The URB Insider

A Quarterly Publication of Underwriters Rating Board

Volume 11, Issue 2

Summer, 2013

High Court Ends Term After Deciding Several Cases

At The Supreme Court

In late June, the U.S. Supreme Court decided several cases. A couple of noteworthy decisions that have generated great interest relate to marriage equality for same-sex couples.

In the first case, the justices struck down a key section of the Defense of Marriage Act or "DOMA". This 1996 law defines marriage as one man and one woman and bars same-sex couples from getting marriage-related benefits.

In a 5-4 decision, the majority, led by Justice Anthony Kennedy, found the provisions unconstitutional. However, the High Court left intact a separate section that allows a state to refuse to recognize a same-sex union from another state.

The second decision was about California's Proposition 8, which was the 2008 ballot measure that banned same-sex marriage in California.

A federal judge had found the ban unconstitutional but supporters of Proposition 8 appealed and lost at the appellate level of the federal court.

The Supreme Court did not rule on gay marriage bans in general. They did hold that those who appealed had no standing to do so.

The Supreme Court also issued other opinions related to other various issues, prior to taking a break for the summer. ◆

Index for this Issue:

NY Court Of Appeals Case

Hastings v Sauve

2013 NY Slip Op 03120 [21 NY3d 122]

Argued March 21, 2013; Decided May 2, 2013

Editor's Note: The following is the opinion of the New York Court of Appeals in the captioned case.

Hastings v Suave, 94 AD3d 1171, reversed.

OPINION OF THE COURT

Smith, J.

We hold that the rule of *Bard v Jahnke* (6 NY3d 592 [2006]) does not bar a suit for negligence when a farm animal has been allowed to stray from the property where it is kept.

Karen Hastings was injured when the van she was driving hit a cow on a public road. The cow had been kept on property owned by Laurier Sauve, and the cow itself was owned by either Albert Williams or William Delarm. There was evidence that the fence separating Sauve's property from the road was overgrown and in bad repair.

Hastings and her husband brought this personal injury action against Sauve, Williams and Delarm. Supreme Court granted summary judgment motions by Sauve and Delarm. The Appellate Division affirmed as to those defendants, and granted summary judgment as to Williams also, citing *Bard* and other cases for the proposition that "injuries inflicted by domestic animals may *only* proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence" (*Hastings v Sauve*, 94 AD3d 1171, 1172 [3d Dept 2012] [internal quotation marks omitted]). The Appellate Division expressed its "discomfort with this rule of law as it applies to these facts—and with this result" (*id.* at 1173), and later granted plaintiffs leave to appeal to this Court. We now hold that the rule of *Bard* is inapplicable to a case of this kind, and reverse the Appellate Division's order.

In *Bard*, we denied recovery to a plaintiff who was attacked by a bull while working in the barn where the bull was kept. Noting that the bull "had never attacked any farm animal or human being before," we declined to "dilute our traditional rule" that a plaintiff in such a case must show that defendant had knowledge of the animal's "vicious propensities" (6 NY3d at 597-599). We made clear that by "vicious propensities" we meant any behavior that "reflects a proclivity to act in a way that puts others at risk of harm" (*id.* at 597, quoting *Collier v Zambito*, 1 NY3d 444, 447 [2004]). We have followed *Bard* in two more recent cases involving plaintiffs who were attacked or threatened by dogs (*Petrone v Fernandez*, 12 NY3d 546 [2009]; *Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787 [2008]).

This case, unlike *Collier*, *Bard*, *Bernstein* and *Petrone*, does not involve aggressive or threatening behavior by any animal. The claim here is fundamentally distinct from the claim made in *Bard* and similar cases: It is that a farm animal was permitted to wander off the property where it was kept through the negligence of the owner of the property and the owner of the animal. To apply the rule of *Bard*—that "when harm is caused by a domestic animal, its owner's liability is determined solely" by the vicious propensity rule (6 NY3d at 599)—in a case like this would be to immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property.

We therefore hold that a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108 (7)—is negligently allowed to stray from the property on which the animal is kept. We do not consider whether the same rule applies to dogs, cats or other household pets; that question must await a different case.

In this case, while a number of important facts are disputed, the record read most favorably to plaintiffs would support a finding that any or all of the three defendants were negligent in allowing the cow to enter the roadway. Summary judgment in defendants' favor should therefore not have been granted.

Accordingly, the order of the Appellate Division should be reversed with costs and defendants' motions for summary judgment denied. The certified question is not necessary and should not be answered.

Chief Judge Lippman and Judges Graffeo, Read, Pigott and Rivera concur.

Order reversed, with costs, defendants' motions for summary judgment denied, and certified question not answered on the ground that it is unnecessary. ◆

NY Cases

Purcell v Metlife Inc.

2013 NY Slip Op 04999
Decided on July 2, 2013

Editor's Note: The following is the opinion of the New York Supreme Court, Appellate Division, First Department in the captioned case.

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 24, 2012, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motions for summary judgment dismissing plaintiff Daniel Purcell's Labor Law § 200 claim as against defendant JRM Construction Management LLC and the Labor Law § 241(6) claim against both defendants to the extent predicated upon alleged violations of Industrial Code (12 NYCRR) §§ 23-1.7(e), 23-1.11 and 23-1.22(b)(2), granted third-party plaintiffs' motions for conditional summary judgment on their contractual indemnification claim against third-party defendant, and denied so much of third-party defendant's cross motion for summary judgment as sought dismissal of third-party plaintiffs' contractual indemnification claim against it, unanimously affirmed, without costs.

The motion court properly dismissed plaintiff's Labor Law § 200 claim against defendant JRM, because there is no evidence that JRM supervised the means or methods of plaintiff's work (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]), and no evidence that it created or had actual or constructive notice of the allegedly dangerous condition that caused plaintiff's injury (*see Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512 [1st Dept 2004]; *see generally Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

The motion court also properly dismissed plaintiff's Labor Law § 241(6) claims to the extent indicated. Industrial Code (12 NYCRR) § 23-1.7(e)(1) is inapplicable, since plaintiff testified that he slipped on wet plywood while carrying a heavy steel beam, and there is no evidence in the record that plaintiff tripped. Moreover, plaintiff's accident did not take place in a "passageway" within the meaning of that provision; rather, it occurred in an open-work area on the eighth-floor roof setback of the work site (*see Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). Section 23-1.7(e)(2) is inapplicable because the wet plywood on which plaintiff slipped is not "debris" or any of the other obstructions listed in that provision; plaintiff does not claim to have slipped or tripped on any scattered tools or other materials (*see Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 [1st Dept 2013]). Section 23-1.11 is inapplicable, since plaintiff does not claim that his accident was caused by defects in the lumber and nail fastenings used in the construction of the plywood (*see Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002]). Section 23-1.22(b)(2) is also inapplicable, since the plywood is neither a runway nor a ramp (*see Gray v City of New York*, 87 AD3d 679, 680 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012].

The motion court correctly found that third-party plaintiffs are entitled to conditional summary judgment on their contractual indemnification claim against third-party defendant. The indemnity provision at issue does not violate General Obligations Law § 5-322.1, as it does not require third-party defendant to indemnify third-party plaintiffs for their own negligence (*cf. Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 794 [1997].

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.◆

Mitchell v Icolari

2013 NY Slip Op 05192
Decided on July 10, 2013

Editor's Note: The following is the opinion of the New York Supreme Court, Appellate Division, Second Department in the captioned case.

DECISION & ORDER

In an action to recover damages for personal injuries, the defendant Eileen Icolari appeals from an order of the Supreme Court, Richmond County (Maltese, J.), dated May 8, 2012, which denied her motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against her.

ORDERED that the order is reversed, on the law, with one bill of costs, and the motion of the defendant Eileen Icolari for summary judgment dismissing the complaint and all cross claims insofar as asserted against her is granted.

The plaintiff allegedly tripped and fell on a raised sidewalk flag while walking on St. Marks Place in Staten Island. The plaintiff commenced this action against Eileen Icolari, who owned the property located at 1-5 St. Marks Place, and the City of New York, to recover damages for his personal injuries allegedly caused by their negligence. In his complaint and bill of particulars, the plaintiff identified the location of the alleged defect as being in front of 1-5 St. Marks Place, situated approximately 50 to 75 feet east of the northeast corner of the intersection with Westervelt Avenue. With respect to Icolari, the plaintiff alleged that she owned, operated, and maintained the subject portion of the sidewalk.

