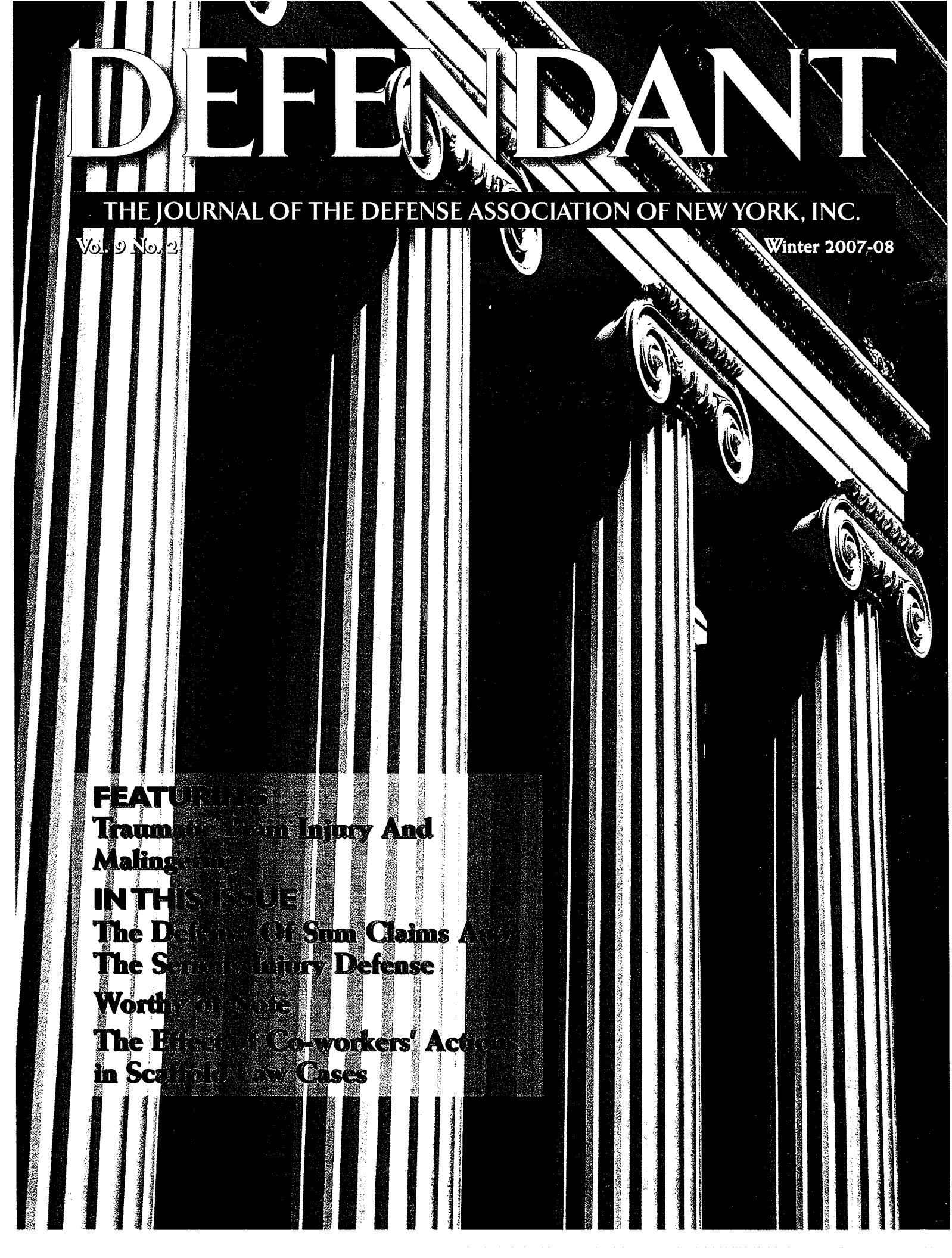
DEFENDANT

THE JOURNAL OF THE DEFENSE ASSOCIATION OF NEW YORK, INC.

Vol. 9 No. 2 Winter 2007-08



FEATURING

Traumatic Brain Injury And Malingering

IN THIS ISSUE

The Defense Of Sum Claims Act

The Serious Injury Defense

Worthy of Note

The Effect of Co-workers' Actions in Scaffold Law Cases

ATTENTION MEMBERS

DANY HAS A WEBSITE

- View CLE & Dinner Announcements on Line •

- Read Recent Articles on Legal Issues •

- Search for other members •

- Confirm the Accuracy of your membership listing and add your telephone, fax numbers and your e-mail address •

View our site at

www.dany.cc or www.dany.ws

or

www.defenseassociationofnewyork.com

Table of Contents

President's Column

KRISTIN G. SHEA*

Dear Members and Colleagues,

Most of us have a daily routine which usually involves all or some of the following: waking (always a good start to a day), showering and dressing, hustling the kids off to school, commuting to work, working, commuting home, eating dinner with the family (if we're lucky), and catching an hour of TV before nodding off on the couch. Weekends are pretty much the same except substitute attending your children's various sports activities in place of work.

Routines give us a sense of order, comfort and peace of mind. But often we allow them to interfere, whether intentional or otherwise, with our accomplishing those things which are necessary but more unappealing to tackle (read: any home or self improvement project).

Organizations, such as the Defense Association of New York ("DANY"), and its leadership can suffer from a similar malaise brought on by routine. We attend the usual periodic dinners and board meetings, grab a CLE credit or two and run.

But this behavior can be dangerous if left unabated. If you don't have your blood pressure checked occasionally, you run the risk of an early demise.

