

OPENING STATEMENT

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New York is a notoriously dangerous jurisdiction for automobile leasing companies and their insurers because of its vicarious liability law. In New York, the registered owner of a vehicle is vicariously liable for the negligence of the driver, even if it exercises no control over the use of the automobile. Furthermore, Article 16 of New York's CPLR specifically exempts motor vehicle accidents from its provisions limiting the liability of a joint tortfeasor for non-economic loss (i.e.: "pain and suffering") to its proportionate share of the fault. In other words, the registered owner of a vehicle (or its insurer) can be held fully liable for all of the damages awarded to a person injured in an automobile accident, without regard to its fault.

New York's extremely broad public policy permitting persons injured in automobile accidents to recover from owners of vehicles, and the resulting burden upon automobile leasing companies and their insurers, is exemplified by the recent decision of New York's Court of Appeals in Tichonova v. Ford Motor Company.

That case, and New York's vicarious liability statute, is the subject of our lead article.

New York Further Expands the Concept of Vicarious Liability For Automobile Lessors and Their Insurers

By Michael E. Gorelick and Kathryn Tondel

Over the past twenty years auto-leasing programs have become an important finance option for affordable motor vehicles in most States. It has become more difficult and expensive to lease an automobile in New York, however, due to the impact of vicarious liability laws on lessors and their insurers.

Vehicle & Traffic Law § 388 makes vehicle owners vicariously liable for the negligence of those whom they allow to drive their cars, regardless of whether the owner or the driver maintains insurance. Many lessors consider New York's law to be unfair, arguing that they have no ability to control who operates the vehicle or the driving habits of the people to whom their vehicles are leased.

This concern is exemplified by Chilberg v. Chilberg, 13 A.D.3d 1089, 788 N.Y.S.2d 533 (4th Dep't 2004) where the leasing company was held vicariously liable under Section 388 when a father operating a leased vehicle negligently ran over his young daughter sunbathing in the driveway. Even though the leasing company had nothing to do with the accident and could have done nothing to prevent it, it was held liable for the \$1million dollar verdict awarded to the child.

Due to lessors' status as a potential "deep pocket", Section 388 is frequently implicated in automobile liability suits. For example, between January 1, 2000 and June 30 2003, the Association of Consumer Vehicles Lessors reported a total of 2,564 vicarious liability suits in New York, totaling in excess of \$6.5 billion. As lobbyists push for tort reform, the Legislature has remained resolute in its intention to assure injured plaintiffs compensation for negligent driving by holding financially responsible parties liable through section 388 of the Vehicle & Traffic

bell, 19 N.Y.2d 350, 277 N.E.2d 28, 280 N.Y.S.2d 123 (1967)).

Despite the expansive nature of Section 388, Courts had set some boundaries upon how far vicarious liability would be extended, in the past. It had been settled law in New York that vicarious liability may not be imputed to the vehicle owner when the driver is statutorily immune from suit. In Naso v. Lafata, 4 N.Y.2d 585, 152 N.E.2d 59, 176 N.Y.S.2d 622 (1958), for example, the Court of Appeals held that a passenger in a car owned by his employer and driven by his co-employee could not sue for injuries sustained in the accident. Workers Compensation was the sole remedy. Similarly, in Sikora v. Keillor, 17 A.D.2d 6, 230 N.Y.S.2d 571 (1962), the Second Department declined to extend liability to the car owner when the driver, a firefighter, was immune from suit under General Municipal Law § 205-b. In Nelson v. Garcia, 152 A.D.2d 22, 548 N.Y.S.2d 963 (1989) the Fourth Department, in interpreting the vicarious liability statute, stated: "Vehicle & Traffic Law § 388...imposes vicarious liability, which by its very nature cannot be imposed upon the owner unless there is liability on the part of the driver. Thus, the immunity of the driver immunized the owner against a claim for liability". Id. at 22

