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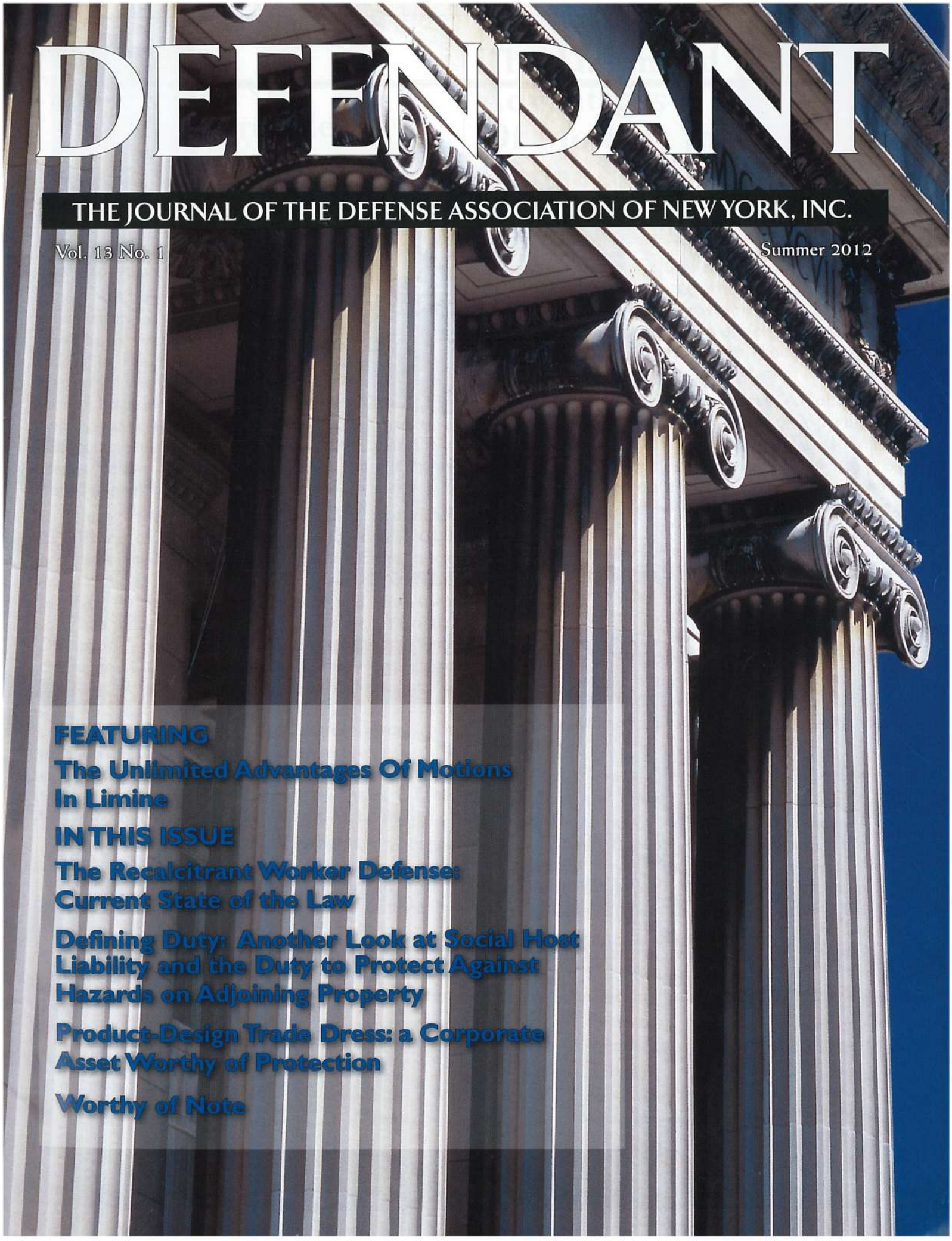

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President's Column

LAWTON W. SQUIRES *

Dear Colleagues, Friends and Supporters:

My tenure as President of the Defense Association of New York has come to an end. I have been proud to serve the Association and follow in the footsteps of and work with many attorneys who assisted me in making my transition to civil litigation from criminal trial practice almost twenty-years ago. I must also thank my partners and colleagues at Herzfeld & Rubin, P.C. for their assistance and support since I joined the Executive Board approximately seven years ago.

During the last year DANY has continued its history of presenting timely and topical CLE programs including: "Advanced Medicare Compliance for Liability Litigators," (which was presented by Paul Belsit of Crowe Paredis and our own Jonathan Judd, Esq.); "The Timing of Expert Witness Disclosure", (which was presented by my law school classmate, Claire Rush, Esq. and the Hon. Eileen Spodek); "Recent Developments and Decisions on the N.Y.S. Labor Law Section 240(1)" (by Jonathan Uejio, Esq. and Michael Blumenfeld, Esq.); and from our new Medical Malpractice Committee: "Anatomy of a Medical Record," (by Executive Board Members Walter Williamson, M.D., Esq. and Patrick J. Brea, Esq. and neuroradiologist, Dr. Leslie St. Louis).

In an effort to attract and encourage younger attorneys to participate in DANY, we have developed a very active and energized Young Lawyers Committee, which has been chaired by Heather Wiltshire-Clement, Esq. and made up of Christopher Hart, Esq., Vincent Pozzuto, Esq., Theresa Klaum, Esq., Dawn DeSimone, Esq. and Glenn Kaminska, Esq. The committee ran two

Continued on page 20

* *Lawton W. Squires is a member of the firm, Herzfeld & Rubin, P.C. He handles complex litigation matters from inception through trial to verdict in the State and Federal Courts. His practice encompasses products liability, labor law, construction accidents, general liability, attorney and judicial disciplinary proceedings, professional malpractice and motor vehicle matters. Mr. Squires also serves as excess and monitoring counsel for numerous clients and several major insurance carriers.*

The Unlimited Advantages Of Motions In Limine

JOHN J. MCDONOUGH, ESQ.*

One of the most critical and versatile evidentiary weapons in the trial attorney's arsenal is not covered by any specific provision in the New York Civil Practice Law and Rules or, for that matter, in either the Federal Rules of Civil Procedure or the Federal Rules of Evidence—the Motion in Limine.

Motions in limine are designed to obtain an advance ruling on the admissibility of a particular piece of potential evidence or a line of questioning. A trial court's authority to make rulings on motions in limine is based on the court's inherent power to admit or exclude evidence. *See People v. Whiting*, 5 Misc.3d 802, 781 N.Y.S.2d 728 (Crim. Ct. Qns. Cty. 2004), *citing People v. Michael M.*, 162 Misc. 2nd 803, 618 N.Y.S.2d 171 (Sup. Ct. Kings County 1994). You can make a motion in limine orally or in writing. *Wilkinson v. British Airways*, 292 A.2d 263, 740 N.Y.S.2d 294 (1st Dep't 2002). However, should you wish to appeal the ruling on your motion, a topic dealt with in more detail below, you will have to comply with the requirements of CPLR § 5512(a) regarding "appealable papers," which reads as follows:

> **§ 5512. Appealable paper; entry of order made out of court.**
>
> Appealable paper. An initial appeal shall be taken from the judgment or order of the court of original instance and an appeal seeking review of an appellate determination shall be taken from the order entered in the office of the clerk of the court whose order is right to be reviewed. If a timely appeal is taken from a judgment or order other than specified in the last sentence and no

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* *John J. McDonough is a partner of the International Firm of Cozen O'Connor where he is the Vice Chairman of the Firm's Litigation Department. He is the Editor of The Defendant and the past president of the Defense Association of New York and a member of the Board of the Defense Research Institute.*

The Unlimited Advantages Of Motions In Limine

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prejudice results therefrom and the proper paper is furnished to the court to which the appeal is taken, the appeal shall be deemed taken from the proper judgment to order.

