The URB Insider

A Quarterly Publication of Underwriters Rating Board

URB Says Farewell To Long Term Employee; Welcomes New Employee

This year on December 31, URB will say farewell to Ann Popkoski, a long time office administrator for the company, who is retiring after 25 years of service.

Ann is well known among the URB companies for her sunny disposition and her flair for making URB events and meetings extra special.

Ann loves animals, and after her retirement, she plans to volunteer at the Mohawk Hudson Humane Society as well as spend more time with Ozzie, her own Dachshund. In addition, she plans to read more, travel and join a gym.

The Management and Staff of URB would like to take this opportunity to say a special thanks to Ann for her many years of service to URB and a job well done. Please join us in bidding farewell to Ann and in wishing her the best in her retirement. Ann will truly be missed at the URB!

On November 25, in preparation for Ann's retirement, URB welcomed Jaime Bashaw, from Watervliet, New York.

Jaime will be taking over the office administrator duties after Ann's retirement.

Jaime is a December, 2012 graduate of SUNY Oswego with a Bachelors Degree in Business Administration and a graduate of Shaker High School in Latham, New York.

Jaime's interests include spending time in the Adirondacks, as well as golfing, kayaking, hiking and playing volleyball on the beach.

Jaime tells us she is very excited to learn more about the insurance industry and to begin her career with URB.

Please join us in welcoming Jaime to the staff at URB and wishing her a long and successful career with our organization.◆

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Hurtado v Williams

2013 NY Slip Op 08183
Decided on December 5, 2013

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

MEMORANDUM AND ORDER Rose, J.P.

Appeal from an order of the Supreme Court (Becker, J.), entered July 17, 2012 in Delaware County, which denied a motion by defendant Black Bear Tavern and Restaurant, Inc. for summary judgment dismissing the complaint and cross claim against it.

After drinking at a tavern operated by defendant Black Bear Tavern and Restaurant, Inc. (hereinafter the Tavern), defendant Carol A. Williams caused a head-on collision resulting in the death of Jose A. Hurtado (hereinafter decedent). The accident occurred approximately seven miles from the Tavern, on the route that Williams would have taken to reach her home. Williams' blood alcohol content was determined to be .14% approximately six hours after the accident and, as a result of severe injuries sustained in the collision, she has no recollection of the night in question. Alleging a violation of General Obligations Law § 11-101 and common-law negligence, plaintiff, the administrator of decedent's estate, commenced this action against defendants. After joinder of issue and discovery, the Tavern moved for summary judgment dismissing the complaint against it. Supreme Court denied the motion, finding that the Tavern failed to meet its burden on the motion, and the Tavern appeals.

In order to establish its entitlement to summary judgment, the Tavern was required to present evidence excluding the possibility that it served Williams alcohol when she was visibly intoxicated (*see* Alcoholic Beverage Control Law § 65 [2]; *McGovern v 4299 Katonah*, 5 AD3d 239, 240 [2004]; *Donato v McLaughlin*, 195 AD2d 685, 687 [1993]; *MacDougall v Kelsch*, 161 AD2d 886, 887 [1990]). The Tavern argues that it met this burden with the statement of Amelia Anson and the statement and testimony of Jinnel Rittel, the bartenders on duty the night in question. According to Rittel, she served Williams one shot of whiskey and one beer and, when Williams later came to the bar and appeared "drunk," she ignored her. For her part, Anson stated that she served Williams one beer, but the Tavern offered no evidence as to whether Anson served Williams before or after Rittel observed her to be intoxicated. While Rittel claimed in her statement that she and Anson were the only ones who served Williams, she described the Tavern as being crowded on the night in question and "very busy," with 50 or 60 people in the bar. She also testified that there was waitstaff on duty and she did not see Williams seated at the bar. A co-owner of the Tavern confirmed that waitstaff was on duty that night and that patrons could get drinks from them. Under these circumstances, the Tavern did not eliminate the possibility that Anson served Williams after Rittel noticed that she was visibly intoxicated. Nor was the possibility ruled out that Williams was served by waitstaff when she was in the visibly intoxicated condition described by Ritter (*see Cohen v Bread & Butter Entertainment LLC*, 73 AD3d 600, 600-601 [2010]; *McGovern v 4299 Katonah*, 5 AD3d at 240; *Wasserman v Godoy*, 136 AD2d 631, 631 [1988]).

