DEFENDANT

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FEATURING

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President's Column

TIMOTHY J. KEANE ESQ.*

Whether you are a member of the judiciary, a member of the plaintiff's bar, a member of DANY, a defense attorney who is not a member of DANY (that should change), or anyone else, if you are reading this column, I would like you to email me at tkeane@quirkbakalor.com. If you prefer the telephone, please call me at (212) 319-1000. We know that many are enjoying and citing The Defendant and we would like to know better just who is doing so. Of course, please feel free to share with me any comments, concerns, or questions you have concerning DANY, The Defendant, or any of DANY's programs and member benefits.

DANY is fortunate to have dynamic Directors and Officers and DANY's members are fortunate to have regular access to the Directors and Officers. We invite you to meet with us Tuesday evening, November 17, 2009, when we honor DANY's Past Presidents. (See the registration form in this magazine and at our website www.dany.cc or contact Tony Celentano at 212.313.3618 for tickets.) Note that many of DANY's Past Presidents continue to serve this organization, the defense bar, and the bar in general in many important capacities and are responsible for DANY's amicus projects, this magazine, and DANY's website, www.dany.cc.

In addition to three major networking opportunities, DANY's Past Presidents' Dinner (November 17, 2009), DANY's Awards Dinner (Spring, 2010), and DANY's Annual Meeting and Golf Outing (June 2010), DANY provides its members (at no charge) CLE, this magazine, and the opportunity to join one or more of DANY's committees, including DANY's Court Techniques and Procedures, Education (CLE), Judiciary, Legislative, Publications, Program (Dinners and Awards), and Amicus Committees, DANY's Substantive Law Committees (Insurance Law, Employment Law, and Medical Malpractice), and DANY's Young Lawyers, Diversity, and Pro-Bono Committees.

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* *Timothy J. Keane is a partner at Quirk and Bakalor, P.C.*

Undocumented Aliens and Medical Care Costs: Attacking Medical Care Costs

JOHN J. MCDONOUGH, ESQ.*

The recent jury verdict in Stuart, Florida favoring defendant Martin Memorial Medical Center in a nationally watched case involving the repatriation of a catastrophically injured undocumented alien to Guatemala has underscored the importance of the debate regarding the medical benefits to which an undocumented alien may be entitled. A corollary of this discussion is the impact immigration status may have on damages sought by such an undocumented alien in a third party bodily injury lawsuit. The law on this issue in New York is relatively undeveloped thus providing a potential area of attack for the defense trial lawyer.

On February 28, 2000, Mr. Luis Alberto Jimenez was a passenger in an automobile that was struck head-on by a drunk driver. Mr. Jimenez, an undocumented alien, sustained severe head injuries and was brought to Martin Memorial Medical Center, a not-for-profit acute care facility. Mr. Jimenez was uninsured as was the drunk driver. Mr. Jimenez remained in a vegetative state for approximately 14 months. He then regained consciousness, although his cognitive functioning improved only to that of a fourth grader. Eventually Mr. Jimenez's health plateaued and Martin Memorial began developing a discharge plan for Mr. Jimenez which sought to place him in a traumatic brain injury rehabilitation facility. The daily cost for an average patient at Martin Memorial is approximately $2,000.00. Mr. Jimenez remained at Martin Memorial for approximately three years.

If a hospital receives Medicare funds they are mandated by federal regulation to treat and stabilize anyone suffering from an emergency medical condition and the federal government does provide emergency care Medicaid coverage for illegal and new immigrants. Emergency Medicaid funds generally reimburse only a fraction of the total cost of rendering such care. Medicare regulations require hospitals who receive such funds to transfer indigent patients to "an

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* *Mr. McDonough is a member of Cozen O'Connor where he is Vice Chairman of the firm's General Litigation practice group. He gratefully acknowledges the contributions of Russell Wheeler, an associate with the firm, to this article.*

Undocumented Aliens and Medical Care Costs: Attacking Medical Care Costs

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appropriate" post-hospital care facility and prohibit 'dumping' of such individuals.

Martin Memorial was unable to find a sub-acute care facility willing to accept the uninsured Mr. Jimenez. Thus, Martin Memorial sought to return or "repatriate" Mr. Jimenez to his native Guatemala but reached an impasse with the guardian of Mr. Jimenez and thereafter commenced an action against him to compel the guardian's cooperation with the hospital's efforts to send Mr. Jimenez to Guatemala. The hospital eventually obtained an order from a Florida state court that required Mr. Jimenez's guardian not to interfere with the hospital's repatriation plan. The guardian's attorney filed an immediate appeal and sought a stay of the order. Prior to the return date of the hearing on the request for a stay, Martin Memorial hired an air ambulance and in 2003 flew Mr. Jimenez back to Guatemala, without informing the guardian. Eventually, the Fourth District Court of Appeals in Florida overturned the order that directed the guardian to cooperate with the repatriation plan.

The guardian of Mr. Jimenez subsequently sued Martin Memorial for false imprisonment in Florida state court. Several weeks ago the jury in that action was charged by the judge, in light of the Fourth District Court of Appeal's order, that Mr. Jimenez, as a matter of law, had been unlawfully detained by the hospital, "without legal authority" and against the will of his guardian, thus satisfying three of the four elements required to support a claim of false imprisonment. However, the jury concluded that the hospital's actions were reasonable under all of the prevailing circumstances and returned a defense verdict.

In New York, CPLR 4111 allows for an itemized verdict of special and general damages which may include itemized awards for past and future medical expenses. (Also see New York Pattern Jury Instruction 2:301). The $1.5 million spent by Martin Memorial caring for Mr. Jimenez for the three years following his accident could be a lien against the proceeds of the lawsuit, if such a situation arose in New York. As the primary obligor to the hospital for his bills, Mr. Jimenez would be able to assert a claim for past medical bills in a personal injury action governed by New York law. As someone who was in the United States illegally and has now been repatriated to his native country, a claim for future medical bills could be made, but assuming hypothetically New York law applied, in what currency should such an award be made? If Mr. Jimenez were never repatriated but still in the United States illegally, in what currency should an award for future medical expenses be made?

The general rule regarding future medical care costs in New York is that a plaintiff must establish with a degree of reasonable medical certainty through expert testimony that such expenses will be incurred. Askey v. Occidential Chemical Corporation, 102 A.D.2d 130, 477 N.Y.S.2d 242; Beyer v. Murray, 33 A.D.2d 246, 306 N.Y.S.2d 619. The issue of where such expenses will, more likely than not, be incurred is one which no New York Court has dealt with to date.

New York courts traditionally held a plaintiff's immigration status irrelevant to the legal claims or remedies available to him. See Mazur v. Rock McGraw, 246 A.D.2d 515, 666 N.Y.S.2d 939, 940 (2d Dept. 1998) (holding that plaintiff's status as an illegal alien

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DANY's Past Presidents' Dinner – Tuesday November 17, 2009

You are invited to attend The **Defense Association of New York's** annual **Past Presidents' Dinner** on **Tuesday November 17, 2007** at:

The DOWNTOWN ASSOCIATION
60 Pine Street,
New York, New York

5:30 P.M.: CLE Insurance Law §3420: A Primer
Richard W. Dawson, Partner, Conway, Farrell, Curtin & Kelly, P.C.

The CLE Board requires that to obtain CLE credit you must be present for the entire program.

1.0 CLE credit (general/skills) will be granted.

*******This course is appropriate for both newly admitted and experienced attorneys.*******

6:30 P.M.: Cocktails and dinner honoring our Past Presidents

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Make your reservations as soon as possible. Fill out the enrollment form below and mail it along with your check. Please pass this notice along to all your colleagues.

Timothy J. Keane, President
Anthony Celentano, Executive Director

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Improving The Odds – The Best Way To Use Professional Services Firms When Making Your Case

BRIAN SANVIDGE, CFE *

Civil litigation or criminal defense is by definition a time of stress. As an attorney, you are used to it. Indeed, you may relish the prospect of "going to battle" on behalf of your client.

The popular sports commentator, Mike Francesa, once made an observation about baseball during one of his radio broadcasts. He commented that during a given season the best team in baseball will lose about one-third of its games. And, in the same year, the worst team in baseball will win about one-third of its games. Success, he declared, was in the middle – how you handled that third of the season that could go either way.

A few more wins here and a few less losses there could put a team into the playoffs, with a shot at the World Series. So, too, in golf. While there is the occasional blowout in a major golf tournament (think of Tiger Woods in The Masters some years ago), most are decided by a stroke or two over the course of four days.

So, too, with litigation or criminal defense.

The margin of victory can be quite narrow, and the wise attorney will seek every advantage they can find when representing a client to the best of their ability.

This is where professional services firms come in. There is a need to be an informed and wise consumer, for your choices may well determine the outcome of a proceeding, be it civil or criminal. A brief explanation of what professional firms do and how best to use them may be useful.

First, what is a "professional services firm?" Many of them used to be called "accounting firms," and most of them still provide accounting and tax services, but over the years they have broadened their scope substantially to include services such as estate planning, valuation, forensic accounting, investigations, consulting, asset searches, and other services.

Second, they are no longer all "accountants." While accountants still make up a fair percentage of their professional staff, most firms now have economists, industry experts, investigators, computer forensic professionals, and others as part of their practice group. This blend is significant, since it allows them to bring a more diverse and comprehensive set of professional skills to bear on a given engagement. Usually, they have alliances with other professional firms that give them global "reach." Thus, finding out who actually owns what percentage of a real estate venture in Russia can be accomplished in a timely manner.

Third, given the nature of modern litigation, they are used to working with counsel. Be that counsel in-house or retained, these professionals know and understand the demands created by potential litigation or regulatory actions.

Fourth, they are used to dealing with the issues raised by budgets, time constraints, confidentiality, computer forensics, and discovery.

There are, however, issues to be taken into account when considering the use of a professional services firm. They are many, but understanding them will enable a more prudent choice when the time comes to engage their services:

- On its surface, accounting may seem to be a thing of precision, with set rules and hard numbers. It is not. It is, rather, an arena governed by judgment. Even allowing for the many enunciated accounting rules and principles, a given transaction may be handled or recorded in a number of ways. Experienced accountants and tax advisors can provide valuable insight as to the appropriateness of the treatment utilized in a given transaction.
- Senior professional services personnel, like attorneys, have seen much in their careers and can bring that wisdom and insight to bear on a given situation quickly, often obviating the need for lengthy analysis and records review. Their assistance can allow an attorney to more quickly and accurately assess a situation and plan an appropriate strategy. Conversely, they may identify an important issue previously unseen.

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* *Brian P. Sanvidge, CFE, is Director of Business Fraud & Investigation at Holtz Rubenstein Reminick LLP, located at www.brrllp.com. Brian can be reached at bsanvidge@brrllp.com.*

Worthy Of Note

VINCENT P. POZZUTO *

1. PRODUCTS LIABILITY

Issues of Fact Precluded Summary Judgment on Causes of Action for Defective Design and Failure to Warn

Passante v. Agway Consumer Products, Inc.
2009 WL 1181479 (2009)

Plaintiff was injured while utilizing a mechanical dock leveler purchased by his employer. The dock leveler was manufactured with a lip that would fall if unsupported by the bed of a truck. Plaintiff was standing on the lip at the dock leveler when the driver of the truck unexpectedly pulled away. The dock leveler tipped and plaintiff was injured. Plaintiff argued that the distributor had offered to sell to his employer a safety option called a "Dok-Lok", which secures a tractor trailer to the loading dock and includes a warning system such that drivers know when they can safely pull away. Plaintiff argued that the safety option should have been standard equipment and thus the dock leveler was designed defectively. Plaintiff further argued that a warning label advising users not to walk on the lip of the dock leveler was stationed too far away from the point of operation to effectively recommend the user not to walk on the lip of the dock leveler. The Court of Appeals reversed summary judgment in favor of the distributor and reinstated the causes of action for design defect and failure to warn. The Court held that a product that fails to incorporate a safety option as standard equipment is not defective as a matter of law where: (1) the buyer is thoroughly knowledgeable regarding the product and the safety feature; (2) there exists normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position to balance the benefits and risks of not having the safety device in the specifically contemplated circumstances of the buyer's use. The Court of Appeals held that issues of fact existed on the second prong of the test because the distributor itself described as pervasive the risk that a tractor trailer would inch forward. The Court further held that defendants did not refute plaintiff's expert's testimony that the dock leveler, because of its collapsing lip, posed an unreasonable risk of harm to the operator. Finally, the court held the plaintiff's expert's affidavit that the warning was insufficient because it contained no warning that it is dangerous to remain on the lip, even momentarily, after the truck was engaged created an issue of fact, and that the expert's opinion that the warning should have been at the point of operation created an issue of fact as well.

2. LABOR LAW

Plaintiff was not Engaging in "Cleaning" Under Labor Law §240(1)

Wicks v. Trigen Syracuse Energy Corporation
2009 WL 1163859 (4th Dept. 2009)

Plaintiff, at the time of the accident, was working at an alternative fuel processing facility owned by the defendant. Between one and five times a day, "hoppers" would become bound with dust particles from paper that was burned at the facility. Plaintiff had to unclog the hoppers and to do so, he would climb a ladder, open the door to the "bug house" and push the dust down the hoppers with a broom. On one such occasion, as plaintiff was descending the ladder after unclogging the hopper, he fell five feet to the ground. Defendants argued that plaintiff was not engaged in "cleaning" a building or structure at the time of the accident under Labor Law §240(1). The Court relied on the Webster's Dictionary definition of the word "cleaning", as the Labor Law does not define that term. Webster's defines cleaning as "the ridding of dirt, impurities or extraneous material." The court held that plaintiff's work did not entail the removal of extraneous material. The Court held that plaintiff was "cleaning the jam" of dust particles in the hopper. In addition, the Court held that inasmuch as the paper particles constituted fuel, they could not be considered extraneous material. Further, in unplugging the hopper, plaintiff was not removing the dust particles but rather, he was essentially stirring them around. The court held that plaintiff was not cleaning. Instead, he was maintaining the operation of the system.

3. INSURANCE COVERAGE

"Earth Movement" Exclusion Did Not Apply to Earth Movement Caused by Excavation Under Language of Policy

Pioneer Tower Owners Association v. State Farm Fire & Casualty Company
2009 WL 1148649 (2009)

Plaintiff sought recovery under an insurance policy

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

Improving The Odds

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- The inclusion of forensic accountants, investigators and computer forensic personnel in their practices allows such firms to call on the resources of subject matter experts when needed, but always after close coordination with the lead counsel.
- Such professionals may be valuable throughout the life of a given situation. Too often, they are engaged after discovery and the preliminary legal analysis, and this can be an inefficient use of their expertise. Discovery, for example, often presents a quandary for even the most experienced counsel. It may become the classic "Catch 22." If counsel asks for everything, they may have reams of data to sift through and evaluate. Conversely, if they ask for too little they may miss information of probative value. Professional services firms have performed thousands of audit, accounting and tax services for a variety of clients. They thus know the peculiarities of different business sectors. The manner in which a shipping company records revenue may be quite different than how a manufacturing company records its revenue. Ratios for profit and loss may vary greatly by industry. Certain records are common in one industry but not another. Such industry knowledge may be a powerful advantage when crafting a discovery request.
- They are responsive. Counsel is often engaged on short notice when a client has a pressing issue. Counsel, in turn, must quickly determine if they need assistance and, when they need it, they tend to need it quickly. Good professional services firms understand these issues and are prepared to respond, as needed.

Complex or vexing legal matters are often best handled by a team of professionals who understand each other's worlds. Hopefully, this article will assist counsel in understanding the world of professional services firms, enabling them to make the best choices and decisions as they, in turn, assist their clients.

In some matters the issue of potential fraud is perhaps a concern. Fraud, as we know it, is an often misunderstood area. We do have reliable, if imperfect, data on its nature and an explication of this research may be instructive. Perhaps the best data available on fraud comes from the Association of Certified Fraud Examiners (ACFE), an organization formed by former FBI Special Agent and CPA Joseph T. Wells in 1989. ACFE now has over 50,000 members in over 120 countries. Its credential, gained by testing – Certified Fraud Examiner (CFE) – is now recognized by organizations as diverse as the FBI, the General Accounting Office, and the US Postal Inspection Service. ACFE for a decade has published an annual report – The Report to the Nation – on the state of fraud in the United States. The data is obtained by the annual and voluntary reporting by CFE's about the frauds they have investigated in the past year. Most of these are what are called "occupational frauds;" that is frauds committed by employees against their employers, be they public companies, private companies, governmental entities, or not-for-profits. After ten years of publication, the statistics compiled by ACFE have remained remarkably stable. Their highlights are thus:

- Offenders are roughly fifty percent male and fifty percent female.
- They, unlike street criminals who tend to be young, are between 45 and 55 years of age.
- They have been with their companies, on average, 10 to 15 years.
- Over 90 percent have no prior criminal record.
- Over 60 percent have college degrees.
- There is geometry to fraud – the higher the organizational rank, the larger the loss. Thus, an executive who commits a fraud will steal about 16 times as much as a front line employee. A manager will steal about 4 times as much as a front line employee. This makes sense, in that the higher one's organizational rank, the more authority and the less supervision they have.
- Few of these frauds are reported to authorities.
- Insurance recoveries from such frauds typically represent less than 15 percent of the loss.
- Most of these frauds, despite the best efforts of both internal and external auditors, are discovered by a tip or by accident.

(Interested readers may wish to access the ACFE Report To The Nation, 2008, from the ACFE website. It can be downloaded and it is free.)

Other interesting work on the issue of fraud, especially in financial institutions, was published in August 2004 by the Computer Evidence Response Team (CERT) from Carnegie-Mellon University and the United States Secret Service. They studied a number or financial institution frauds over a period of years and came to some interesting conclusions:

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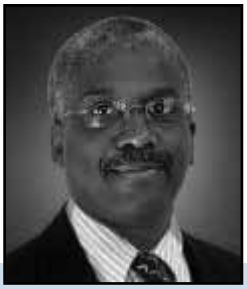
Fred, The Breeding Bull and Its Affect on Dog Attack Cases



LAWTON W. SQUIRES *

As a former managing trial attorney for the United States Fidelity & Guaranty Insurance Company, I was asked to inventory the number of dog attack cases in our office's file inventory following the defense of two trials in Kings County, involving the then, "breed-de-jóur", the Pit Bull Terrier. Our inventory contained only seven (7) dog attack cases out of a total of over seven-hundred files. The injuries and scarring on those matters however drew a considerable amount of attention and oversight from both the insurance carrier's claim's division and our legal management.

Following the trials, I drafted an article entitled, *"No, No!!! Bad Dog!!!"* for the claim adjusters and our staff attorneys, on the handling of dog attack cases, which was published in February of 1998. In reviewing that article and in performing legal search for the instant article, I was struck by the fact that as attorneys defending these matters in the two downstate departments, (the First and Second Departments), our legal research was concentrated and focused on actual dog attack matters, with a very rare "cat attack" case thrown in.

The Court of Appeals decision in Bard v. Jahnke, 6 N.Y.3d 592 (2006) changed how attorneys practicing in the First and Second Departments will have to view their dog attack cases. Dog and cat attack cases have always been included under the larger heading of domestic animal liability matters.

The Hon. Carmen Ciparick, writing for the majority in Collier v. Zambito, 1 N.Y.3d 444 (2004), included a discussion of the history of the law of domestic animal liability in New York State.

DISCUSSION

For at least 188 years (see e.g. Vrooman v. Lawyer, 13 Johns. 339 (1816), the law of this State has been that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities (see Hosmer v. Carney, 228 N.Y. 73, 75 [1920]; see also Restatement [Second] of Torts, §509). Vicious propensities include the "propensity to do any act that might endanger the safety of the persons and property of others in a given situation" (Dickson v. McCoy, 39 N.Y. 400, 403 [1868]).

Knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice (see Benoit v. Troy & Lansingburgh R.R. Co., 154 N.Y. 223, 225 [1897] [citations omitted]; see also 5A-5 Warren, Negligence in New York Courts §5.04 [6] [2000]). In addition, a triable issue of fact as to knowledge of a dog's vicious propensities might be raised – even in the absence of proof that the dog had actually bitten someone – by evidence that it had been known to growl, snap or bare its teeth. Also potentially relevant is whether the owner chose to restrain the dog, and the manner in which the dog was restrained (see Hahnke v. Friederich, 140 N.Y. 224, 226 [1893]; see also Rider v. White, 65 N.Y. 54, 55-56 [1875]). The keeping of a dog as a guard dog may give rise to an inference that an owner had knowledge of the dog's vicious propensities (see Hahnke, 140 N.Y. at 227).

In addition, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities – albeit only when such proclivity results in the injury giving rise to the lawsuit. But nothing in our case law suggests that the mere fact that a dog was kept enclosed or chained or that a dog previously barked at people is sufficient to raise a

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* *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.*

Improving The Odds

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- Most frauds were committed by insiders.
- Most were committed on company time.
- Most used authorized passwords.
- Most were committed by persons not identified previously as "problem employees."
- Most were known by other persons who chose not to report them.

(Again, the interested reader may access this report, free, on-line at the Carnegie-Mellon website.)

