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Grave Injury. DECISION OF INTEREST. Court of Appeals reverses order and grants summary judgment dismissing third-party claims against plaintiff's employer, finding that plaintiff did not suffer a "grave injury" under the Workers' Compensation Law based on scars on forehead and upper eyelid. Court concludes as a matter of law that plaintiff's facial injuries did not meet the permanency and severity conditions precedent to a finding of "facial disfigurement."

Graham v. Pinstripes Garment Services, LLC, 2008 WL 73142 (N.Y. March 20, 2008). Contractual Indemnification.

DECISION OF INTEREST. In interpreting an AIA construction contract between landowner and excavation contractor to determine if contractor must indemnify landowner for damages allegedly sustained by a neighboring landowner when contractor struck underground power line at worksite, Court of Appeals reverses order and holds that landowner was not entitled to contractual indemnification where there existed insufficient proof of contractor's negligence to support indemnification under the indemnification clause of the contract, and record was unclear whether adjacent property owner suffered property damage or merely economic injury for the purposes of applying a clause holding contractor to remedy property damage at the site or adjacent thereto. Watral & Sons, Inc. v. OC Riverhead 58, LLC, 2008 WL 704212 (N.Y. March 18, 2008). First-Party No-Fault - Fraudulent Incorporation. DECISION OF INTEREST. Where defendant insurer sought to consolidate multiple actions to recover assigned first-party, no-fault medical payments for the purpose of determining the merits of its Mallela defense of fraudulent incorporation, court affirms prior decision to consolidate matters and rejects provider's argument that insurer's Mallela defense was untimely and therefore unavailable pursuant to the Second Department's decision in Fair Price Medical Supply Corp. v. Travelers Indemnity Co., 42 A.D.3d 277 (2d Dept. 2007). Court holds that Fair Price "did nothing" to diminish an insurer's right to assert a Mallela defense after the 30-day pay or deny period of Insurance Law § 5106(a) has expired because such a defense is statutory in nature and is not predicated on a policy exclusion. Eastern Medical, P.C. v. Allstate Ins. Co., 2008 WL 787197 (Dist. Ct. Nassau Co. March 26, 2008). Occurrence. DECISION OF INTEREST. Second Circuit Court of Appeals affirms summary judgment in favor of insurer in coverage dispute under a CGL policy. Insured became liable on loans it procured in order to finance the purchase of computer equipment it then sold to a third-party. Court finds there was no occurrence, as required under the policy. Court observes that fraud by the third-party that led to the default could have been prevented by the insured, and that CGL policies do not cover the insured's own losses arising from commercial undertakings. ePlus Group, Inc. v. Travelers Prop. Cas. Co. of America, 2008 WL 681250 (2d Cir. March 11, 2008). Homeowners Coverage - Intentional Acts. DECISION OF INTEREST. In parents' action seeking a declaration that its homeowner's insurer was obligated to defend and indemnify them in underlying action alleging sexual assault as the result of parents' negligent supervision of minor assailant, Second Department affirms order granting summary judgment in favor of insurer where insurer properly disclaimed under exclusions for sexual assault and for bodily injury intentionally caused by any insured and on grounds that the alleged incident was not an accident. Court also holds that claims did not arise out of an occurrence despite the fact that the underlying complaint couches its allegations in negligence, since the gravamen of the underlying action seeks to hold the parents liable for injuries resulting from their son's intentional acts. Kantrow v. Security Mut. Ins. Co., 2008 WL 808953 (2d Dept. March 25, 2008). First-Party Property Coverage - Yacht Policy. Insured sought coverage for repairs to his boat under a yacht policy. Insurer moved for summary judgment on various grounds. Court finds jury must decide whether policy's duty to cooperate required insured only to allow insurer to inspect the allegedly damaged parts before repairing or disposing of them, or if insurer was entitled to inspect the allegedly damaged parts prior to disassembly. Court denies insurer's motion for summary judgment under policy's unrepaired damage clause where insured claimed damages were hidden, subsequent damages from a previous accident that was paid by insurer. Court finds unrepaired damage clause does not apply to additional losses from one accident, but to double recovery for the same loss. Court also rejects insurer's argument that claim was untimely