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Trial Lawyers Section Digest

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Message from the Chair

At the last Trial Lawyers Section Executive Committee meeting held on January 26, 2006, at the New York Marriott Marquis, our outgoing Chair John Powers focused (with unerring accuracy) on the question that we must face in 2006:

How in 2006, can the Trial Lawyers Section be relevant and meaningful for its members?

To answer this question, we must first acknowledge some present-day realities:

1. Membership in the Trial Lawyers Section (and other Sections as well) is down.
2. With so many CLE providers these days, the Trial Lawyers Section CLE programs are not necessarily perceived as "unique or special."
3. Attendance at our Annual Summer Meetings has dropped over the last 3 years.
4. It is more difficult now (as compared to 5 or 10 years ago) to recruit younger attorneys to join the Trial Lawyers Section.

There are no easy solutions to the issues described above. The only thing we know for sure is—giving up is not an option. Some of the ideas we might consider in an effort to reverse the above trends include the following:

1. We must revitalize our *Trial Lawyers Section Digest*. Although we have a gifted, talented Editor for this *Digest*—Steve Prystowsky—Steve cannot do it alone. It is absolutely unrealistic to expect one person—a busy practicing attorney—to be solely responsible for producing 4 issues of the *Digest* per year. We must reach out to law school professors and others who could write *Digest* articles. We must give Steve resources so we can produce a *Digest* that will get the attention of our members.
2. We might try to establish a Trial Lawyers Section listserve. This listserve would enable Trial Lawyers Section members to communicate with each other about such things as evaluation of cases, expert witnesses, proclivities of judges and unusual legal issues. Such a listserve could also be used to solicit opinions of our members regarding subjects on the agenda of future Executive Committee meetings. If we can promote more communication among our members, this might lead to more participation.
3. Each of us must aggressively promote our 2006 Summer Meeting at Cooperstown (August 21-24). Our CLE programs for this 2006 Summer Meeting will be chaired by Peter Kopff (Executive Committee 10th Judicial District—Long Island). The event chair for this meeting is Mark Moretti, Rochester—newly appointed Treasurer of the Trial Lawyers Section. It is my belief that only by phone calls and *personally* reaching out to members and non-members (who would be unlikely to attend in response to a mere written solicitation)—can we hope to get the kind of turnout we need.
4. We must continue support for our jewel—the Trial Lawyers Section Moot Court Competition.

The bottom line is—if we want to put a dent in the problems identified by our outgoing Chair, good intentions won't be enough. We will have to roll up our sleeves and get to work.

Steve O'Leary

Report on 2006 Moot Court Competition

By Steve O'Leary

As most Section members know, our jewel is the annual Trial Lawyers Section Moot Court Competition. This competition was started by Tony DeMarco many years ago. Although Tony is no longer with us, this competition lives on today because of the outstanding work of Professor Travis Lewin, Syracuse Law School, and Judge Tom Franczyk (Buffalo).

This Trial Lawyers Section-sponsored competition consists of approximately 20 law school teams in the New York Region. The teams are given a particular case to present in Court. The student advocates do opening, direct examination, cross-examination and closings during a three-hour mini-trial. At the conclusion of this mini-trial, three evaluators (usually two practicing trial lawyers and one judge) make a determination which law school team was the better advocate (evaluators do not decide which team won the case).

This year, the Trial Moot Court Competition was held at the new Federal Courthouse in Brooklyn. The competition lasted three days—from February 2 through 4, 2006. Professor Keri Gould (St. John's Law School) was the host director for the tournament. Professor Gould had to accomplish a number of tasks including arrangements for use of the courthouse, recruitment of judges and trial attorneys to act as evaluators and conscription of a large number of students to play the roles of witnesses.

This year the student advocates presented a wrongful death civil case. The case involved a claim by the parents of a deceased child against a school district. Plaintiff's contention was that the child was discharged from a school bus at the wrong location—leading to a fatal accident. Defendant claimed that the car which struck and killed the child (the driver of the car was not a party) was the proximate cause of the accident—rather than the School District.

This tournament was structured so the two best teams advance to the National Trial Moot Court Competition held in Dallas (March 22-25, 2006). To qualify for the Nationals, the two winning teams had to win four successive matches!

In the first semi-final match, the winning team was from Cardozo Law School. The Cardozo team consisted of student advocates Adam Harris, Roch Fischer and Tracie Reilly. The Cardozo team was coached by Niki Blumberg.

In the second semi-final match, the winning team was from Syracuse Law School. The Syracuse team consisted of student advocates Gregory P. Amend, Kereshma Sarhangi and Stephanie Long. The Syracuse team was coached by Joanne Van Dyke.

The following individual awards were made:

Anthony J. Demarco, Jr., Advocacy Award (NYSBA) for best advocate through three rounds on a team not advancing to the Championship Rounds: Kristen A. Paulding, Buffalo.

Overall Best Advocate: Gregory P. Amend, Syracuse.

Section members may question why the DeMarco Advocacy Award would go to a student advocate who did *not* advance to the Championship Rounds. The answer is that Tony Demarco was always a champion of the underdog. It was felt that Tony would like the idea that a competitor who did well but whose team did not make the Championship Rounds would receive an Advocacy Award in his name.

Again, on behalf of all Section members, our Section expresses its appreciation to Travis Lewin, Judge Franczyk and Keri Gould for a job well done. We wish the Cardozo and Syracuse teams good luck in the National Tournament in Dallas.

2005 Appellate Decisions

By Steven B. Prystowsky

APPEAL AND ERROR—MOTION IN LIMINE—APPEALABLE ORDERS

Defendants' appeal from the denial of their motion in limine to preclude the plaintiff from introducing expert testimony regarding medical causation and for summary judgment dismissing the complaint is reviewable even though an order deciding a motion in limine is not appealable because no appeal lies from the grant or denial of a pre-trial ruling on the admissibility of evidence:

> The appellants moved and cross-moved to preclude expert testimony regarding medical causation and for summary judgment, since, if the motions in limine were granted, the plaintiff would be unable to prove causation and would not be able to prevail on his claims. Thus, the appellants did not improperly seek the relief of dismissal only through motions in limine. Such motions go to the very merits of the controversy and, if granted, would render the plaintiff's case meritless. Under these circumstances, the resulting order, whether granting the motions and cross motion and rendering the plaintiff's case meritless, or denying them, affected a substantial right of the parties. Thus they are appealable.

Parker v. Mobil Oil Corporation, 16 A.D.3d 648, 793 N.Y.S.2d 434 (2d Dep't 2005), *lv. to appeal granted*, 6 N.Y.3d 702, __ N.Y.S.2d __ (2005).

APPEAL AND ERROR—UNANSWERED QUESTIONS DURING DEPOSITION/VOCATIONAL REHABILITATION EXAMINATION

The court dismissed defendant's appeal from an order which denied its motion to compel the plaintiff to respond to questions regarding his immigration and marital status asked at his deposition and during a vocational rehabilitation examination conducted by the defendant's expert witness:

> Both of the defendant's motions sought merely to compel the plaintiff to answer questions put to him at examinations of the defendant before trial. It is well settled that an "order denying a motion to compel a witness to answer questions propounded at an examination before trial is akin to a ruling made in the course of the examination itself and as such is not appealable as of right," even where it was made upon a full record and on the defendant's motion to compel responses. The defendant never sought leave to appeal from the orders, and as this court has often stated, "we are disinclined to grant leave to parties who have taken it upon themselves to perfect an appeal without leave to appeal."

Singh v. Villford Realty Corporation, 21 A.D.3d 892, 800 N.Y.S.2d 508 (2d Dep't 2005).

AUTOMOBILE—VICARIOUS LIABILITY/VTL § 388—IMMUNITY

Vehicle owner is vicariously liable under VTL § 388 even if the negligent driver is immune from suit because he is a diplomat:

> We hold that the driver's immunity does not shield the owner. Moreover, because 28 USC § 1364 does not provide an exclusive remedy, the suit before us is tenable.
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> * * *
>
> Ford would have us interpret section 388 to necessarily absolve the owner of liability whenever the driver cannot be held liable. The statute, however, is not written that way. It hinges the owner's liability not on the driver's liability but on the driver's negligence.

Tikhonova v. Ford Motor Company, 4 N.Y.3d 621, 797 N.Y.S.2d 799 (2005).

COMPROMISE AND SETTLEMENT—CPLR 2104—TELEPHONE CALL

Plaintiffs' acceptance of a settlement offer by telephone will not be enforced since it is not a settlement in open court as required by CPLR 2104:

> Plaintiffs' acceptance of the settlement offer was communicated by their counsel to defendant's counsel in a telephone call. Accordingly, the agreement to settle the action was not "one made between counsel in open court" and thus is not enforceable.

