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THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE

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TORTS AND CIVIL PRACTICE:
Selected Cases from the Appellate Division, 3rd Department

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

Plaintiff's jury verdict affirmed despite his intoxication at time of crash.

Pasternak v. County of Chenango (Clark, J., 4/18/24)

Plaintiff admitted "to having consumed a few beers" at a motorcycle racetrack he visited with friends, and was injured on his way home when he lost control of his own motorcycle, blaming the crash on the defendant's failure to maintain the subject road in safe condition (alleging it was "permeated with divots, potholes and dips"). Despite evidence of a blood alcohol content of 0.14% (based on a hospital blood sample), the jury found plaintiff's intoxication/negligence was not a substantial factor in causing the accident and that the County was negligent in maintaining the road. Supreme Court (Tait, J., Chenango Co.) denied the defendant's motion to set aside the jury's damages award to plaintiff, which the Third Department affirmed, noting that multiple eyewitnesses testified plaintiff was not exhibiting signs of intoxication when leaving the racetrack and that the jury was presented with "evidence that the road was in severe disrepair."

The Appellate Division, did, however, reverse that part of Supreme Court's order that applied a post-verdict interest rate of 0.31%, finding that defendant's expert (economics professor) proof on the issue failed to establish, by substantial evidence, that the statutory (General Municipal Law § 3-a(1)) interest rate of 9% was unreasonable.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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Statutory violations and motions for summary judgment.

Ruberti v. Butler (McShan, J., 5/2/24)

Plaintiff, injured when his bicycle collided with defendant's car, acknowledged that "he came to a rolling stop, not a complete stop" at a stop sign located several feet before the bike path on which he was riding intersects with two Gloversville streets. Claiming such statutory (V&T Law § 1172(a)) violation was the sole proximate cause of the accident, defendant won summary judgment and dismissal of the complaint from Supreme Court (Slezak, J., Fulton Co.) but the Third Department reversed. Citing to photos of the accident intersection that "cast doubt" on the defendant's contention that her visibility down the bike path was partially limited by a building, trees and bushes, the Appellate Division disagreed with Supreme Court's conclusion "that the only possible inference was that Butler was in the intersection first and, accordingly, had the right-of-way when the collision occurred."

Peterson v. Garnsey (Garry, P.J., 5/16/24)

The car being driven by defendant unsuccessfully attempted to make a left turn across a lane of oncoming traffic, colliding with the vehicle in which plaintiff was a passenger. After defendant was found guilty of violating V&T Law § 1141 (failure to yield the right of way), plaintiff's motion for summary judgment on liability was granted by Supreme Court (Kupferman, J., Saratoga Co.).Affirming, the Third Department also agreed that defendant's cross-motion for summary judgment (relying on the emergency doctrine – PJI 2:14) was properly denied, as defendant's admission that he did not see a vehicle exiting the one-way road onto which he was attempting to make the left turn, "despite clear, day-time weather conditions…reveals that the emergency was one of his own creation."

Fore!

Katleski v. Cazenovia Golf Club, Inc. (Lynch, J., 3/14/24)

Even a novice golfer would concede, as noted here by the Appellate Division in another analysis of primary assumption of risk in sporting/recreational activities, that "being hit without warning by a shanked shot is a commonly appreciated risk of participating in the sport."This plaintiff, an experienced golfer and member of the defendant golf club, was struck in the eye while riding in a golf cart on the 7th hole fairway – the ball having been launched from the 3rd hole tee box. The 3rd and 7th fairways ran roughly parallel (in opposite directions) and eventually intersect at the 7th green and 3rd tee box. Plaintiff alleged the defendant course was dangerously designed in a way that unreasonably enhanced the risk of being struck by a golf ball. Supreme Court (McBride, J., Madison Co.) denied defendant's motion for summary judgment which was supported by expert affidavits from a golf course architect and professional golfer/coach, one of whom noted that since plaintiff was not in the intended path of the shot, the golfer who hit the errant drive was "not obligated to attempt to observe if there were golfers on the 7th fairway before taking his tee shot". The Third Department (with two dissenters) reversed and dismissed plaintiff's complaint, concluding that "the determinative fact" was that plaintiff, as an experienced golfer, knew of the risk involved in playing on this course "and made an informed decision to keep doing so despite the lack of protective barriers."

