Plaintiff used an affirmation from a doctor no longer licensed in New York in an effort to defeat our motion for Summary Judgment

The Court granted our motion in **Brown v Aviles** , Supreme Court, Suffolk Co (Molia, J.) for summary judgment on threshold. The court found that we sustained our burden of establishing a prima facie case of entitlement to a dismissal on threshold grounds based on Dr. Khachadurian's medical reports and examinations finding no evidence of spasm or loss or lordosis and full range of motion on the part of the plaintiff's spine. The plaintiff's testimony was stressed in the motion sense it supported our position that she had not suffered a serious injury. At the examination before trial the plaintiff testified that she returned to work and was able to perform her usual and customary duties as she had done prior to the accident. She did not lose anytime from work. She had physical therapy for 3 months after the accident. The plaintiff failed to support her claim of serious injury. The plaintiff served in opposition an affirmation from Dr. Roger Brick. Dr. Brick is no longer a licensed medical doctor. He was creative in his affirmation since it did not allege he was but stated in the past he held a valid NY State License as a medical doctor. We attached as part of our reply papers exhibits showing that Dr, Brick was no longer licensed and Dr. Brick's New York Medical License was permanently revoked in September 2005. The court dismissed the case.

Cases dismissed on Service and Statute of Limitations Issues

The pitfalls that face plaintiff in the use of service upon the Secretary of State for a non-resident who is in an accident on a New York roadway are great. In **Calloway v Wells**, **Supreme Court, Westchester Co. (Leibowitz, J)** the court dismissed a case against our client Nakia Wells who was a resident of Pennsylvania. The plaintiff served Ms. Wells at her former address in Kissimmee Florida. Her vehicle was registered in New York. The client had resided in Pennsylvania since 2006. She has not resided in Florida since 2005. She has not resided in New York since 2004/2005. Based upon the foregoing we argued that the service upon her through the Secretary of State was never completed since the mailing to the Florida address was never received by the defendant. The plaintiff has the burden of confirming the address of the party served. It is well settled that the burden of investigating and determining a defendant's correct address is on the plaintiff. See, Yarusso v Arbotowicz, 41 NY2d 516 [1977]; Bingham v Ryder Truck Rental, 110 AD2d 867 [2d Dept 1985].

Vehicle and Traffic Law § 253 affords relief which is in derogation of the common law and, therefore, it should be strictly construed. (See, Bingham v Ryder Truck Rental, 110 AD2d 867 [2d Dept 1985].) The statute was enacted to make sure that a nonresident defendant motorist receives actual notice of an action commenced against him. **Only strict compliance with the service requirements of Vehicle and Traffic Law § 253 (2) will confer jurisdiction upon the court.** (**Emphasis Supplied**). Vehicle and Traffic Law § 253 (2) specifically contemplates only three circumstances after service on the Secretary of State where mailing will complete service and confer jurisdiction. These circumstances are: (1) where the defendant or his agent actually signs the return receipt; or (2) where the postal authorities return the original envelope marked "refused"; or (3) where the original envelope is returned by the postal authorities marked "unclaimed".

Vehicle and Traffic Law § 253 (2) further expressly requires the filing of the proof of mailing "by ordinary mail and proof of mailing certificate of ordinary mail". As search of the court file showed that it contained neither an Affidavit of Service nor proof of mailing. This rendered the attempted service invalid. As service was improper and more than three (3) years past since the date of loss, the case was dismissed with prejudice. The plaintiff's cross motion to re-serve the plaintiff was denied since the original service was invalid and incomplete when the statute of limitations ran out. Our motion was granted dismissing the case in its entirety.

Landlord does not have common law duty to install radiator covers at properties where children live.

Utkan v Szula, ____ AD3rd____ (2d Dept, 2009) Slip Opinion 01794 the plaintiff alleged that an exposed radiator in the apartment owned by the defendant-landlord burned the infant plaintiff. The plaintiff attorney argued that the defendant was aware that there were children residing in the apartment. The defendant also knew that the radiators where uncovered or exposed. The plaintiff's mother had requested that the landlord install radiator covers. In a motion for summary judgment the defendant argued that the issue of duty to install covers for radiator covers had been addressed by the Court of Appeals in *Rivera v Nelson Realty, 7 NY3d530.*

The Court of Appeals, in Rivera, held:

> No duty to remedy this alleged hazard is imposed by the Multiple Dwelling Law or arises under common law by virtue of the lease. Accordingly, any duty to protect children from uncovered radiators remains that of the tenant, unless some other statute or regulation imposes it on the landlord. The decision whether radiator covers must be supplied by landlords is thus left to legislators and regulators, who are in the best position to balance the harm prevented by this safety measure against its cost--a cost which, if imposed on landlords, becomes part of the overall cost of rental housing

The Plaintiffs do not claim that the radiator that injured the child were in need of repair, or was defective in any way. Plaintiffs' claim is that an uncovered radiator in good working order, though not a hazard in a home occupied only by adults, is dangerous to children. The Court found that the landlord did not have any duty to install a radiator cover in this situation.[1]

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[1] The argument regarding covering "pipes" under New York City Administrative Code section 27-809 did not apply since the court defined a pipe and radiator based on reasonable foreseeablity. The New York City Administrative Code § 27-809, which requires insulation on "accessible piping" in occupiable rooms carrying steam or fluids exceeding 165 degrees Fahrenheit. The court held that this code "did not require defendants landlord and management company to install radiator covers in premises leased to plaintiff tenants. Radiators are not ordinarily spoken of as "piping," nor radiator covers as insulation. Further, other provisions of the Administrative Code show that the authors of the Code used the word "radiators" to mean something different from "piping" or "pipes." Moreover, it makes sense to treat pipes and radiators differently: no one knows from looking at a pipe whether it carries hot or cold water, but most people, other than young children, can be expected to assume that radiators are hot. Accordingly, defendants were not liable for

The Court in Utkan v Szula, examined the lease provisions. The court found that the lease provisions do not provide a viable basis to distinguish the case from the Court of Appeals ruling in Rivera, *Id.*

We are pleased to announce that Maryann Cioffi as joined the firm as a paralegal. Maryann has worked for Liberty Mutual's house counsels' firm for the last 10 years assigned to her senior attorneys. Maryann will be working in our BI units and in particular with Chris Lanigan and me.

Eileen Sletes has also joined us as a paralegal in the No-Fault unit. Eileen is working toward her degree at Suffolk Community College where she earned her Paralegal Certificate.

On behalf of the staff at DeSena & Sweeney, please have a happy and safe summer.

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burns suffered by the infant plaintiff when he climbed onto an uncovered radiator in his parents' bedroom". Rivera, 7 NY3d 530, 536-37