To lay the foundation to satisfy the above requirements in the event of an appeal, it is strongly recommended that if you must make an oral motion in limine that you request a stenographer be present, whether you are making the motion in the courtroom, in chambers or someplace else. If you make the motion in writing, have the motion, and any supporting documents, marked as a court exhibit and entered into the record.

While many trial lawyers are familiar with the defensive use of a motion in limine, *e.g.* precluding or redacting portions of a hospital record or police report (*Griggs v. Children's Hospital of Buffalo, Inc.*, 193 A.D. 2d 1060, 599 N.Y.S.2d 197 (4th Dep't 1993), many are not aware of the offensive use of a motion in limine. This use of the motion in limine can be far more strategic and beneficial to the trial attorney. Such a motion can be utilized to obtain a ruling in advance of jury selection, and, of course openings, as to the affirmative use of various types of proposed evidence. Thus, such a motion can be used to obtain advance rulings on proposed scientific evidence under the *Frye* standard; seek authorization to use real or demonstrative evidence (*DiSanto v. County of Westchester,* 320 A.D.2d 628, 619 N.Y.S.2d 852 (3rd Dep't 1994)); or attempt to invoke an exception to the hearsay rule. *See Griggs, supra.*

The advantages of seeking a pre-trial resolution of evidentiary matters are several. Getting the evidentiary rulings out of the way before the jury is selected streamlines the trial and avoids the inevitable march back and forth to the jury room with the accompanying waiting and wondering by the jury. The last thing any good defense trial attorney wants is an impatient jury whose attention is non-existent by the time the defense case is presented. A successful defensive motion in limine will exclude highly prejudicial material from being mentioned or exhibited during jury selection, opening statements, or at other times during the trial. Motions in limine can be utilized to obtain a more thoughtful and informed ruling on proposed evidence as the time pressures accompanying oral objections during trial are avoided. A judge is likely to look favorably on a well-argued, well-briefed motion in limine. A trial attorney may propound an offensive motion in limine for the purpose of discussing his or her adversaries' trial themes, and make appropriate adjustments in their presentations, particularly opening statements. This can avoid handing the plaintiff's attorney the advantage of being able to sum up on a deficiency or gap created by the defense attorney by overstating her or his case in openings. The "losing" counsel on a defensive motion in limine may want to defuse or lessen the impact of material allowed into evidence by addressing the damaging evidence early, during jury selection or openings.

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The Recalcitrant Worker Defense: Current State of the Law

BETH WALKER *

Introduction

New York Labor Law §240(1) states, in pertinent part:

> All contractors and owners and their agents...in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish, erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to the person employed.

In order to prevail under a §240(1) claim, a plaintiff need only prove that the statute was violated and that the alleged violation was a proximate cause of the injuries sustained.[1] Once the statutory requirements under §240(1) are met, liability is supposed to be strict and non-delegable: an employee's own negligence cannot be used to diminish the responsibility of the owner or contractor.[2] There are however, several exceptions, one of which includes the "recalcitrant worker defense." This article will focus on the evolution of this defense, starting from its origins and tracing through its development both before and after the *Cahill* decision, ending with a discussion of its current status today, and most importantly addressing whether or not it has become a sub-defense of the "sole proximate cause" theory.

Origins of the Recalcitrant Worker Defense

The "recalcitrant worker defense" originated in a case called *Smith v. Hooker Chems. & Plastics Corp.*, 89 AD2d 361 (4th Dept. 1982). In *Smith*, the plaintiff fell while repairing a roof. His fall would have been prevented had he re-erected the safety equipment that had been put away the night before.[3] The 4th Department concluded that in enacting §240(1), the Legislature intended to protect workers from a failure by owners or contractors to provide adequate safety equipment, but did not intend for this statutory protection to extend to workers who already have safety equipment available, but refuse to use it.[4] Accordingly, defendants under § 240(1) have no absolute duty to supervise workers and a worker who did not use available safety devices was not protected under 240(1).

Limitations of the Recalcitrant Worker Defense following Smith v. Hooker

In the years following the *Smith* decision, numerous court decisions so severely limited the recalcitrant worker defense, that *Smith* was all but officially overruled. In *Stolt v. Gen. Foods Corp.*, the plaintiff fell from a ladder he had been instructed not to climb. The Court of Appeals held that in order for the recalcitrant workers' defense to apply, the defendant must prove that the worker refused to use the available safety devices. An instruction by the employer or owner to avoid using unsafe equipment or engaging in unsafe practices was not a safety device.[5]

A similar line of cases soon followed including *Hagins v. State of New York*,[6] *Gordon v. Eastern Railway Supply*,[7] *Lightfoot v. State of New York*,[8] and *Jastrezebski v. North Shore School District*.[9]

For many years following *Smith*, the recalcitrant worker defense would be invoked only to be rejected, and was confined to a small handful of cases where the plaintiff disobeyed an immediate order to use available safety equipment. This restrictive trend continued on until the revival of 240(1) defenses in the *Cahill* and *Blake* cases.

Blake and Cahill: The Recalcitrant Worker & Sole Proximate Cause Defenses

A. Blake

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The Recalcitrant Worker Defense: Current State of the Law

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In 2003, the sole proximate cause defense was solidified by the Court of Appeals in *Blake v. Neighborhood Hous. Servs. of N.Y.C., Inc.*[10] In *Blake*, the plaintiff had set up a ladder which he owned and used frequently. As he was scraping rust from a window, the upper portion of the ladder retracted and he injured himself. He testified that the ladder was in good condition, but that he was unsure if he had locked the extension clips in place. The Court affirmed the defendant's trial verdict, writing: "Even when a worker is not 'recalcitrant,' we have held that there can be no liability under section 240(1) when there is no violation and the worker's actions (here his negligence) are the 'sole proximate cause' of the accident."

The *Blake* case is significant in that it established the "sole proximate cause" defense as broader than the recalcitrant worker defense, as it did not require a showing that overt instructions were given to the plaintiff. Because it did not require proof of disobedience either, it emerged as a stronger, more far reaching defense that could cover a wider variety of cases.

B. *Cahill*

A year after *Blake*, the Court of Appeals overturned a First Department ruling which granted plaintiff summary judgment on a violation of § 240(1) in *Cahill v. Triborough Bridge and Tunnel Authority*.[11]

Timothy Cahill was a construction worker involved in the repair of the Triborough Bridge. He fell 10 to 15 feet as he was climbing a "form" wall without a safety line. Several weeks before his accident, his supervisor caught him ascending the walls without a safety line, and informed him of the need to use one. Such safety lines were attached to the form wall that the plaintiff was climbing, however the plaintiff chose to use a "position hook" instead, which was not designed or intended for such use.[12]

The First Department said the recalcitrant worker defense was inapplicable because the defendant did not prove that the plaintiff had disobeyed an *"immediate instruction"* to use the safety line. The Court of Appeals rejected this rationale, eliminating the requirement for defendants to prove that the recalcitrant worker disobeyed instructions immediately prior to the accident.

The Court further linked the recalcitrant worker defense to the sole proximate cause defense: "As we held in *Blake*, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability. Cases upholding the so-called 'recalcitrant worker' defense exemplify this rule."[13] The Court then went even further explaining that the "controlling question is not whether the plaintiff was 'recalcitrant,' but whether a jury could have found that his own conduct rather than any violation of Labor Law §240(1) was the sole proximate cause of his accident."[14] Thus, the Court implied that in order to have the recalcitrant worker defense, the plaintiff's recalcitrance needed to be the sole proximate cause of the accident.

