NYSBA FALL 2001 | NO. 43

Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association

A Message from the Chair

Dear Members:

On September 11, 2001, I was sitting in my office drafting a "Message from the Chair" for our next *Trial Lawyers Section Digest* when I heard of the terrorist attacks on the World Trade Center. I think I will remember exactly what I was doing at that moment as clearly as I recall being sent home early from Mrs. Mahar's second-grade class on November 22, 1963, following the assassination of John F. Kennedy.

Suddenly the subject of my Message from the Chair, a discussion of the upcoming change in pattern jury instruction on proximate cause, seemed so unimportant. Since that time, I have tried to set pen to paper to write to our membership to say something meaningful, important or useful, but in the wake of September 11, those words were hard to find. I found myself asking, what can I, or we, as trial lawyers, do to help?

The answer came in a phone call from one of our past Chairs, Robert Bohner. Bob called and asked me for support from our Section and membership to volunteer our services, on a pro bono basis, to assist with claims on behalf of victims of the September 11 terrorist attacks under the Victims Compensation Act passed by Congress on September 21, 2001. I fully supported Bob and now ask for your support.

The Victims Compensation Act, passed by the U.S. Congress on September 21, 2001, provides for compensation to victims who were injured or killed as a result of the terrorist attacks on September 11, 2001, for economic or non-economic loss, without the need to prove liability. Claims must be filed with a Special Master stating the factual basis for eligibility and the amount of compensation sought. The claim form will be developed by the Special Master and must include information concerning any possible economic or non-economic loss, as well as any time limitations for filing claims and only one claim may be filed for each eligible individual. Determination

will be made within 120 days of the filing of the claim.

Filing a claim under this Act waives the right to file a civil action.

The losses from the horrible events of September 11, 2001, have touched all of our lives. We all know someone who was directly affected and suffered the terrible loss of a loved one, friend, relative, co-worker or acquaintance. We can help by volunteering our unique expertise as trial lawyers to those victims who will need help completing the paperwork, establishing damages and appearing at hearings for the presentation of evidence under this new Act. I ask that each of you consider volunteering your time and talents to assist those in need, and to help people who have suffered enough to obtain needed compensation in an expedited fashion, rather than through protracted litigation.

Please feel free to contact me or Bob Bohner with any questions. I can be reached at (518) 464-0600 or mclynch@ainsworthsullivan.com. Bob can be reached at (516) 742-0610 or rbohner@shaw-licitra.com.

I know it's been said again and again, but in closing, I just want to say, God bless you all and God bless America.

Very truly yours,
Margaret Comard Lynch

Inside

Update on Recent Appellate Division Cases

By Hon. Anthony V. Cardona

Serious Injury Under the No-Fault Law—Summary Judgment

I. Introduction

A. Under the No-Fault Law,[1] victims of automobile accidents receive compensation for their economic losses without regard to fault or negligence. However, a party who suffers a serious injury defined within the meaning of the No-Fault Law may bring a plenary tort action to recover for non-economic loss, pain and suffering.

II. Serious Injury Defined

A. Serious injury within the meaning of Insurance Law § 5102(d) means a personal injury which results in:

1. death
2. dismemberment
3. significant disfigurement
4. a fracture
5. loss of a fetus
6. permanent loss of use of a body organ, member, function or system
7. permanent consequential limitation of use of a body organ or member
8. significant limitation of use of a body function or system
9. medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

III. The Major Serious Injury Categories

A. Permanent loss of use of a body organ, member, function or system

1. This category has now been interpreted by the Court of Appeals to require a showing of a total loss of use. In other words, "to qualify as a serious injury within the meaning of the [no-fault] statute [Insurance Law § 5201(d)], [the] 'permanent loss of use' must be total."[2]

a. The injury in *Oberly* was a chronic ulnar neuropathy of a dentist's right hand and forearm which caused stiffness or soreness requiring some adjustments to certain physical activities but which did not require him to limit his dental practice or other day-to-day activities in any meaningful way.

b. Furthermore, because the Court found no "qualitative difference between a partial 'loss of use' and a 'limitation of use,'" it would now appear that a person who sustains a "partial loss of use" of a body organ, member, function or system is relegated to recovery under the two "limitation of use" categories.

B. Permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system

1. It bears noting that in the two "limitation of use" categories there is still a statutory distinction "between injuries affecting 'a body organ or member,' on the one hand, and a 'body function or system,' on the other."[3]

2. While "[b]oth categories require that the limitation be 'consequential' or 'significant', which [the courts] view as synonymous . . . a showing of permanence need be made only when a body organ or member is involved."[4]

3. "A 'significant' limitation of use requires something more than a minor limitation of use."[5]

4. In *Chapman v. Capoccia*,[6] the court held that evidence of plaintiff's post-traumatic stress disorder, sustained as a result of a car accident, was sufficient to establish a *prima facie* case of serious injury within the meaning of the no-fault law, despite the absence of testimony concerning diagnostic testing. The diagnosis was made by his psychiatrist, who had continually treated him for more than ten years. Plaintiff's condition was found to be both a permanent loss of use of a body function or system (given the chronic nature of the problem) and a significant limitation of use of a body function or system. The treating psychiatrist based his opinion on a review of plaintiff's full history and on the fact that he suffered such symptoms as anxiety, nightmares, sleep disturbance, hyperarousal, hypervigilance,

fear, depression, anger, preoccupation with his physical condition and impotence, some of which were capable of being objectively observed by his treating physicians and some were objectively established by his and his wife's testimony.

C. Ninety out of 180 days

1. To satisfy the serious injury threshold for the 90 out of 180 days category, a plaintiff must "establish a medically determined condition and its significant impairment of [his or] her activities for the requisite period of time"[7] and provide support for the conclusion that the restrictions on his or her activities during that period were medically indicated and causally related to the injuries sustained in the accident.[8]

D. Evidentiary burdens

1. Defendant's burden

a. Defendant bears the initial burden of making a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).[9]

b. A defendant can satisfy that burden by submitting the affidavits or affirmations of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim.[10]

2. Plaintiff's burden

a. If defendant meets that burden, "[t]he burden then shift[s] to plaintiff to demonstrate a genuine issue of material fact precluding summary judgment . . . by setting forth 'competent medical evidence based upon objective medical findings and diagnostic tests to support [the] claim.'"[11]

b. Moreover, the "objective medical findings must be based on a recent examination of the plaintiff . . . In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained."[12]

c. Note, the affirmation of a chiropractor, which is not subscribed before a notary or other authorized official, is not competent evidence.[13]

d. "Where conflicting medical evidence is offered on the issue of whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn therefrom, the question is one for the jury."[14]