In light of the Tavern's failure to meet its burden, we have no reason to consider whether the expert affidavit submitted in opposition to the motion was sufficient to raise triable issues of fact (*see generally Hallenbeck v Smith*, 106 AD3d 1412, 1415 [2013]). We agree with the Tavern, however, that the common-law negligence claim against it should have been dismissed as the accident occurred off its premises and the Tavern owed decedent no duty beyond that set forth in General Obligations Law § 11-101 (*see D'Amico v Christie*, 71 NY2d 76, 85 [1987]).

Lahtinen, Stein and Garry, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as denied that part of the motion by defendant Black Bear Tavern and Restaurant, Inc. for summary judgment dismissing the common-law negligence cause of action against it; motion granted to that extent and said cause of action dismissed against said defendant; and, as so modified, affirmed. ◆

Cooper v McInnes

2013 NY Slip Op 08322
Decided on December 12, 2013

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

MEMORANDUM AND ORDER

Lahtinen, J.

Appeal from an order of the Supreme Court (O'Shea, J.), entered February 14, 2013 in Chemung County, which, among other things, denied plaintiffs' motion for a protective order.

Plaintiffs commenced this negligence action alleging various injuries caused by exposure to lead paint when they were children residing in apartment buildings managed or owned by defendants. Defendants served a notice to have plaintiffs examined by psychologist Thomas Griffiths. Plaintiffs moved for a protective order disqualifying Griffiths as the examiner or, alternatively, precluding Griffiths from asking questions regarding "socioeconomics, eugenic[s] or euthenics" and permitting videotaping of the examination. Defendants cross-moved to preclude videotaping or observation of the examination by counsel. Supreme Court denied plaintiffs' motion and partially granted defendants' cross motion. The court, among other things, determined that plaintiffs could have counsel or a representative present during the examination provided that such person remained five feet behind the person being examined and "not use a computer, cell phone or other electronic device during the evaluation, and . . . not record the evaluation or speak with . . . Griffiths or anyone else during the evaluation." Plaintiffs appeal.

We affirm. "'[The] trial court has broad discretionary power in controlling discovery and disclosure'" (*Matter of Scaccia*, 66 AD3d 1247, 1249 [2009], quoting *Allen v Krna*, 282 AD2d 946, 947 [2001]). "Although we can substitute our discretion for that of the trial court regarding disclosure, we typically limit our review to whether the trial court clearly abused its discretion" (*Herbenson v Carrols Corp.*, 101 AD3d 1220, 1221 [2012] [citations omitted]). While plaintiffs' counsel has dealt with Griffiths in previous cases and does not agree with his approach in lead exposure cases, nonetheless the record does not reflect a level of biased or unabashed antipathy by Griffiths such that it constituted an abuse of discretion for Supreme Court to permit defendants to use this expert (*see Lewis v John*, 87 AD3d 564, 565-566 [2011]; *Noteboom v Shugrue*, 306 AD2d 453, 453 [2003]; *cf. Pettway v Ogbonna*, 261 AD2d 700, 700 [1999]). Nor are we persuaded that Supreme Court erred in denying plaintiffs' request that Griffiths be precluded from inquiring about plaintiffs' family history as part of his examination (*see Derr v Fleming*, 106 AD3d 1240, 1243 [2013]; *Cunningham v Anderson*, 85 AD3d 1370, 1374-1375 [2011], *lv dismissed and denied* 17 NY3d 948 [2011]). Finally, Supreme Court acted well within its discretion in prohibiting video or audio recording of the psychological examinations since plaintiffs failed to establish sufficient special or unusual justifying such recording (*see Flores v Vescera*, 105 AD3d 1340, 1340 [2013]; *Lamendola v Slocum*, 148 AD2d 781, 781 [1989], *lv dismissed* 74 NY2d 714 [1989]).

Peters, P.J., Rose and Garry, JJ., concur.

