Notable Cases in the Appellate Courts in 2007

By David A. Glazer

This year, the publications have discussed a variety of important subjects that are of note to the Torts, Insurance and Compensation Law Section of New York State Bar Association. This article discusses how the courts addressed the duty of common carriers, post–note of issue interviews with doctors in medical malpractice cases, requirements for an insurer's duty to defend, high-low agreements, Labor Law § 240, legal malpractice, and premises liability.

Post–Note of Issue Interviews with Doctors in Medical Malpractice Cases

In two different Appellate Division cases, both the Second Department and the Fourth Department have held that defense counsel may not compel plaintiffs to consent to private interviews of non-party treating physicians after a note of issue has been filed.[1] In *Arons*, plaintiffs refused to execute authorizations which would permit defense counsel to informally and privately interview non-party treating physicians who rendered care to the plaintiff-decedent. A defendant moved to compel the production of the authorizations. The Supreme Court granted the motion and directed plaintiffs to provide the authorizations permitting such interviews.

The Second Department held that private interviews of non-party treating physicians are a form of disclosure beyond the scope of CPLR Article 31 and the Uniform Rules. After the filing of a note of issue, a court's authority to allow additional pretrial disclosure is limited to a party's demonstration of "unusual or unanticipated circumstances."[2] Unlike the production of medical reports and hospital records, there is no statutory or regulatory authority which requires a plaintiff to execute authorizations permitting *ex-parte* interviews between their treating physicians and defense counsel.

Following the Second Department's decision in *Arons v. Jutkowitz*, the Fourth Department held that defense counsel may not compel plaintiffs to execute HIPAA-compliant authorizations to grant access to non-party treating physicians for private interviews and enunciated four reasons. First, "there are no provisions in the law permitting such informal disclosure."[3] Second, formal discovery procedures allow "on the record" discussion with witnesses in the presence of the adversary. Third, although a person's medical history is placed at issue when he or she commences an action, access to that medical history is not without boundaries. Unsupervised *ex-parte* interviews with treating physicians may result in the intentional or inadvertent revelation of irrelevant aspects of a person's medical history. Finally, there is no reason to allow discovery after the note of issue is filed when it is not permitted prior to the filing of a note of issue. However, there was a dissent in the Fourth Department. As such, this issue may not yet be fully decided.

Duty to Defend Additional Insureds

In *BP Air Conditioning Corp. v. One Beacon Insurance Group*, [4] the Court of Appeals held that an insurance carrier is obligated to provide a defense for an additional insured as well as a primary insured where the underlying tort action triggers coverage under the policy. This obligation to defend an additional insured applies even if there are other claims that might fall outside the coverage. This obligation occurs even if the other claims are in fact the primary claims in the underlying action where the client invoking coverage is based on a minor claim. Thus, an additional insured must be treated as if it is a primary insured for purposes of a defense.

In 2000, the general contractor subcontracted the HVAC work to BP Air Conditioning Corp., which then subcontracted the HVAC-related steamfitting work. The subcontract contained an indemnification and hold-harmless clause which named BP as an additional insured on the subcontractor's policy issued by defendant One Beacon Insurance Group. In December 2000, an employee of a subcontractor hired by BP was allegedly injured when he slipped and fell on an oil slick at the worksite. The plaintiff sued the general contractor, who then brought a third-party action against BP and the subcontractor. BP tendered its defense to One Beacon, which declined to defend BP although it defended the subcontractor.

BP moved for partial summary judgment against One Beacon. The Supreme Court granted BP's motion to the extent that One Beacon is obligated to defend BP in the underlying tort action. However, the court declined to declare that One Beacon was primarily responsible for BP's defense costs. The Appellate Division modified the Supreme Court's order, holding that One Beacon must provide BP a defense in the underlying action and that the coverage is primary over BP's policy, which would now be treated as excess.

The Court of Appeals held that additional insured coverage is not contingent upon a liability finding and that the obligation of an insurer to provide a defense to an additional named insured under the policy exists to the same extent as it does to a named insured. The Court reinstated the order of the Supreme Court and determined that One Beacon was obligated to provide BP a defense in the underlying lawsuit, regardless of the merits of the

claim. Furthermore, and more importantly, the Court of Appeals held that because the other policies were not presented to the court, the Appellate Division was wrong in deciding that the One Beacon policy would be primary over BP's own policy. Thus, the courts must look to the language of all the contracts to determine whether or not shards would exist, or whether or not one of the respective policies would be primary over the other.

High-Low Agreements

The Court of Appeals held in *In re Eighth Judicial District Asbestos Litigation*[5] that whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of that agreement and its terms to the court and the non-agreeing defendants.

The high-low agreement stipulated that the plaintiff would be paid at least $155,000 at trial on the low side with a high side of $185,000. While the Supreme Court knew of this agreement, but not the terms or amounts involved, it did not disclose the agreement to the other defendant. The trial resulted in an any damages verdict of $3,750,000. The defendant who made the agreement thus had to pay only $185,000 while the non-agreeing defendant had to pay the remainder.

The Court of Appeals held that the Supreme Court erred in failing to disclose to all the parties the existence of a high-low agreement between plaintiffs and one of the defendants because it prejudiced the determination of the rights and liabilities of the non-agreeing defendant at trial, which was deprived of its right to a fair trial and the opportunity to seek appropriate procedural and evidentiary rulings from the trial court. In particular, the Court of Appeals noted that the high-low agreement appeared to be a trial tactic on the part of the plaintiff at the expense of the non-agreeing defendant. As such, the very nature of the agreement prejudiced the rights of the non-agreeing defendant.