The Court of Appeals set forth four criteria for exonerating a defendant from liability under §240(1): (1) the plaintiff had adequate safety devices available; (2) he knew both that they were available and that he was expected to use them; (3) he chose for no good reason not to do so; and (4) had he not chosen not to use the available safety devices, he would not have been injured.[15]

Aftermath of Cahill and Blake

A. *Montgomery & Robinson: Expanding Cahill & Blake*

The Court of Appeals decisions in *Blake* and *Cahill* were viewed as strengthening 240(1) defense. For a few years, decisions seemed consistent with these results. Two more Court of Appeals cases echoed the *Cahill* ruling: *Montgomery v. Federal Express Corp.* and *Robinson v. East Medical Center, LP*.

In *Montgomery*, instead of using a ladder, the plaintiff stood on an inverted bucket in order climb up to a motor room elevated above the building's roof.[16] He then injured himself when he jumped down to the roof.[17] Although ladders were available elsewhere on the jobsite, the plaintiff chose to use a bucket since it was nearby and he would have had to walk farther in order get a ladder. The plaintiff was denied recovery under §240(1) because although there was no ladder in the immediate vicinity, there were ladders on the worksite. It did not matter whether the plaintiff knew the other ladders were available. The Court held that "readily available"

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Defining Duty: Another Look at Social Host Liability and the Duty to Protect Against Hazards on Adjoining Property

MATTHEW J. LARKEN *

The most fundamental requirement of fault-based liability is the existence of a duty owed by the offending party to the injured party. Defining the scope of duty has sometimes proven to be an elusive mission for the courts and has occasionally produced conflicting results. The familiar phrase coined by Judge Cardozo in *Palsgraf v. Long Island R.R.*[1] that "the risk reasonably to be perceived defines the duty to be obeyed"[2] was challenged by Judge Andrew's dissent, which argued that "every one owes to the world at large the duty from refraining from those acts that may unreasonably threaten the safety of others."[3] The debate continues in areas ranging from a driver's duty to safely guide pedestrians across the road[4] to the tort liability of contractors for failure to perform a contractual obligation.[5]

One area where the courts have been reluctant to expand the concept of duty is the obligation to control the conduct of others, with some notable exceptions. For example, an owner or possessor of a property which is open to the public has a duty to maintain the property in a reasonably safe condition for those using it, including the "obligation to maintain minimal security precautions to protect users of the premises against injury caused by the reasonably foreseeable criminal acts of a third person."[6] On the other hand, common law does not recognize dram shop liability for injuries caused by an intoxicated guest who has left the premises: "one who provided intoxicating liquor was not liable for injuries caused by the drinker, who was held solely responsible."[7]

Dram Shop, Duty and D'Amico

In response to the common law limitations, the Legislature enacted General Obligations Law § 11-101, commonly known as the Dram Shop Act, which creates a cause of action on behalf of any party injured by "any intoxicated person" against "any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication."[8] Twenty-five years ago, the Court of Appeals decided the landmark dram shop case, *D'Amico v. Christie*,[9] in which the plaintiffs sought to impose liability upon social hosts for automobile accidents caused by intoxicated guests after they left the defendants' premises. In analyzing the dram shop claim, the unanimous Court of Appeals held that a defendant must be engaged in the commercial sale of alcohol to be exposed to liability under the legislation.[10] Accordingly, New York drew a bright line rule against social host dram shop liability.

The second issue before the *D'Amico* court was whether common law negligence could be applied. The Court of Appeals rejected this argument conclusively, noting that prior decisions "have uniformly acknowledged that liability may be imposed only for injuries that occurred on defendant's property, or in an area under defendant's control, where defendant had the opportunity to supervise the intoxicated guest."[11] The Court explained that the duty to control intoxicated guests "emanated not from the provision of alcohol but from the obligation of a landowner to keep its premises free of known dangerous conditions, which may include intoxicated guests."[12] The *D'Amico* holding was clearly in line with the enduring principle that property owners have no duty to protect against hazards that exist off of their property.[13]

Social Host Liability Revived

Although *D'Amico* appeared to extinguish any claim of liability against a social host to one injured by an intoxicated guest who had left the premises, the Appellate Division, Fourth Department, re-opened the door, albeit briefly. *Martino v. Stolzman*[14]

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involved an automobile accident that occurred on a public roadway between an intoxicated party guest exiting a driveway and a passing motorist. The guest, Michael Stolzman, whose blood alcohol content that was later measured at nearly twice the legal limit, left a private party hosted at the home of Michael and Susan Oliver. As Stolzman backed his vehicle out of the Olivers' driveway into oncoming traffic, he was struck by plaintiff Jennifer Martino's vehicle, seriously injuring Martino and Stolzman's passenger, Judith Rost. Stolzman later pled guilty to driving while intoxicated.

Martino and Rost filed separate suits against Stolzman and the Olivers, which were joined in a consolidated appeal following summary judgment motions. The plaintiffs alleged that the Olivers were liable under the Dram Shop Act and under theories of common law negligence. Central to the negligence claim was evidence that the sightline from the Olivers' driveway was obstructed by vehicles parked along the roadway during the party. The plaintiffs argued that this dangerous condition, coupled with evidence of Stolzman's intoxication, imposed a duty on the Olivers to guide him as he left their home. The Olivers moved for summary judgment seeking dismissal of both theories of liability. The trial court denied the Olivers' motion in its entirety despite the clear mandate of *D'Amico* and its progeny.

In June 2010, a divided Fourth Department modified the lower court order by dismissing the dram shop claims due to the lack of a commercial sale of alcohol, ostensibly upholding New York's rule against social host liability. It was merely a pyrrhic victory for the Olivers, however, as the court found that there remained questions of fact regarding the common law negligence claims which required a trial. The court found that there was an unresolved issue of whether the Olivers knew that Stolzman was "in a dangerous state of intoxication" when he left the party, clearly implying a common law duty to prevent an intoxicated guest from leaving in such a state.[15] The majority continued that the Olivers knew of the obstructed sightlines on the road and, therefore, had "an opportunity to control or at least guide Stolzman as he exited their driveway."[16]

The two judge dissent contended that the Olivers were entitled to summary judgment because they had no duty to prevent Stolzman from leaving their house or assist him in pulling out of their driveway. Pointing to the majority's lack of precedential support and citing to *D'Amico*, the dissenters argued that "requiring social hosts to prevent intoxicated guests from leaving their property would inappropriately expand the concept of duty."[17] Moving to the issue of Stolzman's obstructed view, the dissent relied on several cases which hold that a property owner has no duty to guard against hazards on adjacent property. They reasoned that even though the Olivers "had the opportunity to guide Stolzman as he exited their driveway does not create a duty on the part of the Olivers to do so."[18]

Return of the D'Amico Rule

On February 16, 2012, the Court of Appeals issued a unanimous memorandum decision reversing the Appellate Division, Fourth Department.[19] The court acknowledged that landowners have a duty to control third parties on their property, but found that "the Olivers were no longer in a position to control Stolzman when he entered his vehicle and drove away."[20] The Court of Appeals also agreed with the Appellate Division dissenters that there was no duty to prevent intoxicated guests from leaving a private party.

The Court of Appeals also examined the issue of whether the Olivers owed a duty to assist or warn Stolzman as he drove onto the roadway. The court found that the cars parked on the public road did not create a dangerous condition on the Olivers' property. The court noted that the duty to warn of latent defects does not extend to conditions on adjoining property. The court further explained that the Olivers' potential awareness of the obstruction on the roadway did not impose any duty upon them to guide Stolzman or warn him as he drove away. The court's reasoning is consistent with long-standing precedent that there is "no duty to control the conduct of third persons

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Product-Design Trade Dress: a Corporate Asset Worthy of Protection

BRENDAN T. FITZPATRICK * AND GLENN A. KAMINSKA **

Of the many goals of business are the stimulation of investment, profit, and the protection of corporate assets. Included in these corporate assets are patents, copyrights, trademarks, and trade dress. And through the able use of these assets, including trade dress, businesses compete in the marketplace for economic prominence. But what exactly is trade dress and what can a company and its counsel do when another entity infringes upon the use of their trade dress?