Plaintiff's action not barred by prior written notice requirement.

Clute v. Town of Lisle (Egan, J., 3/14/24)

New York's Municipal Home Rule Law § 10 permits local governments to enact laws requiring

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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prior written notice of a defect on their property as a condition precedent to filing suit for injuries allegedly caused by the defect.

The Clute plaintiff, after crossing a small grassy area between a parking lot and concrete walkway leading to the front entrance of the defendant's highway department building, slipped and fell on what she described as ice on the walkway. The Town had a local law barring injury claims in the absence of prior written notice of the "particular place and condition" alleged to be hazardous and there was no dispute that no such notice had been received before plaintiff's fall. But Supreme Court (Faughnan, J., Broome Co.) denied defendant's motion for summary judgment and the Third Department affirmed, noting that the plaintiff's claim that the town failed to post needed signage (that the front entrance to the building was closed to the public) "is not a defective condition within the meaning of" prior notice laws permitted by Municipal Home Rule Law § 10.

Property owners win summary judgment in trip/slip and falls.

Catman v. Back Water Grille LLC (Reynolds Fitzgerald, J., 3/7/24)

Plaintiff was making a delivery to the defendant restaurant, an account he had serviced for 15 years and to which he'd made 200-300 deliveries. The restaurant allowed patrons to use its kayak paddles, which were stored in a hallway.Plaintiff, walking down the hallway prior to making his delivery, noticed a paddle on the floor near a cooler and as he reached down to move the paddle, lost his balance, fell and was injured.The Third Department, affirming Supreme Court's (Buchanan, J., Saratoga Co.) order granting summary judgment to the defendant, agreed that plaintiff did not raise an issue of fact to overcome defendant's prima facie evidence that the kayak paddle was "both open and obvious and not inherently dangerous."

Martinez v. Walmart Inc. (Clark, J., 5/16/24)

Plaintiff was an employee of a vendor that operated inside the defendant's Amsterdam store, and was injured in a fall that she claimed was caused by excessive moisture transferred to her shoes from non-slip mats positioned at the entrance. Plaintiff testified that her clothes were wet after the fall but admitted that she did not see any water on the mat or the floor just inside the store, which appeared to be confirmed by store surveillance videos. Supreme Court (Auffredou, J., Fulton Co.) granted summary judgment to the defendant and the Third Department affirmed, concluding that plaintiff failed to raise a question of fact upon the defendant's prima facie showing of entitlement to dismissal "as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation."

Medical malpractice defense verdict affirmed.

Fitzpatrick v. Tvetenstrand (Garry, P.J., 4/11/24)

The defendant surgeon removed the right and left lobes of plaintiff's thyroid, given concern about a potentially cancerous nodule on the left lobe. Post-surgery, plaintiff complained of difficulty breathing and a soft voice and was found to have paralysis of the left vocal cord. In the malpractice action, the defendant admitted that he did not discuss with the plaintiff the option of surgical removal of only the left lobe (hemithyroidectomy) - which he explained was inadvisable because the right lobe was non-functional and leaving it intact posed an elevated risk of cancer spreading from the left lobe to the right lobe. At trial, Supreme Court

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TORTS AND CIVIL PRACTICE:

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(Blaise, J., Broome Co.) denied plaintiff's motion for a directed verdict on her cause of action for lack of informed consent, and the jury returned a defense verdict – finding that although the surgeon failed to provide his patient with appropriate information (the option of single lobe removal), a reasonably prudent person would have nevertheless undergone the performed surgery. On appeal, the Appellate Division found that the trial court properly denied plaintiff's motion for a directed verdict, and aligned the Third Department with its "sister Departments in concluding that plaintiffs were not required to preserve their weight of the evidence contention by moving to set aside the verdict upon that basis."

SUPREME COURT DECIDES CASE INVOLVING "DOCTRINE OF CONSULAR NONREVIEWABILITY"

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

I've spent a lot of time in this space hemming and hawing about the world that I practice law in. One thing I've written about ad nauseum is the stupidity of having to sometimes advise some corporate clients that the only way they can hire a foreign specialty occupation worker (i.e., an H-1B) is if they are first selected in a random lottery in competition with 700,000 other employers. This is one of many examples of how ridiculous our immigration system is.