under policy's 12-month limitations period. Court holds that where policy's limitations period does not refer to "inception" of the claim as trigger, trigger is when loss becomes payable under the policy. Koppelman v. The Standard Fire Ins. Co., 2008 WL 789882 (E.D.N.Y. March 21, 2008). Subject Matter Jurisdiction - 9/11 Coverage Litigation. Federal court invested with exclusive jurisdiction over all bodily injury claims arising from clean-up of debris from the September 11 attack denies motion for reconsideration by London excess insurers claiming court lacks subject matter jurisdiction. Court reiterates its prior holding that it is permitted to hear the coverage claims under its supplemental jurisdiction. WTC Captive Ins. Co., Inc. v. Liberty Mut. Fire Ins. Co., 2008 WL 748405 (S.D.N.Y. March 19, 2008). Marine Property Coverage. Following a bench trial in a dispute over coverage under a "megayacht" policy written for a yacht that capsized and was a total loss, court rules in favor of insured. Court finds loss was caused by extreme weather and a failure of power on the vessel, and that loss was covered as both causes were fortuitous. Court rejects insurer's claim insured violated duty of utmost good faith, finding that none of the insured's alleged failures to disclose were material to underwriting of the risk. Court also finds insurer did not meet its burden of proving yacht was not seaworthy in connection with its intended use, and that insurer did not meet its burden that insured violated negative implied warranty of seaworthiness. Federal Ins. Co. v. PGG Realty, LLC, 2008 WL 703715 (S.D.N.Y. March 13, 2005). First-Party Property - Business Exclusion/Agent Liability. Fourth Department holds lower court correctly dismissed claim against insurer for fire damage to a barn where insured's daughter admitted at deposition that at the time of the fire, she was using the barn for her business of breeding horses. Court finds exclusion for business pursuits unambiguous under facts of the case. Court also rejects insured's theory that insurer should be vicariously liable for agent's alleged failure to procure sufficient insurance coverage. Weiss v. Allstate Ins. Co., 2008 WL 684684 (4th Dept. March 14, 2008). Vandalism Coverage. In landlord's breach of contract action against insurer after insurer refused to pay for water damage caused when pipes burst after tenant shut off heat in apartment and vacated

premises, Second Department affirms order denying insurer's motion to dismiss landlord's complaint. Where insurer denied landlord's claim on grounds that policy did not cover losses due to accidental discharge of water, court holds that insurer failed to establish as a matter of law that the landlord's loss was not a result of vandalism, an insured peril. *Wai Kun Lee v. Otsego Mutual Fire Ins. Co.*, 2008 WL 802296 (2d Dept. March 25, 2008). Reasonable Belief in Nonliability. In store owner's action seeking a declaration that insurer was obligated to defend and indemnify owner in underlying personal injury action arising from a stairway slip and fall, Second Department modifies order to hold that the affidavit of store owner's employee raised an issue of fact regarding the reasonableness of store owner's belief in nonliability where employee stated that underlying plaintiff assured her twice that she was all right before leaving the premises unassisted. *Surgical Sock Shop II v. U.S. Underwriters Ins. Co.*, 2008 WL 802552 (2d Dept. March 25, 2008). Homeowners - Insured Status. In injured party's action against homeowner's insurer to recover a default judgment obtained against paintballer residing with homeowners after injured party was shot in the eye with a paintball on homeowners' property, Third Department affirms summary judgment in favor of insurer where paintballer was not "in the care of" homeowners for purposes of being considered an insured under the policy definition where 20 year-old paintballer did his own laundry, paid his own bills, took care of himself during times of illness, occasionally paid rent, and resided with homeowners because he was always there anyways and it was "cooler" to live with his friends. *Lang v. Hanover Ins. Co.