To avoid a similar fate, DANY's Board of Directors is presently assessing our organization to see where it has been, where it is now and where we see it tomorrow. Our goal is to ensure that this organization maintains its relevance to the issues facing the defense industry and that it continues to consistently provide the services that our members desire and expect. It is our hope that this analysis will result in improvements that will enhance your experience as a member and justify why you chose to become a member in the first place.

If you have any suggestions as to what you would like to see offered or the way in which we offer it, please feel free to drop me an email at kshea@conwayfarrell.com.

I look forward to reporting on our efforts come the new year and wish you all a peaceful holiday season.

* *Kristin G. Shea is a partner with the law firm of Conway, Farrell, Curtin & Kelly, P.C. where she practices in the Litigation Department specializing in the defense of schools, churches, child care agencies, and mental health facilities.*

Traumatic Brain Injury And Malingering

JOHN J. MCDONOUGH, ESQ.*

According to a recent peer reviewed study the rate of apparent malingering in mild head injury cases is forty-two percent.[1] In the overwhelming majority of cases, the expected outcome from a mild traumatic brain injury (with no abnormality on medical tests of subsequent complication) is complete recovery within three months. Psychologists have only recently taken full account of how malingering or exaggeration may have contaminated previous conclusions about the course of recovery from head injury. Malingering is defined as "the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives..." by the American Psychiatric Association (APA)[2] The APA's Diagnostic and Statistical Manual further states that, "Malingering should be ruled out in those situations in which financial remuneration, benefit eligibility and forensic determinations play a role."[3]

In order to attempt to objectively assess the claims and allegations of traumatic brain injury by a claimant, neuropsychologists have developed standardized testing which has withstood multiple peer reviewed studies. Within the civil litigation context two types of testing are likely to be useful in clarifying the validity of the claimants complaints. These include self-report tests of symptom exaggeration and performance tests of intentional poor performance or incomplete effort.

Tests such as the Minnesota Multiphasic Personality Inventory – 2 (MMPI-2) ask hundreds of questions about psychiatric symptoms and problems. The test has a number of indices of response consistency and bias. Personal injury claimants often report memory and bodily injury symptoms to a greater degree than severe psychiatric problems. Those who exaggerate tend to maintain the same pattern but to produce more elevated MMPI 2 profiles in general.

The second type of testing which is essential to obtain when defending traumatic brain injury claims involves assessing the effort expended on tasks which require the examinee to solve a mental problem, remember information, or exhibit a competence. Neuropsychological tests assume that the examinee puts forth his or her best effort. The validity of this assumption becomes suspect when a plaintiff in a civil action has the incentive of secondary gain by exaggerating his symptomatology. There currently are a number of specialized, well-researched tests designed to detect effort or intentional failure. Some of these well validated tests include: The Test of Memory Malingering (TOMM), the Word Memory Test, The Computerized Assessment of Response Bias, the Portland Digit Recognition Test, and, the Victoria Symptom Validity Test. Since specific information about detecting poor effort could greatly facilitate coaching an examinee a detailed examination of these tests is deferred. It should be noted that at least two of the above tests have shown perfect sensitivity and specificity. That is, in the published studies they detected all feigners (sensitivity) and no legitimate patients failed (specificity).

As a result of the strong validity of these tests it should be anticipated that at least one method of attacking the claimants effort testing results will be to attack the validity of the tests themselves. However, the National Academy of Neuropsychology recently issued a formal policy statement that symptom validity (effort) testing is medical necessary for all neuropsychological evaluations.[4]

In conclusion, it is clear that the successful handling of a traumatic brain injury case involves closely working with a designated neuropsychologist who thereafter develops and administers a battery of tests designed to assess a full clinical picture of the claimant.

(Footnotes)

[1] Wiley Mittenberg et al. Base Rates of Malingering and Symptom Exaggeration, 24 J. Clinical Experimental & Neuropsychol. 1094 (2002).

Continued on page 6

* *John J. McDonough is a partner with Cozen O'Connor and is Vice Chair of the firm's General Litigation Group. John is regularly involved in the trial of cases around the country involving allegations of traumatic brain injury.*

Reliable IMEs That Meet Your Needs

For the most efficient, reliable Independent Medical Evaluations possible, look to U.S. Medical Consultants.

At U.S. Medical Consultants you enjoy a proven combination of IME advantages

- **Customized Service**
  Tailored to meet your needs
- **One Call Scheduling**
  Most appointments made and confirmed in just minutes
- **Extensive Physician Network**
  Covering New York, New Jersey, Connecticut, Pennsylvania, Illinois, and South Florida
- **Timely Reports**
  We consistently beat industry standards
- **Total Commitment**
  Physicians who are available for legal services
- **Dedicated Staff**
  Committed to Exceeding Expectations

U.S. Medical Consultants, LLC

"Medical Evaluation Professionals"

No IME provider works harder than U.S. Medical to develop a program that's right for you. A program that's convenient, responsive and thorough. A program that meets your standards for quality, reliability and cost-effectiveness.

For more information on what we can do for you please contact Art Hoath at

800-620-7720 ext. 104.

Please visit us at our booth # 1352

The Defense Of Sum Claims And The Serious Injury Defense

KEVIN BURNS* & MATTHEW S. LERNER**

An auto policyholder in New York may elect to purchase higher limits of Supplementary Uninsured/ Underinsured Motorist Coverage (SUM) to provide additional coverage for bodily injuries caused by an accident with an "underinsured" motorist. In order for SUM coverage to be triggered, in an underinsured motorist claim context, an insured must have: a) exhausted the bodily injury coverage of the tortfeasor's policy, and b) have limits of liability for bodily injury with his own carrier that are greater than those of the tortfeasor's policy. The available SUM coverage will then be offset by the tortfeasor's policy limits.

