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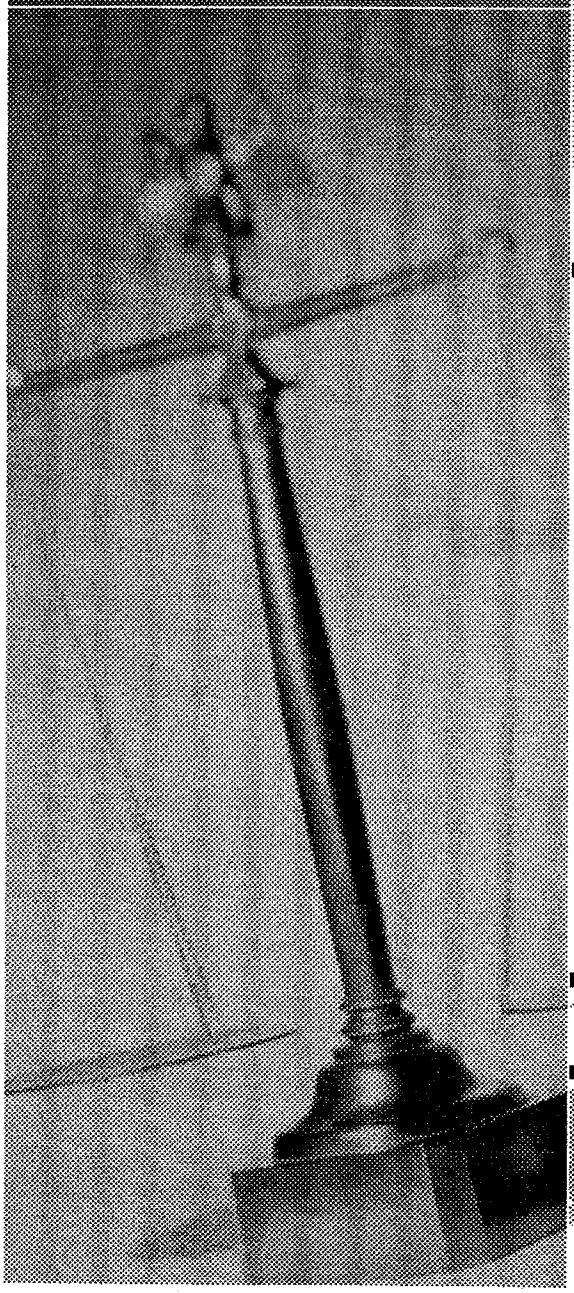

"Low-Fault Deep Pocket" Property Owners in Premises Security Cases May Get Some Relief from a N.Y. Decision

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On June 13, 2002, the New York Court of Appeals, the highest court in New York State, held that an apportionment of liability for damages arising from personal injuries was permissible, as between a negligent property owner and a criminal assailant who was identified and apprehended for brutally attacking a tenant in her Greenwich Village apartment building. *Chianese* v. *Meier, et al.*, 98 N.Y. 2d 270, 2002 N.Y. Lexis 1615.

When a property owner is sued in a premises security case based on criminal acts of a third party on its property, the most critical issue affecting the owner's liability exposure is its ability to obtain an apportionment of liability

against the perpetrator, regardless of the third-party intentional tortfeasor's ability to satisfy a judgment. The *Chianese* decision, the first by the Court of Appeals interpreting the applicability in a premises security case of Article 16 of New York's Civil Practice Law and Rules (CPLR), governing the limitations of joint and several liability under New York law, allows for such apportionment.

[Section 1601 of CPLR Article 16 states that "when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable ... and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action ...." NY CPLR Article 16, Section 1601. (Note: non-economic loss refers to pain and suffering damages suffered by a personal injury plaintiff).]

Prior to *Chianese*, cases before the other appellate courts in New York State addressing the issue of apportionment had produced a judicial quagmire surrounding the application of Article 16 apportionment. The web of confusion spun from these cases left unsettled the prevailing view concerning apportionment of liability against perpetrators in premises security cases in New York State. On the very same day, Aug. 2, 2001, that the Appellate Division, First Department, in *Chianese* denied apportionment against a criminal assailant (285 A.D.2d 315, 729 N.Y.S2d 460 [2001]), two other cases decided by the First Department ruled in favor of apportionment. In *Concepcion* v. *New York City Health and Hospitals Corporation*, 284 A.D.2d 37, 729 N.Y.S.2d 478 [2001], the First Department ruled in favor of apportionment of liability between a negligent hospital and the intentional tortfeasor who assaulted the plaintiff, a visitor to the defendant's hospital. In *Roseboro* v. *New York City Transit Authority*, 286 A.D.2d 222, 729 N.Y.S.2d 472 [2001], the First Department ordered a new trial, on the issue of apportionment only, to determine the extent of liability of three non-party intentional tortfeasors who assaulted the plaintiff-decedent before he was struck by a subway after descending onto subway tracks in an attempt to evade the assault.

