NEW YORK COURT OF APPEALS ROUNDUP:

PRODUCTS LIABILITY, BODY CAVITY SEARCHES, AND DOG BITES

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In a recent decision in a products liability case, *Ramos v. Howard Industries, Inc.*, the Court of Appeals granted defendant summary judgment despite the unavailability of the product at issue because plaintiff failed to overcome the affidavit of defendant's expert. In *People v. Azim Hall*, five members of the Court agreed that the reasonable suspicion standard applies to a visual body search, and four members agreed that, absent exigent circumstances, probable cause and a warrant are required for a manual cavity search, even to remove an object observed during a visual cavity search. And in *Bernstein v. Penny Whistle Toys, Inc.,* the Court confirmed that, unless a dog's owner knew or should have known of the animal's vicious propensities, the owner is not liable for injuries it caused. We discuss the decisions below.

Product Unavailable

It is not extraordinary in a products liability case for the allegedly offending product to be no longer available for examination and testing when the lawsuit is brought. This was so in *Ramos v. Howard Industries, Inc.*, a "paper thin" plaintiff's case in which the Court reversed the denial by the Appellate Division, Fourth Department, of defendant's motion for summary judgment and dismissed the complaint in an opinion by Judge Eugene F. Pigott, Jr., with a dissent by Judge Theodore T. Jones.

Ramos was employed as a lineman for a public utility. He was injured on the job when a transformer made by defendant Howard Industries allegedly exploded because it was defectively designed and manufactured. What made Ramos' claim particularly suspect was that he initially reported being injured when he reached out of his aerial bucket while installing the transformer, saying nothing about an explosion. He then appears to have waited until the statute of limitations was about to expire before asserting, in his complaint, that the transformer had exploded. By that time, the transformer was long gone and what would otherwise have

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been a straightforward worker's compensation claim against his employer was turned into a products liability case against Howard.

After discovery, Howard moved for summary judgment. The affidavit of its expert engineer in support of the motion presented two basic positions. First, the expert set forth what products liability practitioners call a "due care" defense – that Howard's manufacturing processes, testing, inspection, and quality control processes were "current and state of the art" and complied with industry standards, and that any electrical defect would have been "identified" in the manufacturing process, after which the transformer never would have gotten out of the door of Howard's plant. Second, the expert speculated that other "possible causes" of the explosion could have been a faulty rewiring of the transformer by Ramos' employer, or someone dropping some metal object into the transformer while it was being rewired by the employer.

Not to be outdone, Ramos submitted the affidavit of his own expert engineer in opposition, speculating that the explosion was caused by an electrical fault, that two safety devices on the transformer failed, and that the transformer was defectively designed and manufactured causing the explosion. Significantly, in light of its ultimate conclusion, the Court noted that Ramos' expert "rejected the theories presented by defendant to explain the explosion other than a manufacturing defect."

The Court appears to have relied upon *Speller v. Sears, Roebuck & Co.*, 100 N.Y. 2d 38 (2003), among other cases, in concluding that Ramos failed to offer competent evidence to raise an issue of fact for the jury to rebut the position of Howard's expert. While the Court acknowledged that in a circumstantial evidence case a plaintiff is not required to identify a specific defect, the opinion of Ramos' expert was pure speculation as to defect and failed to exclude the opinion of Howard's expert as to alternative causes.

The dissent by Judge Jones stated that the expert proof offered by Howard was itself speculation and was conceded to be such by the expert, and that it therefore was insufficient to provide a basis for granting summary judgment. The dissent also distinguished *Speller* based upon the facts.

This decision will likely encourage defendants in cases in which the product is unavailable for inspection or testing to seek summary dismissal. The predictable response by plaintiffs will be a more robust and detailed refutation of the speculation by defendants' experts than was presented in this case. In the end, it will take extraordinary circumstances – as was the case here – for summary judgment to be granted against a plaintiff, leaving such claims to be resolved by the wisdom of a jury.

Cavity Searches

People v. Hall provides a tour through the unappealing world of police body searches. In a "strip search," a person is required to disrobe so that an officer can visually inspect the person's body. A visual body cavity search involves an officer looking at, but not touching, a person's anal or genital cavities. Judge Victoria A. Graffeo's opinion for the Court defined a manual cavity search as involving "some degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface," and that opinion, as well as the concurring opinion of Judge Carmen Beauchamp Ciparick, considered the removal of a bag from the rectum of the defendant to fall into this category.

Judge Graffeo emphasized that every search must be reasonable, and that reasonableness is evaluated under the particular circumstances of the case, including "where, how and by whom" the inspection is conducted, and whether the person being searched is a detainee or merely has been arrested. Her opinion set forth a series of guidelines for searching arrestees, which should prove helpful to the police and counsel:

- A strip search may be performed on an arrestee only when there is reasonable suspicion that evidence is being concealed under the person's clothing.
- Neither a visual nor a manual cavity search may be routinely undertaken for any particular crime, including following a narcotics arrest, and instead must be justified by "individualized facts known to the police."
- Cavity searches should be conducted by someone of the same gender and in a private location; undertaking such a search in a public place is "patently unreasonable except in the most extraordinary circumstances."

The Court was divided over the application of Fourth Amendment principles to the facts of the *Hall* case, which were as follows. Police officers observed two individuals approach a man named Myers and hand him cash. Myers walked over to Hall and handed him the cash. Hall went into a bodega, reappeared a few minutes later, and handed something to Myers, who walked over to the two individuals and handed them small, white objects that the police suspected were crack cocaine. The individuals left, and Myers and Hall were arrested.

