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THE SARATOGA COUNTY BAR ASSOCIATION

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LAW NOTES

Editor
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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

TIM J. HIGGINS, ESQ., *LEMIRE & HIGGINS, LLC*

Assumption of risk doctrine sinks two sporting activity claims.

Stanhope v. Burke (Clark, J., 10/26/23)

Under New York's primary assumption of risk doctrine, participants in sporting activities "may be held to have consented to those injury-causing events which are known, apparent or reasonably foreseeable." But plaintiffs are not deemed to have assumed the risk of "unique" conditions caused by a defendant's negligence or any such condition "over and above the usual dangers" inherent in the given sport/activity.

Here, plaintiff Stanhope was injured when he was "bucked" off a horse owned by the defendant Conway. An experienced rider (50-60 prior rides), plaintiff admitted that he was familiar with the horse that threw him, having ridden the horse once before the date of accident and having been involved in caring for the horse several times a week. Supreme Court (Burns, J., Otsego Co.) denied the defendant's motion for summary judgment but the Third Department reversed, concluding that a horse suddenly stopping is an inherent risk of horseback riding and that there was no evidence that the horse owner had concealed any unusual risks specific to this horse.

Fritz v. Walden Playboys M.C., Inc. (Fisher, J., 6/29/23)

Plaintiff was hurt at the defendant's motocross track when he lost control of his bike after going off a jump and landing in what he called a "pothole"; which he estimated to be about 3 feet long, 2 feet wide and 8 inches deep. Supreme Court (Mott, J., Ulster Co.) denied the defendant's motion for summary judgment, finding questions of fact whether the property owner created an

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TORTS AND CIVIL PRACTICE:

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unreasonable risk of harm by failing to remedy the hole (which plaintiff claimed was merely filled with dry soil). Citing the plaintiff's 43 years of experience riding motocross (describing him as "the quintessential motocross expert"), the Appellate Division reversed and dismissed the complaint, noting plaintiff's admission that before his fall, he had landed the same jump which caused the back of his bike to "kick up", but he was able to recover.

Premises liability claims.

McIntyre v. Bradford White Corp. (Lynch, J., 12/7/23)

Supreme Court (Auffredou, J., Washington Co.) granted summary judgment to the defendant owner of the rental property where plaintiff alleged her infant child was burned by "an unexpected surge of hot water" from the kitchen sink (where the child was being bathed), rejecting plaintiff's theory of liability (that a mixing valve on a water heater malfunctioned due to the internal build-up of scale) as speculative and not supported by an evidentiary basis. Affirming dismissal of the complaint, the Third Department noted a lack of proof that the property owner had actual or constructive notice of the alleged defect and that plaintiff's experts did not refute defendant's claim that a visual inspection of the mixing valve did not show any evidence of scaling. Plaintiff's reliance on res ipsa loquitor, said the Appellate Division, was unfounded because the temperature of the water flowing from the kitchen faucet "was at least partly within plaintiff's control."

Guzman v. State of New York (Clark, J.P., 11/2/23)

Claimant, walking with her adult daughter through an I-87 rest stop in Clifton Park, contended she tripped and fell when she stepped into a "cracked, uneven" depression in the parking lot pavement. After a liability-only trial, the Court of Claims (Ferreira, J.) ruled the claimant had failed to prove the State of New York was negligent in maintaining the property, and the Third Department affirmed the trial verdict. Noting that the claimant and her daughter both testified that the weather was dry and clear on the date of accident, the Appellate Division said claimant's photo evidence of the hole, taken a day after the fall and showing a hole filled with rainwater, "prevented the Court of Claims from conducting a proper visual examination of the hole."

Gagne v. MJ Properties Realty, LLC (Fisher, J., 11/16/23)

Slip-and-fall on snow/ice actions are often defended under the "storm in progress" doctrine, under which a property owner is relieved of the duty to clear the subject area "while continuing precipitation or high winds are simply re-covering (the property)...as fast as they are cleaned, thus rendering the effort fruitless." Finding the defendant property owner entitled to such relief, Supreme Court (Ferreira, J., Schoharie Co.) dismissed the complaint of this plaintiff, who alleged she was hurt when she slipped and fell on the icy sidewalk outside a Clifton Park building where she worked. Both parties submitted expert affidavits by meteorologists, who generally agreed that there were total accumulations of between .01 and .02 of an inch of precipitation for the entire day of the incident. Reversing and reinstating the plaintiff's Complaint, the Third Department (in a 3-2 split decision) concluded that "a trier of fact should be charged with determining whether there was a lull or ongoing storm in progress" that would modify the defendant's duty to remedy a hazardous condition.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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Plaintiff's $800K pain and suffering awards not excessive.