After the completion of discovery, Icolari moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against her, asserting that the area where the accident occurred did not abut her property. The Supreme Court denied the motion, finding that triable issues of fact existed as to the ownership and control of the raised sidewalk flag.

The elements of a cause of action alleging negligence are the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach proximately caused the injury (*see Turcotte v Fell*, 68 NY2d 432, 437; *Kraut v City of New York*, 85 AD3d 979, 980; *Ruiz v Griffin*, 71 AD3d 1112, 1114; *Ingrassia v Lividikos*, 54 AD3d 721, 724). "[L]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property"(*Nappi v Incorporated Vil. of Lynbrook*, 19 AD3d 565, 566, quoting *Warren v Wilmorite, Inc.*, 211 AD2d 904, 905; *see Irizarry v Heller*, 95 AD3d 951, 953; *Quick v G.G.'s Pizza & Pasta, Inc.*, 53 AD3d 535, 536). Where none of these factors is present, "a party cannot be held liable for injuries caused by the allegedly defective condition" (*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 730; *see Cerrato v Rapistan Demag Corp.*, 84 AD3d 714, 716; *Sanchez v 1710 Broadway, Inc.*, 79 AD3d 845, 846; *Kydd v Daarta Realty Corp.*, 60 AD3d 997, 998; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 562; *Aversano v City of New York*, 265 AD2d 437).

Icolari established, prima facie, her entitlement to judgment as a matter of law by submitting evidence, including a survey of her property and photographs showing that the alleged defect was located in front of Icolari's neighbor's property, and excerpts from the plaintiff's deposition testimony confirming the location of the alleged defect at a point beyond Icolari's property line, thereby demonstrating that Icolari did not own, occupy, control, or put to a special use the sidewalk where the defect which allegedly caused the plaintiff to fall was located (*see Irizarry v Heller*, 95 AD3d at 953; *James v Stark*, 183 AD2d 873, 873). Therefore, Icolari established that she did not owe a duty to the plaintiff with respect to the subject defect (*see Irizarry v Heller*, 95 AD3d at 953).

In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, evidence that Icolari repaired the alleged defect located on the sidewalk abutting her neighbor's property subsequent to the happening of the accident did not create a question of fact as to ownership and control of the area where the alleged defect was located.

In light of our determination, Icolari's remaining contentions need not be considered.

Accordingly, the Supreme Court improperly denied Icolari's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against her. DILLON, J.P., AUSTIN, SGROI and COHEN, JJ., concur. ◆

Filer v Adams

2013 NY Slip Op 03897 [106 AD3d 1417]

May 30, 2013

Editor's Note: The following is the opinion of the Supreme Court, Appellate Division, Third Department in the captioned case.

Spain, J. Appeal from an order of the Supreme Court (Pritzker, J.), entered June 12, 2012 in Washington County, which denied defendant's motion for summary judgment dismissing the complaint.

One evening in June 2008 around 6:30 p.m., plaintiff Andrea Filer (hereinafter plaintiff) and her daughter were riding their horses along Riley Hill Road, a public highway in the Town of Salem, Washington County. At the same time, defendant was jogging along the same road with her son in a stroller and her two dogs by her side. Plaintiff and her daughter noticed that the horses' ears flickered and they stiffened, apparently hearing sounds from behind, and they stopped to calm the horses. The riders looked back and saw defendant. Plaintiff and her daughter testified at a deposition that plaintiff twice yelled to defendant to "please stop"; plaintiff testified that defendant replied "no" and continued on. Plaintiff and her daughter also claimed that defendant's dogs were unleashed, while defendant testified they were on leashes strapped to the stroller. Defendant testified that, upon observing plaintiff having difficulty controlling her horse, she slowed to a walk, which plaintiff did not contradict, and she denied ever hearing plaintiff's request for her to stop. At that time, while defendant was still about 50 yards behind the riders, one of defendant's dogs barked and the horses both abruptly broke into a canter or a run. Plaintiff, who was not wearing a helmet, fell from her horse seconds later and sustained serious injuries.

Thereafter, plaintiff and her husband, derivatively, commenced this action against defendant. Defendant sought summary judgment, arguing that plaintiff, who was an experienced horseback rider, assumed the risks commonly associated with that activity, thereby absolving defendant of liability for plaintiff's injuries. Supreme Court denied defendant's motion for summary judgment and this appeal ensued.

