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### Boy, Am I Thankful

As some of you may know, we in the Cooper household have been given quite a ride on the health merry-go-round lately: the tally over the last 3-1/2 weeks includes 2 urgent-center visits and 2 hospitalizations, including a one-week stay at Long Island Jewish Hospital by my one year-old daughter, Shuli.

Thank G-d, we all seem to be recovering rather nicely. And when you spend some time in these facilities, you are typically confronted with the stark reality that compared to the others that are there at the hospital, your life situation is particularly good, even if you don't always appreciate it.

One other, less important truth became evident: good pediatricians are vastly more valuable than their weight in gold. Yes, Dr. Lightman - that means you.

## Why a Plaintiff's Attorney – Not the Court – Is to Blame for a Negligence Claim Against a 4 Year-Old

It's been widely reported that a New York County judge declined to dismiss as a matter of law a negligence claim against a 4 year-old, who accidentally ran her bicycle with training wheels into an elderly lady. Not surprisingly, the real-life implications of this decision has rankled quite a few New Yorkers, even including some plaintiffs' lawyers - **like me**.

A close reading of the trial judge's opinion suggests that it is well-grounded in New York's negligent supervision principles (for more on this topic, please see "[How Parents Can Be Held Negligent in NY For Their Kids' Dangerous Acts](#)"). But upon further analysis, I think the attorney who brought the case is missing the bigger picture: It is not whether the claim CAN be brought - or viable - under New York law; rather, the better question is whether the claim SHOULD be brought.

Simply put, even though this attorney has dodged a proverbial bullet in that the Court has declined to dismiss his case purely as a matter of law, I can scarcely imagine a personal injury case with less jury appeal.

Seriously, can you think of any jury that would want to award a significant verdict against a 4 year-old?

## How to Protect Your Insurance Commissions in New York

If you are an insurance broker, and were wondering how you are supposed to protect against having your [commission agreement breached](#), a decision that was rendered by a New York Federal judge a few weeks ago - and published in a recent edition of the New York Law Journal - provides an excellent roadmap.

In *Guy Carpenter & Company v. Lockton, RE, LP*, the plaintiff entered into a broker's agreement that was terminable at will, whereby they would earn commissions upon the placement of reinsurance contracts by two insurers, Zephyr and Safe Harbor. Shortly after the business was placed,

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## *Why NY Property Owners Can Be Held Liable – Even for an Open & Obvious Condition*

Back in February, 2009, I wrote about whether the placards that are commonly and prominently displayed in sporting arenas stating: "[Play at Your Own Risk](#)" have any validity under New York law. An important - and unusually candid - decision from New York's Appellate Division, Second Department further clarifies the how a plaintiff can prove that the property owner was negligent even when the condition that led to the injury was patent.

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*"If the condition is obvious, why shouldn't a claimant bear his own responsibility for the accident?"*

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In [Cupo v. Karfunkel](#), the appellate court acknowledged that some of its earlier decisions had proven unclear as to whether a finding that a hazardous condition at a defendant's property was open and obvious would inherently act as a bar to any negligence claims or not. Therefore, the appellate court clarified the rule as follows:

"Where a plaintiff has presented evidence that a dangerous condition exists on the property, the burden shifts to the landowner to demonstrate that he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk. Evidence that the dangerous condition was open and obvious cannot relieve the landowner of this burden."

At this point, you're probably wondering why that should be the rule; after all, if the condition is obvious, why shouldn't the claimant bear his or her own responsibility for the accident?

Anticipating this question, the Court further explained as follows:

Indeed, to [exculpate the property owner from all liability] would lead to the absurd result that landowners would be least likely to be held liable for failing to protect persons using their property from foreseeable injuries where the hazards were the most blatant. We ... hold that proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence."

Regardless of your personal feelings on the subject, you have to admit that the Court does have some pretty compelling reasoning for the rule.

