law with respect to dog bite cases is the same as it has been for the past several decades — in order for a plaintiff to recover under strict liability for an injury inflicted by a domestic animal, plaintiff must establish that the animal had vicious propensities and that the defendant knew or should have known of the animal's vicious propensities. A plaintiff must search into the dog's history, and/or the dog or premises' owner's preventive measures with respect to the dog, in order to present a question of fact to prevail over a defendant's motion for summary judgment. No short cuts are accepted, and as of today, there are no bad dogs in New York State.

PROXIMATE CAUSE IN SECURITY CASES: The Predicted Effects of Burgos & Gomez

Continued from page 2

that a plaintiff must still show that the assailant was an "intruder," as "even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant..."[6]

The defense bar previously interpreted these two requirements as mandating a dismissal of any case where the attacker remained unidentified. Some trial and appellate courts agreed. However, the Court of Appeals expressly rejected this position, stating that it "would place an impossible burden on tenants."[7] The court held that a plaintiff can meet his burden on proximate cause by presenting circumstantial evidence from which it may be reasonably inferred that (1) the assailant gained access to the building through a negligently maintained entrance and (2) that the assailant was an intruder, as opposed to a tenant or a guest of a tenant.[8]

An examination of the facts of the two cases is warranted, so that we might know, with some certainty, what type of circumstantial evidence will be sufficient to meet these burdens.

In ***Burgos***[9] the plaintiff relied upon the following evidence (all circumstantial) in an attempt to defeat the defendant's motion for summary judgment:

- The plaintiff herself did not recognize her assailants.
- The plaintiff lived "in a relatively small building" (five floors and twenty five apartments) and was familiar with all of the building's tenants and their families.
- The assailants did not take any steps to conceal their identities, thus showing an apparent lack of concern about being recognized by the plaintiff or others.
- None of the building's entrances had functioning locks on the date of the occurrence.

The Court of Appeals ruled that these items (presumably in their totality) were sufficient to defeat the motion for summary judgment. The assault and robbery in ***Burgos*** took place as the plaintiff exited from her apartment into the hallway, at which time she was pushed back into her apartment by the assailants. According to the Appellate Division, First Department's decision in the case,[10] the plaintiff in Burgos resided on the ***fourth floor***. Thus, there was no direct evidence as to the means of

Continued on page 7

entry by the assailants. However, the Court of Appeals presumably felt that the plaintiff made a sufficient showing on this issue by stating in her affidavit that ***all*** of the entrances to the building had broken locks. Thus, if the plaintiff's proof was sufficient to show that the assailants were "intruders," it necessarily followed that they "gained access to the premises ***through*** a negligently maintained entrance" as, arguably, all of the entrances were negligently maintained in *Burgos*.

In *Gomez*, the court relied upon the following factors:

- The twelve year old plaintiff actually ***saw*** the assailant enter the defendant's building through a back door which was broken.
- The assailant, when he entered the elevator in the defendant's building along with the plaintiff and several other people, did not push a button to select a floor.
- The plaintiff herself did ***not*** testify that she knew all of the building residents; rather, she indicated that she knew most of them by sight. However, the plaintiff presented evidence from another building resident and a frequent building visitor to the effect that none of them recognized the assailant.
- The assailant left the building through the broken rear door.
- The assailant again made no attempt to conceal his identity, even though there were people in the area who could have easily identified him.

A common thread in both cases was the assailants' failure to take any steps to conceal his identity. The court seemed to feel that a tenant, a guest of a tenant or some other individual generally known to the building's residents would take some steps to disguise himself from his neighbors. But this cuts both ways, as the use of a mask or disguise would call attention to the assailant and make the commission of the crime virtually impossible.

The proof in *Gomez* was, arguably, weaker than the evidence in *Burgos*. The plaintiff in *Gomez* resided in a much larger building, with over 150 apartments and several hundred residents. Furthermore, the assailant's failure to push a button when he got into the elevator should have been of no consequence. There were several other people on the elevator besides the assailant and they all presumably selected a floor. Thus, one could just as easily conclude from the assailant's failure to push a button that he was going to a floor that had already been selected. The conclusion that his failure to push a button was some evidence of his "intruder" status seems to be a bit of a stretch.

SUMMARY

The *Burgos* and ***Gomez*** decisions affirm the plaintiff's burden to prove both that the assailant gained access to the premises ***through*** a negligently maintained entrance ***and*** that the assailant was an intruder, with no right of entry to the premises. However, the blanket rule advanced by some defense counsel, that if the assailant has not been identified, the plaintiff's case must fail, has been flatly rejected by the court of Appeals. Circumstantial evidence can be used by a plaintiff to show that it was more likely than not that the assailants were actually intruders, as opposed to tenants or quests or invitees of tenants. As always, the line between "reasonable inference" and "mere speculation" remains a gray area. It appears that cases where the means of entry cannot be established by admissible evidence may still be dismissed by a motion f or summary judgment. Cases where little or nothing is known about the assailant may face a similar fate. However, the lack of use of a mask or disguise, along with some evidence of the plaintiff's knowledge of ***all*** building tenants and the assailant not being included in that group probably will be sufficient to defeat a motion for summary judgment. The effect of such evidence upon a juror's mind at the time of trial seems more tenuous, particularly in cases involving bigger buildings. In a town such as New York City, where people usually do not get to know their neighbors in their large, high-rise apartment buildings, the credibility of such testimony may be suspect.

Overall, the pendulum has apparently swung in favor of the plaintiffs. While the legal principles relied upon by the Court of Appeals in ***Burgos*** and ***Gomez*** were already well-established, their application to the facts of those cases shows us that a minimal amount of circumstantial evidence will suffice on the proximate cause issue.

FOOTNOTES

[1] *Miller v. State*, 62 N.Y.2d 506

[2] *Burgos v. Aquaduct Realty Corp., Gomez v. New York City Housing Authority*, 198 WL 811464 (N.Y.), Court of Appeals of New York, November 24, 1998.

[3] *Burgos, Gomez Ibid.* at page

[4] *Burgos, Gomez Ibid.* at page

[5] *Burgos, Gomez, supra*

[6] *Burgos, Gomez, supra*

[7] *Burgos, Gomez, supra*

[8] *Burgos, Gomez, supra*

[9] It should be noted at this juncture that the ***Burgos*** case involved an appeal from an order or summary judgment in favor of the defendant, whereas the ***Gomez*** case involved a post-trial motion to dismiss by the defendant landlord, after a verdict in favor of the plaintiff.

[10] 245 A.D.2d 221, 666 N.Y.S.2d 640 (Appellate Division, First Department — 1997)

NEGLIGENT SECURITY LIABILITY: Tired Hinges on the Door to Liability Give Way[1]

INTRODUCTION

The recent Court of Appeals cases of ***Burgos v Aqueduct Realty and Gomez v New York City Housing Authority***, 1998 WL 81 1464 have presented an about face by the Court on the issue of negligent premises security law. Although the general common law principle is that a landowner owes no duty to protect against harm caused by the criminal acts of third parties, where such criminal acts are foreseeable, a duty is imposed on the landowner to take reasonable measures to avoid harm. These reasonable measures are expressed in terms of adequate security controls considering the history of crime on the premises. If the landowner's negligent security is a proximate cause of harm to the Plaintiff, then the Plaintiff has found a viable Defendant. But, when is this duty triggered? When is it breached? What is the test of proximate cause? These are some of the questions that we will examine in this article.

DUTY AND BREACH OF DUTY—FORMATION OF THE NEGLIGENT SECURITY CASE

OPENING THE DOOR TO LANDOWNER LIABILITY

The general standards applicable to negligent security cases in New York were enunciated by the Court of Appeals in ***Nallen v Helmsley-Spear, Inc.***[2] In ***Nallan***, the plaintiff was shot while in the lobby of the building. Plaintiff established that there had been 107 reported crimes in the building. Ten of these reported crimes were against the person, notably, none of these took place in the lobby. The Court made clear that knowledge of a history of criminal activity in the building created a duty in the landlord to provide reasonable precautionary measures to minimize risk and make the premises safe.[3] The ***Nallan*** Court focused on the sheer number of reported crimes and the fact that some were of a violent nature to establish a duty. This test provided little instruction as to what was needed to establish a foreseeable risk of harm. Moreover, whether the nature of the crime in question and the location of its occurrence in the building need parallel the reported crimes was left unanswered. These questions were settled 13 years later in ***Jacqueline s. v. City of New York***.[4] The Court held that there is no requirement that the prior criminal activity relied on be of the same type of criminal conduct that the plaintiff is subjected to, nor that it take place in the exact location where a plaintiff was harmed. Rather, all that was needed was for the criminal history to establish "experimental evidence" to indicate a foreseeable risk.[5]

CLOSING THE DOOR— PLAINTIFFS OBSTACLE COURSE

If the ***Jacqueline S.*** "experimental evidence" test looks like the flood gates of liability on the part of the landowner have blown open, look again. Evidence of prior criminal activity may not suffice to trigger a duty of care where the same is not well documented or unrelated to the type of assault at issue.[6] Notice of "ambient criminal activity" in a given area is insufficient to trigger the duty to undertake security measures absent proof that defendant had notice of same.[7] For example, in ***Williams v. Citibank*** 247 AD 2d 49, 677 N.Y.S. 2d 318 (1st Dept. 1998) evidence showing that an ATM machine was located in a crime ridden area was insufficient to give rise to a landowner duty of premise security to a plaintiff who was assaulted at an ATM. The requirement was that there must be evidence of criminal history at that ATM, which was lacking here. Moreover, speculative assertions unsupported by the record will not establish a prima facie negligent security case.[8] To add to the confusion, Courts have held that mere knowledge on the part of the landowner of criminal acts on the premises is sufficient to trigger a heightened duty regarding security.[9] The pendulum of jurisprudence seems to be swinging wildly and inconsistently.

Where a history of criminal activity and notice to the landowner can not be shown, the ***Ragona*** Court has carved out an interesting escape route for plaintiffs.[10] Plaintiff can show a duty on the landowner's part not in premise security but in keeping with the Multiple Dwelling Law and Administrative Code regarding front door locks under the negligence per se doctrine. By showing that the MDL requires front door locks, and testifying that the intruder did in fact enter through that door plaintiff makes a prima facie case of negligence.

The next hurdle a plaintiff must jump is proving that the assailant was an intruder as opposed to a tenant or invitee.[11] This requirement is based on the fact that the landowner's liability is limited to those instances where the assailant enters the premises improperly. Criminal activities are usually superseding-intervening causes and, therefore, break the chain of causation of the landowner's liability. Given a history of criminal activity on the premises, the landowner has a duty of premise security. This is also the case with assailants from without the property. Thus the tenant/intruder distinction is a crucial one. But how does the plaintiff establish this? After all, an assailant will not desist his attack momentarily in order to provide his victim with resident status. Courts have framed this issue in terms of "identification." Where the plaintiff testifies to seeing the assailant enter through an outer door that had been propped open, and further testifies that he was not a resident, all of whom were familiar to her, one would presume that the defendant's summary judgment motion would be denied. What if plaintiff does not know all of the tenants in the building? What if the building is a large complex? In such instances

Continued on page 16

WORTHY OF NOTE

Continued from page 2

APPEAL - WAIVER

In **Figueroa vs. Dso**, (____A.D.2d 674 N.Y.S.2d 868), the Third Department indicated that a slip and fall plaintiff failed to preserve a claim for Appellate Review that the lessee of a premises could be held liable for an ice build-up on a sidewalk because his workers having undertaken to clear the walkways on an occasion, assumed a duty to do so carefully where the claim was not raised in the trial court.

INSURANCE - CANNOT CREATE

An automobile insurer was not estopped from denying coverage from an underlying death claim brought against an insured by her deceased spouse's estate due to its delay in disclaiming coverage under the policy that did not provide coverage in the first instance for interspousal liability.

While an insurer will be estopped from disclaiming coverage where it unreasonably delays in giving notice of the disclaimer, such notice is not required where the policy never afforded the subject coverage in the first instance, (**Government Employees Insurance Co. vs. Paciano**, _____A.D.2d_____, 674 N.Y.S.2d 719, Appellate Division, Second Department.

INSURANCE-NOTICE BY THIRD PARTY

In **Aetna Cas. & Sur. Co. vs National Union Fire Ins. Co. of Pittsburgh, PA.**, (_____A.D.2d _____, 674 N.Y.S.2d 685), the First Department held that a site owner's liability insurer timely notified a defunct subcontractor's liability insurer of a personal injury suit being asserted against the owner by an employee of the subcontractor, even though over five years had passed since the accident and over two years had passed since the employee had initiated the suit.

Where the insured failed to give proper notice to its liability insurer, the injured party can give the notice thereby preserving its right to proceed directly against the insurer.

The injured party or other claimant against the insured not to be charged vicariously with the insureds delay in ving notice to it liability insurer.

NEGLIGENCE - CONSTRUCTION - SCAFFOLD - LABOR LAW §240

In **Luthi vs. Long Island Resource Corp.**, A.D.2d____, 674 N.Y.S.2d 747), the Second partment ruled that a Construction Safety Statute was signed to protect workers from elevation-related ards in the work place by imposing absolute liability on any contractor or owner who fails to furnish an ployee with appropriate safety devices during the tion, demolition, repair, or alteration of a building.

A nightclub employee was injured when he fell from a ladder while running a temporary microphone cable through the night club's drop ceiling for a special event on the stage could not bring an action under the Construction Safety Statute, as the night club structure was not being altered in any permanent fashion.