The simple answer to the latter question is to turn to the Lanham Act. The Act's purpose is to protect consumers and manufacturers from deceptive representations of affiliation and design. According to § 45 of the Act, it protects "any word, name, symbol, or device or any combination thereof to identify and distinguish goods...from those manufactured or sold by others and to indicate the source of the goods..." 15 U.S.C. § 1127. Section 43(a) of the Act provides some protection for a producer from the use by any person of "any word, term, name, symbol, or device, or any combination thereof...which...is likely to cause confusion...as to the origin, sponsorship, or approval" of their goods. 15 U.S.C. § 1125(a).

As for the first question, trade dress originally included a product's packaging or its "dressing". Over time, and under certain circumstances, it also provided protection for a product's design, which culminated with the Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Samara Bros.*, Inc., 529 U.S. 205 (2000).

In order to prove trade-dress infringement, a plaintiff-manufacturer must first demonstrate that its trade dress is entitled to protection under the Act. To be entitled to protection, the Supreme Court ruled that a plaintiff's dress must be either inherently distinctive or be shown to have acquired distinctiveness through "secondary meaning". A mark will have acquired distinctiveness, even if it is not inherently distinctive, if it has developed secondary meaning, which occurs when, in the minds of the public, the primary significance of the mark is to identify the source of the product rather than the product itself.

The Supreme Court picked up the vexing issue of product-design trade dress in *Wal-Mart*. In *Wal-Mart*, Samara Brothers designed and manufactured a line of children's clothing. Wal-Mart contracted with a supplier to manufacture outfits based upon photographs of Samara's outfits. When Samara discovered this, it sued Wal-Mart for infringement of its unregistered trade dress under the Act. In rejecting Samara's claims, the Supreme Court ruled that in an action for infringement of an unregistered trade dress under the Act, a product's design is distinctive and warranting of protection only upon a showing of secondary meaning.

While *Wal-Mart* was a water-shed moment for trade-dress litigation involving product design, litigation in this complicated area of law continues. Following *Wal-Mart* we saw the courts step into line to ensure that only those product-design marks that have obtained secondary meaning are entitled to protection under the Lanham Act.

The Supreme Court found in *Wal-Mart* that the distinction between product design and product packaging, which may be inherently distinctive, may involve some hard cases at the margin. And just as the devil is always in the details, it is at the margins that litigation occurs.

Cases at the margins are more likely to require secondary meaning than those cases that clearly fall

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** *Glenn A. Kaminska is a partner at Ahmuty, Demers & McManus. Mr. Kaminska is a co-chair of the firm's Insurance Coverage group, as well as a co-chair of the Appellate Practice group. He has authored many articles and is a frequent lecturer.*

Product-Design Trade Dress: a Corporate Asset Worthy of Protection

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into packaging or dressing cases. The First Circuit took on such a marginal trade-dress case where the proponent of the mark claimed that a distinct combination of its products, the sizes, shapes, quantities, labels, and its display-design system were inherently distinctive and entitled the trademark protection. The Court found that the combination claim fell into the category of product design/ configuration, and thus, the proponent of the mark was obligated to obtain secondary meaning for it to be protected. *Yankee Candle Co. Inc. v Bridgewater Candle Co. LLC.*, 259 F3d. 25 (2001).

To determine whether or not a product design has achieved secondary meaning, various Federal Circuits have developed separate, but similar multi-part tests. The tests generally examine (1) the advertising expenditures made in support of the mark, (2) evidence that the consumer links the trade dress to a particular source, (3) unsolicited media coverage of the product, (4) the product's sales figures, (5) the continuous and virtual exclusive use of the trade dress, (6) consumer-survey evidence, (7) direct consumer evidence and proof of actual copying. None of these potential factors are exclusively determinative of whether a mark has obtained secondary meaning.

In 2007, the Sixth Circuit applied its seven-factor test to determine secondary meaning in finding that General Motors was able to demonstrate that the product design of the Hummer motor vehicle, including its unique grill, was entitled to protection. The infringing toy company, which had designed toys to resemble the Hummer, was obligated to pay an 8% royalty on sales and over $900,000 from profits. *General Motors Corp. v. Lanard Toys, Inc.* 468 F.3d. 405 (6th Cir. 2007) The Sixth Circuit credited a business report provided by General Motors that stated the Hummer had 96% brand recognition. The Court also credited a survey prepared for the litigation that concluded that Hummer's trade dress had secondary meaning to almost 77% of the respondents. While not all the respondents to the survey were able to necessarily identify General Motors, the Court found "knowledge that product comes from a single source, even without naming the source, is sufficient to establish secondary meaning."

Courts have long credited consumer surveys as a method to support the claim of secondary meaning. This is true of surveys taken either before the infringement occurs and for those surveys prepared in contemplation of litigation. Therefore, surveys will continue to be a primary source of proof in any trade-dress litigation.

In searching for secondary meaning and trade-dress protection, courts have been forced to review claims to determine if the alleged trade dress is too generic for protection. A generic mark in product-design context is a product design that is overbroad, generalized, or basic. Courts will not protect basic design features due to concerns that the producers will utilize trade-dress protection to monopolize a type of product. A mark can also be generic when it is so common to the industry or the marketplace that is not a designator of a specific source.

The proponent of the mark must demonstrate that the product design is not generic. Even a showing of secondary meaning is insufficient to protect a product design that is overbroad or generic. The proponent must also articulate the specific elements that are claimed to constitute the protected trade dress. An inability to set forth the elements of the trade dress may result in a finding that the trade dress is too generic to be entitled to protection.

Assuming the proponent of a product-design trade dress case can demonstrate that its design is not generic and that its product has secondary meaning, the inquiry then shifts to whether or not the product design is functional, and whether or not there is a likelihood of confusion for the end consumer. A product's features are functional and cannot be protected if the design is essential to the use or purpose of the product, or it affects the cost and quality of the product. In determining functionality, it is reasonable to look to see if the product had ever been issued a utility patent. A utility patent, while not dispositive of the issue, would be strong evidence to demonstrate that the design served a functional purpose. It is some evidence that the main purpose of the design was not to designate the source of the product.

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Worthy Of Note

VINCENT P. POZZUTO *

NEGLIGENT RETENTION

Issues of Fact Precluded Summary Judgment on Negligent Retention and Negligent Supervision Claims

Joan Doe v. Chenango Valley Central School District, 2012 WL 301040 (3rd Dept. 2012)

Parents of infants bought suit against School District alleging negligent retention and negligent supervision after bus driver sexually assaulted infants on field trip. On School District's motion for summary judgment, the court held that while the background check on the bus driver revealed nothing out of the ordinary, the testimony of one of the parents that eight months prior to the field trip she complained that the bus driver had exposed himself to a group of younger children created an issue of fact as to whether the school district knew that he had a propensity to commit acts of sexual misconduct. In addition, the Court held that evidence that the instant plaintiffs were allowed to go back to the bus with the bus driver without a chaperone creates an issue of fact on the negligent supervision claim.