Upon receiving a policy limits offer from the tortfeasor's policy, the insured must request consent to accept the settlement from his or her carrier to pursue an SUM claim. An acceptance of the policy limits without the consent of the carrier will preclude the insured from pursuing a SUM claim. The carrier, upon receiving notice from the insured of a policy limits offer, has 30 days within which to either give consent to their insured to accept the settlement or, alternatively, advance the settlement funds to the insured under the policy, thereby preserving subrogation rights. If the carrier fails to either give consent or advance the settlement funds within 30 days, it is deemed to have given consent, and the insured may thereafter tender a release to the tortfeasor, and pursue an SUM claim with his or her own carrier.

Consider the example where an insured has $100,000/$300,000 Bodily Injury (BI) limits and $100,000/$300,000 SUM limits. The insured is injured in an accident with a tortfeasor who has $25,000/$50,000 BI limits. The insured receives a policy limits offer of $25,000 to settle his personal injury claim with the tortfeasor's carrier. The insured then receives either consent from his own carrier, or the $25,000 funds are advanced to him. He may now pursue an SUM claim for up to $75,000, i.e., his $100,000 SUM policy limits offset by the $25,000 policy limits of the tortfeasor.

Defense counsel's first encounter with a SUM claim is more often than not when a claims representative refers a case upon receipt of a demand for arbitration, or notice of intent to arbitrate. Alternatively, an insured may file suit against the carrier seeking the payment of SUM benefits. In either case, defense counsel must quickly evaluate what defenses are available to defend the case and assert the appropriate affirmative defenses. Immediate consideration must also be given to whether a petition to stay arbitration should be filed seeking either a permanent or temporary stay of the arbitration. Pursuant to CPLR 7503, a carrier must file a petition within 20 days of receipt of the demand for arbitration or notice of intent to arbitrate.

Once arbitration is scheduled, the carrier essentially steps into the shoes of the tortfeasor and defense counsel must assert and develop the appropriate defenses regarding liability or damages. Until recently, the defense bar believed that the "serious injury" threshold was a viable defense to assert against SUM claims. Counsel could argue that a party seeking SUM benefits must demonstrate a "serious injury" within the meaning of section 5102(d) of the Insurance Law. Recent, case law, however, had cast doubt on whether this remains a viable defense. The case of Raffellini v. State Farm, originally decided by Justice David Schmidt in Supreme Court, Kings County, has slowly made its way through the New York appellate courts, and has resolved the "serious injury" issue.

This past October, oral argument regarding Raffellini v. State Farm Mut. Auto. Inc. Co., 36 A.D.3d 92, 823 N.Y.S.2d 440 (2d Dep't 2006) was heard before the New York Court of Appeals. In Raffellini, the plaintiff settled his action to recover damages for personal injuries against the tortfeasor for $25,000, the limit of the tortfeasor's automobile liability policy. Plaintiff subsequently commenced a breach of contract action against his own insurer to recover SUM benefits.

Continued on next page

* *Kevin Burns is an associate in the White Plains office of Goldberg Segalla. His practice is focused on insurance defense work. Mr. Burns has extensive experience in the area of insurance and insurance claims. His background gives him a unique perspective in handling the defense of personal injury claims for the insurance industry.*

** *Matthew S. Lerner is an attorney with Goldberg Segalla LLP who concentrates his practice in appellate advocacy, insurance coverage and defense litigation, and worksite injury litigation. Matt has successfully argued appeals at the Court of Appeals and all four Appellate Division Departments. He also writes one of New York's first legal weblogs, "New York Civil Law."*

The Defense Of Sum Claims And The Serious Injury Defense

However, the plaintiff was attempting to recover those benefits without demonstrating that he sustained a "serious injury" within the meaning of Insurance Law § 5102(d); indeed, no finding of "serious injury" occurred because the plaintiff settled with the underinsured tortfeasor.

In its answer, the plaintiff's SUM insurer asserted the affirmative defense that the plaintiff did not sustain a "serious injury." New York's Appellate Division, Second Department unanimously determined that under Insurance Law § 3420(f)(2)(A) the insurer could not assert such a defense and the plaintiff need not demonstrate a "serious injury" to recover SUM benefits. Several months later New York's Appellate Division, Fourth Department, with Justices Centra and Gorski dissenting, held the complete opposite in Meegan v. Progressive Ins. Co., 43 A.D.3d 182, 838 N.Y.S.2d 748 (4th Dep't 2007).

The Raffellini and Meegan decisions raise important questions regarding SUM recovery. Does a settlement for the policy limits with the underinsured tortfeasor implicitly equate to an admission of "serious injury"? If so, could that admission be held applicable to the SUM insurer? Should a SUM insurer consent to its insured's acceptance of the policy limits from the underinsured tortfeasor and risk waiving the argument that the insured did not sustain a "serious injury"? What impact does the New York Superintendent of Insurance's regulation regarding SUM endorsements have on Insurance Law § 3420(f)(2)(A).

As a reminder, Insurance Law § 3420(f)(1) addresses uninsured motorist (UM) benefits, i.e., where a hit-and-run accident occurs or where the tortfeasor carries no insurance. Section 3420(f)(1) requires the plaintiff to demonstrate that he or she has sustained a "serious injury," explicitly stating so in the provision's body. Section 3420(f)(2)(A) addresses SUM benefits, which applies in situations when a tortfeasor has insurance coverage that is not sufficient to compensate the injured party for the injuries suffered; the SUM coverage then acts as "excess" coverage over that of the tortfeasor. No requirement of demonstrating a "serious injury" is contained in § 3420(f)(2)(A), thereby raising the confusion addressed in Raffellini and Meegan. To further complicate the matter, the Superintendent of Insurance enacted a regulation interpreting § 3420(f)(2)(A) to require the plaintiff/insured to demonstrate a "serious injury" to receive SUM benefits.