NEGLIGENCE - CONSTRUCTION - SCAFFOLD - LABOR LAW §240

The Second Department recently indicated that a construction worker who was injured when he jumped eight feet to a debris shield could not assert a claim under the Scaffolding Law as his injuries resulted from his jump rather than from any defective piece of equipment designed to prevent injuries from elevation-related risks, (**George vs. State**, _____A.D.2d_____, 674 N.Y.S.2d 742).

DISCLOSURE - DEPOSITION - FAILURE TO APPEAR - PENALTY

The First Department recently submitted that a party's flagrant violation of a an award of cost to compensate the opposing party for its time, (**Agron vs. Response Vehicle, Inc.**, _____A.D.2d_____, 674 N.Y.S.2d 677).

DISCLOSURE - WORK PRODUCT

In **Fraylich vs. Mainonides Hosp.**, (_____A.D.2d_____, 674 N.Y.S.2d 668), the First Department ruled that a plaintiff in a medical malpractice action was not entitled to a copy of the notes taken by defendant's counsel of interviews with physicians treating the plaintiff. The notes were part of the attorney's work product.

DISCLOSURE - OVERLY BROAD

It was recently ruled by the Second Department that a discovery order in a products liability case requiring a manufacturer of a loader to produce all accident files for all accidents reported on models of the loader which predated the vertical lift innovation was unduly broad and would be modified to include only those accidents similar in nature to the accident in question involving the model equipped with the vertical path-lift on (**Winiecki vs. Melroe Co.**, _____A.D.2d_____, 674 N.Y.S.2d 778).

MOTION TO DISMISS - CPLR 3216 - EXCUSE INVALID

In **Davies vs. Slotkin**, (_____A.D.2d_____, 674 N.Y.2d 728), the Second Department ruled that a failure of a clerical service retained by plaintiff to file a note of issue with the court was not a justifiable excuse for plaintiffs failure to prosecute an action in response to defendant's 90 Day Notice.

NEGLIGENCE - ASSUMPTION OF RISK - SPORTING EVENT

The Second Department recently submitted that an injured basketball player assumed the risk of injury from stepping into a hole or depression on an outdoor basketball court located at an elementary school, since he chose to play basketball on the court surface with faulty

Continued on page 10

WORTHY OF NOTE

Continued from page 9

conditions that were open and obvious. The photographs depicting the accident site review that the cracks and breaks in the paved surface of the court were clearly visible and were not concealed by grass (**Paone vs. County of Suffolk**, _____A.D.2d_____, 674, N.Y.S.2d 761).

INSURANCE - BELIEF OF NO LIABILITY - NOTICE

In **Frenchy's Bar & Grill vs. United Intern Ins. Co.**, (_____A.D.2d_____, 675 N.Y.S.2d 31), the First Department concluded that where an insured expresses a belief that there was no potential liability as an excuse for giving untimely notice of claim to the insurer, the reasonableness of that belief is something the insured must prove before a trier of the facts.

DEFAULT - VACATING - ELEMENTS

It was recently held by the Appellate Division, Second Department that the defendants in a personal injury action were entitled to a vacation of a default judgment entered against him, where the record contained no affidavit of service of process, defendant made a sufficient showing that they did not receive a copy of the summons and complaint in time to defend the action, and defendant submitted appropriate affidavit of merits in the form of an accident report containing admissions by the plaintiff (**Aloi vs. Firebird Freight Service Corp.**, (_____A.D.2d_____, 675 N.Y.S.2d 107).

MARKED OFF CALENDAR - RESTORATION TO CALENDAR - ELEMENTS

In **Mohammed vs. Manhattan Payment Center, Inc.**, (_____A.D.2d_____, 675 N.Y.S.2d 45), the First Department concluded that a case marked off or stricken from the calendar and has not been restored within a one year period is deemed abandoned. A law office failure may constitute a reason able excuse for the delay in restoring the matter which would allow restoration of the action which had been deemed abandoned.

The matter may be restored where the moving party demonstrates a meritorious cause of action, a reasonable excuse for the delay, a lack of prejudice to the opposing party and a lack of intent to abandon the action.

WRONGFUL DEATH - ELEMENTS

In **Raum vs. Restaurant Associates, Inc.**, (_____A.D.2d_____, 675 N.Y.S.2d 343), the First Department ruled that the Wrongful Death Statute, did not allow individuals not married to the decedent to bring a wrongful death action, with the exception of certain blood relatives, did not discriminate on the basis of sexual orientation against same sex partners in spousal-type relationships. The statute operated without regard to sexual orientation, in that unmarried couples living together, whether heterosexual or homosexual similarly lacked the right to bring a wrongful death action. A decedents same sex partner was not a "spouse" authorized to bring a wrongful death action.

INSURANCE - DISCLAIMER - UNTIMELY

A disclaimer letter which a liability insurer sent to the insured and the injured party almost two months after receiving notice of the injured party's suit, was not given as soon as was reasonably possible, and thus, was untimely and ineffective especially considering that the insurer tendered no explaining for the delay when it was given an opportunity to do so, so indicated the Second Department in **Watson vs. Aetna Cas. & Surety Co.**, (_____A.D.2_____, 675 N.Y.S.2d 367).

SLIP AND FALL - WAX

In **Guarino vs. LaShellda Maintenance Corp.**, (_____A.D.2_____, 675 N.Y.S.2d 374), the Second Department ruled that in the absence of evidence of a negligent application of floor wax or polish, the mere fact that the smooth floor maybe shiny or slippery does not support a cause of action to recover damages for negligence, nor does it given rise to an inference of negligence.

QUESTION OF FACT - ELEMENTS

In **Lyons vs. McCauley**, (_____A.D.2d_____, 675 N.Y.S.2d 375), the Second Department ruled that while a question of negligence is almost always a question of fact and a function for the jury, the initial determination of whether the proof is sufficient to report such a finding is a question of law for the court.

MALPRACTICE - ELEMENTS

The Second Department recently ruled that the elements of proof in an action to recover damages for medical malpractice are (1) deviation or departure from accepted practice and (2) evidence that such departure was the proximate cause of the injury or damages, (**Lyons vs. McCauley**, (_____A.D.2d_____, 675 N.Y.S.2d 375).

In a malpractice matter, expert testimony is necessary to prove the deviation from the accepted standards of medical care and to establish the proximate cause unless the matter is one which is within the experience and observation of an ordinary juror. The consequence of a failure to diagnose cancer is not a matter within the ordinary expertise of a lay person and requires expert testimony.

APPEAL - IMPROPER INCLUSION

In **Mt. Lucas Associates, Inc. vs. MG Refining & Marketing, Inc.**, (_____A.D.2d_____, 676 N.Y.S.2d 80), the in an appellate brief of materials which were not before the trial court reflected a clear disregard for the requirement of rules in acceptable standards of appellate practice, and warranted the imposition of court and sanctions.

Continued on page 11

EVIDENCE - CONTRACT - UNAMBIGUOUS

The First Department recently held that where a contract is straight forward and unambiguous, its interpretation presents questions of law for the court to be resolved without resort to extrinsic evidence, (**Express Industries & Terminal Corp. vs. New York State Department of Transp.**, _____A.D.2d_____, 676 N.Y.S.2d 62).

INSURANCE - AUTOMOBILE - REGULAR USE - ELEMENTS - BURDEN OF PROOF

In **Dutkanych vs. U.S. Fidelity & Guar. Co.**, (_____A.D.2d_____, 675 N.Y.S.2d 623), the Second Department ruled that a college student's use of a friend's vehicle did not constitute "regular use" of a non-covered automobile which would be excluded from coverage under the automobile policy issued to the student's mother.

The student was a resident of the mother's household and hence, insured under the mother's automobile policy. At all relevant times a room was maintained for him in his mother's household, his driver's license, school documents and selected service registration listed his mother's home as his address, he stored clothing and personal belongings there, he had a key to her house, he received mail there and he spent his school breaks at his mother's household.

The student however, was not a resident of his father's household and hence, was not an insured under the father's automobile policy. A room was not maintained for him, his driver's license address was not the father's address, school documents, selective service registration and storage of clothes as well as the key to the house was not to the father's home.

The court also noted that parties seeking to establish the premise of an automobile insurer's obligation to indemnify was the burden of the person attempting to demonstrate that obligation.

GENERAL MUNICIPAL LAW - FIREMAN'S RULE - DEFECT IN ROAD BED

It was recently submitted by the First Department that a police officer, who was allegedly injured when he stepped on a defect in a road bed while on duty, could sue the City under the General Municipal Law based on its alleged violation of the City Charter Provision requiring it to maintain streets and sidewalks in a relatively safe condition, (**Simmons vs. City of New York**, (_____A.D.2d_____, 675 N.Y.S.2d 597).

NEGLIGENCE - INDEPENDENT CONTRACTOR - DUTY OF EMPLOYER

In **Dante vs. Staten Island University Hosp.**, (_____A.D.2d_____, 675 N.Y.S.2d 621), the Second Department ruled that an employer who hires an independent contractor is not liable for the independent contractors negligent acts because of the employer had no right to control the manner in which the work was to be accomplished.

NEGLIGENCE - SEVERAL POSSIBLE CAUSES

In **Agli vs. Turner Const. Co., Inc.**, (_____A.D.2d_____, 676 N.Y.S.2d 54), the First Department indicated where the facts proven show that there are several possible causes of injury, for one or more of which defendant was not responsible, and it was just as reasonable and probable that the injury was a result of one cause as the other, plaintiff cannot recover since, he has failed to prove that the negligent of the defendant caused the injury.

AUTOMOBILE - FOREIGN OBJECT - DUTY OF OPERATOR

In **Gomes vs. Courtesy Bus Co., Inc.**, (_____A.D.2d_____, 676 N.Y.S.2d 196), the Second Department ruled that a workman on a sidewalk construction project struck by a flying construction plank, did not state a claim for negligence against the owner of the bus alleged to have hit the plank as it passed by. There was no evidence of negligence or causality, as the workman was thrown to the ground and did not see the vehicle that hit the plank, there were no witnesses, it was conjectural that a school bus he observed discharging passengers was the vehicle in question.

LIMITATIONS - REPETITIVE STRESS INJURY

It was recently indicated by the Second Department that the Rule of Limitations in so-called "Repetitive Stress Injury" cases is that the cause of action accrues against a given manufacturer upon the onset of symptoms where the last use of the injury producing device, which ever is earlier (**Williams vs. Dynamic Decision, Inc.**, _____A.D.2d_____, 676 N.Y.S.2d 214).

A personal injury action against the manufacturer of a device in a repetitive stress matter accrued on plaintiffs last use of the device.

Similarly, the Second Department indicated in **Seeman vs. International Business Machine Corp.**, (_____A.D.2d_____, 676 N.Y.S.2d 211), that the repetitive stress injury claim against keyboard manufacturers accrued on the on set of the symptoms given that the plaintiff was still using the manufacturer's keyboard.

CONSTRUCTION - SCAFFOLD - LABOR LAW §240 - ELEMENTS

The Court of Appeals recently held that the Scaffold Law was for the protection of workers from injury and was to be construed as liberally as might be for the accomplishment of the purpose for which it was thus framed. Liability under the Scaffold Law is confined to failures to protect against elevated related risk (**Melber vs. 6333 Main Street, Inc.**, 91 N.Y.2d 759, 676 N.Y.S.2d 104).

Injuries sustained by a carpenter who was using forty two inch stilts to install metal studs in the top of a drywall when he "walked down an open corridor without removing the stilts to obtain a clamp he needed, and tripped over an electrical conduit protruding from an

Continued on page 12

WORTHY OF NOTE

Continued from page 11

unfinished floor, did not result from an elevation-related risk, and thus could not recover pursuant to the scaffolding law. The injury resulted not from the stilts, but from the conduit in the floor which was wholly unrelated to the elevation-related risk which required the use of stilts.

DISCOVERY - DEPOSITIONS - ADDITIONAL -ELEMENTS

In **Alcamo vs. City of New York**, (_____A.D.2d_____, 676 N.Y.S.2d 230), the Second Department ruled that in order to show that additional depositions are necessary, the moving party must show: (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material or necessary to the prosecution of the case.

Plaintiff in a wrongful death suit needed to establish for the purposes of additional deposition of a detective despite prior depositions of a police officer, as the detective who had performed tests and computations necessary in arriving at estimated minimal rate of speed of the police vehicle just prior to the accident, and that the police officer's testimony was insufficient in that respect.

INSURANCE - INTERPRETATION

In **OOT vs. Home Insurance Ins. Co.** of Indiana, (_____A.D.2d_____, 676 N.Y.S.2d 715), the Fourth Department indicated that unless otherwise defined by the policy, words and phrases in an insurance policy are to be understood in their plain, ordinary and popularly understood sense, rather than in a forced or technical sense. In the provisions of the policy are clear and unambiguous, they must be enforced as written. Exclusions,or exceptions are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.

If an ambiguity exists, the insurer bears the burden of establishing that the construction it advances is not only reasonable but also that it is the only fair construction, viewed through the eyes of an average man on the street.

INSURANCE - EXCLUSION - SCOPE

The Second Department recently held that an exclusion in a nursery school's liability policy which barred coverage for any injury "arising out of or resulting from molestation or abuse by any employee" or "any other person" applied to a suit against the school alleging that a four year old female student was "assaulted, battered and sexually molested" by a five year old male student (**New World Frontier, Inc. vs. Mt. Vernon Fire Ins. Co.**, _____A.D.2d_____, 676 N.Y.S.2d 648).