ZONE OF DANGER

Zone of Danger Rule did not apply to violation of Labor Law § 240(1)

Fernandez v. Abalene Oil, 2012 WL 310835 (2nd Dept. 2012)

Plaintiff Mark Fernandez was working at a site installing an antenna on a cellular phone tower. As he was standing just outside a fence that surrounded the tower, he observed his brother, Dwayne Fernandez, who was also working on the site, fall from the tower to his death. The decedent's fall caused steel step bolts to fall from the tower, causing Mark Fernandez to duck for cover. In addition, as Mark Fernandez ran to his brother, he slipped and injured himself on snow.

The Supreme Court granted summary judgment to the Estate of Dwayne Fernandez based upon a violation of Labor Law § 240. Mark Fernandez argued that he was also entitled to summary judgment pursuant to Labor Law § 240(1) under the "Zone of Danger" Rule. The appellate division disagreed, holding that the alleged psychological injuries sustained by Mark Fernandez were not a direct consequence of a failure to provide adequate protection to him against a risk arising from a physically significant elevation differential. The court also held that to apply the "zone of danger" rule to a cause of action alleging a violation of Labor Law § 240(1) would in effect extend the owner's non-delegable duty to a person who was not injured by the particular hazard the statute was designed to guard against. The court also held that the Labor Law § 200 cause of action was not applicable as the accident did not occur out of a defective condition, but rather out of the means and methods of work and defendants did not have authority to supervise and control the performance of the work.

LABOR LAW

Labor Law § 200 Applies as Injury Rose from Allegedly Defective Condition

Rodriguez v. BCRE, 230 Riverdale, LLC, 2012 WL 335565 (2nd Dept. 2012)

Plaintiff was allegedly injured while performing demolition work. Plaintiff and two co-workers were pushing a dumpster through an alley behind the building when one of its wheels became stuck and stopped moving. As plaintiff began pulling and his co-workers were pushing the dumpster, one of its wheels fell into a hole. While trying to steady the dumpster, the plaintiff tripped on the hole and both he and the dumpster fell causing injury.

The Appellate Division upheld the lower court's denial of summary judgment holding that the injury

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

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arose from an allegedly defective condition rather than from the manner in which the work was being performed. The Court also held that Labor Law § 241(6) applied to the extent it was based on a violation of 23-1.7(e)(1) of the Industrial Code as there was an issue of fact as to whether plaintiff tripped in a passageway.

LABOR LAW

Labor Law § 240 Applied to fall from ladder while carrying window.

McGill v. Oudsi, 2012 WL 224921 (3rd Dept. 2012)

Plaintiff was replacing the window on the second floor of an apartment building. Plaintiff secured and ascended the ladder he had bought with him to the jobsite. His son was inside the apartment removing interior molding. Once the window was loosened it was guided into plaintiff's hands and rested against the ladder. Plaintiff then began to descend the ladder while sliding the window along it. When he was approximately eight to ten feet from the ground, he fell from the ladder and landed on his back. The Court affirmed the lower court's grant of summary judgment. The court rejected defendant's contention that there was no statutory violation because the ladder itself was not defective and it did not slip or tip. The Court held that it was defendant's failure to provide plaintiff any safety device to protect him from the separate hazard of removing and lowering the four foot by five foot, 40 to 50 pound window.

CHOICE OF LAW

New Jersey Laws Would Apply In DES Case

Gianvito v. Premo Pharmaceutical Laboratories, Inc., 93 A.D.3d 546, 940 N.Y.S.2d 272 (1st Dept. 2012)

Plaintiffs brought suit in New York alleging injury due to in utero exposure to Diethylstibestrol ("DES"). Plaintiffs claimed that "market share" liability should apply. The Court held that New Jersey Law would apply as the law of "the place of the wrong" applies. The place of the wrong is considered to be "the place where the last event necessary to make the actor liable occurred". The Court found that the evidence demonstrated plaintiffs' mothers were residents of New Jersey while pregnant, that they ingested DES while in New Jersey, that they received medical treatment in New Jersey and that plaintiffs were born in New Jersey. Thus, New Jersey Law applied, and the Court found that New Jersey had not formally adopted a market share theory of liability in DES or similar cases.

LEGAL MALPRACTICE

Complaint Stated A Claim Upon Which Relief Could Be Granted

Fitzsimmons v. Pryor Cashman LLP, 93 A.D.3d 497, 940 N.Y.S.2d 254 (1st Dept. 2012)

Trustees brought a legal malpractice action alleging that attorneys failed to notify them of information indicating that money may have been misappropriated from the benefit funds of which they were trustees. Upon defendants' motion to dismiss for failure to state a claim, the Court held that plaintiffs were not required to allege the specific scope of defendants' agreed upon legal representation, nor that defendants' malpractice fell within such scope.

PRODUCTS LIABILITY

Liability Could Not Be Imposed For Breach of Warranty Or Strict Products Liability Upon A Party Outside Manufacturing, Selling or Distribution Chain

Quinones v. Federated Department Stores, Inc., 92 A.D.3d 931, 939 N.Y.S.2d 134 (2nd Dept. 2012)

Plaintiff brought suit against Macy's and others, seeking damages for injuries allegedly sustained when a wooden folding chair he sat on to view an in-store demonstration collapsed. Macy's established that the chair was manufactured by a Bulgarian company, which sold it to co-defendant Beechwood, which sold it to Broadway Party Rental, which then sold it to Macy's. The Court thus found that Macy's was outside the manufacturing, selling or distribution chain and accordingly liability for breach of warranty or strict products liability could not be imposed upon it. The Court also found that Macy's established that it did not have either actual or constructive notice of the defective condition of the chair.

INSURANCE COVERAGE

New York's Appellate Division, First Department, Abrogates Its Holding In Diguglielmo

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Defining Duty: Another Look at Social Host Liability and the Duty to Protect Against Hazards on Adjoining Property

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so as to prevent them from harming others, even where as a practical matter defendant can exercise such control."[21]

The Court of Appeals decision in *Martino* has brought negligence jurisprudence back within the strictures of the common law and reined in the lower courts' clear departure from the precedent established by *D'Amico*. Its holding is also consistent with time-honored rule that, before all else, a duty must exist in order for liability to follow. While the underlying facts in *Martino* make it tempting to find the existence of a duty – when the events have occurred outside of the defendant's property – the courts have not required a property owner to control the conduct of intoxicated adults or to protect or warn against dangerous conditions. The sound public policy reasons behind this standard require no further explanation.

Footnotes

1 248 N.Y. 339 (1928).
2 *Id.* at 344.
3 *Id.* at 350 (Andrews dissenting).
4 *Ohlhausen v. City of New York*, 73 A.D.3d 89, 898 N.Y.S.2d 120 (1st Dep't 2010).
5 *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002).
6 *Massey v. Sterling Mets, L.P.*, No. 105992/07, 2011 N.Y. Slip Op 30644U, at *10 (Sup. Ct. N.Y. County March 17, 2011) (citing Nallan v. Helmsley-Spear, 50 N.Y.2d 507, 429 N.Y.S.2d 606 (1980)).
7 *D'Amico v. Christie*, 71 N.Y.2d 76, 83, 524 N.Y.S.2d 1, 3-4 (1987).
8 N.Y. Gen. Oblig. Law § 11-101(1).
9 71 N.Y.2d at 83, 524 N.Y.S.2d at 3-4; see also *Powers v. Niagara Mohawk Power Corp.*, 129 A.D.2d 37, 41, 516 N.Y.S.2d 811, 814 (3d Dep't 1987).
10 The commercial sale rule only applies to cases involving adults. In cases involving intoxicated minors, General Obligations Law § 11-100 imposes liability for the broader category of "unlawfully furnishing" alcohol.
11 71 N.Y.2d at 85, 524 N.Y.S.2d at 5.
12 *Id.*
13 *See, e.g., Warren v. Wilmorite, Inc.*, 211 A.D.2d 904, 905, 621 N.Y.S.2d 184, 185 (3d Dep't 1995) ("liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use. Should none of these factors be present, liability cannot be imposed").
14 74 A.D.3d 1764, 903 N.Y.S.2d 731 (2010).
15 *Id.* at 1766, 903 N.Y.S.2d at 733.
16 Id. at 1767, 903 N.Y.S.2d at733.
17 *Id.*
18 *Id.* at 1768, 903 N.Y.S.2d at 735.
19 *Martino v. Stolzman*, ___ N.Y.3d ___, 2012 N.Y. Slip Op. 01145 (2012).
20 *Id.*
21 71 N.Y.2d at 88, 524 N.Y.S.2d at 6.

