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Personal Injury - Workers' Compensation - Social Security

September 2016 - By: Tim Higgins, Esq.

*As the calendar turns from summer to fall, we can now enjoy cooler temperatures, colorful foliage and, of course, football!*

*For many football fans, the best part of a game-day experience is the pre-game and post-game "tailgate party". One particular Buffalo Bills fan who sued his hometown team recently scored a victory in court.*

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NFL "tailgating" injury suit saved from dismissal
**Giacometti v. Farrell (New York App. Div., 4th Dept., 11/20/15)**

Plaintiff Adam Giacometti was in the parking lot outside the Bills' football stadium when the Defendant Farrell, part of the post-game "tailgating" crowd, struck Plaintiff with his car. Farrell's car was being chased through the parking lot by the Bills' security contractor (Apex) after Farrell had gotten into a fight with another fan. Plaintiff and several eyewitnesses reported that Farrell swerved his car out of a driving lane (striking and injuring the Plaintiff) "to avoid hitting a burning log that was partially obstructing" the lane.

One Apex security guard testified that getting the burning log out of the roadway wasn't a high priority because security personnel was focused on "underage drinking and just drunk, obnoxious fans".

Lawyers for the Bills won dismissal of the Plaintiff's case, on the argument that its security contractor (Apex) was responsible for the safety of the tailgating crowd. On appeal, the Appellate Division of New York Supreme Court reversed the lower court's decision and reinstated the suit against the Bills, stating that the football team could be held responsible for the negligence of Apex and that the Bills had not proven "as a matter of law that they satisfied their duty to maintain a safe premises" at the stadium.

School could be held liable for injury before football practice
**Duffy v. Long Beach School Dist. (New York App. Div., 2nd Dept., 12/9/15)**

A 15-year old junior varsity football player sued his high school claiming that his coaches failed to supervise the team before practice started; during which time the Plaintiff broke both of his wrists. The injury happened not during a block or a tackle; but when the teen and his teammates were using a "blocking sled" to catapult each other into the air. This horseplay took place before practice started, and prior to the arrival of the coaches for the JV team. Supreme Court dismissed the lawsuit, but the Appellate Division reversed and reinstated the claim. The appeals court found that even though practice hadn't started, a jury might decide the school still had an obligation to supervise the Plaintiff and his teammates. The court also ruled that Plaintiff's injury was not a typical football injury; and therefore not one of the "commonly appreciated risks which are inherent in and arise out of the nature of football generally".

July 2016 - By: Tim Higgins, Esq.

*Every year, thousands of personal injury lawsuits are filed and resolved in the court system of the State of New York. The Court of Appeals, based in Albany and comprised of seven judges, is New York's highest state court.*

*The principal trial court for these personal injury lawsuits is the New York State Supreme Court. Cases or issues that are appealed from the Supreme Court go to intermediate appellate courts, known as the Appellate Division of the New York Supreme Court. A small percentage of issues or cases decided in the Appellate Division reach a final appeal in the Court of Appeals.*

*Because all lower courts in New York are obligated to follow and apply rulings issued by the Court of Appeals, decisions from that court are closely watched in all subject matters. Within the last year, the Court of Appeals has issued decisions that impact personal injury lawsuits.*

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## A hospital can owe a duty of care to a non-patient
## **Davis v. South Nassau Communities Hospital (Fahey, J., 12/16/15)**

Staff at the defendant hospital gave a patient IV medications without warning the patient that the drugs might impair her ability to safely drive a car. The patient (a non-party in this action) thereafter caused an accident with a bus operated by the injured plaintiff. While noting that any "expansion of duty is a power to be exercised cautiously", the Court of Appeals concluded that the hospital had a duty (to the plaintiff; as a third party) to warn the patient of the dangers associated with the medications administered to her. A key consideration in duty analysis, per the Court, is meeting the changing needs of society; quoting Judge Cardozo 100 years ago in *MacPherson v. Buick Motor Co.*; that "the principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be".

## Expansion of the "storm in progress" defense?
## **Sherman v. NYS Thruway Authority (5/5/16)**

While a landowner owes a duty of care to keep his or her property in a reasonably safe condition, liability for negligence will not attach if a plaintiff is hurt "as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter". Applying such "storm in progress" rule to this claim, the Court of Appeals, with 3 dissenting justices, affirmed the Appellate Division ruling dismissing the claim. The claimant New York State Trooper, working out of the Newburgh barracks on property owned and maintained by the defendant Thruway Authority, was hurt after a slip-and-fall on a patch of ice. The fall happened at 8:15 a.m. while it was raining; some 90 minutes after conclusion of an "intermittent wintry mix" of snow, sleet and rain that started as an ice storm the night before. The Court of Appeals majority concluded that "the storm was still in progress" at the time of the injury and the defendant's "duty to abate the icy condition had not yet arisen". The dissenters felt summary dismissal was not proper; that the defendant failed to prove whether the storm had ended in Newburgh at the time of the fall and if so, whether it was too soon for the property owner to take protective measures; and further cautioned that the Court had never before "held that above-freezing rain alone constitutes a type of storm-in-progress that would relieve a property owner from taking any action" to make the property safe.

## The rule of "trivial" defects
## **Hutchinson v. Sheridan Hill House Corp. (Fahey, J., 10/20/15)**

In reversing the judgments of various Appellate Divisions in two of three appeals it considered, the Court of Appeals reviewed the "trivial defect" defense in slip/trip-and-fall claims. The Court's holding in *Trincere* (1997) established that there is no "minimal dimension test" or per se rule that a defect must be of a certain height or depth to be actionable and that courts should not find a defect to be trivial based on size alone. Now in *Hutchinson*, the Court emphasizes that defendants relying on the trivial defect defense for summary judgment "must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses".