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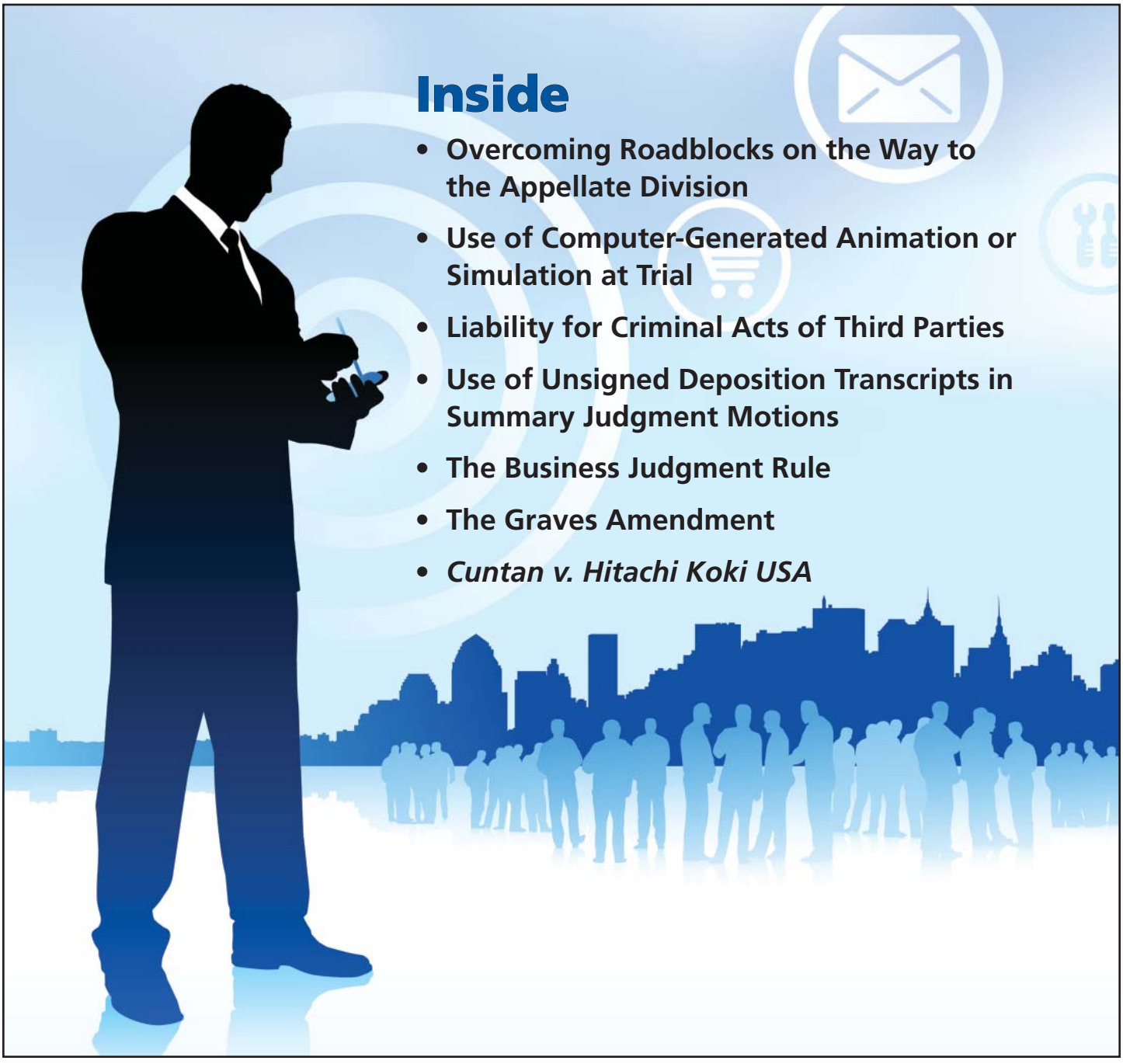

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A View from the Outgoing Chair, Looking Back…

It's hard to believe that a year has gone by since I became the Chair of our Section. The active participation and effort by our Section members made it a very productive year. More specifically, I would be remiss if I did not thank Laurie Giordano, our new Section Chair, Tom Maroney, our new Vice-Chair, and the rest of our Section's Executive Committee for all of their support during the year. As a result of this teamwork, we were able to continue the work started by our prior Section Chairs of energizing and making our Section one of the best in the New York State Bar Association.

As I look back, one of the strategic goals for our Section in 2009 was to attract new members by making our Section more attractive to the newly admitted and young lawyers of New York. This began in July, 2009 when our Section sponsored and attended the Young Lawyers Section boat ride. Tom Maroney, Rich Dawson and Mirna Martinez Santiago's efforts made sure that this well-attended event was a success. We continued this initiative during our summer meeting at Mohegan Sun in August, by focusing part of our CLE program for the newly admitted and young litigation attorneys. This meeting was a great success. We successfully attracted a large group of attorneys, judges, insurance professionals and their families from across New York State. Everyone enjoyed the weather, the venue, the CLE and more importantly, the company. Our program Chairs, Mirna Martinez Santiago and Gary Cusano, put a tremendous amount of time and effort into putting together an excellent program and meeting. Special thanks to Gary Cusano and his band for providing the musical entertainment and to the judges, insurance company professionals and all the people who attended our summer meeting.

Our commitment to young and newly admitted lawyers will continue in 2010 with our Section's sponsorship of two free scholarships to the Young Lawyers Section Trial Academy that will be held at Cornell Law School from Wednesday, March 24, 2010 through Sunday, March 28, 2010.

During the year we held many social and informative events across New York State geared to attracted new members. Our event in May for the Judges of the Third Department was well attended and a great success. This event was sponsored by our Third and Fourth District representatives, Claudia Ryan, Jim Kelly, Bill Cloonan, and Ed Flink, who put a lot of time and effort into coordinating and hosting the event. Brian Rayhill, Ron Balter and Mike O'Brien did a great job of hosting an event for the Thirteenth Judicial District Reception honoring Justice Judith N. McMahon. Our Fall reception was well attended by attorneys, judges and members of our city and state legislatures. Many thanks to Dennis Brady, Michael Tromello and Shawn Downes for the great job they did in hosting this event.

Our highly successful and informative Law School for Claims Professionals was held last Fall. It was a great success because of the hard work and effort of our Chair, Lisa Berrittella, and our local Chairs, Shawn Martin, Beth Fitzpatrick, Ed Flink, and George Skandalis.

Our Section "year" came to a close at our Annual Meeting this January. Our annual joint dinner with the Trial Lawyers Section was held at Cipriani Wall Street. It was a great success. It was attended by over 200 lawyers, judges and insurance professionals. Our dinner speaker this year was the Honorable Luis A. Gonzalez, Presiding Justice of the Appellate Division, First Judicial Department. At this dinner, the annual Torts, Insurance and Compensation Law Section awards were presented. Our District Chair of the Year was Brian J. Rayhill and Committee Chair of the Year was Christopher R. Lemire. In recognition of their outstanding contribution to the practice of law in the field of insurance defense, this year's Sheldon Hurwitz Young Lawyer Award was given to Mirna Martinez Santiago and Audrey A. Seeley. The John E. Leach Memorial Award recognizing outstanding service and distinguished contributions to the legal profession, as a member of our Section, was given to Michael C. Tromello. Congratulations again to our award winners. The next day our joint CLE program was held with the Trial Lawyers Section. This year's program was one of our best. Many thanks to Michael Tromello, our program Chair, for his hard work and effort for putting together a great dinner and CLE program.

As I complete my year as Chair of the Torts Insurance and Compensation Law Section, I would like to take this opportunity to thank our Section members and our Executive Committee for their help and assistance over the past year. I also wish to thank and wish our new officers, Laurie Giordano, Chair; Tom Maroney, Vice-Chair; Jean Gerbini, Secretary, and Brendan Baynes, Treasurer, the best as they continue to lead and energize our Section.

Charles J. Siegel

A View from the Incoming Chair, Looking Forward…

Before looking forward, indulge my looking back and admiring the leadership, experience and guidance of our **Immediate Past Chair Charlie Siegel**. Not only has he advanced the Section (check out his accomplishments in his accompanying "View"), but he has shared his personal wisdom that I now use in every facet of my life—and I will now share it with you. When I asked Charlie about managing attorneys, he offered: "Whenever someone comes to me with a problem, I ask them how they will be part of the solution." Think about it. It really works—colleagues, spouses and kids alike!

Now a brief look at our Section going forward:

The Torts, Insurance and Compensation Law Section is comprised of over 15 committees in substantive areas of law, as well as two Divisions. The largest of our committees are the Automobile Liability and Insurance Coverage Committees. Each provides case law updates to their members and members electronically ask questions of each other and share breaking decisions and legislation. We welcome your involvement!

Our Divisions are the Workers' Compensation and Construction and Surety Divisions. Each focuses on legal issues specific to those who practice in that area of law. In recent months, our Workers' Compensation Division has been very busy addressing significant changes being proposed to the Workers' Compensation Board hearing process. Check its Web page and listserv for breaking news.

Here is more of what we will be doing and working on this year:

The Road to Disney. I am excited to announce that the Section will be holding its Fall Meeting at Florida's Walt Disney World from October 7–10, 2010. A block of rooms at Disney's Yacht Club Resort has been reserved at $159 per night and events will be scheduled throughout those dates. In addition, the low room rates have been locked in for three days before and after the official conference dates to accommodate you and your family vacation.

Law School for Claims Professionals. This is a unique and exciting program organized and presented by our Section members to educate legal issues of importance to claims representatives and other insurance professionals. It is a wonderful opportunity to network with other presenters as well as insurance representatives attending the program.

***TICL Journal*, E-Newsletters and Other Publications**. Looking to publish or receive top quality legal periodicals? Our Section publishes articles of interest to our members in a color, hard copy *Journal* recognized by our members as an excellent reason—in and of itself—to join the Section. In addition, an Insurance Coverage e-Newsletter is sent to all Section members as well as a Section e-Newsletter on Section events and other news. Further, the Class Action Committee updates its members through direct publications and there are many other publications. Sharing of case updates and a thorough area of law articles is a significant value to our members!

If you are interested in working with us and have any questions, please do not hesitate to contact me at lgiordano@leclairkorona.com. I hope that you will agree with me that participating in meetings and committees finds you better educated and rejuvenated about our profession!

I look forward to seeing you soon,

Laurie Giordano

Roadblocks on the Road to the Appellate Division and How to (Sometimes) Overcome Them

By Harry Steinberg

A funny thing happened on the way to the Appellate Division:[1] the appellant discovered, after perfecting an appeal that looked so promising, that there was no appeal to be taken at all. Or the respondent found that the arguments being counted upon to defeat the appeal were foreclosed.

Notwithstanding that New York is among the most generous of states in allowing its litigants to take appeals, including interlocutory appeals of all sorts,[2] there are limits to New York's appellate generosity. Those limits often arise from procedural issues and problems and often procedure can trump substance in determining whether an appeal will succeed or even be heard.

This article explores the roadblocks that appellate litigants can encounter on the road to the Appellate Division and how, sometimes, to avoid or overcome them. Every appellant—and every respondent, as well—should think carefully about the issues discussed below when preparing to take an appeal or to defend against an appeal.

"This article explores the roadblocks that appellate litigants can encounter on the road to the Appellate Division and how, sometimes, to avoid or overcome them."

The Timing Roadblock

First and foremost among an appellant's potential roadblocks is timeliness. CPLR 5513(a) requires that an appeal must be taken within 30 days of notice of entry of an order or judgment. This deadline is hard and fast and cannot be extended, waived or modified.[3]

The 30-day deadline starts to run upon the giving of notice of entry of the order or judgment from which the appeal is to be taken.[4] Notice of entry can take many forms—it need not be the formal document that most attorneys are accustomed to seeing. Notice of entry can take the form of a letter or a motion that contains the entered order[5] and can start the appellate clock running even if given to the wrong address.[6] The notice of entry must, however, accurately describe the order or judgment and the date and place of filing.[7] Furthermore, each party seeking to enforce the 30-day limitation on appeals must give its own notice of entry; a party cannot rely upon a notice of entry given by another party.[8]

An appeal is deemed timely if either of the two steps necessary to take an appeal—serving *and* filing a notice of appeal—has been timely taken; both steps need not be taken within the 30-day period for taking an appeal.[9]

The Proper Paper Roadblock

Notwithstanding New York's generosity in allowing appeals, an appeal may be taken *only* from an appealable paper—i.e., a written and signed order or judgment.[10] Appeals may only be taken from orders and judgments.[11]

However, when an appeal is taken from a decision upon which an order or judgment has not yet been entered, or from an order upon which a judgment has been entered, the Appellate Division may treat such an appeal as a "premature appeal" which, pursuant to CPLR 5520(c), it may entertain.[12]

Not every ruling that a court makes can be appealed—an appeal may only be taken from an order resolving a motion made on notice.[13] Appeals also may not be taken from several categories of orders including an order (a) entered upon the default of the aggrieved party;[14] (b) denying a motion to reargue;[15] (c) entered at a precalendar conference;[16] (d) ruling on a motion *in limine*;[17] (e) entered *ex parte* or *sua sponte*;[18] (f) compelling a non-party witness to answer deposition questions;[19] and (g) that is conditional.[20] However, orders determining a limited class of motions *in limine*—those that limit the scope of issues or claims to be tried are appealable.[21]

A party who specifies the part of the order from which an appeal is taken may not appeal from a part of the order that was not identified in the notice of appeal.[22] This problem can be avoided by simply appealing from the "entire order" or appealing from an order without specifying any aspect of the order that will be the subject of the appeal.

An appellant who has accepted the benefit of an order by, for example, accepting payment and executing a satisfaction, or accepting a sanction, may not appeal from that order.[23] Nor may an appeal be taken from an order or judgment that has been vacated, amended or superseded.[24]

The Final Judgment Roadblock

Entry of a final judgment cuts off the right to appeal from an interlocutory order which is necessarily affected by the final judgment.[25] Thus, a party who takes an appeal from an interlocutory order can lose the right to appeal if

a final judgment is entered and the appealing party does not also appeal from the final judgment.

CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review any non-final order that "necessarily affects" the final judgment. Thus, a final judgment will allow a party to appeal from any interlocutory order from which no appeal was taken provided that the final judgment "necessarily affects" the unappealed interlocutory order. The flip side of this rule is that an interlocutory order that is not "necessarily affected" by the final judgment cannot be reviewed on an appeal from the final judgment. However, an appeal from a non-final order does not bring up for review another non-final order from which an appeal was not taken.[26]

Among the interlocutory orders that were found not to be "necessarily affected" by final judgments and, therefore, not reviewable on an appeal from a final judgment, are (a) denial of a motion to amend pleadings;[27] (b) denial of class certification;[28] (c) rulings addressing liability issues on an appeal from a damages trial;[29] (d) denial of discovery;[30] (e) appointment of a law guardian;[31] (g) determination of the enforceability of an antenuptial agreement;[32] and (h) denial of a joint trial.[33]

On the other hand, interlocutory orders that were "necessarily affected" by final judgments include orders (a) precluding evidence at trial;[34] (b) denying motions to amend pleadings to seek punitive damages;[35] (c) dismissing some claims;[36] (d) orders deciding summary judgment motions;[37] and (e) referring damages issues to a referee and denying plaintiff a jury trial.[38]

The Prior Appeal Roadblock

Where a prior appeal has been dismissed for failure to timely perfect it, any issues presented by that appeal may not be raised on a subsequent appeal because "dismissal of an appeal for want of prosecution [is a dismissal] on the merits of all claims which could have been litigated had the appeal been timely argued or submitted."[39] This rule is not absolute because "an appellate court has the authority to entertain a second appeal in the exercise of its discretion, even where a prior appeal on the same issue has been dismissed for failure to prosecute."[40] Appeals following a dismissed appeal have been permitted in the exercise of discretion.[41]

The State of the Record Roadblock

Nothing can stop an appeal in its tracks faster than an appeal in which the record is incomplete. "It is the obligation of the appellant to assemble a proper record on appeal."[42] The remedy for an appeal taken on an incomplete or improperly compiled record, the Appellate Division has held, is dismissal: "The record submitted on this appeal renders meaningful appellate review…virtually impossible. Therefore, dismissal of the appeal from the judgment is the appropriate disposition."[43]

The Non-Appealing Parties Roadblock

Non-appealing parties generally have no rights on appeal, though there are two exceptions. First, on a motion for summary judgment, the Appellate Division may search the record and grant summary judgment to a non-appealing party as to any issue raised on the motion.[44] Second, the Appellate Division may grant relief to a non-appealing party where it is necessary to grant complete relief to a moving party.[45]

A non-appealing party may nevertheless reap the benefits of an appeal by a co-party by seeking renewal on the basis of the Appellate Division decision.[46]

The Aggrieved Party Roadblock

An appeal may only be taken by an aggrieved party, i.e., a party who has "lost" or has been adversely affected by an order or judgment.[47] "To be 'aggrieved,' the party must have 'a direct interest in the controversy which is affected by the result,' and the adjudication must have 'a binding force against the rights, person or property of the party.'"[48] A party who prevails in the trial court cannot appeal merely because the order contains language, reasoning or dictum which the party deems adverse to its interests.[49]

The Appellate Division has dismissed a number of appeals because the appealing parties were not aggrieved by the order from which they sought to appeal, such as where (a) an order adverse to the appellant is vacated;[50] (b) an order denied a motion directed against the appellant;[51] (c) an order granted the appellant's motion;[52] (d) an order did not decide the appellant's motion;[53] (e) the appealing party assigned its rights to a note and sought to appeal an order attaching the proceeds of that note;[54] (f) the appealing party is an LLC member appealing from a judgment against an LLC;[55] (g) the appealing party seeks reversal of an order dismissing claims against a co-defendant against whom it has no cross-claims;[56] and (h) a plaintiff appeals from the dismissal of a defendant's third-party claim against a third-party defendant against whom plaintiff has no claims.[57]

The Substantial Right Roadblock

Even a party who is aggrieved by an order may not appeal unless the order affects a substantial right.[58] An order deferring, until after an in-camera inspection, the determination of motion to compel discovery does not affect a substantial right.[59]

Whether an order directing a hearing or referring the matter to a referee affects a substantial right is a question about which the First and Second Judicial Departments

disagree. The First Department holds that such orders affect a substantial right and are, therefore, appealable.[60] The Second Department disagrees, holding that such orders do not affect a substantial right and are, therefore, not appealable.[61]

Orders assigning cases to a judge do not affect substantial right.[62]

The Preservation Roadblock

By far one of the most serious roadblocks an appellant, or a respondent, can encounter on the road to the Appellate Division is preservation or, to be more accurate, lack of preservation. The failure to raise an issue or to make a prompt and well-focused objection has derailed all too many appeals.

Preservation is an absolute requirement for an appeal.[63] A full and detailed discussion of the preservation issue is far beyond the scope of this article.[64] However, a few basics about preservation are worth noting. First, an objection must be more than perfunctory and must be fully stated on the record.[65] Any objection must be made promptly.[66] Second, the objection must be specific—an objection on one ground does not preserve an objection on another ground.[67] Third, having a meritorious appellate claim will not save an appellant if the issue has not been preserved. For example, the Appellate Division rejected as unpreserved the claim that a jury's verdict was against the weight of the evidence notwithstanding that it found that the verdict was, in fact, against the weight of the evidence because plaintiff-appellant failed to seek that relief in the trial court.[68]

Although preservation of the claimed error is an absolute requirement for appellate review, there are two exceptions to this rule. First, the Appellate Division will address an unpreserved issue where the claimed error is fundamental, i.e., it precludes fair consideration of the main issues at trial.[69] Second, the Appellate Division will address an issue not preserved in the trial court where the claimed error is based upon a pure legal argument that could not have been avoided by the opposing party had it been timely raised in the trial court.[70]

The Mootness Roadblock

The Appellate Division will not hear appeals that have been rendered moot by subsequent events. "An appeal will not be considered moot if 'the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment.'"[71]

An appeal can be mooted simply by the progress of the litigation. For example, an appeal from an order compelling an appearance for a deposition was mooted by (a) the appellant's appearance for the deposition;[72] (b) a tenant's vacating the premises it was ordered to vacate;[73] (c) plaintiff complying with the order appealed from which required service of a further bill of particulars;[74] (d) the expiration of the period covered by a restrictive covenant;[75] (e) the completion of a project that was the subject of a zoning variance appeal;[76] and (f) where the issue was whether a courtroom could be closed during trial and the trial ended before the appeal could be heard.[77]

Mootness will not bar an appeal where (1) there is a likelihood of repetition; (2) the issue can typically evade review; and (3) there are significant questions that have not been passed upon. This can occur where the issue is whether life-sustaining treatment may be withheld from a mentally disabled patient and the patient dies while the appeal is pending.[78]

The Harmless Error Roadblock

An appellant with a strong appeal from an obvious trial-court error can, nevertheless, snatch defeat from the jaws of victory if the error cited on appeal is harmless—i.e., the error did not affect the outcome of the trial.[79] The harmless error doctrine can arise in any number of circumstances, including the improper exclusion of a report where the contents of the report was the subject of live testimony;[80] admission of evidence at trial that should have been excluded where the evidence did not have a significant effect on the outcome;[81] and an erroneous jury charge is given but the jury does not reach the issue as to which the improper charge was given.[82]

However, even if any single error that was made at trial is not a sufficient basis for reversal, the courts recognize that a series of errors, taken together, can support reversal where the Appellate Division finds that "the cumulative effect of the errors was unduly prejudicial."[83]

The Alternate Basis Roadblock

Another roadblock on the road to a successful appeal is that, regardless of the merits of the issue on appeal, there is an alternate basis for affirmance or reversal. Thus, even if the appellant is correct, the appellant can lose if there is another properly preserved argument that supports the order or judgment. The Court of Appeals put it this way:

> [T]he successful party, who is not aggrieved by the judgment or order appealed from and who, therefore, has no right to bring an appeal, is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in his favor.[84]

Conclusion

When and whether to take an appeal—and the chances for success on appeal—are not questions that depend solely on the legal merits of the substantive issue presented. In many cases, as demonstrated above, the prognosis for an appeal depends on whether the appeal is timely, whether the appeal has been taken from the proper paper, whether there is a proper party, the posture of the case and how the issue was resolved in the trial court. Counsel planning an appeal—and, especially, counsel opposing an appeal—would be well advised to consider these "technical" appellate issues because such issues can mean the difference between success and failure, regardless of whether the substantive issue was correctly decided.