*, 2008 WL 731901 (3d Dept. March 20, 2008). Timeliness of Disclaimer/Timeliness of Notice of Occurrence/Reasonable Belief in Nonliability. In liquor liability insurer's action seeking a declaration that it owed no obligation to defend or indemnify any party in a personal injury action arising from an automobile accident that killed motorist and bar patron, Third Department affirms order denying cross-motions for summary judgment where fact issues existed as to the reasonableness of bar owner's belief in nonliability where owner did not know whether alcohol was a factor in causing the accident and bartender told owner that she served bar patron five to six drinks over a period of more than two hours and patron did not appear intoxicated at the time he left the bar on foot. Questions of fact existed regarding the timeliness of notice to insurer by motorist's estate where estate's attorney conducted a very thorough investigation of the accident, contacted various insurers, and notified insurer only a few weeks after determining that insurer's policy might cover claim. Third Department rejects argument that insurer's disclaimer was untimely where disclaimer was issued about one month after bar owner gave notice and on the same day that insurer received the full report of its investigator. *U.S. Underwriters Ins. Co. v. Carson*, 2008 WL 740337 (3d Dept. March 20, 2008). Auto Exclusion. In pizza parlor's action seeking a declaration that its CGL insurer was obligated to defend and indemnify it in underlying action arising from automobile collision involving insured's delivery driver, court grants summary judgment in favor of pizza parlor where auto exclusion in policy was applicable to insured's employees, but was not clearly applicable to summer-season deliveryman. Where pizza parlor established that deliveryman was hired on a temporary basis to assist with operations during pizza parlor's busy summer season, deliveryman could reasonably be considered a "temporary worker" to which the auto exclusion did not apply and ambiguity must be construed against the insurer. *Nick's Brick Oven Pizza, Inc. v. Excelsior Ins. Co.*, 2008 WL 746547 (Sup. Ct. Dutchess Co. March 20, 2008). Contractual Indemnification - Amendment of Pleadings. In connection with a Labor Law action, defendant city failed to assert a cross-claim for contractual indemnification against contractor, and did not disclose purported contract until after note of issue was filed. Court grants city leave to amend its answer to assert the cross-claim, and grants contractor additional discovery on the claim. *Novack v. The New York City Dept. of Ed.*, 2008 WL 682520 (Sup. Ct. Kings Co. March 14, 2008). Contractual Indemnification - Scope of Indemnification. In a Labor Law action, First Department holds lower court erred in not granting summary judgment awarding contractual indemnification to owner and contractor that designed, but did not dismantle, a scaffold. Court holds that since lower court properly found owner and contractor were not negligent, it should have awarded summary judgment where there was no question that accident occurred within the scope of indemnification provision where accident occurred in connection with, or was incidental to, dismantling of the scaffold. *Balbuena v. New York Stock Exchange, Inc.*, 2008 WL 667198 (1st Dept. March 13, 2008). Contractual Indemnification/General Obligations Law. Owner, construction manager, and contractor satisfied judgment in a separate Labor Law suit that did not determine the issue of negligence, and thereafter sought contractual indemnification against subcontractor. Court finds contractual indemnification provisions did not violate General Obligations Law 5-322.1 because there was no proof of indemnitees' negligence, and because provisions contained savings language "to the fullest extent permitted by law." Court denies subcontractor's motion to dismiss the contractual indemnification claim, and grants plaintiffs' cross-motion. *107 West Apartment Corp. v. K&J Restoration, Inc.*, 2008 WL 746544 (Sup. Ct. New York Co. March 12, 2008). Contractual Indemnification. In a slip-and-fall case, court denies property owner's motion for summary judgment for contractual indemnification against tenant where there is a question of fact regarding the source of the leak that allegedly led to plaintiff's fall. *DeSousa v. Madison Third Building Cos., LLC*, 2008 WL 711017 (Sup. Ct. Queens Co. March 11, 2008). Common-Law Indemnification/Contractual Indemnification. In window washer's personal injury action against building owner and scaffold maintenance company, First Department dismisses as academic the appeal by scaffold maintenance company seeking a decision on its cross-motion for summary judgment awarding it contractual and common-law indemnification against building owner where the complaint and all cross-claims against scaffold maintenance company were dismissed. *Hill v. Stahl*, 2008 WL 763300 (1st Dept. March 25, 2008). Common-Law Indemnification/Contractual Indemnification. In church's action seeking contractual and common-law indemnification from contractor and contractor's insurer for attorney's fees and costs incurred in pedestrian's underlying personal injury action arising from an accident in which pedestrian walked into the arm of contractor's cherry-picker while it was being used for church renovations, court grants insurer's cross-motion to dismiss the complaint as against it where church did not allege that it was an insured under contractor's policy or otherwise state a basis for its claim against the insurer. The court dismisses church's common-law indemnification claim against contractor where there was no liability determination in the underlying action after contractor settled with pedestrian and church appeared to have abandoned the issue. The court dismisses church's

