

No-Fault Regulations

The First Department has affirmed Regulation 68, the controversial measure introduced by the Superintendent of Insurance as a means to combat insurance fraud. The Regulation, which we discussed in our April newsletter, reduces the time that injured motorists have to file claims from 90 to 30 days while also reducing the time doctors have to submit compensation claims from 180 to 45 days. The Insurance Department has said the shorter deadlines will make it more difficult to file fraudulent claims. The opponents of the Regulation, most notably the New York State Trial Lawyers Association claim the new rule will deprive accident victims of no-fault benefits.

The court in In re Application of Medical Society of the State of New York -v- Serio, 2002 N.Y. App. Div. Lexis 10036 (October 22, 2002), the court held that the Commissioner did not overstep his power in shortening the periods, nor did the court feel it was its job to second guess the Commissioner's conclusion that the shortened time periods will not significantly reduce the number of legitimate claims. The opponents of the Regulation will likely attempt to take the fight to the Court of Appeals.

Spoliation

We recently had a fairly routine automobile case which took an unexpected turn when the plaintiff retained an expert to examine the braking system of a vehicle owned by one of the defendants. That request spawned a round of motion practice because the defendant was unable to locate vehicle and make it available for the plaintiff's expert. Given our recent experience and a recent federal court decision which exhaustively discusses the issue, we are taking the opportunity to examine the law of spoliation- the destruction of evidence.

(2d Cir. September 26, 2002) is an action for breach of contract which involved events that occurred in late, 1998. Among the documents that the plaintiff requested during discovery were all e-mails in the defendant's possession dealing with the relevant events. Following numerous delays, the defendant ultimately produced 126 e-mails, however, none of them were from the last three months of 1998, which was the critical factual time period. Following even more delays, the defendant was ultimately able to produce, after the start of the trial, 30 e-mails from the relevant time period, although none of them were damaging to the defendant..

Following receipt of the e-mails, the plaintiff moved for sanctions, asking the judge to instruct the jury that "it should presume the e-mails from October to December, 1998, which have not been produced, would have disproved the defendant's theory of the case." The District Court denied the plaintiff's application, and the plaintiff appealed.

The Second Circuit Court of Appeals began by noting, as do all cases in this area, that the court has very broad discretion in fashioning an appropriate sanction. The Court then went on to discuss the test used by the District Court, and agreed that the lower court had applied the correct legal standard for determining when a party is entitled to an adverse inference. In order to prevail, the party seeking an adverse inference must establish:

- (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
- (2) that the [evidence] was destroyed with a culpable state of mind;
and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

The defendant did not dispute that it had an obligation to preserve the e-mails, the

argument was over the latter two parts of the test. With regard to the state of mind required, the Court examined its precedent and held that the standard is satisfied by showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or negligently. The sanction of an adverse inference in cases involving negligent destruction can be appropriate because each party should bear the risk of its own negligence. As the court discusses, it makes little difference to the victimized party whether the evidence was destroyed negligently or intentionally.

With regard to the relevancy requirement, the court stated that “relevance” in this context means something more than “sufficiently probative” to satisfy the Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that “the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.” The court went on to state that judges be careful to avoid applying too strict a burden of proof, as that would defeat the purpose of the adverse inference.

Where a party destroys evidence in bad faith, the bad faith alone is sufficient circumstantial evidence to warrant the inference. Similarly, a showing of gross negligence in the destruction of evidence will in some cases suffice, standing alone, to support a finding that the grossly negligent party would have been adversely affected by the evidence.

In the instant case, the only evidence submitted that the missing e-mails were relevant was that they were missing. Nevertheless, the court noted that the repeated delays and excuses offered by the defendant in producing the e-mails, they could support the inference if they were negligent or done in bad faith. Ultimately, the case was remanded to the District Court for further proceedings.

Surveillance Tapes

In several issues we have discussed the issue of the timing of the disclosure of surveillance tapes, as there is a split in the departments. To date, the First Department has held that the tape need not be disclosed until after the plaintiff's deposition. The Third and Fourth Departments require disclosure before the deposition. In last month's newsletter, we noted that while the Second Department had not weighed in on the issue, however the lower courts had decided several cases in the area and had followed the First Department. In Falk v. Inzinna, 2002 N.Y. App. Div. Lexis 10023 (October 21 2002), the Second Department followed the Third and Fourth Departments, further splitting the Departments.

To review, the previous cases noted that while the Court of Appeals decision in DeMichel v. South Buffalo Ry. Co., 80 N.Y.2d 184 (1992) held that the defendant had the right to wait until after the deposition to disclose the tape, some courts felt that the subsequent enactment of CPLR 3101(i), which requires disclosure of all portions of a surveillance tape, overruled DiMichel. The First Department did not follow that argument, noting correctly that 3101(i) does not address the priority of disclosure.

The court in Falk felt that the absence of any mention of priority in 3101(i) meant that the Legislature intended for the tapes to be disclosed prior to the deposition. The court felt that had the Legislature wanted to limit disclosure of the videotapes until after the deposition, it would have said so in the statute. The court also based its holding on the liberal disclosure policy of CPLR Article 31, which would be best served by requiring full disclosure of a party's surveillance materials.