Bradley-Chernis v. Zalocki (Egan, J., 11/2/23)

Plaintiff was injured when her car was struck head-on by the defendant's New York State police vehicle when it, responding to a 911 call, failed to negotiate a sharp curve in the road and crossed into the oncoming lane of traffic. At a bench trial, Supreme Court (Gilpatric, J., Ulster Co.) found the defendant was negligent and that his driving reflected a "reckless disregard for the safety of others" (Vehicle & Traffic Law § 1104(e)). During a bench trial on damages, the 44-year old plaintiff offered evidence of her injuries, including a rotator cuff tear and traumatic shoulder bursitis (which required surgical repair), a bulging disk in the neck and post-traumatic stress disorder (for which plaintiff testified she was treating with a mental health professional). Supreme Court found plaintiff met the "serious injury" threshold of Insurance Law § 5102, and awarded damages for past and future pain and suffering ($400K and $432K), and $56K in economic loss. Despite "conflicting proof in the record" as to the extent of plaintiff's injuries and their impact upon her, the Third Department accorded deference to the findings of the trial court and affirmed the damages award which "did not deviate from what would be reasonable compensation."

Dismissal of complaint reversed in fatal grain elevator accident.

Pierce v. Archer Daniels Midland, Co. (Reynolds Fitzgerald, J., 11/30/23)

Plaintiff's decedent was fatally injured in a grain elevator during the course of his employment. In lieu of answering, defendants (parent company and its subsidiary) moved for dismissal of the complaint (CPLR 3211(a)(7)), arguing that all claims against them were barred under the exclusivity provisions of the Workers' Compensation Law. Supreme Court (Zwack, J., Columbia Co.) granted defendants' motion but the Third Department reversed, in part, finding the subsidiary (ADM Milling) was shielded from liability because plaintiff applied for and received workers' compensation benefits from that entity. However, the Appellate Division found the parent company (Archer Daniels) must defend the action as plaintiff's complaint alleged that each of the defendants were responsible for safety on the site of the accident and that the claim "is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss, especially here, where defendants are in exclusive possession of such information."

"CRIMMIGRATION": A RECENT 2ND CIRCUIT RULING COULD HELP IMMIGRANTS WITH NEW YORK "NARCOTIC DRUG" CONVICTIONS

DAVID W. MEYERS, ESQ., *MEYERS & MEYERS, LLP*

Crimmigration, the sometimes-scary intersection between federal and state criminal laws, and U.S. immigration law. More specifically, it is a body of law that has evolved in the immigration law (e.g., statutes, regulations and court decisions) that deals with criminal offenses and their effects on someone's immigration status. The consequences of adverse "crimmigration" results for foreign nationals, either lawfully in the United States or otherwise, including dispositions that some people would consider non-serious, can be devastating (including removal/deportation from the United States). Recently, there was a potentially welcome ray of light from the U.S. Court

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"CRIMMIGRATION": A RECENT 2ND CIRCUIT RULING COULD HELP IMMIGRANTS WITH NEW YORK "NARCOTIC DRUG" CONVICTIONS

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of Appeals for the Second Circuit, when it issued its decision in U.S. v. Minter, No. 21-3102, 2023 WL 5730084 (2d Cir. Sept. 6, 2023), a decision which "could" benefit some immigrants who have New York state convictions relating to the sale or possession of a "narcotic drug."

What is a narcotic drug? "Narcotic drug" is a term used in New York law, and it refers to a list of drugs that New York State has designated as "narcotic drugs," such as cocaine and heroin. (In New York, "narcotic drugs" do not include "cannabis," "stimulants," "hallucinogens," or another category of drug.) In Minter, the defendant had been charged with selling a narcotic drug, more specifically, cocaine.

So, what did the Court hold? In sum, that certain New York convictions for possession or sale of a "narcotic drug" will no longer be deportable or disqualifying drug crimes for immigration purposes. [1] This is potentially huge for some (but not all) individuals with certain New York "narcotic drug" convictions that may now be able to reopen and have dismissed old deportation orders, or defend against the government's attempt to remove them if they are now currently in removal proceedings. In addition, some individuals who had their applications for permanent residence (i.e., a green card) or naturalization denied because of a New York "narcotic drug" conviction may now be eligible.

The only way to know for sure whether a conviction was for sale or possession of a "narcotic drug" is to identify the exact New York criminal statute an individual was convicted under. It's not enough for some to say that he or she was convicted of a felony under whatever the name of the statute is. Many (if not most) laws have multiple sections in them, and the "crimmigration" law will not necessarily have the same adverse consequence for each section. One would need to review the criminal court documents and, potentially, the immigration case documents and decisions too.

And I cannot stress enough that the analysis above needs to be done. Not everyone will benefit from this decision, and there are enormous risks for someone to seek relief based on this decision who is not qualified for it (e.g., having their motion denied or, worse, being put on Immigration & Customs Enforcement's ("ICE") radar, potentially exposing themselves to arrest, detention and even removal).

There's a lot going on in the world of immigration, and if you read the headlines, you'll agree that not all of it is good. Every once in a while, though, there's good news to report, and this is such an instance.

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[1] More specifically, the Court held that selling cocaine in violation of N.Y. Penal Law § 220.39(1) is not a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), because "New York's definition of cocaine is categorically broader than its federal counterpart." Slip Op. at 3. Specifically, federal law "prohibits possession of only optical and geometric isomers of cocaine, while New York's statute prohibits possession of all cocaine isomers." Slip Op. at 5 (emphasis in original).

