



LEGAL INSIGHTS

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CONSTRUCTION CORNER

Court of Appeals Expands Reading of Industrial Code

By Gail L. Ritzert

In a decision issued on March 31, 2011, the New York Court of Appeals refused to narrow the application of the Labor Law and provided the groundwork for the trial courts to expand the application of the Industrial Code provisions. In *St. Louis v. Town of North Elba, et al*, 2011 N.Y. Slip Op 2481 (2011), the Court of Appeals affirmed the Supreme Court and Appellate Division, Third Department's denial of the town's motion for summary judgment.

In *St. Louis*, the plaintiff, a maintenance worker employed at the McKenzie-Intervale Olympic Jumping Complex in Lake Placid, New York, was injured when a 20-foot section of a snow-making pipe fell on him, pinning him to the ground. At the time of the accident, the plaintiff was welding sections of pipe together. Prior to the accident, the pipe in question was held four feet off the ground by a hydraulic-operated clamshell bucket attached to the bucket arm of a front loader. The jaws of the clamshell bucket held the pipe in place during the welding process. After the two sections of pipe had been welded,

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Baseball Spectator's Lawsuit Alleging Enhanced Dangers of Maple Bats Dismissed

By Carla Varriale

A New York court rejected an injured spectator's argument that his negligence lawsuit should proceed because he was struck by shards of a maple bat and the league and team knew that maple bats have been shown to break apart more readily than ash bats. In *Falzon v. Major League Baseball Enterprises, Sterling Mets, LP, Ramon Castro and Louis Castillo*, James G. Falzon alleged that he was sitting in a box seat located along the third-base line at Shea Stadium when the barrel of a broken maple bat struck him in the face, causing serious personal injuries. Falzon has also sued the bat's manufacturer in a separate lawsuit, accusing it of producing an "inherently dangerous" bat.

Essentially, Falzon's lawsuits argue that MLB and the Mets failed to keep spectators "reasonably safe from hazards they had actual knowledge of, including the increased danger posed by shattering maple bats." He relied, in part, on a purported MLB-commissioned study of the dangers presented by maple bats. Falzon also argued that the players weren't careful enough in inspecting and maintaining the offending bat.

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INSURANCE COVERAGE CORNER

Court of Appeals Holds that When Determining Coverage Within Meaning of Uninsured Motorist Endorsement, Occurrence Must Be Viewed from the Insured's Perspective

By Abbie Havkins and David L. Rosenthal

In *State Farm Mut. Auto. Ins. Co. v. Langan*, 2011 N.Y. Slip Op 2437 (N.Y. Mar. 29, 2011), the New York Court of Appeals held that an insured decedent, the victim of an intentional crime, was injured as a result of an accident within the meaning of the uninsured motorist endorsement and certain other provisions of the insured's policy because the occurrence must be viewed from the insured's perspective.

Neil Spicehandler was injured when he was intentionally struck by Ronald Popadich in Manhattan on February 12, 2002. Spicehandler sustained a compound fracture of his lower left leg and died following complications from his surgery. Spicehandler was one of many pedestrians who were injured when Popadich intentionally drove his vehicle into pedestrians. Popadich later pled guilty to second degree murder and admitted that he intended to kill Spicehandler.

Decedent was insured under an automobile liability policy issued by State Farm Mutual Insurance Company. The administrator of Spicehandler's estate submitted a claim to State Farm seeking to recover benefits under the

policy's uninsured/underinsured motorist (UM) endorsement, mandatory personal injury protection endorsement (PIP endorsement) and death, dismemberment and loss of sight endorsement (Coverage S).

The policy's UM endorsement provided in substance that it "will pay all sums that the insured or the insured's legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by an accident arising out of such uninsured motor vehicle's ownership, maintenance or use." The PIP endorsement and Coverage S likewise stated that they would pay benefits for injuries sustained as the result of "an accident." These endorsements excluded coverage on several bases, but none specifically excluded coverage for an injury that resulted from intentional conduct.

State Farm denied coverage because it determined that Spicehandler's death was caused not by an accident, but by the intentional conduct of the operator of the vehicle. State Farm commenced a declaratory judgment action seeking a declaration that it was not obligated to provide benefits in connection with Spicehandler's death. The administrator answered and counterclaimed, requesting a declaration that State Farm was required to provide coverage under the policy. The Appellate Division upheld the portion of the Supreme Court order that denied summary judgment on the issue of whether the incident was covered by the policy, finding that there was insufficient proof to determine whether the decedent had

been the victim of an intentional crime, but that, if he had, the incident would not be covered.

Following Popadich's conviction, State Farm renewed its motion for summary judgment. The trial court granted summary judgment for State Farm. The Supreme Court of New York, Appellate Division, Second Department, affirmed the judgment of the trial court.