The Recalcitrant Worker Defense: Current State of the Law

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did **not** necessitate that safety equipment be in the "immediate vicinity" of the injured worker.[18] Additionally, "...since ladders were readily available, plaintiff's 'normal and logical response' should have been to go get one. Plaintiff's choice to use a bucket to get up and then to jump down, was the sole cause of his injury and he is therefore not entitled to recover under Labor Law §240(1)."[19]

In *Robinson*, the Court of Appeals affirmed the dismissal of the plaintiff's §240(1) claim arising out of an accident when the plaintiff lost his balance while standing on the top cap of a six foot ladder.[20] The plaintiff knew that his employer stored six foot and eight foot ladders on the first floor of the jobsite, yet chose not to look for them prior to starting his work. The Court rejected the plaintiff's argument that because he had asked his foreman for an eight foot ladder and his foreman did not bring him one before his accident, he was forced to complete his work with an unsafe six foot ladder, which was not tall enough for the piping work he was performing.[21] It was immaterial if all the eight foot ladders were in use, as the plaintiff was not instructed to finish the piping before undertaking other tasks, and had enough other work to occupy him for the rest of the workday, during which time he could have waited for the eight foot ladder.[22] The Court concluded: "Plaintiff's own negligent actions-choosing to use a six foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work-were as a matter of law, the sole proximate cause of his injuries."[23]

B. *Miro*: Court of Appeals Sets Limitations on Sole Proximate Cause Defense

Then, in late 2007, the scope of *Cahill*, *Montgomery*, and *Robinson* was again restricted in *Miro v. Plaza Constr. Corp.*[24] In this case, the plaintiff fell down a ladder that was partially covered with slippery fire-proofing material. Instead of asking for another ladder, the plaintiff testified that he thought he could handle the one he had.[25] He also testified that his employer had a "lot of ladders" available and that if a ladder was in bad shape, it was discarded. Using the 4 criteria set forth in *Cahill*, the First Department granted summary judgment to the defendants, finding that the plaintiff had safety devices available to him, that he recognized the undesirability of the fireproofing material on the ladder, he knew he could have requested another ladder, and yet chose not to make such a request, and this choice was the sole proximate cause of his accident.[26]

The Court of Appeals modified the Appellate Division's decision, by denying summary judgment to the defendants on the grounds that "it was not clear from the record how easily a replacement ladder could have been procured,"[27] thereby rejecting the First Department's ruling that "readily available" was not limited to "being stored on site"[28] and narrowing the reaches of the sole proximate cause defense.

C. *The Cherry Case*

One of the most recent decisions from the First Department, issued in August of 2009, reinforces the recalcitrant worker as simply a sub-defense of sole proximate cause and disregards the "general knowledge" of available safety equipment in *Montgomery* and *Robinson*, refashioning it into a "specific knowledge" requirement.

Cherry v. Time Warner, Inc. involved a plaintiff who fell from a scaffold while securing sheet rock to a ceiling. He claimed he fell because the scaffold only had guardrails on two of its four sides. The defendants argued the plaintiff was told not to use scaffolds without four guardrails and that such scaffolds were available the date of his injury.

In reaching its decision, the Court ignored the plaintiff's disobedience of his supervisor's instructions. Instead, it applied the sole proximate cause criteria formula from *Montgomery* and *Robinson*. In the process, it focused on ambiguities in both cases. In *Montgomery*, it accused the Court of offering no concrete definition of "readily available" safety equipment within the meaning of section 240(1) stressing that in order for safety equipment to be "readily available," it should be in the immediate work location.[29] If safety equipment was on another floor, "it is highly unlikely...that... would qualify as 'ready' or 'easily' available."[30] Then, the Court suggested that in order to have a defense to a §240(1) claim, it must also be proven that the injured worker *knew* the safety equipment was available. In support of this proposition, it distinguished *Cherry* from *Robinson*, explaining that the sole proximate cause defense worked in

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Robinson because in that case, "the Court's narrative included the facts that the worker knew there were eight foot ladders on the job site and 'knew what part of the garage [they] were in.'"[31]

The Court concluded its analysis by saying that "the requirement of a worker's 'normal and logical response' to get a safety device" is limited to those circumstances where the worker had knowledge of the availability of safety equipment. This knowledge is not just a general awareness that there is safety equipment on site; rather it is a very specific knowledge as to the "exact location" where the equipment is stored. Moreover, knowledge is not gained from merely seeing or hearing about the storage site; it must have been obtained through "practice of obtaining such devices."

Thus, *Cherry* has effectively specified the knowledge requirement, hinging it onto "prior practice."

Total Extinction of the Recalcitrant Worker Defense?

Recent Appellate decisions not only indicate a shift backwards to pre-*Cahill* status, but also suggest that the recalcitrant worker defense is becoming harder for defendants to invoke successfully. Indeed, it has been slowly but steadily losing its identity. Although there are some cases like *Palacios v. Lake Carmel Fire Dept., Inc.* where the Second Department denied plaintiff's summary judgment motion because the supervisor's testimony that the plaintiff was instructed to use a scaffold created a triable issue of fact and *Yax v. Development Team, Inc.* where the Court found a triable issue of fact as to whether the plaintiff was a recalcitrant worker by submitting the affidavit of plaintiff's supervisor, who testified he provided plaintiff with readily available safety devices and instructed him to use them,[32] which support a more liberal application of the recalcitrant worker defense, most cases have been shifting towards a narrower interpretation.

The recalcitrant worker defense has been limited by the return to pre-*Cahill* standards. It has also been constrained in that it is increasingly analyzed in terms of sole proximate cause. In *Kwang Ho Kim v. D&W Shin Realty Corp.*, the Second Department reversed a grant of summary judgment for defendants on a 240(1) claim. According to the case facts, the plaintiff was standing on an unsecured ladder, when it slipped, causing him to fall. The plaintiff's supervisor testified that he had previously directed the plaintiff to stop working because it was raining and he was alone. Citing *Gordon* and *Stolt*, the Court rejected the recalcitrant worker defense because the defense failed to prove that the plaintiff's actions were the sole proximate cause of his accident.[33] Finally, in *Lovall v. Graves Bros., Inc.*, the plaintiff was using an extension ladder which gave out, causing him to fall. The defense argued that he was a recalcitrant worker in that he had been instructed to use scaffolding instead of a ladder. The Court declined to apply this defense, evaluating it under the sole proximate cause standard: "To be held liable pursuant to section 240(1), 'the owner or contractor must breach the statutory duty...to provide a worker with adequate safety devices, and [that] breach must proximately cause the worker's injuries."[34]

A. *The Gallagher Case*

In its 2010 decision in *Gallagher v. New York Post*,[35] the Court of Appeals reversed the lower court, granting summary judgment to the plaintiff. This decision expanded upon *Cherry* even further. In *Gallagher*, the plaintiff was cutting metal with a two handled, powered saw, when its blade jammed, propelling him forward so that he fell through a nearby uncovered opening.[36] The Court echoed *Cherry*, requiring that "availability of safety devices" be defined as being located not just at the job site, but at the specific area in which the plaintiff was working.[37] It further held that a standing order to use such safety devices does not raise an issue as to whether the plaintiff knew they were available.[38]

B. *Post Gallagher*

In the wake of *Gallagher*, Appellate courts have become more reluctant to invoke the recalcitrant worker defense, while simultaneously treating it as part of the sole proximate cause defense.