Labor Law § 240(1)

The Court of Appeals held in *Broggy v. Rockefeller Group, Inc.*[6] that cleaning qualifies as an independent category of work but falls within the elevation-related risks protected by the "scaffold law." As such, the act of cleaning does not require that it be part of an alteration or contraction project in order to qualify for the protections of Labor Law § 240. In fact, the court concluded that "cleaning" is an entirely discrete item that qualifies for its own protections under Labor Law § 240. This holding effectively expands the number of claims that can fall within the purview of Labor Law § 240.

The plaintiff in this action was part of the window cleaning crew at Rockefeller Center. He was cleaning the inside of the windows while others were cleaning the outside. He was using a squeegee with an extended pole so that he could clean the top of these tall windows. When one of his co-workers decided that he needed to go inside, the plaintiff lifted one of the windows from the bottom. Unfortunately, the window did not stay up and the plaintiff tried to get out of the way of the closing window. The Court of Appeals held that while Labor Law § 240 did in fact apply to the plaintiff, the plaintiff failed to establish a claim because the accident did not occur from a gravity-related risk.

Legal Malpractice

In *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*,[7] defendant law firm was retained to represent plaintiff in an automobile accident case in which plaintiff was a pedestrian and was struck at an intersection controlled by a traffic signal. Defendants requested the jury to be charged with VTL § 1151, which addresses intersections without traffic signals and imposes a duty on pedestrians not to dart into the path of an oncoming vehicle. The jury returned a verdict of $255,000, to be reduced by half to reflect plaintiff's comparative negligence in accordance with VTL § 1151. Plaintiff then retained another law firm for the second trial in which the jury determined that the driver was solely responsible for the accident and the parties settled for $750,000. Plaintiff then brought a malpractice suit against defendants, alleging that they were negligent in failing to request VTL § 1111, the statute regarding intersections regulated by traffic signals and granting pedestrians facing any green signal the right of way in an intersection, to be charged to the jury in the first trial.

Defendants did not dispute that they were negligent in requesting § 1151 in light of the evidence that the intersection at issue was controlled by a traffic light. Plaintiff incurred litigation expenses totaling $28,703.27 to correct defendants' error and to hire experts for the retrial. The Court of Appeals held that plaintiffs were entitled to consequential damages of the same amount.

Duty of Common Carriers

In *Bingham v. New York City Transit Authority*,[8] the plaintiff tripped and fell over metal strip covering the outer edge of a step on a subway station stairway. She sued the New York City Transit Authority and the Metropolitan Transportation Authority, claiming that they failed to maintain the stairway in a safe condition and failed to provide notice or warning of the stairway defect.

The Court of Appeals reiterated that common carriers have a duty of care not only for the maintenance of trans-

portation vehicles, but also regarding the safe maintenance of means of ingress and egress for passengers. The Court further held that where a stairway or approach is "primarily used as a means of access to and egress from the common carrier, that carrier has a duty to exercise reasonable care to see that such means of approach remain in safe condition or, where appropriate, to take such precautions or give such warnings as would protect those using such area against unforeseen danger."[9] Whether the means of approach is used primarily for ingress and egress from the common carrier would be a factual question. The stairway in question was found to be used for such a purpose, and "defendants had a duty to maintain the stairway or to warn patrons of any dangerous condition." Even if another entity possessed the responsibility to maintain the stairway, defendants still retained their responsibility to at least warn passengers of the hazard.

Premises Liability

The Court of Appeals has held in *Clementoni v. Consolidated Rail Corporation*[10] that a landowner has no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the landowner has created or contributed to it. Plaintiff's vehicle collided with a train. Plaintiff was driving across railroad tracks at an unmarked grade crossing intersecting a private road owned by defendants. The rail company owned the tracks and the right of way in which they were centered. The adjacent landowner defendants owned property bordering the right of way. Plaintiff alleged that the adjacent landowners negligently failed to warn him of oncoming trains by failing to put signs, gates or warning signals at the crossing. Plaintiff alleged that the property obstructed his view of oncoming trains.

The Court of Appeals held that the adjacent landowners did not create or contribute to the hazard of oncoming trains because the railroad crossing existed before they purchased the property. They also had no reason to expect that plaintiff would not observe the crossing. The Court further held that a landowner is not generally liable for the existence of uncut vegetation obstructing the view of motorists at an intersection. As such, this case appears to eliminate claims that a property owner's landscaping, which may obstruct a vehicle's view of an intersection, is not a valid basis for a claim of negligence.

Endnotes

1. *Arons v. Jutkowitz*, 37 A.D.3d 94, 825 N.Y.S.2d 738 (N.Y. A.D. 2d Dep't 2006); *Kish v. Graham*, 40 A.D.3d 118, 833 N.Y.S.2d 313 (N.Y.A.D. 4th Dep't 2007).
2. 22 N.Y.C.R.R. § 202.21(d).
3. *Kish v. Graham*, 40 A.D.3d at 123.
4. 8 N.Y.3d 708, 871 N.E.2d 1128 (2007).
5. 8 N.Y.3d 717, 872 N.E.2d 232 (2007).
6. 8 N.Y.3d 675, 839 N.Y.S.2d 714 (2007).
7. 8 N.Y.3d 438, 867 N.E.2d 385, 835 N.Y.S.2d 534 (April 26, 2007).
8. 8 N.Y.3d 176, 864 N.E.2d 49, 832 N.Y.S.2d 125 (2007).
9. *Id.*, 864 N.E.2d at 52.
10. 8 N.Y.3d 963, 868 N.E.2d 187, 836 N.Y.S.2d 507 (2007).

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