
ABRAMS, GORELICK, FRIEDMAN & JACOBSON, P.C.

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O OPENING STATEMENT

Recent additions of Cases and Points have reported on case law developments concerning the defense of spoliation of evidence and its impact upon insurers prosecuting and defending subrogation actions.

Spoliation of evidence is the destruction, significant alteration, or non preservation of evidence that is relevant to pending or future litigation. When evidence has been destroyed or altered in bad faith, resulting in damage to a party's ability to defend a suit which has been or is subsequently commenced against it, the Courts will afford the defendant relief. In New York, spoliation of evidence has been used defensively as a remedial means of punishing the spoliator by imposing sanctions ranging from the striking of its pleading, to the preclusion of witnesses or issues, to even precluding a party from presenting any evidence.

For the doctrine to apply, the destruction or alteration of evidence must have been performed in "bad faith". In a case decided this winter, New York's Appellate Division, First Department explained the parameters of the defense of spoliation, again.

In greater New York Mutual Insurance Co. v. Kurbion (decided December 24, 2002) the defendant moved to dismiss the subrogating insurer's complaint as a sanction for spoliation of evidence. The majority of the Court denied the motion because of the lack of bad faith by the subrogating insurer and its insured (the landlord). There, the destruction

NOT SO OBVIOUS: AN EXAMINATION OF THE "OPEN AND OBVIOUS" DEFENSE

by
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of evidence took place as the result of an order of the Building Department and after the apartment had been inspected by the defendant/tenant and the Fire Department.

However, one Judge (Judge Andrias) wrote a dissenting opinion in which he noted that bad faith is only one factor to consider in determining whether to impose sanctions upon the spoliating party. He found that depending on the circumstances of each particular case, the mere destruction of evidence intentionally, negligently, or otherwise can be grounds for granting a party remedial relief, if it has been sufficiently prejudiced.

If Judge Andrias' reasoning is found to be persuasive in future cases and signals a trend towards the expansion of the right to rely on the spoliation defense in situations not involving the "bad faith" destruction of evidence, the effect upon insurers would be great and could significantly extend the degree to which the spoliation defense would be available in fire and casualty cases.

We will continue to follow carefully developments in this area and will include them in future editions of Cases and Points. Should you have any questions concerning spoliation issue, please do not hesitate to call or email at Mgorelick@agfjlaw.com

INSIDE THIS ISSUE	
Opening Statement.....	1
Will Directors and Officers Insurance Policies Provide Coverage for Fraud?.....	1
Strategy for "Peripheral" Defendants in Asbestos Litigation.....	2
Recent Case Developments	3
AGFJ Developments	4
Public Education Service.....	4

In defending or evaluating a premises liability cases, counsel will invariably come across the least understood defense of "open and obvious." Misapprehensions about the "open and obvious" defense could lead to inadequate discovery and create misleading evaluations. In addition, the complexity of the "open and obvious" defense has led to different interpretations by different courts, which has created a patchwork application of the rule. This patchwork is presently responsible for different rulings in all four judicial departments in the State of New York. Michawlski v. Home Depot, Inc., 225 F.3d 113 (2nd Cir. 2000). Accordingly, defense counsel must thoroughly

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understand the basic concepts of the defense before participating in discovery to ensure a proper development of the defense.

As a general rule, an owner or lessee of property owes no duty to warn or protect the public from conditions that are “open and obvious”. Pinero v. Rite Aid of New York, Inc., 294 A.D.2d 251, 252, 743 N.Y.S.2d 21 (1st Dept. 2000). Courts have unequivocally stated that “open and obvious” conditions are those that can be readily observed or perceived through the use of one’s senses. ¹

Cherry v. Hofstra University, 274 A.D.2d 442, 711 N.Y.S.2d 898 (2nd Dept. 2000). There are no specific rules to determine what is “open and obvious” but judges have examined a litany of factors: including but not limited to, (1) whether the condition was readily apparent, (2) whether the plaintiff’s vision was obstructed or distracted, (4) whether the condition was discernable, and (5) the size of the condition. However, courts have dispensed with the factors where the plaintiff had an awareness of the condition prior to the accident. Costello v. Grand Central Plaza, Inc., 268 A.D.2d 722, 701 N.Y.S.2d 485 (3rd Dept. 2000) (Court held that plaintiff’s acknowledgement that she saw the condition that caused prior to the slip and fall established that the condition was open and obvious as a matter of law). Therefore, discovery tools should be utilized in accordance with the various factors and to determine the plaintiff’s awareness of the condition.