For instance in the 2011 case, *Auriemma v. Biltmore Theatre,LLC*, the Appellate Division held that safety devices were readily available only when the worker knew exactly where they were and there was a prior practice of the worker retrieving his own safety devices.[39] The Court rejected the argument that a standing order to use safety

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Product-Design Trade Dress: a Corporate Asset Worthy of Protection

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Ultimately, a trade-dress infringement claim cannot succeed for the proponent of the mark without proof that there is a likelihood of confusion by the consumer. Much like determining secondary meaning, the courts weigh a variety of factors in determine this issue. Factors considered include (1) the trademark's strength, (2) the similarity between the products, (3) the alleged infringer's intent, (4) evidence of actual confusion by consumers, (5) the relevant consumer's sophistication, and (6) similarities in how the products are marketed. The actual realities of the marketplace serve as a significant determining factor in whether or not the courts will find a likelihood of confusion.

Where there is a product marketed by catalog to a highly sophisticated consumer, one will be hard-pressed to find a likelihood of confusion. But providers of low-cost goods selling to a broad, unsophisticated market may find a greater likelihood of confusion. Even in such a circumstance, the product design may not be the final determining factor. Where virtually identical products are not packaged in the same manner, there may be no likelihood of confusion.

CONCLUSION

The Supreme Court and Federal Circuits continue to shape trade-dress litigation in the product-design context. Courts have set forth with certainty that product design will not be judged by an inherently-distinctive standard. Secondary meaning is the call to arms in these situations.

Protection for product design does not come easily. A proponent of a mark, in addition to showing secondary meaning, is saddled with the burden of showing non-genericness and the fact that the trade dress sought to be protected is non-functional. Even passing these high hurdles, the proponent of a mark still bares the responsibility of demonstrating a likelihood of confusion. While the burdens are many, the protection of corporate assets and continued profitability make Lanham Act claims a fight well worth undertaking.

President's Column

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highly attended "post-CLE" receptions at Thalassa Restaurant in Tribeca for our young attorneys.

Last but not least, our Amicus Committee headed by my friend and Past President, Andy Zajac, Esq. continues to confront the most controversial and topical issues in our courts, that affect our practice areas. In the last year the Committee has briefed and received decisions in the *World Trade Center Bombing Litigation,* 17 N.Y.3d 428, 933 N.Y.S.2d 164 (2011); *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 937 N.Y.S.2d 157 (2011) a N.Y.S. Labor Law §240 (1) case; and *Toledo v. Christo*, 18 N.Y.3d 363, 939 N.Y.S.2d 282 (2012) which dealt with C.P.L.R. Article 50-b. Thanks to our Amicus Committee of Jonathan Judd, Esq., Dawn DeSimone, Esq., David Hamm, Esq., Rona Platt, Esq. and Brendan Fitzpatrick, Esq.

My work as President would also not have been successful without the support of our Executive Director, Tony Celentano and our Website & Technology Director, Concetta McClenin Toscano and our faithful sponsors: Jay Deitz Associates, Ltd.; Capital Service Bureau; Medical Management Group; Robson Forensics; Scientific Expert Analysis; Diamond Reporting; ExamWorks; IQmedia Networks; Reports Ink Corp.; and Franklin Court Press.

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And Holds That An Insurer Cannot Delay Issuing A Disclaimer Of Coverage On Grounds That It Knows To Be Valid While Investigating Other Grounds For Disclaiming.

George Campbell Painting v. National Union Fire Insurance Company of Pittsburgh, PA, 2012 N.Y. Slip Op. 254 (1st Dept. 2012)

In *George Campbell Painting v. National Union Fire Insurance Company of Pittsburgh, PA,* 2012 N.Y. Slip Op. 254 (1st Dept. 2012), New York's Appellate Division, First Department, declined to follow and expressly overruled its prior holding in *DiGuglielmo v. Travelers Prop. Cas.*, 6 A.D.3d 544, 766 N.Y.S.2d 542 (1st Dept. 2004), which held that "[a]n insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer."

In *Campbell*, an owner and general contractor, Campbell and TBTA, sought coverage for an underlying personal injury action from National Union, the excess carrier for, Safespan, the subcontractor who employed the underlying personal injury plaintiff. Plaintiffs in *Campbell* sought such coverage on the grounds that they were additional insureds under the primary and excess policies issued to Safespan. Notwithstanding the fact that Campbell and TBTA knew in August, 2004 that the underlying personal injury claim would exceed Safespan's primary limits, it did not give notice of the claim to National Union, Safespan's excess carrier, until November, 2005. National Union requested that Campbell and TBTA provide certain documents, including status reports from defense counsel representing Campbell and TBTA. On January 17, 2006, Campbell and TBTA provided to National Union an August, 2004 status report from defense counsel advising that the value of the underlying personal injury claim would exceed Safespan's primary limits. National Union did not issue a disclaimer based on late notice until May 17, 2006, four months later.

Campbell and TBTA brought a declaratory judgment against National Union seeking coverage for the underlying claim. Campbell and TBTA moved for summary judgment on the grounds that National Union's disclaimer was untimely under Insurance Law § 3420(d)(2) which obligates insurers to disclaim "as soon as is reasonably possible." National Union cross moved for summary judgment. The lower Court granted summary judgment to Campbell and TBTA, and National Union appealed. The First Department affirmed the lower Court's grant of summary judgment to Campbell and TBTA.

On appeal, National Union argued that under *DiGuglielmo*, it was permitted to delay its disclaimer while it investigated other possible grounds for disclaimer, specifically that Campbell and TBTA were not in fact additional insureds under the excess policy. The First Department disagreed, and stated that it was declining to follow *DiGuglielmo* pursuant to the express language of Insurance Law § 3420(d)(2), prior holdings of the Court of Appeals and policy grounds.

The *Campbell* Court held that the plain language of Insurance Law § 3420(d)(2) "cannot be reconciled with allowing the insurer to delay disclaiming on a ground fully known to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim." The Court further reasoned, "[i]f the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of 'reasonably possible' by the insurer's ongoing investigation of the possibility that the insured may have breached other policy provisions, that the claim may fall within a policy exclusion, or (as here) that the person making the claim is not covered at all."

The First Department also cited two prior holding of the Court of Appeals which it found to be inconsistent with *DiGuglielmo*, *Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 317 N.Y.S.2d 309 (1970) and *First Fin. Ins. Co. v. Jetco Contr. Corp.*, 1 N.Y3d 64, 769 N.Y.S.2d 459 (2003). The First Department noted that in *Gross*, the Court of Appeals held "[t]he literal language of the statutory provision requires prompt notice of disclaimer after decision to do so, and by logical and practical exclusion, there is imported the obligation to reach the decision to disclaim liability or deny coverage promptly too, that is, within a reasonable time." The First Department further noted that in

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The Unlimited Advantages Of Motions In Limine

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Perhaps the biggest potential disadvantage to propounding a motion in limine is alerting opposing counsel to material or issues that she or he is not aware of. The downside of this increases the earlier the motion in limine is made as it gives your adversary an opportunity to thoroughly research, investigate, and consider all of the applicable factual and legal issues involved with a given potential piece of evidence. In areas with such potential, some attorneys have found it beneficial to take a "wait and see" approach to their adversaries case. Their adversaries, as part of their trial 'technique,' are then forced to stand and object to proposed evidence in front of the jury and receive a ruling made under time constraints that they have not dealt with in voir dire or openings.