VERDICTS AND SETTLEMENTS: SCHENECTADY COUNTY SUPREME COURT, JUSTICE THOMAS D. BUCHANAN

MOTOR VEHICLE

Mary E. Malandrino v. Eshelman Transportation, Inc. and Seth G. Lamettery

Plaintiff Attorney: Patrick D. Slade, Esq. – Harding Mazzotti, LLP

Defense Attorney: William J. Greagan – Goldberg Segalla

Facts and allegations:

Plaintiff, a 51 year old woman, sued for injuries sustained as a result of a rear end motor vehicle accident wherein she was struck by a tractor trailer. Plaintiff moved for summary judgment on liability contending that the emergency doctrine did not apply and denying that the roadway was slippery in any respect. The Court denied the motion finding triable issues of fact on both the emergency doctrine and whether comparative fault should be applied.

Plaintiff contended that as a result of the crash, she sustained a nerve injury to her right leg which developed into saphenous neuritis and complex regional pain syndrome. Plaintiff underwent extensive pain management including nerve blocks and a nerve stimulator device. Plaintiff was also recommended for a lumbar neurostimulator. In addition to past pain and suffering, Plaintiff sought damages for economic loss involving future medical expenses and loss of household services totaling $407,000 and $111,000 respectively. At the pretrial settlement conference Plaintiff dropped her demand from $790,000 to $500,000. Defendant increased its offer from $225,000 to $300,000. The carrier was Westfield Insurance Co.

Result: Settlement $350,000.

PREMISES LIABILITY

Valerie Parkis v. Schenectady Municipal Housing Authority

Plaintiff Attorney: Robin N. D’Amore, Esq. – Ellis Law, P.C. (Finkelstein & Partners, of counsel)

Defense Attorney: John W. Ligouri, Jr., Esq. – Ligouri & Houston, PLLC

Facts and allegations:

Plaintiff, a 49 year old woman, sued for a traumatic brain injury with visual disturbance alleged to have been sustained due to a slip and fall on snow and ice at Defendants’ premises. During the course of the litigation, Plaintiff sought discovery of video surveillance which would have been highly probative of the event. Rather than provide the surveillance video, Defendant provided a few still photographs taken from the video, which was subsequently overwritten approximately 8-12 days following the incident. Consequently, the Court granted Plaintiff’s motion for preclusion concerning the contents of the missing video footage as well as giving Plaintiff an adverse inference charge. The decision and order was subsequently affirmed by the Third Department, 211 A.D. 3d 1444 (3 Dept. 2022).

Defendant contended that it maintained the property in a safe condition, that there was a storm in progress, that snow and ice removal operations were underway, and that the

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VERDICTS AND SETTLEMENTS: SCHENECTADY COUNTY SUPREME COURT, JUSTICE THOMAS D. BUCHANAN

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Plaintiff was comparatively at fault. The IME report confirmed causation of the injury.During the pretrial conference, the initial demand of $6,000,000 was reduced to $4,000,000. The total coverage afforded by the Housing Authority was $1,000,000. Accordingly, the initial offer of $100,000 was subsequently raised to $600,000.

Result: Settlement $1,000,000.

PREMISES LIABILITY

Patricia Collazo v. Capital District Apartments, LLC, doing business as Summit Towers Apartments

Plaintiff Attorney: Martin D. Smalline, Esq. – Smalline and Harri

Defense Attorney: Suzanne S. Swanson, Esq. – Wilson Elser Moskowitz Edelman & Dicker, LLP

Facts and allegations:

Plaintiff, a 72 year old woman, sued contending she sustained a trimalleolar fracture as a result of a slip and fall on snow and ice, necessitating treatment with surgery and placement of permanent orthopedic hardware. During a pretrial conference, Plaintiff initially demanded $380,000.

Result: Settlement $180,000.

PREMISES LIABILITY

Jeanne Post-Sourmail v. Duanesburg Physical Therapy, PLLC, et al.

Duanesburg Physical Therapy, PLLC v. Dennis Radford

Plaintiff Attorney: John B. Casey, Esq. – Casey Law LLC

Defense Attorney: Paul Hurley, Esq. – Law Offices of John J. Bello, Jr.

Third Party Defendant: Antigone Tzakis, Esq. – Segal McCambridge

Facts and allegations:

Plaintiff, an 80 year old woman, fell at Defendant's physical therapy office, which was undergoing a flooring project, wherein she tripped over a raised edge between a carpet and adjacent plywood flooring. Yet to be installed was the transition ramp from carpet to astroturf. Plaintiff fell head first into an adjacent wall sustaining a concussion, bilateral shoulder aggravation, aggravation of rotator cuff tear, a fractured tooth necessitating oral surgery, hip replacement, knee replacement, and shoulder surgery. Defendant contended that the hip and knee damage was pre-existing with degenerative changes. Prior to trial, Plaintiff demanded $90,000. Third party defendant offered $15,000. A global settlement was reached. The carrier was Trumbull Insurance of The Hartford Group.

Result: Settlement $60,000.

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