* * *

> To recognize a telephone call between counsel as an "open court" proceeding would invite disputes about what was said and "would constitute but a precursor to renewed litigation."

Tocker v. City of New York, 22 A.D.3d 311, 802 N.Y.S.2d 147 (1st Dep't 2005).

DAMAGES—COMPOUND FRACTURES/FEMUR—$18,000—INADEQUATE

Jury's award of $18,000 for past pain and suffering and $0 for future pain and suffering to 14-year-old who suffered a fracture dislocation of the left shoulder and an open compound fracture of his left femur deviated materially from what is reasonable compensation and the award was conditionally increased to $200,000 for past pain and suffering and $100,000 for future pain and suffering:

> Plaintiff, then 14 years old, suffered a fracture dislocation of his left shoulder and an open compound fracture of his left femur when he skied out of bounds on defendant's mountain and caught his ski under a partially submerged cable that caused him to fall. Plaintiff underwent three surgeries on his fractured leg, including the implantation of an intramedullary rod and screws, and the subsequent removal of the same, and his leg was placed in traction during his two-week stay in the hospital. Plaintiff subsequently underwent two surgeries on his left shoulder, including a procedure to repair a condition that has caused him to suffer multiple post-accident dislocations of the shoulder. Plaintiff spent a total of 3½ months recuperating from his injuries and medical procedures, followed by physical therapy. Medical records reflect that plaintiff experienced initial pain as a consequence of his injuries, although evidence of his use of pain medication was scant. Plaintiff's injuries healed well, his pain diminished after only several months, and his range of motion in the affected areas was not measurably compromised. He returned to competitive downhill skiing approximately 10 months after the accident.
>
> Plaintiff's orthopedic expert . . . opined, without rebuttal, that plaintiff would experience partial permanent disabilities of the left shoulder and left leg/hip area should he continue to engage in an active lifestyle and demanding sports such as skiing.

Singh v. Catamount Development Corporation, 21 A.D.3d 824, 801 N.Y.S.2d 290 (1st Dep't 2005).

DAMAGES—HERNIATED DISC/NERVE ROOT IMPINGEMENT—$150,000/$750,000—PAST AND FUTURE PAIN AND SUFFERING

Award to plaintiff of $750,000 for future pain and suffering for herniated disc at the L5-S1 level with nerve root impingement deviated materially from what was reasonable compensation to the extent that it exceeded $450,000:

> Although plaintiff complains of lifestyle limitations as a result of a herniated disc at the L5-S1 level with nerve root impingement and resulting back pain, leg numbness and restriction in ranges of motion, he was never hospitalized and has not had and is not expected to have surgery, was able to return to his job as a cab driver and claims no lost earnings, and is able to manage his lower back and leg pain with over-the-counter Tylenol. In these circumstances, the $750,000 award for future pain and suffering over 39.9 years deviates materially from what is reasonable compensation to the extent indicated. The $150,000 award for past pain and suffering over more than seven years does not deviate materially from what is reasonable compensation under the circumstances.

Martinez v. Manhattan and Bronx Surface Transit Operating Authority, 23 A.D.3d 302, 806 N.Y.S.2d 470 (1st Dep't 2005).

DAMAGES—HERNIATED CERVICAL DISCS/PERMANENT LIMITATION/NECK—$150,000/$300,000 PAST AND FUTURE PAIN AND SUFFERING—EXCESSIVE

Plaintiff's award of $150,000 for past pain and suffering and $300,000 for future pain and suffering for two herniated discs and quantified decrease in the range of motion of the cervical spine deviated materially from what is reasonable compensation and was conditionally reduced to $100,000/$200,000 for past and future pain and suffering respectively:

> Plaintiff testified as to how his neck was injured in the September 11, 1999

> accident, the 16 months of treatment he received, his inability to work for five months and his limited work schedule thereafter, and his subsequent inability to engage in physical activities that he had previously enjoyed. Dr. Ginde, a board-certified radiologist, testified that the MRI films, taken six days after the accident and admitted into evidence, showed that plaintiff has suffered traumatic injury to his cervical spine, including straightening and reversal of the normal curvature of the thecal sac and spinal cord. After examining plaintiff and reviewing the MRI films, Dr. Rose, a board-certified orthopedic surgeon, testified that plaintiff had suffered two herniated cervical discs as a direct result of the trauma from the accident, with one disc impinging upon a nerve root. He opined that these injuries resulted in a chronic, permanent condition, including an objective, quantified decrease in the range of motion of his cervical spine.

Sow v. Arias, 21 A.D.3d 317, 800 N.Y.S.2d 150 (1st Dep't 2005).

DAMAGES—HERNIATED DISC/RADICULOPATHY—$160,000/$300,000 PAST AND FUTURE PAIN AND SUFFERING

The trial court erred in reducing the jury's award for past and future pain and suffering from $160,000 and $500,000 respectively to $100,000 and $200,000 respectively to 54-year-old plaintiff who sustained a herniated disc, radiculopathy and soft tissue injuries to the neck and back. The Appellate Division reinstated the $160,000 award for past pain and suffering and conditionally increased the award for future pain and suffering to $300,000:

> As a result of the accident, plaintiff, then 54 years old, sustained radiculopathy at L5-S1 with nerve root compression, a herniated disc at L2-L3, and soft tissue injuries to the neck and back. She was treated by an orthopedist and physical therapist for eight months after the accident . . . still had pain in the lower back for which she takes medicine, and otherwise continued to suffer a loss of enjoyment of life. In these circumstances, the jury's award for future pain and suffering deviated materially from what is reasonable compensation to the extent indicated, but its award for past pain and suffering should not have been disturbed.

Vargas v. ML 1188 Grand Concourse, L.P., 24 A.D.3d 104, 804 N.Y.S.2d 745 (1st Dep't 2005).

DAMAGES—PARAPLEGIA—$28,000,000 (PAST AND FUTURE)—FELA STANDARDS—EXCESSIVE

Plaintiff's awards of $10,000,000 for past pain and suffering and $18,000,000 for future pain and suffering "shock[ed] the judicial conscience" and were excessive under the applicable federal standard of review for damages awards in FELA cases. The awards were conditionally reduced to $3,000,000 for past pain and suffering and $9,000,000 for future pain and suffering for a total of $12,000,000.

Cruz v. Long Island Rail Road Company, 22 A.D.3d 451, 803 N.Y.S.2d 91 (2d Dep't 2005).

[EDITOR'S NOTE: Plaintiff, a substation foreman, for the Long Island Rail Road Company, fell approximately 10 to 15 feet from the top of an unprotected transformer after hitting his head on an overhead low-clearance steel I-beam. He sustained numerous injuries including a burst fracture of the spine, at T12, L1, resulting in, *inter alia*, permanent paraplegia and chronic pain.

According to the *New York Law Journal* (10/20/2003, p. 5, col. 1), Mr. Cruz is able to walk approximately 100 feet with crutches and assistance. He underwent a T9-L3 spinal fusion, which included the insertion of stabilizing rods. He suffers from bowel and bladder incontinence and is impotent.]

DAMAGES—PARAPLEGIA—$15,000,000 (PAST AND FUTURE PAIN AND SUFFERING)—EXCESSIVE

Awards of $3,000,000 for past pain and $12,000,000 for future pain and suffering to a 25-year-old paraplegia resulting from an automobile accident was conditionally reduced to $2,000,000 for past pain and suffering and $8,000,000 for future pain and suffering:

> The 25-year-old plaintiff's principal injury is a severed spine at T-6 that resulted in paraplegia and associated complications, including constant and severe pain. The awards for past and future pain and suffering deviate materially from what is reasonable compensation to the extent indicated.

Ruby v. Budget Rent-A-Car Corporation, 23 A.D.3d 257, 806 N.Y.S.2d 12 (1st Dep't 2005).

[EDITOR'S NOTE: The court also vacated the Supreme Court's collateral source offset of plaintiff's future lost

earnings from $3,840,000 to $2,674,268 concluding as follows:

> A collateral source offset for future Social Security disability benefits (CPLR 4545[c]) should not have been granted where plaintiff's experts maintained that he is capable of working in the future albeit in a reduced capacity amounting to $50,000 per year, and defendants' experts maintained that plaintiff is capable of working as he had before the accident such that he suffered no diminution of earning capacity whatsoever. Such a record compels a finding that defendants did not meet their burden of showing that it is "highly probable" that plaintiff will continue to be eligible for Social Security benefits.]