We await a Court of Appeals decision in this area which is certain to come in the near future.

Labor Law Update

The Appellate Divisions continue to struggle to define the meaning of the Labor Law, even when guided by Court of Appeals precedent. The First Department recently decided two cases dealing with what constitutes “construction” under the Labor Law. Despite a Court of Appeals case in the area, the First Department nevertheless produced two sharply divided 3-2 decisions.

The Court of Appeals precedent of Martinez -v- City of New York, 690 N.Y.S.2d 524 (1999), involves a plaintiff who fell from a scaffold while performing an asbestos inspection in a school building owned by the City. The plaintiff’s duties were to determine whether asbestos samples had been previously taken, check areas marked as containing asbestos and measure areas where asbestos was found. It was undisputed that the plaintiff’s work was to be done before any abatement of the asbestos began. The issue before the Court was whether the work in which the plaintiff was engaged when he was injured fell within the ambit of Labor Law section 240(1).

The Court’s decision is rooted in the statutory language that the injured plaintiff must have been engaged in the “erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” In finding that the plaintiff was not doing any of those things, the court noted that the plaintiff’s work was merely investigatory, and was to terminate prior to the removal of any actual asbestos. The court also rejected the lower court’s rationale that the plaintiff was covered by the Labor Law because his work was an “integral and necessary part” of a larger project, feeling that that test would improperly enlarge the reach of the statute.

In Campisi v. Epos, 747 N.Y.S.2d 218 (1st Dep’t 2002), the plaintiff was injured while at work coordinating and monitoring the performance and progress of the contractors working

pursuant to a contract with the City to convert City owned brownstones into a six-family house. While performing his job, he fell through a temporary flooring.

While not performing any of the enumerated activities himself, the court nevertheless held that the plaintiff was covered by the Labor Law. The court noted that while the project did not require the plaintiff to use the tools of the various trades on the job, he was as employed “in the erection, demolition, repairing, altering, painting, cleaning, etc.” within the meaning of the statute as any of the employees whose work he inspected.

The majority’s decision seems to find that the plaintiff was covered because his job was an “integral and necessary part” of the overall project, the test specifically rejected in Martinez. That is the main thrust of the dissent. The dissenters note that the plaintiff’s job was administrative and had no role that advanced the construction work, a job very similar to the plaintiff in Martinez. The dissent criticized the majority’s reliance on the fact that the abatement work in Martinez had not begun at the time the plaintiff was injured. The dissent persuasively points out that the plaintiff’s duties will remain the same whether or not there is other construction work going on. Based upon Martinez’ explicit rejection of the “integral and necessary” test, it does appear that the dissent makes the better argument.

The second case, Adair v. Bestek, 2002 N.Y. App. Div Lexis 9504 (October 8, 2002) involves a stagehand who was focusing overhead lights when the manlift on which he was standing fell over. At the time of the incident, the lights the stagehand was focusing were already fully installed, and all other construction work on the stage had been completed. The court held that the plaintiff was not covered by the Labor Law. The court noted that while his work might have been “necessary and integral” to the entire job, that standard was explicitly rejected in Martinez. In essence, the court held that the plaintiff was in the exact same position

as the plaintiff in Martinez.

The dissent argued that the plaintiff was not in the same position as the plaintiff in Martinez, because the plaintiff in Adair, was actually completing the construction of the stage. It does seem that the plaintiff in Adair was more involved in construction than the plaintiff in Martinez, who was merely an inspector.

While the statute seems to place the emphasis on the plaintiff's activity, it appears that the majority in Campisi and Adair are more concerned with the surrounding circumstances. If the construction work has not begun, or is over or almost over, the plaintiff is out of luck. If construction work is going on, the plaintiff will be covered by the Labor Law, even if he is just monitoring what is going on.

Appellate Review

Although not necessarily uncovering a new area of the law, the recent appeal of Reed v. City of New York reminds defendants of the importance of preparing every case for trial and on not counting on being bailed out by the Appellate Division when things go wrong.

Reed involved a plaintiff who was catastrophically injured when she was run down by a police officer on a motor scooter. The plaintiff sustained multiple skull fractures, brain damage, memory loss, a loss of the senses of taste and smell, and difficulty sleeping.

At trial, the plaintiff called a number of expert witnesses who testified, among other things, that her injuries would be more susceptible to epilepsy and Alzheimer's disease. The City had retained a neurologist, but did not call any experts at trial, presumably because the neurologist's report was not helpful to the defense. At the conclusion of the trial, the jury awarded the plaintiff \$6 million. The City appealed.

The City often relies on the Appellate Division to reduce pain and suffering verdicts.

According to the account of the oral arguments in this case, the Appellate Division took the assistant corporation counsel to task for essentially failing to offer any defense at trial. While it is possible that the First Department will reduce the verdict, it appears that it is not something that will automatically be done.

The case should serve as a reminder of the need to aggressively defend each matter. Obviously, the plaintiff in Reed had a very strong case. That does not excuse the City however, from essentially turning the trial into an inquest. There is always some way to attempt to minimize any injury. While the attempts may be ultimately unsuccessful, they may, at the very least, force a more favorable settlement.

We will advise of the Reed decision once it is handed down.