Commenting on these inconsistent results, the justices of the Appellate Division, First Department, announced their "inability to reconcile their views" on the apportionment issue, in a preface to the three Aug. 2, 2001, decisions. (*Chianese*, supra at p. 6.) Four years earlier, the Appellate Division, Second Department, in *Siler* v. *146 Montague Associates et al.*, 228 A.D.2d 33, 652 N.Y.S.2d 315 [1997], held that the defendant property owners were entitled to seek apportionment of liability against a non-party intentional tortfeasor who assaulted the plaintiff in her apartment, allowing the jury to determine the assailant's share of responsibility for the plaintiff's injuries.

The *Chianese* decision has, hopefully, brought clarity to the issue of applicability of Article 16 apportionment in premises security cases involving non-party intentional tortfeasors. In the case, Josephine Chianese, a Manhattan schoolteacher of handicapped children, brought a civil suit against the owner and managing agent of her apartment building, seeking damages on account of personal injuries that she sustained in the assault and alleging inadequate building security. The jury found that Ms. Chianese's assailant had entered the premises through a "negligently maintained entrance."

The facts revealed that the front double doors and self-locking security door in the building's first floor vestibule were wide open on the day of her assault, which occurred while she was entering her third-floor apartment after returning from work. The superintendent would leave the security door open when going back and forth between the defendants' adjoining buildings; and his wife, also functioning as a superintendent, repeatedly propped open the security door, leaving it unattended, according to other tenants' testimony.

In awarding Ms. Chianese $400,000 for past injuries and $700,000 for future pain and suffering, the jury apportioned liability 50/50 between the owner/managing agent and the non-party assailant, in accordance with CPLR Article 16. The plaintiff moved to set aside the jury's apportionment of liability in an attempt to hold the building owner and managing agent liable for the entire $1.1 million verdict. The trial court set aside the apportionment, concluding that the defendants had breached a "non-delegable duty" owed to the plaintiff, thus invoking an exception to the limited liability rule of CPLR Section 1601 codified in Section 1602[2][iv]. The property owner/managing agent thus found themselves "on the hook" for the entire $1.1 million jury award.

On appeal to the Appellate Division, First Department, the appellate court still found the defendant building owner/managing agent liable for the entire amount of the plaintiff's non-economic loss, $1.1 million; however, on grounds that differed from those of the trial court. The First Department declined to permit apportionment of liability between the defendants and the non-party intentional tortfeasor based on CPLR Section 1602(5), which provides that apportionment of liability under Section 1601 does not apply to "actions requiring proof of intent." The appellate court reasoned that in a premises security case, where a plaintiff must prove the fact of the assault (an intentional act) in order to establish the landlord's negligence, the "proof of intent" exception to the limited liability rule must be applied.

The court of appeals rejected the appellate division's reasoning. In doing so, the court held that since the plaintiff's cause of action against the property owner and managing agent was based in negligence, and not intentional tort, it was not an action "requiring proof of intent." The court stated that the fact "[t]hat a non-party tortfeasor acted intentionally does not bring a pure negligence action within the scope of the

exclusion." (*Chianese*, supra at p. 8.) Rather, the court noted, Section 1602(5) prohibits an intentional tortfeasor from invoking the benefits of the limited liability rule by seeking an apportionment of liability against a negligent co-defendant.

The court further explained that when Article 16 was enacted in 1986, the legislative intent underlying the statute was to "remedy the inequities created by joint and several liability on low-fault, deep pocket defendants." (*Chianese*, supra at p. 5, citing *Rangolan* v. *County of Nassau*, 96 N.Y.2d 42, 46, 725 N.Y.S.2d 611 [2001]). The court concluded there is no indication from the legislative history that Section 1602(5) was intended to create a broad exception to apportionment, as suggested by the appellate court's decision, "at the expense of the low-fault, merely negligent landowners and municipalities—the very parties Article 16 intended to protect." (*Chianese*, supra at p.10).

