LEGAL NEWS IN BRIEF

News in a Flash for Subrogation and Insurance Professionals

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"LESSER OF TWO"

NY Cent. Mut. Ins. Co. v. Topbuild Home Servs., Inc.
U.S. Dist. Ct., E.D.N.Y.
2:17-cv-2051(DRH)(AKT)
(April 24, 2019)

A homeowner's insurance carrier filed suit for subrogation of damage to the property caused by Defendant's negligent insulation. Defendant moved for partial summary judgment on the issue of damages, arguing for application of the "lesser of two" doctrine, whereby Plaintiff is awarded the lesser of (1) the difference between the property's market value before and immediately after it was damaged (i.e. "diminution in value"); or (2) the reasonable cost of repairs necessary to restore it to its original condition. The Court held that the doctrine applies to subrogation actions for negligent destruction of real property. To allow Plaintiff to recover for its full reimbursement, including installation of premium finishes and upgrades to the property, which substantially increased the property's value, would undermine the longstanding rule that a subrogor recovers no greater amount than its insured himself could from the tortfeasor, i.e. diminution of value. Additionally, to rule otherwise would subject the tortfeasor to differing amounts of liability based on whether the homeowner was insured. ■

ATTORNEY WORK PRODUCT

Paladino v. Auletto Enterprises, Inc.
NJ Appellate Division
A-0232-18T1; ___ N.J. Super. ___ 2019 N.J. Super. LEXIS 81
(June 6, 2019)

The Appellate Division referenced R. 4:10-2(c) in analyzing whether certain materials sought were discoverable. First, the court must determine whether the materials were prepared or collected in anticipation of litigation or trial by another party or that party's representative. If they were, then the party seeking the materials must (1) show a substantial need for the discovery; and (2) demonstrate that he or she is unable, without undue hardship, to obtain the substantial equivalent of the materials. Even in the event that such work-product materials are compelled to be produced, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The Court remanded the case due to insufficient information on the record to make a determination as to the second part of the test. However, the Court was able to at least determine that an insurance investigator's photographs of the scene of the underlying accident could be discoverable to Plaintiff if there was a change in the scene prior to the photographs taken by Plaintiff's counsel of the same location. Additionally, witness statements need not be discoverable if Plaintiff has the opportunity to depose such witnesses, unless the witnesses are no longer able to recall the underlying facts. ■

"TANGIBLE PROPERTY"

Estate of Keppel v. Angela's Angels Home Healthcare
NJ Appellate Division
A-3868-17T1; 2019 N.J. Super. Unpub. LEXIS 1068
(May 9, 2019)

Defendant sought coverage from its CGL carrier after its employee misappropriated 192 checks. Under the insurance policies, Nautilus was obligated to pay for "property damage," which was defined therein as either "[p]hysical injury to tangible property, including all resulting loss of use of that property[,]" or "loss of use of tangible property that is not physically injured." The Appellate Division upheld summary judgment in favor of Nautilus, on the grounds that New Jersey law holds that money is not tangible property. Although checks may themselves be tangible, they are only a medium of exchange, have no intrinsic monetary value, and suffer no injury upon being cashed by the wrongdoer. ■

NO RECOVERY FOR INJURIES WHEN OPERATING AN UNINSURED VEHICLE

DeGennaro v. Chapman
NJ Appellate Division
A-4782-17T3; 2019 N.J. Super. Unpub. LEXIS 1544
(July 8, 2019)

Plaintiff unsuccessfully appealed summary judgment against him in his suit for personal injuries in an automobile accident. At the time of the accident, Plaintiff was operating a vehicle owned by his former girlfriend, with whom he lived in Texas for two years before moving to New Jersey. He did not have a valid driver's license at the time of the accident and his girlfriend's vehicle was not insured or registered in NJ; the vehicle's previous coverage was cancelled one month before the accident. N.J.S.A. 39:6A-4.5(a) prohibits recovery for economic or non-economic loss sustained as a result of an accident while the claimant is operating an uninsured automobile. Lack of title ownership aside, the Court determined that Plaintiff was the true owner due to his possession and control of the automobile. Despite residing in NJ for approximately eight months prior to the accident, operating and maintaining the vehicle during that time, Plaintiff is subject to N.J.S.A. 39:6A-4.5(a) and failed to comply with same. ■

REASONABLE EXPECTATION

Hamilton v. Galati
NJ Appellate Division
A-5462-16T1; 2019 N.J. Super. Unpub. LEXIS 1065
(May 9, 2019)

In this action for injuries resulting from a dog bite at the owner's home, the dog owner's parents had previously purchased her home for her and had sought applicable homeowner's insurance while the daughter was moving into the property. The insurance agent explained to the mother that she could not obtain homeowner's insurance because she did not herself live on the property; all she could procure was a dwelling/fire policy which would only cover herself and her husband. Although the agent told the mother that her daughter should get renter's insurance, which would have provided property liability coverage even for a homeowner, the daughter did not obtain any other coverage. Upon appeal, the Court found no ambiguity in the policy, which clearly stated in capital letters that it was not a homeowner's policy, and which did not include the daughter, a non-household member, as an insured. Although the parents argued that the agent could have added the daughter as an "additional insured" to their policy, the agent did not owe a fiduciary duty to the daughter, and was not obligated to so advise them as to coverage for their daughter. ■

"ADDITIONAL INSURED"

Comcast of Garden State, LP v. Hanover Ins. Co.
NJ Appellate Division
A-3245-17T4; 2019 N.J. Super. Unpub. LEXIS 1584
(July 10, 2019)

Comcast sued for Hanover's defense in an action against Comcast for personal injuries arising out of Comcast's placement of a temporary cable on the property where the claimant fell. Hanover prevailed on appeal, on the grounds that the policy which Comcast's contractor JNET had with Hanover did not provide coverage for Comcast's direct negligence unrelated to JNET's work as opposed to vicarious liability based on JNET's own work. Accordingly, Comcast was an "additional insured" only with respect to JNET's work. ■

BRIEF LATIN

Sua sponte: literally "of its own accord"; refers to an action of authority taken by the court without formal application by any party for such action.