E. Evidentiary pitfalls

1. Medical evidence must be based on objective findings and diagnostic tests

a. Subjective complaints of pain

(1) Subjective complaints of pain alone are insufficient.[15]

b. Loss of range of motion

(1) A diagnosis of a loss of range of motion, which is dependent upon a patient's subjective expressions of pain, is insufficient to support an objective finding of a serious injury.[16]

(2) The Third Department has "held that a diagnosis of chronic cervical and lumbosacral strain evidenced only by impaired rotation of the spine and decreased leg raising was insufficient to survive a motion for summary judgment in the absence of further medical evidence of a specific injury suggestive of a permanent loss of use."[17]

(3) The Second Department subsequently held to the contrary.[18]

(4) The Third Department has also noted, however, that "objective diagnoses can be legitimately based on some subjective input by patients," but there must be a detailed explanation of how tests requiring such input "would rule out false inputs."[19]

c. Unsworn medical reports and test results

(1) An unsworn physician's report is insufficient to defeat a motion for summary judgment, absent an acceptable excuse for the failure to submit the report in admissible form.[20]

(2) A plaintiff's physician may not rely on unsworn medical test results prepared by another doctor.[21]

d. Medical reports—other deficiencies

(1) Affirmed medical report was insufficient to establish that plaintiff suffered a "serious injury," where it did not indicate the date the physician examined plaintiff, there was no explanation for three-year gap between the date of the affirmed report and the last examination of plaintiff, and the physician offered no opinion on the seriousness of plaintiff's injury.[22]

2. Chiropractic evidence

a. Where such evidence refers to spasms, trigger points and limited range of motion, there must be detail as to specific location, quantification or how those findings were objectively ascertained.[23] For example, in *Dugan v. Sprung*,[24] where the Third Department affirmed Supreme Court's dismissal of the complaint, plaintiff's expert, a chiropractor, performed cervical compression and range of motion tests which were "based solely on plaintiff's subjective complaints of pain upon movement and compression of his cervical spine . . . Even though [the chiropractor] identified the active and passive tests performed and quantified the limited range of motion of plaintiff's cervical spine," he couldn't explain how the tests would rule out false inputs.[25] The court further indicated that had the chiropractor's opinion been backed up either by a perspective gained by examination and treatment of plaintiff over the course of time or by relevant notes and records, the outcome may have been different.

b. In *Carota v. Wu*,[26] the Third Department observed that:

> [t]he limited range of motion of plaintiff's neck along with tenderness at the C4-C5 level [was] insufficient to support claims alleging a permanent loss of use and/or a permanent or significant limitation of use of his neck . . . without an articulated medical basis or the proffer of objective physical evidence such as swelling, numbness or a contributing preexisting condition that is more than minor. [The treating osteopath's] notation of spasms fail[ed] to correct this deficiency since he failed to identify the tests that he used in diagnosing plaintiff or the locations of the trigger points and spasms he observed.[27]

c. Chiropractor's affidavit was inadequate to raise an issue of fact as to whether plaintiff sustained a significant limitation or permanent consequential limitation of use of a body organ, member, function or system, since it did not specify the degree of limitation or restriction caused by the alleged spinal injuries.[28]

d. In *Barbagallo v. Quackenbush*,[29] where "[p]laintiff's physicians indicated their reliance on trigger point palpations or the presence of spasms which were objectively ascertained and quantified," their finding of permanent disability and loss of use and function in her cervical spine causally related to the accident was sufficient to raise genuine questions of material fact on the issue of serious injury.[30]

3. Causally relate condition to the accident

a. Even when objective evidence of a qualifying loss or limitation, such as degenerative changes in a patient's cervical spine, are confirmed by x-ray or CT scan, the observed condition must still be causally connected to the patient's accident by competent medical opinion.[31]

(1) Where the affirmed medical report of an independent examining neurologist referred to a magnetic resonance imaging report of the plaintiff's cervical spine, dated eight months after the accident, revealed, *inter alia*, a diffuse bulging disc and found that the injured plaintiff's neck had "decreased range of movements to extension," but failed to demonstrate that the bulging disc was causally related to the subject accident, the defendants failed to establish a *prima facie* case for judgment as a matter of law.[32]

4. Herniated or bulging discs

   a. Notably, herniated or bulging discs do not per se meet the statutory threshold of serious physical injury, absent "objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration."[33] There must also be competent proof connecting the condition to the accident.[34]

5. Examine expert affidavits carefully

   a. Finally, when reviewing the serious injury threshold in the 90 out of 180 day category, examine the affidavits of plaintiff's experts carefully to see if they are out of sync with the plaintiff's own affidavit or EBT testimony regarding his or her limitations.

   b. In all categories of serious injury, expert affidavits which simply parrot the statutory language will be deemed deficient as "clearly tailored to meet the statutory threshold"[35] and terms like "mild" or "mild to moderate," when used by a plaintiff's expert to describe the plaintiff's limitation will make a finding of serious physical injury highly unlikely.[36]

Governmental Tort Liability for Failure to Provide Police Protection

I. Introduction

   A. Generally, courts have declined to hold municipalities subject to tort liability for the failure to provide adequate police protection to individual citizens. "This rule is derived from the principle that a municipality's duty to provide police protection is ordinarily one owed to the public at large and not to any particular individual or class of individuals."[37] There is, however, an exception to this general rule; the courts have held municipalities liable for the failure to provide sufficient police protection due to the existence of a special duty owed by the governmental entity to the injured party. This duty is created when it is established that a "special relationship" exists between the municipality and the injured party.

II. The Elements of a Special Relationship

   A. an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;

   B. knowledge on the part of the municipality's agents that inaction would lead to harm;

   C. some form of direct contact between the municipality's agents and the injured party;

   D. that party's justifiable reliance on the municipality's affirmative undertaking.[38]

III. Justifiable Reliance

   A. Addressing this element first, it "provides the essential causative link between the 'special duty' assumed by the municipality and the alleged injury."[39]

   B. Third Department

      1. In the recent case of *Grieshaber v. City of Albany*,[40] the victim placed an emergency 911 telephone call for an ongoing assault at 6:47 p.m. and police officers arrived at her apartment building at 6:52 p.m. Instead of entering the victim's apartment, however, the officers awaited the arrival of an animal control officer to subdue the victim's dog. As a result, the officers did not actually enter the victim's apartment until 7:45 p.m., at which time they found her lying on the floor and transported her to the hospital where she was pronounced dead at 8:31 p.m. The administrator of her estate commenced an action against the city of Albany. Supreme Court denied the city's motion for summary judgment dismissing the complaint.

         a. In reversing Supreme Court's order and granting summary judgment to the city, the Third Department noted that to satisfy the justifiable reliance requirement, the "plaintiff's reliance must have placed her in a worse position than she would have been in had the municipality never assumed the duty."[41] The court found, however, that the plaintiff did not present sufficient evidence that the victim either relaxed her vigilance or forewent an opportunity for flight due to the fact that the victim was heard screaming "Get Out, Get Out" during the 911 call;[42] when apprehended, the assailant had lacerations on his fingers, scratches on his side and an abrasion to his shoulder; and the assailant stated that he exited the apartment when he heard a voice on the victim's answering machine referring to a 911 telephone call that had been placed from the victim's residence.