DAMAGES—TRIMALLEOLAR ANKLE FRACTURE—$290,000 FUTURE PAIN AND SUFFERING

Plaintiff's award of $25,000 for past pain and suffering and $290,000 for future pain and suffering over 28 years did not deviate from what is reasonable compensation:

> The award of $25,000 for past pain and suffering and $290,000 for future pain and suffering did not constitute a material deviation from what is reasonable compensation under the circumstances, given the evidence demonstrating that the injured plaintiff suffered a comminuted trimalleolar fracture of the left ankle, requiring surgery. His leg was in a cast for three months, he required the use of crutches for one year and extensive physical therapy that will continue into the future, he has had numerous other injury-related complications, including an intra-articular fracture in the ankle joint, a fracture of the fibular, nerve damage, loss of sensation and motion, lower back pain, an antalgic gait, degenerative arthritis and osteoarthritis, and will require future surgery.

Uriondo v. Timberline Camplands, Inc., 19 A.D.3d 282, 799 N.Y.S.2d 189 (1st Dep't 2005).

[EDITOR'S NOTE: In *Clark v. N-H Farms, Inc.*, 15 A.D.3d 606, 791 N.Y.S.2d 122 (2d Dep't 2005), the court affirmed the reductions of awards of past pain and suffering from $500,000 to $200,000 and future pain and suffering from $700,000 to $225,000 as reasonable compensation where plaintiff sustained a trimalleolar ankle fracture that required surgery.]

DEFAULT—VACATE—CPLR 317/NOTICE—INSURANCE CARRIER DELAY

Where defendant received the summons and complaint before a judgment was entered against it, it is not entitled to vacate the default judgment under CPLR 317, claiming that it was not personally served because the Secretary of State had an old address:

> East Coast Storage failed to establish that it did not receive the summons in time to defend, as required to obtain relief from a default judgment pursuant to CPLR 317. By its own admission, East Coast Storage received the summons and complaint on July 22, 2003, well before judgment was entered against it upon its default.

Majestic Clothing Inc. v. East Coast Storage, LLC, 18 A.D.3d 516, 795 N.Y.S.2d 289 (2d Dep't 2005).

[EDITOR'S NOTE: The court also denied defendants' motion to vacate under CPLR 5015(a)(1) by showing a reasonable excuse for the default and the existence of a meritorious defense. The court concluded that the "continued default, blamed on insurance carrier delay and settlement negotiations, was inexcusable."]

DISCONTINUANCE—VOLUNTARY/START SECOND ACTION

The court correctly allowed plaintiffs to discontinue their action, commenced in New York County, where they learned that the building where plaintiff sustained an injury was managed by a corporation with a principal office in Brooklyn and that voluntary discontinuance would allow them to commence a second action in Kings County conditioned upon paying defendant's costs and disbursements incurred in the action plus defendant's attorneys' fees incurred on the motion to discontinue:

> The motion was properly granted upon conditions that eliminated any prejudice attributable to the discontinuance. In the latter regard, the motion court aptly noted defendant's failure to show that the discontinuance will cause it to incur additional attorneys' fees, and appropriately limited plaintiffs' payment of defendants' attorneys' fees to those incurred on the instant motion.

Carter v. Howland Hook Housing Company, Inc., 19 A.D.3d 146, 797 N.Y.S.2d 11 (1st Dep't 2005).

INDEMNIFICATION—COMMON LAW—OWNER/TENANT

Owner, who is statutorily liable to plaintiff under Labor Law § 240(1), is not entitled to common-law indemnification from the tenant who contracted for the work to be performed:

> The owner is not entitled to common-law indemnification from the tenant as the tenant was not an active tortfeasor and did not exercise any actual control or supervision of the work.

Landgraff v. 1579 Bronx River Avenue, LLC, 18 A.D.3d 385, 796 N.Y.S.2d 58 (1st Dep't 2005).

INDEMNIFICATION—POST–ACCIDENT AGREEMENT/RETROACTIVE

The response of a contractor (Wiltel) to owner (Viacom) of premises' request for proposal to install voice and data cabling system that makes no reference to indemnification, and a purchase order from a contractor (Lehr Construction) to Wiltel, dated a month after plaintiff's accident, which included an attachment where Wiltel agreed to indemnify Viacom for any claims arising from its work, did not apply retroactively:

> There is no evidence in this record that establishes as a matter of law that the July 28 purchase order between Lehr and Wiltel pertaining to Wiltel's subcontracting work "was made 'as of' [a pre-accident date], and that the parties intended that it apply as of that date."

Temmel v. 1515 Broadway Associates, L.P., 18 A.D.3d 364, 795 N.Y.S.2d 234 (1st Dep't 2005).

INSURANCE—GENERAL LIABILITY POLICY—VENDOR ENDORSEMENT—ADDITIONAL INSURED

A vendor's endorsement in a commercial general liability policy does not cover personal injury claims caused by the vendor's independent acts of negligence since the endorsement only covers those claims stemming from the defective product:

> We conclude that bodily injuries "arising out of [Raymond's products]" means injuries arising out of defects in the products, rather than arising out of the vendor's negligence. The modifying phrase, "which are distributed, sold, repaired, serviced, demonstrated, installed or rented to others in the regular course of the vendor[']s business," on which Raymond places so much emphasis, is most naturally read to describe Arbor's activities with respect to Raymond's products, not—as Raymond argues—to indemnify Arbor for its negligent performance of those activities.

Raymond Corporation v. National Union Fire Insurance Company of Pittsburgh, PA, 5 N.Y.3d 157, 800 N.Y.S.2d 89 (2005).

[EDITOR'S NOTE: The vendor's endorsement (Endorsement 5 ["*Additional Insured—Vendors Schedule*"]) in the policy states that:

> "[s]ection III—Who is an Insured" is amended to include as an Insured any person or organization (referred to below as "vendor") shown in the schedule, but only with respect to "Bodily Injury" or "Property Damage" arising out of "Your Products [Raymond's products] shown in the schedule which are distributed, sold, repaired, serviced, demonstrated, installed or rented to others in the regular course of the vendor[']s business, subject to" several exclusions.]

INSURANCE—NOTICE—PREJUDICE

Insurer need not establish prejudice to disclaim coverage for untimely notice:

> Where a policy of liability insurance requires that notice of an occurrence be given "as soon as practicable," such notice must be accorded the carrier within a reasonable period of time. The insured's failure to satisfy the notice requirement constitutes "a failure to comply with a condition precedent which, as a matter of law, vitiates the contract." Hence, the carrier need not show prejudice before disclaiming based on the insured's failure to timely notify it of an occurrence.

Great Canal Realty Corporation v. Seneca Insurance Company, Inc., 5 N.Y.3d 742, 800 N.Y.S.2d 521 (2005), *rev'g*, 13 A.D.3d 227, 787 N.Y.S.2d 22 (1st Dep't 2004).

INSURANCE—SINGLE OCCURRENCE—ONE LOSS—RENEWAL POLICIES

An infant plaintiff who suffered brain damage as a result of lead poisoning in 1991 when he was one year old was limited to the amount available under one policy period and not the amounts of subsequent renewal policies even though his injuries were exacerbated dur-

ing the subsequent two years when the renewal policies were in effect:

> Christopher's injuries allegedly resulted from "continuous . . . exposure to the same general conditions " and so from "one loss" within the meaning of each policy. Plaintiffs contend, however, that since the loss occurred during each of three policy periods, and each policy applies "to losses which occur during the policy period," Allstate is liable up to its policy limit under each policy. We disagree.
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> * * *
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> But here, the policies do clearly provide otherwise. The noncumulation clause says that "[r]egardless of the number of . . . policies involved, [Allstate's] total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability . . . shown on the declarations page." That limit is $300,000, and thus Allstate is liable for no more.

Hiraldo v. Allstate Insurance Company, 5 N.Y.3d 508, 806 N.Y.S.2d 451 (2005).

[EDITOR'S NOTE: The noncumulation clause in the Allstate policy stated:

> Regardless of the number of insured persons, injured persons, claims, claimants or *policies* involved, our total liability under Business Liability Protection coverage for damages resulting from one loss will not exceed the limit of liability for Coverage X shown on the declarations page. All bodily injury, personal injury and property damage resulting from one accident or from continuous or repeated exposure to the same general conditions is considered the result of one loss. (Emphasis in original).]

