

INSURANCE INDICATOR

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“YOU BETTER WATCH OUT, YOU BETTER NOT CRY...”

The plaintiff was shopping with her friend in Wal-Mart during the holiday season. She claimed that as she was viewing Christmas merchandise stacked on shelves in one of the aisles, a wooden Santa Claus statue fell off of one of the shelves and struck her on the head. The statue was described as weighing two to three pounds, 12 to 15 inches long, and “non-traditionally structured” in that it was tall and thin and came to a point at the top. At trial the jury found in

favor of Wal-Mart on the plaintiff’s negligence and strict liability claims. However, the trial judge granted the plaintiff’s motion for a judgment notwithstanding the verdict and awarded her \$150,000 in damages.

On appeal, the Supreme Court of Louisiana found that the trial judge had committed a “manifest error.” Plaintiff had presented no evidence that neither she nor any other customer in the busy aisle had not caused the statue to

fall, or that the placement of the statue on the shelf constituted “an unreasonably dangerous condition on the merchant’s premises.” Furthermore, the jury had determined that the plaintiff had “serious credibility issues.” The Court found that the jury’s decision should not have been disturbed and reversed the damages award. Davis v. Wal-Mart Stores, Inc., 774 So.2d 84 (La. 2000).

Cetrulo & Capone LLP, an AV rated law firm, has lawyers admitted to practice across New England and in New York. We defend insureds and represent their insurers in areas of general liability, construction, toxic torts, environmental, employment, product liability, personal injury, professional liability, insurance coverage in state and federal trials and appeals, arbitration, mediation and ADR. The best solutions require the best representation.

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NY – DRIVER RUNS OVER 27 PEOPLE; INSURER NEED NOT DEFEND

On two separate dates in February of 2002, Ronald Popadich drove his car through Manhattan with the intention of running over as many people as possible. In fact, he ran over 27 pedestrians, who all filed civil suits against him. After he was arrested, Popadich admitted in a sworn confession that he intended to run over the plaintiffs.

Commercial Insurance Company, who had issued Popadich’s automobile li-

ability insurance policy, filed an action seeking a declaration that it owed no duty to defend or indemnify him in the pedestrians’ civil suits. The Court looked to the language of the insurance policy, which is to be interpreted with an eye to “common speech and the reasonable expectation of an ordinary person.” The policy very plainly excluded coverage for bodily injury that “may reasonably be expected to re-

sult from the intentional or criminal acts of any covered person or is in fact intended by any covered person.” Therefore, the Court wasted little time concluding that Popadich’s actions were not a covered accident under the policy. Summary judgment was entered in favor of the insurer. Commercial Ins. Co. of Newark v. Popadich, 2009 WL 4253729 (N.Y. App. Div. 2009).

Congratulations to the following Cetrulo & Capone LLP lawyers recognized as 2009 SuperLawyers in the November edition of Boston Magazine:

**James E. Carroll
Bert J. Capone
Lawrence G. Cetrulo
Stephen T. Armato
Rory Fitzpatrick**

MA – SUBCONTRACTOR NOT REQUIRED TO NAME GC AS ADDITIONAL INSURED

The owner of a dilapidated warehouse in Fairhaven hired RCS Group as the general contractor to replace the warehouse's roof. RCS hired Lamonica Construction as one of its subcontractors. One of Lamonica's employees was seriously injured one day on the jobsite when he fell head-first from the roof onto the concrete below. Litigation ensued when the employee sued RCS, who then filed a third-party complaint against Lamonica.

One of the claims that RCS asserted against Lamonica was for breach of contract based on the parties' subcontract, which had been drafted by

RCS. Paragraph 5 required Lamonica to purchase "such insurance as will protect it and RCS Group from various claims." However, Lamonica did not name RCS as an additional insured under its general liability policy. RCS claimed that this constituted a breach of contract, and the Superior Court agreed.

On appeal, the Court had to first determine whether the contract even required Lamonica to name RCS as an additional insured. The Court noted that coverage can be afforded to third parties through means other than additional insured status. The "as will protect..." language

in the contract was immediately preceded by an indemnification provision and, since Lamonica's insurance policy covered its indemnification obligations, RCS was adequately protected. The Court further concluded that the language was ambiguous and should therefore be interpreted against RCS, since it could have easily drafted specific language requiring Lamonica to name it as an additional insured. The Appeals Court concluded that Lamonica had not breached the contract and reversed the Superior Court's judgment in RCS's favor. RCS Group, Inc. v. Lamonica Constr. Co., Inc., 916 N.E.2d 381 (Mass. App. Ct. 2009).

CT – FATHER AND SON MAY PURSUE CLAIMS AGAINST INSURER

The plaintiff father and son were owners and members of the company American Crushing and Recycling, LLC. The insurance company provided the automobile liability and umbrella coverage for the company's dump trucks. One of the trucks was involved in an accident and the plaintiffs requested that the insurance company defend and indemnify them in the subsequent litigation. The insurance company refused, maintaining that neither the father nor the son had any standing to assert the

claims of their company and neither had any individual interest in the policies. The lower court granted the insurance company's motion to dismiss.

On appeal, the Court examined whether the plaintiffs had standing to sue and focused on their "specific, personal, and legal interest" in the suit and whether that interest "has been specially and injuriously affected." The Court concluded that both the father and son were insureds under the policy and were parties to the insurance con-

tracts. This was a specific, personal interest that allowed them to maintain their breach of contract claims as they were parties to the contract being sued upon.

The plaintiffs' personal interests had also been affected, since they had been sued individually and were forced to pay their own defense costs. The Court concluded that both plaintiffs had standing and could pursue their claims against the insurance company. Wilcox v. Webster Ins., Inc., 2009 WL 3855961 (Conn. 2009).

FOR FURTHER
INFORMATION, PLEASE
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