   C. First Department

      1. In *Silver v. City of New York*,[43] an 81-year-old woman suffering from heart failure was

assured by EMS personnel that an ambulance had been dispatched to her residence. Seven minutes elapsed between the assurances and the ambulance's arrival, during which time the woman died. In affirming Supreme Court's grant of summary judgment dismissing the complaint, the court, citing *Grieshaber*, found determinative the fact that plaintiff offered no proof that based on the assurances, a decision was made by the decedent not to seek help from an alternative source.

D. Second Department

1. *Kubecka v. State of New York*[44] arose out of the shooting deaths of two witnesses cooperating with the State Organized Crime Task Force (OCTF). The two witnesses assisted with an investigation into illegal garbage carting and as part of the agreement, they were assured that they and their families would be protected from harm. The day after Kubecka told the OCTF about a threatening call he had received, he and the other witness were shot and killed. "[I]n view of the past efforts that OCTF had made on behalf of the victims' families in response to threats made against them, and of which efforts the victims were aware," the court found that "the victims justifiably relied on OCTF taking appropriate protective measures as needed" and "breached its duty to provide reasonable protection to the decedents."

E. Fourth Department

1. The Fourth Department found that justifiable reliance did not exist where the two victims of a shooting never received express or implied assurances of protection from agents of the Sheriff's Department. Only one of the victims had reported the assailant's threats. There was no direct communication between the other victim and the agents of the Sheriff's Department. The only assurance received from agents of the Sheriff's Department was that given to the one victim who had reported the threats and that assurance was only that a deputy would come out to the house shortly to take a complaint. Notably, both victims came and went from their house throughout the day and armed themselves with a shotgun while they were waiting for the assailant's threatened arrival and the deputy's arrival to take a complaint.[45]

F. Court of Appeals

1. *Mastroianni v. County of Suffolk*[46] is one of the few cases in which the Court found that a special relationship did exist between the police officers and the victim. The victim was murdered by her husband. At the time, she had a valid order of protection that directed him to have no contact with her and required him to stay away from her residence. The Court's decision indicates that the victim sought and obtained police intervention on a previous occasion when her husband had violated the protective order. Earlier on the day of the murder, the husband threw the victim's furniture into her backyard. Responding to her call, the police assured the victim that although they could not then arrest him, because there were no witnesses, not even her, to his alleged entry into her home, they would do whatever they could if she had any further problems with him. The police waited while the victim brought her furniture back into her house, and remained on the scene across the street for a time but eventually left the area. Shortly thereafter the husband stabbed the victim, who later died from her wounds. The Court found that the circumstances of the case established that the victim justifiably relied on the police officers given their other undertakings on her behalf, and that a special relationship existed.

2. The Court of Appeals also examined this issue in *Kircher v. City of Jamestown*.[47] The plaintiff's abduction was witnessed by two people who chased the assailant's vehicle until they lost sight of it. Coming upon a police officer, the witnesses informed him of their observations and were advised that he would "call it in." The officer, however, never reported the incident or took any further action on it and the plaintiff was repeatedly assaulted and raped. In upholding the Appellate Division's grant of summary judgment in favor of the defendants, the Court concluded that proof of the reliance of the two witnesses could not be transferred to the plaintiff's benefit. Absent reliance by the *victim*, "the consequences of the municipality's failure to act become far too speculative to allow as the basis of liability."[48]

   In the dissenting opinion, the two dissenters took the position that relief should not be

denied merely because it was the plaintiff's rescuers, and not the plaintiff herself, who had contact with the police officer and relied on his assurances. They indicated that "[t]here is no question that plaintiff's would-be rescuers did contact police and, in reliance on the police officer's actions, stopped their attempts to help plaintiff . . . [thus] there is no reasoned basis for . . . denying recovery solely because plaintiff did not herself contact police or rely on their assurances."[49]

IV. Affirmative Duty

A. This element is satisfied by an order of protection.[50]

B. The mere implementation of security measures at a high school does not give rise to a special duty of protection.[51]

C. Extra police protection targeted to a specific area to combat problems created when large numbers of youths are released from school does not mean the police owed a special duty to protect plaintiff's decedent, an elderly women who was attacked in that area.[52]

D. "[A]ny failure by the State to adopt certain security or administrative rules and regulations to protect students . . . or to follow SUNYA's procedures to communicate to appropriate SUNYA personnel the assailant's threatening remarks directed at a professor . . . does not give rise to a duty or liability on the part of the State in the absence of a special relationship to claimant."[53]

E. Where the victims of a shooting had received no express or implied assurances of protection from agents of the Sheriff's Department, no special duty arose to protect them from the assailant.[54]

V. Knowledge

A. Is also satisfied by the issuance of an order of protection.[55]

B. In *Basher v. City of New York*,[56] the plaintiff was approached by a group of men demanding jobs and/or protection money, who stated that if the plaintiff did not provide such, they would "cause problems." The plaintiff allegedly notified two patrol cars of the threats and was informed by both cars that the location would be kept under surveillance. The police patrolled the area until receiving an emergency call. The plaintiff was later shot and seriously wounded. The Court found that the second element was not satisfied as there were no specific threats of violence made against the plaintiff, no past history of violence and no information that any of the men who approached the plaintiff were armed.

VI. Direct Contact

A. The Court of Appeals has stated that the direct contact requirement "serves to rationally limit the class of persons to whom the municipality's duty of protection runs."[57] Thus, the Court has determined that the contact must generally be between the *injured party* and the municipality.[58]

B. In *Daniel v. Vandi*,[59] the Fourth Department held that the direct contact requirement was not satisfied where a witness to criminal activity or other concerned citizen requests assistance from the police for another person at risk and, recently, in *D'Avolio v. Prado*,[60] the court found that the requirement was also not satisfied by a 911 call made by a victim's son.

C. In *Hancock v. City of New York*,[61] the plaintiff activated a silent alarm system which then required defendant (a security central monitoring service) to contact 911. The First Department, like the Fourth, ruled that the requirement of direct contact was not satisfied where the 911 call was actually placed by a third party.

