

## **Landowner's Duty**

Ever since the Court of Appeal's landmark decision in Basso v. Miller, 40 N.Y.2d 233 (1974), the court's have been refining the scope of the duty owed by landowners to people on their property. The majority of these cases involve some type of defect on the property, which causes the injured party to trip or fall. Occasionally, the defect involves a claim of inadequate lighting. In Peralta v. Henriquez, 760 N.Y.S.2d 741 (2003), the Court of Appeals established the standard that should be followed in inadequate lighting cases.

The defendants in Peralta owned two buildings as well as an adjacent unpaved lot where residents of the buildings and their guests were permitted to park. The lot was lit to some degree by a light on the back of a delicatessen, which was a first floor tenant in one of the buildings. On a rainy evening, the plaintiff parked her car in the lot, exited, and as it was raining ran towards one of the buildings where she was staying. While maneuvering between vehicles in the dark lot, the plaintiff ran into a bent car antenna, resulting in a serious injury to her left eye.

In her lawsuit against the building owners, the plaintiff alleged that the defendants had a general duty to illuminate the unpaved lot and failed to adequately do so, thus creating a dangerous condition that caused her injury. The defendants argued that the delicatessen's light was on and provided adequate illumination of the parking lot. Additionally, the defendants relied upon precedent to argue that the lot was not open to the general public and they, therefore had no duty to illuminate that area of the property.

At the conclusion of the trial, the jury found the defendants 83% responsible and the plaintiff 17% responsible. It is significant to note that in charging the jury, the court refused to charge the issue of notice, reasoning that the failure to light the parking lot constituted a defect created by the owners. The defendants appealed and the Appellate Division affirmed. The

Court of Appeals reversed.

The Court of Appeals traced its decisions involving landowners up through Basso. Basso established the well known standard that a:

“landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.”

Based upon that language, the Peralta court held that the defendants were mistaken in drawing a distinction between public and private parking lots. Basso requires landowners to maintain their property in a reasonably safe condition whether the property is open to the public or not. The court went on to state that providing outside lighting to one’s property may be a reasonable response by a private landowner who knows, or should know, that someone will visit the property and confront a hazard that would be reasonably avoided by illumination.

The court recognized, based upon public policy considerations, that it would be unreasonable to impose a general duty of care requiring landowners to illuminate their property during all hours of darkness. On the other hand, a decision finding that a failure to illuminate alone created a dangerous condition would produce a large class of plaintiffs without any reasonable limitations on a property owner’s liability. Essentially, the court held that these types of cases must be approached on a case by case basis. As such, it is unlikely that summary judgment will ever be appropriate in these cases.

With regard to the trial court’s failure to charge notice, the Court of Appeals held that such a failure was error. The jury should have been asked to determine if the defendants knew or should have known that the existing lighting was adequate given the use and design of the lot.

On a final note, please recall that in cases where the Multiple Dwelling Law applies, a duty to illuminate is imposed by the statute. Specifically, owners of multiple dwellings must

install and maintain lights at various locations of the premises.

### **Serious Injury**

In Franchini v. Palmieri, 2003 N.Y. App. Div. LEXIS 8631, a divided Third Department was called on to analyze the sufficiency of a plaintiff's proof in a case involving a plaintiff with pre-existing injuries. The plaintiff in question was involved in a motor vehicle accident on February 4, 1998 in which she sustained soft tissue injuries. In support of the summary judgment motion, the defendant submitted the plaintiff's medical records, which disclosed a number of pre-existing conditions which existed for a number of years prior to the accident. Specifically, the records showed that the plaintiff suffered from cervical spine arthritis, degenerative disc disease and lower back pain. The plaintiff also treated 7 months before the subject accident for neck injuries incurred in an assault. Furthermore, MRIs taken after the accident confirmed the pre-existing degenerative disc disease. The plaintiff's own medical records, as well as the Independent Medical Examinations, were prima facie evidence that the plaintiff's injuries were not caused by the subject accident. As such, the burden shifted to the plaintiff to come forward with competent medical evidence which raised an issue of fact.

In opposition, the plaintiff submitted the affidavit of a chiropractor who treated the plaintiff for nine months after the accident. The chiropractor diagnosed the plaintiff as suffering from multiple soft tissue injuries as well as limitations of use of her neck and lower back of further stating that 100% all the injuries were "separate and distinct" from any pre-existing injuries the plaintiff may have had.

The majority held that the chiropractor's affidavit was insufficient to raise an issue of fact under any of the serious injury categories. The decision is based in part on the fact that the

chiropractor did not mention any of the plaintiff's specific pre-existing conditions and the chiropractor did not state that he reviewed any of the prior medical records. Putting that aside, the court held that even if the chiropractor had discussed the pre-existing conditions, there was no explanation of his opinion that the prior conditions had resolved before he began treating the plaintiff following the accident. Under those circumstances, the court held that the chiropractor's opinion was speculative and conclusory.

The dissent acknowledged that in cases involving pre-existing injuries, the failure of the plaintiff's expert to indicate an awareness of the prior condition can be fatal. The dissent agreed that such was not the case here, as the chiropractor was clearly aware of the prior conditions, given the way the affidavit was worded. It appears that the dissent has a point, in that the majority does seem to be making a judgment about the credibility of the chiropractor's opinion. Nevertheless, this is yet another case which demonstrates the courts' close scrutiny of the proof submitted by plaintiffs.

