LEGAL NEWS IN BRIEF

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RES IPSA LOQUITUR

Mayer v. Once Upon a Rose, Inc.
New Jersey Appellate Division
Docket No. A-2922-11T3
(January 30, 2013)

The res ipsa loquitur doctrine allows for an inference of negligence when the occurrence itself ordinarily bespeaks negligence; the instrumentality causing the injury was within Defendant's exclusive control; and there is no indication in the circumstances that the injury was the result of Plaintiff's own voluntary actions. Plaintiff had filed suit for injuries sustained when attempting to assist a florist lifting a glass vase, which shattered onto Plaintiff's hands. The trial court dismissed the claim on the grounds that Plaintiff had not provided an expert witness to support his inference of res ipsa loquitur.

Reversing the dismissal, the Appellate Division held that expert testimony is required only where such an inference falls outside the common knowledge of the factfinder and depends on scientific, technical or other specialized knowledge. Such specialized knowledge less likely applies to complex instrumentalities, such as a malfunctioning elevator or automatic door, than to issues of professional liability which implicate a complex standard of care. As laypeople can reason well enough that excessive pressure on glass can cause it to shatter, Plaintiff did not need an expert witness. ■

ASSUMPTION OF RISK

Custodi v. Town of Amherst
New York Court of Appeals
20 N.Y.3d 83
(October 30, 2012)

The Court of Appeals permitted Plaintiff to pursue her personal injury suit arising out of her fall while rollerblading, tripping over a two-inch high differential between a driveway and a drainage culvert. Defendants invoked the assumption of risk doctrine, an erstwhile-absolute defense modified in CPLR 1411, which now reduces the damages recoverable. Subsequent case law has confirmed that "primary assumption of risk," applied to certain types of athletic or recreational activities, still bars recovery. However, the case law applies to voluntary risk-taking activities in designated sporting venues rather than mere access to public or private premises. ■

AMBIGUOUS POLICY TERM

Dean v. Tower Ins. Co.
New York Court of Appeals
19 N.Y.3d 704
(October 25, 2012)

Plaintiffs sued for coverage pursuant to their homeowner's policy after their purchased house burned down. The Plaintiffs acquired the policy during the course of contracting for the house. Having discovered termite damage, Plaintiffs were in the process of conducting repairs when the fire occurred. Tower disclaimed coverage on the grounds that the dwelling did not constitute a "residence premises," per the policy. The Court held that "residency" was an ambiguous term that could equate with occupancy, which might be satisfied by the homeowner's use – here, frequenting

the premises at least five days a week, eating there regularly and sleeping there on occasion, with the intent of eventually moving in with his family. Thus, the Court reversed summary judgment, as whether the policy's residency requirement was met was an issue of fact. ■

POLICY EXCLUSION

Bentoria Holdings v. Travelers Indemnity Co.
New York Court of Appeals
20 N.Y.3d 65
(October 25, 2012)

The Court of Appeals favored the insurer of a policy which excluded coverage for building damage caused by "earth movement…whether naturally occurring or due to man made or other artificial causes." Readily applying precedent which had held an "earth movement," without further language, was an ambiguous term, the Court found the additional language in the policy at hand specific enough to disclaim coverage for damage caused by excavation. ■

TOLLING OF SOL

Fuqua v. Bristol-Myers Squibb Co.
U.S. District Court, D.N.J.
2013 U.S. Dist. LEXIS 20557
(February 15, 2013)

Plaintiffs filed a series of wrongful death lawsuits arising out of alleged exposure to substances emitted by Defendant's facility. In response to Defendant's application to dismiss the claims on SOL grounds, Plaintiffs argued for equitable tolling of their otherwise time-barred claims.

The District Court first addressed the discovery rule, which operates "when injured parties reasonably are unaware that they have been injured or, although aware of an injury, do not know that the injury is attributable to the fault of another." Here, the discovery rule cannot apply to the wrongful death statute, which set forth a limitations provision "based upon a fixed objective event," i.e. death.

The District Court then addressed the issue of possible tolling when a defendant makes conscious efforts to conceal the circumstances surrounding the underlying cause of action, until such time as the claimant discovers or should know of the wrong. Because Plaintiffs failed to allege specifics of such concealment, as required by Federal Rule of Civil Procedure (FRCP) 9(b), the Court dismissed their claims. ■

CONSTRUCTIVE NOTICE

Hillman v. Township of Montclair
New Jersey Appellate Division
Docket Nos. A-1652-11T2; A-1653-11T2
(January 3, 2013)

Plaintiff sued both the adjacent landowners and the Township after a trip and fall in June, 2009, on an uneven sidewalk where a tree root's growth had elevated a sidewalk slab by several inches. In 1991, shortly after purchasing their residence, the landowners contracted to replace the adjacent sidewalk and planted a tree between the sidewalk and the curb. By early 2009, the landowners observed that the sidewalk had risen above its prior level; after the accident, an arborist estimated that the tree root had elevated the sidewalk for at least two to three years.

The appellate court upheld summary judgment for the landowners, on the grounds that residential landowners must have created the defect in a public sidewalk to be held liable. Here, there was no evidence that the landowners' installation in 1991 was performed negligently. The Appellate Division did, however, reverse summary judgment for the Township. The Tort Claims Act provides for limited liability where a public entity has constructive notice of a dangerous condition, imputed when the condition exists for a sufficient time and is obvious enough that the entity should have discovered the condition. Here, the sidewalk's raised condition dated as recently as several months, and as long as several years. ■

FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

Marx v. General Revenue Corp.
U.S. Supreme Court
No. 11-1175
(February 26, 2013)

FRCP 54(d)(1) sets forth that "[u]nless a federal statute…provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." FDCPA §1694k(a)(3) provides that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." The Court held that even where bad faith and harassment are absent in a given suit under the FDCPA, the trial court still has discretion to award costs. ■

Coming Attractions:

Our next issue will feature a recent case in which the New Jersey Appellate Division addressed proving Dram Shop Liability with circumstantial evidence.