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Endnotes

1. With apologies to Stephen Sondheim (music and lyrics) and Burt Shevelove and Larry Gelbart (book), the creators of *A Funny Thing Happened on the Way to the Forum*, which opened on Broadway in May, 1962, became a hit film in 1966 and has been entertaining generations ever since.
2. CPLR 5701(a)(1) appeals to the Appellate Division as of right "from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all of the issues." CPLR 5701(a)(2) further allows appeals as of right from any order deciding a motion made on notice that grants, refuses or modifies a provisional remedy; settles, refuses to settle or modifies a transcript; grants or refuses to grant, a new trial; involves some part of the merits; affects a substantial right; "in effect determines the action"; or grants a motion to reargue or decides a motion to renew. CPLR 5701(c) further allows the Appellate Division to grant leave to appeal from any order that does not fall within the long list of appeals as of right.
3. *Jones Sledzik Garneau & Nardone, LLP v. Schloss*, 37 A.D.3d 417, 417, 829 N.Y.S.2d 230, 231 (2d Dep't 2007) ("The time period for filing a notice of appeal is nonwaivable and jurisdictional"); *Long v. Cleary*, 273 A.D.2d 799, 800, 709 N.Y.S.2d 741, 742 (4th Dep't 2000) (city properly appealed from amended judgment "because the amended judgment altered the original judgment in a material respect"); *Kitchen v. Grace*, 221 A.D.2d 195, 195, 633 N.Y.S.2d 167, 168 (1st Dep't 1995) (appeal from resettled judgment must be dismissed because resettled judgment did not make material changes in original judgment); *Pioneer Savings Bank v. Audubon Quality Homes, Inc.*, 188 A.D.2d 711, 712, 590 N.Y.S.2d 598, 598–99 (3d Dep't 1992) (resettled order which made no material change in original order does not revive time to appeal); *Stancage v. Stancage*, 173 A.D.2d 1081, 1081, 570 N.Y.S.2d 418, 419 (3d Dep't 1991) (notice of appeal served more than 30 days (plus five for mailing) was untimely even though counsel had been discharged where discharge did not comply with formal requirements).
4. *See* CPLR 5513(a).
5. *Norstar Bank of Upstate N.Y. v. Office Control Systems, Inc.*, 78 N.Y.2d 1110, 1111, 578 N.Y.S.2d 868, 868 (1991) (letter enclosing order which bore stamp of clerk and entry date was sufficient to start 30-day appeal period running, requiring dismissal of appeal); *Xander Corp. v. Haberman*, 41 A.D.3d 489, 490, 838 N.Y.S.2d 133, 135 (2d Dep't 2007) (order contained in motion papers "was sufficient to trigger the 30-day period to take an appeal").
6. *Deygoo v. Eastern Abstract Corp.*, 204 A.D.2d 596, 596, 612 N.Y.S.2d 415, 416 (2 Dep't 1994) (notice of entry mailed to counsel's former address, where notice of new address had not been given, sufficient to give notice); *Siegel v. Obes*, 112 A.D.2d 930, 930-31, 492 N.Y.S.2d 447, 448 (2d Dep't 1985) (notice of entry served by mail rather than personally as required by order was deemed sufficient).
7. *See, e.g., Reynolds v. Dustman*, 1 N.Y.3d 559, 561, 772 N.Y.S.2d 247, 248 (2003) (time to appeal did not start to run because "respondents' cover letter describing the enclosure as a 'decision filed' was not notice of entry of a judgment or order").
8. *Blank v. Schafrann*, 206 A.D.2d 771, 773, 615 N.Y.S.2d 107, 108 (3d Dep't 1994) ("CPLR 5513 is construed to require each prevailing party to separately serve an order with notice of entry to commence the running of time within which the appeals limitation period becomes effective for each"); *Williams v. Forbes*, 157 A.D.2d 837, 838-39, 550 N.Y.S.2d 903, 905 (2d Dep't 1990) ("Since Williams never served a copy of the order with notice of entry upon Forbes prior to Forbes filing his notice of appeal, we find Forbes's appeal to be timely. Service of the order upon Forbes by the Armbrusters was not effective to commence the running of time within which to take an appeal."); *Maddox v. City of New York*, 104 A.D.2d 430, 478 N.Y.S.2d 923 (2d Dep't 1984) ("[A] party who is moving to dismiss an adversary's appeal as untimely must have served upon that appellant a copy of the order or judgment appealed from, together with notice of entry, in order to start running the limitations period in CPLR 5513.").
9. CPLR 5520(a); *Peck v. Ernst Brothers, Inc.*, 81 A.D.2d 940, 940–41, 439 N.Y.S.2d 515, 515-16 (3d Dep't 1981) (excusing untimely service where filing was timely); *Messner v. Messner*, 42 A.D.2d 889, 890, 347 N.Y.S.2d 589, 590 (1st Dep't 1973) (notice of appeal timely served but not timely filed).
10. CPLR 5512; *NAM Tai Electronics, Inc. v. UBS PaineWebber*, 46 A.D.3d 486, 487, 850 N.Y.S.2d 11, 12 (1st Dep't 2007) ("[T]he motion court's excusal of defendant's default, made sua sponte during oral argument, is not an appealable order where the transcript was not 'so ordered' by the court."); *Ponzi v. Ponzi*, 45 A.D.3d 1327, 1327, 845 N.Y.S.2d 605, 606 (4th Dep't 2007) ("no appeal lies from a mere decision"); *Bernstein v. Bernstein*, 122 A.D.2d 96, 96, 504 N.Y.S.2d 1019, 1019 (2d Dep't 1986) (no appeal lies from oral statements of the court). *But see Hammerstein v. Henry Mountain Corp.*, 11 A.D.3d 836, 838, 784 N.Y.S.2d 657, 659 (3d Dep't 2004) (although denominated a decision, "we deem the paper a mixed decision and order" which affects a substantial right making it appealable).
11. CPLR 5512(a).
12. *Polizzotto & Polizzotto, LLC v. Ostrowski*, 48 A.D.3d 470, 470, 849 N.Y.S.2d 807, 807 (2d Dep't 2008); *Podhaskie v. Seventh Chelsea Associates*, 3 A.D.3d 361, 361-62, 770 N.Y.S.2d 332, 333 (1st Dep't 2004); *10 Park Square Associates, Inc.*, 288 A.D.2d 828, 829, 732 N.Y.S.2d 305, 307 (4th Dep't 2001) (court would disregard notice of appeal from "jury verdict" "and deem the appeal to have been taken from the judgment"); *Jump v. Jump*, 268 A.D.2d 709, 710, n.1, 701 N.Y.S.2d 503, 504, n.1 (3d Dep't 2000). *See also* CPLR 5512(a) ("If a timely appeal is taken from a judgment or order other than that specified…and no prejudice results therefrom and the proper paper is furnished to the court to which the appeal is taken, the appeal shall be deemed taken from the proper judgment or order.").
13. CPLR 5701(a)(2); *al-Cantara v. Tausend*, 47 A.D.3d 465, 465, 848 N.Y.S.2d 877, 877 (1st Dep't 2008) ("The preliminary conference order at issue is not appealable as of right because it does not decide a motion made upon notice.); *Nova v. Jerome Cluster 3, LLC*,

46 A.D.3d 292, 293, 847 N.Y.S.2d 182, 183 (1st Dep't 2007) ("No appeal lies from an order declining to sign an order to show cause."); *Raymond Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 46 A.D.3d 1251, 1252, 849 N.Y.S.2d 101, 103 (3d Dep't 2007) ("Although the paper has aspects of an order, since it is not based on a notice of motion…the document does not constitute an appealable order.").

14. *Figiel v. Met Food*, 48 A.D.3d 330, 330, 851 N.Y.S.2d 524, 525 (1st Dep't 2008); *De Luke v. Albany Restaurant Supply, Inc.*, 42 A.D.3d 601, 601, 839 N.Y.S.2d 569, 570 (3d Dep't 2007) ("Plaintiff's sole remedy was to make a motion to vacate the order in Supreme Court and, if unsuccessful in that endeavor, appeal to this Court from the order denying that motion.").

15. *O'Brien v. O'Brien*, 16 A.D.3d 1015, 1016, n.2, 793 N.Y.S.2d 212, 213, n.2 (3d Dep't 2005); *Rochester v. Quincy Mutual Fire Insurance Co.*, 10 A.D.3d 417, 418, 781 N.Y.S.2d 139, 141 (2d Dep't 2004) (although denominated as motion to renew, since motion was not based upon new evidence it was actually a motion to reargue, the denial of which was not appealable).

16. *Velasquez v. C.F.T., Inc.*, 267 A.D.2d 229, 230, 699 N.Y.S.2d 470, 471 (2d Dep't 1999) (however, appeal may be taken from order entered upon motion to vacate or modify precalendar order).

17. *Carter v. Suburban Heating Oil Partners, L.P.*, 44 A.D.3d 1221, 1222-23, 845 N.Y.S.2d 482, 484 (3d Dep't 2007) (order directing missing evidence charge is "an advisory opinion, [and] review should await the conclusion of a trial"); *Brennan v. Mabey's Moving & Storage, Inc.*, 226 A.D.2d 938, 938, 640 N.Y.S.2d 686, 687 (3d Dep't 1996) ("no appeal lies from the grant or denial of a pretrial ruling on the admissibility of evidence").

18. *Sholes v. Meagher*, 100 N.Y.2d 333, 335, 763 N.Y.S.2d 522, 523 (2003).

19. *Courtney v. Edelschick*, 157 A.D.2d 818, 819, 550 N.Y.S.2d 415, 416 (2d Dep't 1990).

20. *Soggs v. Crocco*, 247 A.D.2d 887, 889, 668 N.Y.S.2d 796, 798 (4th Dep't 1998).

21. *Parker v. Mobil Oil Corp.*, 16 A.D.3d 648, 650, 793 N.Y.S.2d 434, 436 (2d Dep't 2005) ("Generally, an order deciding a motion in limine is not appealable….However, an order which limits the scope of issues is appealable."); *Scalp & Blade, Inc. v. Advest, Inc.*, 309 A.D.2d 219, 223, 765 N.Y.S.2d 92, 95-96 (4th Dep't 2003) (distinguishing between order adjudicating in advance admissibility of evidence and order limiting legal theories to be tried); *Rondout Electric, Inc. v. Dover Union Free School District*, 304 A.D.2d 808, 810, 758 N.Y.S.2d 394, 397 (2d Dep't 2003) (Although denominated as a motion *in limine*, motion sought to limit recovery and "[a]n order which limits the scope of issues to be tried is appealable.").

22. *Torres v. City of New York*, 41 A.D.3d 312, 313, 838 N.Y.S.2d 67, 68 (1st Dep't 2007); *Time Warner City Cable v. Adelphi University*, 27 A.D.3d 551, 553, 813 N.Y.S.2d 114, 117 (2d Dep't 2006); *Brodeur v. Hayes*, 18 A.D.3d 979, 981-82, 795 N.Y.S.2d 761, 763 (3d Dep't 2005) ("By expressly limiting the appeal to certain portions of the court's order, plaintiffs waived the right to appeal the remainder of that order.").

23. *Cohen v. Transcontinental Insurance Co.*, 262 A.D.2d 189, 191, 693 N.Y.S.2d 529, 531 (1st Dep't 1999) ("A party may not appeal from a judgment after accepting its benefits and executing an unqualified accord and satisfaction"); *Scharlack v. Richmond Memorial Hospital*, 127 A.D.2d 580, 580, 511 N.Y.S.2d 380, 381 (2d Dep't 1987) (acceptance of sanction results in waiver of right to appeal). *But see Williams v. Hearburg*, 245 A.D.2d 794, 795, 665 N.Y.S.2d 760, 760-61 (3d Dep't 1997) ("[W]here a party obtains a judgment on one theory but not another theory, he or she may accept the benefit of one and appeal the other, provided there is no possibility that the outcome of the appeal will affect the cause of action for which the benefit has been accepted."); *Roffey v. Roffey*, 217 A.D.2d 864, 865, 630 N.Y.S.2d 114, 115-16 (3d Dep't 1995) (party may accept judgment and appeal in attempt to increase award).

24. *Public Administrator of Kings County v. Samerson*, 298 A.D.2d 512, 513, 750 N.Y.S.2d 301, 302 (2d Dep't 2002); *Berry v. Jewish Board of Family & Children's Services*, 173 A.D.2d 668, 669, 570 N.Y.S.2d 588, 589 (2d Dep't 1991) (appeal from vacated order must be dismissed).

25. *In re Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 289 (1976).

26. *Fleiss v. South Buffalo Railway Co.*, 280 A.D.2d 1004, 1004, 720 N.Y.S.2d 703, 705 (4th Dep't 2001).

27. *Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Milstein, Felder & Steiner*, 96 N.Y.2d 300, 303, n.1, 727 N.Y.S.2d 688, 690 n.1 (2001).

28. *Friedman v. Connecticut General Life Insurance Co.*, 9 N.Y.3d 105, 112, 846 N.Y.S.2d 64, 68 (2007).

29. *Baker v. Shepard*, 276 A.D.2d 873, 874, 715 N.Y.S.2d 83, 85 (3d Dep't 2000).

30. *Bielicki v. T.I. Bentey, Inc.*, 248 A.D.2d 657, 659, 670 N.Y.S.2d 585, 586 (2d Dep't 1998).

31. *Ellis v. Ellis*, 233 A.D.2d 678, 679, 649 N.Y.S.2d 951, 953 (3d Dep't 1996).

32. *Rupert v. Rupert*, 97 N.Y.2d 661, 662-63, 738 N.Y.S.2d 654, 655 (2001).

33. *Traister v. Russo*, 154 A.D.2d 455, 456, 546 N.Y.S.2d 22, 23 (2d Dep't 1989).

34. *Green v. Green*, 32 A.D.3d 898, 899, 821 N.Y.S.2d 243, 245 (2d Dep't 2006).

35. *Wolf v. Rand*, 258 A.D.2d 401, 404, 685 N.Y.S.2d 708, 711 (1st Dep't 1999).

36. *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 290, 690 N.Y.S.2d 495, 498 (1999).

37. *Crapsi v. South Shore Golf Club Holding Co.*, 19 A.D.3d 1024, 1026, 797 N.Y.S.2d 234, 235 (4th Dep't 2005); *Futterman v. Calce*, 226 A.D.2d 306, 306, 642 N.Y.S.2d 220, 221 (1st Dep't 1996).

38. *Trocom Construction Corp. v. Consolidated Edison Co. of New York, Inc.*, 7 A.D.3d 434, 437-38, 777 N.Y.S.2d 454, 457 (1st Dep't 2004).

39. *Bray v. Cox*, 38 N.Y.2d 350, 355, 379 N.Y.S.2d 803, 807 (1976); *Rubeo v. National Grange Mutual Insurance Co.*, 93 N.Y.2d 750, 757, 697 N.Y.S.2d 866, 869 (1999) ("[T]he message is clear and consistent: the filing of an appeal is not inconsequential. An appeal left untended may be dismissed as abandoned, and appellant may be precluded from later appealing the same issue.").

40. *Faricelli v. TSS Seedman's, Inc.*, 94 N.Y.2d 772, 774, 698 N.Y.S.2d 588, 589 (1999).

41. *See, e.g., Washington v. Delossantos*, 44 A.D.3d 748, 749, 843 N.Y.S.2d 186, 187 (2d Dep't 2007); *McCain v. Larosa*, 41 A.D.3d 792, 793, 838 N.Y.S.2d 663, 664 (2d Dep't 2007); *Podbielski v. KMO-361 Realty Associates*, 294 A.D.2d 552, 553, 742 N.Y.S.2d 664, 666 (2d Dep't 2002) (second appeal allowed since it presented issues identical to co-appellant's permissible appeal).

42. *Gaffney v. Gaffney*, 29 A.D.3d 857, 857, 815 N.Y.S.2d 259, 259 (2d Dep't 2006).

43. *Cohen v. Wallace & Minchenberg*, 39 A.D.3d 689, 689, 833 N.Y.S.2d 623, 624 (2d Dep't 2007); *Mergl v. Mergl*, 19 A.D.3d 1146, 1147, 796 N.Y.S.2d 823, 824 (4th Dep't 2005) ("Where a record on appeal does not contain documents submitted to the trial court and the absence of those documents renders meaningful appellate review impossible, 'dismissal of [the] appeal is an appropriate disposition.'").

44. *Piedra v. Matos*, 40 A.D.3d 610, 612, 835 N.Y.S.2d 407, 408-09 (2d Dep't 2007); *LaSalle Bank National Association v. Nomura Asset Capital Corp.*, 14 A.D.3d 366, 367, 788 N.Y.S.2d 83, 84 (1st Dep't 2005) ("[T] he authority given to the Appellate Division to search the record and grant summary judgment pertains only to relief for the nonmoving party on a matter addressed in the motion."); *American Ref-Fuel Co. of Hempstead v. Resources Recycling, Inc.*, 248 A.D.2d 420, 424, 671

N.Y.S.2d 93, 97 (2d Dep't 1998) (Appellate Division search of record is limited to "issue that was the subject of motions before the court"). *But see JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 385, 795 N.Y.S.2d 502, 511 (2005) ("While the Supreme Court and the Appellate Division may search the record and grant summary judgment to a nonmoving party…we may not.").

45. *511 West 232nd Street Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 n.3, 746 N.Y.S.2d 131, 134 n.3 (2002)("An exception exists only for cases where granting relief to a nonappealing party is necessary to give meaningful relief to the appealing party."); *Bank One National Association v. Osorio*, 26 A.D.3d 452, 453, 811 N.Y.S.2d 416, 417 (2d Dep't 2006) ("We note that in order to grant full relief to the appellant we must grant relief to non-appealing parties by setting aside the foreclosure sale of the subject property."); *Lakewood Construction Co. v. Brody*, 1 A.D.3d 1007, 1009, 769 N.Y.S.2d 664, 666-67 (4th Dep't 2003) ("Although [Lakewood] did not appeal from the order, we are of the view that because the liability of [Lakewood] and [Oneida]…is inseparable, this is one of those cases where relief to a nonappealing party is appropriate.").

46. *Koscinski v. St. Joseph's Medical Center*, 47 A.D.3d 685, 685, 860 N.Y.S.2d 162, 163 (2nd Dep't 2008) (The rule that relief is not available to a non-appealing party "does not bar a non-appealing defendant from seeking renewal of a cross motion to dismiss the complaint insofar as asserted against it based upon an appellate court's decision to grant dismissal of the complaint as to a codefendant.").

47. CPLR 5511; *Village of Croton-On-Hudson v. Northeast Interchange Railway, LLC*, 46 A.D.3d 546, 549, 846 N.Y.S.2d 606, 609-10 (2d Dep't 2007) ("Only a party that is aggrieved by an order may appeal from it….A party that has been granted the relief it sought on a motion is not aggrieved by the order granting that relief… even if the order contains language that the party considers to be objectionable."), *citing Parochial Bus Systems, Inc. v. Board of Education*, 60 N.Y.2d 539, 544-45, 470 N.Y.S.2d 564, 566 (1983); *Pennsylvania General Insurance Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 472-73, 510 N.Y.S.2d 67, 71 (1986); *Schadoff v. Russ*, 278 A.D.2d 222, 222, 717 N.Y.S.2d 284, 285 (2d Dep't 2000) ("Because the order denied the defendants' motion for summary judgment, the plaintiff is not aggrieved, even though he 'disagrees with the particular findings, rationale, or opinion supporting the…order… in his favor.'").

48. *DiMare v. O'Rourke*, 35 A.D.3d 346, 346, 825 N.Y.S.2d 273, 274 (2d Dep't 2006).

49. *Photonics Industries International, Inc. v. Zhao*, 39 A.D.3d 610, 612, 832 N.Y.S.2d 298, 300 (2d Dep't 2007); *Edge Management Consulting, Inc. v. Irmas*, 306 A.D.2d 69, 69, 761 N.Y.S.2d 172, 173 (1st Dep't 2003).

50. *Resort HRF v. Ocean Garden Nursing Facility*, 28 A.D.3d 450, 451, 814 N.Y.S.2d 179, 181 (2d Dep't 2006).

51. *Moncion v. Infra-Metals Corp.*, 20 A.D.3d 310, 312, 800 N.Y.S.2d 381, 383 (1st Dep't 2005).

52. *Emanuel v. Broadway Mall Properties, Inc.*, 293 A.D.2d 708, 709, 741 N.Y.S.2d 278, 280 (2d Dep't 2002).