Such frauds seem to be committed by the "soccer Moms and Dads" who are our neighbors and appear normal in every way, yet one day go to work and decide to steal from the companies that have employed them for over a decade. We know little about why this happens and a relatively new organization, The Institute for Fraud Prevention, was recently formed to bring together academics, researchers, and practitioners from various fields to begin the process of identifying why such acts occur.

(Again, readers with an interest in such matters may wish to access a book called "Danger," by the noted psychologist Michael Apter, who speculates that committing fraud may be similar to recreational activities such as skiing on snow or water. He believes there may be a" thrill" from pushing the envelope.)

Dealing with potential fraud, be it from the inside or the outside, is a challenging and complex task, and does not lend itself well to the skill of only one discipline, as good as it may be. As our task grows, so must our approach.

Professional services firms, with the skills of investigators, forensic accountants, subject matter experts, industry professionals, interviewers, and computer forensic professionals can often add value and achieve a better result. There is a profound but subtle difference between the skills of an accountant and a forensic accountant. Likewise, in the realm of economic damages or business interruption issues, please remember the comments made earlier about accounting in general. It is both art and science, and the wise and experienced professional may be able to offer a view that is both different and supportable, as the facts of the matter dictate.

Mr. Sanvidge was appointed Welfare Inspector General in 2006 by the Governor and confirmed by the NYS Senate. Prior to his appointment, he was the Inspector General of the New York State Labor Department. Under his leadership the office created a criminal prosecution division that charged over 5,000 individuals and recovered over $250 million in fraud.

He brings with him 25 years of experience in local, county, and state government, and has worked with businesses on disaster recovery and business continuity. In addition, he has helped companies ensure integrity and government regulatory compliance.

He is qualified as an expert witness in financial crimes in the State and Federal court systems as well as in American Arbitrations Association (AAA) arbitrations.

Mr. Sanvidge has lectured nationally on business fraud, white collar crime and tax fraud, as well as regulatory compliance and government investigations.

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DEFENDANT

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Appellate Developments In Legal Malpractice Law

BRIAN MCDONOUGH, ESQ. *

ATTORNEY – CLIENT RELATIONSHIP

NEW YORK APPELLATE DIVISION COURT

Plaintiffs and Defendant Had An Attorney – Client Relationship

Bloom v. Hensel

2009 NY Slip Op 884 (2/6/09)

Plaintiffs sued defendant for malpractice, and defendant moved for summary judgment, arguing that he did not have an attorney-client relationship with plaintiffs and had no fee-sharing agreement with a second attorney. The trial court granted summary judgment, and plaintiff appealed. The court reversed, ruling that defendant referred plaintiffs to the second attorney, plaintiffs met with both attorneys, both attorneys' names were on some of the pleadings, and there was an oral agreement to split the fee.

CASE WITHIN A CASE

U.S. DISTRICT COURT (E.D.N.Y.)

Provenzano v. Pearlman, Apat & Futterman, LLP

2008 U.S. Dist. LEXIS 86098 (10/24/08)

Plaintiff claimed that she was struck on the head by a robotic camera at an ABC television studio. Defendant represented her in an action against the camera manufacturer. After a defendant's verdict, plaintiff sued defendant, claiming that the law firm 1) failed to retain a design expert; 2) failed to call the camera designers as witnesses; 3) failed to develop evidence of erratic camera movement; and 4) failed to call eyewitnesses. Defendant moved for summary judgment, arguing that plaintiff failed to provide evidence of a genuine issue of fact. The Court agreed, holding that 1) plaintiff's expert failed to provide any basis that the unprompted camera movement was caused by a design defect rather than negligent repairs by ABC; 2) plaintiff did not identify any specific testimony that the designers could have provided; 3) defendant had developed evidence of erratic camera movement; and 4) no rational fact finder could find that the witnesses' testimony would have resulted in a different verdict.

U.S. DISTRICT COURT (S.D.N.Y.)

Joyce v. Thompson Wigdor & Gilly LLP

2008 U.S. Dist. LEXIS 43210 (6/3/08)

Plaintiff brought her legal malpractice action against defendant for failure to pursue defamation claims against former employers. The defendant moved to dismiss on the ground that plaintiff could not have proven her 'case within a case' because 1) the three statements in question constitute opinion which is protected from suit and 2) the statements do not constitute libel *per se* and thus cannot be sued upon in the absence of special damages. While the court agreed that the first statement regarding plaintiff doing 'nothing at work' was opinion regarding an employee's job performance which is protected from suit, a second statement that plaintiff 'faked having cancer' and a third statement that plaintiff 'falsified health claims' were not opinion or hyperbole but statements of fact and, therefore, actionable. While special damages are required except for libel *per se,* there are exceptions, including when the statement tends to injure another in his/her trade, business or profession. The court held that honesty with respect to claims regarding health status are characteristics of a professional person. Therefore, this exception applied, and proof of special damages was not required. Since plaintiff had a viable 'case within a case' defamation claim for the second and third statements, the motion to dismiss was denied as to them but granted as to the first statement.

NEW YORK APPELLATE DIVISION COURT

Kaminsky v. Herrick, Feinstein LLP

2008 NY Slip Op 9934 (12/18/08)

Plaintiff hired defendant to represent him in an arbitration proceeding wherein plaintiff and another asserted a breach of an initial public offering agreement regarding certain stock. In that arbitration proceeding, plaintiff sought $ 5 million in damages. The arbitration resulted in a damage award of $ 294,000 in compensatory damages and $ 50,000 in punitive damages to plaintiff.

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Fred, The Breeding Bull and Its Affect on Dog Attack Cases

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triable issue of fact as to whether it had vicious propensities.

The law of New York State on domestic animal liability cases historically had followed two separate theories. The first theory being based upon the strict liability principles articulated above; and the second sounding in negligence.

In Dickson v. McCoy, supra, at 401, which involved a horse turned loose in a public street, "Judge Dwight … stated a rule like that of the Restatement: It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence." See the dissent of the Hon. Robert S. Smith in Bard, supra, at 599.

The theories sounding in negligence are broader and more fact specific than the requirements of a strict liability action. The Courts have even allowed for consideration of factors discussed under a strict liability theory to be considered in the analysis of a cause of action sounding in negligence.

FACTORS TO BE CONSIDERED IN ANALYZING VICIOUS PROPENSITIES

"The size and strength of the dog, particularly as manifested by the manner in which it bit the plaintiff raise triable issues of fact as to whether the defendants acted in a reasonably prudent manner." See Parente v. Chavez, 17 A.D.3d 648, (2nd Dept. 2005).

Other "evidence tending to demonstrate a dog's vicious propensities include [evidence of] a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and the fact that the dog was kept as a guard dog," will also be considered by the court and/or trier of fact. See Collier, supra; Grubb v. Healy, 52 A.D.3d (2nd Dept. 2008); and Galgano v. Town of N. Hempstead, 41 A.D.3d 536 (2nd Dept. 2007).

"[V]icious propensities which go to establish liability include a propensity to do any act which might endanger another." See Mitura v. Roy, 174 A.D.2d 1020, (4th Dept. 1991) where defendants' dog jumped into family swimming pool as a guest was diving in, causing a gash to the plaintiff's face; and Felgemacher v. Rugg, 28 A.D.3d 1088, (4th Dept. 2006) which involved a dog jumping on plaintiff's back and knocking him to the ground. The term "vicious propensity" is extended to include "[a] known tendency to attack others, even in playfulness, as in the case of an overly friendly large dog with a propensity for … jumping up on visitors, will be enough to make the defendant liable for [*2] damages resulting from such an act," see Anderson v. Carduner, 279 A.D.2d 369 (1st Dept. 2001) involving defendants' dog jumping up "to greet" the plaintiff and poking her in the eye with its snout. See also Provorse v. Curtis, 288 A.D.2d 832 (4th Dept. 2001) which involved an injury due to a fall following the defendants' dog's "muzzle greeting" and Marquardt v. Nulewski, 288 A.D.2d 928 (4th Dept. 2001) where the dog jumped on a 4 year-old child causing a scratch to her face; and Felgemacher, supra.

Individuals who have had no physical conduct with the vicious or dangerous dog, but who have suffered their injuries while in flight from the approaching animal, have also been able to recover. In Mickens v. Prudential Insurance Corp. of America, 102 A.D.2d 815, (2nd Dept. 1984), a police officer was backing up in a hallway when he confronted an allegedly vicious dog and was injured when he walked backwards and fell down the stairs.

Likewise, Graham v. Murphy, 135 A.D.2d 326 (3rd Dept. 1988) involved a child who appeared to have sustained a minor injury from being bitten by a dog but who sustained a more serious injury when he fell over a tree stump while fleeing the continuing attack.

The Courts have also found liability against a defendant where the dog's vicious propensities with respect to attacking horses caused a recreational rider at a dude ranch to fall from a horse which bucked and jumped in response to an attack from the resident canine. See Kessler v. Wildwood Dude Ranch, Inc., 18 A.D.2d 1028 (2nd Dept. 1963).

DEFENSES – FACTORS FOUND NOT TO ESTABLISH LIABILITY OR WHICH CAN OVERCOME A LIABILITY FINDING

Frequent barking alone is not enough to establish evidence of any "vicious propensity." See Carter v. Metro N. Assoc., 255 A.D.2d 251 (1st Dept. 1998) and Vitrella v. Rodrigues, 11 A.D.3d 287 (1st Dept. 2004), lv denied 4 N.Y.3d 706 (2005).

A dog's "[b]reed alone is insufficient to raise a question of fact as to vicious propensities," Palleschi v. Granger, 13 A.D.3d 871, 872 (3rd Dept. 2004) an Akita; and Loper v. Dennie, 24 A.D.3d 1131 (3rd Dept. 2005) a Rottweiler; Carter, supra, a pit bull terrier; and Pule v. Lent, 146 A.D.2d 968 (3rd Dept. 1989) an Afghan hound.

The Courts have gone so far as to hold that "there is no persuasive authority for the proposition that a court should take judicial notice of the ferocity of

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Plaintiff sued defendant for malpractice, asserting that defendants' failure to offer sufficient expert testimony concerning the valuation of his damages resulted in an inadequate arbitration award. The trial court granted, and the Appellate Division affirmed defendant's motion for summary judgment, holding that plaintiff failed to offer any evidence that the arbitration panel could have reached a substantially different result. As a result, plaintiff failed to establish that the outcome of the proceedings would have been more favorable, but for defendants' asserted failure to present evidence.

NEW YORK APPELLATE DIVISION COURT

Teodorescu v. Resnick & Binder, P.C.