D. The Second Department, however, found that the direct contact requirement *was* satisfied where the mother of a girl being stalked made numerous complaints to police, one of which resulted in the police telling her that the person harassing her daughter, in violation of an order of protection, would be arrested.[62]

General Obligations Law § 9-103—The Recreational Use Statute

I. Introduction

A. Section 9-103 provides a complete affirmative defense to negligence claims against owners, lessees or occupants of property by individuals who are injured while engaging in certain recreational activities while on the property. The protection afforded by section 9-103 is limited only by the provision which states that an owner is not protected from liability for a "willful or malicious" act or omission causing the plaintiff's injury, or where plaintiff paid for permission to engage in an enumerated activity on the property.

II. Application of the Statute

A. Section 9-103 provides that "an owner, lessee or occupant of premises, whether or not posted as provided in ECL 11-2111, owes no duty to keep the premises safe for entry or use by others" for recreational activities specifically enumerated in the statute. Nor does an owner, lessee or occu-

pant have to "give warning of any hazardous condition or use of or structure or activity on such premises" to those entering the property to engage in the enumerated activities.

B. The statute properly applies when "(1) the plaintiff is engaged in one of the activities identified in section 9-103 and (2) the plaintiff is recreating on land suitable for that activity."[63]

C. The statute is inapplicable:

1. where a municipality "already operates and maintains a supervised facility . . . for use by the public."[64]

2. "where the property in question is a highway maintained by a municipality since the property is already open to public use."[65]

III. Determining What Constitutes Suitability of Land for a Particular Recreational Purpose

A. Court of Appeals' suitability test

1. In *Iannotti v. Consolidated Rail Corp.*,[66] the plaintiff was injured while riding his motorized trail bike along a stone and dirt right-of-way 20 to 25 feet wide adjacent to defendant's railroad tracks. The Court noted its agreement with the Third Department's conclusion that section 9-103 is not limited to claims arising in wilderness, remote or undeveloped areas and made it clear that property may be suitable for recreational use notwithstanding its commercial nature.

2. The *plurality* determined that "suitability" turns on whether (1) the property is physically *conducive* to the particular enumerated activity and (2) is *appropriate* for public use in pursuing that activity as recreation.

a. *Concurrence*—disagreed with this test, stating that it is not clear *what* physical attributes of a piece of property will render it inappropriate for a given use.

b. *Dissent*—agreed with the plurality's "suitability" analysis, but reasoned that the land in this case was unsuitable because defendant's own use of the premises (railroad workmen used the road for the purpose of maintaining the tracks) created potential for serious injury.

IV. The Effect of Past Use on a Suitability Determination

A. In *Albright v. Metz*,[67] the plaintiff was injured when he fell some 35 feet into the bed of a landfill while riding his motorized dirt bike on the defendant's landfill. The Court of Appeals determined that a "substantial indicator" of whether property is conducive to a particular activity is "whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it."[68]

The property must not be judged by its "general characteristics," instead the Court reasoned that while portions of the property may not be suitable for a particular activity, other portions may be, thus it is the "general suitability" of the property that controls, and "suitability must be judged by viewing the property as it generally exists, not portions of it at some given time."[69]

B. In *Fenton v. Consolidated Edison Co. of New York*,[70] the plaintiff was seriously injured when he struck a ditch while motorbiking along a dirt access road on a right-of-way owned by defendant. The ditch was one of many placed by defendant in the access road to prevent erosion.

The court found it determinative that although the plaintiff had not previously ridden that particular stretch of the access road, he had previously operated his motorbike along other locations on the roadway. In addition, the trial testimony established that "a lot of people" used the roadway for motorbiking. Based on this establishment of past use, the court found the *Ianotti* test for section 9-103 immunity satisfied.

C. In *Moscato v. Frontier Distributing Inc.*,[71] the plaintiff was riding his ATV towards trails along railroad tracks adjacent to defendant's property when he struck a chain placed across the entrance to the defendant's parking lot.

1. The court found that the property was conducive to ATV use due to the evidence of extensive past recreational use, but did not thoroughly discuss its finding that the property was also "appropriate" for such use "despite its urban location and commercial use."[72]

D. In *Jacobs v. Northeastern Industrial Park*,[73] however, the plaintiff was injured when he fell from his motorbike while riding on defendant's property. The property consisted of 396 acres of woods and open fields which had been used as an area for motorbike riding, hunting and fishing for many years. Apparently, a few months prior to the accident, defendant's contractor had begun digging ditches on the property to repair the drainage system.

The Second Department found that the property was conducive to motorbiking because it had been used for such activity for many years, was only minimally developed and had not been designated for any other particular use.

V. Appropriateness of the Land for a Particular Recreational Activity

A. In *Baisley v. State of New York*,[74] the claimant was injured when he drove his ATV into a wire cable stretched across the trail on which he was riding. The cable had been painted orange and had streamers attached to it, but they were withered at the time of the accident.

1. The court found that while the trail was conducive to the operation of ATVs, it was not *appropriate* for the use of such vehicles due to the fact that it "was used for hiking, bird watching, cross-country skiing and snow shoeing, and, the use of ATVs thereon would not only be likely to disrupt the stated activities, but also to threaten those engaged in those activities with serious injury."[75]

VI. The Effect of the Physical Characteristics of Land on a Suitability Determination

A. In *Reid v. Kawasaki Motors Corp., U.S.A.*,[76] the plaintiff was injured while riding his ATV on a crude track in the middle of a hay field on defendant's property.

1. The court found the land suitable for this purpose as it was a large, sprawling farm in a rural area with numerous acres of unimproved open fields that had been used for years for motorbiking. The court additionally found that the presence of a makeshift track enhanced the property's suitability for that purpose.

B. In *McGregor v. Middletown School District No. 1*,[77] the court found defendant's property suitable for sledding as it had been used for years by the general public for such purpose, and it had *attributes* that rendered it conducive to sledding by small children, such as a short hill, sloping incline and it was set away from traffic. Although plaintiff advanced that a dangerous condition at the bottom of the hill rendered the property unsuitable for the activity, the court reiterated that a dangerous condition is not the "benchmark for suitability, or appropriateness."[78]

C. In *Bryant v. Smith*,[79] the plaintiff was a passenger on an ATV and was injured when she was thrown to the ground while riding across land owned by the defendants.

1. The court determined that the *physical characteristics* of the land (vacant, level and grassy), provided *prima facie* support for the determination that it was both conducive and appropriate for recreational ATV riding.

D. In *Ackermann v. Town of Fishkill*,[80] the plaintiff was injured when he fell off his bicycle while riding down a steep roadway under construction on property owned by defendant.

1. The court determined that the property was unsuitable for bicycle riding as it was located on a steep incline and the surface was strewn with rocks, and no evidence had been offered that the roadway had been used for bicycle riding in the past.

E. In *Olson v. Brunner*,[81] the plaintiff's father was fatally injured by a bull while hunting on defendant's dairy farm. The defendant owned a 207-acre dairy farm, 70 acres of which constituted a pasture surrounded by a single strand of electrified barbed wire in which 60 cows and one bull ran together for breeding purposes. Prior to the accident, the plaintiff's father had been hunting on the farm for ten years.

