 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 16. Limited Liability of Persons Jointly Liable (Refs & Annos)

McKinney's CPLR § 1602

§ 1602. Application

Effective: October 1, 2005
Currentness

The limitations set forth in this article shall:

1. apply to any claim for contribution or indemnification, but shall not include:

(a) a claim for indemnification if, prior to the accident or occurrence on which the claim is based, the claimant and the tortfeasor had entered into a written contract in which the tortfeasor had expressly agreed to indemnify the claimant for the type of loss suffered; or

(b) a claim for indemnification by a public employee, including indemnification pursuant to section fifty-k of the general municipal law or section seventeen or eighteen of the public officers law.

2. not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict (i) the limitations set forth in section twenty-a of the court of claims act; (ii) any immunity or right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission; (iii) any right on the part of any defendant to plead and prove an affirmative defense as to culpable conduct attributable to a claimant or decedent which is claimed by such defendant in the diminution of damages in any action; and (iv) any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior.

3. not apply to administrative proceedings.

4. not apply to claims under the workers' compensation law or to a claim against a defendant where claimant has sustained a “grave injury” as defined in section eleven of the workers' compensation law to the extent of the equitable share of any person against whom the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which any person may be held liable.

5. not apply to actions requiring proof of intent.

  

6. not apply to any person held liable by reason of his use, operation, or ownership of a motor vehicle or motorcycle, as those terms are defined respectively in sections three hundred eleven and one hundred twenty-five of the vehicle and traffic law.

7. not apply to any person held liable for causing claimant's injury by having acted with reckless disregard for the safety of others.

8. not apply to any person held liable by reason of the applicability of article ten of the labor law.

9. not apply to any person held liable for causing claimant's injury by having unlawfully released into the environment a substance hazardous to public health, safety or the environment, a substance acutely hazardous to public health, safety or the environment or a hazardous waste, as defined in articles thirty-seven and twenty-seven of the environmental conservation law and in violation of article seventy-one of such law; provided, however, that nothing herein shall require that the violation of said article by such person has resulted in a criminal conviction or administrative adjudication of liability.

10. not apply to any person held liable in a product liability action where the manufacturer of the product is not a party to the action and the claimant establishes by a preponderance of the evidence that jurisdiction over the manufacturer could not with due diligence be obtained and that if the manufacturer were a party to the action, liability for claimant's injury would have been imposed upon said manufacturer by reason of the doctrine of strict liability, to the extent of the equitable share of such manufacturer.

11. not apply to any parties found to have acted knowingly or intentionally, and in concert, to cause the acts or failures upon which liability is based; provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which said parties may be held liable to the claimant.

12. in conjunction with the other provisions of this article not be construed to create or enlarge actions for contribution or indemnity barred because of the applicability of the workers' compensation law of this state, any other state or the federal government, or section 18-201 of the general obligations law.

13. not apply to any person responsible for the disposal or presence of hazardous or dangerous materials that is the result of the unlawful manufacture of methamphetamine, when such person has been convicted of section 220.73, 220.74, 220.75 or 220.76 of the penal law.

**Credits**

(Added L.1986, c. 682, § 6. Amended L.1996, c. 635, §§ 6, 7; L.2005, c. 394, § 12, eff. Oct. 1, 2005.)

**Editors' Notes**

**PRACTICE COMMENTARIES**

by Vincent C. Alexander

  

CPLR 1602 is principally a list of exceptions to CPLR 1601 that preserve joint and several liability in favor of plaintiffs in given situations. The statute also contains certain "savings provisions" that carry forward pre-existing law in particular circumstances. CPLR 1602 is the product of legislative compromise " 'reflect[ing] careful deliberations over the appropriate situations for a modified joint and several liability rule.' " *Morales v. County of Nassau*, 1999, 94 N.Y.2d 218, 224, 703 N.Y.S.2d 61, 64, 724 N.E.2d 756, 759, quoting Governor's Approval Memorandum, Laws of 1986, ch.682. Unfortunately, § 1602 is poorly drafted, and, as Judge Joseph M. McLaughlin wrote in his 1986 Practice Commentaries: "It has the elegance and clarity of the Internal Revenue Code."

***Subdivision 1***

At the outset, CPLR 1602(1) declares that the judgment-limiting benefits of Article 16 apply to claims for contribution and indemnification.