Here's another: the doctrine of consular nonreviewability. Let me set the stage. You've got a client that needs to apply for a visa at a U.S. embassy or consulate outside the United States. Maybe it's employment-based, family-based, or even a visa for a friend or relative to come visit the United States. You prepare the visa application and get it filed. You prepare your client for his or her interview. The application is well-documented, and your client is well-prepared. The interview goes well, but your client's visa application is nevertheless denied. No meaningful reason is given (and if one is given, it's on a pre-printed form with a box checked next to a section of law, devoid of details). As lawyers, we instinctively think that we can appeal the denial. Think again.

Under current law, U.S. consular officers have the exclusive authority to adjudicate applications for visas.[1] Furthermore, the case law to date has been very clear: there is no judicial review over an embassy's or consulate's decision to deny a visa (or, indeed, over almost any other action by the consulate in adjudicating a visa application).[2] Yes, you read that right. Case law

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[1] Immigration and Nationality Act §104(a) specifically provides as follows: "The Secretary of State shall be charged with the administration and enforcement of the provisions of this chapter … relating to … the powers, duties and functions of diplomatic and consular officers of the United States except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas."

[2] This would not be the case if the issue were before U.S. Citizenship and Immigration Services ("USCIS"). Let me tweak the facts. Let's say your client is applying for a visa, and the consular official determines that because of something your client did in his or her past (e.g., an arrest, etc.), your client is not eligible for a visa without first receiving a waiver of inadmissibility from USCIS. You thereafter apply for that waiver with USCIS, and that application is denied. Here, you can appeal to the Administrative Appeals Office ("AAO"), and perhaps thereafter up the chain of federal courts if you're not successful in that venue.

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"SUPREME COURT DECIDES CASE INVOLVING "DOCTRINE OF CONSULAR NONREVIEWABILITY"

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refers to this as the "doctrine of consular nonreviewability."[3] In 2015, the Supreme Court affirmed this notion that there is no judicial review of the denial of a visa because, according to the Court, an individual abroad (or the U.S. citizen petitioner that may have sponsored the individual abroad, e.g., a relative of that individual) does not have a Fifth Amendment right of due process.[4]

Enter the 9th Circuit Court of Appeals, where, until recently, there was hope that the federal courts would deal with this ridiculous issue. In Muñoz v. United States Department of State,[5] the 9th Circuit Court of Appeals, in a broad decision that gave attorneys hope that there was now a chink in the government's armor, held (a) that a U.S. citizen possessed a protected due process liberty interest in her noncitizen husband's immigrant visa application, (b) that a declaration by a consular officer denying the immigrant visa application because of noncitizen's gang membership contained sufficient information connecting the reason for the denial with the cited statute of inadmissibility, (c) that, in a matter of first impression, due process requires that the U.S. government provide its citizens with timely and adequate notice of a decision to deny a visa, and (d) the failure to provide timely notice of the factual basis for a visa application denial precluded the application of the doctrine of consular nonreviewability.

Suffice it is to say, the government was not happy with the 9th Circuit's decision, and made an application for a writ of certiorari with the Supreme Court, which was granted, in part. The questions presented to the Court were whether a consular officer's refusal of a visa to a U.S. citizen's noncitizen spouse impinges upon a constitutionally protected interest of the U.S. citizen and, assuming there is a constitutional interest, whether then notifying a visa applicant that they were deemed inadmissible under the law suffices to provide any process that is due. [6]

On June 21, 2024, the Supreme Court, in U.S. Department of State et al. v. Muñoz et al., (Case Number 23-334), issued its decision and held that "a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country." In so holding, the Court rejected the due process rights of U.S. citizens in visa matters and upheld the doctrine of consular nonreviewability in all consular determinations.

This is pretty big in my opinion, because as you might imagine, it's a pretty awful (and, as a lawyer, embarrassing) conversation we occasionally have to have with our clients when we tell them that consular officials essentially have unfettered discretion to review visa applications.[7]

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[3] Lihua Jiang v. Clinton, 08-CV-4477, 2011 WL 5983353 (E.D.N.Y. Nov. 28, 2011), citing Al Makaaseb Gen. Trading Co., Inc. v. Christopher, 94-CV-1179 (CSH), 1995 WL 110117 (S.D.N.Y. Mar. 13, 1995).

[4] Kerry v. Din, 576 U.S. 86 (2015).

[5] 50 F.4th 906 (9th Cir. 2022).

[6] The Supreme Court declined to address the question of whether, assuming that a constitutional interest exists and that citing the law is sufficient standing alone, due process also requires the government to provide a further factual basis for the visa denial "within a reasonable time," or else forfeit the ability to invoke consular nonreviewability in court.

[7] There certainly are some (very few) regulatory opportunities to request that a denied application be reviewed by the consular officer's superior, but very rarely, if ever, will that change the result.

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"SUPREME COURT DECIDES CASE INVOLVING "DOCTRINE OF CONSULAR NONREVIEWABILITY"

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I have seen many examples of well-documented cases that are denied for reasons not completely known to me. I've seen sophisticated and confident individuals who have completely unraveled in an intimidating consular interview setting, only to have their case denied.With no recourse at the consular level or in the courts, clients are left to scratch their heads at a process sometimes referred to as "consular absolutism." To say that I am disappointed in the Court's decision would be a massive understatement. Congress should (and obviously could, but will likely not) step in.

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

MOTOR VEHICLE

Daniel A. Hinklein v. Grace Kathryn DeMarzio

Plaintiff Attorney: Michael McGarry, Esq. and Dennis Englert, Esq. – Dennis M. Englert, LLC

Defense Attorney: Christopher Meyer, Esq. – Smith, Dominelli & Guetti LLC

Facts and allegations:

Defendant was driving west on Union Street when she came upon Plaintiff who was riding an electric bike on the sidewalk to her right. She passed Plaintiff then made a right turn at the next corner whereupon the plaintiff rode off the curb and struck her in the passenger rear fender.Plaintiff contended that the defendant was negligent by turning right, knowing that the plaintiff was coming along the sidewalk, and that she did not keep a proper lookout. Defendant contended that Plaintiff was riding the bike illegally on a public sidewalk pursuant to VTL §1242. It was the Court's view that a significant percentage of comparative fault would be applicable in this case. Plaintiff's injuries included pain and suffering associated with a fractured scaphoid bone in the left wrist with concomitant bruising and tearing of the surrounding soft tissues along with post-traumatic arthritis in the left wrist/thumb area and associated joints. Plaintiff alleged permanent loss of use of the left hand/wrist necessitating workplace accommodations. According to Plaintiff, who worked as a janitor, the restriction of use for the left hand was painful and affected his work. The carrier was New York Central Mutual.

Result: Settlement $75,000.

PREMISES LIABILITY

Anthony Marra v. Pavel N. Zaichenko, Individually and d/b/a Soft N' Cushy Auto Upholstery and Accessories

Plaintiff Attorney: George Szary, Esq. – DeGraff, Foy & Kunz, LLP

Defense Attorney: Melissa Smallacombe, Esq. – Burke, Scolamiero & Hurd, LLP

Facts and allegations:

This matter arose from a slip and fall on ice in the parking lot of the Soft N' Cushy auto upholstery business on State Street in Schenectady in February 2019. Plaintiff slipped and fell on snow and ice during an ongoing snow event. Defendant moved for dismissal based upon the storm in progress doctrine which motion was granted by another trial court. In a 3-2 decision, the Appellate Division reversed noting that there were disagreements presented by

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

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the Plaintiff's and Defendant's weather experts as well as on the question of whether the ice present in the parking lot had been there prior to the storm in progress. The record included testimony of a former employee that she had knowledge of the area in question and that it was prone to the accumulation of moisture and precipitation (*Marra v. Zaichenko*, 214 AD3d 1165 ([3d Dept 2023]).

Plaintiff, a 48-year-old delivery person with Rent-A-Center, suffered a right rotator cuff tear as well as a torn bicep. Plaintiff underwent three surgeries resulting in a loss of range of motion; shoulder replacement is a possibility, but not yet determined. Plaintiff contended that he is disabled from his previous line of work given the shoulder injury. Defendant contended that many of Plaintiff's problems were preexisting and that the surgeries were unrelated to this fall. Defendant further contended that liability is in serious doubt having initially been awarded summary judgment and being reversed in a split 3-2 decision. There was a significant lien in the file amounting to approximately $35,000. Plaintiff demanded $185,000 considering the difficult liability case, and applicable comparative fault. Defendant initially offered $20,000. Raised to $50,000 initially, then $100,000. The carrier was Erie Insurance.

Result: Settlement $110,000.

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