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NEW YORK

PERSONAL INJURY

Appellate Division Affirms Summary Judgment in Snow & Ice Cases



Bryan J. Ferrara

The Second Judicial Department of the Supreme Court of the State of New York Appellate Division recently affirmed lower court decisions awarding summary judgment and dismissal of all claims in favor of a defendant snow removal contractor in a case venued in Nassau County Supreme Court. **Robert A. Fitch** and **Bryan J. Ferrara** of Rawle & Henderson LLP represented the defendant snow removal contractor.



Robert A. Fitch

Plaintiff claimed she was injured in two separate slip and fall accidents occurring at her condominium complex. She further claimed that the co-defendants—a building owner and a management company—had notice of a reoccurring ice condition on the premises due to issues with the gutters overflowing. According to plaintiff, the gutters were arranged in such a way that rainwater from the gutters would fall onto the walkway and freeze in the area where both of her falls occurred. As a result of the accidents, plaintiff alleged—among other injuries—multi-level intervertebral disc ruptures resulting in lumbar fusion surgery. Plaintiff brought a lawsuit against the owner of the premises, the management company, and the snow removal contractor.

During the course of discovery, the co-defendants failed to produce records demonstrating prior slip and fall accidents and lawsuits due to faulty gutters at the condominium complex. As a result, we filed a motion to strike co-defendants' cross-claims for their willful and contumacious conduct as well as a motion for summary judgment to dismiss plaintiff's claims.

In granting our motions, the lower court found that (1) co-defendant owner and management company demonstrated willful and contumacious conduct requiring the striking of their cross-claims and (2) the defendant snow removal contractor did not owe any duty of care to plaintiff. Plaintiff and co-defendants appealed both decisions.

Co-defendants argued that the records demonstrating prior slip and fall accidents and lawsuits due to faulty gutters at the premises were not relevant because the prior accidents had occurred at different residences at the condominium complex. On appeal, we successfully argued that the conduct of co-defendants, by not providing proper responses to our discovery demands for a period of nearly two years, demonstrated willful and contumacious conduct requiring the striking of their pleading. We argued that the relevancy of any records should have been addressed by the co-defendants in their responses to our discovery demands but were not.

The Second Department reaffirmed that while public policy favors the resolution of cases on the merits, when a party fails to comply with a court order, frustrating the disclosure scheme set forth in the New York Civil Practice and Law Rules, it is within the trial Court's discretion to strike the pleadings or parts thereof as a sanction against such party. Striking a party's pleading is justified where their failure to comply with discovery demands or orders is willful and contumacious.

Courts have held that willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time.

In another recent decision, *Espinal v. New York City Health & Hosps. Corp.*, the Appellate Division similarly held that "willful and contumacious conduct of the defendant can be inferred from its repeated failures, over an extended period

of time and without an adequate explanation, to comply with the plaintiff's post-deposition demands for the disclosure of certain work orders and the production of certain witnesses, including a witness with knowledge of the facts, as well as to comply with several orders mandating such discovery." 115 A.D.3d 641, 981 N.Y.S.2d 569 (2d Dept. 2014).

We also successfully argued that plaintiff could not bring a claim against the defendant snow removal contractor since (1) defendant did not launch an instrument of harm, (2) plaintiff did not detrimentally rely upon the snow removal contract, and (3) defendant did not entirely displace the property owner's duty to maintain the premises.

Directly on point with the facts of the instant action, in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 (2002), the Court of Appeals held that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." As a general rule, a contractor does not owe a duty of care in tort to non-contracting third parties like plaintiff unless these parties can establish that at least one of the following three exceptions to the general rule (precluding tort liability against third-party contractors) applies to the factual circumstances surrounding the accident: (1) the contractor "launched a force or instrument of harm," thereby creating or exacerbating a hazardous condition; (2) the party detrimentally relied on the continued performance of the contractor's duties; or (3) the contractor entirely displaced the landowner's duty to maintain the premises safely. See *Espinal*, 98 N.Y.2d at 140; see also *Fung v. Japan Airlines Co., Ltd.*, 9 N.Y.3d 351, 360-361 (2007); *Church v. Callanan Indus.*, 99 N.Y.2d 104, 111 (2002).

Robert A. Fitch is the resident partner in our New York City office. He concentrates his practice on the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in Federal Courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. Bob has tried over 100 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. Bob was named a New York Metro Super Lawyer in 2013, 2014, 2015, 2016 and 2017 by the publishers of *Law & Politics*. He has a peer review rating by Martindale-Hubbell of AV (the highest).