*This publication is intended to educate small businesses and individuals about general litigation matters, as well as personal injury and defective product issues. It is not intended to be legal advice, and does not constitute an attorney-client relationship until we have a written agreement. To discuss your particular issues or case, please contact the Law Offices of Jonathan Cooper at 516.791.5700.*

## 3 Reasons That Your Employment Agreement May Not Be Worth the Paper It's Printed On

by Jonathan M. Cooper

This new **FREE Book**, which explains the 3 reasons why an employment agreement may not be worth the paper it's printed on - and how to get around them - is available to be downloaded directly from:

[www.JonathanCooperLaw.com](http://www.JonathanCooperLaw.com)

[How to Protect Your Insurance Commissions in New York](#)  
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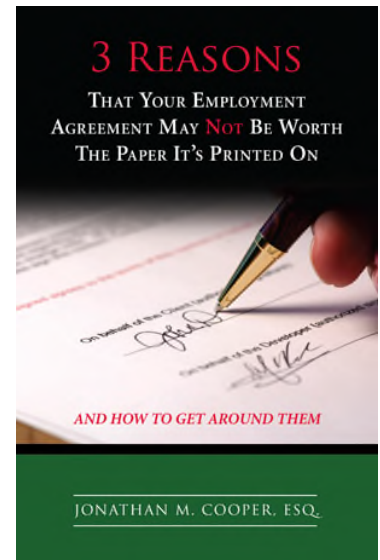
one of the plaintiff's brokers left to go work at a competitor, Lockton, at which point the insurers took their business to Lockton.

As is customary in the field, GC & C would receive their commissions by withholding a percentage of the clients' quarterly premium payments, and transmitting the remainder to the re-insurer. But once this book of business was transferred to Lockton, Lockton refused to pay any more commissions to GC & C, as GC & C was no longer tending to this business.

Importantly, as the court noted, "[The insurers] were legally obligated to pay the full amount of the commission to Guy Carpenter ... when the Reinsurance Contracts were placed. The fact that the contract allowed [the insurers] to pay that commission in installments is irrelevant; they owed Guy Carpenter the entire amount as soon as the reinsurance was placed."

Further, since the agreement called for GC & C to "to deduct a fixed percentage of the quarterly premium payments" to exact their payment, these were deemed "specifically identifiable funds," and thus sufficient for purposes of proving a [conversion](#) claim.

Finally, the Court upheld the plaintiff's [tortious interference with contract](#) claim (at least at this stage of the case) because the four required elements of the claim were satisfied: (1) existence of a contract, (2) defendant's knowledge of that contract, (3) defendant's intentional procurement of a breach, and, (4) an actual breach of the Broker Agreement. See, e.g., *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (N.Y. 1996).




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*"The fact that the contract allowed [the insurers] to pay the commission in installments is irrelevant; they owed [the plaintiff] the entire amount as soon as the reinsurance was placed."*

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**COMMUNICATION POLICY:** As a general rule, Mr. Cooper does not accept unscheduled phone calls. This policy affords Mr. Cooper the ability to pay closer and more focused attention to each case, resulting in more efficient and effective representation for his clients. Moreover, it avoids the endless and needless game of phone tag played by most businesses and law firms. To schedule a phone call or in-person appointment with Mr. Cooper, please call his office at 516.791.5700.

## *In Partisan Vote, CPSC Approves New Consumer Website for Product Complaints*

After the conclusion of a [debate that followed party lines](#), last Wednesday the [Consumer Product Safety Commission](#) approved a new web-based database for complaints regarding consumer products, particularly children's toys and household products. The CPSC intends to launch this new database, called [www.SaferProducts.gov](http://www.SaferProducts.gov), this coming March.

I readily admit, I am fascinated by this development, but think that product manufacturers and retailers may have a legitimate concern here: if it too easy for people to post anonymously their grievances with respect to certain products - and it remains to be seen what protective measures are or will be in place to make sure that these complaints go through some type of verification process before being published - these manufacturers and retailers may end

up with one disgruntled customer being able to affect their core business regardless of whether this customer's claims are valid.

On the other hand, I think the argument may be much ado about nothing. The fact of the matter is that we're in the midst of the Amazon and e-Bay generation, both of which post gobs of customer feedback on the seller of every product they offer. Consequently, while I think that the doomsday prognostications here are largely overblown, I also think that since the website carries a governmental imprimatur, some safeguards and quality control of complaints of [defective products](#) should certainly be in place before any comment is published.



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