At argument, the New York Court of Appeals bench – which consists of Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith, Jones, and Pigott – addressed all the troubling questions that Raffellini raises. Appellant's counsel began his argument on behalf of State Farm by stating that the statutory framework of Insurance Law § 3420(f)(1) and (2)(A) demonstrate the "serious injury" requirement in both the UM and SUM contexts. Chief Judge Kaye asked counsel to explain his position given § 3420(f)(1) explicitly required a "serious injury" showing where § 3420(f)(2)(A) did not. Counsel explained that § 3420(f)(2)(A) was not written in a vacuum. Counsel also pointed out that section 3420(f)(2)(A) incorporated the language of § 3420(f)(1) because § 3420(f)(2)(A) language began with the phrase, "[a]ny such policy." Judge Ciparick seemed to reject that interpretation, observing that such general language is always contained in statutes. Judge Ciparick also seemed to question the fairness aspect of requiring the plaintiff/insured to demonstrate a "serious injury," commenting that SUM benefits are purchased for an additional premium, the coverage is optional, and the benefits act as excess coverage.

Judge Read asked the insurer's counsel whether there was any logic for the Court to require a "serious injury" showing for § 3420(f)(1) and not for § 3420(f)(2)(A). Counsel stated that there was no logic supporting such divergent treatment. Judge Read followed up her question, asking about State Farm's position regarding the plaintiff/insured's settlement with the underinsured tortfeasor (State Farm did not respond to its insured's request for authorization to accept the settlement and, thus, it was deemed that State Farm authorized the settlement), inquiring as to whether an adverse opinion for the insurer would prevent insurers from authorizing underlying settlements. Ultimately, that question remained unaddressed.

With regard to § 3420(f)(1) including the "serious injury" requirement but § 3420(f)(2)(A) not containing such language, the insured argued that the two sections were completely separate. The crux of the insured's argument was that a "serious injury" finding was implicit where the underinsured tortfeasor's carrier paid the plaintiff/insured the policy limits. He reasoned that the plaintiff/insured had to convince the underinsured tortfeasor's carrier that the plaintiff sustained a "serious injury" to justify the carrier paying the policy limits. As such, a settlement demonstrated a "serious injury" finding and the plaintiff did not have to demonstrate for a second time to the SUM insurer that he or she sustained a "serious injury" to receive SUM benefits. Chief Judge Kaye noted that if the "serious injury" finding was implicit when a settlement with the underinsured tortfeasor's carrier was reached,

Continued on page 6

The Defense Of Sum Claims And The Serious Injury Defense

Continued from page 5

what was the harm with just making a "serious injury" showing explicit in a SUM endorsement. Counsel answered that doing so would require two showings of "serious injury", and he argued that such a requirement was an unnecessary obstacle to the plaintiff/insured receiving SUM benefits.

The Court struggled with the argument, noting that at some point, a "serious injury" had to be demonstrated, and in Raffellini, it had not been. Further, the Court also appeared skeptical of counsel's "implicit showing" argument, asking "Aren't there many reasons for settlement?" When presented with the question regarding whether the Meegan decision was distinguishable, the Respondent's attorney stated that the Fourth Department was mistaken in its holding, and that the statute had to explicitly state that a "serious injury" showing was necessary to require such a showing.

Perhaps the most telling question came from Judge Graffeo, who asked "In order to find in your [Mr. Raffellini's] favor, the Court must make a determination about settlement?" The implication of Judge Graffeo's question is that the Court would have to hold that a settlement with the underinsured tortfeasor's carrier equated to an finding of "serious injury." The insured reiterated that a "serious injury" was implied because of the settlement with underinsured tortfeasor's carrier.

On November 15, 2007, the New York Court of Appeals handed down a decision in Raffellini v. State Farm Mut. Auto. Ins. Co., 2007 N.Y. Slip Op. 08777 (Nov. 15, 2007). In a lesson in statutory and regulatory interpretation, the Court of Appeals rejected the plaintiff's argument that Regulation 35-D was unenforceable because it was contrary to the Insurance Law. The Court first recognized that the New York Legislature may authorize an administrative agency to fill in the gaps by prescribing rules and regulations consistent with the enabling legislation. As an example, the Court pointed to the Superintendent of Insurance's power to prescribe certain strict time limits in New York's No-Fault Law to prevent fraud because the regulation was consistent with the legislative purpose. The viability of these strict time limits was discussed in Matter of Medical Socy. of State of N.Y. v. Serio, 100 N.Y.2d 854, 865, 768 N.Y.S.2d 423, 800 N.E.2d 728 (2003). The Court also noted its previous reliance on the Superintendent of Insurance's interpretation of New York insurance law and Regulation 35-D in particular.

The Court also rejected the plaintiff's argument that Regulation 35-D conflicted with § 3420(f)(2)(A), discussing the historical framework of §§ 3420(f)(1)(a) and 3420(f)(2)(A). The Court noted that the "serious injury" requirement was added to the predecessor statute encompassing both sections in 1981, and there was no indication that the requirement applied to one section and not the other. Notably, the Court observed that it views SUM coverage as an extension of uninsured motorist coverage. The Court also noted that the "serious injury" requirement for SUM coverage squared with the purpose underlying supplementary benefits -- i.e., that the injured plaintiff would be in the same position as if he or she would be in if the tortfeasor had coverage equal to the injured plaintiff. The Court observed that an injured plaintiff should not find himself or herself in a more advantageous position just because the tortfeasor was underinsured.

