# LEGAL NEWS IN BRIEF

News in a flash for Subrogation and Defense Adjusters



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## OUT-OF-STATE ATTORNEY MAY SUBMIT AFFIDAVIT OF MERIT IN SUPPORT OF LEGAL MALPRACTICE LAWSUIT IN NEW JERSEY

**Scott v. Calpin**
**U.S. District Court, D. NJ, Camden Vicinage**
**Docket No. 08-cv-4810**
**(March 2, 2010)**

A divorce lawyer filed a motion to dismiss his former client's legal malpractice lawsuit, on the grounds that the affidavit of merit was signed by a Pennsylvania attorney who was not licensed to practice law in the State of New Jersey. N.J.S.A. 2A:53A-27 provides that a plaintiff in a malpractice suit "shall, within 60 days following the date of the filing of the [defendant's] answer, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable possibility that the…skill…exercised…in the…practice…fell outside acceptable professional…standards." Defendant argued that N.J.S.A. 2A:53A-26 requires that a "licensed person" by definition mean "an attorney admitted to practice law in New Jersey." The Court found that the latter statute only defines the types of persons who *may* provide the Affidavit. By contrast, N.J.S.A. 2A:53A-27 states further that "the person executing the affidavit shall be licensed in this or any other state." Moreover, the Court dismissed Defendant's argument that only a New Jersey attorney could determine whether another New Jersey attorney acted negligently within the profession; such an argument raises an issue of credibility, to be determined by the jury.

## LONG-ARM JURISDICTION

**Nicastro v. McIntyre Machinery America, Ltd.**
**New Jersey Supreme Court**
**Docket No. A-29-08**
**(February 2, 2010)**

The New Jersey Supreme Court held last month that the State has personal jurisdiction over a foreign manufacturer of an allegedly defective product which was sold to a New Jersey business by the manufacturer's exclusive U.S. distributor. Defendant's principal place of business is in Nottingham, England, United Kingdom; although its American distributor is a distinct, independently controlled corporate entity, Defendant has sold some of its products on consignment to said distributor. Representatives of both companies attended trade shows and conventions held in various U.S. cities. Plaintiff's employer learned of their merchandise when attending one such convention; he subsequently purchased the product by order from the American company's headquarters in Ohio, which shipped same to his business in New Jersey; there, Plaintiff sustained injuries as a result of the product's defect.

Although Defendant had no presence or minimum contacts in the State which would render it subject to personal jurisdiction, the Court found applicable hereto the "stream of commerce" theory, wherein a corporation "purposefully avails itself of the privilege of conducting activities within the forum State." Here, the Court determined that the Due Process Clause does not bar long-arm jurisdiction over a foreign manufacturer who sells and markets

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the defective product through an independent distributor, when the manufacturer is actually or constructively aware that the product is being distributed throughout the United States and might be sold in New Jersey. Such awareness is inferable regardless of whether said manufacturer controls the distribution. Appearances at the conventions, which attracted Americans from outside the host cities, constituted attempts by Defendant and its distributor to "penetrate the overall American market." The companies, with their similar names, shared communications and joint participation, are apparently not readily distinguishable by the average consumer. New Jersey's strong interest in exercising jurisdiction in this matter stems from the State being the locus of Plaintiff's residence, Plaintiff's place of employment, the underlying injury and treatment, evidence and witnesses, and the likely substantive law. Any manufacturer that wishes to avoid its jurisdiction must at least attempt to preclude distribution and sale of its products in New Jersey.

## EMERGENCY VEHICLES

**Ayers v. O'Brien**
**New York Court of Appeals**
**2009 NY Slip Op 09313**
**(December 17, 2009)**

Vehicle and Traffic Law §1104 protects operators of authorized emergency vehicles for otherwise-negligent conduct, so long as said conduct does not rise to the level of reckless disregard. The Court cited policy in justification of the provision, which protects operators from "civil liability for...mere failure of judgment [which] could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants." When such operators bring suit for their own injuries, however, they cannot preclude the given defendant from asserting a comparative fault defense. The Court foresaw otherwise inequitable results, as where the defendant is "minimally negligent," by contrast to a more negligent operator, who should not recover a windfall from his own, greater wrong.

## DISCOVERY

**Detraglia v. Grant**
**New York Appellate Division**
**2009 NY Slip Op 09120**
**(December 10, 2009)**

The Third Department of the Appellate Division upheld in part the trial court's decision granting Plaintiff's motion to compel discovery as to an underlying automobile accident occurring at 2:57 PM. Plaintiff sought the billing records for both Defendant's cell phones and his wireless air card for his company-issued laptop computer as of the date of the accident between 12 PM and 4 PM. The Appellate Division determined that an issue existed as to whether Defendant had in fact none of said devices operating at the time of the accident, but modified disclosure to the time between 2:30 PM and 3:30 PM, and mandated that the records be submitted for the trial court's *in camera* review prior to disclosure.

## LABOR LAW

**Affri v. Basch**
**New York Court of Appeals**
**2009 NY Slip Op 08673**
**(November 24, 2009)**

An independent contractor brought suit against neighbors for whom he had previously performed small tasks, after he fell from a ladder while installing a vent on the defendants' roof as part of home renovations. The Court of Appeals upheld summary judgment for Defendants, finding said parties outside the purview of Labor Law §240, because they were owners of a two-family dwelling who did not "direct or control the work." Such an issue pivots on the "degree of supervision exercised over 'the method and manner in which the work is performed.'" Here, Defendants only discussed with Plaintiff their anticipated results, rather than the method by which such work would be performed; their instruction to Plaintiff to place a vent through the roof was "simply an aesthetic decision." Plaintiff's voiced apprehension of ascending the roof does not alter the decision, because he proceeded to do so by his own volition and not at the defendants' specific direction.