JUDGMENT—DEFAULT—REASONABLE EXCUSE/AFFIDAVIT OF MERIT

A party moving to vacate a default must submit an affidavit establishing a reasonable excuse and a meritorious defense to excuse the default even if a default judgment has not yet been entered:

> The defendants argue that an affidavit of merit is not required where a default judgment has not yet been entered. In *Ennis v. Lema* [305 A.D.2d 632, 760 N.Y.S.2d 197 (2d Dep't 2003)], the plaintiff moved, *inter alia*, for leave to enter a judgment against one of the defendants based upon its failure to appear or answer the complaint, and that defendant cross-moved to extend its time to answer. This court held that "[a] defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action *to avoid the entering of a default judgment or to extend the time to answer.*" Thus, contrary to the defendant's contention, a reasonable excuse and a meritorious defense are required to excuse a default even if a default judgment has not yet been entered.
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> * * *
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> The only other situation in which the submission of an affidavit of merit was excused is where it is shown that the party did not in fact default (*see Pelaez v. Westchester Med. Ctr.*, 15 A.D.3d 375, 789 N.Y.S.2d 533 (2d Dep't 2005)).

Juseinoski v. Board of Education of the City of New York, 15 A.D.3d 353, 790 N.Y.S.2d 162 (2d Dep't 2005).

[EDITOR'S NOTE: The court also noted that a verified pleading may be accepted in lieu of an affidavit of merit only if it was from someone having personal knowledge. A pleading verified by an attorney under CPLR 3020(d)(3) and not by someone with personal knowledge of the facts is insufficient to establish merit.]

JUDGMENT—DISMISSAL—CPLR 3404—DEATH/LATE SUBSTITUTION

Where there is a lengthy delay in substituting a new legal representative after plaintiff's death, plaintiff is not entitled to restore the case to the calendar even though the order dismissing the action under CPLR 3404 was a nullity, having been issued after plaintiff's death:

> The court correctly found that the order of dismissal was a nullity because it was issued after plaintiff's death and before the substitution of a legal representative for him. However, the present motion to substitute the administrator of plaintiff's estate as plaintiff and to restore the action to the calendar was properly denied in light of the six-year delay in obtaining letters of administra-

tion and the resulting prejudice to defendant.

Cueller v. Betanes Food Corporation, 24 A.D.3d 201, 806 N.Y.S.2d 25 (1st Dep't 2005).

JUDGMENT—DISMISSAL—NEGLIGENT SPOLIATION—NOTICE OF PLAINTIFF'S CLAIM

The Supreme Court properly dismissed defendant's answer, in a breach of contract action, when it failed to produce documents:

> Defendant's answer was properly stricken because of its negligent spoliation of documents after it was on notice of plaintiff's claim, albeit before the action was commenced.

Bear, Stearns & Co., Inc. v. Enviropower, LLC, 21 A.D.3d 855, 804 N.Y.S.2d 54 (1st Dep't 2005).

JURISDICTION—LONG-ARM—CPLR 302(a)(1)—NEW YORK DRIVER'S LICENSE

New York does not have jurisdiction over a defendant/tortfeasor even though when he rear-ended plaintiff in New Jersey, he had a New York driver's license, his vehicle was registered in New York, and plaintiff was a New York resident. Defendant, when sued, was a New Jersey resident:

> We conclude that plaintiffs have failed to establish a sufficient nexus between the purported transactions of business in New York and the negligence claim. Plaintiffs' cause of action arose out of defendant's allegedly negligent driving in New Jersey, not from the issuance of a New York driver's license or vehicle registration. The relationship between the negligence claim and defendant's possession of a New York license and registration at the time of the accident is too insubstantial to warrant a New York court's exercise of personal jurisdiction over defendant. The negligent driver could have had a license from any state, or no license—that defendant had a New York license and registration is merely coincidental. As such, plaintiffs cannot rely on CPLR 302(a)(1) to establish long-arm jurisdiction based on the facts of this case.

Johnson v. Ward, 4 N.Y.3d 516, 797 N.Y.S.2d 33 (2005).

LIMITATIONS OF ACTIONS—NEGLECT TO PROSECUTE—CPLR 205(a)

CPLR 205(a) does not apply to actions dismissed for failure to comply with discovery orders even where the Supreme Court stated that, "it was never this Court's intention to dismiss the prior actions for failure to prosecute."

Plaintiffs were not permitted to recommence their actions under CPLR 205(a):

> Supreme Court's dismissal order refers to plaintiffs' "failure . . . to comply with discovery deadlines," their "delays," their "disregard for the case management order and scheduling order," their lack of diligence, their "inactions" and their "ongoing laxity."
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> Where a case is dismissed for reasons like this, it is not acceptable to permit plaintiffs to start all over again, after the statute of limitations has expired. To countenance that result would be to convert the dismissal itself into just one more opportunity to try again—and plaintiffs have already had at least as many opportunities to try again as they could reasonably expect. The plain purpose of excluding actions dismissed for neglect to prosecute from those that can be, in substance, revived by a new filing under CPLR 205(a) was to assure that a dismissal for neglect to prosecute would be a serious sanction, not just a bump in the road.

Andrea v. Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, 5 N.Y.3d 514, 806 N.Y.S.2d 453 (2005).

[EDITOR'S NOTE: The Court of Appeals reminded attorneys that it would hold parties responsible for their lawyer's failure to meet deadlines:

> Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated.]

MASTER—SERVANT—NO WORKERS' BOARD COMPENSATION DETERMINATION—REMAND

It was error for the IAS Court to find that fact issues exist concerning whether plaintiff was an independent contractor or a special employee of defendant, G. Holdings Corp., since it was for the Workers'

Compensation Board, not the court, to determine worker's employment status:

> Where an employee is injured in the course of employment, his exclusive remedy against his employer is ordinarily a claim for workers' compensation benefits (Workers' Compensation Law § 11). Primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law is vested in the Board, and the law is settled that when a plaintiff brings a common-law action against one who may be his "employer," it is "inappropriate for the courts to express views with respect thereto pending determination by the board" on the issue. Accordingly, we modify the order appealed and remand the matter to Supreme Court for referral to the Board to determine plaintiff's employment status and whether he is entitled to benefits.

Valenziano v. Niki Trading Corporation, 21 A.D.3d 818, 801 N.Y.S.2d 36 (1st Dep't 2005).

MOTIONS—CROSS-MOTIONS—UNTIMELY—GOOD CAUSE

Supermarket owner, who cross-moved for summary judgment 142 days after the Note of Issue was filed, was untimely under CPLR 3212(a):

> Although Shell-Mar [supermarket owner] denominated its motion a cross motion, its effort to "piggyback" on its codefendant's timely motion for summary judgment is unavailing since a cross motion can only be made for relief against a "moving party" (CPLR 2215) and the plaintiff was not a "moving party." Shell-Mar's contentions that no prejudice resulted from its delay and that its motion was meritorious were insufficient justifications to permit late filing. . . . As no "good cause" was proffered by Shell-Mar for the late filing, its motion for summary judgment dismissing the complaint insofar as asserted against it should have been denied as untimely.

Gaines v. Shell-Mar Foods, Inc., 21 A.D.2d 986, 801 N.Y.S.2d 376 (2d Dep't 2005).

[EDITOR'S NOTE: The Appellate Division, however, affirmed the order granting summary judgment to Shell-Mar's co-defendant, Dayton Seaside Corp., the property owner, who established its *prima facie* entitlement to summary judgment by presenting evidence that the cement divider on which the plaintiff tripped and fell was both open and obvious and not inherently dangerous.]

MOTIONS—EXPERT AFFIDAVIT—ADMINISTRATIVE CODE INTERPRETATION—CONCLUSORY

Plaintiff's expert's conclusory affidavit was insufficient to raise a question of fact whether premises owner maintained its property in a reasonably safe condition. Decedent, involved in "play fighting," was "pushed" and "fell through" the center panel of a three-panel bay window in the General Motors tower. The expert affidavit stated that the window violated Administrative Code § 27-651 and departed from good and accepted engineering and building safety practices when the tower was built since the "non-tempered glass was hazardous because [this glass] is not resistant to horizontal human impact loads and is highly susceptible to shattering and breaking up into sharp dangerous shards."

In rejecting plaintiff's expert's testimony as conclusory, the court stated:

> Plaintiff's expert cited no authority, treatise, standard, building code, article or other corroborating evidence to support his assertion that good and accepted engineering and building safety practices called for the installation of tempered glass in the General Motors building when it was erected in 1968, or for defendant to retrofit this 50-story tower's non-tempered glass windows with bars after acquiring the building in 1998.
>
> * * *
>
> He provided no authority for his very particular specifications (i.e., thickness, height above the floor, horizontal load capacity) for such bars, or any basis for his view that tempered glass and/or a bar would have prevented decedent's accident, especially in light of the absence of any information about the height at which or the force with which decedent struck the bay window's center panel.

Buchholz v. Trump 767 Fifth Avenue, LLC, 5 N.Y.3d 1, 798 N.Y.S.2d 715 (2005).