As to the right of indemnification, a defendant held vicariously liable to the plaintiff is entitled to indemnity from the actual tortfeasor. CPLR 1404(b); CPLR 1602(2)(ii). Thus, when a vicariously liable defendant's percentage of fault is 50% or less in comparison to other participants in the tort--such percentage deriving from the culpability of the actual tortfeasor whose conduct exposed the defendant to vicarious liability--the defendant is entitled to indemnity from the actual tortfeasor in an amount equal to the percentage of such tortfeasor's fault.

Furthermore, CPLR 1602(1) ensures that the party from whom indemnity is sought--the indemnitor--cannot be required to pay more than its equitable share of the plaintiff's noneconomic damages if the indemnitor's share is 50% or less. This point was established in *Frank v. Meadowlakes Development Corp.*, 2006, 6 N.Y.3d 687, 816 N.Y.S.2d 715, 849 N.E.2d 938. There, the court held that CPLR 1602(2)(ii) preserves the right of a vicariously liable defendant (or defendant held liable for a nondelegable duty) to be indemnified, but CPLR 1602(1) limits the amount of indemnification the defendant can recover from an actual tortfeasor whose share of the fault is 50 percent or less. CPLR 1602(1) embodies the paramount intent of Article 16 to benefit low-fault, deep-pocket tortfeasors, thus subordinating the operative effect of CPLR 1602(2)(ii).

The plaintiff in *Frank* suffered a workplace accident. He sued the property owner and the general contractor, alleging liability under § 240 of the Labor Law. The property owner impleaded another contractor as a third-party defendant. Following a post-verdict settlement with Frank, the property owner sought indemnity from the third-party defendant for the full amount of the settlement. This contractor, however, was found to be only 10% at fault, the remaining allocation being 10% for Frank and 80% for the general contractor. The Court of Appeals ruled that the impleaded contractor, whose share of the fault was at the 50-percent-or-less level, was not obligated to indemnify the property owner for the full amount it paid to the plaintiff. Rather, after factoring out the plaintiff's percentage of fault, the proper application of Article 16 left the impleaded contractor responsible for only 1/9 of that portion of the property owner's settlement attributable to noneconomic damages.

The Court of Appeals reasoned that CPLR 1602(2)(ii) was a savings provision with respect to a general principle of law--here, the pre-existing right of indemnity--not the creation of an exception to a tortfeasor's Article 16 right of apportionment. (The court drew upon the reasoning of its decision in *Rangolan v. County of Nassau*, 2001, 96 N.Y.2d 42, 725 N.Y.S.2d 611, 749 N.E.2d 178, which is discussed under *Subdivision 2*, below.) Thus, under CPLR 1602(2)(ii) the right of indemnity persists, but CPLR 1602(1) limits the amount of such indemnity in accordance with CPLR 1601. This reading of the statute, said the Court of Appeals, implements the clear intent of CPLR 1601 and CPLR 1602(1) to prevent a tortfeasor who has been assigned a small degree of fault

  

from being "forced to pay an amount grossly out of proportion to that assignment." 6 N.Y.3d at 693, 816 N.Y.S.2d at 718, 849 N.E.2d at 941.

CPLR 1602(1)(a) provides that parties may, by pre-accident contract, define their rights with respect to full indemnity, and subdivision (1)(b) preserves the statutory indemnification rights of certain public employees.

***Subdivision 2***

CPLR 1602(2) preserves certain pre-existing statutory and common law rights, such as a defendant's right to diminution of damages based on plaintiff's contributory fault pursuant to CPLR 1411. *See* CPLR 1602(2)(iii); Practice Commentaries on CPLR 1601, at C1601:5. Also, as discussed under *Subdivision 1*, above, CPLR 1602(2)(ii) preserves a defendant's right to indemnification, subject to the right of the indemnitor to limit its liability for plaintiff's noneconomic damages to the indemnitor's proportionate share of the total liability.

CPLR 1602(2)(iv) operates as a savings provision to ensure that a defendant with a nondelegable duty or a duty to compensate based on the doctrine of respondeat superior remains vicariously liable for the negligent act of its delegate or employee. Such defendant may not use CPLR 1601 as a basis to escape liability by asserting that its equitable share of fault is 0% in relation to the actual fault of its delegate or employee. A party subject to vicarious liability continues to be responsible to the same extent as its delegate (in connection with a nondelegable duty) or its agent or employee (in connection with respondeat superior). This is the intended effect, and the only effect, of CPLR 1602(2)(iv). Subdivision (2)(iv) does not, in other words, create an exception to the right of a vicariously liable defendant to seek an apportionment of noneconomic damages with respect to other joint tortfeasors. The Court of Appeals settled upon this reading of the statute in *Rangolan v. County of Nassau*, 2001, 96 N.Y.2d 42, 725 N.Y.S.2d 611, 749 N.E.2d 178, and *Faragiano v. Town of Concord*, 2001, 96 N.Y.2d 776, 725 N.Y.S.2d 609, 749 N.E.2d 184.