The issue for the Court of Appeals was whether Spicehandler's injuries were caused by an accident within the meaning of the policy. Although the relevant endorsements did not define the term "accident," the Court of Appeals had previously held that it is not to be given a narrow, technical definition, but should be given the interpretation the average person would give. See *Miller v. Continental Ins. Co.*, 40 N.Y.2d 675, 676 (1976). For the purposes of automobile insurance, an accident is defined as "an event typically involving violence or the application of external force." To determine whether the event was accidental, the Court said it must be viewed from the eyes of the insured, to see whether it was "unexpected, unusual and unforeseen." The accident should not be looked at from the perspective of the victim because a casualty is always unforeseen in the eyes of a victim. In this

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case, the victim was also the insured party.

Looking at the casualty from the perspective of the insured party, the Court found that the accident was an unexpected or unintended event. The Court found support for this conclusion in the New York Insurance Department Regulations that require that an automobile insurance liability policy contain a clause specifying “that assault and battery shall be deemed an accident unless committed by or at the direction of the insured.” 11 NYCRR § 60-1.1 (f).

Where, as here, the insured is also the victim, the triggering event is always going to be unforeseen. While this case involved automobiles and has a narrow holding, it should serve as an important warning to insurers that insurance policies must be carefully drafted and must include all necessary exclusions. State Farm lost this case because the policy did not define the word “accident” and did not contain an exclusion for intentional conduct.

Court of Appeals Rules on ‘Other Insurance’ Clause Found in Competing Insurance Policies

In *Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co., Inc.*, 2011 N.Y. Slip Op 1361 (N.Y. 2011), the New York Court of Appeals reversed New York’s Appellate Division, First Department, when it held that a commercial general liability insurer had a duty to defend two underlying actions where a commercial general liability (CGL) insurance policy and a directors and officers (D&O) insurance policy were each provided to the same insured.

Hermitage Insurance Company issued

a CGL policy to Fieldston Property Owners Association effective from July 5, 2000 to July 5, 2001. The insurance policy included an “other insurance” clause, which stated that the insurance would be the primary insurance unless the insurance was excess over certain other insurance policies.

Federal Insurance Company issued a directors and officers (D&O) policy from February 13, 1999 to February 13, 2002. This insurance policy also included an “other insurance” clause which said that the D&O policy was an excess policy where the loss was insured under another policy.

Chapel Farm Estates commenced an action in federal court against Fieldston arising from Fieldston’s officers making “false statements and fraudulent claims” as to Chapel Farm’s right to access its property from public roads. That action was dismissed. Chapel Farms filed another action in New York Supreme Court. Federal disclaimed coverage in both cases because of its “other insurance” clause, and Hermitage defended Fieldston under a reservation of right each time.

Hermitage and Federal each filed a declaratory judgment action seeking to establish their respective defense obligations. The Supreme Court concluded that Hermitage was the primary insurer because of the impact of the “other insurance” clauses. The Appellate Division reversed the Supreme Court, declaring Federal as the primary insurer because the losses were not insured under the CGL policy.

The Court of Appeals reversed the Appellate Division citing the “other insurance” clauses. Since “other insurance” existed in the form of Hermitage’s CGL policy, Federal became an excess insurer and had no duty to defend. The Court of Appeals explained as follows:

Federal’s D&O policy provides that its coverage is excess where “any loss arising from any claim

made against the insured is insured under any other valid policy(ies).” “Loss” as defined in the D&O policy includes “defense costs.” Based on the broad duty to defend, and upon the conceded possibility that Hermitage’s CGL policy covers at least one cause of action in each of the two underlying complaints, Hermitage has a duty to provide a defense to the entirety of both complaints (*see, e.g., Town of Massena*, 98 N.Y.2d at 443-444). Thus, under the terms of Federal’s D&O policy, there does exist “other insurance,” which would cover the “loss” arising from the defense of the two underlying actions. Accordingly, Hermitage had an obligation to defend both of the underlying actions without contribution from Federal (*see Firemen’s Ins. Co.*, 233 A.D.2d at 193; *Sport Rock Intl., Inc. v. American Cas. Co. of Reading, Pa.*, 65 A.D.3d 12, 21, 878 N.Y.S.2d 339 (1st Dep’t 2009) citing *State Farm Fire & Cas. Co. v. LiMauro*, 65 N.Y.2d 369, 373, 482 N.E.2d 13, 492 N.Y.S.2d 534 (1985)), notwithstanding the fact that Federal would appear to have an obligation to indemnify Fieldston for a greater proportion of the causes of action, if successfully prosecuted.

The language that insurers use in their “other insurance” provisions can have a dramatic impact on the outcome of insurance coverage disputes between insurers. It will affect the insurer’s defense and indemnity obligations not only to the named insured but to additional insureds as well. Since “other insurance” analyses compare the language of the two competing policies, great care must be given to the language being utilized.

