LAW OFFICES OF JONATHAN M. COOPER

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INSIDE THIS ISSUE

Driving While Drowsy is Far More Common Than You May Think

A recent NHTSA study concluded that nearly 40% of U.S. drivers felt "drowsy" while behind the wheel; the National Sleep Foundation put the actual number is roughly 1/3 higher - at nearly 60%.

Even at the lower number, this statistic is alarming - or should be. Leaving aside for the moment the dangers inherent in texting while driving - a scourge to be sure - the manifest danger posed by driving while drowsy (as highlighted by the recent Upstate New York bus crash) is certainly noteworthy as well.

Lest you think that simply drinking a cup of coffee or a can of Coke will do the trick, the study indicates that they aren't nearly effective enough.

When a NY Court Will Allow Claims Seeking to Pierce the Corporate Veil

As noted in our earlier article, "Piercing the Corporate Veil – Critical Facts that You Will Need to Prove Your Case Under New York Law," it's not an easy task to amass sufficient facts to survive an initial motion to dismiss a claim that seeks to pierce a corporation's veil – let alone prove those facts at trial. That's why when a court allows those claims to survive – at least initially – the facts of those cases are noteworthy.

In *Safety Management Systems, Inc. v. Safety Software Unlimited*, the defendant in this commercial litigation lawsuit sought court leave to amend its answer to assert additional counterclaims seeking to pierce the corporate veil. In support of its argument for allowing the amendment, the defendant claimed the following:

- That the plaintiff corporation was wholly owned by the individual plaintiff;
- that the plaintiff paid herself and her employees unsustainably high salaries;
- That the plaintiff diverted corporate funds to her personal account;
- That the plaintiff co-mingled funds with her corporation.

Assuming these allegations are true is it any wonder that the court allowed this claim to survive? I thought not.

Assumption of the Risk Doesn't Mean You Don't Have to Maintain Your Sidewalk

Following the lead of its sister appellate court (see, "Rollerblader Didn't Assume Risk of Injury, Says NY Appeals Court"), New York's Appellate Division, First Department (which handles appeals from the courts in Bronx and Manhattan) recently held that the notion of "play at your own risk" (or, in legalese, "assumption of the risk") does not act as an inherent bar to a negligence claim in New York.

In Ashbourne v. City of New York, the plaintiff was injured while rollerblading after her skates got caught on a "rise" or "bump" in the sidewalk. In reversing the trial court's ruling that had dismissed the case, the appellate court stated as follows:

Continued on page 3

We strongly encourage the readers of our monthly newsletter to provide feedback about issues they would like to see addressed in our future publications.

To do so, please contact us through our website, www.JonathanCooperLaw.com or via e-mail at jmcooper@jmcooperlaw.com

*"It is **very** difficult to predict accurately whether a New York court will enforce a non-compete agreement, particularly when you're dealing with senior-level employees."*

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Why It's Often Hard to Predict Whether a NY Court Will Enforce a Non-Compete Agreement

Although I've written extensively on the subject of non-compete agreements, setting forth some of the general principles and the exceptions to those rules that help dictate whether a particular non-compete agreement will or won't be enforced by a New York court, I must concede that it's often hard to predict with any degree of certainty what a New York court will do.

That's why I give kudos to attorney Stephen Kramarsky, Esq., who authored an excellent article on New York non-compete agreements that recently appeared in the New York Law Journal.

The premise of his article is this: critical analysis of the courts' treatment of non-compete agreements has shown time and again that the question of whether these provisions will be upheld or rejected turns on the unique and specific facts of each case.

Further complicating an attorney's ability to predict the outcome of a challenge to a specific non-compete agreement, the courts have frequently vacillated on these provisions – *even when the employees' agreements and positions were essentially the same, **and even at the same company***.

For example, in *International Business Machines Corp. v. Visentin*, a Federal Court in New York denied IBM's request for a preliminary injunction seeking to enforce a non-compete agreement; But in *IBM Corp. v. Papermaster*, a case that was decided just over two years ago, the same Federal Court upheld the restrictive covenant, holding that by allowing Visentin to work for Apple would "inevitably" lead to the disclosure of critical proprietary information.

Quite frankly, it is hard to fault IBM for assuming they would win this fight; after all, both Papermaster and Visentin were "key, high-level technical managers, members of IBM's most important senior management committee with responsibility for some of the company's most important business initiatives."

But that underscores the essential point made above: it is ***very*** difficult to predict accurately whether a New York court will enforce a particular non-compete agreement - ***especially when you're dealing with senior-level employees***.

When You Don't Have a Written Agreement –

(How You Can Still Recover Your Losses)

by Jonathan M. Cooper

This **FREE Book,** which explains how you can recover your losses if you've been wronged by someone else's breach of contract in New York, but you didn't memorialize all of the terms you meant to in your agreement, is available for download directly from:

www.BreachOfContractBook.com

Assumption of Risk in New York

cont'd from page 1

> "Although plaintiff was rollerblading, an activity one could consider to be recreational and risky, this is not a case like *Anand* where plaintiff and defendant were participants in an organized sporting event … [it] does not constitute a sponsored sporting event or recreational activity for the purpose of applying the assumption of risk doctrine."

Interestingly, the relative degree of experience of the rollerblader is apparently not determinative. Consider the appellate court's language in *Custodi v. Town of Amherst*, where despite the plaintiff's acknowledged expertise as a rollerblader, the court reached the same result, stating:

> "[Defendant] established that plaintiff was an experienced rollerblader and that she was aware that tripping and falling are risks inherent in the activity, which are increased when rollerblading on uneven surfaces such as sidewalks ... [but] it cannot be said that the height differential between defendants' driveway apron and the curb was a "known, apparent or reasonably foreseeable consequence" of rollerblading on a paved roadway, sidewalk, or driveway … We cannot agree with defendants that the height differential between their driveway apron and the curb was an open and obvious condition and that they are thereby absolved of liability. It is well settled that "the open and obvious nature of the allegedly dangerous condition . . . does not negate the duty to maintain [the] premises in a reasonably safe condition but, [instead], bears only on the injured person's comparative fault."

"The open and obvious nature of the dangerous condition does not negate the duty to maintain the premises in a reasonably safe condition."

***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.*

New AAP Report Significantly Alters Car Seat Recommendations for Infants & Children

On March 21, the American Academy of Pediatrics issued a report that they jointly authored with the National Highway Traffic Safety Administration that significantly changed established guidelines for children's car and booster seats. Here are the highlights - (and your adolescent children aren't going to like it):

Old Guidlines	New Guidelines
Children should remain in rear-facing seat until age 1 and 20 lbs.	Children should remain in rear-facing seats until age 2, or as long as possible, i.e., the child reaches the seat's maximum height and weight for the rear-facing car seat
Children should remain in booster seats until age 8.	Booster seats should be used until the child reaches 4' 9" in height, possibly up to age 12.

As an initial matter, it is hard to argue against the report's emphasis on a child's physical size rather than the child's age (regarding the booster seats) in determining what the proper time is for a child to be eligible to sit in a regular car seat; it's actually common sense. (Although I do wonder why it took nearly ten years for these two agencies to sort that out.)

Second, while safety is, of course, a primary concern, this report does leave off a significant issue: many cars that are currently on the market and/or already in use by parents may have trouble accommodating additional booster seats for those adolescent children.

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