MALPRACTICE - EVIDENCE - PHOTOGRAPHS - STATEMENTS - BUSINESS RECORDS

In **Crisci vs. Sadler**, (_____A.D.2d_____, 676 N.Y.S.2d 646), the Second Department ruled that an action against an orthopedic surgeon brought by the parents of an infant patient alleging the surgeon's treatment of the patient's elbow fracture constituted malpractice, photographs of the patient allegedly taken less than one year after the fracture was treated which showed a marked deformity of the patient's left elbow, was admissible to prove when the deformity arose, to disprove testimony that abnormal growth occurred over a four year period and to corroborate evidence that the deformity was present shortly after the injury. The medical records of the patient's current treating physician were admissible as business records. It was also proper to include the parent's claim that once the immobilization device was removed from the patient's arm, it looked "crooked."

FORUM NON CONVENIES - ELEMENTS

It was recently held by the First Department in **Holnes vs. Maritime Overseas Corp.**, (_____A.D.2d_____, 676 N.Y.S.2d 540), that the Court had discretion to dismiss an action on the grounds of Forum Non Convenies where the action is jurisdictionally sound but would be better adjudicated elsewhere. Elements that would be considered by the Court include the burden on New York Courts, the potential hardship to the defendant and the availability of an alternative form where the plaintiff might bring a suit. The fact that the transaction out of which the suit arose occurred in a foreign jurisdiction favors dismissal especially where the defendant will consent to the suit in that jurisdiction.

INSURANCE - ANTI-SUBROGATION RULE - LIMITATIONS

In **Pierce vs. City of New York**, (_____A.D.2d_____, 677 N.Y.S.2d 173), the Second Department ruled that the anti-subrogation rule which barred a contractor, who was an additional insured under the subcontractor's general and umbrella liability policies from seeking indemnification and contribution from the subcontractor for damages awarded to the subcontractor's injured employee, though only to the extent of payment actually made to the contractor by the general liability insurer.

DAMAGES - EMOTIONAL DISTRESS - TOXIC SUBSTANCE - ELEMENTS

The Second Department recently indicated to maintain a cause of action to recover damages for emotional distress following exposure to a toxic substance, that plaintiff must establish first that he was in fact exposed to a disease-causing agent, and that there is a "rationale basis" for his fear of contracting a disease.

Plaintiffs could not recover for negligent infliction of emotional distress arising out of their alleged exposure to defendant's petroleum products, where none of the

Continued on page 13

plaintiffs could show a physical manifestation of the petroleum contamination, nor could the plaintiffs establish a nexus between the personal injuries they sustained and the alleged petroleum contamination. (**Prato vs. Vigliotta**, _____A.D.2d_____, 677 N.Y.S.2d 386).

INSURANCE - BELIEF OF NON-LIABILITY - ELEMENTS

In **SSBSS Realty Corp. vs. Public Service Mut. Ins. Co.**, (_____A.D.2d_____, 677 N.Y.S.2d 136), the First Department ruled that when an insured asserts a reasonable belief in non-liability as an excuse for a failure to give timely notice to his liability insurer, the issue is not whether he believes he will be ultimately found liable for the injury, but whether he has a reasonable basis for the belief that no liability claim will be asserted against him.

The insured's belief that an elderly patron of his diner would not make a claim after she tripped and fell on a raised slab of flagstone on the sidewalk upon existing the diner was not reasonable, and thus did not excuse a 91 day delay in telling the liability insurer about the accident, where the patron told the manager when she fell that she was in pain and could not stand and asked that an ambulance be called, and where the defective condition of the sidewalk was clearly discernible.

In cases of this nature, the insured has the burden of showing the reasonableness of such excuse given all the circumstances.

SUMMARY JUDGMENT - ELEMENTS

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a material question of fact sufficient to preclude summary judgment, so indicated the Court of Appeals in **A.H.A. General Const. Inc. vs. New York City Housing Authority**, (92 N.Y.2d 20, 677 N.Y.S.2d 9).

LIMITATIONS - RELATION BACK - ELEMENTS

In **L & L Plumbing & Heating vs. Depalo**, (_____A.D.2d_____, 677 N.Y.S.2d 153), the Second Department submitted that for the rule allowing a relation back to the original date of the filing to be operative in an action which a party is added beyond the applicable limitations period, a plaintiff is required to prove that (1) both claims arose out of the same conduct, transaction or occurrence, (2) that the new party is united in interest with the original defendant and by reasons of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudice 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 an excusable mistake by the plaintiff in originally failing to identify all the proper parties the action would have been brought against him or her as well.

MALPRACTICE - HOSPITALS - LIABILITY

In **Filippone vs. St. Vincent's Hosp. and Med. Center of New York**, (_____A.D.2d_____, 677 N.Y.S.2d 340), the First Department ruled that hospitals are not vicariously liable for the acts of private attending physician. The hospital is shielded from liability where its employees follow the orders of the attending physician, unless the latter's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into their correctness.

The hospital and the resident surgeon were not liable for damages to the urethra of a patient alleged to have occurred during surgery. The deposition testimony indicated that the resident followed the orders given by the private surgeon, and did routine items such as clamping vessels.

NEGLIGENCE CONSTRUCTION LABOR LAW §240

In Moore vs. Elmwood-Franklin School, (_____A.D.2d 672 N.Y.S.2d 221), the Fourth Department ruled that a plaintiff who was straddling the peak of a roof when his foot slipped and he slid several feet down the roof before his fall was stopped, could not assert a claim pursuant to §240 Subdivision 1 of the Labor Law as the particular section did not contemplate the type of accident sustained the plaintiff.

LIMITATIONS - ARBITRATION

In **Continental Ins. Co. vs. Richt** (_____A.D.2d_____, 677 N.Y.S.2d 634), the Second Department held that generally the six year limitations period for arbitration demands begins to run when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court.

INSURANCE - AMBIGUITY

The First Department recently held that pursuant to the doctrine of Contra Proferentem, when an insurer fails to submit extrinsic evidence that resolves an ambiguity in an insurance policy, the proper interpretation is an issue of law for the court and the ambiguity must be resolved against the drawer of the contract, the insurer (**Kenavan vs. Empire Blue Cross & Blue Shield**, _____A.D.2d_____, 677, N.Y.S.2d 560).

NEW TRIAL - ELEMENTS

It was recently held by the First Department in **Rivera vs. City of New York**, (_____A.D.2d_____, 677 N.Y.S.2d 537), that where liability is sharply contested and plaintiffs injuries are serious, an inexplicably low award for the such injuries makes it most likely that the jury had rendered an impermissible compromise verdict, in which it not only finds plaintiff partially responsible for the accident, but also compromises on liability and where awards suggest likelihood of such a tradeoff, a new trial is required on all the issues.

The jury awarded $2,600 for future medical expenses,

Continued on page 14

WORTHY OF NOTE

Continued from page 13

$2,500 for two years of therapy, $100 for medical supplies for forty six years, $5,000 for home equipment, and $4,500 for future pain and suffering to the plaintiff who had suffered severe and disabling injuries were irreconcilably inconsistent warranting a new trial on all issue.

TRIAL - NON-DISCLOSURE OF WITNESS

In **Rivera vs. City of New York** (_____A.D.2d_____, 677 N.Y.S.2d 537), the First Department held that the trial court did not abuse its discretion in allowing a witness to testify in an action arising from an automobile accident even though the party calling the witness had not disclosed the witness in response to a demand for a witness list where the non-disclosure was not willful, the witness was located at the very address listed on the police report that had been provided to the opposing party, and the opposing party did not seek any remedy when the intention to call the witness was announced at the outset of trial.

STATEMENT OF READINESS - VACATING ELEMENTS

In **M & J Trimming, Inc. vs. Kew Management Corp.**, (_____A.D.2d_____, 677 N.Y.S.2d 789), the First Department ruled that an order directing plaintiff to file a note of issue so as to place the action on the trial calendar unfairly deprived the defendant of his right to discovery, particularly in light of the facts that if anyone, it was plaintiff and not defendant, who engaged in dilatory conduct, and that plaintiffs had the burden to prosecute the action.

PRODUCTS LIABILITY - DEFECTIVE PRODUCT - DUTY TO WARN - UNINTENDED ELEMENTS

In **Liriano vs. Hobart Corp.**, (92 N.Y.S. 2d 232, 677 N.Y.S.2d 764), the Court of Appeals ruled that a manufacturer who places a defective product on the market that causes injury may be liable for the ensuing injuries. The product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by an adequate seaming for the-use of the product.

The manufacturer is not liable under defective design theory for injuries caused by subsequent alterations by a third party that renders the product defective or unsafe. Where a product is purposely manufactured to permit its use without a safety feature, the plaintiff may recover for injuries as a result of removing the safety feature. The manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have know.

The manufacturer has no duty to warn of consequences or dangers associated with modifications of the product that are patently dangerous or pose an open and obvious risk. The manufacturer does have a duty to warn of the danger of unintended uses of the product provided those uses are reasonably foreseeable.

ATTORNEY PRIVILEGE - THIRD PERSONS

Communications between a client and an attorney made in the presence of a third person would not be privileged (**Doe vs. Poe**, 92 N.Y.S.2d 864, 677 N.Y.S.2d 770).

AUTOMOBILES - NEGLIGENCE - EMERGENCY SITUATION

In **Lyons vs. Rumpler**, (_____A.D.2d_____, 678 N.Y.S.2d 142), the Second Department ruled that the actions of a motorist in responding to an emergency situation created when the first vehicle collided with the second vehicle and was propelled into oncoming traffic, by taking his foot off the accelerator and turning his steering wheel away from the oncoming vehicle in an attempt to avoid the collision were clearly reasonable, so that any error in his judgment was not sufficient to constitute negligence allowing a recovery in an action arising from the ensuing accident.

MALPRACTICE - DUE CARE

The Second Department recently indicated in **Yasin vs. Manhattan Eye, Ear and Throat Hospital**, (_____A.D.2d_____, 678 N.Y.S.2d 112), the testimony from a patient's medical expert that the surgeon should have ordered additional blood test and should have immediately hospitalized the patient, instead of referring her to a specialist, after diagnosing a sub-acute bacterial endocarditis did not establish medical malpractice. The expert did not explain how these alleged failures constituted malpractice approximately related to the patient's claims, and the patient began receiving appropriate treatment only two days after the surgeon's proper diagnosis.

LIMITATIONS - FRAUD

An action to recover damages based on actual fraud must generally be commenced within six years of the commission of the fraud but may also be commenced within two years after the actual or imputed discovery of the fraud even though more than six years has elapsed from the commission of the wrong, so indicated the Second Department in **Freda vs. McNamara**, _____A.D.2d_____, 678 N.Y.S.2d 135).

NEGLIGENCE - CONSTRUCTION - LABOR LAW §240

In **Horton vs. Otto**, (_____A.D.2d_____, 678 N.Y.S.2d 139) the Second Department ruled that a worker who was injured in a fall while sanding a door located at the top of a three step landing could not maintain a claim against the employer and other defendants pursuant to the scaffolding law, absent any showing that his injuries arose from the special elevation-related hazards against which the law was intended to provide protection.

Continued on page 15

MALPRACTICE - DUTY OF CARE - PHYSICIAN

The mere fact that a urologist was the patient's admitting physician at a hospital did not cause the urologist to assume a general duty of care with regard to the treatment provided to the patient by other physicians, so indicated the Second Department in **Yasin vs. Manhattan Eve, Ear & Throat Hospital**, (_____A.D.2d_____, 678 N.Y.S.2d 112).

INSURANCE - PROCUREMENT -INDEMNIFICATION

In **KMO-361 Realty Associates vs. Podbielski**, (_____A.D.2d_____, 678 N.Y.S.2d 323) the First Department ruled that the liability insurer's refusal to indemnify the additional insureds in an underlying wrongful death action was no basis for the declaration that the insured breached its agreement with the additional insureds to procure liability insurance. The court indicated that the duty to indemnify was premature at the time of the motion.

INSURANCE - EXCLUSION - BURDEN OF PROOF

The Second Department recently ruled in **Salzman & Salzman vs. Home Ins. Co.**, (_____A.D.2d_____, 678 N.Y.S.2d 353), that when an exclusion clause is relied upon to deny liability coverage, the insurer has the burden of demonstrating that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further that the allegations, in toto are subject to no other interpretation.

INSURANCE - NOTICE OF COMPLAINT - UNTIMELY

In **Safer vs. Government Employees Ins. Co.**, (_____A.D.2d_____, 678 N.Y.S.2d 667), the Second Department ruled that an insureds delay in notifying his homeowner's liability insurer of an incident giving rise to a suit against him until more than one month after he was served with the plaintiffs amended complaint was unreasonable as a matter of law under the policy requiring notice "as soon as practical."

RES IPSA LOQUITUR - ELEMENTS

In **Pavon vs. Rudin** (_____A.D.2d_____, 679 N.Y.S.2d 27), the First Department ruled that plaintiff must establish three things to rely on the theory of Res Ipsa Loquitur; 1) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence; 2) the instrumentality causing the accident was within defendant's exclusive control; and 3) the accident was not due to any voluntary action or contribution by the plaintiff.

The doctrine creates a prima facie case of negligence sufficient for a submission to the jury which is permitted but not required to infer negligence.