2008 NY Slip Op 7904 (10/14/08)

Plaintiff slipped on ice on a public sidewalk owned by the New York City Housing Authority ("NYCHA"). Defendant was retained, served an untimely notice of claim upon the NYCHA, and the complaint was dismissed. Plaintiff sued defendant for malpractice, and defendant moved for summary judgment, arguing that plaintiff could not have prevailed in the underlying slip-and-fall action. The trial court denied the motion, concluding that the evidence raised a triable issue of fact as to whether the NYCHA could have been found liable on a theory of constructive notice. The Appellate Division reversed, ruling that to make out a prima facie case of negligence in a slip-and-fall case involving an accumulation of snow and ice, the plaintiff must demonstrate that the defendant created the condition which caused the accident or that it had actual or constructive notice thereof. To give rise to constructive notice, a defect must be visible, apparent, and exist for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy it. Defendant relied on plaintiff's deposition testimony, which was insufficient to support her claim that the icy patch where she slipped existed when she traversed that sidewalk the previous evening, and she could not point out the exact location of her fall. The Appellate Division held that summary judgment should have been granted.

CONTINUOUS REPRESENTATION

U.S. DISTRICT (S.D.N.Y.)

Pandozy v. Gumenick

2008 U.S. Dist. LEXIS 41440 (5/23/08)

Defendant represented plaintiff in an apartment sale. On 1/2/04, defendant prepared a letter for plaintiff which sought to rescind the sale contract. Plaintiff thereafter fired defendant and hired another attorney. The apartment buyer sued plaintiff, who lost and then rehired defendant for the appeal which did not deal with issues raised in the letter. Plaintiff sued defendant on 2/16/07 for legal malpractice because of alleged defects in the letter. New York has a 3 year statute of limitations. Plaintiff argued that the continuous representation doctrine tolled the statute of limitations. The doctrine protects a plaintiff who has an ongoing relationship with his attorney by tolling the statute of limitations until the ongoing representation is completed. It requires (1) an ongoing representation connected to the specific matter at issue in the malpractice action (the rule in New York is that a corporate transaction and litigation in some way related to that transaction should not be considered the same specific matter, absent unique circumstances); and (2) clear indicia of an ongoing, continuous, developing and dependent relationship. Because the initial representation with respect to contract rescission involved a different subject matter than the appeal of the specific performance action, the continuous representation doctrine was not applicable. Also, since there was a breakdown in the relationship, the doctrine was not applicable.

NEW YORK APPELLATE DIVISION COURT

Hasty Hills Stables, Inc. v. Dorfman

2008 NY Slip Op 547 (6/10/08)

Plaintiffs retained the defendant law firm on 9/24/96 regarding the owner's sale of property on which they had a lease to operate a stable. They sought to ensure that the buyer assume a 50 year lease between plaintiffs and the seller. The buyer assumed the lease at the 10/10/96 closing until it sold the property to a new owner in 7/01, which exercised a lease defeasance clause permitting it to terminate the lease, and evicted plaintiffs in 5/03. Plaintiffs sued defendant on 1/25/05 to recover damages based on its failure to advise them about the defeasance clause and to eliminate the clause before the 1996 closing. Defendant argued that the action was time-barred because it accrued at the 10/10/96 closing, and the complaint was filed after the three-year statute of limitations expired. Plaintiffs argued that defendant's representation continued until 5/20/04 when the defendant confirmed its termination as plaintiff's attorney. The trial court denied defendant's motion for summary judgment. The appellate court reversed, holding that under the doctrine of continuous representation, the three-year statute of limitations is tolled only while the attorney continues to represent the client in the same matter after the alleged malpractice is committed. The defendant's subsequent representation of plaintiffs in matters unrelated to the specific matter that gave rise to the alleged malpractice was insufficient to toll the statute of limitations.

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CRIMINAL DEFENSE MALPRACTICE

U.S. DISTRICT COURT (S.D.N.Y.)

Avile v. Feitell

2008 U.S. Dist. LEXIS 40319 (5/23/08)

Plaintiff pled guilty to heroin possession and distribution and sued his criminal defense attorney. Plaintiff alleged that defendant violated the Code of Professional Responsibility. The Court held that there is no private cause of action for Code violations; and to state a claim of legal malpractice, a plaintiff in a criminal case must allege a colorable claim of innocence of the underlying offense. Having pled guilty to the underlying crime, plaintiff could not state a malpractice claim.

NEW YORK APPELLATE DIVISION COURT

Yong Wong Park v. Wolff & Samson, P.C.

2008 NY Slip Op 9176 (11/20/08)

Plaintiff claimed that defendants committed malpractice by advising him to plead guilty to trafficking in counterfeit goods without advising him of the immigration consequences of his guilty plea. Defendants filed a motion to dismiss, the substance of which was not discussed in the Appellate Division's decision. The Appellate Division ruled, *inter alia*, that plaintiff's claim was barred by his undisturbed guilty plea, and it rejected plaintiff's claim that his innocence need not be alleged where the alleged malpractice related to a collateral matter (deportation) rather than the core of the criminal action. The court also ruled that plaintiff did not allege that, but for defendants' alleged malpractice, plaintiff would not have pleaded guilty.

INSURANCE COVERAGE

NEW YORK APPELLATE DIVISION COURT

Executive Risk Indem. Inc. v Pepper Hamilton LLP

2008 NY Slip Op 07044 (9/23/08)

Plaintiff provided professional liability insurance coverage to defendant law firm and brought an action against defendant and its other insurers, seeking a declaration that it had no obligation to indemnify defendant. The underlying claims against defendant arise from an alleged securities fraud scheme by the firm's former client (SFC) which later filed bankruptcy. The bankruptcy trustee requested that defendant enter into a tolling agreement while he considered whether to bring claims against it. Defendant thereafter notified its insurers. The trustee then brought an action against defendant, alleging negligence in its failure to discover SFC's alleged securities fraud as well as actual complicity in SFC's alleged fraudulent scheme. Plaintiff then brought its action against defendant and its other insurers, after which the excess insurers moved for summary judgment, contending, *inter alia*, that because of defendant's alleged nondisclosure of information known to it about SFC, defendant breached the "prior knowledge" policy exclusion, which states that the policy does not apply to any claim "arising out of any act, error, or omission committed prior to the inception date of the policy which the insured knew or should have known could result in a claim, but failed to disclose to the Company at inception." The trial court granted summary judgment, holding, *inter alia*, that because defendant knew of SFC's alleged misconduct and of the likelihood that claims would be made against it, based on its representation of SFC while the alleged misconduct took place, it had an obligation to inform the insurers of its knowledge and its concern that it might be subject to suit when it applied for coverage or for renewal of coverage. The appellate court reversed, ruling that there was no objective evidence permitting a reasonable professional to conclude that defendant itself did anything that would subject it to suit or other claim. The policy exclusion cannot be read to apply whenever the insured has knowledge of a client's misconduct and represented the client while the misconduct occurred. Defendant itself must have acted improperly, so as to have itself created the possibility of a professional liability claim against it. Since the "known of" act, error or omission at the heart of such a potential claim must be that of the insured, not that of its client, its representation of a client while the client itself, unknown to the firm, engages in wrongful conduct, cannot suffice.

JUDGMENT RULE

U.S. BANKRUPTCY COURT (E.D.N.Y.)

In re Smith

2009 Bankr. LEXIS 141 (1/26/09)

Plaintiffs, a former debtor, his wife, and his sister moved to reopen the debtor's Chapter 7 bankruptcy case for the purpose of pursuing a legal malpractice action against the Chapter 7 trustee and his bond holders. They claimed that the trustee committed malpractice, breach of fiduciary duty, and negligence. The only assets in the debtor's estate were the debtor's derivative claims against a corporation. Plaintiff contended that the trustee committed malpractice when he failed to pursue these claims. The court ruled, *inter alia*, that while the trustee had a fiduciary duty to the estate to liquidate assets, a bankruptcy trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or pursuant to court order. Although a trustee is subject to personal liability for negligent violations of duties imposed upon him by law, a trustee is not liable

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in any manner for mistake of judgment where discretion is allowed. The court held that the trustee was within his discretion under the business judgment rule to not pursue the alleged derivative claims, and he was immune from suit for personal liability for acts taken as a matter of business judgment.

NEW YORK APPELLATE DIVISION COURT

Noone v. Stieglitz

2009 NY Slip Op 1093(2/10/09)

Defendants represented plaintiff in a personal injury action. During jury deliberations, plaintiff accepted a "high-low" settlement offer of $ 500,000 - $ 1,000,000. The jury returned a verdict against plaintiff, who sued defendants for failure to introduce certain evidence at trial and to advise her of the consequences of the high-low settlement. Defendants moved for summary judgment, arguing that plaintiff was advised of the consequences of the high-low settlement on the record and that the evidence in question would not have changed the verdict. The trial court granted summary judgment, and plaintiff appealed. The court affirmed, ruling that attorneys are free to select among reasonable courses of action in prosecuting an action without exposing themselves to liability for malpractice, and that defendants demonstrated that they pursued a reasonable trial strategy. Defendants also demonstrated that plaintiff was advised of the consequences of the high-low settlement.

RETAINER AGREEMENT

U.S. DISTRICT COURT (S.D.N.Y.)

Lok Prakahasan, Ltd. v. Berman

2008 U.S. Dist. LEXIS 101756 (12/12/08)

Plaintiff sued defendants for malpractice for failing to offer an exhibit at trial. Defendants represented themselves *pro se,* filed a counterclaim for unpaid attorney fees, and moved for summary judgment on the complaint and the counterclaim, which the court granted. Defendants then sought attorney fees for the malpractice action based on the retainer agreement which stated: "If it is necessary to institute litigation to collect our fee or preserve any lien securing the payment of our fee, you will be responsible for all costs and legal fees associated with such actions." The court denied attorney fees for defending the malpractice action as the retainer agreement language did not include it.

SHAREHOLDER LIABILITY

U.S. DISTRICT COURT (E.D.N.Y.)

Schnabel v. Sullivan

2008 U.S. Dist. LEXIS 79048 (9/29/08)

Plaintiff sued his attorneys for personal losses regarding the purchase of a restaurant business. Defendants moved for partial summary judgment, claiming that plaintiff lacked standing to assert certain damages which, if suffered, were suffered only by plaintiff's corporate entity, not personally by plaintiff. While the court agreed that a sole or majority stockholder has no independent right of action to recover personally for wrongs to the corporation, the court found undisputed evidence of an independent duty owed by defendants personally to plaintiff as the individual who retained defendants. The Court also found sufficient evidence that plaintiff incurred personal damages as 1) he issued personal financial guarantees in connection with the restaurant, 2) he injected his own money to cover operating costs, 3) he had been sued directly in the restaurant seller's action, and 4) in settling the seller's lawsuit, he was forced to surrender his right to recover those funds in that action.