1. The court, citing *Albright*'s holding that suitability must be judged by examining the property as it generally exists, not portions of it at some given time, found the property suitable for hunting.

F. In *Rzeczkowski v. Kowalczi*,[82] the plaintiff was snowmobiling on defendants' 76-acre dairy farm, a portion of which was used as a gravel pit, when he proceeded up an incline and then plunged into a gravel pit below.

1. The court, citing *Albright*, ruled that Supreme Court had erred by determining that the land was unsuitable and found that since the plaintiff was snowmobiling in an open area, and not in a gravel pit itself, and the land had been used by other snowmobilers in the past, it was conducive to and appropriate for snowmobiling.

Current Conflicts Within the Labor Law

I. Topic One: Window Washers and the Labor Law

A. Introduction

1. In recent years, New York appellate court decisions have reflected an increasing awareness of the need to ensure that commercial window washers are provided an adequate amount of protection under the Labor Law. More specifically, numerous opinions have examined the connection

between Labor Law § 240(1), the Scaffold Law, and Labor Law § 202, which is aimed directly at protecting window washers. As both sections appear to apply to window cleaning, an issue has arisen in the courts as to whether window washers who have a remedy under section 202 (the statute specifically geared towards protecting window washers) are precluded from also seeking the absolute liability protection of section 240(1) (the more general statute).

B. Section 202

> The owner, lessee, agent and manager of every public building and every contractor involved *shall provide such safe means for the cleaning of the windows* and of exterior surfaces of such building as may be required and approved by the board of standards and appeals. The owner, lessee, agent, manager or superintendent of any such public building and every contractor involved *shall not require, permit, suffer or allow any window* or exterior surface of such building *to be cleaned unless such means are provided to enable such work to be done in a safe manner* for the prevention of accidents and for the protection of the public and of persons engaged in such work in conformity with the requirements of this chapter and the rules of the board of standards and appeals. A person engaged at cleaning windows or exterior surfaces of a public building shall use the safety devices provided for his protection. Every employer and contractor involved shall comply with this section and the rules of the board and shall require his employee, while engaged in cleaning any window or exterior surface of a public building, to use the equipment and safety devices required by this chapter and rules of the board of standards and appeals.
>
> The provisions of this section shall not apply to (1) multiple dwellings six stories or less in height located anywhere in this state; nor to (2) any building three stories or less in height in cities, towns or villages having a population of less than forty thousand; nor to (3) the windows or exterior surfaces of any building which may be exempted under any rule adopted by the board of standards and appeals.
>
> The board of standards and appeals may grant variations pursuant to the provisions of section thirty of this chapter. All existing variations heretofore made by the board relating to the cleaning of windows are hereby validated and continued in full force and effect until amended or terminated by the board.
>
> The board of standards and appeals may make rules to effectuate the purposes of this section.
>
> Notwithstanding any other law or regulation, local or general, the provisions of this section and the rules issued thereunder shall be applicable exclusively throughout the state and the commissioner shall have exclusive authority to enforce this section and the rules issued thereunder. [Emphasis added].

C. Section 240(1)

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, *cleaning* or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. [Emphasis added].

D. The First, Second and Fourth Departments have determined that non-domestic window washers have a remedy under both sections.

1. In *Cruz v. Bridge Harbor Heights Associates*,[83] the plaintiff, who had not been provided with a belt, window anchors or any other safety device, fell three stories while cleaning the windows of an apartment complex.
    a. The First Department ruled consistently with its previous opinions[84] when it determined that a plaintiff seeking recovery under Labor Law § 202 is not precluded from also seeking relief under section 240(1).[85]
2. In *Harzewski v. Centennial Development LTD*,[86] the Fourth Department cited the First Department's decision in *Terry*, when it determined that a plaintiff who was injured when he fell while cleaning the exterior windows of a two-story commercial building could maintain a cause of action under Labor Law § 240(1). The court noted that while the cleaning of windows does not include domestic window cleaning, section 240(1) does apply "where . . . a professional window washer was hired to clean the exterior windows of a multistory building."[87]
3. In *Williamson v. 16 W. 67th St. Co.*,[88] the plaintiff window washer was an employee of a third-party defendant window cleaning service hired to clean the exterior windows of a retail clothing store. The plaintiff gained access to the third floor windows by climbing out of a window onto a ledge and affixing his canvass safety harness to anchors outside of the windows. However, the canvass broke and the plaintiff fell, thereby sustaining grave injuries.
    a. The majority determined that Labor Law § 240 is applicable to claims by window cleaners who are injured as a result of elevation-related risks inherent in their work, as long as the cleaning of windows is not a truly domestic activity.
    b. The court acknowledged the rule that where a general statue and a specific statute conflict, the specific statute should govern over the general, but the court reasoned that such a rule would be improperly applied in *Williamson* because its effect would be to subvert the principal purpose of both of the statutes, which is to protect workers engaged in high-risk, height-related occupations.

E. The Third Department has determined that an injured window washer's exclusive remedy lies in a cause of action under Labor Law § 202.
    1. In *Bauer v. Female Academy of Sacred Heart*,[89] the plaintiff was in the process of cleaning a third-story window of a commercial building when he fell to the ground thereby sustaining serious physical injuries.
        a. The majority, mindful of the opinions of the First and Fourth Departments, concluded that "with the enactment of Labor Law § 202, window cleaners were afforded absolute liability against owners of all buildings except dwellings while working at elevated heights, the precise protection afforded other enumerated workers under Labor Law § 240. Thus, we agree with defendant that to conclude that the Legislature at the time of the enactment of Labor Law § 202 intended that the protections of Labor Law § 240 also would encompass window cleaners 'would have the effect of making Labor Law § [202] . . . virtually useless.'"[90]

F. The Court of Appeals has not yet definitively ruled on this issue.
    1. The Court tangentially addressed the issue in *Brown v. Christopher St. Owners Corp.*,[91] a case involving a plaintiff who was injured when he fell from the second-floor ledge of an apartment building while washing the exterior of one of the windows.
        a. While the Court did not reach the question of whether Labor Law § 202 provides the exclusive remedy in such cases involving window cleaning, it did differentiate between routine, household window washing and commercial window washing, stating that Labor Law § 240 (1) "does not include the routine, household window washing at issue here . . . Unlike the painting of a house . . . or the cleaning of the windows of a large, nonresidential structure such as a school . . . the routine cleaning [here] is not the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240."[92]

II. Topic Two: Landing Zone Cases

A. Introduction

1. Section 240 only applies to "special hazards" limited to such "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured."[93] Subsequent to *Ross*, the appellate courts uniformly determined that plaintiffs injured as the result of objects moving horizontally or laterally are not protected by Labor Law § 240.[94] However, an issue has recently arisen as to whether employers and work-site owners are absolutely liable for injuries sustained by laborers as a result of being struck by objects *intentionally* dropped in furtherance of a legitimate work function (such as asbestos removal).