Contact

Abbie Havkins: 646-747-5100 or
abbie.havkins@hrrvlaw.com

David Rosenthal: 646-747-5124 or
david.rosenthal@hrrvlaw.com

Insurance Law Amended to Provide No-Fault Coverage for Intoxicated or Impaired Drivers

By Gail L. Ritzert

Prior to January 26, 2011, no-fault insurers were permitted to exclude from coverage a person who was injured as the result of operating a motor vehicle while intoxicated or while impaired by the use of a drug within the meaning of VTL § 1192. This exclusion was set forth in the mandatory personal injury protection endorsements in 11 NYCRR § 65. However, this exclusion was only applicable if the intoxicated or drugged condition was a contributing cause of the accident, which resulted in injuries.

However, Insurance Law § 5103(b)(2) was amended to prohibit a no-fault insurer from excluding coverage for necessary emergency health services. As of January 26, 2011, all motor vehicle insurance policies issued, renewed, modified, altered or amended in New York State require the no-fault insurer to provide first-party benefits for necessary emergency health services to intoxicated or impaired drivers. In a Circular Letter issued on January 12, 2011, the Insurance Department interpreted “necessary emergency services” to mean:

services rendered to a person by or under the supervision of a paramedic or emergency medical technician to treat the onset of sudden pain or injury and to stabilize the person, provided the person is transported directly from the scene of the motor vehicle accident to the general hospital. Pursuant to this interpretation, once the sudden pain or injury is treated and the person is stabilized, (generally in the emergency room) the no-fault insurance coverage ceases.

Significantly, the amendment allows the no-fault insurer to maintain an action against the covered person for the amount of the first-party benefits paid or payable on behalf of the covered person if that person is found to have violated VTL § 1192. The right of recovery against

the intoxicated or drugged driver exists even if the insurance policy does not include the intoxication or impairment by the use of drugs or alcohol exclusion. However, the no-fault insurer may not maintain such an action if the intoxication or impairment was not a contributing cause of the injuries.

Notably, if the no-fault insurer is successful in its action against the covered person and recovers the no-fault benefits paid on behalf of that person, the covered person’s health insurer may be responsible for the necessary emergency health services, depending upon the language and exclusions contained in the policy, since no-fault insurance benefits would no longer be recoverable.

However, a no-fault insurer may not utilize the loss transfer provision set forth in Insurance Law § 5105 if the insurer recovers the benefits from the intoxicated or drugged driver under amended Insurance Law § 5103(b)(2).

Contact

Gail L. Ritzert: 516-620-1710 or gail.ritzert@hrrvlaw.com



As of January 26, 2011, all motor vehicle insurance policies issued, renewed, modified, altered or amended in New York State require the no-fault insurer to provide first-party benefits for necessary emergency health services to intoxicated or impaired drivers.

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the plaintiff began hitting the weld seam with a hammer to remove the excess metal, when the jaws of clamshell bucket suddenly opened, releasing the pipe. The plaintiff's co-workers testified at their depositions that, on the date in question, they did not secure the load with chains as they usually did. Thus, no safety device, chain or rope was in place to prevent the pipe from falling should the machine malfunction.

In his suit against the owner of the Olympic Complex, the plaintiff asserted a claim under Labor Law § 241(6) and asserted that the defendant violated Industrial Code section 12 NYCRR § 23-9.4(e). Section 23-9.4 of the Industrial Code is entitled "Power Operated Equipment." Section 23-9.1, Application of this Subpart, provides that "the provisions of this part shall apply to the power-operated heavy equipment or machinery used in construction, demolition and excavation operations." This section is followed by nine sections that identify specific kinds of power-operated heavy equipment and machinery, which do not include "loaders" or "front-end loaders."

Section 32-9.4(e), the section upon which the plaintiff relied, provides, in pertinent part:

Where power shovels and backhoes are used for material handling, such equipment and the use thereof shall be in accordance with the following provisions:

(e) Attachment of load.

(1) Any load handled by such equipment shall be suspended from the bucket or bucket arm by means of wire rope having a safety factor of four.

(2) Such wire rope shall be connected by means of either a closed shackle or safety hook capable of holding at least four times the intended load.

At the close of discovery, the defendants moved for summary judgment seeking a dismissal of the plaintiff's Labor Law § 241(6) claim asserting, in part, that Section 23-9.4 only applies to "power shovels and backhoes" and does not extend to front-end loaders. The Supreme Court, relying on the decision in *Copp v. City of Elmira*, 31 A.D.3d 899 (3d Dep't 2006), which held that section 23-9.4 applied to a "payloader," held that the enumerated section applied to "front-end loaders."

The decision was affirmed by the Appellate Division, Third Department, which found that it is "the manner in which the equipment is being used rather than its name or label" which is to be the standard in assessing the applicability of a particular Code section.