MISCELLANEOUS

U.S. DISTRICT COURT (E.D.N.Y.)

Failure To Provide Trial Evidence Not Actionable

Provenzano v. Pearlman, Apat & Futterman, LLP

2008 U.S. Dist. LEXIS 86098 (10/24/08)

Plaintiff claimed that she was struck on the head by a robotic camera at an ABC television studio. Defendant represented her in an action against the camera manufacturer. After a defendant's verdict, plaintiff sued defendant, claiming that the law firm 1) failed to retain a design expert; 2) failed to call the camera designers as witnesses; 3) failed to develop evidence of erratic camera movement; and 4) failed to call eyewitnesses. Defendant moved for summary judgment, arguing that plaintiff failed to provide evidence of a genuine issue of fact. The Court agreed, holding that 1) plaintiff's expert failed to provide any basis that the unprompted camera movement was caused by a design defect rather than negligent repairs by ABC; 2) plaintiff did not identify any specific testimony that the designers could have provided; 3) defendant had developed evidence of erratic camera movement; and 4) no rational fact finder could find that the witnesses' testimony would have resulted in a different verdict.

NEW YORK APPELLATE DIVISION COURT

Covenant Not To Sue Applied to Attorney

Hugar v. Damon & Morey

2008 N.Y. Slip Op 4167 (5/2/08)

Plaintiffs, a client and his limited liability company, appealed an order that granted defendant attorneys' motion to dismiss their action for breach of fiduciary duty and legal malpractice. The client and his limited liability

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company, and two other individuals and their respective limited liability companies, hired the attorneys to help them form a new company. When the new company terminated the client's employment, the attorneys continued to represent the new company and its remaining principals in negotiations to resolve his claims against them. When the client's claims were eventually resolved, he, on behalf of himself and his company, executed a settlement agreement that included a general release. The appellate court found, *inter alia*, that the complaint was properly dismissed since the action was barred by the covenant not to sue in the settlement agreement in which the clients agreed not to institute any action at law or equity or to assert any claim against various entities, including agents, relating to any company matters. The attorneys were agents of parties to the settlement agreement, and the subject matter of the client's action involved company matters. Accordingly, the covenant covered the allegations of legal malpractice and breach of fiduciary duty in the complaint.

NEW YORK APPELLATE DIVISION COURT

Ex-Husband's Attorney Not Liable to Ex-Wife

Breen v. Law Off. of Bruce A. Barket, P.C.

2008 NY Slip Op 5640 (6/12/08)

In their divorce settlement, plaintiff and her husband agreed that he would purchase her interest in one parcel of land, and a second parcel would be sold with proceeds divided between them. The husband's lawyer drafted a quit claim deed that conveyed both parcels to the husband. Plaintiff's lawyer reviewed the deed, and plaintiff signed it. Plaintiff sued her attorney and her ex-husband's attorney for malpractice. The ex-husband's attorney's law firm moved for summary judgment, which the trial court denied. The law firm appealed, and the appellate court held that 1) the ex-husband's attorney was not liable to third parties, such as plaintiff, who was not in privity or near privity with his client for harm caused by his alleged negligence; 2) he had no duty to impart correct information to the plaintiff; 3) she was not a third party beneficiary of the retainer agreement between the attorney and the ex-husband; 4) there was no "linking conduct" between plaintiff and the attorney; 5) the deed did not constitute a representation between the attorney and plaintiff; and 6) there was no justifiable reliance, since plaintiff notified her attorney of the deed's errors who then advised her to sign it nonetheless. Plaintiff's attorney also had brought a cross claim against the ex-husband's attorney for contribution and indemnification. The appellate court held that because the ex-husband's attorney owed no duty to plaintiff, her attorney was not entitled to contribution; and because he owed no duty to plaintiff's lawyers, they were not entitled to indemnification from him.

NEW YORK APPELLATE DIVISION COURT

Vicarious Liability

Whalen v. Degraff, Foy, Conway, Holt Harris & Mealey

2008 N.Y. LEXIS 3979 (7/12/08)

Plaintiff retained defendant to recover an interest in a partnership and to secure a judgment against Gerzof, who then died in Florida. Defendant hired a Florida law firm (Bailey) to file any claims required with respect to the judgment against the estate, but a notice of claim was not filed within the required time period. Plaintiff sued defendant, claiming it was vicariously liable for Bailey's negligence and for failing to supervise it; and moved for summary judgment. Defendant also moved for summary judgment, claiming it was entitled to rely on Bailey to perform the requisite acts. The trial court denied both summary judgments. The appellate court held that while a firm is not ordinarily liable for the acts or omissions of a lawyer outside the firm who is working as co-counsel or in a similar arrangement, as such a lawyer is usually an independent agent of the client (Restatement [Third] of Law Governing Lawyers § 58, Comment e), defendant solicited Bailey and obtained its assistance without plaintiff's knowledge. Although plaintiff later was advised that Bailey had been retained, she had no contact with Bailey and did not enter into a retainer agreement with it. Therefore, defendant assumed responsibility for filing the estate claim, Bailey became its subagent, and it had a duty to supervise Bailey's actions. Furthermore, while plaintiff ordinarily would be required to submit an expert affidavit setting forth the applicable standard of care in her favor, no affidavit was necessary because defendant knew of the deadline and took no steps to inquire as to the status of the filing. Thus, plaintiff's motion for summary judgment should have been granted, awarding her judgment as a matter of law.

NEW YORK APPELLATE DIVISION COURT

Alter Ego Doctrine Regarding Plaintiff

Baccash v. Sayegh

2008 NY Slip Op 6436 (7/29/08)

Plaintiff was the sole officer and shareholder of Iman Bridal Couture, Inc. and hired defendant to represent her in the purchase of a trade name of Peggy Peters, Ltd. Defendant allegedly advised her that she would have to purchase Peggy's inventory in order to acquire its trade name. She agreed and claimed that defendant negotiated a stock purchase rather than an asset purchase, thus requiring Bridal to assume Peggy's business' trade debt and a bank loan guaranteed by the owner. She signed the agreement without reading it. Plaintiff (not Iman) sued defendant because of the stock purchase and defendant's defaulting in a creditor's lawsuit which had been brought against both businesses. The jury returned

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a verdict for plaintiff, and defendant moved to set aside the verdict, claiming plaintiff failed to prove she suffered any damages, because it was plaintiff's business and not plaintiff which made payments in satisfaction of Peggy's debts. The trial court denied that part of defendant's motion, holding that since plaintiff was the sole officer and shareholder of Iman, the corporation was her alter ego. The appellate court reversed, holding that a corporation has a separate legal existence from its shareholders even where the corporation is wholly owned by a single individual, that courts are loathe to disregard the corporate form for the benefit of those who have chosen that form to conduct business, that the alter ego doctrine typically is employed only by third parties seeking to circumvent the limited liability of the owners, and that no evidence was presented that the business was plaintiff's alter ego.

NEW YORK APPELLATE DIVISION COURT

Failure to Investigate Third Party Claim

Thompson v. Seligman

2008 NY Slip Op 6496 (7/31/08)

Plaintiff's employer contracted to provide a hotel with cleaning persons. Plaintiff was injured while she was cleaning a hotel room and retained defendants to represent her in a worker's compensation claim. She also inquired about suing the hotel for pain and suffering. Defendants informed her that she could not pursue the claim, mistakenly believing that she was employed by the hotel. By the time plaintiff consulted with a different attorney who advised her that she could have brought a claim, the statute of limitations had expired. Plaintiff sued defendants, who moved for summary judgment, alleging that they had no duty to investigate plaintiff's representations that she was employed by the hotel. The trial court denied the motion, finding that plaintiff raised questions of fact with respect to defendants' duty to investigate her claim and whether they were negligent in performing that duty. The appellate court affirmed, finding that that the scope of defendant's duty is an issue of law for the court, that an attorney has the responsibility to investigate and prepare every phase of his or her client's case, and that defendants owed such duty to plaintiff. Plaintiff's pay stubs and W-2 statement correctly identified her employer, and there is no evidence that defendant ever asked to review those documents or made any further inquiry regarding the identity of her employer.

NEW YORK APPELLATE DIVISION COURT

Summary Judgment Denied To Referring Attorney Who Shared The Contingency Fee

Rosenstrauss v. Jacobs & Jacobs

2008 NY Slip Op 8472 (11/5/08)

Plaintiff sued several attorneys for malpractice. Some of the defendant attorneys moved for summary judgment because, *inter alia*, they only referred plaintiff to the other defendant attorneys. The trial court denied summary judgment, and the court affirmed because, *inter alia*, the attorneys agreed to participate in any contingency fee in the underlying action.

NEW YORK APPELLATE DIVISION COURT

Malpractice Action Against Deceased Attorney Dismissed

Marte v. Graber, 2008 NY Slip Op 8552 (11/13/08)

Plaintiff sued his attorney who had died three months before the suit was filed. The trial court granted plaintiff's motion, pursuant to CPLR 305 and CPLR 1021, to amend the summons and substitute defendant, a voluntary administrator, for the attorney. Defendant appealed, and the court reversed, holding that since the summons and complaint were filed after the attorney died, the client had not properly commenced an action against the attorney. was never served on the attorney.

NEW YORK APPELLATE DIVISION COURT

Attorney's Successful Collection Action Does Not Preclude Malpractice Action

York v. Landa

2008 NY Slip Op 10614 (12/30/08)

Plaintiff–client and defendant–attorney entered into an agreement wherein the client agreed to pay $ 75,000 in full satisfaction of all outstanding legal fees regardless of the outcome of an underlying matrimonial action. Defendant was awarded a $ 75,000 money judgment against plaintiff in the matrimonial action, and plaintiff then sued defendant for malpractice. Defendant moved to dismiss the action because of collateral estoppel, arguing that the prior action confirmed that he was entitled to an award of an attorney's fee, thereby necessarily deciding that he had not committed legal malpractice. The trial court denied the motion and the Appellate Division affirmed, holding that because the issue of whether the attorney committed legal malpractice was not necessarily decided in the collection action, the client was not precluded from raising that issue.