### **Contribution**

An unusual factual situation led to a novel application of General Obligations Law section 15-108. Chase Manhattan Bank v. Jeffries, 2003 N.Y. App. Div. Lexis 8999, deals with the effect of a settlement between an injured party and a tortfeasor on related claims the injured party has against non-settling joint tortfeasors who do not participate in the settlement. Essentially, the statute provides that such a settlement reduces a nonsettling tortfeasor's liability to the injured party by the greater of the amount of consideration the settling tortfeasor paid for its release or, alternatively, the amount of the settling tortfeasor's equitable share of the damages. At the same time, the statute extinguishes all contribution claims between the settling and non-settling tortfeasors.

Chase Manhattan involves a Texas' corporation's suit relating to a private offering of stock. The corporation, 50-Off Stores sued Chase Manhattan in Texas Federal Court and a another defendant, Jefferies & Co., in Texas state court. Ultimately, 50-Off won a \$10.6 million judgment in federal court against Chase Manhattan. Shortly thereafter, 50-Off settled its claim against Jefferies for \$4.3 million. Chase then sued Jefferies in New York state court for contribution, alleging that it paid more than its fair share of damages. Not surprisingly, Jefferies raised G.O.L. 15-108 as a defense to Chase Manhattan's claim. In response, Chase Manhattan argues that the statute did not apply because the settlement had not been effected until after a judgment had been entered against Chase Manhattan. The IAS court denied Jefferies motion to dismiss and Jefferies appealed to the First Department.

The First Department began its analysis by looking at the rationale for section 15-108. Specifically, the court noted that prior to its enactment, defendants had no incentive to settle, since they would still be liable to contribution claims by non-settling defendants. As such, by eliminating contribution claims in such cases, the Legislature hoped to encourage settlements in cases involving multiple defendants. In addition to encouraging settlement, the statute was concerned with the equitable apportionment of liability.

In affirming the lower court's decision that Chase Manhattan had a valid claim for contribution, the First Department concluded that extinguishing Chase Manhattan's contribution claim would deprive it "of the opportunity to seek contribution against the settlor without receiving the opportunity for reduction of its liability to the injured party by the settlor's equitable share of damages." In other words, the statute is not to be applied in such a way that only one of its twin goals may be fulfilled. As such, Chase Manhattan should be permitted to make a contribution claim against Jefferies under G.O.L. 15-108.

It should be noted that the Chase Manhattan decision is consistent with the Second Department's decision in Cover v. Cohen, 497 N.Y.S.2d 382 (2d Dep't 1985 ).

### **Labor Law Update**

Generally, the summer months provide fewer noteworthy decisions than the rest of the year. The Labor Law however, apparently never takes a vacation. The latest decision is a Supreme Court case from Oneida County, Fox v. Tioga Construction, 2003 N.Y. Misc LEXIS 1065, which we include here as the presiding judge wrote a fairly lengthy opinion in an effort to distinguish the case from precedents involving collapses of "permanent" structures.

At the time of the accident, the plaintiff was employed by the New York State Department of Transportation, which was in the process of constructing a pedestrian bridge over a new highway. Before the bridge was completed, it collapsed, causing the plaintiff to fall thirty feet and sustain serious injuries. The plaintiff moved for summary judgment under Labor Law section 240(1). In support of the motion, the plaintiff submitted an expert affidavit which concluded that the bridge did not have sufficient structural integrity to support the workers and equipment on it. The expert further stated that appropriate shoring would have prevented the collapse.

The defendant did not offer any expert testimony, and there was really no factual dispute; it was undisputed that no type of shoring or bracing was provided. The defendant offered a legal defense to the plaintiff's claim, specifically that the Labor Law was not intended to cover the collapse of a partially completed structure which was intended to be permanent. In other words, the defendant argued that the collapse of the bridge was not the collapse of a scaffold or other "temporary" device listed in the statute, but was rather the collapse of an uncompleted but

permanent structure itself, which was not covered by the Labor Law.

The defendant did in fact have precedent on its side. For example, in Dombrowski v. Schwartz, 629 N.Y.S.2d 924 (4<sup>th</sup> Dep't 1995), a permanent stairway was placed in its proper location, but was not anchored or affixed. As such, when a workman attempted to climb it, he fell 10 feet. In holding the section 240(1) did not apply, the Appellate Division pointed out that since the stairway was permanent, it was not the functional equivalent of a ladder or one of the other statutorily enumerated devices.

In the instant case, the court chose to distinguish Dombrowski and the other cases cited by the defendants by stating that in those cases, the plaintiffs were complaining about the absence of a structural component of the building, not (as here) the absence of a safety device. The court relied on Keefe v. E & D Specialty Stands, Inc., 688 N.Y.S.2d 865 (4<sup>th</sup> Dep't 1999), which involved a plaintiff using partially constructed bleachers as a stairway to move other seats into position. The Appellate Division concluded that the bleachers were being used as a temporary staircase, or as the functional equivalent of a ladder which triggered the Labor Law.

The court felt that the facts in Keefe were very close to the instant case. The court emphasized the fact that in order to complete the work on the bridge, workers and materials had to be maintained at the height of the permanent structure. The structure itself was performing that purpose, and as such, was operating as a type of platform or scaffold. The court did note that if construction had proceeded further, to the point where this could have been called a “substantially completed structure”, the defendants argument may have prevailed. (One can see much debate over what exactly constitutes a “substantially completed structure.”) As the bridge was operating as a scaffold and as no safety devices were provided, summary judgment under section 240(1) was appropriate.

Given the valid arguments made by both sides, we anticipate an appeal. We will keep you posted.