PLEADING - ANSWER - EXTENSION OF TIME

The Second Department recently held that a defendant's motion to dismiss the compliant for failure to state a claim extended their time to answer and thus extended the time in which the plaintiff could amend their complaint as of right, so reflected the Second Department in **STS Management, Inc. vs. New York State Department of Taxation and Finance**, _____A.D.2d_____, 678 N.Y.S.2d 772).

RESTORATION - ELEMENTS

It was recently indicated by the Second Department that a party wishing to restore a matter to the trial calendar after dismissal may have the action reinstated after a demonstration of four essential factors: 1) the case has merits; 2) there is a reasonable excuse for the delay; 3) there was no intent to abandon the matter; and 4) there is no prejudice to the non-moving party.

The medical malpractice plaintiffs were not entitled to the granting of their motion to restore their matter to the trial calendar wherein an alleged obstetrical malpractice occurred more than twenty one years earlier; the matter was marked off the calendar three times due to plaintiffs unpreparedness, and plaintiffs excuse on this occasion amounted to nothing more than law office error, (**Kourtsounis vs. Chakrabarty**, _____A.D.2d_____, 679 N.Y.S.2d 84).

VENUE - PLACE OF RESIDENCE

In **Llorca vs. Manzo** (_____A.D.2d_____, 679 N.Y.S.2d 83), the Second Department ruled that plaintiff's choice of venue was improper where the action was commenced in a county where none of the parties resided. As a result, plaintiff forfeited the right to select the place of venue and defendant's motion for change of venue should have been granted. Defendant promptly served the answer along with the demand for a change of venue, followed it up within 15 days with a motion to change the venue to a proper venue.

DISMISSAL - AFTER OPENING STATEMENT - ELEMENTS

In **Gleyzer vs Steinberg** (_____A.D.2d_____, 679 N.Y.S.2d 154), the Second Department ruled that motions to dismiss made after plaintiff's opening statement are disfavored and should be granted only where the defendant establishes either that 1) the complaint does not state a cause of action, 2) the cause of action is conclusively defeated by an admitted defense, or 3) admissions or statements of fact made by the plaintiff's counsel in the opening statement absolutely preclude recovery.

The dismissal of the complaint was erroneous where the complaint was amplified by the bill of particulars stated a cause of action and nothing in the opening statement precluded the possibility of the recovery.

INSURANCE - PROCUREMENT - WAIVER

The First Department recently indicated that a general contractor which breached an agreement with the property owner to procure insurance failed to show that the owner waived the breach, absent evidence tending to establish that the purported waiver was intentional, a voluntary relinquishment of a known right. In point of fact, there was no evidence that the owner even knew

Continued on page 16

WORTHY OF NOTE

Continued from page 15

that the contractor had failed to provide the agreed upon coverage (**White vs. Church of Our Lady of Sorrows**, _____A.D.2d_____, 679 N.Y.S.2d 381).

RES JUDICATA - RESULT

In **Mosher vs. Banes**, _____A.D.2d_____, 679 N.Y.S.2d 404), the Second Department ruled that "Res Judicata" requires that when a cause of action has been adjudicated on the merits, the parties to the action are bound by the judgment and may not relitigate the same cause of action between themselves.

DISCOVERY - FAILURE TO COMPLY - ELEMENTS - SANCTIONS

The First Department recently ruled that a defendants failure to comply with discovery orders did not warrant a dismissal of defendant's answer. While there was considerable evidence that defendant had taken an irresponsible attitude toward complying with discovery obligations, the level of willfulness which would warrant an extreme sanction of dismissal was not present (**New vs. Scores Entertainment, Inc.**, _____A.D.2d_____, 679 N.Y.S.2d 282).

The imposition of Two Thousand Five Hundred ($2,500) Dollars in penalties against the defendant as a sanction for failure to comply with the order was warranted by the circumstances and represented a fair recompense for the time spent by plaintiffs counsel in unsuccessful attempts to obtain compliance with the discovery orders.

Repeated failure on the part of the defendant to provide the names of persons employed by it at the time of the incident while not warranting a dismissal of the answer provided a basis to preclude the defendant from offering testimony of any witness who had not yet been identified.

VERDICT - SETTING ASIDE

In **Altman vs. Alpha Obstetrics & Gynecology, P.C.**, (_____A.D.2d_____, 679 N.Y.S.2d 642), the Second Department indicated that in determining whether a jury verdict is based upon insufficient evidence as a matter of law, the relevant inquiry is whether there is simply no valid line of reasoning and permissible inference which could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial.

PLEADING - DELAY IN SERVING ANSWER

In **Kaiser vs. Delaney** (_____A.D.2d_____, 679 N.Y.S.2d 686), the Second Department indicated that the defendants 2 1/2 month delay in serving an answer in a personal injury action was excusable, in light of an absence of prejudice to the plaintiff, the meritorious nature of the defense, and the public policy in favor of resolving matters on their merits.

FEDERAL REMOVAL

Continued from page 1

claimant. A party over whom the Court has not acquired personal jurisdiction should not be subject to procedural penalties, such as the forfeiture of valuable removal rights.

The Defense Research Institute has filed an amicus curiae brief in the United States Supreme Court on the question of when the Thirty (30) day period in which a defendant may exercise its removal right begins to run. The DRI amicus brief was prepared by David C. Lewis of the Phoenix, Arizona law firm of Jones, Skeleton and Hochuli. It asks the Court to interpret 28 U.S.C. §1446(6) to mean that the removal period begins to run no sooner then the date of formal service. It reflects the widely-held defense position that removal of certain actions from State Court to Federal Court is appropriate and serves the best interests of defense litigants. Thus, the defense should have as much time as possible (up to 30 days) to study the complaint to determine whether it belongs in a Federal forum under either diversity or Federal question jurisdiction.

NEGLIGENT SECURITY LIABILITY: Tired Hinges on the Door to Liability Give Way[1]

Continued from page 8

plaintiff's burden appears insurmountable. The law was in need of clarification, but what should be the standard?

Once a duty is established, it must be shown that the landowner breached this duty, i.e. that is to say that the landowner did not implement reasonable security measures. What is reasonable is measured against the nature of the foreseeable harm.[12] Where, for example, a patient in a hospital has a record of tendencies towards dubious threats of suicide, drug abuse, elopement from his assigned room, petty theft and trespass, but no credible evidence of violent tendencies toward others, standard security measures were appropriate and no ejectment or special attention need to be given him.[13] Similarly, where individuals posing as police are let into a building by the doorman claiming they are there to execute a search warrant, then subsequently rob a tenant at gunpoint, there is no landowner liability because the employee was acting reasonably given the circumstances.[14] Moreover, when a public entity acts as a proprietary capacity as a landlord, it is held to the same

Continued on page 17

duty as private landlords in providing security for the building.[15]

If plaintiff can show negligence by the landowner, but cannot establish that this negligence was a proximate cause of his injuries, there will be no cause of action. In the negligent security context, the Court at first ruled that plaintiff must establish how the assailant gained access to the promises, preferably by eyewitness proof. The mere statement in a police report that the assailant gained access through inoperative locks is hearsay and insufficient to withstand summary judgment.[16] The inference that the assailant entered through an unlocked door and not the interior stairwell or elevator because tenant did not hear the interior door nor see light from the elevator is too speculative to warrant denial of a summary judgment motion.[17] If the building is small, a description of the assailant may be furnished and affidavits secured from tenants stating that on the date in question they never enabled an individual fitting that description to be in the premises, and/or that no tenant fits this description, would be very helpful, but is it enough? Must plaintiff include all the possibilities? Initially, the Courts held the plaintiff to such a standard.[18] Then, in November 1998 the Court of appeals decided ***Burgos v. Aqueduct*** which changed the law with respect to proximate cause.

BURGOS—REOPENING THE DOOR

The issue in ***Burgos*** was whether the tenant sustained her burden of proof an proximate cause by showing that the unidentified assailant was an intruder who gained access to the promises through a negligently maintained entrance. The Court concluded that the tenant did sustain her burden of proof.

The rule enunciated by the Court was that the "Plaintiff's burden of proof on this issue is satisfied if the possibility of another explanation for the event is sufficiently remote or technical 'to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' ***(Schneider v Kings Highway Hospital. Cntr, 67 NY2d 743 at 744, 500 NYS 2d 95, 490 NE2d 1221; see also Gayle v City of NY —NY 2d —)***." (Slip Copy Page 2).

The Court sought to balance a tenant's ability to recover against a landlord's ability to avoid liability when its conduct did not cause any injury. Thus, the Plaintiff need only show at trial that the evidence renders it "more likely or more reasonable then not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance." (Slip Copy Page 3).

Applying this rule to the facts of ***Burgos***, the Court concluded that the Plaintiff had sustained her burden of proof by showing: A. that she did not recognize her assailants; B. that the attacker did not seek to conceal his identity, and C. None of the entrances had functioning locks.

The proof in ***Gomez*** was similar, only Gomez lived in a large building with over 150 apartments compared with the Burgos' building which consisted of 25 families. Nevertheless, Gomez claimed she "knew most of the building residents by sight." (Slip Copy Page 3). Additionally, Gomez solicited testimony from another building resident and a frequent visitor who testified in support of her case that they did not recognize the assailant. The assailant also did not push a floor button when he got into the elevator. The attacker made no effort to hide his identify in either case.

In scrutinizing this testimony, which the Court finds sufficient to withstand summary judgment, it is clear that the pendulum has swung 180 degrees. Whereas the pre-Burgos law strongly favored the landowner, the law now makes it easy for the Plaintiff to withstand a motion for summary judgment by the Defendant. Thus, these emotionally charged cases will now almost certainly reach sympathetic jurors, many of whom live in large building complexes in urban centers, and most of whom are pre-disposed toward the plaintiff in cases of this nature.[19]

THE NEW CRITERIA

A close examination of the criteria set by the Court indicates that the requirements imposed upon the Plaintiff are now so easy that very few, if any, cases will be dismissed an motion. First, the Plaintiff must state, either at a deposition or in an affidavit that he/she did not recognize the assailant. This testimony obviously cannot be contradicted by the Defendant; It is information that rests exclusively with the Plaintiff, who may or may not be telling the truth, It would seem logical that the larger the building the mare difficult the burden of proof would be on the Plaintiff. Is this fair to the plaintiff? In Burgos the building consisted of 25 families. Considering the norms of behavior in large urban centers, it is unlikely that a person would know all the families and frequent visitors to each family. To rule that one could know all of the 150 families that inhabit a low income Housing Project where "turn over" is high is contrary to common sense. Although nominally the burden the Court imposed on the Plaintiff is significant, in reality the Court accepted the Plaintiff's testimony to this effect and ruled as it did in Gomez, the jury in her favor be re-instated. Is there any case then that the trial courts will dismiss if the Plaintiff claims he/she knows all the tenants? At what point does such a statement by Plaintiff become untenable—200 tenants, 250 tenants, 300 tenants? Is there any proof the Defendant ran offer to contradict Plaintiff's claim to such a prodigious memory? Should an expert an human psychology or "memory expert" be called as a witness?

Secondly, the assailant must make no effort to conceal his/her identity. Usually, this is also information that only the Plaintiff will know. The usual evidence offered in this connection is that the assailant did not wear a mask and that he/she immediately left the building. Consider however, that one who prowls the hallways of a building or rides the elevators thereof while wearing a mask is almost certain to be apprehended. Who would get into an elevator and ride with a masked man (the facts of

Continued on page 18

NEGLIGENT SECURITY LIABILITY: Tired Hinges on the Door to Liability Give Way[1]

Continued from page 17

Gomez), or open a door while a masked man was behind her in the hallway (the facts of Burgos)? Nor does leaving the building indicate that the assailant is from outside the premises. The last place an assailant would go directly after an attack is his own apartment within the building.

Thirdly, why does this evidence offered by the Plaintiff make it "***more*** likely than not..." that the person who entered the premises did so improperly ? Wouldn't such evidence, at best, only raise a reasonable inference that the person entered improperly, not that it was ***more*** likely that the person entered improperly, The Court of Appeals was unpersuaded by this line of reasoning. In its desire to soften the harsh pre-Burgos rule it rendered nugatory the standards.

LOOKING TOWARD THE FUTURE- Blowing open the door of liability

What then can a Defendant do to increase its chances of having a motion for summary judgment granted in a negligent security case?

A possible method would be to secure an accurate description of the assailant contemporaneously made from the police, then make reasonable efforts to identify whether the assailant was a tenant or frequent visitor to the premises by attempting to find a tenant who matched the description given. The evidence would consist of checking police records or incident reports, posting a drawing of the person described in the entranceway, filming the entrance for a period of time and comparing the film with the description, posting a watch at the door for a period of time, etc.

If the defendant shows that several tenants/visitors closely resemble the assailant that should be enough to defeat plaintiffs case on motion.

In support of the motion, producing statistics of the number of people who match the description who are in fact tenants (age, sex, race, height, weight), would be persuasive evidence. Additionally, statistics of the "turnover" rate at the complex would be useful, as would the affidavit of an expert to the effect that generally the norms of behavior in such buildings is for tenants not to know by sight ail the residents of the premises. This is especially the case in urban settings where the building complexes tend to be large.

The Defense needs to convince the Motion and Trial Courts that the usual standards for granting or denying summary judgment motions do not apply in the negligent security cases because the Court of Appeals has made it clear in Burgos that the Plaintiff must meet a ***higher standard*** than simply showing that there are the usual "questions of fact." The Defendant should buttress its argument with evidence such as the items above in order to force the Plaintiff to come forward with such proof which would force the Court to the conclusion that it is not more likely than not that the person involved was from outside the building.