Notably, the Court did not address the preclusive effect a finding of "serious injury" would have on a SUM insurer where the determination was made below and the tortfeasor and the injured plaintiff ultimately settled for the policy limits. Will the injured plaintiff be required to demonstrate a "serious injury" twice or will the SUM insurer (not a party to the underlying action) be bound be the "serious injury" determination? If the SUM insurer agrees to the underlying settlement or does not respond to the injured plaintiff's request to settle the underlying action, do those actions demonstrate the SUM injurer's agreement with the "serious injury" findings? Given these unanswered questions, the SUM insurer can best protect its interests by analyzing each request to settle with the underlying tortfeasor and not let the time period pass without weighing in on the request.

Traumatic Brain Injury And Malingering

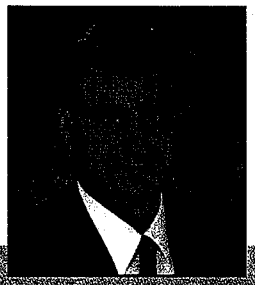
Continued from page 2

[2] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders IV 739 (4th Ed. 1994) [hereinafter DSM-IV].

[3] *Id.* at 467.

[4] National Academy of Neuropsychology Policy & Planning Committee (2005), Symptom Validity Assessment" Proactive Issues and Medical Necessity, 20 Archives Clinical Neuropsychol. 419 (2005).

Worthy Of Note



VINCENT P. POZZUTO*

1. EXPERT TESTIMONY

Absence of Medical Literature did not Bar Expert Proof

Diejoia v. Gacioch,
839 N.Y.S.2d 904 (4th Dept. 2007)

Plaintiff claimed that the manner in which the defendant doctor performed a cardiac catheterization was improper and caused a spinal cord infarct four days later resulting in paralysis. During a Frye hearing, plaintiff's expert vascular surgeon and treating vascular surgeon concededly could not produce medical literature that documented a prior case in which cardiac catheterization through the groin was the cause of aortic thrombosis that led to spinal cord infarct. The lower court precluded the proffered expert testimony and dismissed plaintiff's case. On appeal, the Fourth Department held the proffered theories were not novel because the expert surgeon testified that thrombotic events are well known to be associated with a catheterization and thrombosis is also known to have led to spinal stroke. The court held that the fact that there is no textual authority only goes to the weight of such testimony.

2. PROCEDURE

120 Day Time Limit to Move for Summary Judgment Could Not be Extended by Stipulation of Parties

Coty v. County of Clinton,
839 N.Y.S.2d 825 (3rd Dept. 2007)

Defendant moved for summary judgment 125 days after the filing of the Note of Issue by Plaintiff. Defendant first contended that the 5-day rule of CPLR § 2103(b)(2) extended the time period as plaintiff served the Note of Issue by mail. The court noted that the 120 day time frame in CPLR § 3212(a) runs from the filing of the note of issue, not service. CPLR § 2103(b)(2) adds five days to respond to the service of a paper. The court further held that the court has the exclusive authority to extend a statutory deadline and mutual agreement of the parties without court approval will not suffice.

3. INDEMNITY

Premises Owner Could Not Obtain Indemnity from Third-Party Defendant which Returned to Inspect/Repair Property

Brazell v. Wells Fargo Home Mortg., Inc.,
839 N.Y.S.2d 758 (1st Dept. 2007)

Wells Fargo took legal title to the subject property six weeks prior to plaintiff's accident. Wells Fargo settled directly with the plaintiff. As such, the court held Wells Fargo lost its rights to contribution from another tortfeasor and could only pursue indemnity. However, the court found that Wells Fargo had ample opportunity during the six weeks between the time it acquired the premises and the accident to repair the defect at issue, and thus could not obtain indemnity from company that it had retained to inspect the premises prior to purchase.

4. LABOR LAW

§ 240 Liability Cannot Pass to Landlord who had No Knowledge of Work being Performed

Morales v. D & A Food Service,
839 N.Y.S.2d 464 (1st Dept. 2007)

Defendant Santomero, the landlord of the premises, leased the subject commercial property to D & A Food Service. The lease prohibited the tenant from "making any structural alterations in interior or exterior without written consent of the landlord." Without obtaining the landlord's approval, the tenant hired plaintiff to make repairs at the premises. Plaintiff

Continued on page 8

* *Vincent P. Pozzuto is a member in the Manhattan office of Cozen O'Connor.*

Continued from page 7

fell from a ladder and was injured. The court held that because the work was performed without the landlord's knowledge and in violation of the lease, the landlord could not be liable. In a concurring opinion, Justice Mazzarelli stated that the court was "constrained" to hold in favor of the landlord due to recent precedent, but that she firmly believed that the law does not allow an owner to evade in a lease what the legislature has deemed its non-delegable duty.

5. PREMISES LIABILITY

Vandalism was Not a Foreseeable Circumstance Imposing Duty on Subcontractor

Corsino v. New York City Transit Authority, 839 N.Y.S.2d 490 (1st Dept. 2007)

Plaintiff, while exiting a train at the 14th Street subway station, tripped over a "dragline cord" hung across the station platform. The dragline cord was used to pull wires through conduit during a rehabilitation project at the station. The Transit Authority had contracted with CAB Associates for the rehabilitation work. CAB subcontracted the electrical work to Sheldon Electric. Sheldon Electric subcontracted with Villafane for a communications system. This drag cord was part of Villafane's work. Plaintiff contended through her expert that Villafane was negligent in not installing a cover plate over the conduit. The court noted that the drag line was run through conduit that was nine feet off the ground, and was secured at the ceiling at the end of each work day. As such, the drag line was not accessible to anyone on the platform. The court held that as a matter of law, the removal of the drag line by vandals was not a foreseeable circumstance imposing a duty on Villafane. The motion for summary judgment on behalf of the Transit Authority, Sheldon and CAB was granted on the grounds of lack of notice.