NEW YORK APPELLATE DIVISION COURT

Estate Lacked Privity To Bring A Malpractice Action

Estate of Saul Schneider v. Finmann

2009 NY Slip Op 2319 (3/24/09)

Decedent transferred ownership of a life insurance policy on his own life from a limited liability partnership, which he controlled, to himself. He allegedly acted on the advice of defendant. Decedent died, and the transfer of ownership of the policy allegedly resulted in increased estate tax liability. Decedent's estate sued defendant

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for damage to its building caused by an excavation on an adjacent lot. A structural engineer found that a number of cracks, separations and open joints were caused by an excavation in an adjacent lot, and the failure of the excavators to properly underpin. Plaintiff submitted a claim for the damage to its carrier, State Farm. The policy had an exclusion for "earth movement". The policy defined "earth movement" as the "sinking, rising, shifting, expanding or contracting of earth." The definition went on to state that "earth movement" includes but is not limited to "earthquake, landslide, erosion and subsidence but does not include sinkhole collapse." The Court held that the law governing the interpretation of exclusionary clauses is highly favorable to the insureds. The Court held that when an insurer wishes to exclude certain coverage, it must do so in clear and unmistakable language. Admitting that the case was a "close one", the Court held that it could not say that the event that caused plaintiff's loss was unambiguously excluded from the coverage of the policy. The plaintiff argued that the examples given of earth movement were all different than excavation, an intentional removal of earth by humans. Plaintiff argued that when specific examples are mentioned, those not mentioned should be understood to be things of the same kind. Defendant argued that the literal language of the exclusion described exactly what happened, i.e., the earth moved. The Court concluded that both defendant's and plaintiff's readings were reasonable. Precedent required the Court to adopt the reading that narrowed the exclusion, and resulted in coverage.

4. EVIDENCE

Plaintiff's Co-Worker's Statements were "Excited Utterances", and thus, an Exception to the Hearsay Rule

Heer v. North Moore Street Developers, LLC
2009 WL 1150187 (1st Dept 2009)

On a summary judgment motion, defendant argued that the lack of witnesses to plaintiff's accident and plaintiff's inability to recall how the accident happened precluded summary judgment for plaintiff under Labor Law §240(1). The Court held that a co-worker's sworn statement placing plaintiff on a scaffold bridge that did not have a rail just before the accident and the fact that he had no safety device was prima facie evidence that his injury was a result of a fall from the sidewalk bridge. The co-worker's statement that he heard bricklayer's yelling that plaintiff had fallen were admissible as "excited utterances."

5. LOSS OF SEPULCHER

Notice of Claim for Loss of Sepulcher was Timely. Punitive Damages Claim Dismissed

Melfi v. Mount Sinai Hospital
2009 WL 1118956 (1st Dept. 2009)

Leon Melfi collapsed in his room at a welfare hotel in Manhattan. He was brought by ambulance to Mt. Sinai Hospital. Identifying information found on Mr. Melfi included his address, date of birth, and social security number. The ambulance call report also listed his friend, Joan Tedesco, as his next of kin. Mr. Melfi died at the hospital. The death certificate included his name and age, but omitted his address, social security number and Ms. Tedesco's information. Mr. Melfi's body remained in the Mt. Sinai morgue for 30 days. It was then transferred to the City Morgue at Bellevue Hospital. The record was silent as to any effort made to locate his next of kin while the body was at Bellevue. Mr. Melfi's body was subsequently sent for embalming practice by students of Nassau Community College's Mortuary Science Department. He was then buried in Potter's field. Two months after his burial, his niece was contacted by the welfare hotel and told of his death. She informed her father, the plaintiff, John Melfi. John Melfi ultimately learned that his brother was buried in Potter's field, but more than 90 days after his brother's death. Mr. Melfi filed a Notice of Claim against Bellevue for loss of sepulcher. Bellevue moved to dismiss on the grounds that the Notice of Claim was filed more than 90 days after Leonard Melfi's death. The Court held that because the injury arising out of a loss of sepulcher claim is emotional, it is axiomatic that plaintiff must be aware of the interference with the right to provide for a loved one's burial. As such, the claim did not accrue until John Melfi realized that his brother's body had been buried in a mass grave of unknown bodies. The Court held that the punitive damages claim against Mt. Sinai for the acts of the doctor in failing to make diligent attempts to locate the next of kin should be dismissed as he could not be considered someone with a "high level of general managerial authority" such that the hospital could be found to have "authorized, participated in, consented to or ratified his conduct."

6. LABOR LAW

Labor Law §240(1) Cause of Action Dismissed

Garcia v. Edgewater Development Company
2009 WL 1154009 (2nd Dept. 2009)

Plaintiff was injured when a panel of drywall struck his back as he was unloading it from a raised platform and pulling it through an open, second-story window. The court reversed the lower court's denial of defendant's motion for summary judgment seeking to dismiss the Labor Law §240(1) cause of action. The Court found that although the platform was raised to reach the second-story window, the plaintiff was able to grasp the

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top and bottom corners of the panel. Thus the drywall was "not elevated above the work site, but rather was at the same level as the plaintiff." As such, Labor Law §240(1) did not apply.

7. INSURANCE COVERAGE

Insured's Conduct was not an Accident Subject to Commercial General Liability Carrier's Duty to Defend; Conduct did not Fall Under Exclusions in Policy Issued by Nonprofit Organization Liability Carrier

Village of Springfield v. Reynolds
2009 WL 1099695 (4th Dept. 2009)

Defendant Reynolds was the owner of a building that housed his residence and a tavern/restaurant. After the building was damaged in a fire, the plaintiff Village of Springfield directed that the building be demolished. Reynolds brought an underlying suit against the Village of Springfield for the loss of property and alleged violations of various constitutional rights. The Village brought a declaratory judgment action against its commercial general liability carrier, (Argonaut), and its Nonprofit Organization liability carrier (USSIC). The court held that the Village failed to establish that the loss was caused by an "occurrence" as defined in the policy. The policy defined "occurrence" as an accident, and the underlying complaint alleged that the decision by the Village to demolish the building and the demolition itself were intentional. As such, the court granted Argonaut's Motion for Summary Judgment. USSIC attempted to rely on two policy exclusions: (1) the exclusion for, inter alia, the destruction of tangible property and (2) the exclusion for wrongful acts on the part of the insured including acts that are dishonest, malicious, fraudulent, "or otherwise intended to cause damage to persons or property." Because the complaint also included allegations of the violation of various constitutional rights including denial of due process, right to free speech and the denial of equal protection, the Court held that USSIC failed to raise an issue of fact whether "the allegations of the complaint cast that pleading solely and entirely within the policy exclusions."

8. LABOR LAW

Worker's Compensation Board Finding is not Entitled to Collateral Estoppel Effect; Issues of Fact Precluded Application of One and Two Family Home-Owner's Exemption.

Baker v. Muraski
2009 WL 1099724 (4th Dep. 2009)

The Court held that an issue of fact existed as to whether plaintiff was "employed" within the meaning of the Labor Law. The Court further held that the determination of the worker's compensation board that plaintiff was not employed by Defendant-owners of the house was not entitled to collateral estoppel effect in view of the differing definitions of "employee", "employer", and "employed" in the Labor Law and the Worker's Compensation Law. Finally, the court held that there was an issue of fact as to whether the homeowner's exemption applied as fact issues existed as to whether defendant husband, an experienced roofer who was working with plaintiff at the time of this accident, directed or controlled plaintiff's work.

9. NOTICE OF CLAIM

Petitioner Was Not Entitled to Leave to Serve Late Notice of Claim

Ali v. New York City Health & Hospitals Corp.
877 N.Y.S.2d 221 (2nd Dept. 2009)

The Court held that petitioner failed to explain a nine-year delay in seeking to serve a late notice of claim. The Court found that the delay was not directly attributable to the infant-petitioner's infancy. The Court further held that the mere fact that the defendant was in possession of the infant's medical records did not, without more, establish that the hospital had actual knowledge of the essential facts constituting the claim.

10. LABOR LAW

Worker's Injury Did Not Involve an Elevation-Related Hazard

Romeo v. Property Owner (USA) LLC
877 N.Y.S.2d 48 (1st Dept. 2009)

Plaintiff electrician's injury occurred when he was walking on a raised computer floor. He stepped on a floor tile that suddenly and unexpectedly dislodged, causing his right foot to fall through the 2 foot by 2 foot opening and strike the concrete sub-floor 18 inches below. The court affirmed the dismissal of the Labor Law §240(1) cause of action finding that plaintiff's injury while walking on the permanent floor did not involve an elevation related hazard of the type contemplated by the statute. The Court also affirmed the dismissal of the Labor Law §200 claim on the ground that there was no evidence to indicate that the owner or general contractor had either notice of the alleged hazardous tile condition or that they directly controlled and supervised the electrical work. The Court also affirmed the dismissal of the Labor Law §241(6) claim. The hazardous opening provision of the industrial code [12 NYCRR §23-1.7(b)(1)] was inapplicable inasmuch as the opening in question and the 18 inch depth to the sub-floor did not present significant depth and size to warrant the protection of the provision.

11. MEDICAL MALPRACTICE

Office of Professional Misconduct Was Not Required to Produce Statements of Medical Malpractice Defendants

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Collected During Investigation

Harold v. Community General Hospital of Greater Syracuse
876 N.Y.S.2d 828 (4th Dep. 2009)

The Court held that pursuant to Public Health Law §230(10)(a)(v), the files of the Office of Professional Misconduct concerning possible instances of professional misconduct are confidential, subject to some exceptions that did not apply. While the prohibition relating to discovery of testimony does not apply to the statements made by any person in attendance at a meeting of the Board who is a party to an action, the Department of Health established that the Board never convened on the matter at issue.

12. PROCEDURE

Plaintiff Failed to Show Good Cause for Failure to Timely Serve Summons and Complaint

Ambrosio v. Simonovsky
2009 WL 1240101 (2nd Dep. 2009)

The Court held that plaintiff was required to show good cause for his failure to serve the defendant with the summons and complaint within 120 days of its filing. Plaintiff admittedly made no attempt to serve the defendant within 120 days after the filing. The court also held that plaintiff failed to show that an extension of time was warranted in the interests of justice in light of the one year delay between the time the summons and complaint was filed and the time plaintiff cross-moved for an extension, the 9 ½ month delay between the expiration of the statute of limitations and the defendant's receipt of notice of the action and plaintiff's failure to make any showing of merit.

13. EXPERT EVIDENCE

Expert Affidavit was not Supported by Sufficient Factual Basis; Res Ipsa Loquitar was not Applicable

Bazne v. Port Authority of New York and New Jersey
877 N.Y.S.2d 321 (1st Dept. 2009)

Plaintiffs alleged that while they were on an escalator at the Port Authority Bus Terminal, the escalator shook suddenly and stopped, causing them to fall backwards. Defendants made a motion for summary judgment arguing that even assuming a mechanical defect, they were not liable, given that there was no record of prior complaints about the escalator, Otis performed regular bi-monthly preventative maintenance and no problems were indicated in the service maintenance records it kept. In opposition, plaintiff's expert opined that the escalator could have jerked due to deterioration or wearing of various parts, and inferred that Otis was negligent by not replacing certain parts. The Court held that the affidavit was not probative because it was not based upon depositions or documents produced but rather on speculation and purported "missing documents." The Court further held that res ipsa loquitur did not apply because plaintiff failed to demonstrate that the escalator, which was subject to extensive public contact in daily basis, was in defendant's exclusive control.