B. The Third Department–*Roberts v. General Electric Co.*[95]

1. *Roberts v. General Electric Co*., a 3-2 decision, arose out of an accident that occurred while the plaintiff was employed as an asbestos handler for a firm that had contracted with the defendant to remove asbestos insulation from several chemical tanks at a General Electric facility. The asbestos removal process required workers positioned on top of tanks to cut steel support bands, thereby allowing pieces of asbestos to fall 12 to 14 feet to the floor where other workers would retrieve them. The plaintiff was injured when a falling piece of asbestos struck him on the shoulder.

   The majority reasoned that Labor Law § 240(1) was designed to prevent exactly the type of injury sustained by the plaintiff. The court noted that any number of the safety devices enumerated in section 240(1) could have prevented the "dangerous free fall" of the asbestos.

   The court ruled that "from the viewpoint of protecting workers, it is simply irrelevant whether the falling asbestos was intentionally or negligently released where the facts otherwise support the application of the provisions of Labor Law § 240(1)."[96]

   On the other hand, the dissent reasoned that the majority's conclusion was inconsistent with the court's earlier decision in *Corey v. Gorick Construction Co*.[97] In *Corey*, the court held that Labor Law § 240(1) was inapplicable where a descending beam struck the plaintiff after it had been purposefully released to a targeted site from a backhoe in accordance with a demolition plan. There, the court found determinative the fact that the beam did not fall as the result of an improper or defective mechanism, but fell purposefully. Since the plaintiff in *Roberts* was not injured by an object that was "improperly hoisted or inadequately secured," the dissent concluded that Labor Law § 240(1) was not triggered.

C. First Department Decisions

1. In *Campanella v. St. Luke's-Roosevelt Hospital*,[98] the plaintiff was standing in a Dumpster and being handed timbers by coworkers standing 8 to 12 feet above him. The plaintiff's job was to guide the timbers so that they fell into the Dumpster. At one point, the plaintiff was handed a particularly heavy timber which he was unable to control and sustained injury as he twisted to keep it from crushing him.

   a. The court granted summary judgment to the plaintiff on the issue of defendant's liability under Labor Law § 240(1) ruling that the lowering of the timbers 8 to 12 feet implicated the statute which provides protection for workers whose jobs "entail a significant risk inherent in the particular task because of the relative elevation" at which it must be performed.[99]

2. The plaintiff in *Brust v. Estee Lauder Inc.*,[100] was injured when he was struck by a wrench that was dropped from above by a fellow worker.

   a. The court ruled that Labor Law § 240(1) clearly applied to the situation because it involved an injury caused by a gravity-related hazard.

D. Second and Fourth Departments

1. In *Cosgriff v. Manshul Construction Corp.*,[101] the plaintiff was hit in the head by an object which came from the roof of a building on a construction site on which he was working.

   a. The court concluded that the plaintiff was entitled to summary judgment as no safety devices were provided which would have prevented the accident. Interestingly, however, the Court did not note whether the object had been negligently or intentionally dropped on

the plaintiff, the Court simply stated that as the plaintiff was hit on the head from an object coming from the roof while he was working, he was entitled to summary judgment under section 240(1).

2. In *Jiron v. China Buddhist Ass'n.*,[102] plaintiff was injured when he was struck by a part of a piece of equipment that he was attempting to move which disengaged and fell from a height of approximately 15 to 20 feet above the ground.
    a. The majority ruled that the plaintiff's claim did fall within the scope of Labor Law § 240, finding that the requirement that workers be provided with proper protection extends not only to the hazards of building materials falling from a hoist, but also to the hazards associated with a defective hoist, or portion thereof, falling from an elevated level to the ground.
3. In *Micoli v. City of Lockport*,[103] the plaintiff sustained injuries when one of his co-workers dropped his end of a scaffold pick that he and the plaintiff were carrying up a ladder.
    a. The court ruled that Labor Law § 240(1) protects workers not only from the dangers of building materials falling from elevated work sites, but also from the dangers associated with safety devices or pieces thereof falling and striking them. Notably, the court did not address the issue of whether or not section 240(1) would apply when objects are intentionally dropped.

E. Court of Appeals
1. In *Narducci v. Manhasset Bay Associates*[104] the plaintiff was standing on an extension ladder and removing window frames when a pane of glass from an adjacent window fell on him. In a 3-2 decision, the First Department denied defendant's motion to dismiss the plaintiff's section 240 claim while the dissent reasoned that section 240 was not applicable because the window pane had not been secured or hoisted in an unsafe fashion during the work.
2. In the Fourth Department case, *Capparelli v. Zausmer Frisch Assocs.*,[105] the plaintiff climbed halfway up a ladder to install a ceiling fixture on a 10-foot high ceiling. The plaintiff lifted the fixture into the ceiling and then descended the ladder a step to adjust his position, however, as he did so, the light fixture began to fall from the grid. The plaintiff sustained injuries when he reached out to stop the fixture from hitting him.
3. In a consolidated opinion,[106] the Court of Appeals ruled that Labor Law § 240 was inapplicable to both claims. While the Court's affirmance of the dismissal in *Capparelli* was based upon the fact that there was no height differential between the plaintiff and the falling object, the *Narducci* decision is relevant.
    a. In ruling on *Narducci*, the Court noted that liability under section 240(1) "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein."[107] For liability resulting from injuries due to falling objects, the Court stated that the plaintiff must show more than that he was injured by a falling object, "[a] plaintiff must show that the object fell, *while being hoisted or secured*, because of the absence or inadequacy of a[n] [enumerated] safety device."[108] Thus, the Court found that as the window that fell on the plaintiff was part of the pre-existing building structure, it was not a situation where a hoisting or securing device "would have been necessary or even expected."[109]

PJI 2:70 on Proximate Cause Charge—Jury Confusion

I. Introduction
A. The New York Pattern Jury Instructions changed between the second and third editions (1996) to alleviate jury confusion in reference to this charge.
1. "An act or omission is a proximate cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable men would regard it as a cause of the injury."[110]
2. "An act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that

reasonable people would regard it as a cause of the injury."[111]

3. Although the word "proximate" was removed, the change in language was merely semantic and did not effect a change in the law regarding proximate cause.[112]
4. Instruction on apportionment of damages added at the trial court's discretion:
   a. "Whether the negligence of a particular party was a substantial factor in causing an injury does not necessarily depend on the percentage of fault that may be apportioned to that party."[113]
5. Instruction where there might be more than one proximate cause of plaintiff's harm:
   a. "There may be more than one cause of an injury. Where the independent and negligent acts or omissions of two or more parties cause injury to another, each of those negligent acts or omissions is regarded as a cause of that injury provided that it was a substantial factor in bringing about that injury."[114]