In a recent decision, however, the New York Court of Appeals reversed this limitation in the automobile liability context. In Tichonova v. Ford Motor Company, 2005 WL 1035237, (decided May 5, 2005), the Court of Appeals held that vicarious liability may be imputed to the vehicle owner, regardless of the fact that the driver has diplomatic immunity and thus, cannot be sued or held liable for a plaintiff's injuries. Although Tichonova does not overrule the Court's prior decisions regarding immunity in contexts other than where the driver possesses diplomatic immunity, it does reflect New York's public policy that vicarious liability under Section 388 in New York is extremely

broad and far reaching

Tichonova v. Ford Motor Company, arises out of a car accident involving Alexei Konovalov, a Russian diplomat. Mr. Konovalov, who had leased his car from Ford Motor Company, rear ended another vehicle. The accident caused significant injuries to Svetlana Tichonova, a passenger in Mr. Konovalov's car. Ms Tikhonova was barred from suing the driver, Konovalov, because his status as a diplomat rendered him immune from suit. She did, however, sue Ford Motor Company under Vehicle & Traffic Law § 388(1).

At issue was whether the federal statute (28 USC § 1364), which requires members of a diplomatic mission to secure automobile liability insurance, provides an exclusive remedy. If so, plaintiff's suit against Ford would be barred. The Court reasoned, however, that the federal statute was not an exclusive remedy, based upon its language (distinguishing the language in 28 U.S.C § 1364 from that found in Workers Compensation Law, § 29, and General Municipal Law § 205-b which are exclusive remedies). The Court held that: "contrary to Ford's assertion, (that the diplomatic immunity statute barred a derivative liability suit against it where the tortfeasor was immune), the basis for these decisions was not that liability could never derive from an immune party's negligence. Rather, both decisions rest on the statutory language..." As a result, the Court of Appeals affirmed the denial of Ford's motion to dismiss, and ruled that a lessor of a vehicle can be held vicariously liable for the negligent act of a lessee irrespective of the fact that the lessee, is immune from suit.

Although the limitations upon vicarious liability still remain in certain contexts (where the language of the statute in question clearly provides an exclusive remedy), the holding in Tichonova v. Ford makes it clear that New York's public policy continues to be strongly in favor of ensuring that persons injured in automobile accidents have a source of recovery for their damages. As a result, automobile leasing companies and their insurers will continue to face significant exposure, absent action by the Legislature.

Recent Labor Law Case Developments

New York's Labor Law, which imposes strict liability upon owners and general contractors for job site injuries sustained by workers, and the contractual indemnification and insurance implications arising out of those accidents, continues to be a fertile source of litigation. The following recent decisions from New York's Appellate Courts are of significance to insurers, claims professionals and counsel defending such cases:

Indemnification Agreements

- We have reported, in the past, on Flores v. Lower East Side Service Center, Inc., (a case handled by AGF&J) which involved a contractual indemnification claim by an owner against an injured worker's employer where the written contract was not executed until after the accident.

The Courts below had held that the parties' failure to sign the contract prior to the accident took it outside of the provisions of the Workers Compensation Law which permit an owner to bring a third-party claim against an injured workers employer when the employer has "entered into" a written contract to indemnify the owner prior to an accident.

However, in a decision handed down on March 29, 2005, New York's Court of Appeals settled the issue by finding that the term "entered into", as it relates to the written contract for indemnification permitted by Workers Compensation Law § 11, did not require that the contract be "signed" prior to the accident. Instead, the Court found that the

lishing that the parties intended to be bound, despite the fact that the written agreement was not actually signed.

After marshalling the undisputed facts, the Court found that there had, in fact, been a meeting of the minds between the owner and the employer/contractor as to all of the material terms of the agreement to indemnify and the fact that the agreement was not, in fact, signed at the time of the accident, did not render it inapplicable. Thus, the Court reversed the holdings below and granted summary judgment for indemnification to the owner against the third-party defendant/employer. For more information on the Flores case or indemnification issues in Labor Law cases, contact Steven DiSiervi at sdisiervi@agfjlaw.com.

- Temmel v. 1515 Broadway Associates, (decided May 26, 2005) also involved a situation where a contract providing for indemnification had not been signed prior to the accident.

In Temmel, plaintiff was injured while working at Viacom's premises. He was granted partial summary judgment on liability against Viacom pursuant to § 240(1). Viacom's motion for contractual indemnification from plaintiff's employer, Witel, was denied.