contractual indemnification claim against contractor where contractor's obligation to indemnify was triggered only to the extent that the alleged injury was caused by contractor's negligence and there was no finding of negligence on the part of the contractor. *St. Nicholas Cathedral of Russian Orthodox Church in North America v. Colonial Co-Op. Ins. Co.*, 2008 WL 787267 (Sup. Ct. New York Co. March 25, 2008). Contractual Indemnification. In property owner's and property manager's third-party action seeking contractual indemnification from snow removal contractor and its insurer for defense costs incurred in main action for personal injuries arising from a walkway slip and fall, court holds that trial court erred in directing insurer to pay owner's and property manager's defense costs where the claims against snow removal contractor were dismissed and insurer properly denied coverage on grounds that the injuries did not arise from a covered accident. After granting owner and property manager leave to amend third-party complaint to allege cause of action for breach of contract against insurer, Second Department holds that owner and property manager are entitled to summary judgment on that cause of action after insurer failed to raise an issue of fact regarding insurer's agreement to share owner's and manager's defense costs. Insurer's agreement was embodied in correspondence between counsel that was sufficient to form an enforceable stipulation under CPLR § 2104. *Wronka v. GEM Community Management*, 2008 WL 798930 (2d Dept. March 25, 2008). Contractual Indemnification. In connection with a personal injury action against building owner and lessees alleging damages caused by the ingestion of lead paint, Second Department affirms order denying owner's motion for summary judgment seeking contractual indemnification from lessees pursuant to lease agreement where owner failed to make out its prima facie entitlement to summary judgment by demonstrating that the indemnification provision shifted all responsibility for third-party claims regardless of the owner's own negligence. *Roni v. Rahim*, 2008 WL 803036 (2d Dept. March 25, 2008). Common-Law Indemnification. In a personal injury action arising from a worksite accident, Second Department affirms order denying plumbing contractor's cross-motion for summary judgment seeking common-law indemnification from co-defendant contractors where plumbing contractor failed to present evidence showing that it was not negligent and that proposed indemnitors were negligent in causing the accident or that they had the authority to direct, supervise, or control the work giving rise to plaintiff's injury. *Nasuro v. PI Associates, LLC*, 2008 WL 806321 (2d Dept. March 25, 2008). Contractual Indemnification. In bus passenger's personal injury action against port authority and bus owner arising from an alleged trip and fall in boarding area, First Department modifies order denying port authority's motion for summary judgment seeking contractual indemnification from bus owner and to grant port authority's indemnification claim conditioned on a finding of liability against the port authority. Court holds that there should have been a conditional grant of summary judgment where the indemnification clause at issue was enforceable in light of bus owner's obligation to procure insurance. *Rubin v. Port Authority of New York and New Jersey*, 2008 WL 732154 (1st Dept. March 20, 2008). Contractual Indemnification. In a decision with little factual background or analysis, First Department affirms order denying defendant's motion seeking the advancement of attorney's fees because the indemnification provision between plaintiff and defendant is ambiguous and cannot, as a matter of law, be interpreted as providing for reimbursement of defendant's attorney's fees in the instant action between the signatories of the contract. *Digital Broadcast Corp. v. Ladenburg Thalmann & Co., Inc.