The parties have focused on the defense of primary assumption of risk, a "closely circumscribed" doctrine applied only in the "limited context" (*Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395 [2010]) of qualified and "particular athletic and recreative activities" (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012]). We find, however, that there is no proof whatsoever that plaintiff was engaged in a qualified activity that was "sponsored or otherwise supported by the defendant" or that plaintiff's injury "occurred in a designated athletic or recreational venue" and, therefore, the doctrine of primary assumption of the risk is not applicable to insulate defendant from all liability for plaintiff's injuries (*Custodi v Town of Amherst*, 20 NY3d at 88; *see Trupia v Lake George Cent. School Dist.*, 14 NY3d at 395-396; *Lecznar v Sanford*, 265 AD2d 728, 730 [1999]; *Roe v Keane Stud Farm*, 261 AD2d 800, 801 [1999]; *contrast Soloman v Taylor*, 91 AD3d 1180, 1181 [2012] [horseback riding plaintiff thrown from horse spooked by dogs on the defendant's property, where the plaintiff boarded her horse]). Since such qualified activity was not involved, "defendant remains potentially liable for . . . plaintiff's injury and the comparative negligence statute (*see,* CPLR 1411) operates to reduce[ ] the plaintiff's recovery in the proportion . . . her conduct bears to . . . defendant's culpable conduct" (*Roe v Keane Stud Farm*, 261 AD2d at 801 [internal quotation marks and citation omitted]; *see Turcotte v Fell*, 68 NY2d 432, 438 [1986]; *Lecznar v Sanford*, 265 AD2d at 730).

Nevertheless, viewing the evidence most favorably to plaintiffs, defendant is entitled to summary judgment dismissing the complaint. Initially, to the extent that plaintiffs rely upon negligence principles to hold defendant liable for the actions of her dog in barking at the horses and causing plaintiff's injuries, "[t]he Court of Appeals has made clear that a cause of action for ordinary negligence does not lie against the owner of a domestic animal[FN*1] which causes injury.

Continued on next page ⟹

Filer v Adams

2013 NY Slip Op 03897 [106 AD3d 1417]

May 30, 2013

Continued From Page 5

Rather, the sole viable claim is for strict liability," which must be established by "evidence that the animal's owner had notice of its vicious propensities" (*Alia v Fiorina*, 39 AD3d 1068, 1069 [2007] [citations omitted]; *see Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Bard v Jahnke*, 6 NY3d 592, 599 [2006]; *Collier v Zambito*, 1 NY3d 444, 446-448 [2004]; *Bloomer v Shauger*, 94 AD3d 1273, 1274-1275 [2012], *affd* 21 NY3d 917 [2013]; *Gordon v Davidson*, 87 AD3d 769, 769 [2011]). This principle applies, even here, where any claim by plaintiffs would be grounded in defendant's own alleged negligence in not preventing her dogs from barking or allowing them to be unleashed (*see Petrone v Fernandez*, 12 NY3d at 550; *Doerr v Goldsmith*, 105 AD3d 534, 535 [1st Dept 2013]; *Gordon v Davidson*, 87 AD3d at 769; *Curbelo v Walker*, 81 AD3d 772, 774 [2d Dept 2011]; *Vichot v Day*, 80 AD3d 851, 852 [2011]; *Rose v Heaton*, 39 AD3d 937, 939 [2007]).

Plaintiffs did not allege in their complaint that defendant should be strictly liable for the injuries caused by the barking actions of her dog or that defendant had actual or constructive knowledge of any vicious propensities on the part of her dogs (*see Gordon v Davidson*, 87 AD3d at 769). Further, even had plaintiffs pleaded a strict liability claim, their allegations that defendant violated the leash law would be "irrelevant" (*Petrone v Fernandez*, 12 NY3d at 550 [internal quotation marks and citation omitted]). Moreover, there is no evidence that defendant's alleged failure to leash her dogs was a proximate cause of the accident (*see Plante v Hinton*, 271 AD2d 781, 782 [2000]). Plaintiff did not claim that the dogs ran away from defendant, came into contact with or in proximity to the horses or plaintiff, that the horses were somehow cognizant that the dogs lacked leashes, or that leashes would have prevented the dog from barking, which plaintiffs claimed was the trigger for the horses' flight and plaintiff's fall.