[EDITOR'S NOTE: The Court also noted that in the tower's roughly 31 years of occupancy before the inci-

dent, there was no remotely similar occurrences such as glass popping or slipping out of a window, or a window panel breaking when someone came into contact with it:

> In light of these circumstances, decedent's accident was not foreseeable as a matter of law. . . . Concomitantly, the third-party act of pushing decedent into the window was sufficiently extraordinary to supersede any alleged negligence on defendant's part.]

NEGLIGENCE—GOL § 18-101—ASSUMPTION OF RISK—SKIING

Plaintiff, who fell and slid under wooden fence to bottom of ravine and hit a tree while downhill skiing, has no cause of action against landowner:

> Defendant met its initial burden by submitting evidence establishing as a matter of law that plaintiff's accident was caused by "variations in terrain . . . [and] ice" (General Obligations Law § 18-101[1]), i.e., that the accident was caused when plaintiff "slid on ice," fell and hit a tree, all of which are inherent risks in the sport of downhill skiing.

Bennett v. Kissing Bridge Corporation, 17 A.D.3d 990, 794 N.Y.S.2d 538 N.Y.S.2d 538 (4th Dep't 2005), *aff'd*, 5 N.Y.3d 812, 803 N.Y.S.2d 22 (2005).

[EDITOR'S NOTE: Two judges dissented in the Appellate Division. They concluded that the affidavit of plaintiff's expert, who was defendant's former employee and familiar with the slope in question, raised an issue of fact when he asserted that the area at issue "was not fenced in a satisfactory and appropriate manner" based on the design of the slope and the installation of a metal culvert ending at the adjacent ravine.]

NEGLIGENCE—DOG BITE—BARKING AND GROWLING

Defendant, dog owner, was not entitled to summary judgment since there was a question of fact whether she knew or should have known of dog's alleged vicious propensities:

> Plaintiff raised an issue of fact whether defendant knew or should have known of her dog's alleged vicious propensities by submitting evidence that, prior to the incident herein, defendant's dog would run along defendant's side-yard fence and would behave in an aggressive manner by jumping on the fence casting her paws over the fence, and barking and growling as pedestrians passed by the house.

McLane v. Jones, 21 A.D.3d 1376, 801 N.Y.S.2d 644 (4th Dep't 2005).

NEGLIGENCE—DUTY/SECURITY GUARD—OVERBOOKED NEW YEAR'S EVE PARTY

Security guard who was injured by ticketholders who were refused entry to a New Year's Eve party at Eva's Garden restaurant because it was already overcrowded has a cause of action against the promoter and owner of the restaurant for negligence:

> A duty of care is said to exist where "the plaintiff's interests are entitled to legal protection against the defendant's conduct." The scope and extent of the duty is defined by the risk of harm reasonably to be perceived. Thus, where it is reasonably foreseeable that a defendant's failure to use ordinary care in his or her own conduct will create a risk of harm to a plaintiff with whom he or she has a cognizable legal relationship, the defendant has a duty to use such ordinary care to avoid the risk.
>
> * * *
>
> Vetrone, who was present because he was hired as a security guard for the New Year's Eve party, reasonably had the right to expect that Giovanni, as the event's organizer and promoter, and Chang and Ha Di Corp., as the restaurant's owners, would not so overbook the event as to require him, acting virtually alone, to face a large crowd of angry ticketholders who paid to attend the party, but were unexpectedly and rudely denied entry and told to go home. Nor do we agree with Giovanni's alternate contention that, in effect, he owed no duty to Vetrone because, as a security guard, Vetrone necessarily assumed the risk that the event would be so overbooked as to put him in the position of having to face and turn away this large crowd seeking entry on the basis of prepaid tickets. We concluded therefore that Giovanni, Chang and Ha Di Corp. failed to demonstrate that they owed no duty to Vetrone.

Vetrone v. Ha Di Corporation, 22 A.D.2d 835, 803 N.Y.S.2d 156 (2d Dep't 2005).

[EDITOR'S NOTE: The court also concluded that the criminal acts of the ticketholders who were denied entry was not a superseding cause of the security guard's injuries:

> The fact that the third persons' acts may constitute criminal conduct does not necessarily make them a superseding cause as a matter of law. To the contrary, intervening criminal acts may still give rise to liability under ordinary principles of negligence where there is a sufficient underlying legal relationship between the parties and where the acts are "a 'reasonably foreseeable' consequence of circumstances created by the defendant."
>
> * * *
>
> Under the circumstances of this case, we cannot conclude that, as a matter of law, the assault upon Vetrone as he tried to close the door of the restaurant on a crowd of people holding prepaid tickets was far removed from, or an unforeseeable consequence and independent of, the conduct of Giovanni, Chang, and Ha Di Corp., in negligently overbooking the event and in then directing the unceremonious denial of admission to this large crowd of people who were there to attend a New Year's Eve party for which they had already paid.]

NEGLIGENCE—ICE AND SNOW—STORM IN PROGRESS—RECURRING CONDITION

Premises owner, New York City Transit Authority, is entitled to storm-in-progress defense even though it had a general awareness that water may be present on the station floor during periods of inclement weather:

> A property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition during an ongoing storm or for a reasonable time thereafter. Here, it had been snowing, sleeting and raining on and off all day and the steps down into the subway were exposed to those weather conditions. Thus, summary judgment was properly granted in defendants' favor.
>
> Plaintiff argues that the ongoing storm doctrine should not apply because his injury was caused by a recurring hazardous condition of which NYCTA was aware. A general awareness that the stairs and platforms become wet during inclement weather was insufficient to establish constructive notice of the specific condition causing plaintiff's injury.

Solazzo v. New York City Transit Authority, 6 N.Y.3d 734, 810 N.Y.S.2d 121 (2005), *aff'g*, 21 A.D.3d 735, 800 N.Y.S.2d 698 (1st Dep't 2005).

NEGLIGENCE—LABOR LAW § 240—CONSTRUCTION MANAGER/OWNER'S AGENT—STOP UNSAFE PRACTICES

As construction manager for a school capital improvement project, Turner was owner's agent and strictly liable under Labor Law § 240(1) where its responsibility included: (a) contractual, statutory, and regulatory compliance by all other trade contractors; (b) to immediately direct the trade contractors to cease work which constituted unsafe practices or hazardous conditions; and (c) to take action within its reasonable control to minimize the loss of life and damage to property during emergencies:

> Although a construction manager of a work site is generally not responsible for injuries under Labor Law § 240(1), one may be vicariously liable as an agent of the property owner for injuries sustained under the statute in an instance where the manager had the ability to control the activity which brought about the injury. "When the work giving rise to [the duty to conform to the requirements of section 240(1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor." Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law.
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> * * *
>
> The label of construction manager versus general contractor is not necessarily determinative. Thus, on the facts of this case, given (1) the specific contractual terms creating agency, (2) the absence of a general contractor, (3) Turner's duty to oversee the construction site and the trade contractors, and (4) the

> Turner representative's acknowledgment that Turner had authority to control activities at the work site and to stop any unsafe work practices, we agree that the Appellate Division was correct in holding Turner liable as a statutory agent of the school district under Labor Law § 240(1).

Walls v. Turner Construction Company, 4 N.Y.3d 861, 798 N.Y.S.2d 351 (2005).

NEGLIGENCE—LABOR LAW § 240(1)—FALLING OBJECT—UNSECURED

Twenty-seven-year-old transit worker, struck by unsecured dolly, which was used in his work and stored on top of a "bench wall" 5½ feet high and adjacent to the worksite, is covered under Labor Law § 240(1):

> The elevation differential between the dolly and plaintiff was sufficient to trigger Labor Law § 240(1)'s protection, and the dolly was an object that required securing for the purposes of the undertaking.

Outar v. City of New York, 5 N.Y.3d 731, 799 N.Y.S.2d 770, *aff'g*, 286 A.D.2d 671, 730 N.Y.S.2d 138 (2d Dep't 2001).

[EDITOR'S NOTE: Justice Andrew V. Siracuse, commenting on *Outar* after it was decided by the Second Department, stated: "No doubt *Outar* will be treated as an aberration" because the parameters of "falling object" liability have now been restricted to certain specific hazards, during specific activities involving specific devices." See Siracuse, *Pendulum Swings Back on the "Falling Object" Test*, 4/2/2002 N.Y. L.J. p. 1, col. 1).

In *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001), the Court of Appeals held that a plaintiff, to recover under Labor Law § 240(1), must establish that the object fell while being hoisted or secured because of an inadequacy of a safety device enumerated in the statute. Not every falling object case is covered under Labor Law § 240(1). Both the Appellate Division and the Court of Appeals in *Outar* dismissed *Narducci*, by prefacing the cite with a "cf."