53. *Xander Corp. v. Haberman*, 41 A.D.3d 489, 490, 838 N.Y.S.2d 133, 135 (2d Dep't 2007).

54. *Advanced Distribution Systems, Inc. v. Frontier Warehousing, Inc.*, 27 A.D.3d 1151, 1152, 811 N.Y.S.2d 840, 841 (4th Dep't 2006).

55. *Michael Reilly Design, Inc. v. Houraney*, 40 A.D.3d 592, 593, 835 N.Y.S.2d 640, 641 (2d Dep't 2007).

56. *Grigoropoulos v. Moshopoulos*, 44 A.D.3d 1003, 1004, 845 N.Y.S.2d 94, 96 (2d Dep't 2007). *But see Gerbino v. Tinseltown USA*, 13 A.D.3d 1068, 1070, 788 N.Y.S.2d 538, 540 (4th Dep't 2004) (defendant was aggrieved by dismissal of claim against potential joint or concurrent tortfeasors).

57. *Murray v. City of New York*, 43 A.D.3d 429, 430, 841 N.Y.S.2d 341, 343 (2d Dep't 2007). *But see Klinge v. Ithaca College*, 235 A.D.2d 724, 725, 652 N.Y.S.2d 377, 379 (3d Dep't 1997) (College which had duty to indemnify faculty members was aggrieved and could appeal denial of motion by faculty members to dismiss claim where faculty members chose not to appeal.).

58. CPLR 5701(a)(2)(v).

59. *In re Nugent*, 26 A.D.3d 892, 893, 808 N.Y.S.2d 876, 877 (4th Dep't 2006); *Lombardi v. Hall*, 5 A.D.3d 739, 739, 774 N.Y.S.2d 560, 561 (2d Dep't 2004); *Jimenez v. Brenilee Corp.*, 48 A.D.3d 351, 351, 852 N.Y.S.2d 94, 95, (1st Dep't 2008) (Court's postponement of grant of motion pending submission of proper affidavit did not affect substantial right and was not appealable.).

60. *Gottesman Business Brokers, Inc. v. Goldman Fire Protection Corp.*, 238 A.D.2d 250, 250, 656 N.Y.S.2d 610, 611 (1st Dep't 1997), *citing General Electric Co. v. Rabin*, 177 A.D.2d 354, 356-57, 576 N.Y.S.2d 116, 118 (1st Dep't 1991) ("This Court has consistently held that an order of reference is appealable…since it affects a substantial right…in that it would force one party or the other to submit to a lengthy expensive hearing."); *Travelers Property Casualty Corp. v. Fusilli*, 266 A.D.2d 48, 49, 698 N.Y.S.2d 641, 643 (1st Dep't 1999) (rejecting position that no appeal lies from order of referral).

61. *Zoref v. Glassman*, 44 A.D.3d 1036, 1036, 843 N.Y.S.2d 834, 834 (2d Dep't 2007) ("An order directing a hearing to aid in the determination of a motion and cross motion does not dispose of the motion or cross motion and does not affect a substantial right, and therefore is not appealable."); *Daly v. Meiskin*, 6 A.D.3d 646, 646, 775 N.Y.S.2d 552, 552 (2d Dep't 2004) ("order of reference… did not affect a substantial right").

62. *Hilligas v. Veznedaroglu*, 96 A.D.2d 721, 721, 465 N.Y.S.2d 362, 363 (4th Dep't 1983).

63. CPLR 5501(a)(3) (appeal may be taken from "any ruling to which the appellant objected or had no opportunity to object"); CPLR 5501(a)(4) (appeal may be taken from "any remark by the judge to which the appellant objected"). *See also* CPLR 4017 ("Formal exceptions to rulings are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. *Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501.*") (emphasis added).

64. *See* Steinberg, *Preservation of Error: Objections, Issues Must Be Timely Raised,* N.Y.L.J., December 24, 2008, p. 4, col. 3.

65. *Venancio v. Clifton Wholesale Florist, Inc.*, 1 A.D.3d 505, 506, 767 N.Y.S.2d 249, 250 (2d Dep't 2003) ("This contention is unpreserved for appellate review, as the parties' arguments concerning this witness took place, for the most part, off the record, and there is no indication that the arguments now made on appeal concerning [the issue] were raised before the Supreme Court.").

66. *Horton v. Smith*, 51 N.Y.2d 798, 798, 433 N.Y.S.2d 92, 93 (1980) ("When a timely objection is not made, the testimony offered is presumed to have been unobjectionable and any alleged error considered waived."); *Zelaya v. New York New York Auto Body, Inc.*, 41 A.D.3d 594, 594, 836 N.Y.S.2d 430, 430 (2d Dep't 2007) ("In light of defendants' failure to raise a *Frye* objection…until after the close of plaintiff's case, the expert's testimony is presumed to have been unobjectionable and any alleged error in its admission was waived.").

67. *Carr v. Burnwell Gas of Newark, Inc.*, 23 A.D.3d 998, 998, 803 N.Y.S.2d 834, 836 (4th Dep't 2005) ("Plaintiffs made only a general objection to that statement and thus failed to preserve for our review their specific contention that the testimony…constituted improper bolstering."); *Liuni v. Haubert*, 289 A.D.2d 729, 729, 734 N.Y.S.2d 317, 319 (3d Dep't 2001) ("'[A] specific objection placed on an untenable ground waived all other valid grounds which might have been but were not raised.'"), *quoting Short v. Short*, 142 A.D.2d 947, 947, 531 N.Y.S.2d 155, 156 (4th Dep't 1988); *Robillard v. Robbins*, 78 N.Y.2d 1105, 1106, 578 N.Y.S.2d 126, 126 (1991) (generalized objections are insufficient to preserve issue).

68. *DiLeo v. Barreca*, 16 A.D.3d 366, 368, 793 N.Y.S.2d 53, 55 (2d Dep't 2005).

69. *Bennett v. Wolf*, 40 A.D.3d 274, 275, 835 N.Y.S.2d 148, 149 (1st Dep't 2007) ("Plaintiff has failed to show error so fundamental that it caused a gross injustice or that the comments substantially influenced or affected the fairness of the trial."); *Garris v. K-Mart, Inc.*, 37 A.D.3d 1065, 1066, 829 N.Y.S.2d 333, 334 (4th Dep't 2007) ("In the absence of preservation, a jury verdict will not be set aside based on an alleged error in the charge…where, as here, the alleged error is not fundamental, i.e., 'it is [not] so significant that the jury was prevented from fairly considering the issues at trial.'"); *Ciarelli v. Lynch*, 22 A.D.3d 987, 988-89, 803 N.Y.S.2d 236, 239 (3d Dep't 2005) (The erroneous charge "affected the verdict and precluded fair consideration of the central issues presented" so "we conclude that the error was fundamental and a new trial is warranted in the interests of justice."); *Pawelek v. Gleason*, 16 A.D.3d 1108, 1109, 791 N.Y.S.2d 765, 766 (4th Dep't 2005) ("[T]his Court may grant a new trial in the interest of justice only 'when the error is so fundamental that it precludes consideration of the central issue upon which the action is founded.'").

70. *Buywise Holding, LLC v. Harris*, 31 A.D.3d 681, 682, 821 N.Y.S.2d 213, 215 (2d Dep't 2006) ("[T]his question is one of law that may be considered on appeal since the plaintiff's brief presents no new facts and the matter could not have been avoided by the defendant if brought to his attention at the proper juncture."); *Allianz Underwriters Insurance Co. v. Landmark Insurance Co.*, 13 A.D.3d 172, 174, 787 N.Y.S.2d 15, 17 (1st Dep't 2004) ("To the extent that [defendant] argues that plaintiff did not specifically raise these two issues before the motion court, these are questions of law which we may review for the first time on appeal."); *Przydatek v. New York State Office of Children & Family Services*, 13 A.D.3d 1102, 1102, 790 N.Y.S.2d 597, 598 (4th Dep't 2004) ("[W]e nevertheless address that contention because '[a] question of law appearing on the face of the record may be raised for the first time on appeal if it could not have been avoided by the opposing party if brought to that party's attention in a timely manner.'"). *But see Deep v. Clinton Central School District*, 48 A.D.3d 1125, 1126, 850 N.Y.S.2d 792, 793 (4th Dep't 2008) ("Defendants' further contention…is raised for the first time on appeal and thus is not properly before us. An issue may not be raised for the first time on appeal...where it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court.'").

71. *CIT Technology Financing Services, Inc. v. Tricycle Enterprises, Inc.*, 13 A.D.3d 783, 784, 787 N.Y.S.2d 133, 135 (3d Dep't 2004), *quoting Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714, 431 N.Y.S.2d 400, 402 (1980).

72. *Cadle Co. v. Court Living Corp.*, 34 A.D.3d 254, 254, 823 N.Y.S.2d 401, 401 (1st Dep't 2006).

73. *Tan Holding Co. v. Eklund*, 33 A.D.3d 487, 488, 823 N.Y.S.2d 31, 31 (1st Dep't 2006).

74. *Khoury v. Chouchani*, 27 A.D.3d 1071, 1071, 811 N.Y.S.2d 257, 259 (4th Dep't 2006).

75. *Digitronics Inventioneering Corp. v. Jameson*, 11 A.D.3d 783, 784, 783 N.Y.S.2d 678, 679 (3d Dep't 2004).

76. *Dreikausen v. Zoning Board of* Appeals, 98 N.Y.2d 165, 173-74, 746 N.Y.S.2d 429, 433-34 (2002).

77. *Hearst*, 50 N.Y.2d at 714, 431 N.Y.S.2d at 402.

78. *In re M.B.*, 6 N.Y.3d 437, 447, 813 N.Y.S.2d 349, 355 (2006) ("[W]e address this appeal under the exception to the mootness doctrine because the issue presented is substantial, likely to recur and involves a situation capable of evading review."). *See also Avella v. Batt*, 33 A.D.3d 77, 80, 820 N.Y.S.2d 332, 336 (3d Dep't 2006) (election law issue deemed subject to exception to mootness rule).

79. CPLR 2002 ("An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced."). *See also* CPL 470.05(1) (setting forth harmless error doctrine in the criminal law context).

80. *Wilbur v. LaCerda*, 34 A.D.3d 794, 795, 826 N.Y.S.2d 135, 136 (2d Dep't 2006); *Zohar v. 1014 Sixth Avenue Realty Corp.*, 24 A.D.3d 125, 126, 806 N.Y.S.2d 182, 183 (1st Dep't 2005) (error in redacting portions of report was harmless since redacted language was testified to by witnesses); *Corneroli v. Broghi*, 11 A.D.3d 409, 409, 783 N.Y.S.2d 572, 572 (1st Dep't 2004) (exclusion of recorded conversations was, at most, harmless error since excluded evidence would not have changed outcome); *Beeley v. Spencer*, 309 A.D.2d 1303, 1305, 765 N.Y.S.2d 725, 728 (4th Dep't 2003) (error in admitting six statements was harmless given that four of the statement authors testified and were cross-examined and remaining two statements were cumulative); *Fernandes v. Allstate Insurance Co.*, 305 A.D.2d 1065, 1066, 758 N.Y.S.2d 729, 730 (4th Dep't 2003) (exclusion of expert testimony as to weight of snow on roof was harmless since claim was for wind damage).

81. *Kerr v. Vinokur*, 37 A.D.3d 418, 419, 829 N.Y.S.2d 622, 623 (2d Dep't 2007); *Sullivan v. DRA Imaging, P.C.*, 34 A.D.3d 371, 371, 824 N.Y.S.2d 636, 637 (1st Dep't 2006) (error in allowing testimony about hearsay report was rendered harmless by concession on cross-examination that report was out of date); *Ortiz v. Variety Poly Bags, Inc.*, 19 A.D.3d 239, 240, 797 N.Y.S.2d 70, 71 (1st Dep't 2005) (error in admitting written statements rendered harmless by "precise and readily understood" curative instruction); *Manzo v. Gross*, 19 A.D.3d 379, 380, 796 N.Y.S.2d 702, 703 (2d Dep't 2005) (error in admitting records was harmless since records were cumulative of properly admitted documents).

82. *Shalot v. Schneider National Carriers, Inc.*, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2008 WL 5376523 (2d Dep't 2008) (claimed error in giving emergency doctrine charge was harmless given jury's finding that defendant was negligent); *Maione v. Pindyck*, 32 A.D.3d 827, 828, 821 N.Y.S.2d 110, 113 (2d Dep't 2006) (error in instructing jury to consider apportionment against defendant rendered harmless by jury's finding that defendant was not negligent); *Braunsdorf v. Haywood*, 295 A.D.2d 731, 733, 743 N.Y.S.2d 623, 625-26 (3d Dep't 2002) (error in charging jury as to plaintiff's assumption of the risk rendered harmless given finding that defendant was not negligent); *Holtermann v. Cochetti*, 295 A.D.2d 680, 681, 743 N.Y.S.2d 590, 592 (3d Dep't 2002) (error in charging statutes prohibiting following too closely negated by jury's finding that defendant not at fault).

83. *McGloin v. Golbi*, 49 A.D.3d 610, 611, 853 N.Y.S.2d 378, 379 (2d Dep't 2008) (errors included improper missing document charge, precluding accident report and failing to give emergency charge); *DeCrescenzo v. Gonzalez*, 46 A.D.3d 607, 609, 847 N.Y.S.2d 236, 239 (2nd Dep't 2007) ("[D]efendants were denied a fair trial by virtue of the cumulative effect of the improper conduct of the trial court" which included "propensity to admonish the defense counsel" and allowing plaintiff significantly more leeway in cross-examination and in making extraneous comments.); *Van Dusen v. McMaster*, 28 A.D.3d 1057, 1058, 814 N.Y.S.2d 438, 439 (4th Dep't 2006) (new trial warranted by "the cumulative effect of the prejudicial misconduct of defendants' attorney and…various erroneous evidentiary rulings" which included prejudicial comments, unsubstantiated allegations by defense counsel and cross-examination as to uncharged criminal activity).

84. *Parochial Bus System*, 60 N.Y.2d at 545-46, 470 N.Y.S.2d at 567. *See also Cataract Metal Finishing, Inc. v. City of Niagara Falls*, 31 A.D.3d 1129, 1130, 818 N.Y.S.2d 409, 410 (4th Dep't 2006) (Prevailing party's cross-appeal must be dismissed because it is not aggrieved, but it "may nevertheless contend as an alternative basis for affirmance…that it is entitled to summary judgment on a ground rejected by the court.").

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Use of Computer-Generated Animation or Simulation at Trial

By Salvatore J. DeSantis, Alice Spitz and Ayesha Syed

The litigation tool that arguably has the greatest impact on a jury is the presentation of a computer-generated accident animation or simulation. This is especially true in the transportation area where the trucking industry is viewed as a deep pocket and jurors have preconceived notions that tractor trailers can be a menace on the road. Although they are relatively expensive to produce, the use of such visuals is amply justified by a favorable verdict for the side who produced it. A visual reconstruction of how an accident could have, and could not have, happened will clearly be more influential than the theoretical and technical jargon-filled testimony of an accident reconstruction expert and/or biomechanical engineer without the benefit of visual aid. Additionally, as older jurors are replaced by youngsters who have grown up with laptops, cell phones, and Nintendo Wii, presentations on computers or TV monitors at trial will be increasingly more necessary and influential.

If the facts of the particular case are suitable for presentation in this format, and time and effort are taken to create an animation or simulation, it is crucial to ensure that it will be admissible at trial. Familiarity with the foundational, procedural, and substantive evidentiary requirements is essential both to presenting visual evidence, or to be able to make informed objections if the adversary produces such visual evidence.

The Distinctions

Animations

The admissibility criterion for computer-generated animations is different from that of simulations due to the different purposes for which they are used. In *Clark v. Cantrell*, where deciding on the admissibility of an animation was a matter of first impression, the court held: "An animation is used to illustrate a witness's testimony by recreating a scene or process, and properly is viewed as demonstrative evidence." An animation does not purport to be a reconstruction of the accident. It is merely a visualization of the expert's opinion of what he or she believes happened based on physical evidence. Usually, animations are not entered into evidence, and the jury does not view them outside of the courtroom. The expert's opinion itself is based on other evidence such as measurements taken at the scene, skid marks, photographs, witness testimony, and the inferences drawn by the expert based on his or her expertise. *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (S.C. 2000).

"A computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic...(2) relevant...(3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury." *Id*. The animation must relate to evidence in the record, be relevant to a material and disputed issue of fact, and assist the jury in making a determination on the issue. The expert should be qualified to present the opinion, and the opinion must be sufficiently based on facts in evidence. The program that created the animation should be reliable, and it should produce a fair and accurate representation of what it purports to convey, which is the expert's opinion, and the expert should be available to testify. *Id.*

In order for the animation not to be considered misleading, the conditions portrayed in the animation should be substantially similar to those of the actual incident. For instance, the animation must be technically correct on details such as distance, terrain, relative speed, path of travel, and surroundings. The animation should be consistent with the trial testimony of the proponent of the evidence. Lastly, the judge, in his or her discretion, should find that the probative value of the animation is greater than the risk of unfair prejudice. *Id.*

In *Clark,* the testimony of the technician who created the animation and the reconstruction expert who interpreted the actual physical evidence was sufficient for authentication. However, the animation was ultimately excluded on the ground that it was not a fair and accurate representation of the evidence to which it related, namely, the plaintiff's testimony, because her testimony conflicted with her own expert's placement of the defendant's vehicle in the animation. Had it been consistent with the plaintiff's own testimony, it would not have been excluded. The court held: "The fact [*sic*] the animation is inconsistent with testimony or evidence presented by the opposing party should not necessarily lead to its exclusion, provided it fairly and accurately portrays the proponent's version of events." This is so because the animation "does not purport to be recreating the actual incident, only the expert's theory on its cause and result. For this reason, the requirements for the admissibility of an animation are the same as what is required for conventional demonstrative evidence such as charts and models." *Clark v. Cantrell,* 339 S.C. 369, 529 S.E.2d 528 (S.C. 2000).

Examples

Presentations which may be objected to:

Only playing an animation in slow motion, *Suanez v. Egeland,* 330 N.J. Super. 190, 749 A.2d 372, (N.J. Super. A.D. 2000); including an audio-track containing speech that

could be mistaken for substantive testimonial evidence, *Persley v. New Jersey Transit Bus Operations*, 357 N.J. Super. 1, 813 A.2d 1219 (N.J. Super. A.D. 2003); the testimony of a proponent of the animation contradicting what the expert depicted; *Clark, supra*, and an animation which portrayed a hypothetical placement of a vehicle in a position that clearly contradicted the factual evidence, *State v. Hultenschmidt*, 125 Wash. App. 259, 102 P.3d 192 (Wash. App. Div. 2, 2004).

Since the *Clark* court considered the issue, other courts have also held that authentication can be established upon a showing that the evidence is what its proponent claims it to be, which is the same as the federal standard for demonstrative evidence. In a New York case, a new trial on the issue of liability was ordered based on the Appellate Division's holding that it was an abuse of the trial court's discretion to admit an animation when "the circumstances portrayed in the computer-generated animation were sufficiently different from those which existed at the time of the accident." *Kane v. Triborough Bridge & Tunnel Authority*, 8 A.D.3d 239, 778 N.Y.S.2d 52 (N.Y. 2004). The court held that the jury should have been instructed that "the computer-generated animation was being admitted for the limited purpose of illustrating the expert's opinion as to the cause of the accident and that it was not to consider the computer-generated animation itself in determining what actually caused the accident." The court stated that the lack of the instruction alone would be sufficient basis for a new trial.

Procedurally, an opponent of an animation or simulation must request a limiting instruction to preserve any objections to the animation for appeal. A New Jersey court stated, "Although plaintiff also argues the trial judge should have provided the jury with a limiting instruction regarding the tape, no limiting instruction was requested and even now plaintiff does not identify what the contents of any such instruction should have been." *Persley v. New Jersey Transit Bus Operations, supra.* In *New York*, the court held that a limiting instruction was sufficient to safeguard the decision to admit an animation although the proponent improperly referred to it as a "reconstruction," which the appellant claimed would mislead the jury to treat it as fact. *Datskow v. Teledyne Continental Motors Aircraft*, 826 F. Supp. 677 (W.D.N.Y. 1993).

In a 2008 case an Oklahoma court provided a thorough example of a limiting instruction for the introduction and use of an animation. "For future guidance in the use of animations as demonstrative aids, the trial court should instruct the jury, at the time the animation is offered and allowed as a demonstrative aid and before it is shown…, that (1) the animation is not evidence but is intended only as a visual aid to the jury in understanding certain testimony or evidence presented at trial by illustrating and explaining that testimony or evidence, (2) the animation represents only a re-creation of the proponent's version of the event and should in no way be viewed as an actual re-creation or recording of the event, and (3) because the animation is intended to assist them as jurors, it may be accepted or rejected in whole or in part. When used only as a demonstrative aid and not as an exhibit admitted into evidence, the animation should be marked as a demonstrative exhibit of the proponent and included as part of the trial court record but should not be sent to the jury deliberation room with the jury." *Tull v. Federal Express Corp.*, 197 P.3d 495, Okla. Civ. App. Div. 2 (2008).

The opponent of an animation should vigorously cross examine the expert regarding his or her method of preparation of the animation at the time it is shown. The opponent should also cross-examine the witnesses whose testimony the expert uses as a foundation for his or her opinion. In *Harsh v. Petroll*, the court decided that since the opponent "chose not to cross-examine these individuals at trial when they were offered or to call them in their own presentation of their case, that was a choice that was made that cannot be undone now." *Harsh v. Petroll*, 840 A.2d 404 (Pa. Cmwlth. 2003).

