Summing Up

"Summing Up" is a newsletter that addresses legal issues facing insurance carriers and defendants in civil litigation.

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CARRIER ENTITLED TO OFFSET OF ALL OCCUPANTS OF VEHICLE IN SUM CASE

As discussed in In the Matter of the Arbitration Between New York Central Mutual Fire Insurance Company and Brandon J. Baker, (4th Dept. 2017),Brandon J. Baker was injured in a motor vehicle accident while riding as a passenger in a vehicle driven by Joseph J. Merkley. The Merkley vehicle was rear-ended by a vehicle driven by Christie L. Bailey and was propelled into oncoming traffic when it was struck by a vehicle driven by Anna Swartsfelder.

Merkley, Berkley, and Swartsfelder divided the Bailey vehicle's insurance policy limit of $100,000.00 and each received $33,333.33. Thereafter, Baker sought SUM benefits from New York Central Mutual, the insurer of the Merkley vehicle, but the claim was disputed. According to New York Central Mutual (NYCM), in calculating the offset for the SUM endorsement under the policy, it was entitled to offset the aggregate amounts received by Merkley and Baker from the Bailey' insurance carrier. Since that payment amounted to $66,000.00, NYCM argued that the offset was greater than the SUM limit of $50,000.00.

Respondent thereafter filed a demand for SUM arbitration under the Merkley policy. The Appellate Division concluded that the Supreme Court properly granted NYCM's petition for permanent stay of the arbitration noting that once Bailey's insurance carrier tendered the policy limits, the exclusion in the SUM endorsement that limited SUM payments to the difference between the SUM coverage and the insurance payments received by Merkley and Baker from any person legally liable for bodily injuries applied. As such, New York Central properly offset the $66,666.66 received by Baker and Merkley thereby obviating the potential recovery by Baker under the SUM endorsement.

SPOLIATION SANCTIONS PROPER AGAINST DEFENDANT

In Warren v. J-M Manufacturing, (1st Dept. 2018), it was established that in the 1990's JMM lost and destroyed numerous boxes containing records of the manufacturing, sale, and marketing of a pipe which contained asbestos. The pipe was part of a line of product the defendants purchased from Johns-Manville in the 1980's. Consequently, the plaintiff requested a spoliation charge at the time of trial.

The Court determined that JMM contemplated the possibility of litigation, having entered into a litigation cooperation agreement with Johns-Manville at the time it purchased the pipe business. Internal memos from the 1980's showed that executives and lawyers at JMM discussed the risk benefit of continuing the product line, as well as the possibility that its insurance carriers would withdraw liability coverage for the product. Accordingly, the Appellate Division affirmed the lower Court's decision in its broad discretion in directing that the jury be charged with an adverse spoliation inference at the time of trial.

GROCER OWED NO DUTY TO PLAINTIFF WHEN PLAINTIFF WAS INJURED DOING AN ACTIVITY HE WAS NOT REQUIRED TO DO

In Lynch v. S&C Wholesale Grocers, Inc. (1st Dept. 2018), the plaintiff truck driver/delivery person alleges that he was injured while manually unloading heavy boxes from a trailer owned by defendant. Plaintiff claims the shrink-wrap used by defendant's employees to secure the boxes to a pallet came loose, causing the boxes to fall to the floor and requiring them to be unloaded by hand. The plaintiff claimed he was injured when he was manually unloading boxes from a trailer that was owned by the defendant.

Defendant established its entitlement to judgment as a matter of law first by showing that it did not create the alleged hazardous condition. Defendant submitted through plaintiff's testimony that he and defendant's employees inspected the trailer before he left defendant's facility to commence deliveries, and did not observe loose boxes on the floor. Nor did plaintiff observe loose boxes when he re-secured the load after his first delivery on the day of his accident.

Defendant also showed that it lacked actual or constructive notice that there were boxes on the trailer's floor. Plaintiff testified he did not notify defendant about the loose boxes before he decided to manually unload them at his second delivery of the day.

Additionally, the possibility of injury arose only when plaintiff voluntarily opted to pick up the boxes and toss them to a store employee, even though he was not required to do so since the law draws a sharp distinction between a condition that merely sets the occasion for or facilitates an accident and an act that is a proximate cause of the accident.

As such, the Court determined that the defendant was entitled to summary judgment.

OPEN AND OBVIOUS FURNITURE PLATFORM FOUND NOT DANGEROUS

In Faber v. Place Furniture, Inc., (1st Dept. 2017) plaintiff commenced an action as a result of injuries sustained when she tripped and fell on an eight inch furniture display platform at defendant's store.

The evidence established that the eight-inch furniture platform where the plaintiff tripped was an illuminated, open and obvious condition which was readily observable by the use of one's own senses. Furthermore, it was established that the plaintiff and her family had navigated the step on multiple earlier occasions without incident. As such, the Appellate Division held that the defendant met its burden establishing prima facie entitlement to summary judgment.

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