The complexity and misapprehension of “open and obvious” is in part generated by a little known exception, that a duty to warn or a duty to protect the public from an obvious dangers will be imposed when the owner or lessee had reason to expect or should have expected that the public would find it necessary to encounter the obvious danger. Spannagel v. State of New York, 298

A.D.2d 687, 689, 748 N.Y.S.2d 421 (3rd Dept. 2002). For example, when the obvious danger is an ice-covered entryway that is the only means of egress, a duty to warn or protect the public will be imposed despite the fact that the dangerous condition was obvious to the plaintiff. Stern v. Ofori-Okai, 219 A.D.2d 772, 631 N.Y.S.2d 102 (3rd Dept. 1995) (Court denied motion for summary judgment where plaintiff slipped and fell on icy driveway where knew of condition to his fall.)

Accordingly, discovery tools should be utilized to determine the necessity of encountering the danger and expectation that someone would encounter such a danger.

The above is only a overview, as New York’s appellate courts have rendered different results on the “open and obvious” defense. The First Department, has accepted the “open and obvious” defense but has consistently held that the question of whether a condition is open and obvious is generally one of fact, rarely decided on a motion for summary judgment. Orellana v. Merola Associates, Inc., 287 A.D.2d 412, 731 N.Y.S.2d 726 (1st Dept. 2001) (Court held that issues concerning open and obvious defense are not susceptible to summary judgment and may be decided by the jury). The Second Department is the Department most willing to accept the open and obvious defense. The Third Department has accepted the “open and obvious” defense but has limited its application by aggressively applying the necessity exception discussed above. Stern v. Ofori-Okai The Fourth Department has held that open and obvious conditions relieve the owner or lessee’s duty to warn. Duclos v. County of Monroe, 258 A.D.2d 935, 685 N.Y.S.2d 549 (4th Dept. 1999) Accordingly, success on the “open and obvious” defense will usually be predicated upon the venue of the action.

Although it may require a Herculean effort to obtain the necessary discovery it is certainly worth the effort, as the proper development of the “open and obvious” defense may defeat a plaintiff’s claim, in its entirety, and will, at the very least, serve as an excellent basis for a comparative negligence claim.

Recent Case Developments

- Inadvertently produced document is protected by the attorney/client privilege

In New York Times Co. v. Leher, McGovern Bovis Inc. (decided 12/ /02) the Appellate Division First Department unanimously reversed a holding by the New York County Supreme Court (Justice Ira Gammerman) which denied a motion by Parsons Main Inc., a defendant and third-party plaintiff, for a protective order prohibiting the use of memo written by one of its employees to its counsel.

That memo, which had been labeled “attorney-client privilege communication/attorney work product” was inadvertently turned over to the other defendants by counsel during pre-trial discovery. The trial judge rejected the defendant’s request for a protective order against use of the document, holding that absent a written request from Parsons’ attorney that the report be prepared or an explicit statement in the report itself or its cover letter that it was prepared pursuant to counsel’s request, the attorney-client privilege was not applicable.

On appeal, the appellate division unanimously found that the document was absolutely immuned from discovery. Court’s decision noted that “there is nothing in the law governing attorney-client privilege that precludes the privilege from attaching to client communications made in response to oral requests by attorneys.” Further held that

inadvertent disclosure of a privileged document does not constitute a waiver of the attorney-client privilege.

Products Liability – Importer Of Machine Must Indemnify Distributor Where Both Parties Are Held Strictly Liable.

The Appellate Division, Second Department, in deciding Godoy v. Abamaster of Miami Inc., decided the novel question of whether the distributor of a defective product is entitled to indemnification from an importer/distributor of the product which is higher in the chain of distribution, where both are strictly liable in tort to the plaintiff.

Plaintiff, Godoy, brought suit to recover damages for the loss of all four fingers on her right hand which occurred when she was operating a manually fed, electrically powered commercial meat grinder. She brought suit against the retailer that sold the meat grinder (Abermaster) the wholesale distributor of restaurant equipment who sold the meat grinder to the retailer (Carfel).

The defendants answered separately and brought cross claims against each other. Abermaster cross claimed for contribution and indemnification, while Carfel sought only contribution from Abarmaster. Carfel also attempted to start a third party action against the manufacturer of the meat grinder (a Taiwanese Company) but was unable to obtain jurisdiction over it.

Carfel settled with the plaintiff prior to trial for the sum of \$350,000. On the trial on the issue of liability, the jury, which had been charged on strict products liability, found that the meat grinder was defective in design and that the defect was a substantial factor in causing the plaintiff’s injury. The jury further found that the defect in the product existed at the time the product left the hands of both the manufacturer, the wholesale distributor and the retailer. The jury apportioned fault 40% to the plaintiff,

50% to the retailer and 10% to the distributor.