Will these be enough to overcome the reluctancy of Judges to dismiss cases? The Plaintiff will argue that these points go to the weight of the evidence, and cannot sustain a motion for summary judgment; the Defendant should argue that the Court of Appeals made it clear that the burden of proof on the Plaintiff to show that the assailant is an intruder requires him to show that the assailant is "***more*** likely[20] than not" an intruder. Therefore the Motion or Trial Court must delve into the evidence and not merely find that there are questions of fact; i.e., the normal requirements of summary judgment motions do not apply here. Once a body of case law develops in which the Motion or Trial courts rule on dismissals by applying the "usual" summary judgment standards of issue finding as opposed to issue determination it will be very difficult for the defense to overcome the process.

CONCLUSION

In his dissenting opinion in the Jacqueline S. Case, Justice Bellacosa eloquently stated the dilemma facing the Court in formulating a rule of law to deal with the negligent security case. His prescient conclusion that the Court was not coming to grips with the reality of the situation has come to pass. "Creating a cascade of public liability of the type imposed here under these circumstances is particularly ill-suited and ill-fated to redressing endemic urban ill and crimes. This ancient tort theory and common-law method of spreading risk and deterring negligent conduct does not work here." (81 NY2d at 298-9).

Bellacosa expressed concern that the majority's decision would open the liability door to a rapid expansion of the negligent security tort. The landowner with the "deep pocket" would feel this expansion most. However, until now, his fears have not become a reality. There are two reasons for this. First, landowner duty is difficult to establish. Assailant's status and criminal history have proven to be most elusive to plaintiffs. Second, the issue of causation is a giant hurdle. Proving that locks were defective or windows broken is the easy part, and on its own bring the plaintiff nowhere. To succeed in his case, plaintiff must show that it was these locks or windows that afforded the assailant entry into the building and was a proximate cause of plaintiff harm. These two obstacles have kept the flood gates of litigation in check. ***Burgos***, on the other hand, may be the realization of Bellacosa's fears. The new standard of "more likely than not" that has been superimposed on the requirements of assailant's status and on the issue of proximate cause will undoubtably change

Continued on page 22

REPORT FROM THE COMMITTEE ON THE DEVELOPMENT OF THE LAW FROM DANY AND UPDATE ON THE LAW OF PREMISES SECURITY

*by Andrew Zajac**

*Frank V. Kelly***

As reported in the prior issue of The Defendant (Fall 1998, Vol. 2, No. 2), the committee submitted an ***amicus curiae*** brief to the Court of Appeals in ***Burgos v. Aqueduct Realty Corp.***. On November 24, 1998, the Court of Appeals issued its opinion in that case, and the result was a significant victory for plaintiffs. ___ N.Y.2d ___, ___ N.Y.S.2d ___, 1998 WL 811464 (1998). In ***Burgos***, the Court of Appeals abrogated a rule in premises security cases which had been promulgated by the Appellate Divisions and which had been extremely favorable to defendants. Under that rule, such cases were subject to summary dismissal on the ground of lack of proximate cause if the plaintiff could not affirmatively identify the assailant as an uninvited stranger to the building. The Court of Appeals has now abrogated the rule, stating that it placed an impossible burden on tenants. The Court has held that the plaintiffs can now satisfy their burden of proving proximate cause at trial even where the assailant remains unidentified, if the proof renders it more likely or reasonable than not that the assailant was an intruder who entered the building through a negligently maintained entrance. Interestingly, the Court of Appeals also held that a plaintiff's burden to withstand summary judgment in such cases is even lower. The Court stated that in order to defeat summary judgment, "a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries."

The Court's opinion actually dealt with two cases. In both cases, the Court of Appeals reinstated actions which had been dismissed by the Appellate Division. In ***Burgos v. Aqueduct Realty***, the Court held that the following circumstantial proof sufficed to withstand the defendant's motion for summary judgment: The plaintiff submitted an affidavit where she stated that she was beaten and robbed in her apartment by two men who were unmasked and who made no effort to conceal their identities. The plaintiff lived in a building which contained 25 apartment units, and the plaintiff stated that she knew all of the tenants. The plaintiff also pointed to three robberies in the building during the prior three years, and she also stated that despite repeated complaints to the building management, none of the building's entrances had functioning locks.

In ***Gomez v. New York City Housing Authority***, the plaintiff offered no direct proof that the assailant was an intruder, but did offer the following circumstantial evidence which the Court of Appeals held to be sufficient: The plaintiff was raped and sodomized in her apartment building by an assailant who gained entry to the building through the broken rear entrance door. The assailant entered an elevator with the plaintiff and several other people, but he did not push a button to select the floor. The assailant made no effort to conceal his identity. When the plaintiff exited the elevator, the assailant followed and assaulted her. The plaintiff, who testified that she knew most of the building residents by sight, stated that she did not recognize the assailant. In addition, two other witnesses, a building resident and a frequent building visitor, testified that they did not recognize the perpetrator.

On the same day that the Court of Appeals issued its opinion in ***Burgos***, the Court decided ***Price v. New York City Housing Authority***, ___ N.Y.2d ___, ___ N.Y.S.2d ___, 1998 WL 811539 (1998). In Price, the Court of Appeals affirmed a judgment based upon a jury verdict which found that the defendant was negligent, but that the negligence was not the proximate cause of the occurrence. In that case, the plaintiff was robbed and sexually assaulted in her apartment building. The front door of the building was not equipped with a lock. The perpetrator, Ronnie Matthews, was a serial rapist who was an intruder in the building. One of the main issues in the case was the propriety of permitting the testimony of the defendant's expert, who was a criminal behavior analyst. That expert concluded that, given Matthews' background as a serial rapist, he would not have been deterred by the security afforded by such devices as a front door lock and an intercom. The Court of Appeals held that, under the circumstances of this case, such testimony was properly permitted. However, the Court stated that the plaintiff opened the door to defendant's expert's testimony by presenting testimony by several experts of her own. The

Continued on page 20

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REPORT FROM THE COMMITTEE ON THE DEVELOPMENT OF THE LAW FROM DANY AND UPDATE ON THE LAW OF PREMISES SECURITY

Continued from page 19

plaintiff's experts testified regarding various characteristics of the perpetrator, such as impulsiveness, immaturity, insecurity, and a propensity to commit crimes of opportunity when presented with an unlocked door. The Court of Appeals stated that the testimony of the plaintiff's experts furnished the occasion for the above-described testimony of the defendant's expert, which was offered in rebuttal. We believe that ***Price*** will be of limited utility to defendants. A close reading of the Court's opinion in that case appears to indicate that defendants will not be able to present evidence in the form of criminal behavior analysis in cases of this nature unless the plaintiff opens the door with expert testimony regarding the propensities of the perpetrator.

As aforestated, ***Burgos v. Aqueduct Realty Corp.*** was a significant victory for plaintiffs. However, important defenses still exist in premises security cases. While ***Burgos*** considerably lessened plaintiff's burden of establishing proximate cause, the conduct of a plaintiff may serve to sever the causal connection between the lack of security and the plaintiff's damages. For example, in ***S.M.R.K., Inc. v. 25 West 42nd Street Company***, ___ A.D.2d ___, 673 N.Y.S.2d 119 (1st Dep't 1998), lv. denied, ___ N.Y.2d ___, ___ N.Y.S.2d ___ (December 17, 1998), the two individual plaintiffs were employees of a travel agency in a commercial office building. The plaintiffs were assaulted by an unidentified assailant. The Appellate Division, First Department, affirmed the grant of summary judgment to the defendant. One of the bases of the dismissal was that the plaintiffs were unable to show that the perpetrator was an intruder. However, the First Department also stated that the causal link between the defendant's alleged negligence and the assault was broken by the act of leaving the door to the entrance of their office unlocked in anticipation of a lunch delivery. While the Court of Appeals has held that the denial of a motion for permission to appeal has no precedential value, it is nevertheless noteworthy that in ***S.M.R.K.***, the Court of Appeals' denied the plaintiff's motion for permission to appeal after its decision in ***Burgos***.

In ***S.M.R.K.***, the Appellate Division relied upon its previous decision in ***Elie v. Kraus***, 218 A.D.2d 629, 631 N.Y.S.2d 16 (1st Dep't 1998), ***lv. denied***, 88 N.Y.2d 842, 644 N.Y.S.2d 683 (1996). In ***Elie***, the plaintiff was assaulted and shot in his apartment. The plaintiff alleged that the incident was caused by inadequate security. Prior to the occurrence, the plaintiff's wife left the apartment to buy milk. Thereafter, the plaintiff heard his bell ring, and without checking the peephole, he buzzed open the door which disengaged the lock to his apartment. The assault then ensued. The Appellate Division held that the plaintiff's act of buzzing open his front door without checking the peephole was the intervening cause of the occurrence.

Moreover, in ***Burgos***, the Court of Appeals reiterated the long-standing rule that "landlords have a 'common-law duty to take minimal precautions to protect tenants from foreseeable harm' including a third-party's foreseeable criminal conduct" citing ***Jacqueline S. v. City of New York***, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993) and Nallan v. ***Helmsley-Spear, Inc.***, 50 N.Y.2d 507, 429 N.Y.S.2d 606 (1980). Application of that rule can provide valuable defense in cases of this nature. In ***Jacqueline S.***, the Court stated as follows:

> Whether knowledge of criminal activities...can be sufficient to make injury to a person...foreseeable, must depend on the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question.

81 N.Y.2d at 295, 598 N.Y.S.2d at 163 (internal citations omitted).

Thus, the Court of Appeals has declared that, in cases of this nature, foreseeability is a necessary element of the plaintiff's claim, and foreseeability is lacking where there is no history of prior criminal activity which bears a sufficient relationship in time, place and nature to the incident in question.

Consequently, New York's Appellate Divisions have issued numerous decisions that expound upon those basic principles. In cases involving crimes inflicted upon persons, prior crimes involving property are not relevant. Recently, in ***Lind v. Suffolk County Water Authority***, ___ A.D.2d ___, 673 N.Y.S.2d 215 (2d Dep't 1998), ***lv. denied***, 92 N.Y.2d 810, 680 N.Y.S.2d 55 (1998), the Appellate Division held that the previous actions of trespassers who littered, spray-painted graffiti and overturned equipment, did not make it foreseeable that a crime would ensue that would likely endanger the safety of a person. Also, in ***Ianelli v. Powers***, 114 A.D.2d 157, 162, 498 N.Y.S.2d 377, 381 (2d Dep't 1986), ***lv. denied***, 68 N.Y.2d 604, 506 N.Y.S.2d 1027 (1986), the court held that two prior thefts of property were insufficient to give rise to the foreseeability of a murder at an office building. ***See*** also, ***Lauersdorf v. Supermarkets General Corp.***, 239 A.D.2d 319, 657 N.Y.S.2d 732 (2d Dep't 1997).

Furthermore, the prior criminal incidents must bear a clear relationship in character to the occurrence in question. Accordingly, in the recent case of ***Jarosz v. 3135 Johnson Tenant Owners Corp.***, ___ A.D.2d ___, 667

Continued on page 21

N.Y.S.2d 752 (1st Dep't 1998), the court held that numerous unrelated prior criminal acts did not establish foreseeability with respect to an attempted rape, robbery and assault. In so holding, the court stated the following:

> [T]he criminal activities shown here - telephone harassment, assault with a broom, and petit larceny, all involving acquaintances in the residential portion of defendant's building, car-related crimes that occurred on the street or in defendants' nearby outdoor parking lot, and robberies that occurred in the street, involving the same victim who was known to carry large sums of money - were so dissimilar in nature from the violent attack upon plaintiffs as to be insufficient, as a matter of law, to raise a triable factual issue as to foreseeability.
>
> ___ A.D.2d ___, 667 N.Y.S.2d at 763.

See, also, ***Polumbie v. Golub Corp.***, 226 A.D.2d 979, 640 N.Y.S.2d 700 (3d Dep't 1996).

In addition, the prior crimes must bear a sufficient temporal relationship to the incident in question. Thus, in ***Leyva v. Riverbay Corporation***, 206 A.D.2d 150, 620 N.Y.S.2d 333 (1st Dep't 1994), the Appellate Division reversed the lower court and dismissed the plaintiff's complaint, which was based on an incident where the plaintiff was shot during an attempted robbery on the defendant's premises (Co-Op City). The court found it significant that there were only eight isolated incidents of criminal activity in the two years preceding the occurrence, the most recent of which took place six months earlier. Id. 206 A.D.2d at 154, 620 N.Y.S.2d at 336.

Moreover, the ***Leyva*** court held that a landlord is not required to implement more than minimal security measures unless the plaintiff provides evidence of "recurring criminal activity." Id. 206 A.D.2d 150, 154, 620 N.Y.S.2d at 333, 336.