Try reconciling the following cases with *Narducci* and *Outar*:

In *Rosado v. Briarwoods Farm, Inc.*, 19 A.D.3d 396, 796 N.Y.S.2d 394 (2d Dep't 2005), plaintiff was injured when bundles of lumber which had been resting on the framing of an uncompleted porch overhang fell on top of him. He could not invoke Labor Law § 240(1) since the court concluded that "lumber resting on the porch overhang was not an object that needed to be secured." In *Love v. New York State Thruway Authority*, 17 A.D.3d 1000, 794 N.Y.S.2d 166 (4th Dep't 2005), Labor Law § 240(1) did not apply to a worker injured in the course of her employment while sandblasting and painting a highway bridge when she was struck by either a falling piece of concrete from the bridge itself or a falling metal clamp that was being used to secure a tarp or "pick" scaffolding suspended from the bridge. *See also Gambino v. Massachusetts Mutual Life Ins. Co.*, 8 A.D.3d 337, 777 N.Y.S.2d 713 (2d Dep't 2004) [plaintiff, injured by a 37-pound bucket of joint compound that fell on his head from the top of a 16-foot scaffold without protective rails that he was moving, had his complaint dismissed based on *Narducci*].

On the other hand, Labor Law § 240(1) applied in *Van Eken v. Consolidated Edison Company of New York*, 294 A.D.2d 352, 742 N.Y.S.2d 94 (2d Dep't 2002), [plaintiff, while working in a trench that was 16-to-18-feet deep, was injured when a co-employee, attempting to deflect a plywood sheet that was being loaded into the trench, dropped his jackhammer which struck plaintiff]. *See also Orner v. Port Authority of New York and New Jersey*, 293 A.D.2d 517, 740 N.Y.S.2d 414 (2d Dep't 2002) [electrician while working on the ground floor who was struck by unsecured roofing material that had fallen from roof was covered under Labor Law § 240(1)].

Plaintiff in *Outar* was awarded $7 million including $4.9 million for lost wages, future lost Social Security benefits and future lost pension benefits. The Appellate Division modified the lost wages award to $4.3 million based upon the jury's duplicating past lost Social Security benefits and the jury's failure to make certain deductions in accordance with the expert testimony presented at trial. Plaintiff's injuries included Central Cord Syndrome, which resulted in neurogenic bladder and impotence, herniated discs at C4-5 and C5-6, which necessitated diskectomies; major depressive disorder, which was marked by suicidal ideations; and post-traumatic stress disorder.]

NEGLIGENCE—LABOR LAW § 240(1)—GENERAL CONTRACTOR/"DESIGN/BUILDER"—CONTROL

Company [Klewin Building], named as the design/builder in the construction of a casino, has a nondelegable duty under Labor Law § 240(1) even though no general contractor was designated for the project since Klewin was cloaked with all the duties of a general contractor:

> The record establishes that Klewin was designated as the "design/builder" pursuant to its agreement with the Seneca Niagara Falls Gaming Corporation, which had leased the facility from the Empire State

> Development Corporation. Although there is no designated general contractor, Klewin "is liable under [Labor Law § 240(1)] because [it] was responsible 'for coordinating and supervising the . . . project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors' and thus acted as general contractor."

Nephew v. Klewin Building Company, Inc., 21 A.D.3d 1419, 804 N.Y.S.2d 157 (4th Dep't 2005).

[EDITOR'S NOTE: The court also held that a contractor was liable under a contractual indemnification clause in a contract even though the contract was signed one month after the date of plaintiff's accident:

> We agree with the decision of the First Department in *Podhaskie v. Seventh Chelsea Assoc.*, 3 A.D.3d 361, 770 N.Y.S.2d 332 (2004) and conclude that "case law supports [McPhee's] contention that such a clause in a [sub]contract executed after a plaintiff's accident may nevertheless be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made as of [a pre-accident date], and that the parties intended that it apply as of that date."]

NEGLIGENCE—LABOR LAW § 240(1)—ROUTINE MAINTENANCE

Plaintiff, who fell from a ladder as he was attempting to install a new poster over the face of a 12-foot by 24-foot billboard on the roof of defendant's building, was not entitled to invoke Labor Law § 240(1):

> Plaintiff's activities may have changed the outward appearance of the billboard, but it did not change the billboard's structure, and thus were more akin to cosmetic maintenance or decorative modification than to "altering" for purposes of Labor Law § 240(1).

Munoz v. DJZ Realty, LLC, 5 N.Y.3d 747, 800 N.Y.S.2d 866 (2005), *rev'g*, 15 A.D.3d 363, 789 N.Y.S.2d 526 (2d Dep't 2005).

[EDITOR'S NOTE: The Appellate Division was divided 3 to 2. The majority applied Labor Law § 240(1), reasoning:

> The question of whether an activity is routine maintenance not covered by Labor Law § 240(1) as distinguished from a repair or alteration covered by Labor Law § 240(1) is a question of degree which must be considered in light of the legislative purpose to protect against "risks related to elevation differentials." Standing on a step ladder to perform the periodic replacement of a plastic sign in a sign holder constitutes routine maintenance (*see Cook v. Parish Land Co.*, 239 A.D.2d 956, 659 N.Y.S.2d 601 [4th Dep't 1997]). Similarly, standing on an eight-foot ladder to replace a light bulb on an illuminated sign constitutes routine maintenance (*see Smith v. Shell Oil Co.*, 85 N.Y.2d 1000, 630 N.Y.S.2d 962 [1995]). However, replacement of a defective light fixture on a light pole 25 to 27 feet high constitutes a repair or alteration since the work involves "more than routine maintenance" (*Cook v. Presbyterian Homes of W.N.Y.*, 234 A.D.2d 906, 907, 655 N.Y.S.2d 701 [4th Dep't 1996]).

The two judges who dissented concluded that there was no "alteration" absent making a significant physical change to the configuration or composition of the building or structure as required under *Joblon v. Solow*, 91 N.Y.2d 457, 672 N.Y.S.2d 286 (1998):

> Naturally, what is "significant" is a matter of degree. As applied to the facts of this case, I do not see pasting preglued pieces of paper to a pre-existing billboard as making a significant physical change to the configuration or composition of the subject structure. In fact, one could plausibly argue that those attributes of the structure are not changed at all when the poster it displays is changed. The billboard's outward appearance may significantly change the identity of the advertiser and its message, but its shape, dimensions, the matter composing its structure, the manner in which it is secured to the building on which it rests, the platform affording access to it, and the like are not changed at all.
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> * * *
>
> Rather, the activity here is more akin to "cosmetic maintenance" or "decorative modification" performed as a matter of routine, which has been held not to fall within the statute.]

NEGLIGENCE—LABOR LAW § 240(1)—LADDERS/JOB SITE—SOLE PROXIMATE CAUSE

Plaintiff, who was assisting in elevator repairs and who used a bucket to get up to the motor room located four feet above the roof because the stairs were missing and then jumped down and injured his knee, is not protected by Labor Law § 240(1):

> We agree with the Appellate Division that, since ladders were readily available [at the job site], plaintiff's "normal and logical response" should have been to go get one. Plaintiff's choice to use a bucket to get up, and then jump down, was the sole cause of his injury, and he therefore not entitled to recover under Labor Law § 240(1).

Montgomery v. Federal Express Corporation, 4 N.Y.3d 805, 795 N.Y.S.2d 490 (2005).

NEGLIGENCE—LABOR LAW § 240(1)—NO CONTRACT OR NOTICE

Plaintiff, a utility employee who was dispatched by his employer to cut off electrical power to a building on fire from a pole on defendants' property, is not protected by Labor Law § 240(1) when he fell from a ladder placed against the utility pole, which broke at ground level, because the owner had no knowledge or notice of work being performed:

> Review of the record reveals no proof that defendants contracted for the work, called plaintiff to the scene or had any notice that he was on their property until after the accident. Under such circumstances, we are unpersuaded that Supreme Court erred in dismissing the causes of action premised under Labor Law.

Personius v. Mann, 20 A.D.3d 616, 798 N.Y.S.2d 195 (3d Dep't 2005), *mod.*, 5 N.Y.3d 857, 807 N.Y.S.2d 11 (2005).

[EDITOR'S NOTE: The Court of Appeals affirmed the dismissal of the Labor Law claims (§§ 240[1] and 241) but modified the order by reinstating plaintiff's negligence claim. The Court held that there was a question of fact whether defendants fulfilled their duty to inspect and maintain the pole in question.]