*, 2008 WL 714155 (1st Dept. March 18, 2008). Contractual Indemnification/Common-Law Indemnification. In property owner's and contractor's third-party actions seeking indemnification from underlying plaintiff's employer and safety contractor in connection with main action for personal injuries arising from a construction site accident, court: (1) denies safety contractor's motion to dismiss claims against it where its contractual obligations to inspect the jobsite and ensure compliance with safety codes created a common-law duty of indemnification; and (2) grants motion by underlying plaintiff's employer to dismiss all claims against it where plaintiffs and third-party plaintiffs failed to rebut employer's prima facie showing that its employee's head trauma did not constitute a "grave injury" under Section 11 of the Workers' Compensation Law through medical records and employee's own testimony showing that employee was cleared to resume gainful employment. *Goodleaf v. Tzivos Hashem, Inc.*, 2008 WL 724730 (Sup. Ct. Kings Co. March 18, 2008). UM Coverage/Timeliness of the Proceeding. In an action by insurer to stay arbitration of an uninsured motorist benefits claim, First Department affirms order granting insurer's petition on grounds that timeliness of the proceeding was properly measured from the time of claimant's notice to insurer specifying that claimant's demand to arbitrate was brought under the hit-and-run provision of the subject policy. Court rejects claimant's argument that timeliness should be measured from service of an earlier demand that gave no indication whether such claims were being brought under the lack-of-coverage or hit-and-run provision. *In re State Farm Automobile Insurance Co. v. Scott*, 2008 WL 795755 (1st Dept. March 27, 2008). UM Coverage/Other Insurance. In an action by insurer to stay arbitration of an uninsured motorist benefits claim, Second Department affirms order denying insurer's petition after a framed issue hearing on whether the vehicle of the alleged tortfeasor was insured at the time of the alleged accident. Court holds that evidence adduced at framed issue hearing showed that alleged tortfeasor's insurer effectively terminated its policy with sufficient notice to third parties under VTL § 313 prior to the accident, thus insurer's petition was properly denied. *In the Matter of Mercury Insurance Group v. Ortiz*, 2008 WL 808055 (2d Dept. March 25, 2008). UM Coverage/Other Insurance. In connection with an action to stay the arbitration of an uninsured motorist benefits claim, First Department dismisses appeals of order denying injured parties' request for sanctions against alleged tortfeasor's insurer after insurer failed to appear at referee's hearing. Court holds that insurer previously showed a justifiable excuse and a meritorious defense, namely that tortfeasor was involved in a pattern of questionable accidents, and injured parties failed to demonstrate their entitlement to coverage from tortfeasor's insurer. Even innocent victims are not entitled to coverage if their injuries were not caused by an accident within the meaning of the applicable insurance policy. *Emanvilova v. Pallotta*, 2008 WL 714251 (1st Dept. March 18, 2008). UM Coverage/Other Insurance. In an action by insurer to stay arbitration of an uninsured motorist benefits claim, Second Department affirms order denying insurer's petition where alleged tortfeasor's insurer demonstrated that it effectively terminated its policy with sufficient notice to third parties under VTL § 313 prior to the accident. *Progressive Casualty Ins. Co. v. Jackson*, 2008 WL 740515 (2d Dept. March 18, 2008). SUM - Resident Relative. Pedestrian injured in accident sought SUM benefits under his fiancée's policy.

Insurer petitioned for a permanent stay of arbitration based on position that injured person did not qualify as a resident relative under the policy. Second Department affirms grant of petition, finding policy's definition of a resident relative unambiguously does not extend to a non-spouse. Court rejects injured person's reliance on a web page identifying him as a covered driver since the web page does not constitute an endorsement. *GEICO v. Constantino*, 2008 WL 740529 (2d Dept. March 18, 2008). Uninsured Motorist Coverage - Physical Contact. Fourth Department affirms grant of permanent stay of arbitration where accident resulted where the insured, a policewoman on patrol, took evasive action to avoid another car that entered the expressway in front of her patrol car. Court holds that requirement of physical contact with another vehicle cannot be expanded to frustrate the express language of the statute. *Erie Ins. Co. v. Calandra*, 2008 WL 684503 (4th Dept. March 14, 2008). SUM - Untimely Disclaimers. SUM insurer denied coverage where it claimed insurer failed to get consent to settle the underlying case for the tortfeasor's limits. Fourth Department holds lower court properly granted summary judgment in favor of insured where at the time of the settlement, insurer had sufficient information to issue a disclaimer, but waited 36 days to do so. *Morath v. New York Central Mut. Ins. Co.