With respect to the evidence of the prior crimes, the plaintiff is required to present concrete proof. Vague and unsubstantiated claims of previous criminal activity are insufficient. ***Williams v. Citibank***, N.A., ___ A.D.2d ___, 677 N.Y.S.2d 318, 320 (1st Dep't 1998); ***Urena v. Hudson Guild***, 213 A.D.2d 312, 624 N.Y.S.2d 401 (1st Dep't 1995). Furthermore, to give rise to foreseeability, the prior crimes must have occurred on the defendant's property. Proof of prior criminal activity in the neighborhood surrounding the defendant's property is inadequate. ***Williams v. Citibank***, N.A., ___ A.D.2d ___, 677 N.Y.S.2d 318, 321 (1st Dep't 1998); ***Mendez v. 441 Ocean Avenue Associates***, 234 A.D.2d 524, 651 N.Y.S.2d 175 (2d Dep't 1996). Additionally, the Second Department held that in addition to submitting proof of previous criminal activity, it is incumbent upon plaintiff to show that the defendant was on notice of that activity. ***Davis v. Jo-Ern Realty Corp.***, 239 A.D.2d 458, 662 N.Y.S.2d 769 (2d Dep't 1997). In ***Davis***, while the plaintiff presented proof that there were prior burglaries in the building, there was no proof that the defendants, the owner and manager of the building, had notice of those previous crimes. Thus, the Appellate Division held that the action was properly dismissed.

As stated above, in ***Burgos v. Aqueduct Realty Corp.***, the Court of Appeals reiterated that "landlords have a 'common-law duty to take minimal precautions to protect tenants from foreseeable harm' including a third-party's foreseeable criminal conduct." The security measures taken by a defendant can be effective in aiding in the defense of an action of this nature. ***Jarosz v. 3135 Johnson Tenant Owners Corp.***, ___ A.D.2d ___, 667 N.Y.S.2d 752 (1st Dep't 1998) was discussed above on the issue of foreseeability. In that case, the plaintiff was the victim of an attempted rape, robbery and assault occurring in a parking garage adjoining a residential building. With respect to the security measures provided by the defendants, the Appellate Division stated as follows:

> The past experience plaintiffs rely on required no more than the "minimal security measures" (See, Miller v. State of New York, 62 N.Y.2d 506, 513, 478 N.Y.S.2d 829, 467 N.E.2d 493) that defendants did provide, namely, both pedestrian and automobile doors that were kept locked and required either a key or electronic "clicker" to open, and a flyer that was circulated to the garage tenants advising them to make sure both doors were kept shut.
>
> ___ A.D.2d ___, 667 N.Y.S.2d at 752.

See, also, ***Leyva v. Riverbay Corp.***, 206 A.D.2d 150, 154-155, 620 N.Y.S.2d 333, 337 (1st Dep't 1994).

Moreover, the Second Department has held that if the incident is caused by a defective or non- functioning security device, it is incumbent upon the plaintiff to present proof that the defendant had notice of the defect for a sufficient period of time to have it repaired. E***leby v. New York City Housing Authority***, 223 A.D.2d 665, 637 N.Y.S.2d 219 (2d Dep't 1996).

Additionally, other viable defenses exist in actions of this nature:

In Waters v. New York City Housing Authority, 69 N.Y.2d 225, 513 N.Y.S.2d 356 (1987), the Court of Appeals held that where neither the victim nor the criminal had any connection to the defendant's building, there was no liability. In that case, the infant plaintiff was walking on the street outside of the defendant's housing project when she was accosted and forced into a defendant's building through the front door that had been unsecured for a considerable period of time. There was evidence of prior crimes in the building involving outsiders. Once inside, the plaintiff was robbed and sodomized. The Court held that under the circumstances, the plaintiff was not within the zone of foreseeable harm.

There is no duty to protect persons not on the defendant's premises. In ***Rodriguez v. Oak Point Mgmt., Inc.***, 87 N.Y.2d 931, 640 N.Y.S.2d 868 (1986), ***rev'g***., 205 A.D.2d 224, 618 N.Y.S.2d 772 (1st Dep't 1994), the Court

Continued on page 22

REPORT FROM THE COMMITTEE ON THE DEVELOPMENT OF THE LAW FROM DANY AND UPDATE ON THE LAW OF PREMISES SECURITY

Continued from page 21

of Appeals reversed the Appellate Division, First Department and held that the landlord was not liable for a gunshot wound suffered by a visitor to the building 191 feet from the entrance to the premises, notwithstanding drug-related activity in and around the building. The Court held that at the point of the shooting, the plaintiff's relationship to the building was a mere fortuity, and his position was no different than that of a passerby. ***See, also, Muniz v. Flohern, Inc.***, 77 N.Y.2d 869, 568 N.Y.S.2d 725 (1991) (no liability to passerby injured by shotgun discharged by robber on defendant's premises).

The Second Department has held that a landlord has no duty to prevent crimes occurring in outdoor common areas of the premises. ***Daly v. City of New York***, 227 A.D.2d 432, 642 N.Y.S.2d 907 (2d Dep't 1996).

The Second Department has also held that an out-of-possession landlord who has not retained dominion or control over the premises is not liable for a criminal act occurring on the premises. ***Dalzell v. McDonald's Corp.***, 220 A.D.2d 638, 632 N.Y.S.2d 635 (2d Dep't 1995), ***lv. denied***, 88 N.Y.2d 815, 651 N.Y.S.2d 17 (1996).

In ***Siler v. 140 Montague Associates***, 228 A.D.2d 33, 652 N.Y.S.2d 315 (2d Dep't 1997), the Second Department held that, in circumstances where the criminal was apprehended (and therefore could have been sued by plaintiff), the landlord may seek an apportionment of liability against the non-party criminal pursuant to Article 16 of the CPLR. Thus, under that holding, if the jury assesses the landlord's liability at less than 50%, the plaintiff's non-pecuniary damages are reduced by the criminal's proportionate share of fault.

In ***Harris v. New York City Housing Authority***, 211 A.D.2d 616, 621 N.Y.S.2d 105 (2d Dep't 1998), the Second Department held that the fact that the plaintiff's decedent was the victim of a targeted murder by a long-time enemy severed any causal connection between the defendant's negligence and the injuries.

In recent years, the courts have not been receptive to negligent security claims based upon inadequate lighting. ***Rodriguez v. New York City Housing Authority***, 87 N.Y.2d 887, 639 N.Y.S.2d 1008 (1995), ***rev'g.***, 211 A.D.2d 328, 628 N.Y.S.2d 82 (1st Dep't 1995); ***Ascher v. Garafolo Electric Co.***, 113 A.D.2d 728, 493 N.Y.S.2d 196 (2d Dep't 1985), ***aff'd***, 67 N.Y.S.2d 637, 499 N.Y.S.2d 681 (1986). But ***see, Loeser v. Nathan Hale Gardens, Inc.***, 73 A.D.2d 187, 425 N.Y.S.2d 104 (1st Dep't 1980).

Also, it should be noted that generally, a landlord does not have a duty to protect a tenant from an attack by another tenant unless the landlord had the right and the opportunity to evict the wrongdoing tenant for other acts of misconduct prior to the incident in question. Gill v. New York City Housing Authority, 130 A.D.2d 256, 519 N.Y.S.2d 364 (1st Dep't 1987).

Finally, security guard companies are generally insulated from liability in cases of this nature. Gonzalez v. National Corporation for Housing Partnerships, ___ A.D.2d ___, 679 N.Y.S.2d 395 (1st Dep't 1998). Exceptions to that general rule include when the contract between the security company and the landlord expresses a clear intent on the part of the security company to protect the plaintiff from the criminal acts of third parties. Another exception to the general rule arises where, by their conduct, security guards have assumed a duty to the injured plaintiff.

While the foregoing discussion is not meant to provide a comprehensive list of defenses in premises security cases, the committee hopes that this article will be of some benefit in defending cases of this nature.

NEGLIGENT SECURITY LIABILITY: Tired Hinges on the Door to Liability Give Way[1]

Continued from page 18

the face of litigating negligent security cases. Summary judgment will no longer be the landlord's trump card and liability may become the norm. **LANDLORD BEWARE!**

One thing is for sure, the best way to avoid a lawsuit for negligence is to fix the locks and make sure they stay that way. The prevention of lawsuits for negligent security is a lot easier than defending them.

FOOTNOTES

[1] *Leonard A. Robusto* - Member of the Firm of Tutoki & Goldstick Esqs.; *David Y. Wolnerman - Law Intern at the Firm of Tutoki & Goldstick, Esqs.*

[2] 50 N.Y. 2d 507, NYS 2d 606, 407 NE 2d (1980)

[3] *Id.* at 520

[4] 81 N.Y. 2d 288 598 NYS 2d 160, 614 NE 2d 723 (1993)

[5] *ID. At 295. The plaintiff lived in a building which was part of a 22 building complex. The affidavits offered on a motion for summary judgment were to the effect that none of the crimes reported in this complex had taken place in plaintiff's building.*

[6] Ragona v. Hamilton Hall Realty 674 NYS 2d 113 (2nd

Continued on page 28

THE RETROACTIVE AND PROSPECTIVE APPLICATION OF THE 1996 THREE YEAR STATUTE OF LIMITATIONS IN NON-MEDICAL MALPRACTICE CASES IN NEW YORK STATE

by Kevin G. Faley

Andrea M. Alonso

The New York State Legislature amended CPLR Section 214(6) effective September 4, 1996 to repeal the rule enunciated by the Court of Appeals in ***Santulli v. Englert, Reilly & McHugh, P.C.***[1] that the statute of limitations to be applied in actions for professional malpractice (other than medical, dental or pediatric) is not solely the three-year negligence limitation, but can also be the expanded six year contract limitation.

In ***Santulli***, a claim involving legal malpractice, the Court of Appeals found that the choice of the applicable statute of limitations was properly related to the ***remedy*** rather than to the theory of liability.

Thus, "an action for failure to exercise due care in the performance of a contract insofar as it seeks recovery for damages to property or pecuniary interest recoverable in a contract action is governed by the six year contract statute of limitations [CPLR 213(1)]."[2]

Whereas the pre 1996 CPLR 214(6) simply provided that an action to recover damages for non-medical malpractice "must be commenced within three years," the new amendment, with ***Santulli*** clearly in mind, now provides that such an action must be commenced within three years "regardless of whether the underlying theory is based in contract or tort."[3]

As with most new statutes, two questions that are of immediate concern are whether or not the statute is retroactive and, if it is not, then how is the statute to be applied prospectively. This prospective application is especially important when a statute of limitations is shortened since there will be an issue of whether or not the application will result in an abrogation of a vested right of a party.

The question of retroactivity appears to have been answered with a resounding no; however, an equally important question is how the statute is to be applied to cases filed after September 4, 1996. Does the six year statute of limitations apply to cases which have accrued before the date the statute was enacted, but filed after or will the three year statute of limitations apply?

Or will the court fashion some sort of reasonable time frame in which to file a professional malpractice claim that was viable on September 3, 1996, but extinguished on September 4, 1996?

This article will address the retroactivity issue and then discuss those cases which have had to deal with professional malpractice claims filed after CPLR 214(6) was enacted and for which the application of the new three year statute of limitations would have immediately extinguished otherwise viable claims.

RETROACTIVITY

Not surprisingly, once the shortened statute of limitations was enacted defendants began to file motions to dismiss claiming that the newly enacted three year statute of limitations was retroactive and applied to claims filed ***prior*** to September 4, 1996 and which had been relying on the six year statute of limitations pronounced in ***Santulli***.

Obviously, what the defendants were attempting to do was to have a court dismiss a pending claim which essentially had become a vested right of the plaintiff. The dismissal of a claim which had been viable on September 3, 1996, but which was no longer valid on September 4, 1996 through an act of the Legislature would have constitutional and due process implications.

The defendants, apparently aware of these repercussions, argued that CPLR 214(6) did not ***change*** the statute of limitations but ***clarified*** that the period of limitations as intended by the Legislature was and always had been three years. The amendment merely reaffirmed the legislative intent that the statute of limitations was three years, the argument went, and that the ***Santulli*** decision never changed the Legislative intent that the statute of limitations was and always had been three years. In other words, pay no attention to ***Santulli*** and its progeny for the Courts were mistaken in ever holding that the statute of limitations was six years.

It was not surprising that defense attorneys would make

Continued on page 24

THE RETROACTIVE AND PROSPECTIVE APPLICATION OF THE 1996 THREE YEAR STATUTE OF LIMITATIONS IN NON-MEDICAL MALPRACTICE CASES IN NEW YORK STATE

Continued from page 23

this argument as attorneys have always been extremely resourceful in representing clients. What is surprising is that one court actually credited this argument and held that the three year statute of limitations applied to cases filed before September 4, 1996.

In ***Russo v. Walker***,[4] Nassau County Supreme Court Judge Marvin Siegel held, in effect, that the statute as amended was not really being applied retroactively as the intent of the Legislature "was not to ***change*** the statute of limitations governing non-medical malpractice, but to ***clarify*** that the period of limitation as intended by the Legislature was and always had been three years."[5] (Emphasis supplied)

Judge Siegel noted that the Legislative comments accompanying the 1996 Bill referred to the courts having recently "expanded" the statute of limitations in non-medical malpractice cases to six years under a breach of contract theory and that this expansion "abrogated and circumvented the original legislative intent."[6]

The comment continued and stated that "it is essential that ... Section 214(6) of the CPLR be amended to reaffirm the legislative intent that where the underlying complaint is one which essentially claimed that there was a failure to utilize reasonable care or where acts or omissions of negligence are allegedly claimed, the statute of limitations shall ...be three years if the case comes within the purview of CPLR 214(6) ...regardless of whether the theory is based in tort or breach of contract."[7]

The court found that this language "was clearly intended by the Legislature not to shorten the statute of limitations but to clarify that the statute, as previously enacted, was intended only to provide for a three year period of limitations."[8]

Accordingly, while one could argue that Judge Siegel did not find that the statute was retroactive but rather that the statute had always been three years and hence the Court of Appeals was "wrong" in its ***Santulli*** decision, the consequence of his decision was to allow the amended three year statute of limitations to apply to a case filed before September 4, 1996 and thus to give it retroactive effect.