At the station house, Hall's clothing was searched and no drugs were found. He was taken to a private cell, where he was ordered to remove his clothing and bend over or squat. He complied. According to the police officers, they observed a string or piece of plastic hanging out of Hall's rectum. When Hall refused the request to remove the object, one officer held his arms and forced him into a bent position while another other pulled the string, and a plastic bag containing crack cocaine came out.

The Court held that Hall's motion to suppress the cocaine should have been granted.

Chief Judge Judith S. Kaye concurred in Judge Graffeo's opinion, which found the visual cavity search to have been justified, but held the manual search following it should not have been conducted without a warrant. These Judges, along with dissenting Judges Eugene F. Pigott, Jr., Susan Phillips Read and Robert S. Smith, in an opinion by Judge Smith, concluded that "reasonable suspicion" is the appropriate standard for a visual body search, including a visual cavity search. Judge Graffeo wrote that the police must have "a specific articulable factual basis" for believing the arrestee had secreted evidence inside his body. That standard was met here given that Hall went into the bodega (thus suggesting the drugs were not readily accessible), no drugs were found in his clothing, and the primary officer involved testified that a "good majority" of those arrested for narcotics in the area of the crime were found to have hidden drugs between their buttocks.

Judge Graffeo's opinion applied the Supreme Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), to the manual cavity search of Hall. *Schmerber* held that a search that intrudes upon a person's body (there, a blood test) must be based upon a "clear indication" that evidence will be found inside the body, and that a search warrant must be obtained absent an emergency (because the alcohol level of a person's blood diminishes with time, the warrantless search in that case was justified). The police must have probable cause, which clearly existed once the officers observed something protruding from Hall's rectum, but here there was no exigent circumstance to excuse their failure to obtain a warrant.

The dissent argued that *Schmerber* was inapplicable to the removal of the bag because there was no evidence that any hand or implement was inserted into Hall's body. Judge Smith wrote, "I do not see why it is unreasonable for the officers to take, with minimal force, what they have already lawfully seen."

Judge Theodore T. Jones joined Judge Ciparick's opinion concurring in the result, which argued that both searches were unconstitutional. These Judges would hold that even a visual cavity search requires probable cause and a warrant, absent an emergency.

Dog Bites Child; Scooter Acquitted

Danielle Bernstein, an 8-year old child, accompanied by a young friend and the friend's mother, went into the Penny Whistle Toy Store in Bridgehampton, which was owned by Mendez. No other customers were in the store. Mendez was present, as was his dog Scooter, a male Labrador Retriever mix who was tied to a 20-foot leash and lying on the floor.

Mendez said that Scooter was friendly. When Danielle approached, the dog sat up. The child knelt by the dog and proceeded to pet, scratch, hug, and kiss him. There was some evidence, albeit disputed, that Danielle had a lollipop in her mouth when she entered the store. The dog, suddenly and without provocation, growled and bit Danielle on the cheek,

causing a significant disfiguring injury that required 40-50 stitches. Scooter had never before bitten or snapped at anyone, or shown any aggressive behavior.

Danielle's father sued the store and Mendez based upon theories of strict liability and negligence. Defendants asserted a third-party claim against the mother of Danielle's friend. The Supreme Court, New York County, granted motions for summary judgment in favor of the defendants and third-party defendant. The Appellate Division, First Department, affirmed (3-2). A strong dissent was filed by Justice David B. Saxe, in which Justice Angela M. Mazzarelli joined, on the basis that the motion for summary judgment should have been denied as to the negligence claim against the store, and Mendez as proprietor of the store, because they had a duty of care under the law of premises liability.

The Court of Appeals unanimously affirmed in *Bernstein v. Penny Whistle Toys, Inc.*, in a concise memorandum opinion that relied upon *Collier v. Zambito*, 1 N.Y.3d 444 (2004), a 4-2 decision of the Court, and *Bard v. Jahnke*, 6 N.Y.3d 592 (2006), a 4-3 decision of the Court. The opinion was based upon the absence of proof that Scooter had exhibited a vicious propensity in the past.

We respectfully suggest, as did the dissent in the Appellate Division, that under the facts in this case the negligence claim should have been sustained and decided by a judge or jury at trial. Such a result would not have offended the nearly 200-year old rule colloquially (but somewhat erroneously) referred to as the "one bite" rule, which holds a dog owner strictly liable if he knew or should have known of the animal's "vicious propensities."

We submit that when an owner invites young children into his toy store where he keeps a large dog on a leash, gives assurances to the child and adult chaperone that the dog is friendly, and indeed encourages contact, the owner assumes a duty to provide a safe environment for such child, free of the risk of an animal attack. As recognized by the majority and dissenting opinions in *Bard*, comments g and h to § 518 of the Restatement (Second) of Torts recognize that the owner of a domestic animal can be held liable in negligence for failing to prevent the animal from inflicting injury, even if the owner does not know or have reason to know of the propensity of the animal to be dangerous. Such a rule would be in harmony with the law of many other states that appear to follow the Restatement. On the facts here, holding the store and its owner to general negligence standards would seem reasonable and not inappropriately dilute the "one bite," or *Collier* rule, upon which the Court principally relied.