As in *Faragiano*, consider the case of a plaintiff who is injured in an accident caused in part by two negligent vehicle users and in part by an asphalt company that negligently resurfaced the road on behalf of a municipality. Plaintiff sues the two vehicle users, the municipality and the asphalt company. The municipality owes a nondelegable duty to maintain its roads in a reasonably safe condition, and therefore remains vicariously liable by virtue of CPLR 1602(2)(iv) for the negligent work of its delegate, the asphalt company. The municipality may not seek an apportionment with the asphalt company (e.g., by claiming that the municipality's fault is 0% in relation to that of its delegate, the asphalt company). But the municipality is still entitled to seek an apportionment between itself and the vehicle users "for whose liability it is not answerable." 96 N.Y.2d at 778, 725 N.Y.S.2d at 611, 749 N.E.2d at 186.

The reasoning underlying the Court's conclusion that CPLR 1602(2)(iv) is merely a savings provision and not an exception to Article 16 is to be found in *Rangolan v. County of Nassau*, *supra*. First, the overall statutory scheme of CPLR 1602 differentiates subdivision (2)(iv) from the genuine exceptions found elsewhere in the statute. The true exceptions are all preceded by the unambiguous statement that CPLR 1601 "shall not apply" in given circumstances, whereas subdivision (2)(iv)'s introductory language contains different phraseology: It is stated that CPLR 1601 "shall not be construed to impair ... [or] alter" liability based on nondelegable duties or respondeat superior. The use of different terminology within the same statute raises an inference that different concepts were intended. Thus, CPLR 1602(2)(iv) simply preserves pre-existing law with respect to vicarious liability concepts. Furthermore, one of the specific exceptions, CPLR 1602(8), states that apportionment shall not apply in cases under Article 10 of the Labor Law, which imposes a nondelegable duty on property owners and contractors to provide a safe workplace. This provision would be redundant if CPLR 1602(2)(iv) created an all-encompassing exception for nondelegable duties.

  

Second, a construction of CPLR 1602(2)(iv) that would create an exception to apportionment in all cases involving nondelegable duties or respondeat superior would be at odds with the purpose of Article 16. The intent of the legislation was to benefit municipalities, hospitals, employers and other "deep-pocket" defendants. Because organizational parties are frequently held vicariously liable for the acts of delegates, agents and employees, depriving them of the right of apportionment with other tortfeasors would undo the very protection that CPLR 1601 was intended to provide.

**Subdivision 3**

CPLR 1602(3) precludes the applicability of Article 16 in administrative proceedings.

**Subdivision 4**

CPLR 1602(4) states that Article 16 does not apply to claims under the Workers' Compensation Law. Furthermore, subdivision (4) was amended in 1996 as part of a legislative scheme that limits contribution and indemnity claims against employers whose workers are injured on the job. *See* Practice Commentaries on CPLR 1401, at C1401:7. The operation of the amended version of § 1602(4) is discussed in the Practice Commentaries on CPLR 1601, at C1601:4. *See also* CPLR 1602(12).

**Subdivision 5**

Subdivision 5 of CPLR 1602, which states that Article 16 does not apply "to actions requiring proof of intent," deprives defendants of any reduced-liability benefits when they have participated in an assault or similar intentional tort resulting in personal injury. What of the hybrid situation where one of the tortfeasors acted with intent while another was merely negligent? Is the negligent defendant entitled to seek an apportionment with the intentional wrongdoer? The Court of Appeals answered yes in *Chianese v. Meier*, 2002, 98 N.Y.2d 270, 746 N.Y.S.2d 657, 774 N.E.2d 722. Thus, when a plaintiff has been injured by two joint or successive tortfeasors, one of whom acted with intent and the other only negligently, the intentional tortfeasor will be liable for the full amount of plaintiff's damages but the negligent tortfeasor may assert the limited-judgment benefits of Article 16.