14. DAMAGES

Claimant was not Entitled to Damages for Future Pain and Suffering

Araujo v. State of New York
877 N.Y.S.2d 315 (1st Dept. 2009)

The Court held that the Court of Claim's determination that the worsening condition of claimant's knee after the subject accident was caused not by the accident but by a degenerative condition that had its nascency in a surgery pre-dating the accident by more than nine years was a result of the resolution of credibility issues presented by conflicting expert testimony and that there was no basis to disturb that determination. Accordingly, the determination to make no award for future pain and suffering would not be disturbed.

15. JURISDICTION

Bus Driver was not Subject to Personal Jurisdiction in New York

Vaichunas v. Tonyes
877 N.Y.S.2d 204 (2nd Dept. 2009)

Plaintiff was injured as she exited a bus operated by the defendant, a non-New York domiciliary. The accident occurred in Atlantic City, New Jersey. The Court held that pursuant to the portion of the longarm statute relied upon by the plaintiff, CPLR 302(a)(3), personal jurisdiction may be exercised over a non-domiciliary when the defendant "commits a tortuous act without the state causing injury to person or property within the state". The situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff.

16. PREMISES LIABILITY

Genuine Issue of Material Fact Existed as to Whether Sidewalk Defect was Trivial

Delarosa v. City of New York
877 N.Y.S.2d 439 (2nd Dept. 2009)

In a sidewalk defect case, the Court held that a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip. In determining whether a defective condition is trivial as a matter of law, a court must examine the facts presented, including the width, depth, elevation irregularity and appearance of the condition, along with the time, place and circumstances of the injury.

Continued on next page

17. COVERAGE

Doctrine of Estoppel Precluded Insurer From Denying or Disclaiming Coverage

Liberty Insurance Underwriters, Inc. v. Arch Insurance Company

877 N.Y.S.2d 44 (1st Dept. 2009)

Contractor's Insurer brought an action against the City's Insurer seeking a declaration regarding each parties' respective obligations under commercial general liability policies to defend and indemnify insureds in an underlying personal injury action. The Court held that the doctrine of estoppel precluded the Contractor's insurer from denying or disclaiming coverage where the proper defending party relied to its detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on the loss of the right to control its own defense. The Court rejected plaintiff's argument that this doctrine should be limited to coverage disputes between insurers and insureds. The Court held that the defendant insurer was not entitled to reimbursement of defense costs incurred before tendering the defense to plaintiff.

18. COVERAGE

Insured Did Not Have Good Faith Objective Basis to Believe that Tenant was not Going to Commence Litigation

Ferrara v. Meceda Realty Corp.

877 N.Y.S.2d 35 (1st Dept. 2009)

The Court held that where the insured did not give notice for more than two months after learning of the infant-plaintiff's accident, it was their burden to establish that a reasonably prudent person, upon learning of the accident, would have a good faith objective basis for believing that litigation would not be commenced. The Court found that it was not disputed that on meeting with plaintiff's mother, the insured's property manager had seen burn scars on the infant-plaintiff and had been told that the infant had been in the hospital. At that point, the insureds could not have reasonably believed that there would be no litigation arising out of the accident and therefore had not shown any extenuating circumstances to justify their delay in reporting the occurrence.

19. PROCEDURE

Plaintiff's Delay in Presenting New Theory of Liaiblity Warranted Rejection of Argument

Yousefi v. Rudeth Realty, LLC

877 N.Y.S.2d 132 (2nd Dept. 2009)

The Court held that while modern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action supported by submissions, plaintiff's delay was inexcusable in this case. The theory of res ipsa loquitur was not raised until plaintiff served opposition papers to defendant's summary judgment motion.

20. FIREFIGHTER'S RULE

Administrative Code Sections 27-128 and 27-128 provided Basis for Liability Under GML Section 205-a

Cusamano v. City of New York

877 N.Y.S.2d 153 (2nd Dept. 2009)

Plaintiff, a New York City firefighter, suffered an injury when he fell down a staircase in a building owned by the City of New York during a training exercise. Plaintiff slipped on debris at the top of the staircase and attempted to grab the handrail, but could not. After a jury trial, the plaintiff was awarded $1.2 million for future pain and suffering. The City appealed. The Court held that Administrative Code Section 27-375(f) did not apply, as the stairs at issue were not "interior stairs" as they did not lead to an exit. Thus, 21-375(f)'s requirement of a handrail on interior stairs did not apply. The Court held that Administrative Code Sections 27-127 and 27-128, which require that owners must maintain buildings in a safe condition did apply, as the jury could have concluded that the defendants failed to maintain the stairway in a safe condition based on the nature and placement of the handrail. The Court noted that plaintiff testified that the handrail "wasn't a real handrail, it was just pieces of wood nailed to a wall", and he "couldn't put [his hand] around it." It is also noted that the Court reduced the future pain and suffering award to $775,000. Plaintiff suffered a fracture of the wrist with surgery and placement of hardware, inpingment in the AC joint of his shoulder requiring two surgeries and a torn medial meniscus requiring surgery.

21. VOIR DIRE

Trial Court's Limit of 15 Minutes for Each Round of Voir Dire was Unreasonable

Zgradek v. McInerney

876 N.Y.S.2d 227 (3rd Dept. 2009)

In a rear-end auto case where liability was conceded, the Supreme Court limited voir dire to 15 minutes per round. The Third Department granted a new trial. The Court held that while the trial Court is accorded discretion in setting time limits for voir dire, the 15 minutes allotted for each round in this case was unreasonably short. The case involved factual and medical issues, expert testimony and challenges to causation on each injury. The jury found a "serious injury" under the threshold law, but made no award for past and future pain and suffering. The Court held that such a finding was a material deviation from reasonable compensation.

President's Column

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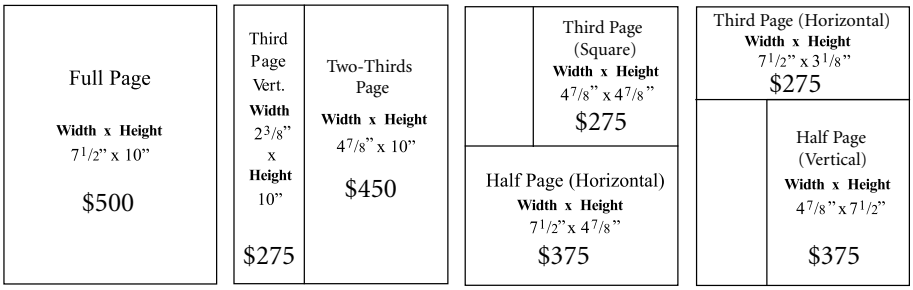

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any particular type or breed of domestic animal." See Roupp v. Conrad, 287 A.D.2d 937, 938 (3rd Dept. 2001) a German shepard; and Loper, supra.

"The presence of a "Beware of Dog" sign, standing alone, is insufficient to impute notice of a dog's viciousness." See Shaw v. Burgess, 303 A.D.2d 857, 858-859 (3rd Dept. 2003); Shannon v. Schultz, 259 A.D.2d 937, 938 (3rd Dept. 1999), lv denied 93 N.Y.2d 816 (1999); and Smedley v. Ellinwood, 21 A.D.3d 676 (3rd Dept. 2005).

Evidence of barking and chasing small animals within the defendant's yard is also insufficient [to establish liability] where it demonstrates nothing more than "normal canine behavior", Collier, supra at 447; Fontanas v. Wilson, 300 A.D.2d 808, 809 (3rd Dept. 2002); and Campo v. Holland, 32 A.D.3d 630 (3rd Dept. 2006).

The Courts have also found that the "vicious propensity" claimed must result in the injury giving rise to the lawsuit. A dog found to have jumped and "banged heads" with the plaintiff causing him to sustain a laceration above his right eye requiring stitches was found to have acted consistently with "normal canine behavior." Although "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities albeit only when such proclivity results in the injury giving rise to the lawsuit." See Collier, supra, Pollard, supra, Anderson, supra, and Dickinson, supra.

A landlord with knowledge of a tenant's dog's vicious propensities may raise a defense to the negligence claims brought against him where the attack occurred outside of the demises premises. See Sedeno v. Luciano, 34 A.D.3d 365 (1st Dept. 2006).

Provocation of the animal, such as chasing, assaulting, attacking or otherwise threatening the animal (or its handler or master) can be asserted as a viable affirmative defense. See Seybolt v. Wheeler, 42 A.D.3d 643 (3rd Dept. 2007).

WHERE DO WE CURRENTLY STAND?

In Collier, the Court of Appeals restated its longstanding rule:

> "that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of other in a given situation."

(Collier, supra. [quotation marks and citations omitted]; see also N.Y. PJI 2:220 [2006].

Once this knowledge is established, the owner faces strict liability. Justice Read writing for the majority said in footnote #2 of the opinion that,

> "Our rule is virtually identical to the Restatement (Second) of Torts §509 (1977): A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm."

Only two years after Collier, the Court of Appeals in Bard has rejected longstanding precedent and the Restatement (Second) of Torts in a case involving Fred, a hornless dairy breeding bull that was allowed to roam free within an enclosure and barn while workmen invited onto the property to assist the owners were present. The owner(s) never advised their invitee(s) of Fred's presence. Fred cornered Mr. Bard and although "hornless", charged the worker ramming him in the chest and then slamming him into the pipes in the barn. Mr. Bard sustained fractured ribs, a lacerated liver and the exacerbation of a preexisting cervical spine condition.

In analyzing Mr. Bard's first claim sounding in strict liability the Court found that,

> [H]ere, Fred had never attacked any farm animal or human being before September 27, 2001. He had always moved unrestrained within the limits of the barn's low cow district, [*5] regularly coming into contact with other farm animals, farm workers and members of the Jahnke family without incident or hint of hostility. He had never acted in a way that put others at risk of harm. As a result, Bard cannot recover under our traditional [**strict liability**] rule. [Emphasis added].

The Court also addressed Mr. Bard's second claim founded in negligence. Their analysis included a discussion of significant sections of the Restatement (Second) of Torts on the issues of negligence and distinctions within the class of certain domestic animal that could be considered more dangerous than their counterparts,

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did not bar maintenance of personal injury claim). See also Mishalaski v. Ford Motor Co., 935 F.Supp. 203 (E.D.N.Y. 1996) (applying New York law to hold plaintiff's status as undocumented alien irrelevant, and not to bar, action for compensatory damages); Collins v. New York City Health and Hospitals Corp., 575 N.Y.S.2d 227, 151 Misc.2d 266 (Sup. Ct. N.Y. Co. 1991) (deeming decedent's undocumented immigration status no bar to wrongful death claim).