ORDERED that the order is affirmed, with one bill of costs. ◆

Juett v Lucente

2013 NY Slip Op 08331
Decided on December 12, 2013

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

MEMORANDUM AND ORDER
Spain, J.

Appeal from an order of the Supreme Court (Mulvey, J.), entered September 5, 2012 in Tompkins County, which denied plaintiff's motion for partial summary judgment on the issue of liability.

Plaintiff's employer was hired to expand the parking area outside of an apartment building which necessitated the removal of several trees. While plaintiff was removing tree limbs with a chainsaw as part of that project, he was injured when a limb he cut knocked over the ladder he was using and caused him to fall. He thereafter commenced this action against defendants, the owner and managers of the apartment building, and asserted claims sounding in negligence and violations of Labor Law §§ 240 (1) and 241 (6). Following joinder of issue and discovery, plaintiff moved for partial summary judgment on the issue of liability under Labor Law § 240 (1). Supreme Court denied the motion, and plaintiff appeals.

In order to recover under Labor Law § 240 (1), plaintiff is obliged to show that he was injured in the course of "the erection, demolition, repairing, altering, painting, cleaning or pointing of a *building or structure*" (emphasis added). A tree is a naturally occurring object that is "clearly not a 'building' or a 'structure' within" the meaning of the statute (*Lombardi v Stout*, 80 NY2d 290, 295-296 [1992]; *see Crossett v Wing Farm, Inc.*, 79 AD3d 1334, 1336 [2010]). Plaintiff argues that he is nevertheless entitled to recover under Labor Law § 240 (1) because he was employed in "duties ancillary to" work encompassed by the statute, namely, the expansion of the parking lot (*Bolster v Eastern Bldg. & Restoration, Inc.*, 96 AD3d 1123, 1123-1124 [2012]; *see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). His argument is unavailing for the simple reason that construction work, as here, involving only a parking area or highway and nothing more, "does not constitute work on a [building or] structure for purposes of Labor Law § 240 (1)" (*Dilluvio v City of New York*, 264 AD2d 115, 121 [2000], *affd* 95 NY2d 928 [2000]; *see Spears v State of New York*, 266 AD2d 898, 898 [1999]; *Matter of Dillon v State of New York*, 201 AD2d 793, 794 [1994]; *cf. Lombardi v Stout*, 80 NY2d at 296 [tree removal adjacent to house construction, driveway and parking lot work is covered]).

Supreme Court thus correctly denied plaintiff's motion, but defendants urge this Court to go further and "exercise our power to search the record and grant partial summary judgment [to defendants] dismissing plaintiff['s] Labor Law § [240 (1)] claim" (*Kropp v Town of Shandaken*, 91 AD3d 1087, 1091 [2012]; *see* CPLR 3212 [b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111 [1984]). Even viewing the evidence in the light most favorable to plaintiff, "there are no triable issues of fact regarding" defendants' liability under Labor Law § 240 (1) (*Ortiz v Fage USA Corp.*, 105 AD3d 720, 722 [2013]; *see DiBartolomeo v St. Peter's Hosp. of the City of Albany*, 73 AD3d 1326, 1327 [2010]). Inasmuch as granting summary judgment to defendants is thus fully warranted by the record and would serve the interest of judicial economy under the circumstances presented here, we grant such relief (*see Kropp v Town of Shandaken*, 91 AD3d at 1091; *Falsitta v Metropolitan Life Ins. Co.*, 279 AD2d 879, 881 [2001]).

Rose, J.P., McCarthy and Egan Jr., JJ., concur.

ORDERED that the order is modified, on the law, without costs, by granting partial summary judgment to defendants dismissing the Labor Law § 240 (1) cause of action, and, as so modified, affirmed. ◆

Case Notes Around The Country

- **California**—In a preliminary ruling, a California state court judge has ruled that three companies are ordered to pay $1.1 billion in bid to assist government agencies in removing lead from about 5 million homes in the state.

- **Connecticut**—Connecticut's High Court, in a case of first impression, has ruled that an insurer's right to subrogation takes priority over any recovery right an insured may have because of a deductible or self-insured retention.

- **Illinois**—A requirement of the Affordable Care Act that group insurance plans cover contraceptives was ordered blocked by the U.S Court of Appeals in Chicago.