NEGLIGENCE—LABOR LAW § 240(1)—ROUTINE MAINTENANCE

Plaintiff, who was injured while adjusting a loose chain on a garage door, was engaged in routine maintenance and not "repairing" within the meaning of Labor Law § 240(1):

> The distinction between routine maintenance and repairing does not turn solely on whether the work involves fixing something that is not functioning properly. Even if the item to be repaired is malfunctioning or inoperable, when the work involves only component replacement or adjustment necessitated by normal wear and tear, it constitutes routine maintenance, rather than "repairing" or any other enumerated activity.
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> * * *
>
> The amount of work or danger entailed, however, does not bring a case within the confines of the term "repair" for purposes of determining liability under Labor Law § 240(1).
>
> Nor is it dispositive that the job arose from a service call by defendants requesting, among other things, repair of an operator on another door that had been damaged by a truck, in addition to the adjustment of the chain. The fact that a job rises from a service call, rather than regularly scheduled maintenance, is not sufficient to render it repair work. Moreover, while plaintiff's work on the other door's damaged operator may have constituted "repairing," that job was completed prior to plaintiff commencing adjustment of the loose chain and "the statute does not cover an injury occurring after an enumerated activity is complete."

Barbarito v. County of Tompkins, 22 A.D.3d 937, 803 N.Y.S.2d 208 (3d Dep't 2005).

NEGLIGENCE—MUNICIPALITIES—SPECIAL RELATIONSHIP

City, employer of police officer who directed an allegedly unfit accident victim (Hallums) to drive her vehicle, is not liable to injured plaintiff when Hallums drove her vehicle in reverse instead of forward:

> The police officer was exercising his discretion when he told Hallums to move her car. . . . To hold the City liable for the negligent performance of a discretionary act, a plaintiff must establish a special relationship with the municipality.
>
> * * *

> Establishing a special relationship based on a municipality's assumption of a duty requires (a) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a municipality's agents that inaction could lead to harm; (3) some form of direct contract between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

Kovit v. Hallums, 4 N.Y.3d 499, 797 N.Y.S.2d 20 (2005).

[EDITOR'S NOTE: The Court concluded that plaintiff did not satisfy the third element of the test because there was no communication or relationship between plaintiff and the police officer.

In a companion appeal, *Lazan v. County of Suffolk*, 4 N.Y.3d 499, 797 N.Y.S.2d 20 (2005), the Court found no liability on the part of the county when one of its police officers requested that plaintiff, who had parked on the shoulder of the Long Island Expressway, to move his vehicle even though he complained of chest pains and was not feeling well. After plaintiff drove off, he lost control of his car and struck a guardrail and telephone pole. Here, the Court found that the second prong of the test for special relationship liability was not met: "Plaintiff never expressly told the police officer he was too sick to drive and the record shows that it was not manifestly clear to the officer that plaintiff was so disabled that he could not drive a short distance to a safer location."]

NEGLIGENCE—PREMISES—NOTICE

The Appellate Division erred in reversing the IAS Court's dismissal of plaintiff's complaint because plaintiff did not establish notice—actual or constructive—of a recurring condition:

> Tenant asserted that while descending the steps at 5:00 a.m., he tripped over a beer bottle. Yet he acknowledged that the bottle was not on the steps at 8:30 p.m. the night before and no evidence was offered indicating that the landlord was notified of the debris that night or that the bottle was present for a sufficient period of time that defendant's employees had an opportunity to discover and remedy the problem. "[O]n the evidence presented, the [beer bottle] that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation."

Rivera v. 2160 Realty Co., L.L.C., 4 N.Y.3d 837, 797 N.Y.S.2d 369 (2005), *rev'g*, 10 A.D.3d 503, 781 N.Y.S.2d 645 (1st Dep't 2004).

[EDITOR'S NOTE: The Appellate Division, in reversing the IAS Court, relied on defendant's superintendent's admission that particular tenants frequently left refuse and garbage on the stairs. The Appellate Division maintained that plaintiff is not required to prove that defendant had, or should have had, knowledge of the exact item of debris which caused him to fall. The Appellate Division reasoned:

> Defendant's superintendent admitted specific knowledge of a recurring dangerous condition, namely, that tenants and their guests "constantly" "partied" in the stairway, the only means of egress from the building, during the course of which they spilled liquid and left bottles, the very condition that allegedly caused plaintiff's fall. Under such circumstances, a defendant's summary judgment motion must be denied.]

NEGLIGENCE—PREMISES—SLIP AND FALL—DEFENDANT'S INITIAL BURDEN

Supreme Court properly denied defendants' motion for summary judgment since the defendant, in a slip and fall case, failed to meet its initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it:

> The defendants offered no evidence to establish when the area in question was last inspected or cleaned on the day of the plaintiff's accident.

Britto v. Great Atlantic & Pacific Tea Company, Inc., 21 A.D.2d 436, 799 N.Y.S.2d 828 (2d Dep't 2005).

[EDITOR'S NOTE: Under this ruling, unless a defendant, in a slip and fall case, establishes when it last inspected or cleaned the area where plaintiff fell, it cannot make a *prima facie* showing that it did not have constructive notice of the dangerous condition.]

PLEADINGS—AMENDED ANSWER—AFFIRMATIVE DEFENSE/PERSONAL JURISDICTION

Defendant who failed to assert affirmative defense of lack of personal jurisdiction may amend the answer

to assert the defense if the answer is amended within the 20-day period under CPLR 3025(a):

> Permitting a defendant to add a jurisdictional defense to an answer by an amendment as of right is consistent with CPLR 3211(e), and advances the purpose of CPLR 3025(a). CPLR 3025(a) gives a party 20 days after serving a pleading to correct it or improve upon it, and the addition of a jurisdictional defense is no less proper a correction or improvement than any other. We hold that a party who adds such a defense by an amendment as of right "raise[s] such objection in the responsive pleading" within the meaning of CPLR 3211(e).

Iacovangelo v. Shepherd, 5 N.Y.3d 184, 800 N.Y.S.2d 116 (2005).

PLEADINGS—GRAVE INJURY—SECOND/THIRD-PARTY ACTION

Subcontractor's second/third-party action against plaintiff's employer, which was instituted after the effective date of the Omnibus Workers' Compensation Reform Act, did not preclude its right to common-law indemnification because the main action was commenced before the effective date of the Act:

> Here, there is a direct relationship between the [defendant/third-party plaintiff] MTA and the Metro-North's liability to the plaintiffs, as well as [third-party defendant/second/third-party plaintiff] Leadcare's liability to the MTA and Metro-North for contractual indemnification, and [second/third-party defendant] Safeway's liability to Leadcare for common-law indemnification. Accordingly, we find that Safeway's liability to Leadcare for common-law indemnification must be measured from July 17, 1996, the date that the underlying action was commenced, as such liability is derivative of the underlying action, which was commenced before the effective date of the Act.

Dudek v. Metropolitan Transportation Authority of State of New York, 24 A.D.3d 21, 801 N.Y.S.2d 50 (2d Dep't 2005).

PRE-TRIAL DISCOVERY—NOTE OF ISSUE—NON-PARTY DEPOSITION

Supreme Court erred in granting defendant's motion for a protective order quashing, vacating and setting aside the notice to take the deposition of the non-party witness:

> An affidavit showing unusual or unanticipated circumstances justifying a departure from the general rule foreclosing discovery after the filing of a notice of issue (see 22 N.Y.C.R.R. 202.21[d]) was not required here since the relief sought, deposition of the non-party treating physician of the plaintiff's decedent, was not in the nature of discovery (see CPLR 3101[d][1][iii]).

Brandes v. North Shore University Hospital, 22 A.D.3d 777, 803 N.Y.S.2d 178 (2d Dep't 2005).

PRODUCTS LIABILITY—DUTY TO WARN—INSTALLER'S MANUAL

Manufacturer of Aquastat, Honeywell, did not breach its duty to warn not to install a 2½ inch Aquastat in a 4-inch well because its installation instructions were unambiguous:

> Honeywell's installation instructions for its aquastat unambiguously warned: "IMPORTANT – The immersion well must fit the sensing bulb snugly and bulb must rest against bottom of well." Since the sensing bulb, which is at the end of the aquastat, was to be inserted at the bottom of the well, and the 2½ inch aquastat could not be fastened at the bottom of the 4-inch well used herein, we are satisfied that Honeywell discharged its duty to warn installers to pair the proper well and aquastat.

Cleary v. Reliance Fuel Oil Associates, Inc., 17 A.D.3d 503, 793 N.Y.S.2d 468 (2d Dep't 2005), *aff'd*, 5 N.Y.3d 859, 807 N.Y.S.2d 11 (2005).