Although ***Russo*** was one of the first cases decided after the statute was enacted and is the first decision addressed in this article, its star fell fast and was without consequence. All of the other reported decisions, except one, have held that the defendant's arguments in Russo were not persuasive and that the statute could not be retroactive.[9] One case in particular, Ruffolo v. Garbarini & Scher, P.C.,[10] essentially shredded the defendant's arguments and the court's opinion in Russo.

In ***Ruffolo***, the legal malpractice action was commenced on March 29, 1996, approximately five months before the enactment of the shortened statute of limitations. The cause of action had accrued, at the latest, on February 5, 1991. Obviously, the action was timely under a six year statute of limitations, but untimely under a three year statute of limitations.

The question on appeal was "whether plaintiff's legal malpractice claim is rendered time barred by a recent amendment to CPLR 214(6) which applies the three year statute of limitations to such malpractice claims, irrespective of the underlying legal theory."[11]

Judge Sullivan, writing for a unanimous First Department, noted that while comment to the 1996 amendment stated that the expansion of the statute of limitations to six years "abrogates and circumvents the original legislative intent," the legislative history accompanying the original passage of CPLR 214(6) suggested otherwise.

Judge Sullivan quoted language which illustrated that when CPLR 214(6) was being drafted for enactment in 1975, it was suggested at that time that the three year limitation on nonmedical malpractice actions be extended to include contract claims. In fact, it was a recommendation that the three year statute be explicitly worded to refer to an action to recover damages for malpractice, "whether based on tort, contract or any other theory." This language was rejected in 1975 and, accordingly, Judge Sullivan questioned whether or not it was ever the Legislature's original intent to have a three year statute of limitations for these type of cases.

Additionally, the court stated that even if it was the Legislature's original intent to confine these cases to a three year statute of limitations, "the Court of Appeals, by repeatedly interpreting that statute so as not to apply to malpractice actions based on breach of contract, fixed its meaning as definitively as if it had been so amended by the Legislature." Accordingly, "at least from the date on which ***Santulli*** was decided until the effective date of the amendment of CPLR 214(6), the time for commencing an action for legal malpractice alleging breach of contract and seeking damages recoverable under a contract claim was six years, and any such action commenced within that period would not be untimely."[12]

Finally, the Court added, application of the amendment to render actions untimely which were timely when commenced would be impermissible and would impair vested rights and violate due process.

Continued on page 25

enactment of the amendment ...***Based upon the record before us, we find that the commencement of the action five and one-half months after September 4, 1996 was reasonable.***"[21] (Emphasis supplied).

The Fourth Department in ***Shirley v. Danziger***[22] decided that the institution of a legal malpractice claim within 20 days after the effective date of the amendment was a reasonable time but as in ***Coastal Broadway***, there is no detailed treatment of the reasoning behind the decision.

For a discussion of the issues involved in the prospective application of 214(6), it is necessary to examine three lower court decisions.

Davis v. Isaacson, Robustelli,[23] a lower court case decided on November 12, 1997, (two months before ***Coastal Broadway Associates***) deals with a claim that was commenced five months ***after*** the effective date of the statute. ***Davis***, another legal malpractice action, involved a claim which accrued in November of 1991, and, accordingly, under the ***Santulli*** case, the statute of limitations would have expired in November 1997. The claim was filed on January 29, 1997, approximately five months after the effective date of the statute, but within the ***Santulli*** time period.

Under the new three-year period, the action would be barred and the court had to determine whether or not to allow the malpractice claim to stand.

Judge Gans noted that this was a case of first impression and that "no court has determined on the merits the precise question of retroactivity presented in this case, where the action was commenced after enactment of the amendment, based on claims which accrued beforehand and became time barred immediately upon the effective date of the amended statute."[24]

The court held that the amendment "must be treated as ***technically retroactive*** in this situation" but decided that "under the facts of this case, overriding constitutional prohibitions controlled the ultimate outcome."[25] (Emphasis supplied)

Judge Gans then noted that both the United States Supreme Court and the New York Court of Appeals "have long recognized the Legislature's power to create a new or curtail an existing statute of limitations intended as a retrospective law ... That power is restricted only to the extent that it be exercised within ... constitutional parameters."[26]

Under these situations, the court continued, it is essential that such statutes allow a "reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the Legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice."[27]

The lower court stated that while it was up to the Legislature to determine what a "reasonable time" would be, that the Legislature, in this case, abrogated this responsibility and it was up to the court to determine what a reasonable time would be.

The court found that in a case "such as this one, where in shortening the statute of limitations, the Legislature affords plaintiff no time to prosecute his claim, and no time whatever remains for him to sue under the shortened statute, as a matter of law plaintiff is deprived of a reasonable time to bring suit, which violates the constitutional provision that no person shall be deprived of property without due process of law."[28]

The court not only found that five months was a "reasonable time" to bring the suit, but went further and stated that plaintiff's action is "***subject to the six year statute of limitations previously enforced and untimely***."[29] (Emphasis supplied.)

Accordingly, the ***Davis*** Court not only found that five months was a reasonable time in which to bring a lawsuit that was viable prior to the enactment of the statute, but further opined that the claim was governed by the six year statute of limitations; in effect, there was no prospective application of 214(6). Although that precise question was not before the Court, this reasoning would mean that the plaintiffs would have been able to bring suit until November 1997, thirteen months after the statute had been amended.

Is then a thirteen-month period a "reasonable time" to bring a claim after a shortened statute of limitations has been enacted? Not according to a later lower court case of ***Kelly v. Cesarano, Hague & Kahn, P.C.*** That lower court case was decided by Judge David Goldstein on July 24, 1998 and came to the exact opposite decision of the court in ***Davis***.

In ***Kelly***, Judge Goldstein noted that the plaintiff's claims accrued on April 14, 1994 and were viable as of September 4, 1996. Accordingly, the plaintiff had until April 14, 1997 under the three year statute of limitations. However, suit was not filed until October 29, 1997, thirteen months after the new statute was passed.

The court noted that the amendment did not have retroactive application to cases filed before September 4, 1996, but that it would apply in "someway" to cases filed after September 4, 1996.

The court held that "in this case, it is clear that had plaintiff instituted suit on or before April 14, 1997, 7 months after the amendment and within three years after the accrual of the claim, the action would have been timely. Here, however, plaintiff waited until October 29, 1997, more than thirteen months after the effective date of the amendment to CPLR 214(6) and more than six months after the expiration of the three year statute of limitations ... To institute suit some thirteen months after September 4, 1996 ...was unreasonable in terms of time."[30]

Continued on page 26

THE RETROACTIVE AND PROSPECTIVE APPLICATION OF THE 1996 THREE YEAR STATUTE OF LIMITATIONS IN NON-MEDICAL MALPRACTICE CASES IN NEW YORK STATE

Continued from page 25

The sound reasoning of the First Department in ***Ruffolo***, a First Department case, would seem to indicate that ***Russo***, a lower court case in the Second Department, will be overturned on appeal.

The only case that has actually held that the Legislature intended that the statute was meant to be retroactive is ***Estate of Joseph Re v. Kornstein Veisz & Wexler***,[13] however, the statute was not applied retroactively as the court concluded that such an application would be unconstitutional.

In ***Estate of Joseph Re***, Judge Sotomayor found that although "New York's Legislature intended for the amended CPLR 214(6) to apply retroactively, the court finds that such an application would offend the basic notions of due process under New York law."[14]

Judge Sotomayor stated that generally, statutes are applied prospectively, unless there is a clear legislative indication to the contrary. If there is a clear legislative indication to the contrary that it is intended that the statute be retroactive, then the statutes are to be given retroactive construction "to the extent that they do not impair vested rights or create new rights."[15]

Judge Sotomayor quoted the legislative comment and noted that the Legislature "adopted unusually blunt language expressing dissatisfaction with the approach taken by the Court of Appeals in ***Santulli***."[16]

Judge Sotomayor found that "the Legislature did not conceive of its amendment as a new provision, but as a rebuke of the Court of Appeals, designed to reaffirm that the limitations period applicable in malpractice actions is, and has properly been, three years."[17]

Judge Sotomayor added that by "assailing ***Santulli*** as a misguided aberration, the Legislature announced its intent to end the continued application of that decision — effective immediately — in all cases."[18]

In rejecting the retroactive application of CPLR 214(6), Judge Sotomayor found that in order to pass constitutional muster, legislation retroactively shortening the period of limitations must provide a party with a reasonable time to commence an action. If the statute of limitations deprives a party of a reasonable time within which suit may be brought, it then violates the constitutional provision that no person shall be deprived of property without due process of law.

Further, the decision provides that "the validity of a statute of limitations which purports to bar a right which existed before the statute becomes effective depends upon whether the statute allows a reasonable time after it became a law within which a party may enforce this right."[19]

Judge Sotomayor found that retroactive application of the amended provision would go further than merely depriving the plaintiffs of a reasonable time in which to file their action and would extinguish a viable claim. Judge Sotomayor stated that there is a well defined body of law which counsels against retroactivity in this case as it would offend long held notions of equity and fairness; it would affront Federal due process; and it would result in the loss of a vested right. Accordingly, while Judge Sotomayor found that it was certainly the Legislature's "intent" to have CPLR 214(6) be retroactive and apply to cases filed prior to its enactment, Judge Sotomayor ruled that this intent could not be enforced.

It would certainly appear that, barring an extremely novel interpretation of the statute by the Court of Appeals, that the shortened statute of limitations will not be given retroactive effect.

CLAIMS FILED AFTER SEPTEMBER 4, 1996

Since the courts have essentially put to rest the question of whether the statute will be applied retroactively to cases pending as of the effective date of the statute, the remaining question is what happens to claims filed after September 4, 1996, but which had accrued before that date.

Specifically, what happens to cases where the professional malpractice occurred more than three years but less than six years before September 4, 1996.

If the statute had not been amended, the six year statute would have applied to these cases. However, once the statute was amended, these cases became immediately time barred.

The courts that have dealt with this issue all agree that the immediate extinguishment of these claims is unconstitutional and that a party should be afforded "some reasonable opportunity and period following enactment within which to pursue a claim."20 The question then becomes what is a "reasonable time" to commence an action which would have been timely before the amendment of the statute of limitations.

The initial Appellate Division to decide this issue was the First Department in ***Coastal Broadway Associates v. Rafael***.

Unfortunately, the First Department merely issued a memorandum decision which did not discuss the facts of the case but simply held that "due process requires that plaintiff be given a reasonable period of time after September 4, 1996 to pursue a claim therefore existing but immediately barred upon the immediately effective

Continued on page 27

Kelly appears to hold that while the shortened statute of limitations will not apply to cases which were filed before the effective date of the statute, claims accruing before but filed ***after*** the effective date of the statute, will not get the total benefit of the ***Santulli*** six year statute of limitations but must be filed within a "reasonable time." Thirteen months is not a reasonable time.

The same reasoning was applied by the Federal Court in ***Panegeon v. Alliance Navigation Lines, Inc.,***[31] a situation where the malpractice accrued as early as October 18, 1993, but, in any event, no later than December 31, 1993. However, plaintiffs filed their Complaint in March 1997, six months after the statute was enacted.

The court concluded that "the amended three year statute of limitations governing malpractice claims should apply to claims ***accruing*** prior to the 1996 amendment's effective date, but not filed until a reasonable time after its passage."[32]

The court found that the malpractice claims before it were subject to a three year statute of limitations and therefore the statute expired no later than December 31, 1996. As noted above, the claim was not filed until March 1997.

In a footnote the Court addressed whether or not the plaintiff filed the action within a reasonable time after the shortened statute. The court stated that it need not "address the issue of how to define the term reasonable time in this context because ...plaintiffs had at least forty-four days — and as many as one hundred eighteen days — in which to file timely their malpractice claim after the enactment of the 1996 amendment. Plaintiffs therefore cannot argue that they did not have a reasonable time in which to file their claims after the statute of limitations was amended."[33]

Finally, in the Federal Court case of ***Middle Market Financial Corporation v. D'Oranzio***," Judge Kram held that a legal malpractice action commenced 56 days after the statute was instituted timely.

Accordingly, what appears to be the trend is that for all claims filed after September 4, 1996, the three year statute of limitations will apply. However, the courts will consider how much time elapsed between the effective date of the statute and the filing of the summons and complaint in order to determine whether or not the plaintiff had a reasonable time to file the summons and complaint. Apparently, this will have to be done on a case by case basis as what constitutes a reasonable time is ***sui generis***.

The ***Panegeon*** case strictly construed the statute and what constitutes a reasonable time. ***Kelly*** refrained from defining what a reasonable time would be, but found that thirteen months was unreasonable. ***Coastal Broadway*** decided that five and one-half months was reasonable. Davies held that five months was reasonable, but, in dicta, can be interpreted to hold that the six year Santulli statute of limitations applies to claims accruing before the statute was amended. Shirley held that 20 days was reasonable and Middle Market found 56 days to also be appropriate.

As these cases have illustrated, courts may be divided as to what constitutes a reasonable time. Certainly, any claim which accrued before September 4, 1996 and filed as of the date of this article would probably be untimely. It also appears clear that such claims filed within six months after the new amendment would be timely, except, perhaps, in Federal Court. It is those cases that fall between these two boundaries which will be the subject of future litigation.