B. Does confusion remain after the revision?
1. *Petrone v. Mazzone*[115]
2. Not unique to juries—*Argentina v. Emery World Wide Delivery Corp.*[116]
   a. Certified question from U.S. Court of Appeals Second Circuit—asked whether a portion of the Vehicle and Traffic Law required that vehicle "must be *the* proximate cause of the injury before the vehicle's owner may be held vicariously liable."[117]

      Court of Appeals stated in reply to the Second Circuit that since "there may be more than one proximate cause of an injury," courts must use "a" rather than "the" when referring to proximate cause.[118]

3. Cases generating more confusion than others
   a. Multiple tortfeasors
   b. Comparative negligence

II. Language of 1 NY PJI 2:70
A. "Proximate cause" vs. "Substantial factor"
1. Changing to "substantial factor" first proposed 90 years ago
   a. Smith, *Legal Cause in Actions of Tort*[119]
   2. Idea has gradually won acceptance throughout the various states in the intervening decades.[120]

B. Additional changes
1. Comment following revised PJI 2:70 suggests making its language even more accessible to jurors—suggests that pattern charge "will be more readily understood by lay jurors if the principle is expanded upon and related to the facts of the particular case. The law must not only be stated accurately but 'be reduced to terms likely to be understood by the jury.'"[121]

III. Examples Where Jury Finds Negligence and Damages but No Proximate Cause
A. *Petrone*, *supra*
1. Third Department reversed jury verdict and ordered new trial where jury found defendant negligent but determined that this negligence was not a proximate cause of the accident.

B. *Clarke v. Order of Sisters of St. Dominic*[122]
1. Court reached same result on virtually identical underlying facts as *Petrone*.
2. Jury found defendant negligent, but concluded that such negligence was not a proximate cause of plaintiff's injuries, but then apportioned fault 90 percent for plaintiff and 10 percent for defendant.
3. Court ordered new trial, citing "substantial confusion among the jurors in reaching their verdict" and calling the verdict "internally inconsistent."[123]
4. Moreover, court noted that trial court "was aware that the jurors had previously expressed difficulty in comprehending the concept of proximate cause" but still failed to require the jury to reconsider its verdict or order a new trial.[124]

C. *Stilloe v. Contini*[125]
1. Jury found doctor negligent in medical malpractice action but decided that his negligence was not a proximate cause of plaintiff's injuries.
2. Court upheld jury verdict. Although plaintiff argued jury confusion after jury requested a rereading of the definition of proximate cause during deliberations, the court found that this did not establish jury confusion.
3. The court noted that "[j]ury verdicts are to be accorded deference on review, particular-

ly those rendered in favor of defendants in tort cases."[126]

D. *Ohdan v. City of New York*[127]

1. The court in a 3-2 split upheld verdict where jury determined that all defendants had acted negligently but that only one of the defendants' negligence was a proximate cause of plaintiffs' injuries.
2. Majority concluded that the jury could have concluded that the negligence of some defendants was not foreseeably linked to the injuries suffered, noting that "[a] jury verdict is normally accorded great weight," and finding that the verdict can "easily be said to have been arrived at by thoughtful and careful analysis."[128]
3. Dissent stated that jury's finding of negligence could not "reasonably be reconciled with its determination" that such "negligent conduct was not the proximate cause of the accident," calling the jury's findings vis-à-vis liability "incoherent" and concluding that a new trial was required to resolve this issue.[129]

IV. Jury Reconsideration of Verdict Before Discharge

A. Confused or inconsistent jury verdicts can be remedied by trial court

1. Must be done before jury is discharged.
2. Before such reconsideration, the court should re-instruct the jury to help resolve any confusion.

a. *Roberts v. County of Westchester*[130]

(1) Westchester County jury found both plaintiff and defendant negligent, but further determined that neither party's negligence was a "substantial factor" in bringing about plaintiff's harm; jury compounded this confusion by apportioning fault 55 percent to plaintiff and 45 percent to defendant.

(2) Supreme Court told the jury that for a party to be at fault, its negligence must be a substantial factor in causing the accident, but denied plaintiff's request to re-instruct the jury. During a colloquy with the court, the jury's foreperson repeated her belief that defendant's negligence was not a substantial cause, but the jury then apportioned fault 90 percent to plaintiff and 10 percent to defendant, again failing to conclude that plaintiff's negligence was a substantial cause of the accident.

(3) Second Department found that the trial court erred by failing to re-instruct the jury before ordering it to reconsider its verdict and remitted the matter to Supreme Court for new trial.

3. Can avoid expense of an entire new trial

a. *Johnson v. Village of Saranac Lake*[131]

(1) Third Department affirmed jury's verdict finding defendant negligent and such negligence a proximate cause of plaintiff's injury.

(2) Jury originally found defendant negligent but did not find this negligence to be a proximate cause of the injury, although it apportioned 60 percent of the fault to defendant. Supreme court found this result to be inconsistent and re-instructed the jury on "substantial cause" and directed the jury to reconsider its verdict.

(3) Appellate division rejected defendant's claim that the second verdict demonstrated confusion, and concluded that the jury's first verdict was the product of an inadvertent mistake and the trial court acted properly by allowing the jury to clarify its verdict.

V. Erroneous Instructions by the Trial Court

A. Court's duty in instructing the jury

1. "A trial court is required to state the law relevant to the particular facts in issue, and a set of instructions that confuses or incompletely conveys the germane legal principles to be applied in a case requires a new trial."[132]
2. Jury confusion may be caused by improper jury instructions or by the contents of the verdict sheets.

B. *Capicchioni v. Morrissey*[133]

1. Court reversed verdict and ordered new trial where the trial court instructed the jury that they must determine whether a party's negligence was "the cause of the accident" and the jury found that defendant was neg-

ligent but that such negligence did not proximately cause plaintiff's injury.

2. Court reversed judgment despite counsel's failure to object to the instructions in question, exercising its discretion to reverse in the interest of justice, since the erroneous instruction "may have had a vital bearing on the close issue of proximate cause"[134] even though the court had originally defined proximate cause as "a cause."[135]

C. *Liebgott v. City of New York*[136]

1. Supreme Court initially told jury that there could be only one proximate cause of the accident and although plaintiff's counsel did not object, the court later corrected the instruction.