In answering the question certified by the Appellate Division, the Court of Appeals agreed that Subpart 23-9 of the Code, which applies to "power-operated heavy equipment or machinery used in construction" extends to a front-end loader being used to construct a drainage pipeline. A front-end loader

is undeniably "power-operated heavy equipment." *St. Louis, supra*. The Court stated that the safety requirements set forth in section 23-9 extend to equipment enlisted to handle material otherwise performed by power shovels and backhoes. The Court of Appeals went on to state that:

Although the Code does not enumerate each piece of heavy equipment that can be operated to suspend materials from its bucket or bucket arm, § 23-9.4(e) was clearly drafted to reduce the threat posed by heavy materials from buckets by requiring loads to be fastened with sturdy wire, proportionate to the weight of the load. The same danger that exists for a worker using a power shovel or backhoe with an unsecured load exists for a worker using a front-end loader with an unsecured load.

In support of this finding, the Court cited to the testimony provided by the plaintiff's co-workers, who testified that they normally secured the materials in the bucket with a metal chain.

The Court of Appeals noted that the Industrial Code should be "sensibly interpreted and applied" to effectuate

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its purpose. The decision went on to state that “the preferred rule both as a matter of statutory interpretation and as a reinforcement of the objective of the Industrial Code is to take into consideration the function of a piece of equipment, and not merely the name, when determining the applicability of a regulation.” *Id.*

Significantly, three justices dissented. For the dissent, Justice Smith pointed out that in its decisions, the Court of Appeals has steadfastly held that, in order for an entity, which does not supervise or have direct control of the work, to be liable for a non-delegable duty imposed by the Labor Law, the injury must result from a violation of the “specific detailed rules” enumerated in the Industrial Code. He went on to state that the starting point for the analysis regarding whether a particular section sets forth a specific duty are the words of the regulation. Justice Smith pointed out that the majority’s decision disregarded the words of the regulations and rewrote the regulation in contravention of the long-standing tenets under which Labor Law cases are decided.

This decision creates a dangerous precedent. The trial courts now have a basis to take it upon themselves to rewrite the regulations set forth in the Industrial Code and apply the standards in a manner they see fit, regardless of the words set forth therein. Despite this decision, the defense bar must continue its vigilance and demand that the courts strictly interpret Industrial Code regulations and not expand the intent and application beyond the specific commands set forth by the commissioner of labor.

Contact

Gail L. Ritzert: 516-620-1710 or
gail.ritzert@hrrvlaw.com

Baseball Spectator’s Lawsuit Alleging Enhanced Dangers of Maple Bats Dismissed

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New York, however, is a “limited duty of care” state. This is a specialized duty of care that protects owners and operators of baseball stadiums from liability for spectator injuries caused by errant baseballs, bats and even promotional items that may enter the stands. The limited duty of care is satisfied when an owner or operator establishes that the requisite protected area was provided behind home plate (as it was in the Falzon case, although Falzon and his family conceded that they were not sitting in the protected area and that they did request seats in the protected area). Moreover, announcements and the language on the back of tickets to baseball games warn spectators about the possibility of bats and bat fragments (maple or otherwise) entering the stands.

In an effort to avoid the monolithic limited duty of care, Falzon advanced several arguments, including the argument that alleged enhanced danger presented by shattering maple bats was not a risk he assumed. Falzon also contended that the screened area should not just be limited to the area behind home plate, as that standard was outmoded given the current state of play. He further argued that because of the way that maple bats shatter, a spectator does not have adequate time to react and therefore faces an enhanced risk of injury.

Justice Anil C. Singh, sitting in Supreme Court, New York County, disagreed with these arguments and dismissed Falzon’s action against MLB, Sterling, Castillo and Castro. The court held that the issue was not whether maple bats are more likely to break than traditional ash bats—because the risk of injury to spectators who occupy unprotected areas remains the same. The court expressly declined to extend the limited duty of care or to require the owners and operators of a baseball stadium to protect additional areas of the ballpark with protective screening. The court also noted that to hold otherwise would essentially render them insurers of a spectator’s safety—a standard the court expressly declined to adopt. Falzon has stated that he will appeal the decision while his case against the bat manufacturer proceeds.

Contact

Carla Varriale, Jarett Warner and Hilary Levine represented the defendants.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Jarett L. Warner: 646-747-5104 or jarett.warner@hrrvlaw.com

Hilary R. Levine: 646-747-6778 or hilary.levine@hrrvlaw.com



HRRV DECISIONS OF INTEREST

Federal Court Dismisses Negligence Claim Finding No Breach of Duty

Ball v. MTV Networks On Campus, Inc.
U.S. District Court, Northern District of New York
7:08-cv-0944 (TJM)
May 23, 2011