In support of its claim for contractual indemnification, Viacom relied upon a "Bid Document" dated prior to the loss. However, that document made no reference to indemnification. Instead, a purchase order from the general contractor to Witel dated more than a month after the accident included an attachment in which Witel agreed to indemnify Viacom for any claims arising from its work.

Based upon the evidence, the Appellate Division, First Department, held that since the only reference to the indemnification agreement was found in the purchase order dated more than one month after plaintiff's accident, the record was devoid of any language demonstrating an intention by the parties that it be retroactively applied. Thus, the Court concluded that there had been no indemnification agreement "entered into" prior to the accident and Viacom was not entitled to contractual indemnification from plaintiff's employer.

Was Worker Involved in "A Protected Activity" Under The Scaffold Law?

- Crapsi v. South Shore Golf Club Holding Company, Inc., (decided by the Appellate Division, Fourth Department, on June 10, 2005) involved a case where the plaintiff was injured when he fell from the second tier of the tee box structure during the construction of an inflatable dome over a driving range.

Plaintiff moved for partial summary judgment under Labor Law § 240(1) [the Scaffold Law]. The motion was denied, below. On appeal, the Fourth Department granted the motion for partial summary judgment on liability finding that, as a matter of law, the plaintiff was involved in a protected activity under the Statute because his work was necessary and incidental to the erection of the golf dome. Thus, plaintiff's status as a protected worker would not be affected, even if his employer's contention that its role was only that of a consultant or adviser, was correct. Accordingly, the Court found that plaintiff was entitled to the protection of the Statute.

- In Rosado v. Briarwoods Farm, Inc., (decided June 6, 2005), the Appellate Division, Second Department, found that where a construction worker was killed when lumber fell on him at a construction site, his personal representative was not entitled to summary judgment pursuant to Labor Law § 240(1). In Rosado, the Court held that in the context of a falling object that injures a worker in an activity covered by § 240(1), the plaintiff must also establish that the object fell while

being hoisted or secured because of an inadequacy of a safety device enumerated in the Statute. The Court found that under the circumstances of the case, the lumber resting on the porch overhang was not an object that needed to be secured. The Court found that the accident was not one which implicated the protection afforded by § 240(1) and thus, the cause of action under that Statute was dismissed.

- In Doucoure v. Atlantic Development Group, LLC., (decided May 24, 2005), a construction worker was injured when a piece of concrete debris that had been chipped loose fell down an elevator shaft and struck his head.

Plaintiff's claim under the Scaffold Law (§ 240(1)) was dismissed since the debris was neither being hoisted nor was it secured at the time of the accident. On appeal, the Appellate Division, First Department, affirmed that portion of the decision below which denied plaintiff's motion for seeking summary judgment on liability and which granted defendant's cross-motions dismissing plaintiff's claim under § 240(1). The Court held that "for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or enumerated in the Statute."

- In Landgraff v. 1579 Bronx River Avenue, LLC., (decided May 31, 2005), the Appellate Division, First Department, found that the building owner was liable under the Scaffolding Law, as a matter of law. In that case, the Court found that the scaffold from which the plaintiff fell was too small and too light and did not provide proper protection to the plaintiff while he was working. Thus, the Court concluded that because plaintiff was exposed to an elevation related risk arising from the inadequacy of the protective device with which he had been supplied, he was entitled to judgment, as a matter of law under § 240(1). Furthermore, the Court found that liability was not precluded by the recalcitrant worker defense because plaintiff had not been furnished with any safety devices such as slings, pulleys or safety belts which could have prevented his fall.

A Crane is a "Structure" Within the Meaning of the Scaffold Law.

- In Cun-En-Lin v. Holy Family Monuments, (decided May 31, 2005), the Appellate Division, Second Department, affirmed the lower court's grant of summary judgment on liability to the plaintiffs pursuant to Labor Law § 240(1). In doing so, the Appellate Division held that the crane from which the plaintiffs fell was a "structure" within the meaning of § 240(1). The Court noted that the reported cases define a "structure" as "any production or piece of work artificially built up or composed of parts joined together in some definite manner". Since the crane was a "structure" and the plaintiffs fell from an elevator height while repairing the structure, they were engaged in a protected activity under the Statute and thus, were entitled to judgment against the defendant owners and general contractors, as a matter of law.