Comparison with Other Jurisdictions

California

Consistent with New York's liability apportionment rule in premises security cases, California similarly recognizes the property owner's right to seek a jury determination of liability against the third-party perpetrator. In *Weidenfeller* v. *Star and Garter, et al.*, 1 Cal.App.4th 1, 2 Cal.Rptr. 2d 14 [2001], the Court of Appeals of California, Fourth Appellate District, held that Section 1431.2 (popularly known as Proposition 51), governing the application of comparative fault concerning actions for personal injury, property damage or wrongful death does apply to cases involving both intentional and negligent tortfeasors. The plaintiff in *Weidenfeller*, a victim of an unprovoked armed assault in the parking lot of the defendant's bar, sued the bar and its owners for failure to provide adequate lighting and security. The court emphasized the purpose underlying the comparative fault statute, stating "[t]he California Supreme Court has also emphasized that the purpose of Section 1431.2 is to prevent the unfairness of requiring a tortfeasor who is only minimally culpable as compared to the other parties to bear all the damages." 1 Cal.App.4th 1 at p.6 (*See, Evangelatos* v. *Superior Court*, 44 Cal.3d 1188, 1198 [1988] cited by the *Weidenfeller* Court).

Moreover, the *Weidenfeller* Court reasoned that to penalize negligent tortfeasors by precluding apportionment of liability against an intentional tortfeasor "violates the common sense notion that a more culpable party should bear the financial burden caused by its intentional act" (1 Cal.App.4th at p. 5) and frustrates the purpose of Section 1431.2.

New Jersey

New Jersey likewise allows for apportionment of liability between negligent and intentional tortfeasors. In *Blazovic, et al.* v. *Andrich, et al.*, 124 N.J. 90, 590 A.2d 222 [1991], the Supreme Court of New Jersey held that the state statute governing apportionment of liability, the New Jersey Comparative Negligence Act, applies to intentional conduct, and remanded the case for a new trial wherein a jury was to apportion fault between all parties, including a negligent restaurant owner and the plaintiff's assailants.

Interpreting New Jersey's Comparative Negligence Act, the court noted that the intent of the Act included according "a fairer result to moderately negligent plaintiffs," and stated that "consistent with the evolution of comparative negligence and joint-tortfeasor liability in this state, we hold that responsibility for a plaintiff's claimed injury is to be apportioned according to each party's relative degree of fault, including the fault attributable to an intentional tortfeasor." *Blazovic*, supra at p. 107.

Accordingly, the jury was required to determine the relative percentages of fault of the negligent and intentional tortfeasors (the relative percentage of fault stemming from the plaintiff's own negligence was to be determined as well by a jury in the new trial).

The *Blazovic* Court did recognize a scenario in which it would be inappropriate to apportion fault to include an intentional tortfeasor.

In a subsequent case, the Superior Court of New Jersey, Appellate Division, addressed this issue, referring to "growing confusion regarding the breadth of [the] exceptions to *Blazovic*'s general rule." *Martin* v. *Prime Hospitality Corporation, et al.*, 345 N.J. Super. 278, 288, 785 A.2d 16 [2001].

The appellate court in *Martin*, in a manner consistent with the general rule enunciated in *Blazovic*, held that under New Jersey law, a jury must apportion fault between the negligent and intentional tortfeasors in a premises security case. However, the *Martin* Court held that the defendant responsible for providing security would be denied the benefit of an apportionment of liability against the intentional tortfeasor where the duty of that defendant included preventing the specific misconduct that caused injury to the plaintiff. "[T]o determine when Blazovic excuses apportionment, the overall focus is on whether the plaintiff's injury was so foreseeable to the supervising defendant that a failure to act or an inadequate response that causes the plaintiff to suffer foreseeable injury warrants imposition of the entire fault upon that defendant." *Martin*, supra at pp. 292, 293.

Blazovic and *Martin* both distinguish *Butler* v. *Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 [1982], decided by the New Jersey Supreme Court in 1982. In *Butler*, the plaintiff, a customer returning to her car after shopping for food at an Acme store, was attacked in the store's parking lot. In one year's time, there were seven muggings on the Acme premises. Five of those muggings took place during the four months preceding Ms. Butler's assault.

Acme hired off-duty police officers as security guards, and only one officer at a time was on duty. Among the guard's duties included patrolling both the inside and outside of the store, and watching customers' parcels while they retrieved their cars. At the time of the plaintiff's attack, the only security guard on duty was inside the store. In addition, there were no signs or warnings posted to advise customers of the possibility of criminal attack.

A fair inference drawn from the *Blazovic* and *Martin* cases is that a premises security case having facts similar to those in *Butler* could trigger the exception to New Jersey's apportionment rule. Thus, a property owner in New Jersey could be excluded from the benefit of a liability apportionment against a criminal perpetrator under circumstances similar to those in *Butler*, and found to be fully responsible for a judgment in favor of a plaintiff arising from an intentional act such as an assault.

Florida

A defendant property owner in Florida will not find a jury in a premises security case that has been instructed to apportion fault against an intentional tortfeasor. Florida's comparative fault statute excludes apportionment of damages in "any action based upon an intentional tort." Section 768.81, Florida Statutes.