For plaintiffs, their strong suit is the Davies case which can be read as holding that the six year statute of limitations still applies to cases accruing before September 4, 1996.

To temper defense arguments that this will give plaintiffs more than three years to file a claim after September 4, 1996, plaintiffs should concede that statute of limitations should be the shorter of either six years from the date of accrual or three years from the effective date of the amendment.35

This will avoid another inequity, that is, a case which accrued on September 3, 1996 would be governed by a six year statute of limitations, while a case which accrued the next day would be subject to a three year limitation.

Defendants, on the other hand, should argue that the statute is effective immediately and applies to all cases filed after September 4, 1996 and that, at most, a reasonable period of time to commence a suit is up to six months.

While professionals such as accountants, architects, and engineers still do not enjoy the two and one-half year statute of limitations that physicians have, they have certainly closed the gap with CPLR 214(6)

FOOTNOTES

1. 78 N.Y.2d 700, 579 N.Y.S.2d 324, 586 N.E.2d 1014 (1992)
2. 78 N.Y.2d at 707, 579 N.Y.S.2d at 327, 586 N.E.2d at 1017. (high/low caps)
3. New York Civil Practice Law and Rules Section 241(6) (McKinney's 1997).
4. 171 Misc.2d 707, 655 N.Y.S.2d 313 (Sup. Ct., Nassau County, 1997).
5. 171 Misc.2d at 708, 655 N.Y.S.2d at 314.
6. 171 Misc.2d at 709, 655 N.Y.S.2d at 314.
7. 171 Misc.2d at 709, 655 N.Y.S.2d at 314.
8. 171 Misc.2d at 709, 655 N.Y.S.2d at 314.
9. ***White of Lake George, Inc. v. Bell***, 173 Misc 2d 423, 662 N.Y.S.2d 362 (Sup. Ct., Albany County 1997); ***Garcia v. Director***, N.Y.L.J., January 1, 1997, p. 26, col. 2 (Sup. Ct., N.Y. County); ***Federal Deposit Insurance Corp, v. Pelletreau & Pelletreau***, 965 F.Supp. 381 (E.D.N.Y. 1997); ***Keller v. Lee***, 1997 WL 218435 (S.D.N.Y. April 30, 1997); ***Mason Tenders District Council Pension Fund v. Messera***, 958 F.Supp. 869 (S.D.N.Y. 1997); ***Durtin v. Shea***, 957 F.Supp. 1360 (S.D.N.Y. 1997); ***Kent v. Brofman***, 1997 WL

Continued on page 28

THE RETROACTIVE AND PROSPECTIVE APPLICATION OF THE 1996 THREE YEAR STATUTE OF LIMITATIONS IN NON-MEDICAL MALPRACTICE CASES IN NEW YORK STATE

Continued from page 25

305254 (S.D.N.Y.); ***Romeo v. Schmidt***, 244 A.D.2d 861, 668 N.Y.S.2d 113 (4th Dept, 1997); ***Ruffolo v. Garbarini & Scher***, 239 A.D.2d 8, 668 N.Y.S.2d 169 (4th Dept. 1998); ***Dowd v. Law Plan Hyatt Legal Services***, ____ A.D.12d ____, 671 N.Y.S.2d 344 (2d Dept. 1998); ***Martin v. Canale***, ____ A.D.2d ___ 676 N.Y.S.2d 349 (3rd Dept. 1998); ***Vogel v. Lymann***, 246 A.D.2d 422, 668 N.Y.S.2d 162 (1st Dept. 1998); ***Amateur Hockey Association of the U.S. v. Parson***, 244 A.D.2d 222, 664 N.Y.S.2d 919 (1st Dept. 1997).

One Court found that it was the Legislature's intent for the statute to be retroactive. (***Estate of Joseph Re v. Kornstein Veisz & Wexler***, 958 F.Supp 907 (S.D. N.Y. 1997) but refused to give it retroactive affect.

10. ***Ruffolo, supra***. Note 9.
11. 239 A.D.2d at 9, 668 N.Y.S.2d at 169.
12. 239 A.D.2d at 12, 668 N.Y.S.2d at 171.
13. 958 F.Supp 907 (S.D.N.Y. 1997)
14. 958 F.Supp at 918
15. 958 F.Supp at 918.
16. 958 F.Supp at 917.
17. 958 F.Supp at 917.
18. 958 F.Supp at 918.
19. 958 F.Supp at 918.
20. See ***Panegeon v. Alliance Navigation Line, Inc.***, 1997 WL 473385 (S.D.N.Y.); ***Coastal Broadway Associates v. Raphael***, ____ A.D. 2d ___, 668 N.Y.S.2d 586 (1st Dept. 1998); ***Davis v. Isaacson Robustelli, Fox, Fine, Greco & Fogelgamren***, P.C., 175 Misc.2d 40, 667, N.Y.S.2d 608 (Sup. Ct., N.Y. County 1997); ***Kelly v. Cesarano, Hague & Khan***, P.C., 678 N.Y.S.2d 708 (Sup. Ct., N.Y. County 1998); ***Shirley v. Danziger***, 676 N.Y.S.2d 369 (4th Dept. 1998); ***Middle Market Financial Corporation v. D'Oranzio***, 1998 WL 397867 (S.D.N.Y. 1998).
21. ***Coastal, supra***, note 20 246 A.D.2d at 445, 668 N.Y.S.2d at 586.
22. ***Shirley v. Danziger, supra.***
23. ***Davis, supra***, note 20.
24. 175 Misc.2d at 43-44, 667 N.Y.S.2d at 610.
25. 175 Misc.2d at 44, 667 N.Y.S.2d at 610.
26. 175 Misc.2d at 45, 667 N.Y.S.2d at 612.
27. 175 Misc.2d at 45, 667 N.Y.S.2d at 612.
28. 175 Misc.2d at 46, 667 N.Y.S.2d at 613.
29. 175 Misc.2d at 46, 667 N.Y.S.2d at 613.
30. ***Kelly, supra***, 678 N.Y.S.2d at 709.
31. ***Panegeon, supra***, note 20 1997 WL 473385, at 3.
32. ***Id***. at 3.
33. ***Id***. at 4.
34. ***Middle Market Financial Corporation, supra.***
35. This "solution" has been suggested by Professor Vincent C. Alexander in The Supplementary Practice Commentaries for 1997. CPLR 214(a) McKinney's, Book 7B Cumulative Pocket Part, p.p.p. 133-4.

NEGLIGENT SECURITY LIABILITY: Tired Hinges on the Door to Liability Give Way[1]

Continued from page 22

Dept. 1998) Cayo v. Supermarkets General, 247 AD2d 421, 668 N.Y.S. 2d 703 (2nd Dept. 1998).

[7] Todorovich v. Columbia University, 245 AD 2d 45, 665 N.Y.S. 2d 77 (1st Dept. 1997).

[8] *Cofield v. NYCHA*, 249 AD 2d 498, 672 N.Y.S. 2d 136 (2nd Dept. 1998).

[9] *Kahane v. Marriot Hotel Corp.*, 249 AD 2d 164, 672 N.Y.S. 2d 55; *King v. Resource Property, 245 AD 2d 10, 665 N.Y.S. 2d 637 (1st Dept. 1997).*

[10] *Ragona supra*

[11] *Gomez v. NYCHA, 672 N.Y.S. 2d 676 (1st Dept. 1998) rev'd in Burgos v. Aquaduct Realty 1998 WL 811464. The Appellate Division decision makes for interesting reading. It is an example of the harshness of the Pre-Burgos rule.*

[12] *Miller v. State of New York, 62 N.Y.2d 506, 478 NYS 2d 829, 467 NE 2d 493 (1984)*

[13] *Johnson v. New York Health and Hospitals Corporation, 676 N.Y.S. 2d 38 (1st Dept. 1998). This lengthy case goes into intricate detail of the security measures taken at Bellevue Hospital, a large N.Y. City institution connected by a Tunnel to a homeless shelter.*

[14] *Greenberg v. Gelfand, 1988 N.Y. App. Div. Lexis 7379 (1st Dept. 1998)*

[15] *Miller v. Supra, 62 N.Y.2d 506 and Weiner v. Metropolitan Transportation Authority, 55 N.Y. 2d 175, 448 NYS 2d 141, 433 NE 2d 141, 433 NE 2d 124 (1982)*

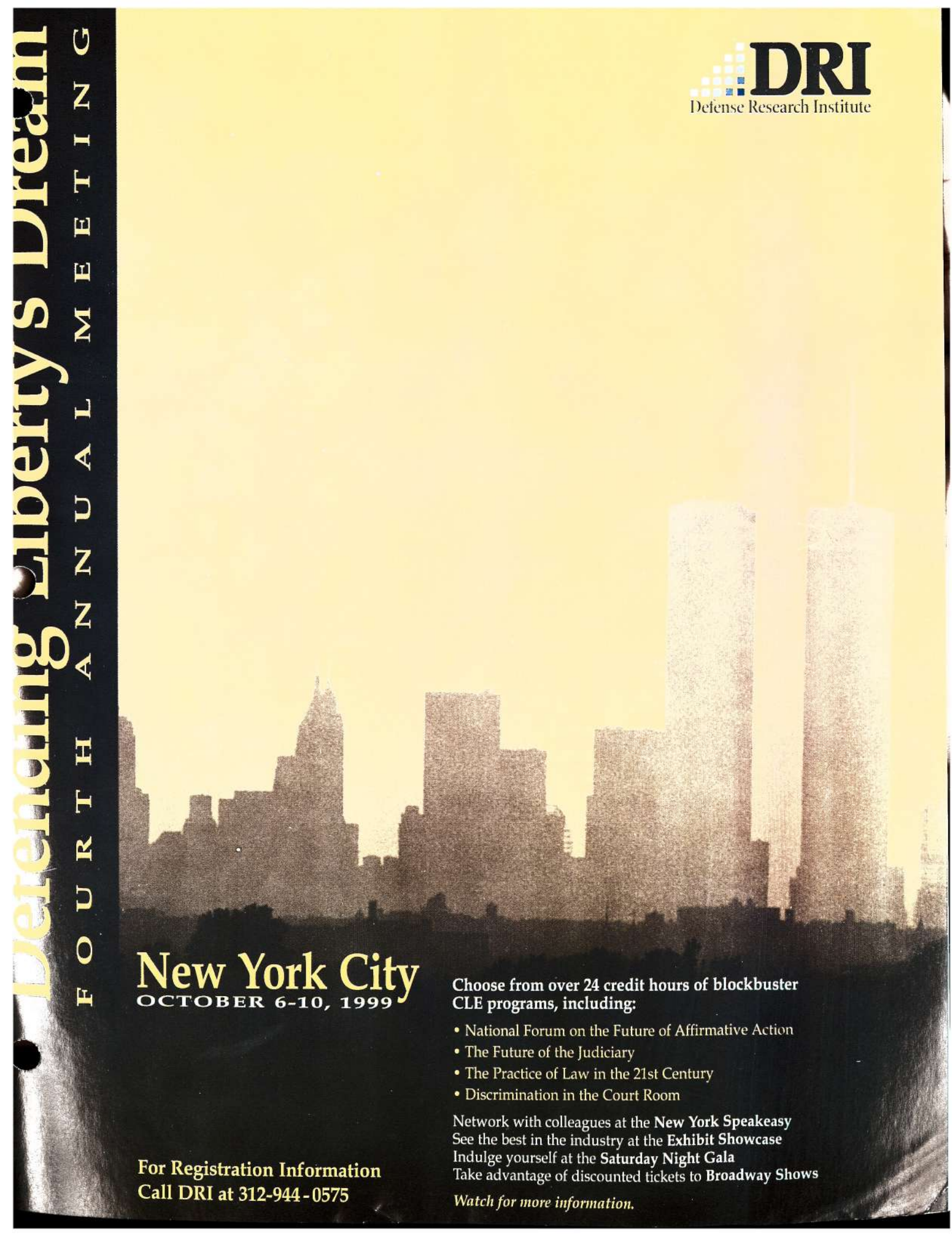
[16] *Pitchon v. NYC 243 AD 2d 548, 664 N.Y.S.2d 559, (2nd Dept. 1997)*

[17] *Bennett v. Twin Parks NE Houses Inc., 247 AD 2d 213, 668 N.Y.S. 2d 201 (1st Dept. 1998)*

[18] *Cortes v. NYCHA, 248 AD 2d 191, 669 N.Y.S.2d 582 (1st Dept. 1998); Levine v. Fifth, 242 AD 2d 564, 662 N.Y.S. 2d 95, (2nd Dept. 1997); Borrero v. NYCHA, 236 AD 2d 262, 653 N.Y.S.2d 581 (1st Dept. 1997)*

[19] *Burgos was a consolidated appeal. Thus, Norma Burgos survived a motion for summary judgment by the defendant; Marisela Gomez, whose verdict against the New York City Housing Authority was overturned by the Court, had her jury verdict reinstated.*

[20] *Nevertheless, the history leading up to Burgos, the "balanced" approach of its holding, and the wording of the standard "more likely than no—all point toward a somewhat tougher standard of proof against a plaintiff when faced with a defendant's motion for summary judgment. The process is already commenced see Manning v. City of New York (S/NY QDS: 22700693) and Tully v. Sylvan Lawrence (USSD QDS, 2760430).*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