The animation in *Mintun v. State* depicted an accident from three vantage points, including one that the proponent called "the witness view." The witness who viewed the accident testified as to his own determination of what occurred, which was inconsistent with the animation. Since the proponent testified that he was only presenting his own theory of what he believed an eyewitness would have seen from the vantage point of the actual eyewitness, and the animation was consistent with his own testimony, the court held it to be admissible. *Mintun v. State*, 966 P.2d 954, Wyo. (1998).

Pennsylvania v. Serge provided a procedural guideline for a party seeking admission of a computer-generated animation. The Supreme Court of Pennsylvania advised that the proponent should file a motion *in limine* before trial, and that the farther along into the trial the proposed animation was disclosed, the more likely it would be that the prejudicial effect would outweigh the probative value of the animation because the opposing party would have less time to examine it or prepare its own. *Commonwealth of Pennsylvania v. Serge*, 586 Pa. 671, 896 A.2d 1170 (Pa. 2006).

Simulations

Simulations are unlike animations in every respect other than that they are presented on a screen. They are usually submitted as substantive evidence, and as the basis of the reconstruction expert's opinion. Accident reconstruction experts commonly rely on computer programs specifically designed for the purpose of predicting what would occur in reality when the program is given specific parameters. The expert enters data based on actual evidence from the accident and allows the computer to perform mathematical calculations, the results of which show some aspects of the mechanics of the accident. Fault, possible extent of injuries, and vehicle defects can be determined

in this way. The expert would then adopt the computer's conclusions as the basis for his or her testimony.

While it has consistently been held that animations are not to be evaluated under the *Daubert* or *Frye* tests, since they are only demonstrative evidence that only illustrate an expert's opinion testimony, simulations are subject to either of those tests, depending on which one is followed by the state's courts. This heightened scrutiny for simulations exists since results of the simulation are usually submitted as substantive proof of a fact at issue. The court is therefore responsible for ensuring the testimony has some extent of reliability, when scientific methods are used to form the evidence. Simulation results fall within the category of results of experiments or tests for purposes of evidentiary standards they must meet.

901(b)(9) Fed. R. Evid. governs the authentication of a process such as a computer simulation program to ensure the reliability of the results presented in the expert's testimony. Many states which have adopted statutory codes of evidence use the federal *Daubert* standard to determine the admissibility of computer-generated accident simulations. Under the *Daubert* test, there are multiple factors that the judge, in a gatekeeper role, is to consider before allowing a simulation into evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S. Ct. 2786 (U.S. Cal.1993).

Several factors that establish authentication under rule 901 of the Federal Rules of Evidence have been identified. "This standard can generally be satisfied by evidence that (1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed, (3) proper procedures were followed in connection with the input and output of information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly, and (6) the exhibit is properly identified as the output in question." *State v. Swinton*, 268 Conn. 781, 847 A.2d 921 (Conn. 2004).

In *Livingston v. Isuzu Motors, Ltd*, the court held that a simulation program was properly authenticated under its strict application of the *Daubert* factors when the expert who developed and conducted the simulation touched upon each of the four factors in his testimony. As to whether the theory underlying the program was tested, he explained that the theory was based on commonly known physics equations. As to the second factor for peer review, he testified about presentations and lectures given to automobile engineers. Although he was unable to testify precisely about the rate of error of the program, which is the third factor, the court did not exclude the simulation in favor of allowing the opposing side to bring this information out on cross examination. The fourth factor, general acceptance in the scientific community, was satisfied by his identification of peers who had evaluated his work. *Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473 (D. Mont. 1995).

In *Hinkle v. City of Clarksburg*, a computer simulation was excluded because the conditions of the test were not substantially similar, rendering the results of the test unreliable. The defendant "introduced a videotaped recreation of the accident that was conducted at a test facility on a flat, straight, asphalt surface in daylight by an experienced driver." However, the parties had previously agreed on the fact that "at the time of the accident it was night, and plaintiff was driving down a hill at a sharp curve in the road when he struck the utility pole." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 1996.

In New York, results of tests are admissible as substantive evidence if the methods by which the results were produced meet the standard set forth in *Frye v. United States*. *Frye* held that an expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. *Frye v. U.S.*, 54 App. D.C. 46, 293 F. 1013, 1014 C.A.D.C 1923.

The court in *Commercial Union Ins. Co. v. Boston Edison Co.* applied the *Frye* test to computer-generated simulations. It stated that "we treat computer-generated models or simulations like other scientific tests, and condition admissibility on a sufficient showing that (1) the computer is functioning properly; (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party, so that they may challenge them); and (3) the program is generally accepted by the appropriate community of scientists." The issue in that case was the opponent's objection to the third criteria. They contended that the relevant community of scientists were actual air conditioning and heating experts. The court rejected the argument that HVAC technicians are the measuring scientific community, and instead, it was held that the community to be used was that of accident reconstruction and other types of qualified engineers who regularly use simulation programs like the one at issue. *Commercial Union Ins. Co. v. Boston Edison Co.*, 412 Mass. 545, 591 N.E.2d 165 (Mass. 1992).

State v. Sipin applied the *Frye* test to computer-generated simulations as well. It held that simulations can be admitted as substantive proof when it is established that the computer is functioning properly, the data entered into the computer was accurate according to the evidence from the incident, and the program equations were accurate. On appeal, a new trial was ordered so that there could be a *Frye* hearing. The Appellate Division concluded that it was not proven that there was general acceptance in the community of accident reconstruction experts for the purpose for which the program at issue was used. Namely, "the use of the multi-body version of PC-CRASH to predict interior occupant movement in a multi-impact accident" was not shown to be generally accepted when the proponent provided "no validation studies that had been done on the use." *State v. Sipin,* 130 Wash. App. 403, 123 P.3d 862 (Wash. App. Div. 1, 2005).

As to procedural matters, the court in *State v. Sipin*, stated that any program relied on for the basis of an expert's opinion should be disclosed to the opposing side in advance of trial so that they can test its reliability and prepare cross examination questions for the expert who relied on it. However, non-disclosure prior to trial is not a ground to exclude an exhibit, if it is disclosed prior to its introduction, outside the presence of the jury. However, state laws differ on timing of this disclosure and careful examination should be made of the applicable state's law.

In *Deffinbaugh v. Ohio Turnpike*, the Ohio Court of Appeals found a sufficient foundation to support admissibility where the testifying expert testified (1) to the name of the program he used, (2) that the program offered an accurate depiction of the motion of the vehicle, and (3) that he used known facts and a reliable estimate of speed to generate the simulation and where the use of the computer simulation was disclosed pretrial. 588 N.E.2d. at 194.

In *Turner v. Williams*, the court stated that the plaintiffs' motion to exclude a reconstruction expert's testimony because he did not enter all the facts from deposition testimony was not a basis on which to exclude his testimony, because this issue could be addressed on cross examination. The admissibility of the simulation itself was not addressed. *Turner v. Williams*, 326 Ill. App.3d 541, 2001.

Bray v. Bi-State Development Corp. held that the reconstruction expert need not run the simulation program himself or herself, saying, "There is no general requirement that a testifying expert physically do this." The court found it sufficient that the reconstruction expert "supervised the process and supplied the data to be entered [and] testified he generally relied on the manufacturer's representative to actually run the program." *Bray v. Bi-State Development Corp*., 949 S.W.2d 93 (Mo. App. E.D. 1997).

The court in *Zimmerman v. Powell* stated that "we abandoned the *Frye* test and, in its place, adopted the framework set forth in *Daubert*…. Under the *Daubert*… framework, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion…. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.... The trial court must also determine if the witness has applied the methodology in a reliable manner." It further stated, "Once a party opposing an expert's testimony has sufficiently called into question the testimony's factual basis, data, principles, [or] methods, or their application ...the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." Despite this very good outline of the *Daubert* test, the court did not perform one on the facts of the simulation because the record was not preserved on the issue, and any prejudice from that issue combined with other errors was a reduction in damages. *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (Neb. 2004).

Lally v. Volkswagen Aktiengesellschaft addressed a simulation which was offered to show "the real time movement of the occupants in the crash, and the components with which they would likely have come into contact if the vehicle moved at a fifty-three degree angle," calculated by a reconstruction expert for purposes of comparing it to the damage on the actual car. It went on to say that the test for admissibility was "whether the evidence is relevant, the extent to which the test conditions are similar to the circumstances surrounding the accident, and whether the experiment…will confuse or mislead the jury." The court held the test result was relevant as to the defendant's theory of causation. It acknowledged that although the simulation did not precisely replicate the conditions of the accident, it was substantially similar for the purpose of the jury's understanding of "how the occupants would have moved inside the vehicle and what parts of the interior they would likely have struck if they moved in the direction posited by the defendants' experts." It stated that determining substantial similarity was a matter for the discretion of the court. *Lally v. Volkswagen Aktiengesellschaft*, 45 Mass. App. Ct. 317, 698 N.E.2d 28 (Mass. App. Ct. 1998).

Although the general rule is that a *Frye* or *Daubert* analysis must be done to determine the admissibility of a simulation, the analysis is not necessary when the proponent does not submit the simulation as substantive evidence. In *Lyons v. J.A. Auger, Inc*., the court held that where an expert reconstructionist used a simulation only to test his theories, and the simulation was not entered as an exhibit as scientific proof of the cause of the accident, there was no need to test the foundation of the program other than according to the criteria of "reasonable reliance." 821 So.2d 536, (La. App. 2 Cir. 2002).

Conclusion

Using computerized animation or simulation in a catastrophic motor vehicle accident must be given serious consideration. An early comprehensive investigation to gather the raw data necessary to reconstruct the accident will ensure that as a proponent of the computerized animation or simulation the jury will get to see it.

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Liability for Criminal Acts of Third Parties

By Glenn A. Monk and Julie C. Hellberg

I. Introduction

A premises owner is under an affirmative duty to safeguard persons lawfully on his or her property from foreseeable harm. As with any premises liability case, the landlord's duty regarding criminal conduct by a third party is proscribed by whether the conduct was foreseeable. Foreseeability in this context turns on the circumstances of whether a criminal element had previously infiltrated the premises or whether the owner would otherwise be on notice that a likely criminal act would occur on the premises. Thus, any analysis of liability for criminal acts of third persons should commence by investigating whether and what type of criminal conduct had previously occurred on the premises.

In cases where a plaintiff can indeed demonstrate that he or she was injured by reason of the criminal conduct of a third person, and that the criminal conduct was foreseeable, a premises owner has a duty to take "minimal security precautions." Where the premises owner fails to install minimal security devices or installs them negligently in the face of the foreseeable risk of harm, he or she can be held liable to the plaintiff for his or her injuries. A defendant landlord can generally satisfy the "minimal security measures" standard by demonstrating that there were working locks and an intercom at the entrance to the building.

"In cases where a plaintiff can indeed demonstrate that he or she was injured by reason of the criminal conduct of a third person, and that the criminal conduct was foreseeable, a premises owner has a duty to take 'minimal security precautions.'"

II. Duty

The threshold question in any negligence action is whether the defendant owes a legally recognized duty of care to the plaintiff. *Hamilton v. Beretta USA Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7 (2001); *Moss v. New York Telephone Co.*, 600 N.Y.S.2d 759, 760 (2d Dep't 1993); *Iannelli v. Powers*, 114 A.D.2d 157, 498 N.Y.S.2d 377, 380 (2d Dep't 1986). Although "a possessor of land…is not an insurer of the visitor's safety," *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519, 429 N.Y.S.2d 606, 613 (1980), he or she is under an affirmative duty to maintain the property in reasonably safe condition for those who use it. *Id.; Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564 (1976). It is now well established that this duty includes the obligation to take minimal precautions to protect members of the public from the reasonably foreseeable criminal acts of third persons. *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 684 N.Y.S.2d 139 (1998); *Miller v. State of New York*, 62 N.Y.2d 506, 513, 478 N.Y.S.2d 829 (1984); *Nallan, supra; Kush v. City of Buffalo*, 59 N.Y.2d 26, 33, 462 N.Y.S.2d 831, 835 (1983). However, the existence of the duty to take such precautions is circumscribed by whether the crime which caused plaintiff's injuries was reasonably foreseeable to the landowner, and whether the landowner had the ability to control the conduct of the third party. "The risk reasonably to be perceived defines the duty to be obeyed" and delimits the duty's scope. *Palsgraf v. Long Is. R.R. Co.*, 248 N.Y. 339 at 344, 162 N. E. 99 (1928).

In order to establish the existence of the premises owner's duty to take minimal protective measures, one must show that the owner "either knows or had reason to know from past experience 'that there is a likelihood of conduct on the part of third-persons…which is likely to endanger the safety of the visitor.'"[1] *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 519, 429 N.Y.S.2d at 613 (quoting Restatement Torts 2d, S 344, Comment F); *M.D. v. Pasadena Realty Co.*, 300 A.D.2d 235, 753 N.Y.S.2d 457 (1st Dep't 2002). "Lacking such notice, there is no duty on the part of the landowner to provide protective measures, as foreseeability of harm is the measure of a landowner's duty of care." *Adiutori v. Rabovsky Academy of Dance*, 149 A.D.2d 637, 540 N.Y.S.2d 457 (2d Dep't 1989). Where there is little evidence of criminal activity in the building, there are insufficient facts to base a finding of foreseeability. *M.D. v. Pasadena Realty Co., supra* (quoting *Iannelli v. Powers, supra*); *Camacho v. Edelman*, 176 A.D.2d 453, 574 N.Y.S.2d 356 (1st Dep't 1991).

Stated differently, a landowner has no duty protect visitors from the criminal acts of third parties unless it is shown that the landowner either knows or has reason to know that there is a likelihood of conduct dangerous to the safety of the visitor. Absent such notice, a criminal act perpetrated by a third person is considered an intervening or superseding cause of injury that absolves a defendant landowner from liability. *Kush, supra; Perry v. Rochester Lime Co.*, 219 N.Y. 60, 113 N.E. 529 (1916); *Waters v. New York City Housing Authority*, 116 A.D.2d 384, 501 N.Y.S.2d 385 (2d Dep't 1986). Absent a cognizable duty of care, no liability can be imposed on a premises owner as a matter of law. *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 528, 478 N.Y.S.2d 838, 467 N.E.2d 502 (1984). The determination of a duty on the part of the defendant is for the Court to decide. *Bodaness v. Staten Island Aid, Inc.*, 170 A.D.2d 637, 567 N.Y.S.2d 63 (2d Dep't 1991); Moss, *supra*. Thus, where

a defendant can make a showing that the intentional act by a third party was not reasonably foreseeable—i.e., that he or she had no notice of criminality connected to the property through historical data or otherwise—a motion for summary judgment may be granted.

(a) Foreseeable Risk

(i) Ambient Crime

"Ambient neighborhood crime alone is insufficient to establish foreseeability." *Novikova v. Greenbriar Owner's Corp.*, 258 A.D.2d 149, 153, 694 N.Y.S.2d 445, 448 (2d Dep't 1999). "It is only insofar as the ambient crime has demonstrably infiltrated a landowner's premises or insofar as the landowner is otherwise on notice of a serious risk of such infiltration that its duty to provide protection against the acts of criminal intruders may be said to arise." *Todorovich v. Columbia University*, 245 A.D.2d 45, 46, 665 N.Y.S.2d 77, 78 (1st Dep't 1997). Although the past criminal activity need not be of exactly the same type or in the exact location, "the court should consider the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question." *Mulvihill v. Wegmans Food Markets, Inc.*, 266 A.D.2d 851, 698 N.Y.S.2d 130, 131 (4th Dep't 1999); *Maheshwari v. City of New York*, 2 N.Y.3d 288, 294, 778 N.Y.S.2d 442, 446 (2004); *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 614 N.E.2d 723, 598 N.Y.S.2d 160 (1993).

However, it is not invariable that notice of a risk of third-party criminality must be based on precedent incidents at the premises. Where there are other grounds to infer that the owner was or should have been aware of a real risk that the alleged crime upon its property would occur, the law does not forbid an inference of notice and consequently arising duty. *Nash v. Port Authority of New York and New Jersey*, 51 A.D.3d 337, 856 N.Y.S.2d 583, 588 (1st Dep't, April 29, 2008). The relevant requirement in premises liability actions is ultimately notice, not history. 51 A.D.3d 337, 856 N.Y.S.2d at 589.

Cases Holding That the Risk of Harm Was Not Foreseeable

In *Maheshwari v. City of New York*, plaintiff was attacked in the parking lot after a large outdoor concert. The Court of Appeals held that the attack was not foreseeable because the "types of crimes committed at past Lollapalooza concerts are of a lesser degree than a criminal assault, and would not lead defendants to predict that such an attack would occur or could be prevented." 2 N.Y.3d 288, 294, 778 N.Y.S.2d 442, 446. Moreover, it found that a "random criminal attack…is not a predictable result of the gathering of a large group of people." *Id.*

In *Novikova v. Greenbriar Owner's Corp.*, plaintiff's decedent, a visitor to a tenant in defendant's condominium, was shot and killed during a robbery in the entry hall of the building. Plaintiff's attempt to establish that the criminal conduct was foreseeable, thus requiring the landlord to provide minimum security measures, was rejected by the Court. It found that

> of the 21 reported crimes relied upon by the plaintiffs, only three are reported as having occurred at or in front of the subject premises—two apartment burglaries and one theft of a car. None of these three crimes are similar to the crime at issue. Indeed, the burglaries do not even necessarily implicate street crime or a criminal intruder as these crimes might have been committed by a fellow tenant, a guest or a service provider. Of the remaining reported crimes, the vast majority concern the theft or vandalism to cars, or burglaries…and none concerned an ambush-style robbery as occurred here.

Id. at 153. In addition, the Court found that the reported crimes were not close in proximity to the subject area, and did not occur at the same time of day as in the instant case (2:30 a.m.). Accordingly, as the subject criminal act was not reasonably foreseeable, defendant owed no duty to protect plaintiff's decedent, and the Court granted summary judgment to the defendant.

In *Todorovich v. Columbia University*, plaintiffs were attacked and robbed in the vestibule of their building while they were attempting to open the door on their return from vacation. In response to an attack on another tenant whose house keys were taken in the robbery on the public sidewalk in the neighborhood, defendant landlord had previously changed the locks of the vestibule door while the plaintiffs were away. Plaintiffs claimed that Columbia breached its duty of care by changing the locks and failing to provide them with new keys. 245 A.D.2d 45, 665 N.Y.S.2d 77.

However, plaintiffs failed to provide a record of any prior incidents in which the ambient crime in the neighborhood had infiltrated the building, or that defendant Columbia had any notice of any criminal activity. The facts on which to base a finding of foreseeability necessary to a determination that defendants owed a duty to provide minimal protection were therefore insufficient. Thus, the Court held that defendant landlord owed no duty to the plaintiffs in the first instance, and granted summary judgment to Columbia. 245 A.D.2d at 47, 665 N.Y.S.2d 77.

In *Mulvihill v. Wegmans Food Markets, Inc.*, plaintiff was attacked in the parking lot of the grocery store at 2:00 a.m. by a group of young males. The court found that the incidents that occurred in the parking lot and the store during the three years before plaintiff's assault "were so dissimilar in nature from the violent attack upon plaintiff [ ] as to be insufficient, as a matter of law, to raise a triable factual issue as to foreseeability." 266 A.D.2d 851,

698 N.Y.S.2d 130, 131 (4th Dep't 1999) (interior citations omitted).

In *Williams v. Citibank, N.A.*, the Court found that the bank could not be held liable for the attack on a customer using the ATM machine inside its vestibule as plaintiff could not show any history of crimes in the vestibule. It specifically rejected plaintiff's theory that ATM machines attract criminal activity, and thus extra precautions should have been taken. Even if Citibank had a duty to plaintiff, however, it had fully complied with Administrative Code of the City of New York § 10-160 with respect to the security requirements at an ATM. It had equipped the entry doors with a locking device that permitted ingress only by use of an ATM card; the lock was working properly; there was adequate lighting and at least one exterior wall of untinted glass to provide an unobstructed view of the ATMs; video surveillance cameras, fully operational, were in place, as well as a free telephone service that automatically connects the caller to a customer-service person. 247 A.D.2d 49, 677 N.Y.S.2d 318 (1st Dep't 1998).

Cases Holding That the Need for Security Was Foreseeable or at Least That the Facts Adduced Raised a Question of Fact for Trial

In *Miller v. State of New York*, plaintiff satisfied the required threshold showing by offering evidence that with respect to her own dormitory

> there had been reports to campus security of men being present in the women's bathroom. Claimant herself had complained twice to the Assistant Quad Manager of her dormitory area about nonresidents loitering in the dormitory lounges and hallways when they were not accompanied by resident students.

62 N.Y.2d 506, 509 478 N.Y.S.2d 829. Furthermore, all of the dormitory doors were equipped with locks which the State, as a matter of policy, did not lock. As this Court noted, "the act complained of under the landlord theory of liability was the failure to lock the outer doors of the dormitory," and the duty which was breached was the "duty to take the rather minimal security measure of keeping the dormitory doors locked." *Id.* at 513, 514.

In *Jacqueline S. v. City of New York*, plaintiff, a 14-year-old resident of a New York City housing project, was abducted in the lobby of her building and taken to a room on the roof and raped. Plaintiff produced evidence that other violent criminal activity including rape and robbery had occurred in the complex, and indeed in her building. Although the police could not recall whether the criminal activity had occurred in plaintiff's building, the Court of Appeals held that the evidence produced by plaintiff was sufficient to raise a triable issue of fact as to whether the crime had been foreseeable, thus requiring the Housing Authority to have taken security measures. 81 N.Y.2d 288, 614 N.E.2d 723, 598 N.Y.S.2d 160.