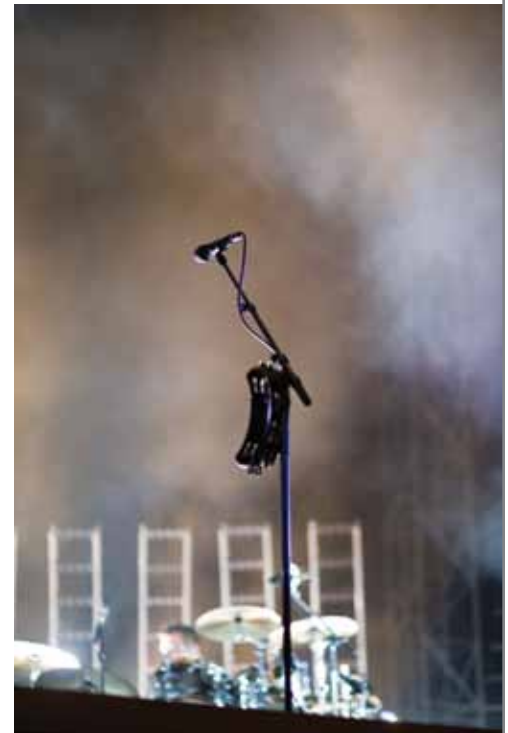
Plaintiff Malcomb Ball alleged that he sustained injuries while loading a ramp onto the trailer of a truck utilized in connection with a concert tour. The plaintiff was a concert tour truck driver employed by Upstaging Inc. and assigned to work the mtvU 2006 Campus Invasion Tour, produced by Live Nation for MTV. Ball's job included transporting equipment throughout the course of the tour. The State University of New York at Potsdam (SUNY Potsdam) was a stop on the tour. The plaintiff arrived at SUNY Potsdam on the morning of the concert. Four stagehands, all of whom were college students employed by Student Government Association of Potsdam (SGA), removed a metal ramp (among other concert-related equipment) from underneath the plaintiff's trailer. After the concert ended, the process of loading the equipment back into the trucks began.

While one of the trucks was being loaded, the plaintiff instructed three SGA stagehands to assist him in lifting a metal ramp off the ground and loading it on the rack located underneath a trailer. While they were walking with the ramp, the plaintiff was giving instructions to one of the stagehands as to how to properly carry it. Because of space constraints, the plaintiff instructed the stagehand to work his way toward the front of the ramp while holding on to it so it could be properly placed in the rack. Meanwhile, the plaintiff also was working his way up to the front of the ramp. The stagehand let go of the ramp, causing it to tilt to one side. The plaintiff maneuvered himself in a position so he could properly raise the ramp. As the plaintiff bent down to lift the ramp back up, he jerked it up. Before the plaintiff was able to get the ramp to a comfortable carrying position, the stagehands on the other end of the ramp started walking toward the plaintiff. During this process, the plaintiff lost his footing, his knee twisted, and he fell. The ramp came down on the plaintiff's right knee causing him injury.

The plaintiff commenced suit against MTV and Live Nation claiming that each was negligent in failing to use reasonable care in hiring, retaining, employing and/or the assigning trained and/or experienced personnel to assist in the loading of the concert equipment and in failing to properly supervise that personnel during the process of loading the equipment.

Among other things, the plaintiff argued that MTV and Live Nation were obligated to provide professional stagehands to assist in the unloading and loading of the concert equipment; and that the use of arguably inexperienced college students constituted a breach of duty.

Senior U. S. District Judge Thomas J. McAvoy, sitting in the U.S. District Court for the Northern District of New York, granted summary judgment for Live Nation and MTV, holding that "[a]ssuming, without deciding, that Defendants owed Plaintiff a duty of care . . . they did not breach any such duty." Rejecting the plaintiff's contention that the use of college students as stagehands supported a claim of negligence, Judge McAvoy noted that there was nothing in the record suggesting that the stagehands provided were not able-bodied or otherwise physically or mentally capable of maneuvering the equipment for purposes of unloading and loading it into the trucks. In finding that the plaintiff could not establish a breach of duty as a matter of law, Judge McAvoy noted that there was insufficient evidence in the record upon which a fair-minded finder of fact could reasonably conclude that the defendants had reason to know that the use of students as stagehands was likely to result in injury to the plaintiff or others.



Contact

Steven H. Rosenfeld and Carmen A. Nicolaou represented Live Nation and MTV.

Steven H. Rosenfeld: 646-747-5105 or
steven.rosenfeld@hrrvlaw.com

Carmen A. Nicolaou: 646-747-5106 or carmen.nicolaou@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Court Finds That Splish Splash Owes No Duty With Respect to an Open and Obvious Condition That is Readily Observed by the Reasonable Use of One's Senses

Manbasia Roopnarnine v. Splish Splash at Adventureland, Inc.
Supreme Court, Queens County
Index No. 8539/09
April 12, 2011

Justice Orin R. Kitzes, sitting in Supreme Court, Queens County, granted Splish Splash at Adventureland, Inc.'s motion for summary judgment. The plaintiff alleged that she sustained injuries as a result of a trip and fall on a raised tree/plant/branch adjacent to the sidewalk/walkway at Splish Splash water park on August 29, 2008.