The Court found that because both Carfel and Abarmaster were liable to the plaintiff, not because they were negligent, but only by imputation of law, there is no rational way to apportion the damages between them. Thus, because contribution is available only where “two or more tortfeasors combine to cause an injury” and is determined “in accordance with the relative culpability of each person, the court found that there was no basis for contribution and that, instead, the appropriate concept was indemnification.

Thus, the court found that because the distributor Carfel, was higher up on the chain of distribution than the retailer, the retailer should be entitled to indemnification from it for any damages assessed against it as a result of its strict liability for the defective product. (___AD 2d ___ decided January 21, 2003)

Negligence-Notice Requirement

To establish a prima facie case of negligence, a plaintiff needs to demonstrate the existence of a dangerous or defective condition that caused his injuries and that the defendant either created or had actual or constructive notice of that condition. In Steinberg v. D Waldner Co. Inc., Justice Paul Baisley of Supreme Court, Suffolk County recently held that despite the opposition of the plaintiff and all of the other defendants, the third-party defendant (plaintiff’s employer) was entitled to summary judgment because of the absence of proof that it either caused or created the condition or that it had actual or constructive notice of the dangerous condition.

In Steinberg, plaintiff sued the manufacturer and retailer of a filing cabinet after plaintiff was injured when the top drawer of the cabinet

detached from its track and fell upon him. The manufacturer impleaded the plaintiff’s employer, claiming that it either altered the cabinet or positioned it in an improper fashion. However, in opposing the third-party defendant/employer’s motion, neither the plaintiff, the retailer nor the manufacturer established, in an evidentiary fashion, that the third-party defendant’s negligence contributed to the accident or that it had actual or constructive notice of the defective condition. Furthermore, the court found that the doctrine of *res ipsa loquitur* did not serve as a basis for imposing liability on the third-party defendant/employer, as a matter of law.

The third-party defendant/employer, James McCullagh Co. Inc., was represented by Tina Fugazzi of AGF&J. For more information concerning this case please contact Tfugazzi @agfjlaw.com.

AGFJ DEVELOPMENTS

AGF&J has relocated its office to 115 Broadway (11th Floor), New York, New York 10006. Our telephone number, fax number and email addresses remain the same.

Manna Morejon has successfully defended AGF&J’s client by winning a summary judgment in an automobile liability case wherein the plaintiff claimed to have sustained a torn rotator cuff requiring arthroscopic surgery. The court found that based upon medical evidence presented plaintiff’s rotator cuff tear was degenerative and not the result of the accident. Thus, the court granted summary judgment to agf&j’s client finding the plaintiff’s injury does not qualify as “a permanent consequential limitation of use of a body organ or member” and thus was not a “serious injury” within the meaning of New York’s no-fault statute. For more information on this case, contact mmorejon at agfjlaw.com.

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In Toure v. Avis Rent A Car Systems, Inc., 2002 N.Y. Slip Op. 05748, 746 N.Y.S.2d (2002), the Court of Appeals ruled on three separate cases. In two cases the plaintiff failed to produce evidence of an objectively measured quantified limitation of use of a body organ, member, function or system. However, the plaintiffs testified to limitations of activities. The plaintiff's physicians affirmed or testified that they reviewed the plaintiffs' records, examined the plaintiffs and found limitations in motion and spasms. They also submitted MRI films revealing disc herniations and bulges into evidence which they stated was the cause of. The Court of Appeals held that the plaintiffs successfully established a "permanent consequential" or "significant" limitation of use under Insurance Law §5102(d). The Court held that "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. As experts *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compared the plaintiff's limitations to the normal function or system." Toure, supra (emphasis in original).

While the court relied upon its own prior holding in a case called Dufel v. Green, 84 N.Y.2d 795, 622 N.Y.S.2d 900, 647 N.E.2d 105 (1995) to support the possibility that a "qualitative assessment" may suffice to establish a "significant" limitation, in the years since the Dufel decision the Appellate Courts have firmly held that "the plaintiff's expert *must submit quantitative objective findings* in addition to an opinion as to the significance of the injury." See e.g., Grossman v. Wright, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000) (emphasis added). With the Toure decision the Court of Appeals makes

clear that, so long as it is supported by objective evidence, not only a "quantified" assessment of plaintiff's limitation but a "qualitative" assessment will be sufficient to meet the "serious injury" threshold. ///