In *Nieswand v. Cornell University*, plaintiff's decedent was shot in her dormitory room by the rejected boyfriend of her roommate. It was never determined how the intruder gained entrance to the dormitory, and the University's security department had no records of any problem with the assailant. Moreover, no murder or attempted murder had ever occurred on campus prior to the tragedy. Nonetheless, on plaintiff's showing that in the three years prior to the shooting, Cornell experienced four rapes, eight robberies, and 51 total assaults, as well as over 3,200 other burglaries and larcenies, the District Court denied Cornell's motion for summary judgment. It held that a genuine issue of fact existed as to whether the murder had been foreseeable given the criminal activity on campus, thereby giving rise to Cornell's duty to provide security. 692 F. Supp. 1464, at 1468-69 (N.D.N.Y. 1988).

In *Nash v. Port Authority of New York and New Jersey*, plaintiff sued for injury occasioned by the 1993 bombing in the parking garage of the World Trade Center. Plaintiff produced documentary evidence that as early as 1983, the Port Authority had received several reports warning of possible bomb attacks on the building, and reports and interoffice memoranda regarding "target-hardening" security measures that should be taken, including in the under-building garage. "Tellingly, not one of the consultants who reviewed the security of the subgrade public parking facilities found that existing security measures were adequate or that defendant might, as an alternative to implementing the recommended precautions, prudently adopt a wait-and-see attitude." 51 A.D.3d 337, 856 N.Y.S.2d at 589. Upholding the trial court order denying defendants' motion to set aside the jury verdict, the First Department held that the documentary evidence in the case permitted the inference that defendant was on notice that a devastating car-bombing in the subgrade garage of its complex was a very real possibility, and thus defendants had a duty to take the appropriate security measures under the circumstances. *Id.*

(ii) Vicarious Liability and Foreseeability

An employer is not liable under the doctrine of respondeat superior for torts committed by an employee for purely personal reasons unrelated to the furtherance of the employer's business. *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933, 693 N.Y.S.2d 67 (1999); *Sandra M. v. St. Luke's Roosevelt Medical Center*, 33 A.D.3d 875, 823 N.Y.S.2d 463 (2d Dep't 2006). For the most part, employer liability will turn on the above doctrine, and the question of safeguarding the premises from foreseeable acts of third persons does not arise. For example, a bar owner could be held vicariously liable for the acts of his bouncer whose rough removal of a patron injures the patron because the bouncer was acting in furtherance of the em-

ployer's business. Where the violent act of an employee is not foreseeable, the employer/premises owner cannot be held liable to the plaintiff for injuries caused by the employee. Employers can also be held liable for criminal activity of an employee under the theories of negligent hiring or negligent supervision.

In *Sandra M., supra*, plaintiff was raped by a nurse caretaker employed by St. Luke's Roosevelt. The Second Department held that the hospital is not responsible for knowing or foreseeing what an employer could not be expected to know of [the criminal tendencies of] its employees, and thus St. Luke's could not be held liable under this premises liability theory.[2]

The same holds true for independent contractors retained by the business/property owner. For example, in *Kirkman v. Astoria Gen. Hosp.*, the plaintiff was raped by a security guard, employed by a subcontractor security company, who was on duty at a hospital where the plaintiff had been visiting a patient. The court determined that the hospital could not be held liable, as a possessor of realty, for a breach of the duty to protect the visitor from the reasonably foreseeable criminal acts of third persons, since there was "no evidence in the record that [the hospital] had any knowledge of, or contact with, the employee that would have made the employee's criminal act foreseeable to the hospital." *Kirkman v. Astoria Gen. Hosp.*, 204 A.D.2d 401, 402, 611 N.Y.S.2d 615 (2d Dep't 1994).

It is also worth noting that insurance policies often contain exclusions for intentional torts, such as assault and battery. Thus, it has been held that insurers have no duty to defend and indemnify an employer for an employee's intentional acts, criminal or not. *Penn-America Group, Inc. v. Zoobar, Inc.*, 305 A.D.2d 1116, 759 N.Y.S.2d 825 (4th Dep't 2003) (holding that due to the assault and battery exclusion, insurer had no duty to defend and indemnify bar owner for the bar bouncer's assault); *but see Anastasis v. American Safety Indem. Co.*, 12 A.D.3d 628, 786 N.Y.S.2d 88 (2d Dep't 2004) (held that where bouncer stepped on patron's leg unintentionally the act did ***not*** fall within insurance policy's exclusion for assault and battery, and the insurer had a duty to defend and indemnify).

Moreover, public policy interdicts enforcement of an indemnity agreement where the agreement purports to indemnify a party for the intentional infliction of harm. *Austro v Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 496 N.Y.S.2d 410 (1985). Thus, an agreement to indemnify may not provide indemnity against future criminal or illegal acts by employees.

b. Assumption of Duty

In the absence of a legal obligation to protect tenants from criminal conduct by third parties, a landlord can nevertheless be held liable under the theory of "assumed duty" where he or she voluntarily provides security but fails to do so carefully and omits to do what an ordinary prudent person would do in accomplishing the task. *Wolf v. City of N.Y.*, 39 N.Y.2d 568, 384 N.Y.S.2d 758 (1976). Merely assuming a duty to provide some form of security, however, does not create automatic liability. Rather, an assumed duty arises where the failure to exercise due care *increases* the risk of harm to the plaintiff or where the harm suffered was due to plaintiff's reasonable *reliance* on the voluntary undertaking and that he or she tailored his or her own conduct accordingly. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 522, 429 N.Y.S.2d 606.

In *Nallan, supra*, plaintiff was shot while in lobby of defendants' building at time when a lobby attendant employed by defendants was away from his desk. The Court of Appeals stated [in *dicta*, after ordering a second trial due to an inconsistent jury verdict] that at the second trial plaintiff could support a theory of "assumed duty" upon a showing that plaintiff was familiar with the building's after-hours procedures and expected that an attendant would be present, and that he was therefore lulled into a false sense of security and neglected to take the precautions he might otherwise have taken upon entering the building. 50 N.Y.2d at 522-23, 429 N.Y.S.2d 606.

In *Jacobs v. Helmsley-Spear, Inc.*, plaintiff was robbed at gunpoint while walking to the garage of her apartment. The electronic garage door, which the landlord had voluntarily undertaken to install, was broken at the time of the incident. Plaintiff testified that she would have entered the garage to safety "but for the fact that the locking mechanism was inoperable." Thus, the Court held that because the landlord "installed a security system which by its very nature would induce tenants to use that entrance to the garage as readily as the entrance within the building" plaintiff was "lulled into a false sense of security," thereby demonstrating reasonable reliance. *Jacobs v. Helmsley-Spear*, 121 Misc.2d 910, 469 N.Y.S.2d 555 (N.Y. Civ. Ct. 1983) (citing *Nallan, supra*).

III. Breach of Duty

Once a duty on the part of the premises owner has been established, plaintiff must show that defendants breached their duty by failing to maintain "minimal security measures." *Miller v. State of New York*, 62 N.Y.2d at 513, 478 N.Y.S.2d 829. Minimal security measures might be as slight as a working lock on an entry door, or might require further security such as an intercom, cameras, locking the elevator, etc.

What safety precautions may reasonably be required of landowner, who holds his land open to the public, to make his premises safe for the public is almost always question of fact for jury; in assessing reasonableness of landowner's conduct, a jury may take into account such variables as seriousness of risk of harm and cost of various safety measures. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 519, 429 N.Y.S.2d at 613; the law does not

require that a landlord must provide state of the art or perfect security, but "only reasonable security measures." *James v. Jamie Towers Housing Co.*, 99 N.Y.2d 639, 760 N.Y.S.2d 718 (2003); *Tarter v. Schildkraut*, 151 A.D.2d 414, 415, 542 N.Y.S.2d 626 (1st Dep't 1989); *Iannelli v. Powers*, 114 A.D.2d 157, 498 N.Y.S.2d 377. Generally, the threshold requirement of minimal security measures is one functional lock and a functional intercom system.

In *Tarter v. Schildkraut, supra*, the inner vestibule door had a functioning lock, which plaintiff was entering when she was shot, and a working intercom system. The First Department reversed the jury's verdict, holding that under the circumstances, the one locked door was sufficient to discharge defendant's duty to the plaintiff. 151 A.D.2d at 415, 542 N.Y.S.2d 626.

In *Novikova v. Greenbriar Owner's Corp., supra*, the court held that by providing an inner door lock, an intercom, surveillance camera, and evening doorman the landlord "satisfied their duty to provide minimal precautions against the foreseeable criminal acts of third parties." Moreover, the failure to provide a doorman 24 hours per day did not raise a triable issue of fact that defendant breached the duty of care. 258 A.D.2d at 152-53, 694 N.Y.S.2d 445.

If a security guard is provided, it is not a breach of duty where the guard is not present at his post one-hundred percent of the time. In *James v. Jamie Towers Housing Co.,* the Court of Appeals held that defendant landlord discharged its duty to take minimal security precautions by providing locking doors, an intercom service and 24-hour security, *notwithstanding the fact that the security guard was not at his post at the time of the attack*. 99 N.Y.2d at 642, 760 N.Y.S.2d 718, 720.

In *Iannelli v. Powers, supra*, where the decedent was killed by an assailant who gained access to the locked building when another tenant opened the door, the Court reversed the jury verdict that defendants had breached their duty to provide greater security than a locked entrance. Specifically, the Court held that even assuming that the defendants had a duty to adopt security measures in the first place, the plaintiff failed to "adduce testimony *from a qualified expert* in the field of building security…regarding the deficiencies in security, if any,… and what additional safety measures, if any, could reasonably have been undertaken…." 114 A.D.2d at 163, 498 N.Y.S.2d 377.

IV. Proximate Cause

As with all negligence claims, it is plaintiff's burden to show that defendants' conduct in allegedly failing in their obligation to take reasonable precautionary measures to make premises safe for visiting public was a substantial causative factor in sequence of events that led to plaintiff's injuries. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 519, 429 N.Y.S.2d at 613.

"In premises security cases...the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. *Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant,* ***plaintiff can recover only if the assailant was an intruder***." *Burgos v. Aqueduct Realty*, 92 N.Y.2d 544, 550-551, 684 N.Y.S.2d 139 (1998) (emphasis added). A plaintiff's own conduct of responding to a knock or a ring by opening a locked apartment door that contains a peephole without first looking through the peephole to ascertain who is on the other side constitutes intervening and superseding causation that breaks the causal chain and severs the landlord's liability. This is true even where a plaintiff can demonstrate that the landlord's security measures were not reasonable. *S.M.R.K., Inc. v. 25 West 43rd Street Co.*, 250 A.D.2d 487, 673 N.Y.S.2d 119 (1st Dep't 1998); *Benitez v. Paxton Realty Corp.*, 223 A.D.2d 431, 637 N.Y.S.2d 11 (1st Dep't 1996).

In *Elie v. Kraus*, plaintiff lived in a garden apartment complex where the individual tenant's own apartment doors were the main line of defense against intruders. The Court held that the fact that plaintiff buzzed open his door without first checking who was at the door, after dark, despite the fact that he had a peephole in his front door, to be an intervening cause of the attack, thus severing the landlord of liability. 218 A.D.2d 629, 631 N.Y.S.2d 16 (1st Dep't 1995).

But see *Mason v. U.E.S.S. Leasing Corp.*, 96 N.Y.2d 875, 730 N.Y.S.2d 770 (2001). The Court of Appeals upheld lower court decisions, finding that plaintiff's action of opening the door to her attacker without looking through the peephole thinking that it was her boyfriend was not an intervening cause of the attack as a matter of law. The Court reasoned that the complex's security could be found negligent under the circumstances in allowing entrance to the attacker, despite the fact that he "had…been involved in several criminal acts in the complex, including robbery, attempted rape and the beating of a security guard; that he had been arrested on the premises; and that defendants kept an arrest photo of him." 96 N.Y.2d at 878. Note that in this case, plaintiff's own door was not the primary security measure.

a. Stalking Cases

Similar to the cases where a plaintiff cannot provide sufficient proof that the assailant was an intruder to the building, and not a tenant or visitor, the evidence of a stalking relationship between the victim and the assailant has been held to be an intervening cause of injury, and severs the landlord's liability. For example, in *Rivera v. New York City Housing Auth.*, the defendant's failure to repair the front door lock was "undermined by the clear evidence that this attack was motivated by a preconceived

criminal conspiracy to murder plaintiff's stepbrother who lived with her…[and thus] it was most unlikely that any reasonable security measures would have deterred the criminal participants." 239 A.D.2d 114, 115, 657 N.Y.S.2d 32, 33 (1st Dep't 1997).

In *Tarter v. Schildkraut, supra*, in addition to finding that the defendants did not breach their duty because they provided reasonable security, the Court reversed a jury verdict, holding that "the conclusion is inescapable that plaintiff's ex-lover was intent on harming plaintiff. He had stalked her for that purpose. Given the motivation for the assault, his acts were truly extraordinary and unforeseeable and served to breach the causal connection between any negligence on the part of defendants and the plaintiff's injuries." 151 A.D.2d at 416, 542 N.Y.S.2d 626.

V. Risk Transfer Considerations

a. Security Contracts—Indemnity

A contracting security company owes no duty of care to a non-contracting third party arising out of its contractual obligation or the performance thereof unless: it increases the risk; plaintiff reasonably relies on the performance of the contract; or where the contractor entirely replaces the landowner's duties to maintain the premises safely. *Church v. Callanan Indus.*, 99 N.Y.2d 104, 752 N.Y.S.2d 254, 782 N.E.2d 50 (2002); *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138–139, 746 N.Y.S.2d 120, 773 N.E.2d 485 (2002); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 611 N.Y.S.2d 817, 634 N.E.2d 189 (1994); *Timmins v. Tishman Const. Corp.*, 9 A.D.3d 62, 777 N.Y.S.2d 458 (1st Dep't 2004).

However, keep in mind that the owner or possessor of land can contractually transfer the risk to its security contractor through indemnification provisions. *McFall v. Compagnie Maritime Belge S.A.*, 304 N.Y. 314, 327–28 (1952). Such a determination must be made after review of the security contract indemnity clause.

b. Out-of-Possession Landlord

An out-of-possession property owner is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs. *Hepburn v. Getty Petroleum Corp.*, 258 A.D.2d 504, 684 N.Y.S.2d 624 (2d Dep't 1999) (out-of-possession landlord not liable for shooting during robbery of gas station). The ability of the landowner to transfer his or her duty to a tenant is set forth in the lease provisions where general contract principles of indemnity will apply. The reservation of a right to enter the premises for purposes of inspection and repair constitutes sufficient retention of control to impose liability for injuries caused by a dangerous condition *only* where the condition violates a specific statutory provision and there is a significant structural or design defect. *Id.* A landlord retains control over the premises where he or she is involved in the daily operations of the business in possession (for example, where landlord is principal shareholder of the corporation that owns the building and also owns and operates the business leasing the premises). *See also Ahmad v. Getty Petroleum Corp.*, 217 A.D.2d 600, 629 N.Y.S.2d 779 (2d Dep't 1995); *Decorato v. Cozzoli Bros., LLC*, 841 N.Y.S.2d 825, 825, 16 Misc.3d 1108(A), 1108(A) (Sup. Ct., Kings Co. 2007) (grocery store shooting).

VI. Affirmative Defenses

a. CPLR 1411—Contributory Negligence

The doctrine of contributory negligence serves to diminish the amount of damages otherwise recoverable by the plaintiff where plaintiff's own conduct contributes to the cause of the injury. Contributory negligence is an affirmative defense that must be pleaded and proved by the party asserting the defense. CPLR 1412. Apportioning liability among plaintiff and defendant is usually a question to be resolved by a jury.

In order for premises owner to avail himself or herself of the doctrine of contributory negligence, the plaintiff's own conduct must be a cause in fact of his or her own injury. *Arbegast v. Board of Educ. of South New Berlin Central School*, 65 N.Y.2d 161, 168, 490 N.Y.S.2d 751 (1985). As a practical matter, the circumstances that might arise where plaintiff could be held contributorily liable are few and delicate to argue at trial, as they raise the ire of the jury if perceived as blaming or attacking the victim. However, a plaintiff could be assessed contributory negligence if, for example, he or she left open or unlocked the apartment window giving entrance on the fire escape.

b. CPLR Article 16—Joint and Several Liability

The limitations on liability imposed by Article 16 apply only to liability for non-economic loss, i.e., pain and suffering. Liability for economic losses remains joint and several in all instances. CPLR Article 16 does not apply to actions requiring proof of intent. Where there are multiple tortfeasors and only one has acted intentionally, apportionment for noneconomic loss *may* be apportioned against him or her, even if the criminal perpetrator is not a party to the action. The plaintiff can avoid the application of apportionment to the non-party perpetrator if he or she can show he or she failed, using all due diligence, to obtain jurisdiction. However, often the non-party perpetrator, having been successfully prosecuted, can be served at a correctional facility, making it difficult for the plaintiff to gain this exception. Note that the intentional tortfeasor may not benefit from Article 16, nor may multiple intentional tortfeasors apportion liability among themselves.

In *Chianese v. Meier*, 98 N.Y.2d 270, 746 N.Y.S.2d 657 (2002), the Court of Appeals sustained an apportionment of liability among defendant building owner, defendant

managing agent and the non-party assailant, who had acted intentionally. The Court held that the exception in CPLR 1602(5) applies to prevent defendants who are found to have committed an intentional act from invoking the benefits of Article 16. The Court noted, however, that in the multiple party situation presented in *Chianese*, plaintiff's claims against the named defendants did not require a showing of intent, and the non-party tortfeasor's intentional conduct did not bring this pure negligence action within the scope of the exception in CPLR 1602(5). *See* PJI 2:275; *see also Roseboro v. NewYork City Transit Authority*, 286 A.D.2d 222, 729 N.Y.S.2d 472 (1st Dep't 2001); *Concepcion v. New York City Health and Hospitals Corp.*, 284 A.D.2d 37, 729 N.Y.S.2d 478 (1st Dep't 2001); *Siler v. 146 Montague Associates*, 228 A.D.2d 33, 652 N.Y.S.2d 315 (2d Dep't 1997) (landlord could seek apportionment of liability of assailant, plumber, who was non-party but was party over whom jurisdiction could have been obtained). *See also Cardenas v. Alexander Wolfe & Co.*, 303 A.D.2d 313, 758 N.Y.S.2d 15 (1st Dep't 2003).

"Because of the innate sympathy that a jury might have for the victim of a crime, establishing comparative liability of the plaintiff is a delicate exercise requiring care not to appear to be attacking the victim."

While it is clear that plaintiff must plead and prove an exception to Article 16, there is a division of authority as to whether a defendant must plead and prove the Article 16 defense. The Second Department holds that where plaintiff sues multiple defendants, Article 16 applies *unless* plaintiff establishes an exception and, therefore, defendants are not required to assert Article 16 as an affirmative defense. *Marsala v. Weinraub*, 208 A.D.2d 689, 617 N.Y.S.2d 809 (2d Dep't 1994). Moreover, as defendants do not carry the burden of proof, they may not be required to supply a bill of particulars regarding the identity of possible additional tortfeasors. The First Department holds that an Article 16 defense must be pleaded only if it would likely surprise plaintiff or apportionment injects new factual issue into case. *Maria E. v. 599 West Associates*, 188 Misc.2d 119, 726 N.Y.S.2d 237 (Sup. Ct., Bronx Co. 2001). On the other hand, the Fourth Department holds that defendants, as parties seeking to limit their liability under CPLR 1603, have the burden of proof and must, therefore, plead Article 16 as an affirmative defense (see CPLR 3018(b)), *and* provide a bill of particulars as to that defense, *Ryan v. Beavers*, 170 A.D.2d 1045, 566 N.Y.S.2d 112 (4th Dep't 1991).

VII. Conclusion

The successful defense of a premises owner or possessor against a claim arising from the criminal conduct of a third party depends in the first instance on thorough investigation of the facts and circumstances surrounding the occurrence. Where the evidence demonstrates that there is no previous criminal history on the property or that the landlord is not otherwise on notice of the likelihood that criminal activity would occur there, the landlord owes no duty to the plaintiff as a matter of law, and a motion for summary judgment should be pursued. Where a landowner is found to owe a duty to the plaintiff, the investigation will reveal whether the landlord provided "minimal security measures." Although a court can find that the security provided was sufficient as a matter of law, the determination is more often left for the jury to decide. If motion practice is not available or successful in insulating the landowner from liability, additional strategies and considerations are available. Because of the innate sympathy that a jury might have for the victim of a crime, establishing comparative liability of the plaintiff is a delicate exercise requiring care not to appear to be attacking the victim. The ability to apportion fault to the often judgment-proof criminal perpetrator is another means to reduce the defendant landowner's potential for joint liability and exposure for non-economic damages.

Endnotes

1. Note that a landlord is under a duty to exercise reasonable care to discover that such acts are being done or are likely to be done. *Nallan, supra*. Thus, ignorance of a pervasive criminal element in his or her property would provide no protection from liability if the exercise of reasonable care would have disclosed criminal activity to him or her.
2. Note that the Court also held that the hospital was not liable for negligent hiring as it had no knowledge of any violent background of the employee of which it would have had a duty to investigate.