In New York State Courts, there is no prohibition on interlocutory appeals. Thus, the loser of a motion in limine should consider an immediate appeal. The general rule on such appeals, that has many gaping exceptions, is that "an order deciding a motion in limine is not appealable, since an order, made in advance of trial which merely determines the admissibility of evidence is an unappealable adversary ruling," but "an order which limits the scope of issues to be tried in appealable." *Parker v. Mobil Oil Corp.*, 16 A.D.3d 648, 650, 793 NYS.2d 434 (2nd Dep't 2005), *aff'd on other grounds*, 7 N.Y.3d 434 (2006).

The reason why the above general rule has become so porous is because of the rights conferred on an aggrieved party by CPLR § 5701, which states in relevant part at § 5701(a) 2(iv) and (v), as follows:

> § 5701. Appeals to appellate division from supreme and county courts.
>
> (a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court:
>
> 1. from any final or interlocutory judgment except on entered subsequent to an order of the appellate division which disposes of all the issues in the action; or
>
> 2. from an order not specified in subdivision (b), where the motion it decided was made upon notice and it:
>
> (i) grants, refuses, continues or modifies a provisional remedy; or
>
> (ii) settles, grants or refuses an application to resettle a transcript or statement on appeal; or
>
> (iii) grants or refuses a new trial; except where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits; or
>
> (iv) involves some part of the merits; or
>
> (v) affects a substantial right; or
>
> (vi) in effect determines the action and prevents a judgment from which an appeal might be taken; or
>
> (vii) determines a statutory provision of the state to be unconstitutional, and the determination appears from the reasons given for the decision or is necessarily implied in the decision; or
>
> (viii) grants a motion for leave to reargue made pursuant to subdivision (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221; or

In *Parker*, the Second Department took the position that while the general rule prohibiting appeals from motions in limine that merely determine the admissibility of evidence such as a police report containing multiple layers of hearsay, such rule is inapplicable if the motion in limine involved some part of the merits [§ 5701(a) 2(iv)] or affects a substantial right [§ 5701 (a) 2(v)].

In *Parker*, the Second Department was faced with an appeal by the plaintiff's attorney from an order granting the defensive in limine motion of Mobil Oil Corp., the defendant, which precluded the plaintiff's expert from testifying on medical causation in regard to claimed exposure to benzene. In upholding the right to appeal, the court stated:

> Such motions go to the very merits of the controversy and, if granted, would render the plaintiff's case meritless. Under these circumstances, the resulting order, whether granting the motions and cross motion and rendering the plaintiff's case meritless, or

Continued on next page

The Unlimited Advantages Of Motions In Limine

denying them, affected a substantial right of the parties.

Parker, supra at 650. *See also, City of New York v. Mobil Oil Corp.*, 12 A.D.3d 77 (2004); *Scalp & Blade, Inc. v. Advest, Inc.*, 309 A.D.2d 219, 223-225 (2003).

It is clear from the above that the motion in limine should always be considered by any trial attorney seeking to finalize his or her trial game-plan and as a means to open a window into the game-plan of his or her adversary.

Worthy of Note

Continued from page 21

Jetco, the Court of Appeals held "[t]he timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage." The First Department concluded "[i]n view of the foregoing, adhering to the *DiGuglielmo* rule would be tantamount to deliberately setting aside the rule promulgated by the Court of Appeals (and flowing naturally from the language of the statute) that once the insurer has sufficient knowledge of facts entitling it to disclaim...it must notify the policy holder in writing as soon as is reasonably possible."

Finally, the *Campbell* Court also held that *DiGuglielmo* must be abrogated on policy grounds. It noted that the legislative intent that motivated the enactment of Insurance Law § 3420(d)(2) was "to expedite the disclaimer process, thus enabling a policyholder to pursue other avenues expeditiously."

The Recalcitrant Worker Defense: Current State of the Law

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devices raised a question of fact that the plaintiff knew such safety devices were available.

Furthermore, the court in *Silvas v. Bridgeview Investors, LLC* declined to apply the recalcitrant worker defense, defining it according to the pre-*Cahill* terms, stating that the plaintiff's supervisor's affidavit was insufficient in establishing that the plaintiff had disobeyed immediate, specific instructions to avoid an unguarded balcony and that this recalcitrance was the sole proximate cause of his accident.[40] Likewise, the Second Department's *Ortiz v. 164 Atlantic Avenue, LLC* returned to the old requirement that in order for the recalcitrant worker defense to apply, there must be "immediate specific instructions to use an actually available device or to avoid using a particular unsafe device."[41]

As illustrated above, with a few exceptions, recent cases have revealed a trend that has not only weakened §240(1) defenses by adding burdensome requirements, but has also demoted the recalcitrant worker defense to a sub-defense of sole proximate cause.

Footnotes

1 *See Bland v. Manocherian*, 66 N.Y.2d 452 (N.Y. 1985)
2 *Maleeny v. Standard Shipbuilding Corp.*, 237 N.Y. 250 (N.Y. 1923); *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313 (N.Y. 1948); *Connors v. Boorstein*, 4 N.Y.2d 172 (N.Y. 1958)
3 *Smith v. Hooker*, 89 AD2d 361, 362-363 (4th Dept. 1982)
4 *Id.*, at 366.
5 *Stolt v. Gen. Foods Corp.*, 81 N.Y.2d 918, 920 (N.Y. 1993)
6 *Hagins v. State of N.Y.*, 81 N.Y.2d 921,922 (N.Y. 1993)
7 *Id.*, at 563.
8 *Lightfoot v. State of N.Y.*, 245 A.D.2d 488 (2nd Dept. 1998)
9 *See Jastrezebski v. North Shore School District*, 223 A.D.2d 67 (2nd Dept. 1996)(Court found recalcitrance where plaintiff ignored specific safety instructions the moment his supervisor left the worksite); *Sanango v. 200 E. 16th St. Housing Corp.*, 290 A.D.2d 228 (1st Dept. 2001)(....)
10 *Blake v. Neighborhood Housing Services of N.Y.C., Inc.*, 1 N.Y.3d 280 (N.Y. 2003)
11 *Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y.3d 35 (N.Y. 2004)
12 *Id.*
13 *Cahill v. Triborough Bridge Authority*, 4 N.Y.3d 35, supra, at 39.
14 *Id.*
15 *Id.*, at 40.
16 *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805, 806 (N.Y. 2005)
17 *Id.*
18 *Id.*
19 *Id.*
20 *Robinson v. East Medical Center*, LP., 6 N.Y.3d 550, 552 (N.Y. 2006)
21 *Id.*, at 553.
22 *Id.*, at 554.
23 *Id.*, at 555.
24 *Miro v. Plaza Constr. Corp.*, 9 N.Y.3d 948 (N.Y. 2007); 38 A.D.3d 454 (1st Dept. 2007)
25 38 A.D.3d 454, at 455.
26 *Id.*
27 9 N.Y.3d 948.
28 38 A.D.3d 454, at 455.
29 885 N.Y.S.2d 28,32 (1st Dept. 2009)
30 *Id.*
31 *Id.*
32 2009 WL 4067212 (2nd Dept. 2009)
33 47 A.D.3d 616 (2nd Dept. 2008)
34 63 A.D.3d 1528 (4th Dept. 2009)
35 14 N.Y.3d 83 (N.Y. 2010)
36 *Id.*
37 *Id.*
38 *Id.*
39 82 A.D.3d 1 (1st Dept. 2011)
40 79 A.D.3d 727 (2nd Dept. 2010)
41 77 A.D.3d 807 (2nd Dept. 2010)

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