Who Is An "Owner" Within the Meaning of the Statute?

- Zaher v. Shopwell, Inc., (First Department, decided May 24, 2005) involved a claim by a worker who was injured in the basement of a building while installing cable. The worker brought suit, alleging that Shopwell was an "owner" within the meaning of Article 10 of the Labor Law in that it was a "person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit". Plaintiff argued that the Statute applied to Shopwell, even though it was a lessee, because it had the

right or authority to control the work site. Thus, plaintiff contended that Shopwell fell within the statute's definition of an "owner".

On appeal, the First Department, reversed the trial court's grant of summary judgment to Shopwell, finding that it had not established, as a matter of law, that it was not an "owner". The Appellate Court concluded that since defendant delivered the cable to the basement and moved boxes around in the basement to accommodate the plaintiff, that there was some evidence in the record from which a jury could conclude that Shopwell exercised enough control over the work to qualify as an "owner" under the statute. Thus, defendant should not have been granted summary judgment. Instead, the issue should have been left to the jury.

The Meaning of "Grave Injury" in the Case of Acquired Brain Injuries

- Olszewski v. Park Terrace Gardens, Inc., (decided May 24, 2005), the First Department rejected the owners claim for common law indemnification against the third-party defendant/employer.

Prior to trial, the Court sustained the owner's claims against the plaintiff's employer for contractual indemnification but dismissed their claims for common law indemnification, upon a finding that plaintiff's injury was not "grave" within the meaning of Workers Compensation Law § 11. On motion at the close of evidence during trial, the Court dismissed the common law indemnification claim on the ground that the trial evidence established that plaintiff's "injuries are no worse than those in Barbieri v. Mt. Sinai Hospital". On appeal, the Court found that the Barbieri case, relied on below in dismissing the owner's claims for common law indemnification had since been overturned by the Court of Appeal's decision in Rubeis v. Aqua Club where the Court found that where the injured plaintiff is unemployable in any capacity, his acquired brain injury is "grave" within the meaning of the Statute. Thus, the Court held that since it could not be determined from the record whether plaintiff was unemployable in any capacity, the dismissal of the owner's claim for common law indemnification was erroneous. Those claims were thus reinstated and remanded for a hearing on the issue of whether plaintiff's brain injury was "grave" within the meaning of the Statute.

Other Cases of Interest

Late Notice: No Prejudice Is Required

In Great Canal Realty Corp. v. Seneca Insurance Company, (decided June 16, 2005), the Court of Appeals reversed the findings below and granted summary judgment to the defendant/insurer in Great Canal Realty Corp. v. Seneca Insurance Company on its "late notice" defense.

The lower courts had found that a question of fact existed as to whether the insured had provided timely notice of the occurrence. Two Appellate Division Judges opined that New York's Court of Appeals would reverse the "no prejudice" rule if called upon to do so. However, as we recently reported, the Court of Appeals has since ruled that an insurer need not establish that it has been prejudiced by an insured's late notice of occurrence or claim, to validly decline coverage where the insured is unable to provide an excuse for its failure to comply with the policy's notice provisions. Argo Corporation v. Greater New York Mutual Ins. Co., 4 N.Y.3d 332, (decided April 5, 2005).

Great Canal had been decided by the Appellate Division shortly before the Court of Appeals' ruling in Argo. When Great Canal reached the Court of Appeals, the decision was reversed and the

triable issue of fact as to whether its delay in giving notice was reasonably founded on a good faith belief of non-liability entitled the insurer to summary judgment declaring that it was not obligated to defend or indemnify the insured in an underlying tort action, despite the insurer's lack of prejudice. If you have any questions concerning the late notice defense, please contact Daniel Friedman at dfriedman@agfjlaw.com

Clergy Malpractice Claims Are Beyond the Courts' Permissible Jurisdiction

- In Wende C. v. United Methodist Church, (decided February 22, 2005), New York's highest Court was faced with claims against a minister who, while counseling husband and wife parishioners, engaged in sexual activity with the woman. The Complaint against the minister alleged battery and clergy malpractice.