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The Use of Unsigned Deposition Transcripts in Summary Judgment Motions

By David A. Glazer and Melissa Wu

Summary judgment motions take a lot of time and effort. And, every lawyer knows that judges frequently look for reasons to deny summary judgment motions for a variety of reasons. Oftentimes, it is merely to make a potential settlement more likely. As a practicing lawyer, one cannot give a judge an excuse to deny an otherwise meritorious motion. One way that judges deny dispositive motions is by finding a technical defect such as improper use of a deposition transcript.

The Appellate Divisions have nuanced approaches regarding the admissibility of unsigned or unexecuted deposition transcripts. The Court of Appeals has yet to speak directly on the disparities among the Departments. This can pose difficulties for practitioners unfamiliar with a particular Appellate Division's interpretation of CPLR 3116, the applicable rule for signing and certifying deposition transcripts.

"[I]t is important to note that each department's treatment of unsigned deposition transcripts is nuanced."

Five factors have the most bearing when the Appellate Division decides whether an unsigned deposition transcript is admissible: (1) whether the witness had the opportunity to review and sign the transcript of his or her testimony and reasons for any failure to sign the transcript; (2) whether the transcript was certified; (3) whether a party is seeking to use the transcript as a deposition or merely as a party admission; (4) whether the transcript sets forth sufficient details of the case, and (5) the attorney's lack of knowledge of facts of the case or the attorney's making of conclusory statements in his or her affirmation.

Generally, in all departments except the Second Department, if a deposition transcript is certified as accurate by a court reporter, it will be admissible even if unsigned. In all departments including the Second Department, if a witness had the opportunity to review and sign his or her transcript, the transcript may be used in support of a motion or at trial even if it is unsigned. Deposition transcripts generally do not have to be signed if a party seeks to use it as an admission. An unsigned transcript is also more likely to be admitted if the motion sets forth sufficient details of the case and not merely conclusory statements. A failure to obtain the witness's signature is more likely to be excused if it is shown that an attempt to get the signature was made and reasons for the failure are provided. However, it is important to note that each department's treatment of unsigned deposition transcripts is nuanced. The Second Department is stricter and more likely to exclude an unsigned deposition transcript if it is not shown that the witness was afforded the chance to sign the transcript. Set forth below are the applicable CPLR provisions concerning the admissibility of unsigned deposition transcripts and their use in motions for summary judgment and an analysis of each department's treatment of such transcripts.

CPLR 3116. Signing deposition; physical preparation; copies

> **Signing**. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.
>
> **Certification and filing by officer.** The officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall list all appearances by the parties and attorneys. If the deposition was taken on written questions, he shall attach to it the copy of the notice and written questions received by him. He shall then securely seal the deposition in an envelope endorsed with the title of the action and the index number of the action, if one has been assigned, and marked "Deposition of (here insert name of witness)" and shall promptly file it with, or send it by registered or certified mail to, the clerk of the court where the case is to be tried. The deposition shall always be open to

the inspection of the parties, each of whom is entitled to make copies thereof. If a copy of the deposition is furnished to each party or if the parties stipulate to waive filing, the officer need not file the original but may deliver it to the party taking the deposition.

[…]

CPLR 3212. Motion for summary judgment.

[…]

Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

[…]

First Department

Generally, unsigned deposition transcripts are accepted by the First Department, especially if they are certified as accurate by the court reporter. *See Wilson v. Trolio*, 816 N.Y.S.2d 355 (1st Dep't 2006); *White Knight Ltd. v. Shea*, 782 N.Y.S.2d 76 (1st Dep't 2004); *Zabari v. City of New York*, 672 N.Y.S.2d 332 (1st Dep't 1998); *Eldon Group America v. Equiptex Industrial Products Corp.*, 654 N.Y.S.2d 23 (1st Dep't 1997). The First Department interprets CPLR 3116(a) as allowing "a deposition transcript to be admitted as though it were signed especially where[…] the transcript was certified as accurate." *Zabari*, 672 N.Y.S.2d at 333. Where a deposition transcript is being used as an admission and not as a deposition, it does not need to be signed. *See Morchik v. Trinity School*, 684 N.Y.S.2d 534 (1st Dep't 1999).

The New York County Supreme Court in *Palumbo v. Innovative Communications Concepts, Inc.*, 668 N.Y.S.2d 433 (1997) succinctly summarized the First Department's approach. A signed transcript may be used under all circumstances. If the witness is a party and the transcript was certified, then the transcript can be used as a party admission. But if the transcript is (1) unsigned, or (2) the witness is a nonparty, or (3) the witness is a party and the transcript is neither signed nor certified, then the party seeking to use the transcript bears the burden of showing that the transcript was sent to the witness and that the witness had the opportunity under CPLR 3116(a) to see if the transcript is correct. *Id*. at 433.

Any corrections should be made within the 60-day limit set by CPLR 3116(a) and courts should be circumspect about extending this limit, especially when corrections would change the substance of the testimony. *Zamir v. Hilton Hotels Corp.*, 758 N.Y.S.2d 645 (1st Dep't 2003). Corrections made beyond this 60-day limit must be accompanied by a "strong showing of justification." *Id*. at 647.

However, unsigned transcripts of non-deposition interviews are never admissible under CPLR 3212. *Reilly v. Newireen Associates*, 756 N.Y.S.2d 192 at 198 (1st Dep't 2003). If such transcripts are unsigned and no excuse is provided for the nonconformity with the proper form, they will not be considered by the court. *Id*.

Second Department

Generally, unsigned depositions submitted in support of a motion are not admissible if the submitting party fails to show that the transcripts were forwarded to the witnesses for their review pursuant to CPLR 3116(a). *See Martinez v. 123-16 Liberty Ave. Realty Corp.*, 850 N.Y.S.2d 201 (2d Dep't 2008); *McDonald v. Mauss*, 832 N.Y.S.2d 291 (2d Dep't 2007); *Pina v. Flik International Corp.*, 808 N.Y.S.2d 752 (2d Dep't 2006); *Santos v. Intown Associates*, 793 N.Y.S.2d 477 (2d Dep't 2005); *Scotto v. Marra*, 806 N.Y.S.2d 603 (2d Dep't 2005); *Lattimore v. Port Authority of New York and New Jersey*, 760 N.Y.S.2d 224 (2d Dep't 2003); *Miccoli v. Kotz*, 717 N.Y.S.2d 661 (2d Dep't 2000); *Lalli v. Abe*, 650 N.Y.S.2d 303 (2d Dep't 1996); *Lo Cicero v. Frisian*, 542 N.Y.S.2d 210 (2d Dep't 1989); *First National State Bank v. Schwartzman*, 400 N.Y.S.2d 359 (2d Dep't 1977); *Nicholas v. Island Industrial Park of Patchogue, Inc.*, 360 N.Y.S.2d 39 (2d Dep't 1974).

However, as long as witnesses are given an opportunity to review their transcripts, the witness's failure to sign will not impede the transcript's use in a pre-trial motion or during trial. In *Ashif v. Won Ok Lee*, 868 N.Y.S.2d 906 (2d Dep't 2008), it was held that the unsigned deposition transcript of a third-party defendant was admissible since it was submitted by the party deponent himself and therefore was adopted as accurate. Likewise, in *Thomas v. Hampton Express, Inc.*, 617 N.Y.S.2d 831 (2d Dep't 1994)

the court interpreted CPLR 3116(a) as saying "if either a party or a nonparty witness refuses or fails to sign a deposition transcript that has been properly prepared and submitted for signature, the unsigned deposition may be used at trial in any manner authorized." There, defendant Hampton Express, Inc. submitted an unexecuted transcript in support of its summary judgment motion. Plaintiff Thomas contended that the transcript was insufficient proof to establish defendant's entitlement to summary judgment but the court held that further discovery would not reveal any more essential facts. *Id*. The Second Department seems to place more importance on whether the witness was given an opportunity to review and sign his or her deposition transcript. As long as the witness had such an opportunity, an unsigned transcript can be used.

"Even if it is not your responsibility to exchange the transcript, do it anyway if you want the best opportunity to win that summary judgment motion."

Third Department

The Third Department is in accord with the First Department in its treatment of unsigned deposition transcripts. A party's refusal or delay in signing or returning a deposition transcript is not a disclosure violation and does not prejudice the adverse party because such a transcript can be used as if it were signed. *See Heilbrunn v. Town of Woodstock*, 857 N.Y.S.2d 279 (3d Dep't 2008); *Moak v. Raynor*, 814 N.Y.S.2d 289 (3d Dep't 2006). The Third Department reads CPLR 3116(a) as allowing an unsigned deposition transcript to be used as though signed if the witness fails to sign and return the deposition within 60 days. *See Chisholm v. Mahoney*, 756 N.Y.S.2d 314 (3d Dep't 2003); *Ireland v. GEICO Corp.*, 768 N.Y.S.2d 508 (3d Dep't 2003); *see also Urbank v. Big Scott Stores Corp.*, 460 N.Y.S.2d 154 (3d Dep't 1983) (an unsigned deposition transcript was considered by the court in reaching its decision that no cause of action existed).

Fourth Department

There is a dearth of case law in the Fourth Department on the treatment of unsigned deposition transcripts. *R.M. Newell Co., Inc. v. Rice*, 653 N.Y.S.2d 1004 (4th Dep't 1997) held that deposition transcripts certified as accurate by the court reporter and sent to the witness for his or her review and signature were usable as though signed, but even if it were not usable as a deposition under CPLR 3116(a), it could be used as an admission. The only other case on the issue held the trial court's receipt into evidence of a witness's unsigned deposition transcript as harmless error because of evidence independent of the witness's testimony. *Hahn v. City of Niagara Falls*, 533 N.Y.S.2d 37 (4th Dep't 1988).

The Safest Solutions

In all departments, a practitioner must forward a deposition transcript to the witness for the witness's review and signature. If a signature cannot be obtained within sixty days pursuant to CPLR 3116(a), a practitioner is well-advised to keep proof that the transcript was forwarded to the witness and to document reasons for the failure to obtain the witness's signature. Such proof can be as simple as a letter to the witness accompanying the transcript when it is forwarded to the witness.

If there are any corrections to be made to the transcript, they should be made within the 60-day limit prescribed by CPLR 3116(a), particularly if they would change the substance of the testimony. Changes made beyond the 60-day limit warrant a showing of strong justification. If there are no changes to the transcript and the transcript was forwarded to the witness with proof of the same, failure of the witness to execute the transcript will not render it inadmissible.

Though the First, Third, and Fourth Departments seem to be more lenient in their application of CPLR 3116(a), it is always good practice to keep proof that the transcript was forwarded to the witness and to document reasons for the failure to obtain the witness's signature within the sixty days prescribed by CPLR 3116(a). This is especially true for depositions of nonparty witnesses. However, if such transcripts were certified as accurate by the court reporter or the transcript is being used as a party admission, they are more likely to be accepted without a signature by courts in these departments. Unsigned transcripts of non-deposition interviews are not admissible under CPLR 3212 in a motion for summary judgment.

So, if you want to avoid a denial of your motion on a technical defect, then make sure all transcripts have been exchanged. Even if it is not your responsibility to exchange the transcript, do it anyway if you want the best opportunity to win that summary judgment motion.

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Everything I Need to Know About the Business Judgment Rule I (Re)Learned from *In re Bear Stearns*

By Anthony Michael Sabino

It is an old litigator's maxim that even in bad times, people sue. Well, the times are most certainly bad, and most assuredly people are suing. Exacerbating matters is the fact that much of our current economic woes can be directly attributed to various missteps by corporate managers. Their misjudgments have earned the ire of many, but, in particular, the unremitting enmity of the one constituency they are directly accountable to: the stockholders who put them in power in the first place. So, as times go from bad to worse, aggrieved shareholders are initiating suit with a fury never before seen.

Of course, suing is one thing; prevailing is another. And the primary bulwark against shareholder litigation is the business judgment rule. Axiomatic from the earliest days of corporate law, in sum it provides that a corporation's directors and officers will not be second-guessed by courts of law for incorrect business decisions, provided said decisions were made in an atmosphere of loyalty, due care, and good faith toward stockholders. That protection can be undone if the angered shareowners can demonstrate the board and/or officers acted recklessly, in bad faith or otherwise with a selfishness geared toward serving only their individual wants.

Admittedly, the crucible for the purest promulgations of the business judgment rule emanate from the state courts of Delaware, the nation's bastion of the law of corporate formation, operation, and dissolution. But that sister forum's law has been ably interpreted and applied by our own New York courts (both state and federal), as is fitting; after all, and notwithstanding recent woes, New York remains the epicenter of American business, if not the worldwide economy itself.

We are reminded of this by the most recent and cogent exemplification of the business judgment rule in the case of *In re Bear Stearns Litigation*.[1] There, Justice Herman Cahn took on a most difficult and notorious case, and in workmanlike fashion, cut to the quick of its essential legal principles and proclaimed the latest iteration of this all-important corporate law maxim. Certainly, while relying heavily upon borrowed Delaware law and precedents, this New York jurist also well served the local interests of the forum state, by espousing a view of the rule that solidly lands on all fours with New York's own take on the business judgment rule.

Before turning specifically to *Bear Stearns*, let us examine that last statement, to wit, that New York and Delaware corporate law are more or less in synch on the matter of the contours of the business judgment rule. Over the years, the courts of New York have been rather clear-cut in explaining the workings of the business judgment rule.

> *"[A]s times go from bad to worse, aggrieved shareholders are initiating suit with a fury never before seen."*

In *Norlin Corp. v. Rooney, Pace Inc.*,[2] the Second Circuit recited that the fiduciary duties ordinarily owed by directors to the shareholders who elected them include, first and foremost, the duty of due care and the duty of loyalty.[3] The former refers to the responsibility of directors to exercise, in the performance of their governance tasks, the care that a reasonably prudent person would use under similar circumstances. The latter implicates a duty of loyalty to the shareholders who elected the board (simple enough), but conjoined to that is a prohibition against self-dealing or similarly selfish behavior.[4] Directors have the benefit of the business judgment rule's presumption that they acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the corporation and its owners.[5] As former Chief Judge of the Southern District Michael Mukasey noted in *Official Committee of Subordinated Bondholders v. Integrated Resources, Inc.* (*In re Integrated Resources*),[6] the business judgment rule shields corporate directors and officers from judicial second-guessing.[7] These pillars of the business judgment rule have remained unchanged in New York law since the turn of the last century.[8] Having attended to the synchronicity between the New York and Delaware courts on the issue before us, we are now are free to turn to the details of the most recent holding that adds yet another level of solid brick to the legal infrastructure.

We can safely assume that the readers of this august journal were not marooned on that lonely Pacific island made famous in *Lost*, so familiarity with the sudden and epic demise of the once great investment bank known as Bear Stearns will be assumed. Rather, we will strictly limit ourselves to those details that became pivotal in Justice Cahn's reasoning.

First, we note the procedural posture of the litigation was as follows: Justice Cahn was presiding over various consolidated class actions, brought by aggrieved shareholders against Bear Stearns' board of directors and principal officers. The consolidated actions included litigation transferred from the Delaware chancery court, where they had been initiated because that is where the corporation

was officially domiciled. The defendants had moved for summary judgment, after a period of extensive discovery, via document production, party depositions, and expert testimony.[9]

Deciding the summary judgment motions before him, the veteran justice left no one in suspense. From nearly the introduction, he declared that he was dismissing *in toto* the actions wherein the shareholders sought damages from the defendant directors and officers for alleged violations of fiduciary duty in connection with the JPMorgan Chase rescue-cum-merger.[10]

The court declared that the decisions made by the board and the officers were fully protected by the business judgment rule, and furthermore shielded by the exculpatory provisions of the corporation's certificate of incorporation. The steps taken by the directors to preserve some sort of shareholder value, and avoid the uncertainty of a bankruptcy filing—"an event with potentially cataclysmic consequences for the broader economy as well as for the shareholders," opined Justice Cahn—would pass muster even if scrutinized under some enhanced standard of review under applicable Delaware law.[11] That direction given, the detailed reasoning quickly followed.

As aforesaid, the events surrounding the near collapse and subsequent federally assisted takeover of Bear Stearns by JPMorgan Chase are well documented in the public record, so we need not regurgitate them here. Pertinent to a deeper appreciation of the court's concerns motivating the eventual decision, we note these particularly revealing details. The renowned investment house of Lazard Freres, Bear's financial advisors, made inquiry with over a dozen potential merger partners in less than a week on Bear's behalf; only JPMorgan and the private equity firm of J.C. Flowers "had expressed meaningful interest." The Flowers proposal, such as it was, was severely uncut by its inability to fund its proposition.[12]

In truth, with no other game in town and Bear in such extremis that it would almost certainly file for bankruptcy immediately (and thereby leave shareholders with absolutely nothing), the board signed off on an "Initial Merger Agreement" with JPMorgan, called for a $2 per share purchase of the target's common stock, and the option for the companion purchase of the wounded Bear's Madison Avenue headquarters building for $1.1 billion. This preliminary deal also featured a "no solicitation" clause that prohibited Bear from actively seeking competitive bids, but did permit its board to participate in discussions with a bona fide alternative, if such an interested third party came along, and (upon appropriate legal advice) consideration of such a counteroffer would be necessary in order for the board to fulfill its fiduciary obligations to the Bear stockholders.[13]

The shifting sands of Bear's liquidity and other factors caused the principals to renegotiate and amend the initial deal, and Justice Cahn is careful to point out that the Bear directors were ably assisted in that regard, not only by Lazard, but by no less than four of the most eminent corporate law firms in the United States.[14] Key to the renegotiated terms—JP was to be permitted to purchase 95 million Bear shares for $ 10 per, effectively "locking up" 39.5 % of its target's shares in the bank's hands. As is now well known, and as a direct result of this revisitation, JPMorgan eventually bought out the rest of Bear's common stock for the same $10 per share price.[15] The rest, as they say, is history.

Then, the inevitable litigation followed. As already posited, Justice Cahn had before him the defendants' motions for summary judgment seeking dismissal of the shareholders' complaints, which alleged, in the main, breach of fiduciary duty by the directors and officers in relation to the JPMorgan takeover. As proper, the court turned to the crux of this entire controversy: the proper application of the vaunted business judgment rule. Likewise as proper, the court would be guided by the principles espoused by the Delaware state courts, as both Bear and JPMorgan were incorporated in that jurisdiction.[16]

Bear Stearns first notes the fundamentals of the business judgment rule. "The core duties are those of loyalty and care." It is presumed that directors making a business decision are informed, act in good faith, and in an honest belief that they are doing what is best for the shareholders. The business judgment rule operates to preclude a court from unreasonably imposing itself upon the business affairs of a corporate citizen. Accordingly, a board's decisions will be left undisturbed as long as they can be attributed to any rational business purpose.[17]

Now addressing other linchpins of the business judgment rule, *Bear Stearns* continues to state that the axiom is both a substantive rule and a procedural guide. At the outset, the burden is on the complaining shareholders to rebut the rule's presumptions favoring the directors. This can be achieved by demonstrating the board's lack of due care, lack of independence or even gross negligence in the discharge of its obligations. Bad faith, for instance, can be demonstrated via a showing of conscious wrongdoing and intentional actions to advance an agenda other than the best interests of the corporation itself.[18] Yet in fairness to the ostensible defendants, the directors can overcome the rebuttal of the business judgment rule by demonstrating that the questioned action was indeed entirely fair to the corporation and its shareholders.[19]

These were the basic tenets of the business judgment rule, as postulated by the *Bear Stearns* court. But there were additional permutations, which Justice Cahn found crucial to making his ultimate decision. These further elaborations range beyond the generalities of the business judgment rule, and impose heightened standards of review for business decisions under certain conditions. As carefully reasoned through by this New York court, these

additional tests eventually came together to form the triad of the final decision.

The first leg of the corporate triad was the landmark *Unocal*[20] test, whereunder there is an enhanced level of judicial scrutiny when the directors take defensive measures in response to a perceived threat to corporate policy and effectiveness.[21] *Unocal* imposes a higher standard, noted Justice Cahn, because of the threat that a besieged board of directors may take steps to protect its own power and position, actions that might diverge from the overall well-being of the shareholders.