In *Merrill Crossings Associates, etc.* v. *Lawrence Howard McDonald, et al.*, and *Wal-Mart Stores, Inc., etc.* v. *Lawrence Howard McDonald* (consolidated cases), 705 So.2d 560 [1997], the Supreme Court of Florida held that an action alleging negligence in failing to provide reasonable security measures, which results in an intentional criminal act injuring the plaintiff on premises controlled by the defendant, is an "action based upon an intentional tort" pursuant to Florida's comparative fault statute, rendering the doctrine of joint and several liability applicable. Thus, the jury was not permitted to apportion damages between the negligent premises owner and the intentional tortfeasor.

The plaintiff in *Merrill Crossings* was shot and injured by an assailant in a Wal-Mart store parking lot. He subsequently brought suit against Wal-Mart and Merrill Crossings (owner and developer of the shopping center) on grounds that the defendants failed to maintain reasonable security measures. The Supreme Court of Florida reasoned that the legislature's inclusion of "any action based upon an intentional tort" in the statute as an exception to the application of comparative fault implies that the court must inquire whether a plaintiff's claim has "at its core" an intentional tort committed by someone.

In examining the "substance of the action" as required by the statute to determine if the action falls within the statutory term "negligence cases" to warrant apportionment of fault, the court found that an intentional tort was at the core of the plaintiff's action against Wal-Mart and Merrill Crossings. Moreover, the court agreed with the appellate court below that the statute's exclusion from comparative fault "gives effect to a public policy that negligent tortfeasors such as in the instant case should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence." 705 So.2d at 562.

(*Merrill Crossings* was cited in a subsequent case, *Barton Protective Services, Inc.* v. *Faber, et al.*,745 So.2d 968 [1999], wherein the Court of Appeal of Florida, Fourth District, reversed apportionment of fault. The plaintiffs sued the defendants, including a shopping mall security company, in a civil rights action under 42 U.S.C. Section 1983 based on intentional acts in connection with an unlawful arrest. The court stated "comparative fault principles simply do not apply to intentional torts under Florida law." 745 So.2d at 976.)

With the broad language "any action based upon an intentional tort" embedded in Florida's statute, a property owner seeking apportionment of liability against an intentional tortfeasor in a premises security case is at a significant disadvantage. By contrast, New York, California and New Jersey are among the states that permit such apportionment. Still, a premises owner in New Jersey may find itself without the benefit of apportionment against an intentional tortfeasor if the *Blazovic* exception is triggered.

Chianese's Impact on New York Premises Security Litigation

The impact of the *Chianese* decision in New York State will ultimately be seen in the way premises security cases are litigated there and in the ultimate liability exposure for property owners, who are typically the "low fault, deep pocket" defendants in those cases. Property owners and their insurers may not be so inclined to opt for settlement in premises security cases, due to the reduced risk of exposure which, prior to *Chianese*, was likely to include the entire amount of a verdict or judgment in the plaintiff's favor as long as a jury found the property owner at least 1 percent at fault. Likewise, the strategy of plaintiff attorneys can be expected to change, in that the property owner will, more than ever, be the focus of the plaintiff's case, because it is critical for the plaintiff to obtain a liability apportionment greater than 50 percent against the property owner. From the property owner's standpoint, the strategy remains essentially the same—keeping the jury's focus directly where it belongs, that is, on the perpetrator of the crime.

Blaming the plaintiff/victim, under most circumstances, can be a dangerous trial tactic. It is difficult to imagine a scenario in which a property owner will be held more responsible than the criminal perpetrator, unless a jury's anger is sufficiently raised against the property owner and their motivation to punish the property owner is triggered.

The rule permitting apportionment of liability against an intentional tortfeasor in a premises security case can have one important drawback from a public policy standpoint. Since New York's CPLR Section 1601 speaks of apportionment of liability against any party or non-party over whom the plaintiff could have obtained jurisdiction "with due diligence," the statute does not permit a negligent tortfeasor to apportion fault against the unidentified perpetrator of the crime. Thus, a crime victim who is aware of the potential for recovery in civil litigation will have a reduced incentive to cooperate in the investigation of the crime and the apprehension of the perpetrator.

Doing so could substantially reduce the victim's ultimate recovery in a civil lawsuit. A solution to this anomalous result can be achieved by removing the statute's limitation for non-parties beyond the court's jurisdiction, and permitting apportionment of liability against parties and non-parties alike, whether or not they are subject to the court's jurisdiction. This is entirely consistent with the policy underlying the limited

liability rule: that a tortfeasor will be responsible for its own equitable share of a judgment based on its degree of fault, and not on the depth of its pockets.

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