Bob can be reached directly at (212) 323-7070 • rfitch@rawle.com

Bryan J. Ferrara is an associate in our New York City office of Rawle & Henderson LLP. Mr. Ferrara concentrates his practice in the areas of insurance coverage, medical professional liability, and casualty and premises liability. Bryan earned his J.D. from St. John's University School of Law in 2008 and his B.A. in Psychology from SUNY College at Old Westbury in 2004. He is admitted to practice in New York, as well as the U.S. District Courts for the Southern and Eastern Districts of New York.

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ABA TIPS / WEBINAR

Philadelphia Partner **Zachary M. Rubinich** was appointed the **2017-2018 Vice Chair to the American Bar Association Workers' Compensation and Employer's Liability Law General Committee**. This will be the third term in this position for Zach. In addition, he has been appointed as a member of the **2017-2018 American Bar Association Standing Committee for Diversity and Inclusion**. In addition, Zach presented a **webinar for the Clear Law Institute** titled "*Claims Management Techniques in Workers' Compensation Cases*" in July 2017. The webinar provided guidance to effectively work through a claim and avoid issues that can regularly arise. Attendees learned how to successfully investigate an accident, report an injury, communicate with various parties, facilitate return-to-work situations and gain the tools to address issues that arise after an on-the-job injury. Discussion topics included the injury reporting process, interaction with injured employees and medical providers, claim reporting procedures, comprehensive accident investigation, and effective early return to work through modified duty programs.



Zachary M. Rubinich

Zach defends insurance carriers, self-insured entities and third-party administrators in workers' compensation matters. He is experienced in the Pennsylvania Workers' Compensation Act and has handled litigation at all trial and appellate levels in Pennsylvania. He has received certification from the Pennsylvania Bar Association Workers' Compensation Law Section as a Specialist in the practice of workers' compensation law. Zach frequently speaks on workers' compensation issues to employers, insurance carriers and local and national professional organizations. He is rated AV Preeminent by Martindale-Hubbell.

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PENNSYLVANIA BAR INSTITUTE

Brett A. Wolfson co-presented a CLE course in Philadelphia in July 2017 for the **Pennsylvania Bar Institute (PBI)** titled "*Ultimate Motions Practice*." PBI is the continuing legal education arm of the Pennsylvania Bar Association. Brett focused on what to do and what not to do when filing and arguing motions in civil court. Attendees learned how the motions you win can affect the course of litigation and settlement. The course included discussion of motions to disqualify, to dismiss, to transfer venue and quash, to compel and protect, motions for sanctions and summary judgment, motions to disqualify the judge, opposing counsel and expert witnesses, and motions that change the course of litigation.



Brett A. Wolfson

Brett is a partner in our Philadelphia office. He focuses his practice on catastrophic injury and/or death cases involving products, construction/industrial/workplace, commercial motor vehicle, medical professional and premises liability. He serves as a *Judge Pro Tem* for the Dispute Resolution Center of the Philadelphia Court of Common Pleas. Brett volunteers for the Philadelphia Support Center for Child Advocates. He is a major fund raiser for the National MS Society, for which he also serves on the New Jersey Government Relations Committee Advisory Committee. Brett earned his J.D. from Rutgers University School of Law and his B.A. in Philosophy from West Chester University. He has also served under two Philadelphia Common Pleas Court Judges, as a law clerk to the Honorable Joseph D. O'Keefe while he was Supervising Judge of the Complex Litigation Center and the Honorable Sandra Mazer Moss as a Team Leader for a major jury program. Brett is rated AV Preeminent by Martindale-Hubbell.

Brett can be reached directly at: (215) 575-4255 • bwolfson@rawle.com

ADMISSION TO NEW JERSEY

Diane B. Carvell, Of Counsel to the Firm in our Harrisburg office, was admitted to practice in **New Jersey** in August 2017. She is also admitted to practice in **Pennsylvania** and **New York**, as well as the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania, the U.S. District Courts for the Northern, Eastern, Southern and Western Districts of New York, and the U.S. Court of Appeals for the Third Circuit. Diane focuses her practice on the defense of commercial motor vehicle companies and their insurers. She received her law degree in 1996 from Dickinson School of Law, where she was the recipient of the Golub Foundation Graduate Scholarship and the Sandor Yelon Award. In addition, she was a member of the *Dickinson Journal of International Law*. She graduated, *magna cum laude*, from Elmira College in 1993, where she was Phi Beta Kappa and the recipient of the Iris Leadership award. Diane served as a legal intern for the Honorable John P. Callanan, Schuylers County Court, Watkins Glen, New York and in the Chemung County Public Defender's Office in Elmira, New York. She is a former member of the Elmira College Alumni Board. In addition, she is an accomplished writer and frequent contributor on legal issues.