Although conceived in the swashbuckling hostile takeovers days of the 1980s, the *Unocal* standard has evolved to include within its ambit increased scrutiny for so-called "deal protection devices" that shield a favored merger deal from unwanted competing bids.[22] Parenthetically, the *Bear Stearns* court added that the board can successfully justify its actions by demonstrating it had reasonable grounds to defend the corporation from intruders, and the defensive measures taken were reasonable in proportion to the threat posed by the unsolicited bids. In that regard, the inclusion of a majority of independent, outside directors in the defensive strategy decisions materially enhances the veracity of the board's actions.[23]

Leg two of the triad is the *Blasius* test, so named for *Blasius Industries, Inc. v. Atlas Corp.*,[24] which espouses an even stricter benchmark of a "compelling justification" standard when incumbent directors prevent or impede an independent majority of shareholders from expanding or replacing the existing board. The *Bear Stearns* court agreed that this test is particularly onerous, rarely applied, and normally reserved for contested board elections.[25]

The third and final leg of the triad of enhanced scrutiny beyond the nominal business judgment rule was espoused in the seminal *Revlon*[26] case. Pursuant to this landmark, a board's conduct is subject to enhanced review when the transaction at issue involves a sale or change in the control of the corporation. It is triggered by mergers done for cash or in stock-for-stock swaps, where the target is swallowed by an acquirer that, in turn, is dominated by a small control group.[27] As Justice Cahn characterized it in *Bear Stearns*, there is "no tomorrow" for existing shareholders of the target in such cases, as they will be subjugated to the new masters of the surviving corporation. To be sure, the *Revlon* test, like its companion *Blasius*, is not normally implicated in the case of a stock-for-stock merger of widely held public companies, because the shareholdings are diffused over a large and fluid market.[28]

Now turning to apply all the foregoing to the matter at hand, Justice Cahn first noted that the aggrieved Bear shareholders plainly sought to bypass the normal strictures of the business judgment rule, and persuade this court to apply one of the more involved tests as above noted. Specifically, the shareholders complained of three principal facets of the deal struck with JPMorgan: (a) the "lock up" of Bear stock by issuing approximately 39.5% of Bear common shares to JP as part of the deal; (b) the "no solicitation" clause restricting the Bear directors from shopping around the firm; and (c) the option for JP to buy the Madison Avenue headquarters building for $1.1 billion. The Bear shareholders conceded that such deal-protection mechanisms normally pass muster under Delaware law; but here, combined in this fashion, they claimed that this unholy triumvirate "disenfranchised the [Bear] shareholders and depressed the ultimate purchase price."[29]

Once more, Justice Cahn did not mince words; "[p]laintiffs have failed to establish that a heightened standard of review should be applied, and, accordingly, the business judgment rule is controlling." And as was obvious from earlier in the opinion (and the instant analysis), the Bear shareholders could not rebut the general presumptions of the business judgment rule.[30]

The *Bear Stearns* court was clear as crystal in its findings. "There is no evidence that the board," comprised of a majority of independent directors, and, significantly, "assisted by teams of financial and legal advisers," acted out of self-interest or in bad faith. The interests of the directors were without a doubt aligned with the interests of the shareholders who elected them. No one had an affinity with the aquirer, JPMorgan. The Bear Stearns board was not seeking to entrench itself and maintain its individual power in light of a hostile takeover bid. Indeed, as to the last, Justice Cahn was deliberate in pointing out that the merger required the entirety of the Bear board to resign, thus eliminating entrenchment as a possible motive for any misguided actions.[31]

As to the allegations made by the complaining shareholders, as largely dependent in this summary context on the testimonials of their expert witnesses, the court was unmoved by what is plainly categorized as "speculati[on] about Bear Stearn's alleged true value and the claimed superiority of various bankruptcy options. These opinions, however, do not take into sufficient consideration the very real emergency which the company faced, and the real time pressure under which the Bear Stearns' officers and directors were operating."[32] Justice Cahn was the consummate realist in this regard, bluntly stating the company could not have stayed open for business had it not agreed to the deal proffered by JPMorgan and facilitated by the federal government. Implicitly, the court found implausible the notions held by the shareholders' experts that there were other, viable options that the board could have pursued or at least considered in those dark, few days.[33]

Almost in a nod to the director defendants, the *Bear Stearns* opinion commended the expeditious manner in which the board acted on limited options, attempted to salvage some $1.5 billion in shareholder value, and avoid a calamitous bankruptcy that might have wiped out all the shareholders' equity "while wreaking havoc on the financial markets." Justice Cahn's ultimate conclusion at this juncture: "The Court should not, and will not, second guess their decision."[34]

But Justice Cahn was nothing if not circumspect, for he was not done. Now the court turned to state that, even if it heeded the shareholders' cry for enhanced scrutiny, the plaintiffs' claims would still fall short. First, if one were to view the board's actions as defensive under the *Unocal* standard, the shareholders had still failed to demonstrate that the directors were wrong in perceiving a bona fide threat to the corporation. "The liquidity crisis genuinely threatened Bear Stearns with extinction," the corporation was "on the verge of filing for bankruptcy," and the threat so severe that the federal government had intervened to "avoid a broader destabilization of the markets."[35]

Again, the *Bear Stearns* court emphasized the board's reliance upon top-notch help from the outside. The directors had "promptly retained competent, independent financial and legal advisers to explore its options." The board's response was proportionate to the threat. The merger terms agreed to were essential to keep JPMorgan at the table, given that "over a dozen other potential corporate parties" had rejected Bear's overtures. In sum, the directors acted reasonably to a very real threat of corporate Armageddon, and thus the enhanced scrutiny per *Unocal* would be misplaced.[36]

All the foregoing likewise negated any need for enhanced scrutiny pursuant to *Blasius*. Justice Cahn found the directors' actions were compelled by the desire to retain the sole offer of value. "Despite the exigent circumstances," the Bear Stearns board was still able to negotiate down some of the bank's initial demands, for instance, knocking down the percentage of stock to be issued to JP from 60 % to the final 39.5 % figure, and, of great importance, forcing the acquirer to raise the payout from $ 2 to $ 10 a share, a fivefold increase. Finally, not only where both the *Unocal* and *Blasius* standards met, for reason that the target board was composed of a majority of independent directors, "the record of the diligence of Bear Stearns' board in confronting and resolving the crisis leaves little room for judicial review of its conduct."[37]

As an additional matter, the *Bear Stearns* court found the *Revlon* obligation to maximize shareholder value well met. Simultaneously cataloging both what the law requires of corporate directors and what the Bear board actually did here, Justice Cahn recited the following: the directors were sophisticated and well informed of their options; were fully engaged in negotiations and drove as hard a bargain as the stressful climate would allow; and had available, and in fact, relied upon the advice of undisputed legal and financial experts.[38]

Lastly, the *Revlon* standard was satisfied because the board, acting in an extremely truncated time frame, found only one real offer, notwithstanding its best efforts to engage multiple bidders. And with that one offer and essentially zero leverage to improve it, the directors did the best they could to not let it get away (and actually succeeded in obtaining a much better price). In simple words, opined Justice Cahn, the business judgment rule protects directors that make reasonable decisions at the time, not perfect ones nor ones immune from second-guessing.[39]

Bear Stearns now turned to additional grounds as to why the inclusion of the already discussed deal protection devices did not mandate enhanced scrutiny under the circumstances of the instant case. To be sure, opined the court, heightened judicial inquiry is mandated when it appears the board employed such mechanisms to entrench its position at the expense of shareholders, particularly in a hostile takeover context or a struggle for board control. But "[d]eal protection provisions are not reviewed in a vacuum." In formulating this merger, the Bear board acted in response to a very real outside threat to the corporation's very existence, as distinguished from a selfish desire to maintain its own continuity in light of a hostile takeover bid. Thus, the *Unocal* objective of thwarting deal provisions intended to act defensively and entrench incumbent management was not at issue.[40] Similarly, *Revlon* did not support the allegations of the Bear shareholders because, notwithstanding the proviso for the distribution of over a third of Bear's stock to JP to "lock up" the deal, the diffused and public nature of the shareholder base assured that the unaffiliated shareholders were not ousted from control.[41]

Considering all this, Justice Cahn held that the deal protection provisions were reviewable only under the rubric of the general business judgment rule. And since the complaining shareholders failed to show any indicia of self-dealing, disloyalty or deception by the board, the *Bear Stearns* court was well satisfied that their allegations had to be dismissed.[42] Yet the court's final words on this issue might have been the most dramatic and conclusive: "The financial catastrophe confronting Bear Stearns, and the economy generally, justified the inclusion of the various merger protection provisions intended to increase the certainty of the consummation of the transaction."[43]

A frank appraisal of *Bear Stearns* reveals that not only is this opinion a worthy landmark of New York jurisprudence, its timeliness in the current economic climate cannot be exaggerated. Subsequent to the events that gave rise to this controversy, we were staggered with

the demise of many of Bear Stearns' brethren, including the calamitous bankruptcy of Lehman Brothers and the expedited sale of Merrill Lynch to Bank of America. At the time of this writing, we await, among others, the outcome of the pending restructuring of Citigroup, and the absorption of Wachovia by Wells Fargo.[44] Of far greater concern, one cannot possibly forecast what lies ahead for other troubled industries, the automakers being paramount among them, as American businesses try to ride out this relentless storm.

In these dark times, directors and officers are compelled to make tough choices—to merge, to restructure, to sell off assets, even to file for bankruptcy. Any of these strategies is certain to anger at least some of the stockholders whom the board serves. Anger leads to litigation, and litigation leads to judicial inquiry. To date, the exercise of judicial oversight in a place and time far removed from the crisis is properly tempered by the prudent exercise of the business judgment rule.

We first note that much assurance can be taken from the court's great emphasis that the Bear directors surrounded themselves with professionals of impeccable credentials, who no doubt provided tremendous expertise, and in a pressure cooker environment. In this regard, the lesson that has been reinforced is that a board making serious (not to mention "life or death") decisions must surround itself with the best advisers possible (and assumedly take heed of them). No amount of legal or financial advice renders a board bulletproof, but *Bear Stearns* amply demonstrates that a board gives itself durable insulation when it does not skimp on competent advice.

In its second aspect, *Bear Stearns* tells us that the established maxims of the business judgment rule live on. Specifically, the maxim does not give license to a court to liberally second guess business decisions and view board action through the comfortable prism of hindsight. Directors will continue to be judged as they have always been, under the rigorous but still reasonable demands that they acted with loyalty, due care, and made informed decisions with the benefit of the advice of competent experts.

While the presumptions of the business judgment rule shall first inure to the benefit of directors and officers, that body will still be kept on the straight and narrow path by the right of complaining shareholders to rebut such favorable assumptions by demonstrating bad faith or self-dealing by miscreant boards. In sum, the time-tested axioms of the business judgment rule remain unchanged, even in these difficult times.

Yet *Bear Stearns* serves a higher purpose. It does indeed recognize that so-called enhanced review of board decisions is appropriate and desirable, in the right circumstances. It follows accepted norms by delimiting those conditions to the proven scenarios where the board enacts defensive measures solely to entrench itself, to fend off challenges to its elected status, and where a change of control will oust the present directors from their lofty position. *Bear Stearns* did not arbitrarily declare that enhanced review should now be expanded to crisis situations such as this board found itself facing.

"At the end of the day, we are reminded of what well might prove to be the credo of the Bear Stearns *case: Directors are required to make the best decision, not a perfect one."*

That is where *Bear Stearns* demonstrates its greatest value. It has been generations since this nation has faced an economic crisis of these epic proportions. It would have been easy for this court to be overzealous in its review of what the Bear directors did, and either impose the existing enhanced review standards as the shareholders asked it to, or even promulgate some new variation for when more intensive scrutiny is required.

Justice Cahn resisted that temptation. He kept a cool head, and recognized that the directors in question had done the same, assembling a powerful cadre of legal and financial advisers, carefully contemplating what options they actually had in the limited time they were allowed, and then doing what they could to save something of worth for the beleaguered shareholders.

At the end of the day, we are reminded of what well might prove to be the credo of the *Bear Stearns* case: Directors are required to make the best decision, not a perfect one. This is the cornerstone of the business judgment rule, and we can be assured of its solidity for this financial crisis and those yet to come.

Endnotes

1. __ Misc.2d __, 2008 N.Y. Slip Op. 28500, 2008 N.Y. Misc. LEXIS 7075 (N.Y. Sup. Dec. 4, 2008).
2. 744 F.2d 255 (2d Cir. 1984) (Kaufman, J.).
3. *Id.* at 264.
4. *Id. See also Pepper v. Litton*, 308 U.S. 295, 306–07 (1939).
5. *Id. See also Tese-Milner v. TPAC, LLC* (*In re Ticketplanet.com*), 313 B.R. 46, 62-63 (Bankr. S.D.N.Y. 2004).
6. 147 B.R. 650, 656 (S.D.N.Y. 1992).
7. *See also CRTF Corp. v. Federated Dep't Stores, Inc.*, 683 F. Supp. 422, 440–42 (S.D.N.Y. 1988) (courts will uphold a board's decision as long as it can be attributed to any rational business purpose).
8. *Jacobson v. Brooklyn Lumber Co.*, 184 N.Y. 152, 162 (1906). *See also Barr v. Wackman*, 36 N.Y.2d 371, 380 (1975); *Giblin v. Murphy*, 97 A.D.2d 668, 670 (3d Dep't 1983); *Kimeldorf v. First Union Real Estate Equity and Mortgage Investments*, 309 A.D.2d 151, 157–58 (1st Dep't 2003).

9. While a state matter, the case had been assigned to the County of New York's Commercial Division, a forum specifically designed to partition off solely business litigation from more general controversies, and then efficaciously adjudicate the former. The Commercial Division's individual rules are more reflective of the streamlined Federal Rules of Civil Procedure than New York's own CPLR, and that contributed to the matter being heard akin to a "fast track" matter.
10. The shareholders had also sued JPMorgan Chase, the eventual rescuer of Bear Stearns, for allegedly tortuious conduct in effecting its government-sanctioned merger with the beleaguered investment house, and the entirety of those companion claims were dismissed as well.
11. *Id.* at 5.
12. *Id.* at 9-11.
13. *Id.* at 14-15.
14. Although they have no need of additional publicity from this humble writer, the firms were Skadden, Arps; Sullivan & Cromwell, and Cadwalader, Wickersham & Taft, all of New York, and Richards, Layton & Finger of Delaware. *Id.* at 16-17.
15. *Id.* at 18.
16. *Id.* at 30.
17. *Id.* at 31 (citations omitted).
18. *Id.* at 31-32 (citations omitted). *See also In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 52, 67 (Del. 2006).
19. In a point crucial to the instant case, director liability may be further proscribed by an exculpatory provision in the certificate of incorporation (which the Delaware Code does allow). *Id.* at 33. Bear's incorporation documents did in fact contain such an exculpatory clause, thereby making the shareholders' position herein even more problematic. *Id.* at 33-34.
20. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).
21. *Bear Stearns*, *supra*, __ Misc. 2d. at __, LEXIS at 34 (citations omitted).
22. *Id.* at 34-35.
23. *Id.* at 34 n.7. *See also Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989).
24. 564 A.2d 651, 659-60 (Del. Ch. Ct. 1988).
25. *Id.* at 35-36.
26. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). *See also Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994).
27. *Id.* at 34-35. *Compare Revlon*, *supra*, 506 A.2d at 179-80.
28. *Id.* at 35.
29. *Id.* at 37.
30. *Id.* at 37-38.
31. *Id.* at 38-39.
32. *Id.* at 38-39.
33. *Id.* at 38-39.
34. *Id.* at 39-40.
35. *Id.* at 40-41.
36. *Id.* at 41-42.
37. *Id.* at 42-43.
38. *Id.* at 42-43.
39. *Id.* at 43-44 (citations omitted).
40. *Id.* at 45-46.
41. *Id.* at 46-47.
42. *Id.* at 49-50.
43. *Id.* at 52. Parenthetically, we note that the opinion thoughtfully disposes of certain additional issues. Justice Cahn candidly called "irrelevant" the contentions of the shareholders' experts that the board should have considered more fully the options of bankruptcy, a spin-off or asset sales. The court disregarded such notions as "hindsight evidence." *Id.* at 52-53. Similarly, the court ousted the shareholders' assertion that the board breached its fiduciary duty for allegedly failing to disclose numerous material facts in soliciting shareholder approval for the JPMorgan deal. Justice Cahn held that the aggrieved shareholders failed to demonstrate that the board omitted material facts from its disclosures. Quite to the contrary, the court found the board provided a great deal of detailed information to the shareholders about the evolution of the merger process, and thereafter rationally drew the line where additional disclosure would be superfluous. *Id.* at 61-64.
44. For a pithy analysis of key shareholder litigation arising from some of these distressed situations, as well as the instant case, *see* Tariq Mundiya, *Directors' Fiduciary Duty During the Credit Crunch*, 241 N.Y.L.J., p. 4, cl. 4 (Jan. 6, 2009).

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This article is, as always, dedicated to the memory of Mary Jane C. Sabino, attorney, professor of law, beloved spouse, and beloved mother of Michael and James.

The Graves Amendment: Changing the Landscape of Automotive Vicarious Liability

By Jeremy Cantor

Aug. 10, 2005 will likely be known as one of the most important dates in the history of the vehicle rental and leasing industry. Automotive vicarious liability for rental and leasing companies was essentially eliminated on that date, when the enactment of the controversial Graves Amendment preempted New York Vehicle and Traffic Law § 388. New York Vehicle and Traffic Law Section 388 states, in relevant part, as follows:

> **§ 388. Negligence in use or operation of vehicle attributable to owner.**
>
> 1. Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by a person using or operating the same with the permission, express or implied, of such owner….

As a result, the effect of NYVTL § 388 was to impose vicarious liability upon an entity such as a leasing company, which retains title ownership of a leased vehicle, for the negligent acts of the permissive user of that vehicle.

On August 10, 2005, the Transportation Equity Act was signed into law by President George W. Bush. As part of the Transportation Equity Act, subchapter 301 of title 49 of the United States Code was amended by adding at the end thereof, in relevant part, the following statute which has come to be known as the Graves Amendment:

> **§ 30106. Rented or leased motor vehicle safety and responsibility.**
>
> (a) In general.—An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—
>
> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).
>
> ….
>
> (b) Applicability and effective date. Notwithstanding any other provision of law, this section shall apply with respect to any action commenced on or after the date of enactment of this section without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment.[1]

The Graves Amendment was therefore clearly intended to preempt NYVTL § 388 as a matter of federal law and bar recovery against motor vehicle rental and leasing companies based on vicarious liability.[2] The Graves Amendment further applies to all actions commenced on or after August 10, 2005, even if the conduct or harm occurred before its enactment date.[3] Therefore, even if a motor vehicle accident occurred prior to August 10, 2005, if the complaint was filed after August 10, 2005, the case falls within the protections of the Graves Amendment.[4]

Several challenges have been made to the Graves Amendment since its enactment, as a series of cases focuses on the potential unconstitutionality of the Graves Amendment itself. Specifically, attorneys have argued (ultimately unsuccessfully) that the Graves Amendment exceeds Congress' authority under Article 1, Section 8 of the United States Constitution's Commerce Clause, which is the source of Congressional power to regulate commerce among the states. Beginning in 2006, many attorneys relied on the New York Supreme Court, Queens County decision of *Graham v. Dunkley & NILT, Inc.*[5] to demonstrate the potential unconstitutionality of the Graves Amendment. In *Graham*, a plaintiff allegedly was injured in a car accident involving a leased vehicle from County Line Buick Nissan, Inc.[6] The lease was subsequently assigned to the defendant NILT, Inc. ("NILT").[7] On or about March 8, 2006, plaintiff commenced an action against the driver defendant Rayon S. Dunkley and NILT.[8] The complaint did not allege any affirmative negligence on the part of NILT, but sought damages from NILT based on vicarious liability only.[9] NILT moved to dismiss the complaint for failure to state a cause of action based on the Graves Amendment.[10] In determining that the Graves Amendment was unconstitutional, the Supreme Court, Queens County Decision stated in relevant part:

> The issue of supremacy of congressional legislation over New York State law is not one to be simply assumed, for Congress has only those powers to legislate that are conferred on it by the United States Constitution. The substantive law of torts is not to be faintly acquiesced to legislation by Congress, particularly when there is no preponderance of constitutional authority to support such a conclusion.[11]

The Supreme Court, Queens County, decision in *Graham* went on to hold that the Graves Amendment was an unconstitutional enactment in excess of Congressional power pursuant to the Commerce Clause of the U.S Constitution and therefore denied that branch of NILT's motion.[12]

It was, however, a decision that has been subsequently reversed by the Appellate Division, Second Department.[13] The Second Department determined that the Graves Amendment does in fact fall within the second and third categories of Congress' Commerce power, because it "regulates both instrumentalities, of, and things in, interstate commerce" and that there was a rational basis to conclude that the renting and leasing of vehicles have a "substantial effect on interstate commerce."[14] Thus, since the *Graham* decision, New York courts have consistently held that the Graves Amendment represents a proper exercise of Congressional authority under the Commerce Clause.[15]

An interesting application of the Graves Amendment has involved its interplay with the "relation back doctrine" and potentially the statute of limitations. The relation back doctrine could be relevant when a plaintiff attempts to add an owner/lessor as a party defendant to a previously commenced lawsuit, after the effective date of Graves Amendment. Under New York law, a plaintiff may add a party to a lawsuit after the expiration of the statute of limitations if the original action was properly commenced within the limitations period. However, the plaintiff must satisfy three conditions in order for claims against one defendant to relate back to claims asserted against another.[16] Where one of these three conditions is not satisfied, the relation back doctrine will not apply.[17] First, both claims must stem from the same conduct, transaction, or occurrence.[18] Second, the new party must be "united in interest" with the original defendant.[19] Unity of interest will be found where there is a relationship between the parties giving rise to the vicarious liability of one for the conduct of the other.[20] Third, the new party must have known, or should have known, that but for mistake by the plaintiff as to the proper parties to the action, the action would have been timely brought against the new party.[21] In *Buran v. Coupal*, for example, the plaintiff was permitted to change corporate names in the pleadings because the newly added corporation at all times knew of the plaintiff's injury and the plaintiff's misapprehension regarding the corporation's name change, and except for the expiration of the statute of limitations, otherwise failed to show how the newly added corporate defendant would be prejudiced by amendment.[22]

In *Flederbach v. Fayman*, plaintiff commenced a lawsuit against the defendant driver of the offending vehicle before the enactment of the Graves Amendment.[23] More than three years after the accident and after the enactment of the Graves Amendment, plaintiff learned that defendant's vehicle was leased and moved for leave to add the leasing company as defendant to the action.[24] The trial court denied the motion based on the fact that Graves Amendment barred vicarious liability actions against leasing companies, and the plaintiff appealed the trial court's decision to the Appellate Division, Second Department, arguing that the claim against the leasing company "related back" to the action commenced against the lessee before the enactment of the Graves Amendment.[25] The appellant largely relied on the Court of Appeals' decision in *Jones v. Bill*, which reversed a lower court's decision and held that the plaintiff could add leasing and rental companies as additional defendants after the enactment of the Graves Amendment if the claim related back to the claims against the lessee brought before the Graves Amendment was in effect.[26] However, the Court of Appeals in *Jones* did not address the issue of whether a plaintiff could apply the relation-back doctrine to save cases commenced against leasing and rental companies after the enactment of the Graves Amendment *and* after the expiration of the statute of limitations, as the Court specifically stated that the context of a computation regarding the statute of limitations was not relevant for the purposes of that case.[27]

Consistent with *Jones*, the Appellate Division in *Flederbach* held that the plaintiff's motion was not barred by the Graves Amendment, since the original action was commenced prior to the effective date of that statute.[28] However, the appellate court still affirmed the order denying plaintiff's motion to add the leasing company as a defendant, on the ground that the claim against the leasing company was barred by the statute of limitations. The Court stated:

> The plaintiffs argue that the claim against Chase [the leasing company] relates back to the timely-commenced action against the operator of the offending vehicle. However, the plaintiffs failed to meet their burden of proving that the relation-back doctrine is applicable, since there is no evidence that Chase knew or should have known that, but for a mistake on the part of the plaintiff, it would have been

named in the action as well (*see Buran v. Coupal*, 87 N.Y.2d 173, 638 N.Y.S.2d 405, 661 N.E.2d 978). Indeed, there is no evidence that Chase was aware of the accident, much less the lawsuit, within the limitations period (*see Williams v. Majewski*, 291 A.D.2d 816, 737 N.Y.S.2d 463; *compare Porter v. Annabi*, 38 A.D.3d 869, 833 N.Y.S.2d 555). Since notice within the limitations period is "the 'linchpin' of the relation back doctrine" (*Buran v. Coupal*, 87 N.Y.2d 173, 180, 638 N.Y.S.2d 405, 661 N.E.2d 978), the denial of the plaintiffs' motion for leave to serve a supplemental summons and amended complaint adding Chase as a defendant to the action was correct.[29]

"To date, plaintiffs' attempts to circumvent the strict protections of the Graves Amendment have been largely unsuccessful."