The Court disposed of the battery claim as unupportable because the proof showed that the sex acts engaged in by the wife with the minister were entirely consensual. Thus, plaintiffs failed to establish a *prima facie* case of battery, which is defined as an unlawful and impermissible touching.

The Court also dismissed the claim for clergy malpractice, finding that reviewing that claim would go beyond the Court's permissible jurisdiction because it "would improperly require Courts to examine ecclesiastical doctrine". Thus, the Court found that the cause of action was barred by the "entanglement" clause of the First Amendment.

A cause of action had also been brought against the minister predicated upon a violation of the Education Law. In dismissing this claim, the Court found that the Statute only applied to licensed counselors. Since the minister had no license for professional counseling, that cause of action was dismissed, as well.

Insurance Coverage—Vendor's Endorsement

- In Raymond Corporation v. National Union Fire Insurance Co., (decided by the Court of Appeals on June 29, 2005) the question before the Court was whether the vendor's endorsement in a CGL policy covered personal injury claims caused by the vendor's independent acts of negligence, as opposed to claims arising from a defective product.

Plaintiff, TBS Group, Inc. (formerly known as "Arbor Handling Services") sold two new Raymond sideloaders to J.T. Ryerson & Sons, a steel distributor. Because there would be a substantial delay before the new sideloaders could be delivered, Ryerson asked Arbor to secure two rental units for its use in the meantime.

Arbor located a Raymond sideloader in another city. Ryerson rented the unit. It was disassembled and shipped to its facility. Arbor sent two service technicians to reassemble and adjust the sideloader. However, Arbor's technicians did not do so properly. As a result, the sideloader jammed, causing serious head and brain injuries to the Ryerson employee who was operating it.

After the injured worker sued, Raymond looked to National Union for coverage, contending that the vendor's endorsement, which listed Arbor as an additional insured, provided coverage. National Union denied coverage.

The Court of Appeals held that the claim against the vendor, Arbor, was outside the coverage of the vendor's endorsement in Raymond's policy. In doing so, the Court reasoned that the language of the policy covers vendors "only with respect to Bodily Injury or Property Damage arising out of [Raymond's products] . . . which are distributed, sold, repaired, serviced, demonstrated, installed or rented to others in the regular course of the vendor's business". Thus, the Court concluded that bodily injuries "arising out of [Raymond's products]" meant injuries arising out of defects in the products, rather than arising out of the vendor's negligence. The Court stated that the modifying phrase "which are distributed, sold, repaired, serviced, demonstrated, installed or rented to others in the regular course of the vendor's business" contained in the vendor's endorsement is most naturally read to describe the vendor's activities with respect to the products, not as plaintiff's argued, to indemnify the vendor for its negligent performance of those activities.

AGFJ DEVELOPMENTS

- AGF&J is pleased to announce that Steven M. DiSiervi and Jade M. Priest, who were formerly senior associates, have now been named members of the firm. They are both members of our tort and general liability defense department.

- AGF&J is also pleased to announce that Vanessa Caballero and Bryan Goldstein have become associated with the firm. Ms. Caballero obtained her JD from Brooklyn Law School and her BA from NYU. Mr. Goldstein earned his JD at Brooklyn Law School and his BA from Touro College.

- Glenn Jacobson obtained a defendant's verdict for our client in a serious burn injury case in Queens County. AGF&J represented the owner of a commercial premises leased to a jewelry manufacturing concern. While working for the jewelry manufacturer, the plaintiff suffered serious burns when the flame of his Bunsen burner ignited alcohol which was also utilized at his work bench in the jewelry manufacturing process.

The plaintiff was barred from suit against his employer and, instead, brought a negligence suit against the owner, alleging that he was liable because of the existence of a dangerous condition on the premises. Previously, the Appellate Division had found the existence of a question of fact as to whether allowing the plaintiff to work at his bench with alcohol in close proximity to the Bunsen burner constitute a "dangerous condition" on the premises, within the meaning of New York's Labor Law.

Despite the expert testimony proffered on behalf of the plaintiff, the jury agreed that the defendant had not created, and was not responsible for, any dangerous condition and that, instead, plaintiff's injuries were caused by his own negligence.

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