Diane B. Carvell

Diane can be reached directly at: (717) 234-1054 • dcarvell@rawle.com

NEW ADDITIONS

Jordan L. Howell has joined our **Philadelphia** office as an associate. He concentrates his practice in the areas of casualty & premises liability, construction, insurance coverage and product liability. Jordan earned his J.D. from the Drexel University Thomas R. Kline School of Law in 2013. While attending law school, Jordan was a legal intern for the Philadelphia District Attorney's Office. He earned his B.A. in Criminal Justice in 2010 from Temple University. While earning his bachelor's degree, he served as an intern with the Defender Association of Philadelphia. After graduating from law school, Jordan was an Assistant District Attorney in the Major Trial Division of the Philadelphia District Attorney's Office from 2013 to 2016. In 2017, before joining Rawle & Henderson LLP, Jordan served as an Assistant District Attorney in the Special Investigations Unit of the Philadelphia District Attorney's Office. Jordan is admitted to practice in Pennsylvania and New Jersey.

Jordan can be reached directly at: (215) 575-4365 • jlhowell@rawle.com



Jordan L. Howell

Robert F. Fanning has joined our **New York City** office as an associate. Robert concentrates his practice in the areas of medical professional liability, premises liability and insurance coverage. He earned his J.D. from the Maurice A. Deane School of Law at Hofstra University in 2016. He was a law clerk with Rawle & Henderson LLP during his second and third years of law school. Robert was a summer intern for the Honorable Tammy Robbins of the Nassau County Supreme Court in 2014. In addition, Robert served as vice president (2014–2015) and executive board advisor (2015–2016) of the Hofstra Veteran Law Students Association. He earned his B.S. in Criminal Justice in 2007 from Elmira College. After graduating from Elmira College, Robert enlisted in the United States Marine Corps in 2007 and completed the Basic Reconnaissance Course in 2008. In 2010, he deployed to Haiti on a humanitarian mission and the Horn of Africa with 2nd Force Recon, 1st Platoon, in support of the 24th Marine Expeditionary Unit. In 2011, he deployed to Afghanistan with 3rd Recon Battalion, Bravo Company, conducting combat operations in the Sangin Valley. In 2012, he was honorably discharged as a sergeant. Robert is admitted to practice in New York and Florida.

Robert can be reached directly at: (212) 323-7084 • rfanning@rawle.com



Robert F. Fanning

Daniel H. Ko has joined our **New York City** office as an associate. Daniel has extensive experience handling all aspects of litigation in personal injury defense matters. He focuses his practice on the defense of clients involving casualty & premises liability, commercial motor vehicle litigation, and construction defect cases. Daniel earned his J.D. from Boston College Law School in Newton, Massachusetts, in 2011. While attending law school, he helped draft a Supreme Court *amicus curiae* brief for refugees detained in Guantanamo Bay. He also served as President of the Asian-Pacific American Law Students Association from 2009 to 2010. He earned his B.A., *magna cum laude*, from Rutgers University in New Brunswick, New Jersey, in 2008. Daniel was on the Dean's List every semester and was a New Jersey Leaders of Tomorrow Presidential Internship participant for Assemblyman Upendra Chivukula. He is proficient in Korean. He is admitted to practice in New York, New Jersey and Pennsylvania, as well as the U.S. District Court for the District of New Jersey.

Daniel can be reached directly at: (212) 323-7072 • dko@rawle.com



Daniel H. Ko

IN MEMORIAM



It is with deep sadness that Rawle & Henderson LLP announces the passing of **David N. Zane**. David passed away on Saturday, July 8, 2017. He was 54 years old. He was a partner in our New York City office. David joined Rawle & Henderson LLP on June 2, 2014. He earned his Juris Doctorate from St. John's University in 1987 and his B.A. from Queens College of the City University of New York in 1984. He will be missed by his family and friends, and by all of us here at Rawle & Henderson LLP.