[EDITOR'S NOTE: The Court of Appeals in effect rejected the dissenters' finding that there was a question of fact concerning the adequacy of the warnings:

> Honeywell's instructions warn that "[t]he immersion well must fit the sensing bulb snugly and bulb must rest against bottom of well." However, Honeywell's specifications for this aquastat state "[i]mmersion well: . . . Insulation—2¼ or 4 in." A mechanical engineer employed by Block testified at

his deposition that that provision specified the "maximum length" of the well and he was not aware of "anything else" which "an installer could look at to figure out what size well to use with that aquastat."

Since Honeywell attributed the accident to the use of a four-inch well, which was within the range of maximum lengths in its own specifications for the aquastat in question, there is an issue of fact as to whether its warnings were sufficient under the particular circumstances of this case. The adequacy of the warnings is an issue of fact for the jury.]

SERVICE OF PROCESS—CPLR 306-b—ABUSE OF DISCRETION

The trial court improperly granted plaintiff's application for an extension of time to make late service under CPLR 306-b where plaintiff improperly served defendant at the job site and there was a year and-a-half gap between the expiration of the statute of limitations and defendant's first receipt of notice:

> In view of the extreme lack of diligence shown by plaintiff, and the long delay (more than a year and a half after running of the statute of limitations) before defendant received any notice of the action, the courts below abused their discretion in granting plaintiff an extension to serve defendant "in the interest of justice" pursuant to CPLR 306-b.

Slate v. Schiavone Construction Company, 4 N.Y.3d 816, 796 N.Y.S.2d 573 (2005), *rev'g*, 10 A.D.3d 1, 780 N.Y.S.2d 567 (1st Dep't 2004).

SPOLIATION—DISCRETION—DESIGN DEFECT

Defendant is not entitled to summary judgment or a preclusion order because plaintiff traded in defendant's allegedly defective leased vehicle two weeks after the accident and defendant failed to establish prejudice fatally compromised its ability to defend this action:

> Here, prior to the date of the accident, a Ford field service engineer actually inspected and tested the subject vehicle in connection with the very defect alleged by the plaintiffs. Moreover, although the vehicle is no longer in the plaintiffs' possession, there is nothing to suggest that it does not exist or cannot be located through the vehicle identification number. In any event, "in cases of alleged design defects, there is growing recognition that the loss of the specific instrumentality that allegedly caused the plaintiff's injuries is not automatically prejudicial to the manufacturer thereof because the defect will be exhibited by other products of the same design."
>
> Also relevant here is the fact that the plaintiffs and Ford face similar evidentiary difficulties as a consequence of the vehicle's unavailability. Thus, this is not a case in which the plaintiffs "reaped an unfair advantage in the litigation" as a result of their conduct.

Lawson v. Aspen Ford, Inc., 15 A.D.3d 628, 791 N.Y.S.2d 119 (2d Dep't 2005).

SPOLIATION—NORMAL BUSINESS PRACTICE

Lessor of semi-electric hospital bed, who repaired bed by replacing malfunctioning foot spring, which it preserved, but was unaware of any injury resulting from lease of bed and followed normal business practice of breaking the bed down into its component parts to store it after the lease expired, was not liable for sanctions on the theory of negligent spoliation of evidence:

> Supreme Court has broad discretion to determine the appropriate sanction for spoliation of evidence, which determination will only be disturbed upon a clear abuse of that discretion. We find no such abuse here. Although spoliation sanctions may be appropriate even for the negligent, rather than intentional, destruction or disposal of evidence, "in the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices."
>
> Here, at the time of the alleged accident, Home Therapy [lessor] knew only that the bed was not working correctly, not that there was an injury which could lead to a potential lawsuit. It was reasonable for Home Therapy to preserve only the malfunctioning part and to release the remaining parts of the bed back into the marketplace, pur-

suant to its normal business practices. Thus, "evaluating the reasonableness of the nonpreserving party's conduct," Supreme Court properly declined to punish Home Therapy for disposing of the remaining bed components before knowing that they were involved in any injury or potentially the subject of future litigation.

Steuhl v. Home Therapy Equipment, Inc., 23 A.D.3d 825, 803 N.Y.S.2d 791 (3d Dep't 2005).

TRIAL—PRO HAC VICE

Trial court abused its discretion in denying plaintiff's motion for admission pro hac vice of two California attorneys to appear as co-counsel with his New York attorney where the motion was made promptly after amended pleadings were filed and there was no discernible adverse impact upon considerations of judicial efficiency or court's management of courtroom and calendar:

> The policy of this State is to give recognition to "a party's entitlement to be represented in ongoing litigation by counsel of its choosing."

Giannotti v. Mercedes Benz U.S.A., LLC, 20 A.D.3d 389, 798 N.Y.S.2d 141 (2d Dep't 2005).

TRIAL—READ BACK/TESTIMONY—VERDICT

Absent a showing of prejudice, the trial court did not err in accepting the jury verdict even though the jury did not review the readback it requested earlier:

> Where a deliberating jury requests information but indicates, before the court is able to respond to the request, that it has reached a verdict, the court should ordinarily ascertain from the jurors, before accepting the verdict, that they no longer require the information they had requested. However, the failure of the trial court to do so requires reversal only where its failure to respond causes serious prejudice to a party.
>
> Here, the jury's request for a readback of that portion of the trial testimony of the train flagger in which he was impeached by responses from his 1999 deposition testimony, related only to the credibility of the witness. Thus, it cannot be said that serious prejudice resulted from the Supreme Court's failure to provide the requested information before accepting the verdict.

Havens v. New York City Transit Authority, 20 A.D.3d 391, 798 N.Y.S.2d 140 (2d Dep't 2005).

VENUE—CONVENIENCE OF WITNESSES

Supreme Court erred in granting defendant's motion to change venue, which was made under CPLR 510(1) (improper venue), but based on the convenience of witnesses [CPLR 510(3)], which was not raised in the original notice of motion. In addition, the motion was made in the wrong county:

> The motion to change venue could be made in the Supreme Court, Suffolk County, only on the ground that New York County was not a proper county, and not on the ground that venue in Suffolk County would serve the convenience of witnesses. Whatever may be the merits of a motion pursuant to CPLR 510(3) to change venue for the convenience of witnesses, it should have been brought in New York County or a county contiguous thereto.

Rubens v. Rodney Fund, 23 A.D.3d 636, 805 N.Y.S.2d 640 (2d Dep't 2005).

WITNESSES—NON-PARTY/SUBPOENA

Plaintiff demonstrated special circumstances sufficient to entitle him to subpoena a botanist for a deposition since defendants had not yet identified him as their expert and he was knowledgeable concerning the falling tree:

> Where, as here, the complaint alleges that the decedent's death was caused by a falling tree, which was removed from the accident scene within 48 hours, special circumstances exist to permit the plaintiff to depose Dr. Peter [botanist], including that Dr. Peter examined the tree and surrounding vegetation before key evidence was rendered unavailable to the plaintiff.

Dixon v. City of Yonkers, 16 A.D.3d 542, 792 N.Y.S.2d 514 (2d Dep't 2005).

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Committee on Arbitration and Alternatives to Dispute Resolution

John P. Connors, Jr.
766 Castleton Avenue
Staten Island, NY 10310
718/442-1700

Committee on Continuing Legal Education

Thomas P. Valet
113 East 37th Street
New York, NY 10016
212/684-1880

Arlene Zalayet
60 Andover Road
Roslyn Heights, NY 11577
516/528-0687

Committee on Cyberspace

Timothy P. Murphy
1500 MONY Tower I
Syracuse, NY 13202
315/471-3167

Committee on Legal Affairs

Prof. Michael J. Hutter, Jr.
80 New Scotland Avenue
Albany, NY 12208
518/445-2360

Committee on Legislation

John K. Powers
39 North Pearl Street, 2nd Floor
Albany, NY 12207
518/465-5995

Committee on Medical Malpractice

Thomas P. Valet
113 East 37th Street
New York, NY 10016
212/684-1880

Committee to Preserve and Improve the Jury System

James H. Kerr
172 Arnold Drive
Kingston, NY 12401
845/338-2637

Committee on Products Liability, Construction and Motor Vehicle Law

Howard S. Hershenhorn
80 Pine Street, 34th Floor
New York, NY 10005
212/943-1090

Committee on Trial Advocacy Competition

John P. Connors, Jr.
766 Castleton Avenue
Staten Island, NY 10310
718/442-1700

Stephen O'Leary, Jr.
88-14 Sutphin Boulevard
Jamaica, NY 11435
718/657-5757

Committee on *Trial Lawyers Section Digest*

Steven B. Prystowsky
120 Broadway
New York, NY 10271
212/964-6611

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Trial Lawyers Section
New York State Bar Association
One Elk Street
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