Splish Splash argued that it did not owe a duty of care to the plaintiff because the alleged condition was not inherently dangerous as a matter of law and was open and obvious. Splish Splash also argued that it did not breach any duty of care owed to the plaintiff and that the plaintiff was unable to establish the element of proximate cause. In support of its motion for summary judgment, Splish Splash submitted the plaintiff's deposition testimony, which indicated that she arrived at the park picnic area and that her husband parked their van so that the alleged dangerous condition (the tree branch or bush) was directly behind the van. The plaintiff conceded that she saw the tree branch or bush upon arrival and in fact walked in its surrounding area on her way into the water park. The plaintiff further admitted that, prior to the incident, she did not observe any garbage or debris in the area around the bush and that her vision of the area was not obstructed in any manner. The plaintiff herself was unaware of what caused her to fall and only later learned from family members. She also testified that she had frequented the water park on prior occasions and was not aware of any complaints regarding tree branches near the parking lot.

Splish Splash produced testimony from its general manager to demonstrate the lack of prior complaints or similar accidents in the picnic area. Furthermore, he testified that the area of the plaintiff's accident was a planter that is about 20 feet wide and 100 feet long, which was filled with "natural" conditions such as trees and bushes and were maintained on a daily basis. Finally, Splish Splash produced photographs of the purported area, which indicated that the bush and roots were clearly visible to observers.

The plaintiff opposed Splish Splash's motion and argued that the purported condition, identified for the first time by the plaintiff's expert as a juniper, was inherently dangerous and not open and obvious. The plaintiff relied on her expert's affidavit, who argued that Splish Splash did not adhere to proper horticulture procedures and provide proper maintenance for the juniper. The plaintiff also produced an affidavit regarding a description of the purported condition that she alleges caused her to fall. Finally, the plaintiff argued that Splish Splash's motion was premature as the plaintiff had not conducted the deposition of Splish Splash's head landscaper.

The court held that there is no duty to warn against a condition that can be readily detected by reasonable use of the senses. It noted that the plaintiff failed to demonstrate that the tree branch or bush was in any way obscured so as not to be open and obvious or that it was somehow inherently dangerous due to its particular characteristics. The court also noted that the plaintiff's affidavit submitted in opposition, for the first time mentioned that she fell over a bush, while her prior testimony stated otherwise.

The court further held that the plaintiff's expert witness did not raise an issue of fact since his examination of the tree branch or bush occurred over one year after the alleged incident, and there was no indication that the condition of the subject area was the same as it was at the time of the incident. Significantly, the court noted that the plaintiff's expert failed to cite any law, rule, regulation or even industry standard that reflects his conclusion that the subject area failed to follow the standard of care in landscape design. Finally, the court held that Splish Splash's motion was not premature as it had produced a witness with sufficient knowledge, a fact that was not contested by the plaintiff's counsel. The plaintiff's counsel failed to note what information the landscaper could provide and, as such, held the mere hope that discovery would reveal something. The court ruled that is not basis for denying Splish Splash's motion for summary judgment.

Contact

Carla Varriale, Jarett Warner and Hilary Levine represented Splish Splash at Adventureland, Inc.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Jarett L. Warner: 646-747-5104 or jarett.warner@hrrvlaw.com

Hilary R. Levine: 646-747-6778 or hilary.levine@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Claim of Injury in Manhattan Half-Marathon Dismissed Based on Release

Zuckerman v. New York Road Runners, Inc.
Supreme Court, County of New York
Index No. 105044/10
February 18, 2011

Plaintiff Jonathan Zuckerman alleged that he slipped and fell on January 25, 2009, while participating in the Manhattan Half-Marathon. The plaintiff filed a summons and verified complaint against defendants New York Road Runners, Inc. (NYRR) and Road Runners Club of America, Inc. (RRCA). According to the verified complaint, the plaintiff alleged to have slipped on a slippery substance that he believed to be ice when he moved off of the race course to fix his shoelace. The plaintiff alleged that NYRR and RRCA were negligent in failing to provide adequate areas for participants to exit the race course. The plaintiff also sued the City of New York and New York City Department of Parks and Recreation.

NYRR and RRCA moved for summary judgment on the grounds that the plaintiff executed an electronic waiver before he was able to register for the race. The electronic waiver stated that by entering the race he assumed all risks associated with participating in the event, including, but not limited to, falls. NYRR produced evidence in support of the motion

establishing that it was impossible for an individual, more specifically the plaintiff herein, to have completed the registration for the Half-Marathon without clicking the dialogue box, accepting the electronic waiver.