*, 2008 WL 684562 (4th Dept. March 14, 2008). MVAIC Coverage. Fourth Department holds lower court erred by denying petitioner's application to commence an action against MVAIC. Petitioner alleges he was injured in a hit-and-run. Court finds petitioner's attorney's affidavit was sufficient to support presumption that petitioner mailed notice. Court also holds courts should have conducted a hearing to determine if petitioner made all reasonable efforts to identify the vehicle and driver. *Carter v. Motor Vehicle Accident Indem. Corp.*, 2008 WL 683428 (4th Dept. March 14, 2008). First-Party No-Fault - Vacation of Arbitral Award. Court vacates arbitration award denying provider's claim where arbitrator required provider to produce evidence to substantiate services provided notwithstanding that provider submitted documents sufficient to meet its prima facie case. Concurring justice takes issue with Second Department precedent requiring courts to review no-fault arbitrations as compulsory even where initiated by provider, which, unlike insurer, has a choice whether to go to arbitration. *Metropolitan Radiological Imaging, P.C. v. Country-Wide Ins. Co.*, 2008 WL 711878 (Sup. Ct. App. Term March 13, 2008); *R.J. Professional Acupuncturist, P.C. v. Travelers Prop. Cas. Ins. Co.*, 2008 WL 711875 (Sup. Ct. App. Term March 13, 2008). First-Party No-Fault - Lack of Medical Necessity. Court affirms summary judgment in favor of insurer where its detailed peer review reports establishing lack of medical necessity went unrebutted by provider. Court also affirms denial of provider's motion where conclusory affidavit of corporate officer failed to lay a foundation for the admission of documents. *Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co.*, 2008 WL 711886 (Sup. Ct. App. Term March 12, 2008). First-Party No-Fault - Lack of Medical Necessity. Court affirms summary judgment in favor of insurer where its detailed peer review reports establishing lack of medical necessity went unrebutted by provider. *Eagle Surgical Supply, Inc. v. Progressive Cas. Ins. Co.*, 2008 WL 711887 (Sup. Ct. App. Term March 12, 2008). First-Party No-Fault - Lack of Medical Necessity. Following trial, court rules in favor of insurer where its expert sufficiently testified that MRIs of five claimants were not medically necessary where claimants suffered soft tissue damage and received MRIs within one month of their accidents. Provider's cross-examination failed to rebut insurer's proof. *Andrew Carothers, M.D., P.C. v. GEICO Indem. Co.*, 2008 WL 650280 (Civ. Ct. Kings Co. March 10, 2008). First-Party No-Fault - Claim Documentation. Court reverses summary judgment in favor of provider, finding that provider's corporate officer's affidavit was insufficient to establish his personal knowledge of provider's practices and procedures to lay a foundation for the admission of documents. *Fortune Medical, P.C. v. New York Central Mut. Fire Ins.*, 2008 WL 711638 (Sup. Ct. App. Term March 10, 2008); *Vista Surgical Supplies, Inc. v. Utica Mut. Ins. Co.*, 2008 WL 712018 (Sup. Ct. App. Term March 10, 2008). First-Party No-Fault - Untimely Submission of Claims. Court reverses denial of insurer's motion for summary judgment and dismisses claims that were submitted more than 45 days after services were rendered. Court notes that policy was issued after the regulations reduced the period to submit claims from 180 days to 45. Court holds that insurer did not have to prove the policy actually contained the endorsement stating the 45-day period. *Eagle Chiropractic, P.C. v. Chubb Indem. Ins. Co.*, 2008 WL 712036 (Sup. Ct. App. Term March 10, 2008). First-Party No-Fault - Insured Incident. Court reverses summary judgment in favor of provider, finding insurer demonstrated a founded belief the injuries did not arise out of an insured incident. However, court finds insurer failed to submit evidence to establish that injuries did not arise out of an insured incident as a matter of law, and is also not entitled to summary judgment. *Lexington Acupuncture, P.C. v. GEICO Ins. Co.*, 2008 WL 711650 (Sup. Ct. App. Term March 7, 2008). First-Party No-Fault - Independent Contractor. In an action to recover assigned first-party, no-fault medical payments, Appellate Term affirms order denying summary judgment in favor of insurer on grounds that services for which provider sought reimbursement were provided by an independent contractor. Insurer's motion for summary judgment was properly denied where provider submitted treating physician's affidavit stating that he is provider's sole shareholder, not an independent contractor, and that the "independent contractor" box on the NF-3 claim form was marked erroneously. *Atlantis Medical, DC v. Liberty Mut. Ins. Co.*, 2008 WL 763094 (Sup. Ct. App. Term March 24, 2008).