6. PREMISES LIABILITY

Building Manager's Control Over Elevators was Insufficient to Allow for Application of Res Ipsa Loquitur

Hodges v. Royal Realty Corp., 839 N.Y.S.2d 499 (1st Dept. 2007)

Plaintiff alleged that elevator on which she was riding dropped from the 14th floor to the 10th floor, causing injury. The building manager, Royal, had a contract with an elevator maintenance company, Schindler, which called for Schindler to maintain the elevators in a safe operating condition, perform periodic inspections and provide a full-time elevator mechanic. Under the contract, Royal was to monitor the equipment and take it out of service in the event of malfunction. The court held that under these circumstances, Royal did not exercise such a degree of control as to allow for the application of Res Ipsa Loquitur.

7. COLLATERAL ESTOPPEL

Finding of Unemployment Insurance Appeal Board Did Not have Preclusive Effect

Pelzer v. Trusel Elevator & Elec. Inc., 839 N.Y.S.2d 84 (1st Dept. 2007)

Plaintiff was injured when he was in a stopped elevator. He was in radio communication with his co-workers who were attempting to re-power the elevator. He crawled outside of the elevator and when power was restored, he was injured. He brought suit against the elevator maintenance company and the building owner. During a hearing before the Unemployment Insurance Appeal Board, an Administrative Law Judge found that plaintiff had disobeyed the building superintendent's orders to stay in the cab and that this constituted misconduct. The court held that this did not have a collateral estoppel effect on the issues of the proximate cause and assumption of the risk.

8. DUTY TO WARN

Danger of Jumping Off 50 Foot Cliff into Lake was Open and Obvious

Hinchey v. White-Willow, LLC, 839 N.Y.S.2d 230 (2nd Dept. 2007)

15 year old plaintiff was injured when she jumped from a 50 foot cliff into a lake while she was trespassing on the defendant's property. Plaintiff alleged that a fence was improperly maintained, that teenagers frequently trespassed on the property for purposes of jumping off the cliff and that there were

Continued on next page

no warning signs about the danger of jumping off the cliff. The court held that even if defendant was somehow negligent in maintaining the cliff, there was no duty to warn as the danger of jumping off a 50 foot cliff was open and obvious and readily ascertainable through the use of one's senses. The court found that the infant plaintiff's conduct was the sole proximate cause of her injuries.

9. LABOR LAW

Labor Law 240 Applies when an Injury was Caused by Plaintiff's Effort to Prevent an Object from Falling

Lopez v. Boston Properties, Inc.,
838 N.Y.S.2d 527 (1st Dept. 2007)

Plaintiff was working on the seventh floor of a building under construction. A co-worker was hoisting a bucket of bolts, nuts and washers up to plaintiff on a pulley system. Plaintiff was standing on a beam wearing a safety line and harness. As the bucket was being hoisted, it became stuck under the decking of the seventh floor. Plaintiff pulled the tack line to try to dislodge the bucket, but the co-worker, evidently believing that plaintiff was unloading the bucket, let go of the line. Concerned for the safety of his co-worker, plaintiff grabbed the bucket, causing him to fall off the beam. Plaintiff fell 6 to 8 feet and his safety line then halted his descent. The court held that the failure to provide a brake mechanism on the pulley was a proximate cause of plaintiff's injuries and granted summary judgment. The court held that it is sufficient to demonstrate that an injury was caused by an effort to prevent an object from falling. The court further held that the risk that an elevated worker might become injured while trying to save a co-worker below from injury is not so unforeseeable as to be a superseding cause.

10. INSURANCE COVERAGE

Insured had No Basis for Good-Faith Belief in its Non-Liability

Sorbara Const. Corp. v. AIU Ins.Co.,
838 N.Y.S.2d 531 (1st Dept. 2007)

Plaintiff insured became aware of its employee's accident and lawsuit almost immediately, but did not notify its excess carrier for 5-1/2 years, until after the defendants in the underlying matter had instituted a third-party action against it. The court held that although a good-faith belief in non-liability may excuse the failure to give timely notice, there was no indication plaintiff ever took any action to ascertain the possibility of its own liability prior to the commencement of the third-party action and thus, there was no good-faith basis for its good-faith belief in its non-liability. The court also held that plaintiff's own duty to provide notice to its excess carrier is not negated by the insurer's actual knowledge acquired from another source.

11. INSURANCE

Insurer's 2-1/2 Month Delay in Issuing Disclaimer Based upon Policy Exclusion did Not Estop It from Disclaiming

Topliffe v. U.S. Art Co., Inc.,
838 N.Y.S.2d 571 (2nd Dept. 2007)

Defendant U.S. Artworks accepted possession of 85 works of art produced by the poet and artist Kenneth Rexroth. In May 2002, the owners of the artwork requested to view it. It could not be found. U.S. Artworks employees opined that it had been inadvertently discarded. U.S. Artworks notified its insurance carrier. Two and one-half months later, the carrier notified U.S. Artworks that it would be disclaiming coverage based on the "mysterious disappearance" exclusion in the policy. The court held that 3420(d) of the Insurance Law did not apply since the underlying claim did not involve death or bodily injury. The court further held that U.S. Artworks could not show prejudice in the delay, since it could only speculate that a more favorable settlement could have been reached if the carrier had issued assumed its defense.

12. PROCEDURE

Forum Selection Clause in Bill of Lading is Enforceable

Strovalle v. Land Cargo, Inc.,
835 N.Y.S.2d 606 (2nd Dept. 2007)

In a personal injury action, the third-party defendant

Continued on page 10

Continued from page 9

moved to dismiss based upon a forum selection clause in a bill of lading. The court held that forum selection clauses are prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court.