- **Maryland**—The Maryland Court of Appeals has upheld the *Frye-Reed* "General Acceptance" Test for admissibility.

- **Iowa**—The Iowa Supreme Court recently ruled an immigrant worker from Mexico, who stayed in the United States after her visa had expired, is entitled to Workers' Compensation due to a work-related injury. She had a visa for 10 years and had lived in Iowa for 19 years.

- **Massachusetts**—The Massachusetts Supreme Judicial Court has decided that punitive damages based on gross negligence should not be evaluated differently from punitive damages based on willful, wanton and reckless conduct.

- **Oklahoma**—A constitutionality challenge to Oklahoma's Workers' Compensation statute has been rejected by the Oklahoma Supreme Court.

- **Pennsylvania**—In a mesothelioma case, the Pennsylvania Superior Court affirmed the lower court decision to grant Summary Judgment to the defendant as a result of a *Frye* challenge to plaintiff's expert testimony, part of a trend of stricter review standards.

- **Wisconsin**—An appeals court in Wisconsin recently held that manure isn't a pollutant under an insurance policy.◆

URB Forms In the Works

For your information, listed below are some URB Forms currently in the works for your information:

- SF Forms Series Update
- ML-22 Residence Held In Trust
- LS-31A and LS-31B Host Liquor Liability
- ML-46 Personal Injury Endorsement
- ML-345 Equipment Breakdown Enhancement Endorsement (For Use With Farmowners Policies)
- FL-124 Roof Surface Actual Cash Value Loss Settlement
- SF-124 Roof Surface Actual Cash Value Loss Settlement

Combined Companies
Average Homeowners Policy Value
2012

Zone	Overall ($)	RC Overall ($)	ACV Overall ($)
1.1	138,216	157,980	95,446
1.2	166,394	184,277	106,240
1.3	161,185	181,452	97,831
1.4	167,001	185,663	104,589
1.5	138,229	165,618	90,687
1.6	155,340	176,385	97,266
1.7	223,308	227,527	146,333
1.8	199,806	209,827	139,108
1.9	195,156	209,517	96,419
2	153,028	179,013	106,294
3	305,878	306,915	178,750
4	325,417	328,495	260,250
5	68,751	155,001	45,833
6	381,000	384,001	302,501
7	380,365	385,606	136,500
8	365,162	367,501	296,667
9	328,908	329,797	206,500
10	316,066	317,352	207,500

Note: If you submit statistics to URB, URB can send you your company's individual numbers.

Emerging Issues In Cyber Law and Liability

The rise of technology has created the world of cyber space. Far from the final frontier, it is the world we live in today. According to Digital Information World, 85 percent of people in the world have internet access.

The issues that are emerging in cyber law that will determine how cyber liability is looked at in the future include, but are not limited to, laws involving electronic equipment and mobile devices, cyber security, cloud computing, social media and spam laws.

There is a trend of increased use of electronic equipment and mobile devices and a corresponding explosion of gripe sites, chat rooms and weblogs. With regard to the use of electronic equipment to access the internet and mobile devices, most jurisdictions do not yet have laws intended to regulate their use. This can lead to the proliferation of personal injury and crimes involving electronic equipment and these devices, and the increased need for protection and privacy of users and nonusers alike.

Cyber security is a topic that is regularly discussed today because cyber attacks are increasing. There is a call to set forth effective uniform mandatory provisions relating to cyber security that continue to evolve. Cloud computing presents challenges in the area of data security, data privacy and jurisdiction.

Perhaps the most significant issue to impact cyber law is social media. The number of people using social media is growing. According to Digital Information World, 25 percent of the people in the world now use social media.

When used inappropriately, social media can be the source of cyber harassment, defamation and crime.

Another issue is how the anti-SPAM laws will impact the use of the internet. In many cases, sending SPAM violates the receiver's right to privacy.

These issues of cyber law and cyber liability pose new questions to the insurance industry about the related risks.

While the exposures are different in personal lines policies as compared to commercial lines policies, the risks are real in either type.

The typical basic Homeowners' Policy does not provide personal injury coverage but it can be endorsed onto the policy.