Reduced to its essentials, *Chianese* involved a property owner's alleged negligence in furnishing or maintaining building security leading to injuries inflicted by an intruder who acted with criminal intent. (The intruder was not named as a party.) Based on the jury's finding that the percentage of culpability as between the owner and the intruder was 50-50, the owner claimed that his liability to the plaintiff should be limited in accordance with CPLR 1601. The plaintiff argued, in opposition, that this was "an action requiring proof of intent" because she was required to prove that an assault occurred, thus triggering the exception in § 1602(5) and precluding apportionment.

The Court of Appeals rejected the plaintiff's argument, concluding, in effect, that the term "action" in § 1602(5) should be read in the narrow sense of "cause of action" or "claim." Only individual claims against intentional wrongdoers get the benefit of the exception from apportionment. Under the "plain language" of the statute, the *Chianese* plaintiff's negligence claim against the property owner was not "an action requiring proof of intent." The owner's liability turned on its negligent act of failing to provide adequate security without regard to the state of mind of the assailant who injured the plaintiff. The Court noted that its reading of subdivision (5) was consistent with subdivision (11). Whereas subdivision (5) precludes an intentional tortfeasor from apportionment irrespective of the mental state of the other participants, subdivision (11) precludes apportionment with other intentional tortfeasors who acted "in concert."

  

The court also cited legislative history--"what little ... there is"--as supportive of its reading of subdivision (5). The Governor's memorandum of approval of Article 16 stated that joint and several liability is preserved "in instances in which the *defendant's* acts" are willful, i.e., with emphasis on the acts of the individual defendant. Conversely, there is no indication that § 1602(5) "was intended to create what would amount to a broad exception to apportionment at the expense of the low-fault, merely negligent landowners and municipalities--the very parties article 16 intended to benefit." 98 N.Y.2d at 277-78, 746 N.Y.S.2d at 661, 774 N.E.2d at 726.

**Subdivision 6**

Oddly, the reduced-liability benefits of Article 16 are unavailable to most of the tortfeasors in the most common tort case of all: the motor vehicle accident. In such an action, the status of each tortfeasor must be carefully analyzed in order to determine whether the exemption of CPLR 1602(6) is operative. By its terms, subdivision (6) makes Article 16 inapplicable to users, operators and owners of motor vehicles and motorcycles but only as those terms are defined in §§ 125 and 311 of the Vehicle and Traffic Law. Thus, a school crossing guard whose negligence in directing traffic was the alleged cause of an automobile accident could take advantage of Article 16 because she did not fall within the exclusion of subdivision (6). *Massey v. City of New York*, 1992, 155 Misc.2d 580, 589 N.Y.S.2d 145 (Sup.Ct.Kings Co.). Although school crossing guards have authority to control the flow of traffic in and around schools, they are not thereby "users" or "operators" of motor vehicles. The definitional limitations contained in § 1602(6) make it clear, the *Massey* court said, that the Legislature intended to be selective with respect to the defendants who continue to be subject to full joint and several liability in actions involving motor vehicle accidents. For example, manufacturers of automobiles involved in accidents and municipalities that negligently maintain roadways remain eligible for the benefits of Article 16.

The Legislature's selectivity is also demonstrated by the fact that drivers and owners of fire and police vehicles get the benefit of Article 16 because fire and police vehicles are not within the definition of motor vehicles in Veh. & Traf.Law §§ 125 and 311. Thus, in a multi-vehicle accident involving a fire ladder truck, both the firefighter who was driving the truck and his municipal employer would get the benefit of CPLR 1601 if the negligent firefighter's share of the fault was 50% or less. *See, e.g.*, *Towers v. Hoag*, 2007, 40 A.D.3d 244, 245, 833 N.Y.S.2d 388, 388 (1st Dep't) (concurring opinion). This is the intended result, of course, because municipalities were among the chief proponents of the adoption of Article 16.

**Subdivision 7**

CPLR 1602(7), like § 1602(5), clearly is based on a policy determination that egregiously unreasonable conduct should subject the defendant to full joint and several liability. Thus, a defendant who acted recklessly forfeits the benefits of CPLR 1601. *See Towers v. Hoag*, 2007, 40 A.D.3d 244, 245, 833 N.Y.S.2d 388, 389 (1st Dep't) ("[I]n order to trigger the reckless disregard exception set forth in CPLR 1602(7), plaintiff must prove, by a preponderance of the evidence, the intentional commission 'of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome.' ") (concurring opinion) (internal citations omitted).