13. INSURANCE COVERAGE

New York Law Governed Contract Dispute with Subcontractor's Insurer; General Contractor's Admission of No Fault on Part of Subcontractor Did Not Preclude Additional Insured Status

Worth Const. Co. Inc. v. Admiral Ins. Co., 836 N.Y.S.2d 155 (1st Dept. 2007)

Plaintiff, Worth Construction, was the general contractor on a construction site in White Plains, New York. Defendant Admiral insured Hackensack Steel, a New Jersey corporation. Defendant Farm Family insured Pacific Steel, a company which was hired by Worth to build a staircase. The injured worker, an employee of a subcontractor of Hackensack Steel that was also a named insured on the Admiral policy, sustained injuries when he slipped on the stairs built by Pacific. Worth's notice to Admiral, almost 15 months after learning of the accident, was late as a matter of law. Worth argued that New Jersey law applied, and thus Admiral had to show prejudice. The court held that the motion court correctly found the center of gravity to be in New York, where the subject construction site was located and where the underlying personal injury action was being litigated. Thus, New York law applied and no showing of prejudice was necessary. The court further held that Worth's admission in the underlying personal injury action that Pacific was not at fault did not preclude Worth from claiming that it was entitled to additional insurance coverage under Farm Family's policy. Pacific's work in the policy was defined to mean "materials, parts or equipment furnished in connection with such work or operations." Given this definition, it was immaterial whether Pacific's installation of the stairs was negligent. It was sufficient that the injury was sustained on the stairs.

14. EVIDENCE

Plaintiff Was Not Entitled to an Adverse Interest Charge Based Upon Missing Accident Report

Jean-Pierre v. Touro College 836 N.Y.S.2d 283 (2nd Dept. 2007)

After a defense verdict, plaintiff contended that Supreme Court improperly denied her request for an adverse interest charge against defendants based upon their failure to produce an accident report allegedly generated by a non-party to the action. The Court held that a party seeking an adverse inference charge based on a missing document must make a prima facie showing that the document in question actually exists, that it is under the opponent's control and that there is no reasonable explanation for failing to produce it. In the subject case, a Touro representative testified that he never sought or received an accident report and another defendant representative testified that he was unable to locate the document after performing a search.

15. MEDICAL MALPRACTICE

Motion for Renewal Denied Based On Speculative Nature of Expert's Causation Findings

Levy v. New York City Health & Hospitals 836 N.Y.S.2d 123 (1st Dept. 2007)

The action was commenced by the filing of a summons with notice. Plaintiff's first attorney did not respond to defendants' demands for a complaint because he was unable to procure a certificate of merit pursuant to CPLR 3012-a. The motion court dismissed the action. Five years later, plaintiff, through a new attorney, moved to renew and compel defendants' acceptance of the complaint. The Court held that the lower court properly denied the motion to renew on the ground that the expert's statements were speculative in that they failed to address plaintiff's declining condition prior to presenting to defendants. In addition, plaintiff failed to provide a reasonable justification for the five-year delay.

Continued on next page

16. PRODUCTS LIABILITY

Production of "Exemplar" Product Warranted Grant of Motion for Leave to Renew

Kreusi v. City of New York
836 N.Y.S.2d 281 (2nd Dept. 2007)

Plaintiff brought a product liability action when the chair he was sitting on allegedly collapsed suddenly. Plaintiff, a police inspector, brought suit against the chair manufacturer, HMI, and the City of New York. Several years into the litigation, it was discovered that the chair had been destroyed after the commencement of the action. The manufacturer moved for summary judgment contending that it could not properly defend itself without the chair. The lower Court denied its motion on the grounds that pieces of the chair had been discovered. The Appellate Division affirmed. Subsequently, an "exemplar" chair was located. After examining the exemplar chair and the subject chair's fragments, HMI's expert found it impossible to reach a conclusion as to why the chair collapsed. HMI moved for renewal based upon the argument that the exemplar chair constituted "new facts". The Second Department held that renewal was proper because the exemplar chair, and the expert's inspection of it constituted new facts. However, the Court held that conflicting engineer's affidavits as to the cause of the collapse precluded summary judgment.

17. LABOR LAW

Accident Did Not Fall Within the Ambit of Labor Law §240(1)

Berg v. Albany Ladder Company, Inc.
836 N.Y.S.2d 720 (3rd Dept. 2007)

Plaintiff was assisting in the unloading of steel trusses from a flatbed truck at a construction site. Plaintiff was standing on a level of trusses on the truck 5 feet above the bed of the truck. The trusses were being unloaded with a forklift. One set of trusses rolled toward plaintiff, resulting in a situation he described as presenting the option to "either be squashed or ride the load to the ground". He was injured while riding the load to the ground. The Court held that 240 did not apply because the accident was not caused by the lack of a ladder but rather, trusses – located on the same elevation as plaintiff – rolling towards him, when they were improperly lifted by the fork lift. The Court further held that 12 NYCRR 23-9.2(b)(1) which required power operated equipment to be operated in a safe manner at all times, to be insufficiently specific to support the Labor Law §241(6) cause of action.

DEFENDANT

VOL. 9 NO. 2 Winter 2007-08

John J. McDonough
EDITOR IN CHIEF

STAFF
Anthony Celentano
Denise LaGrua
Alexandra M. McDonough

Kevin Burns, Mathew S. Lerner
Vincent P. Pozzuto, and David A. Shimkin

Published quarterly by the Defense Association of New York, Inc., a not-for-profit corporation.