Typical commercial lines policies will have personal injury coverage and some can add cyber liability coverage that isn't terribly expensive.

Social media exposure in particular presents puzzling issues to insurers. Coverage is determined by an "offense" in both personal and commercial policies, but offense is not a defined term. This presents the question of what constitutes an electronic offense? Is an update another offense because it is another publication? Or is each text or tweet a separate occurrence? Does the risk grow exponentially when a poster is on another party's site?

These will be expensive cases to litigate. Only time will tell what insurers will be dealing with in cyber law and cyber liability. ◆

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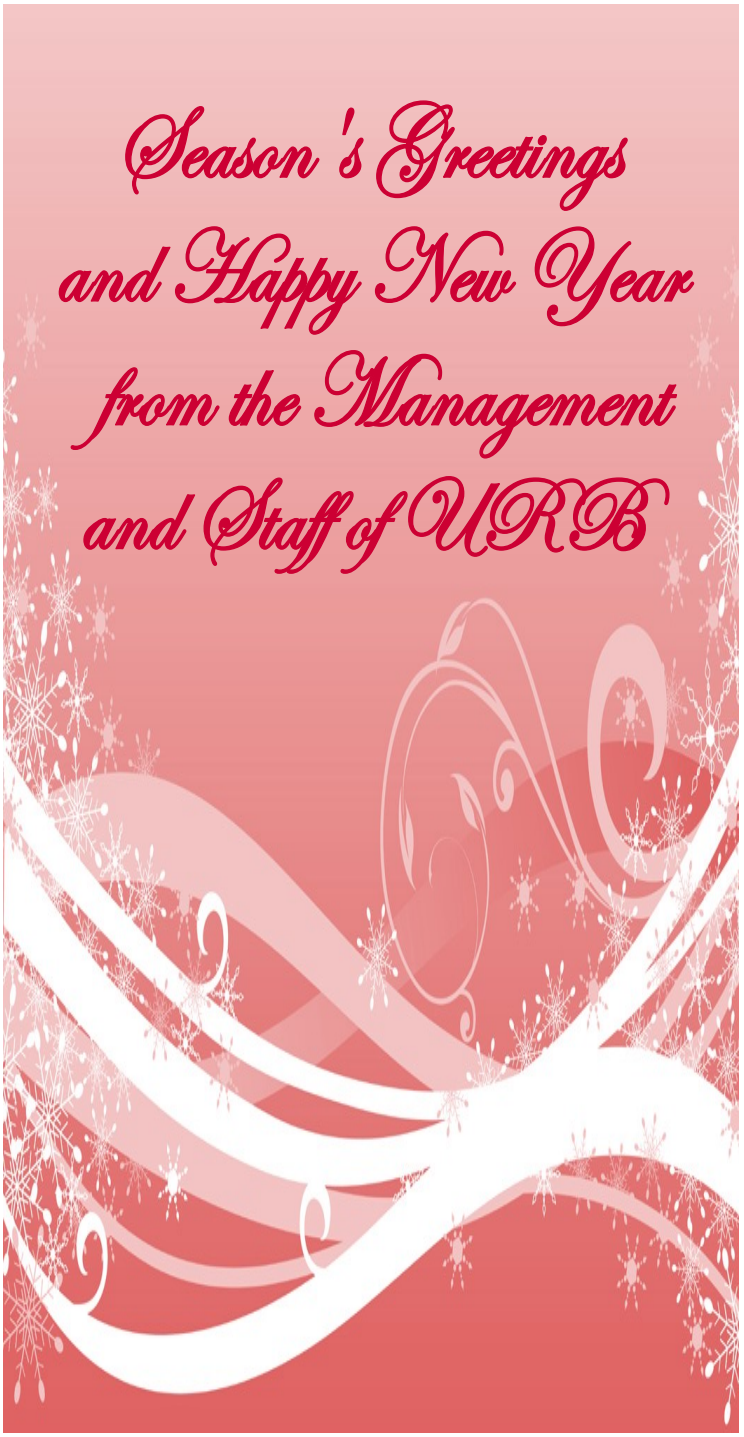
Proof Editors: Mary Shell, CPCU
Jean French, CPCU

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



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