Moreover, a review of NYRR's records revealed that the plaintiff had registered and participated in NYRR events since 1999. Over the last four years alone, the plaintiff had participated in more than 26 NYRR races, each time agreeing to the electronic waiver on NYRR's website. Thus, NYRR and RRCA argued that the plaintiff knew and appreciated the language contained in the waiver.

RRCA argued that in the alternative, the plaintiff's complaint must also be dismissed because RRCA had no involvement with the organization or execution of the Manhattan Half-Marathon in general.

The Supreme Court of the State of New York granted the motion, dismissing the complaint against NYRR and RRCA.

Contact

Carla Varriale and Deborah Peters Jordan represented New York Road Runners, Inc. and Road Runners Club of America, Inc.
Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com
Deborah Peters Jordan: 646-747-5133 or deborah.jordan@hrrvlaw.com



HRRV DECISIONS OF INTEREST

Reversal Leads to Dismissal of Cycling Claim Based on Release

Schwartz v. Martin
Appellate Division, Second Department
Index No. 2010-08318
March 3, 2011

The Appellate Division, Second Department has reversed the order of Supreme Court, Kings County denying a motion for summary judgment on behalf of Century Road Club Association (CRCA), USA Cycling, Inc., and granting the plaintiff's motion to amend the complaint to add as defendants the City

of New York and the New York City Department of Parks and Recreation.

The plaintiff was a CRCA member and volunteer race marshal, who had signed a series of releases over three years. Approximately two months after signing the latest release, the plaintiff was acting as a marshal at a CRCA race in Central Park, which was a required condition to participating in CRCA club races in Central Park. During the race, the plaintiff allegedly was struck and injured by a bicycle ridden by the defendant Terence Martin, who was not participating in the race.

The court held that the releases clearly and unequivocally expressed the intention of the parties to relieve USA Cycling, CRCA, the City of New York and the New York City Department of Parks and Recreation of liability for their own negligence. The court also held that the releases did not violate General Obligations Law § 5-326, noting that although the plaintiff purchased a racing license from USA Cycling, he did not pay a fee to use Central Park.

As such, the court (1) dismissed the complaint as against CRCA and USA Cycling and (2) denied the plaintiff's motion for leave to amend the complaint to add the City of New York and the New York City Department of Parks and Recreation as defendants. In doing so, the court enforced the releases signed by the plaintiff and held that the alleged acts of the moving defendants did not rise to the level of intentional wrongdoing or evince a reckless indifference to the rights of others (the standard for establishing a claim for gross negligence).

In light of its determination, the court also held that the Supreme Court erred in granting the plaintiff's motion for leave to amend the complaint to add the City of New York and the New York City Department of Parks and Recreation as defendants, as the proposed amendment was patently devoid of merit.

Contact

Steven H. Rosenfeld and Carmen A. Nicolaou represented Century Road Club Association, USA Cycling, Inc., the City of New York and the New York City Department of Parks and Recreation.

Steven H. Rosenfeld: 646-747-5105 or steven.rosenfeld@hrrvlaw.com

Carmen A. Nicolaou: 646-747-5106 or carmen.nicolaou@hrrvlaw.com



The court enforced the releases signed by the plaintiff and held that the alleged acts of the moving defendants did not rise to the level of intentional wrongdoing or evince a reckless indifference to the rights of others (the standard for establishing a claim for gross negligence).

HRRV DECISIONS OF INTEREST

Court Favors Splish Splash Saying Plaintiff Did Not Support Negligence Claim

Abayev v. Splish Splash at Adventureland, Inc.
 Supreme Court, New York County
 Index No. 24549/08
 April 5, 2011

Infant plaintiff Rafael Abayev allegedly sustained injuries while a patron at the Splish Splash water park. The infant plaintiff alleged that he and his family were on a queue line for a ride when he decided to leave the line to play in water coming from some fountains. To get to the fountains, the infant plaintiff testified that he climbed over chains and under metal bars to enter the fountain area. After splashing water on himself, his parents called the infant plaintiff to come back to the ride queue line. The infant plaintiff stepped back over the chains and went under the metal bars to return to his family. It was not until he was back in the presence of his family that he looked down and noticed that he had cut his leg. He testified that he did not know how or where he was cut. His mother also testified that she did not know how or where her son was injured.

The plaintiffs filed suit against Splish Splash alleging that it was negligent in its ownership and operation of the water park. It was undisputed that the area where the fountains were located was a decorative area off limits to the general public.

Splish Splash at Adventureland, Inc. moved for summary judgment on the grounds that: there was no evidence that any defective condition existed, it did not create or have notice of any alleged condition, and that the plaintiffs failed to establish that Splish Splash's alleged negligence was the proximate cause of the incident.

The Supreme Court of the State of New York granted Splish Splash's motion, holding that the plaintiffs did not establish: what alleged condition caused the infant plaintiff to be injured, that the alleged condition was defective, that Splish Splash created or had notice of any alleged condition, and that the plaintiffs' testimony did not support the plaintiffs' claim that Splish Splash's alleged negligence was the proximate cause of the incident.