Thus, the only remaining allegation on which plaintiffs could base a negligence claim is that defendant was negligent by continuing to approach despite plaintiff's request that she stop. Even assuming, without deciding, that this Court were to recognize that defendant had a duty under this scenario to take further efforts to minimize the reaction of plaintiff's horses to her presence—which we find a dubious concept, at best—plaintiffs have not alleged any facts from which it could be concluded that defendant breached any such duty (*see Plante v Hinton*, 271 AD2d at 782; *Estes v New York State Saddle Horse Assn.*, 188 AD2d 857, 860 [1992]; *compare DiPilato v Biaseti*, 6 AD3d 648, 650 [2004]; *Millan v Brown*, 295 AD2d 409, 410 [2002]). "The mere act of [walking] . . . in close proximity to an unknown horse, as the complaint alleges, does not present an issue of negligence, as a matter of law" (*Estes v New York State Saddle Horse Assn.*, 188 AD2d at 860). In this regard, defendant—who had no prior experience with horses—was walking on a public highway, where she had every right to be (*see* Vehicle and Traffic Law § 1156 [b]). She slowed down to evaluate the horses and riders ahead of her, and, while she did not stop, she was still 50 yards away when plaintiff and her daughter lost control of their horses. Moreover, plaintiffs' negligence claim also fails because they alleged no facts from which it could be inferred that defendant's actions, in walking on a public street or otherwise, were the proximate cause of plaintiff's injuries (*see Plante v Hinton*, 271 AD2d at 782). Accordingly, defendant is entitled to summary judgment.

Rose, J.P., McCarthy and Egan Jr., JJ., concur. Ordered that the order is reversed, on the law, with costs, motion granted, summary judgment awarded to defendant and complaint dismissed.

Footnotes

Footnote *: While dogs are not listed as "domestic animals" in Agriculture and Markets Law § 108 (7), they have been treated as such under our common law (*see e.g. Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Collier v Zambito*, 1 NY3d 444, 446 [2004]; *Hahnke v Friederich*, 140 NY 224, 227 [1893]). ◆

Middleton v Town of Salina

2013 NY Slip Op 05119
Released on July 5, 2013

Editor's Note: The following is the opinion of the Supreme Court, Appellate Division, Fourth Department in the captioned case.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 21, 2012. The order, among other things, granted the motion of defendant County of Onondaga for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this action to recover damages arising from a backup of sewage in their house, plaintiffs appeal from an order that, inter alia, granted the motion of the County of Onondaga (defendant) for summary judgment dismissing the complaint against it. Contrary to plaintiffs' contention, Supreme Court properly granted the motion.

In the complaint, as amplified by the bill of particulars and the notice of claim, plaintiffs allege, among other things, that defendant is liable under a negligence theory. In an action against a municipality such as defendant, it is "the fundamental obligation of a plaintiff pursuing a negligence cause of action to prove that the putative defendant owed a duty of care. Under the public duty rule, although a municipality owes a general duty to the public at large to [perform certain governmental functions], this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created. This is an offshoot of the general proposition that [t]o sustain liability against a municipality, the duty breached must be more than that owed the public generally' " (*Valdez v City of New York*, 18 NY3d 69, 75). "The second principle relevant here relates not to an element of plaintiffs' negligence claim but to a defense that [is] potentially available to [defendant]—the governmental function immunity defense . . . [T]he common-law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of governmental functions . . . [pursuant to which] [a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent' " (*id*. at 75-76).

Thus, we begin our analysis by examining the "special duty issue in this case in recognition of the fact that, if plaintiffs cannot overcome the threshold burden of demonstrating that defendant owed the requisite duty of care, there will be no occasion to address whether defendant can avoid liability by relying on the governmental function immunity defense" (*id*. at 80). Contrary to plaintiffs' contention, they failed to establish that defendant owes them a special duty of care apart from any duty owed to the public in general.