Given that the Second Department is the only appellate court to reach this issue, it appears that a plaintiff cannot maintain an action against a leasing company brought subsequent to the enactment of the Graves Amendment, where the statute of limitations has expired, absent awareness of the accident or lawsuit within the limitations period. While there will likely be further complications regarding the Graves Amendment and its application to certain time provisions, one thing is clear: Barring any allegations of negligence, product liability or criminal wrongdoing on the part of leasing or rental companies, the obvious impact of the Graves Amendment is to preempt vicarious liability under Vehicle and Traffic Law 388 for actions commenced after August 10, 2005. As a result, if plaintiff's claims are based on mere ownership of the leased or rental vehicle, the Graves Amendment is applicable and strictly bars such an action as to the corporate defendant. To date, plaintiffs' attempts to circumvent the strict protections of the Graves Amendment have been largely unsuccessful. More appeals and pressure on Congress may follow, but as it stands, the Graves Amendment is for real, leaving leasing and rental companies immune from any vicarious liability for their drivers.

Endnotes

1. 49 U.S.C. § 30106.
2. *See Flagler v. Budget Rent a Car System, Inc.*, 538 F. Supp. 2d 557, 558 (E.D.N.Y. 2008).
3. 49 U.S.C. § 30106.
4. *See, e.g., Green v. Toyota Motor Credit Corp.*, 2009 U.S. Dist. Lexis 26278 (E.D.N.Y. March 25, 2009).
5. 13 Misc. 3d 790, 827 N.Y.S.2d 513 (N.Y. Sup. Ct., Queens Co. 2006).
6. *See Graham*, 50 A.D.3d 55, 56, 852 N.Y.S.2d 169 (2d Dep't 2008).
7. *Id.*
8. *Id.* at 172.
9. *Id.*
10. *Id.*
11. *See Graham v. Dunkley*, 13 Misc.3d 790, 806 827 N.Y.S.2d 513, 525 (N.Y. Sup. 2006).
12. *Id.*
13. *Graham v. Dunkley*, 50 A.D.3d 55, 852 N.Y.S.2d 169 (2d Dep't 2008), *appeal dismissed*, 10 N.Y.3d 835, 859 N.Y.S.2d 607, 889 N.E.2d 484 (2008).
14. *See Green v. Toyota Motor Credit Corp.*, 2009 U.S. Dist. Lexis 26278 at *4 (E.D.N.Y. March 25, 2009) (quoting *Graham v. Dunkley*, 50 A.D.3d 55, 61).
15. *See, e.g., Green v. Toyota Motor Credit Corp.*, 2009 U.S. Dist. Lexis 26278 (E.D.N.Y. March 25, 2009); *Stampolis v. Provident Auto Leasing Co.*, 586 F. Supp. 2d 88, 94 (E.D.N.Y.2008); *Berkan v. Penske Truck Leasing Canada, Inc.*, 535 F. Supp. 2d 341, 345 (W.D.N.Y. 2008).
16. *See Buran v. Coupal*, 87 N.Y.2d 173, 638 N.Y.S.2d 405, 661 N.E.2d 978 (1995).
17. *See Civil Services Employees Ass'n, Inc., et al. v. Pataki*, 259 A.D.2d 826, 687 N.Y.S.2d 740 (3d Dep't 1999); *Ramsaywack v. Louis Allis Corp., Inc.*, 259 A.D.2d 533, 686 N.Y.S.2d 464 (2d Dep't 1999).
18. *Buran* at 178.
19. *Id.*
20. *Raschel v. Rish*, 69 N.Y.2d 694, 512 N.Y.S.2d 2, 504 N.E.2d 389 (1986); *Cuello v. Patel*, 257 A.D.2d 499, 684 N.Y.S.2d 528 (1st Dep't 1999).
21. *Buran* at 181.
22. *Id.*
23. 57 A.D.2d 474, 869 N.Y.S.2d 180, 2008 N.Y. Slip Op. 09553 (2d Dep't 2008).
24. *Id.*
25. *Id.*
26. 10 N.Y.3d 550, 860 N.Y.S.2d 769, 890 N.E.2d 884 (2008).
27. *Id.* at 554.
28. *Id.*
29. *Id.* at 181–182.

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Cuntan v. Hitachi Koki USA

By Allison N. Fihma

On September 14, 2009, Magistrate Judge Cheryl L. Pollak of the United States District Court for the Eastern District of New York issued a Report and Recommendation in the matter of *Ioan Cuntan v. Hitachi Koki USA, Ltd.*, 06 CV. 03898. The decision, which recommended that summary judgment be granted, thoughtfully details and dissects each area of product liability claims and, in doing so, provides a useful tool for litigators. The Report and Recommendation is now a final order. It stands to offer litigators an interesting primer on some issues which are too often not addressed in such detail.

Cuntan was a product liability action brought against Hitachi Koki USA, Ltd. ("Hitachi") regarding a Hitachi C7S-B2 circular power saw that was manufactured in 2004. Plaintiff Ioan Cuntan lacerated his left hand when he placed the saw on the grass next to his hand while reaching for plywood. Plaintiff claimed that the guard failed to close, causing the saw to travel some one-and-a-half feet on the grass before reaching and cutting his hand.

Plaintiff's complaint sounded in claims of defective design, defective warnings, defective manufacturing and negligence. All claims were dismissed.

An inspection of the saw was conducted by defense expert, Richard Otterbein, who observed that the return spring designed to automatically return the lower blade guard to its original position was missing. It was undisputed in the litigation that the saw had remained in the exclusive possession of plaintiff and his counsel since the accident. At his deposition, plaintiff testified that the saw was in the same condition as it was at the time of the accident. However, as discussed more fully below, he attempted to recant this admission in opposition to summary judgment, claiming that his testimony concerning the saw's condition was limited to a visual examination of the saw's exterior.

From a defense standpoint, the decision is instructive on the following issues:

1. When a plaintiff must oppose a motion for summary judgment using an expert in a product liability action.
2. What a plaintiff must show to implicate a recall condition as being causal in his or her case.
3. The impact of a change in testimony tailored for summary judgment purposes.
4. The burdens of proof of each side in a product liability case.
5. The open and obvious danger defense to a failure-to-warn claim.
6. The adequacy, as a matter of law, of warning language provided with a product.
7. Impact of failure of a plaintiff to read warnings upon any failure-to-warn claims being advanced.
8. Conspicuity of warnings.

We address each part of the ruling in turn.

1. When a plaintiff must oppose a motion for summary judgment using an expert in a product liability action

Rarely do we see such a direct statement on the plaintiff's need for an expert in a design defect case as we do by Magistrate Judge Pollak in *Cuntan*. She clearly stated:

> Under New York law, a plaintiff seeking to establish a design defect is generally required to provide expert testimony as to the feasibility and efficacy of alternative designs.

Hitachi's success in their motion stems primarily in the fact that plaintiff's provided absolutely no expert testimony in opposition to their motion. Throughout the course of discovery, the plaintiff was given four extensions of time to provide expert reports but never did so. The Court highlighted this failure and plaintiff's failure to request time to obtain an expert in order to respond to defendant's motion. Plaintiff mistakenly believed that he could succeed without an expert; he went so far as to consent to be precluded from introducing an expert in exchange for an extension of time to file opposition.

As the Court makes clear, to successfully impose liability for a design defect, a plaintiff must satisfy the three-prong test put forth in *Voss v. Black & Decker Mfg. Co*. 59 N.Y.2d 102, 107, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983). The plaintiff must establish (1) that the product as designed, posed a substantial likelihood of harm, (2) it was feasible for he manufacturer to design the product in a safer manner and (3) that the defective design was a substantial factor in causing the plaintiff's injury. The first two factors define the "risk-utility" test.

Logically, a plaintiff cannot offer evidence on the risk utility factors set forth in *Voss* without expert testimony. Here plaintiff attempted to do just that. Plaintiff decided to rely upon the testimony of a Hitachi witness concerning the availability of "Saw Stop" technology on other models of saws. The Court observed, quite reasonably, that the bare fact that a feature is available for one product does not mean that it can be feasibly adapted to the subject product. It also does not mean that the feature, if utilized, would have prevented the accident.

One critical lesson to be taken away from this case, therefore, is the importance from a plaintiff's standpoint of retaining a qualified expert, and to not merely develop theories of defect and causation, but also to test them.

The Court recognized that it is possible to succeed on a design claim without an expert but, in order to do so the plaintiff must (1) establish the product did not perform as intended and (2) exclude all other causes of the accident. The plaintiff must produce a triable question of fact by offering competent evidence which is sufficient to rebut

defendants' alternative cause evidence. This burden cannot be satisfied with "pure speculation and conjecture" as attempted by Cuntan. There must be tangible evidence to rebut defendants. Proving a design defect claim without an expert is even more burdensome than proving it with one. Magistrate Judge Pollak clearly recognized the importance and value of an expert.

The Court's observations of plaintiff's failure to invoke Fed. R. Civ. P. 56(f) further reinforced Judge Pollak's perception that the use of an expert to oppose summary judgment is not optional, it is essential.

2. What a plaintiff must show to implicate a recall condition as being causal in his or her case

The Hitachi saw in question was manufactured in 2004; within a short time of the saw's manufacture, Hitachi had a recall on saws manufactured in 2002 for a problem with the lower blade guards. The evidence was unrebutted that there was a recall on earlier manufactured saws, but equally unrebutted that the recall did not apply to the subject saw. Although the recall was fairly close in time to the manufacture of the subject saw, and, more critically, involved a stuck lower guard condition, the Court observed that plaintiff failed to prove that his guard failed to operate for the same reasons implicated by the recall.

Judge Pollak did not apply the "close enough" analysis often utilized by courts in rejecting summary judgment in cases involving a prior product recall. It would have been an easy enough approach to take. The lesson to take away is that a manufacturer addressing a prior recall should do whatever it can to focus on the lack of evidence linking the accident to the recall conditions.

3. The impact of a change in testimony tailored for summary judgment purposes

To defeat plaintiff's defective warning claim, Hitachi focused on the fact that plaintiff testified that he did not read the warnings. Plaintiff's deposition testimony was clear on this point, yet when he needed to rebut defendant's argument, he submitted an affidavit contradicting his deposition, claiming he did in fact read the warning. In a footnote, Judge Pollak dismissed plaintiff's "sham affidavit."

The Second Circuit and Federal Courts generally follow the "sham" affidavit rule, which prohibits a party from tailoring testimony to oppose a motion for summary judgment. *Mack v. United States*, 814 F.2d 120, 125 (2d Cir. 1987) (rejecting former FBI agent's affidavit which contradicted prior deposition testimony); *Galvin v. Eli Lilly and Co.*, 488 F.3d 1026, 1030 (D.C. Cir. 2007) (party precluded from creating issue of material fact by contradicting prior sworn testimony). Judge Pollak applied this concept in an interesting manner in *Cuntan*.

The Court not only applied the sham affidavit rule, rejecting the testimony, but also went further, noting that if plaintiff never paid any special attention to the warnings, it follows, by definition, that he would not have paid any more attention to alternative warnings.

4. The burdens of proof of each side in a product liability case

New York is not generally a jurisdiction which engages in burden shifting in product liability cases. An arguable exception is *Liriano v. Hobart Corporation*, 170 F.3d 264 (2d Cir. 1997), which tries to insert a heeding presumption into the New York law on failure to warn.

Cuntan is not a decision which employs burden shifting. To the contrary, the decision explicitly provides that a plaintiff has the burden of:

1. Ruling out poor maintenance as causal in the accident;
2. Ruling out alternative cause evidence in order to show that an alleged design or manufacturing defect caused the accident;
3. Showing that an alternative warning (and the specific text thereof) would have prevented the accident;
4. Showing that an alternative manner of presenting the warning would have prevented the accident;
5. Proving a manufacturing defect;
6. Proving actual notice on the part of defendant of the hazard; and
7. Proving constructive notice on the part of defendant of the hazard.

In sum, this is a decision which puts plaintiff to his proof, and, accordingly, is useful precedent, with useful language, on each of the above subjects.

5. The open and obvious danger defense to a failure-to-warn claim

Cuntan is not all good news for the defense bar. The use of the "open and obvious" defense continues to get curtailed as demonstrated in the Judge's opinion.

Magistrate Judge Pollak refused to apply the open and obvious defense to the risk of cutting fingers on the exposed blade under these circumstances. More problematic is her conflation of the doctrine of "open and obvious," which focuses on the objective risk of harm that should be perceived by the reasonable operator, with the doctrine of "knowledgeable user" which focuses specifically on a plaintiff's own subjective knowledge of the hazard as admitted in deposition. The "open and obvious" defense relates to the question of duty to warn—no manufacturer is obligated to warn about hazards that are so obvious that they are generally known. The "knowledgeable user" defense relates to causation—if plaintiff actually knew of the hazard, a warning wasn't going to tell him anything he didn't already know.

On these facts, the Court, even though confusing the two doctrines, may well have reached the right result. The risk of being injured by a spinning disk is certainly obvious. However, the risk "created" by a guard that fails to close, the Court ruled, cannot be deemed "obvious" as a matter of law, especially here, where plaintiff testified that

he had no knowledge that the lower blade guard was not working. The end result may be the right one.

In reality, by not simply rejecting the warning claim on the ground of obviousness, the Court was able to reach some far more interesting and useful questions for the defense bar about failure to warn. However, be aware that there is language in this decision that confuses the "open and obvious" and "knowledgeable user" doctrines.

6. The adequacy, as a matter of law, of warning language provided with a product

After assessing Hitachi's warnings on the subject saw and in the manual, Magistrate Judge Pollak, in an uncommon move, found them adequate as a matter of law.

The Court cited to the two on-product warnings Hitachi did provide:

> **DANGER-**
>
> **KEEP HANDS AND BODY AWAY FROM AND TO THE SIDE OF THE BLADE. CONTACT WITH BLADE WILL RESULT IN SERIOUS INJURY.**
>
> **WARNING-**
>
> **TO REDUCE THE RISK OF INJURY, USER MUST READ AND UNDERSTAND INSTRUCTION MANUAL. CHECK LOWER BLADE GUARD. IT MUST CLOSE INSTANTLY! HOLD SAW WITH BOTH HANDS. SUPPORT AND CLAMP WORK. WEAR EYE PROTECTION.**

The Court also focused on warnings in the manual which were to the same effect. One paragraph actually had the accident scenario described perfectly:

> **Always observe that the lower guard is covering the blade before placing saw down on bench or floor.** An unprotected, coasting blade will cause the saw to walk backwards, cutting whatever is in its path. Be aware of the time it takes for the blade to stop after switch is released.

The Court found these warnings unambiguous and more than adequate.

7. Impact of failure of a plaintiff to read warnings upon any failure-to-warn claims being advanced

To prevail on a warning defect claim plaintiff must prove that defendant's failure to warn was a proximate cause of his injury and that he would have read and heeded a warning had one been given. *Glucksman v. Halsey Drug Co.*, 160 A.D.2d 305, 553 N.Y.S.2d 724) (1st Dep't 1990); *Guadalupe v. Drackett Prods. Co.*, 253 A.D.2d 378, 676 N.Y.S.2d 177 (1st Dep't 1998). A plaintiff's admission that he never read the on-product subject warning expressly forecloses his ability to prove a case. *Sosna v. Am. Home Prods.*, 298 A.D.2d 158, 748 N.Y.S.2d 548 (1st Dep't 2002); *Estrada v. Berkel, Inc.*, 14 A.D.3d 529, 789 N.Y.S.2d 172 (2nd Dep't 2005).

The Court ruled that a plaintiff who fails to read the warnings cannot challenge their substance:

> If a plaintiff admits that he failed to read a products warning, he *cannot* establish that the substantive language of the warnings caused his injury. *Cuntan*, 06 CV. 03898

A practitioner should always depose a plaintiff on this point and gather testimony on how much, if any, attention plaintiff gave to a warning.

8. Conspicuity of warnings

Still, the fact that a plaintiff does not read the warnings may not necessarily end the inquiry. A defendant may be held liable for failing to provide adequate substantive warnings because of poor placement or presentation. This is the doctrine of "conspicuity."

All plaintiff offered on "conspicuity," however, was a single sentence thrown into a brief, stating warnings

> should have been prominently been displayed on the machine with pictogram [sic] and other remarkable language, color and print to make this danger obvious to the operator.

Such an argument, unencumbered by any support, pretty clearly falls short of the bar required in opposing summary judgment. The Court made sure to note that this one line was not sufficient to sustain their burden.

Magistrate Judge Pollak took time to distinguish a case in the Southern District of New York that suggested that the adequacy of presentation of warnings is not a showing a plaintiff must make at the summary judgment phase. *Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537 563 (S.D.N.Y. 2005). She distinguishes this decision by observing that a plaintiff must, at a bare minimum, offer some reason at the summary judgment phase to conclude that some alternative warning would have altered a plaintiff's conduct. In *Cuntan*, unlike *Derienzo*, there was no dispute as to which warnings were supplied with the product. In addition, the plaintiff in *Cuntan* made no showing as to how any alternative warning, or presentation of warning, would have altered his conduct.

We note that District Court Judge Roslyn Mauskopf adopted Magistrate Judge Pollak's Rulings and Recommendations.

Conclusion

For defense counsel, the *Cuntan* decision, which is well reasoned and was not appealed, is a road map for defending and prevailing upon product liability claims. It is a useful primer on the current state of product liability law in New York. It displays careful consideration of the law, and makes explicit and clear a number of concepts that already exist in the law, but that are not often stated with such clarity.

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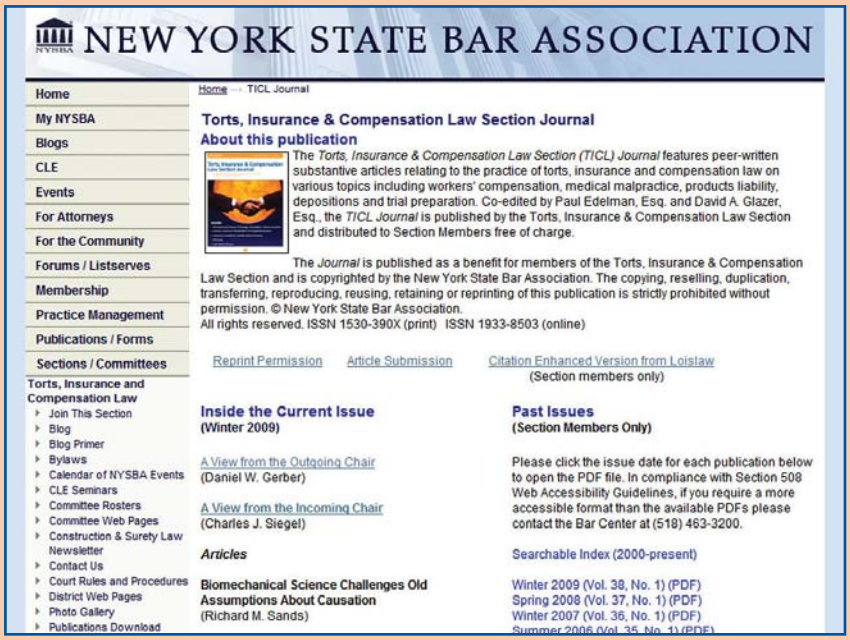

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