Contact

Carla Varriale and Deborah Peters Jordan represented Splish Splash at Adventureland, Inc.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Deborah Peters Jordan: 646-747-5133 or deborah.jordan@hrrvlaw.com

Court Finds Nightclub is Not Responsible for a 'Negligent Assault' or for the Acts of a Contracted Security Company, Determined to Be an Independent Contractor

Iakovos Papapoulos v. Paramount Security and JMED Holdings LLC
 Supreme Court, Queens County
 Index No. 21214/08
 April 5, 2011

Iakovos Papapoulos was a patron at Pacha nightclub on September 16, 2007, at which time he was allegedly involved in an altercation with a ticket taker and subsequently assaulted by a security guard, an employee of Paramount Security. The plaintiff argued that Pacha was negligent in permitting the assault, negligently supervised the security company and its employees and violated General Obligations Law § 11-101 (Dram Shop Act).

After extensive discovery, HRRV moved for summary judgment on behalf of JMED Holdings, which does business as Pacha, on the basis that the plaintiff failed to state a cause of action. JMED argued that the plaintiff improperly attempted to couch an intentional assault claim as one for negligence. To the contrary, the plaintiff's deposition testimony supported a claim based upon an assault by a Paramount Security guard. The court agreed and determined that the plaintiff pled a cause of action for assault and that "negligent assault" causes of action do not exist in New York because "once intentional offensive [contact] has been established, the actor is liable for assault and not negligence."

Addressing the negligent supervision claim, the court held that JMED, as an employer, which hired Paramount Security, an independent contractor, is not liable for the independent contractor's negligent acts. The plaintiff failed to demonstrate any exceptions to the general rule.

The court also dismissed the Dram Shop claim, as the plaintiff did not contest JMED's argument that it did not violate the Dram Shop Act.

Contact

Steven Rosenfeld and Gregg Scharaga represented JMED Holdings.

Steven H. Rosenfeld: 646-747-5105 or steven.rosenfeld@hrrvlaw.com

Gregg Scharaga: 646-747-5113 or gregg.scharaga@hrrvlaw.com

HRRV DECISIONS OF INTEREST

HRRV Secures Victory on Motion to Dismiss for Suffolk County Water Authority

Anello v. Suffolk County Water Authority
 Supreme Court, Suffolk County
 Index No. 24441/08
 February 11, 2011

Utilizing an aggressive defense under the General Municipal Law and a well-timed motion to dismiss, HRRV lawyers successfully extracted the Suffolk County Water Authority from a suit filed by a pedestrian plaintiff who was seriously injured after falling into an allegedly defective water vault. In a written decision that constituted a warning to claimants who commence suits at their own risk without following Municipal Law procedure, Judge Paul J. Baisley of the Supreme Court of Suffolk County dismissed all claims against the Authority in a hotly contested motion.

The plaintiff, Ricky Anello, sustained severe leg and hip injuries on April 6, 2007, when he allegedly fell into a broken and defective water vault. Claiming that the Suffolk County Water Authority had failed to properly maintain the vault, the plaintiff brought suit against the Authority and several adjacent property owners.

Prior to commencement of the suit, and after the plaintiff filed a notice of claim against the Authority, HRRV lawyers demanded that the plaintiff submit to an examination under Municipal Law Section 50-h to give testimony regarding his claims. After adjourning the examination several times and failing to appear at the examination, the plaintiff filed suit in Suffolk Supreme Court. In response, HRRV moved to dismiss the complaint under CPLR 3211 arguing that the plaintiff had failed to comply with prerequisites of the Municipal Law Section 50-h(5), rendering his complaint jurisdictionally defective. In opposition, the plaintiff contended that the Authority had waived its right to conduct an examination of the plaintiff and failed to preserve its rights under the General Municipal Law.

Observing that HRRV lawyers had diligently and meticulously documented their efforts to preserve the Authority's statutory rights to an examination, Judge Baisley rejected the plaintiff's attempts to circumvent the law and reaffirmed the established rule that a potential plaintiff who does not comply with the mandates of the Municipal Law is precluded from commencing suit against a governmental authority. The court granted the motion in its entirety and dismissed all claims against the Suffolk County Water Authority.

Contact

Sean P. Dwyer represented the Suffolk County Water Authority.
 Sean P. Dwyer: 516-620-1720 or sean.dwyer@hrrvlaw.com



1065 Avenue of the Americas
 Suite 800
 New York, New York 10018
 212-488-1598
 212-564-0203 Facsimile

114 Old Country Road
 Suite 300
 Mineola, New York 11501
 516-620-1700
 516-746-0833 Facsimile

50 Main Street
 10th Floor
 White Plains, New York 10606
 914-682-2636
 914-560-2245 Facsimile

www.hrrvlaw.com

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