In order for plaintiffs to establish that defendant owed a special duty to them, they were required to establish that defendant "voluntarily assume[d] a duty that generate[d] justifiable reliance by the person who benefit[ted] from the duty' " (*McLean v City of New York*, 12 NY3d 194, 199). That burden has four elements, i.e., " (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' " (*id*. at 201, quoting *Cuffy v City of New York*, 69 NY2d 255, 260). Here, defendant met its initial burden on the motion by submitting evidence establishing that plaintiffs' alleged reliance upon representations allegedly made by defendant's agents was not justifiable (*see Estate of Scheuer v City of New York*, 10 AD3d 272, 273-274, *lv denied* 6 NY3d 708; *see generally Dabriel, Inc. v First Paradise Theaters Corp.*, 99 AD3d 517, 521-522), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In any event, even assuming, arguendo, that plaintiffs raised a triable issue of fact whether defendant owed a special duty to them, we conclude that the court properly determined that the "second principle" set forth in *Valdez*, i.e., the governmental function immunity defense (*id*. at 75), applied.

Continued on next page ⟹

The URB Insider

Published Quarterly by
Underwriters Rating Board
2932 Curry Road
Schenectady, N.Y. 12303
Phone: 518-355-8363, Fax: 518-355-8639
Published for friends and affiliates of URB
Editor/Creator: Kimberly Davis, Esq., CPCU
Proof Editors: Mary Shell, CPCU
Jean French, CPCU

We're On the Web!
URBRATINGBOARD.com
E-mail us at:

jean@urbratingboard.com
mary@urbratingboard.com
tim@urbratingboard.com
kim@urbratingboard.com
arthur@urbratingboard.com

PA Case Notes

- A panel of the 3rd U.S. Circuit Court of Appeals in Philadelphia rejected a Pennsylvania cabinet maker's religion-based challenge to the Affordable Care Act's requirement that larger companies provide workers with health insurance that covers birth control.
- The first lawsuit known to be filed in Pennsylvania that challenges a state law that effectively bans same-sex marriage there was brought by the American Civil Liberties Union, which represents several plaintiffs. ◆

Case Notes Around The Country

- Florida—The Florida Supreme Court has ruled replacement cost includes contractor's profit.
- Iowa—A couple has been allowed by the Iowa Supreme Court to sue their attorney for emotional distress due to advice that caused them to be separated from their children and grandchildren for a decade.
- Maryland—The Court of Appeals of Maryland says bars cannot be held responsible for accidents caused by their patrons after they leave.
- Nevada—A woman who tripped on a speed bump at a casino was awarded $775,000 for her shoulder injury, and the judgment was upheld by the Nevada Supreme Court. ◆

Middleton v Town of Salina

2013 NY Slip Op 05119
Released on July 5, 2013
Continued From Page 7

Defendant established that it was engaged in a governmental function when it engaged in the allegedly negligent conduct, i.e., failing to install a check valve or similar anti-backflow device on plaintiffs' sewer line to prevent sewage from flowing backwards out of the sewer line and into plaintiffs' house. " Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment. If these functions and duties are essentially clerical or routine, no immunity will attach' " (*id.* at 79).

"Beyond the role the individual employee plays in the organization, the availability of governmental function immunity also turns on whether the conduct giving rise to the claim is related to an exercise of that discretion' . . . The defense precludes liability for a mere error of judgment' . . . but this immunity is not available unless the municipality establishes that the action taken actually resulted from discretionary decision-making—i.e., the exercise of reasoned judgment which could typically produce different acceptable results' " (*id.* at 79-80). Thus, it has long been the rule that "[t]he duties of the municipal authorities in . . . determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion" (*Johnston v District of Columbia*, 118 US 19, 20-21; *see generally McCarthy v City of Syracuse*, 46 NY 194, 196). Plaintiffs' allegation that defendant was negligent in failing to correct the problem by installing an anti-backflow device concerns a discretionary action taken in the course of a governmental function because it "relate[s] only to the design of the system, for which [defendant] may not bear liability" (*Carbonaro v Town of N. Hempstead*, 97 AD3d 624, 625; *cf. Johnston v Town of [*3]Jerusalem*, 2 AD3d 1403, 1403-1404; *Biernacki v Village of Ravena*, 245 AD2d 656, 657). Defendant therefore met its initial burden on the motion with respect to the "second principle" of the test set forth in *Valdez*, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). ◆

Editor's Note: The material contained in this publication is provided as information only, and is not intended to be construed or relied upon as legal advice in any manner. Always consult an attorney with the particular facts of a case before taking any action. The material contained in this publication was not necessarily prepared by an attorney admitted to practice in the jurisdiction of the material contained in the publication. ◆