**Subdivision 8**

CPLR 1602(8) eliminates the reduced-judgment benefits of Article 16 for any person whose liability arises from the nondelegable duties imposed by Article 10 of the Labor Law. Sections 240 and 241 of the Labor Law require owners and contractors to maintain a safe workplace.

**Subdivision 9**

  

Subdivision 9 of CPLR 1602 is another policy-based exception that takes away the benefits of Article 16 for a defendant whose liability is based on the unlawful release of a hazardous substance into the environment.

**Subdivision 10**

CPLR 1602(10) eliminates several-only liability in a products liability action when a manufacturer has not been joined as a party because of the plaintiff's inability to obtain jurisdiction over the manufacturer, and the manufacturer's liability is based on the doctrine of strict liability. In such circumstances, the named defendant has no right of apportionment to the extent of the absent manufacturer's share. *See Miller v. Staples the Office Superstore East, Inc.*, 2008, 52 A.D.3d 309, 860 N.Y.S.2d 51 (1st Dep't) (ordinarily, plaintiff would have burden of establishing that nonparty manufacturers were beyond court's jurisdiction for purpose of applying exception in CPLR 1602(10), but burden shifted to defendants to show that no jurisdiction existed over such manufacturers when defendants moved to amend answer to assert counterclaim for declaration of inapplicability of CPLR 1602(10)). The exception in CPLR 1602(10) is similar in concept to the first proviso in CPLR 1601(1). *See* Practice Commentaries on CPLR 1601, at C1601:2.

**Subdivision 11**

CPLR 1602(11) fills some gaps that might be thought to exist under CPLR 1602(5). Parties who acted knowingly or intentionally, and in concert, to cause the acts or failures upon which plaintiff's loss is based do not get the benefits of Article 16.

**Subdivision 12**

CPLR 1602(12) was added when the Legislature imposed limitations on contribution and indemnity rights against employers whose injured workers have sued third persons. *See* Practice Commentaries on CPLR 1401, at C1401:7.

**Subdivision 13**

A 2005 amendment to CPLR 1602 added subdivision 13 as another exception to the operation of Article 16. The spread of illegal methamphetamine laboratories led the Legislature to create new crimes for the manufacture of the drug and the disposal of materials from methamphetamine laboratories. Among the risks to health and safety in these criminal activities is the dispersal of the gas anhydrous ammonia, which becomes toxic when released in the environment and capable of causing personal injury to those who come into contact with it. Subdivision 13 precludes a tortfeasor who has been convicted of the methamphetamine manufacturing and disposal crimes from taking advantage of Article 16's limitations on liability in civil actions based on exposure to hazardous or dangerous materials connected to the crimes. *See generally* Sponsor's Memorandum in Support of S.5920, Laws of 2005, ch.394.

**Implied Exceptions**

In *Morales v. County of Nassau*, 1999, 94 N.Y.2d 218, 703 N.Y.S.2d 61, 724 N.E.2d 756, the Court of Appeals rejected the notion that courts may create additional nonlegislative exceptions to the operation of Article 16. The trial court in *Morales* recognized a judge-made exception to Article 16 in cases against municipalities for the negligent enforcement of orders of protection. While acknowledging New York State's strong public policy encouraging the enforcement of orders of protection, the Court of Appeals refused to engraft another exception onto CPLR 1602 based on such public policy. Upon reviewing the legislative history of Article 16, the court concluded that the statute represented a "careful balance" of competing interests that took account

  

of all exceptions deemed appropriate by the Legislature. The court therefore stood by the standard canon of construction *expressio unius est exclusio alterius*: the listing of specific exemptions indicates an exclusion of all others. Also, where the Legislature has indicated its policy preferences, courts should not superimpose their own. 94 N.Y.2d at 224-25, 703 N.Y.S.2d at 64, 724 N.E.2d at 759. *See also Van Vlack v. Baker*, 1997, 242 A.D.2d 704, 663 N.Y.S.2d 49 (2d Dep't) (noting the absence of any exception for social host liability in CPLR 1602, the Appellate Division said "it was improper for the court to determine that CPLR 1601 did not apply ... on the ground that the policies underlying the enactment of General Obligations Law § 11-100 outweighed the policies underlying the subsequent enactment of CPLR article 16").

Notes of Decisions (73)

McKinney's CPLR § 1602, NY CPLR § 1602
Current through L.2016, chapters 1 to 519.

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