The Defendant Welcomes Contributors
Send proposed articles to:
John J. McDonough
Cozen O'Connor
45 Broadway, New York • NY• 10006

The Effect of Co-workers' Actions in Scaffold Law Cases

DAVID A. SHIMKIN*

The superseding actions of a third party have long been recognized in negligence cases as breaking the link between a defendant's conduct and a plaintiff's injury. The defense is also available when defending Labor Law § 240(1) claims, and Labor Law attorneys should keep this in mind.

Labor Law § 240(1), also known as The Scaffold Law, imposes absolute liability on contractors and owners for workplace accidents in which a worker is injured as a result of an elevation risk. The duty to supply necessary security devices is non-delegable.

However, the Court of Appeals in Blake v. Neighborhood Housing Services of New York, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003) established that liability under Labor Law § 240(1) will only exist where there is both a violation of the statute, and a finding that the violation caused the accident. As the Court stated, "[A]n accident alone does not establish a Labor Law § 240(1) violation or causation." Blake, at 289.

Courts have recognized two main defenses to the Scaffold Law. The sole proximate cause defense allows a contractor or owner to escape liability if it can demonstrate that the worker's own negligence was the only cause of the accident. See Blake, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003). A second option, the recalcitrant worker defense, allows a defendant to demonstrate that the worker rejected adequate safety devices made available by the owner or contractor. See Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004).

A third way to combat a claim made under Labor Law § 240(1) is to argue that the actions of co-workers were an unforeseeable, superseding and intervening event that caused the accident. The Second Department has dealt with this issue numerous times, and most favorably for defendants, in Bernal v. City of New York, 217 A.D.2d 568, 628 N.Y.S.2d 823(2d Dept. 1995).

The Bernal plaintiff fell when one of his co-workers was attempting to lower him on a Hi-Lo machine. The Hi-Lo bumped into adjacent scaffolding, and the scaffolding then collapsed, injuring the plaintiff.

The plaintiff moved for summary judgment on the basis of Labor Law § 240(1). The Second Department upheld the lower court's denial of the plaintiff's summary judgment motion. The court found that, "[A] reasonable fact-finder might conclude that the co-worker's conduct was the sole proximate cause of the plaintiff's injuries or that the co-worker's conduct constituted an unforeseeable superseding, intervening act." See Bernal, 217 A.D.2d at 569.

Central to the court's finding that the co-worker's actions were unforeseeable was the fact that no worker had previously used a Hi-Lo at the site to raise or lower workers on the scaffolding structure. This decision, then, offers a third avenue by which a practitioner can defeat a motion for summary judgment made pursuant to Labor Law § 240(1) claim: he can raise an issue of fact as to the accident's cause by establishing that a co-worker committed an unforeseeable act that led to the accident.

The Second Department's decisions since Bernal indicate that the determination of whether a co-worker's actions are forseeable rests on each case's facts. In DeSousa v. Brown, 280 A.D.2d 447, 721 N.Y.S.2d 69 (2d Dept. 2001), for instance, the plaintiff-bricklayer fell from a scaffold when a co-worker adjusted a pin and brace on the scaffold and caused it to wobble. The plaintiff moved for summary judgment on Labor Law § 240(1) grounds, and the motion court denied the application. The Second Department reversed the motion court, and granted the motion, finding that the co-worker's adjustment of the pin was foreseeable and not so extraordinary so as to be a superseding cause of the accident.

Similarly, in Van Eken v. Consolidated Edison Company of New York, 294 A.D.2d 352, 742 N.Y.S.2d 94 (2d Dept. 2002), the plaintiff was working in a trench when a co-worker at street level released his grasp on a jackhammer in an attempt to deflect a falling piece of plywood. The jackhammer struck the plaintiff, and the plaintiff moved for summary judgment on Labor Law § 240(1) grounds. The motion court denied the

Continued on next page

* *David A. Shimkin is a Member in the Manhattan office of Cozen O'Connor. (Summer Law Clerk Laura Mothersele assisted in the preparation of this article).*

The Effect of Co-workers' Actions in Scaffold Law Cases

motion, but the Second Department reversed, finding that the co-worker's acts were foreseeable and not a superseding, intervening cause of the accident.

The First Department has also considered this issue of co-worker negligence. In Montalvo v. J. Petrocelli Construction, Inc., 8 A.D.3d 173, 780 N.Y.S.2d 558 (1st Dept. 2004), the plaintiff was on a ladder holding a plenum while a co-worker drilled a hole in it. The ladder was not secured. The plenum suddenly fell from the plaintiff's grasp and struck the ladder, causing the plaintiff to fall. The defendant moved for summary judgment on Labor Law § 240(1) grounds, and the motion court granted that relief. The First Department reversed and granted summary judgment to the plaintiff, finding that the actions of the plaintiff and the co-worker were not so extraordinary as to constitute a superseding cause of the accident.

Bernal, then, stands alone as a case in which co-worker negligence was found sufficient to raise an issue of fact as to the cause of an accident in a Labor Law § 240(1) analysis. Still, Bernal remains good law.

Attorneys defending owners or contractors, then, should take advantage of this third Scaffold Law defense by determining whether a plaintiff's co-workers have done anything unforeseeable that might have caused the alleged accident.

DEFENDANT

Application for Membership

THE DEFENSE ASSOCIATION OF NEW YORK
P.O. Box 950
New York, NY 10274-0950

I hereby wish to enroll as a member of DANY.

I enclose my check/draft $ _____

Rates are $50.00 for individuals admitted to practice less than five years; $175.00 for individuals admitted to practice more than five years; and $500.00 for firm, professional corporation or company.

Name _____

Address _____

_____

Tel. No. _____

I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions.

***ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS.**

THE DEFENSE ASSOCIATION OF NEW YORK
P.O. Box 950
New York, NY 01274-0950