In 2002, the U.S. Supreme Court decided Hoffman Plastic v. NLRB, 535 U.S. 137, invalidating an award of back pay to a group of undocumented workers who had been terminated for organizing a union. The Court held that such an award was contrary to the provisions of the Immigration Reform and Control Act. Id. Although New York courts diverged on the applicability of Hoffman to lost earnings claims brought by undocumented aliens (compare Balbuena v. IDR Realty LLC, 787 N.Y.S.2d 35, 13 A.D.3d 285, (1st Dept. 2004) (precluding claim) with Majlinger v. Cassino Contr. Corp., 25 A.D.3d 14, 802 N.Y.S.2d 56 (2d Dept. 2005) (permitting claim)), they continued to consistently uphold the right of such plaintiffs to assert claims for other forms of compensatory damages, including future medical costs.

For example, those New York courts that refused to follow Hoffman (a majority) recognized the right of an undocumented alien to seek all manner of compensatory damages, including the cost of future medical care. See Asgar-Ali v. Hilton Hotels Corp., 798 N.Y.S.2d 342, 4 Misc.3d 1026(A) (Sup. Ct. New York Co. 2004) (interpreting Hoffman not to preclude claims for traditional compensatory damages and citing authority in support).

Moreover, those courts that interpreted Hoffman to preclude lost wage claims did not go so far to recognize it as a bar to other aspects of a personal injury claim, such as the costs of future medical care. See Sanango v. 200 East 16th St. Housing Corp., 788 N.Y.S.2d 314, 316, 15 A.D.3d 36, 37 (1st Dept. 2004) (conceding that "plaintiff is entitled, without regard to his immigration status, to recover damages for items such as pain and suffering and medical expenses."), rev'd on different grounds, Balbuena v. IDR Realty LLC, 812 N.Y.S.2d 416, 6 N.Y.3d 338 (2006).

Finally, the courts flatly rejected attempts by defendants to use Hoffman as a general bar to personal injury claims by undocumented aliens. See Cano v. Mallory Mgmt., 195 Misc. 2d 666, 669-670, 760 N.Y.S.2d 816, 818 (Sup. Ct. Richmond. Co. 2003).

In 2006, the Court of Appeals definitively rejected Hoffman's applicability to claims for future lost earnings. Balbuena, supra. Opinions issued by New York courts since that decision reflect a deepening refusal to consider immigration status in regard to the ability of an undocumented alien to assert a claim for bodily injury. See Lee v. Riverhead Bay Motors, 868 N.Y.S.2d 666, 667, 57 A.D.3d 283, 284 (1st Dept. 2008) (stating, that undocumented status of plaintiff claiming future medical costs is not a "bar to the recovery of damages in a civil action for personal injuries"); Coque v. Wildflower Estates Developers, Inc., 867 N.Y.S.2d 158, , 58 A.D.3d 44, (2d Dept. 2008) (threatening that parties to personal injury action brought by undocumented alien would stipulate to increase in award of future medical costs from $863,000 to $2.5 mil. or submit to retrial on issue).

Those New York cases that address the ability of an undocumented alien to seek damages for future medical care do not specify whether such recovery is properly measured in U.S. dollars or the currency of the plaintiff's native country. The reasoning contained in the decisions discussing future lost earnings claims, however, suggests a basis from which to analogize the measure of damages properly applied to an undocumented alien's claim for future medical costs.

It should be noted initially that the only New York decisions to permit measurement of an undocumented plaintiff's lost wage claim in terms of his native country's economy are those that apply Hoffman to preclude a claim for lost U.S. earnings. See, e.g., Balbuena, 787 N.Y.S.2d 35, 13 A.D.3d at 286 (1st Dept. 2004).

Proceeding by way of analogy, it would be reasonable to assume that the parties to an action involving an undocumented alien's claim for future medical costs could introduce evidence relevant to the likelihood that the plaintiff would remain in the United States for the duration of the award period. The Court of Appeals, in Balbuena, held that a jury evaluating an undocumented alien's lost wages claim should be permitted to consider **immigration** status as a factor in fixing damages. 812 N.Y.S.2d at 429, 6 N.Y.3d at 362. By way of example, it suggested that an undocumented plaintiff could introduce evidence of having obtained a work visa that would allow him to lawfully work in the United States; a defendant, the court hypothesized, could submit evidence that the plaintiff had been denied such documentation, thereby decreasing the

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i.e., a breeding bull or stallion would generally be considered more dangerous than a cow or a gelding.

> Justice Read wrote that, "Bard therefore argues alternatively that he can recover under a common-law cause of action for negligence, as expressed in the Restatement (Second) of Torts §518 (1977), Comments g and h. This common-law cause of action is, he claims, separate and apart from and in addition to our traditional rule.
>
> Section 518 provides generally that the owner of a domestic animal, which the owner does not know or have reason to know to be abnormally dangerous, is nonetheless liable if he intentionally causes the animal to do harm, or is negligent in failing to prevent harm. Comment g, "Knowledge of normal characteristics" provides that
>
> "[i]n determining the care that the keeper of a not abnormally dangerous domestic animal is required to exercise to keep it under control, the characteristics that are normal to its class are decisive, and one who keeps the animal is required to know the characteristics. Thus the keeper of a bull or stallion is required to take greater precautions to confine it to the land on which it is kept and to keep it under effective control when it is taken from the land than would be required of the keeper of a cow or gelding."
>
> Comment h, "Animals dangerous under particular circumstances" states that "[o]ne who keeps a domestic animal that possess only those dangerous propensities that are normal to its class is required to know its normal habits and tendencies. He is therefore required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm. Thus the keeper of even a gentle bull must take into account the tendencies of bulls as a class to attack moving objects and must exercise greater precautions to keep his bull under complete control if he drives it upon a public highway. So, too, the keeper of an ordinarily gentle bitch or cat is required to know that while caring for her puppies or kittens she is likely to attack other animals and human beings."
>
> Building on these provisions and their specific references to bulls, Bard contends that because Fred was not only a bull, but a breeding bull housed with the herd over whom he exercised dominance, Jahnke was negligent in failing to restrain Fred, [FN3] or to warn non-farm [*6] personnel of his presence. But this is no different from arguing that Jahnke was negligent in that he should have known of Fred's vicious propensities because – as plaintiffs' expert put it – "bulls, in particular breeding bulls, are generally dangerous and vicious animals."

Despite this detailed analysis, which quotes and appears to accept the separate theory of negligence articulated in the Restatement (Second) of Torts, the Court of Appeals reverses itself and rejects 190 years of New York State Law and according to the Hon. R.S. Smith's dissenting opinion, becoming "the first state court of last resort to reject the Restatement rule." (Bard, supra, at 599).

The majority ultimately concluded that "particular breeds or kinds of domestic animals are dangerous, and therefore when an individual animal of the breed or kind causes harm, its owner is charged with knowledge of vicious propensities. Similarly, we have never held that male domestic animals kept for breeding or female domestic animals caring for their young are dangerous as a class. We decline to do so now or otherwise to dilute our traditional rule under the guise of a companion common-law cause of action for negligence. **In sum, when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in Collier."** (Emphasis added).

This decision expressly rejected a separate cause of action sounding in negligence for the injuries caused by a domestic animal owned by an individual. [A viable negligence action can apparently still be pled against the defendant, who is not the owner of the "offending beast."] See Sedeno, supra, and Crawford v. NYCHA, 33 A.D.3d 956 (2nd Dept. 2006).

The Court's wisdom in abandoning the application of a negligence cause of action against the owner of a domestic animal that does harm was questioned immediately. In his scathing dissent, Justice Smith added to his earlier comment cited above, "I think that [the rejection of the Restatement/negligence rule] is a mistake. It leaves New York with an archaic, rigid rule, contrary to fairness and common sense that will probably be eroded by *ad hoc* exceptions."

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As of the writing of this article, the First Department has followed the ruling of the Court of Appeals in Bard, supra. Its decision in Bernstein v. Penny Whistle Toys, Inc., acknowledged 40 A.D.3d 224 (1st Dept. 2007), aff'd 10 N.Y.3d 787 (2008), that negligence and premises liability theories had been rejected. The Bernstein court however did issue a dissent that argued for an enhanced duty towards an injured infant/child plaintiff, (at p. 225).

The Third Department has also held that negligence is no longer a basis for a finding of liability against the owner of a domesticated animal when a strict liability theory is pled and applicable to the facts. See Alia v. Fiorina, 39 A.D.3d 1068 (3rd Dept. 2007).

The Second Department has however, as Justice Smith predicted in his dissent in Bard, already carved out the first reported *"ad hoc"* exception to Bard. The Court held in Petrone v. Fernandez 53 A.D.3d 221 (2nd Dept. 2008) that contrary to Alia, supra, and Bard, supra, a dog owner may be held liable in negligence for injury caused by his or her pet when said negligence is founded upon a violation of a local leash law.

In conclusion, it would appear to be strategically wise for those defending any domestic animal liability action sounding in negligence against the animal's owner to include an affirmative defense that plaintiff has failed to state a cause of action and/or to consider moving to dismiss that action as early as possible in the litigation. Bard and the post-Bard case law in the First, Third and Fourth Departments would support this strategy unless and until those Departments elect to carve out the *"ad hoc"* exceptions anticipated by Justice Smith, that we have seen in Petrone, supra.

POST SCRIPT:

Following the submission of this article for publication in February 2009, the Court of Appeals decided the matter of Petrone v. Fernandez, 2009 NY Slip Op 04694, on June 9th, 2009. The Court of Appeals held that, "[w]hen harm is caused by a domestic animal, its owner's liability is determined *solely by*…the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities." The law of New York State is now that other concepts of negligence, or as in *Petrone*, a violation of a leash ordinance, will not be sufficient. Lawton W. Squires

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possibility of future U.S. employment. Id.

"In other words," the Court stated, "…the determination must be based on all of the relevant facts and circumstances presented in the case." Id. The court's reasoning suggests, in the absence of any express authority on the issue, a defendant may offer proof of an order or administrative hearing or other immigration action affecting the plaintiff's status in the United States and introduce evidence of the lower cost of future medical care in his native country.

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for malpractice. Defendant moved to dismiss, and the trial court and appellate court affirmed, holding that inasmuch as the estate was not in privity with defendant, and there is no allegation that one of the exceptions to the privity requirement was applicable, the estate could not maintain a malpractice action in its own right. Since decedent did not have a claim during his lifetime against defendant for malpractice, as the only alleged damage suffered from the alleged malpractice was the increase in estate tax liability, which could not have been incurred while decedent was alive, the estate may not maintain the action under EPTL 11-3.2(b).

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