2. Appellate division, despite specifically finding that "the court's initial instruction was erroneous,"[137] held that "the defect was cured by the court's entirely proper supplemental instruction regarding this definition in response to a request for clarification from the jury."[138]

3. Court rejected plaintiff's claim that jury was confused, stating that "we are satisfied that any possible confusion was obviated by the remainder of the court's charge and by the supplemental instruction regarding proximate cause" based, in part, on the fact that the jury submitted no further questions to the court after the supplemental instruction.[139]

D. Distinction between *Capicchioni* and *Liebgott*

1. Both involved one incorrect instruction and one correct instruction on proximate cause.

2. Difference was what the last instruction to the jury was before the verdict.

a. In *Capicchioni*, court's original correct instruction was voided by two subsequent incorrect instructions, including one during the jury's deliberations.

b. The court in *Liebgott* cured its original misinstruction with a proper supplemental charge.[140]

VI. Practice Suggestions

A. Instructions must be carefully crafted—

1. Particularly in cases involving issues of comparative negligence, multiple defendants or intervening harms.

2. Work with the trial court to be certain to use the language "a cause" or "a substantial factor" rather than "the cause" or "that cause." Remember you're trying to convey to the jury that an act or omission need not be the only cause of plaintiff's injury, but rather one of the causes of the harm.

3. Examine the verdict sheet.

4. Poll the jury.

B. Cure problems before discharging jury.

Preclusion of Expert Testimony as a Remedy for CPLR 3101(d)(1)(i) Violations

"The rule of CPLR 3101(d) is as clear as the judicial interpretation it has enjoyed."[141]

I. Introduction

A. CPLR 3101(d)(1)(i)

1. Provision requires expert disclosure and gives trial court discretion in remedying a party's failure to make proper disclosure.

2. Duty of expert disclosure:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

a. The rule only arises "[u]pon request"

b. No specific timetable for disclosure

3. Trial court's broad discretion to remedy violations:

> However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just.

a. No definitions of "good cause" or "insufficient period of time"

b. No guidance as to what "orders may be just"

4. Limited exception for certain malpractice actions:

In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

II. Failure to Make Proper Disclosure

A. Insufficient content of disclosure

1. "Reasonable detail"—subject matter, substance of facts and opinions, summary of grounds for opinion

2. No guidance in statute

B. Timing of disclosure

1. CPLR 3101(d)(1)(i) does not create a specific deadline governing expert disclosure (i.e., 30 days, two weeks, etc.), but rather, gives courts latitude where a party has made disclosure an "insufficient period of time" before trial.

2. Aversa v. Taubes[142]

CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information "at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute," unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.[143]

C. Conduct of disclosing party

1. *Maillard v. Maillard*[144]

a. Relatively lenient rule as to those failing to comply with CPLR 3101(d)(1)(i)

b. "In order to invoke the drastic remedy of preclusion, the court must determine that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious."[145]

2. *Vega v. Lapalorcia*[146]

a. Reversed Supreme Court's decision to preclude plaintiff's expert, finding that "plaintiffs did not intentionally or willfully fail to comply with CPLR 3101(d)."[147]

3. Other departments follow the intentional or willful to disclose standard

a. *Downes v. American Monument Co.*[148]

b. *Rushford v. Facteau*[149]

c. *Peck v. Tired Iron Transport, Inc.*[150]

D. Prejudice to party seeking preclusion

1. *Rushford, supra*

Third Department affirmed Supreme Court's refusal to preclude plaintiff's expert, where plaintiff had originally disclosed a different witness, but that witness was unavailable and a different expert witness was substituted at the last minute.

The court found that the failure to disclose was not intentional or willful, and concluded that the opposing party could not have been surprised by the witness' testimony since it was similar to the testimony that would have been offered by the unavailable, previously disclosed witness.

The court found that there was no prejudice suffered by the substitution and declined to disturb the alternative remedial measures fashioned by the Supreme Court.

E. Where both parties have failed to comply with CPLR 3101(d)(1)(i)

1. *Godfrey v. Dunn*[151]

Although defendant did not comply with CPLR 3101(d) in disclosing his medical expert, he was still entitled to have the expert testify since plaintiff also violated the rule by first stating that no experts had been retained and then revealing too late that plaintiff's surgeon would testify.

In addition, plaintiff's counsel admitted that he learned of defendant's medical expert's testimony during a pretrial conference 17 days before trial.

III. Remedies for Disclosure Violations

A. Preclusion of non-disclosed expert from testifying at trial

1. *Corning v. Carlin*[152]

   a. Plaintiff failed to respond to defendant's repeated requests for CPLR 3101(d) disclosure until after opening statements.

   b. No good cause shown for plaintiff's failure to retain an expert witness until eve of trial.

2. Within trial court's discretion

   a. *Marra v. Hensonville Frozen Food Lockers Inc*.[153]

      (1) No preclusion where party waited until ten days before trial, court found that delay was not willful.

   b. *Peck, supra*

      (1) No preclusion where no evidence of willfulness, surprise or prejudice to party seeking preclusion.

B. Effect of preclusion

1. Dismissal of case

   a. *Bauernfeind v. Albany Medical Center Hospital*[154]

      (1) Medical malpractice defendant demanded expert data from plaintiff, plaintiff did not respond for seven years.

      (2) Supreme Court granted defendant's motion to preclude expert and granted defendant's motion for summary judgment.

      (3) Plaintiff could not proceed in medmal action without expert testimony.

C. Alternatives to preclusion

1. *McDermott, supra*

   a. Plaintiff waited three years until the eve of trial to respond to defendant's counsel's requests for expert disclosure.

   b. Plaintiff's failure to disclose expert was found to be neither intentional nor willful.

   c. Court required offending counsel to pay $1,500 to opposing counsel for lack of diligence, to cover fees, rather than precluding expert.

D. Standard applied in reviewing trial court's sanction

1. *Lillis, supra*

   a. Court applied an *abuse of discretion* standard in affirming Supreme Court's decision not to preclude defendants' expert, although the expert was retained one week before trial and was not disclosed until the second day of the trial.

   b. Appellate Division found that defendants' late disclosure was not intentional or willful and that the expert's testimony did not offer any surprises.

IV. Responsibilities of Party Seeking Preclusion

A. Requirements of CPLR 3101(d)(1)(i) only take effect "upon request"

1. Where a party feels that an opponent has made inadequate expert disclosure, the burden is on him or her to object to the allegedly inadequate disclosure prior to trial, or else risk waiving the objection and having the opponent's expert testify at trial.

2. *Qian v. Dugan*[155]

   a. Supreme Court precluded plaintiff's expert witnesses who would have testified as to the value of certain property lost in a fire, as well as the origin and causation of the fire, for which plaintiff sought recovery.

   b. Supreme Court also dismissed the complaint, since the expert testimony was central to plaintiff's case.

   c. Defendant had not moved for preclusion until the day of trial, however, and the Third Department found that "the record reveals that plaintiff received no notice, prior to defendant's in-court motion, that his responses were considered to be inadequate in any respect . . . there is no indication that plaintiff was informed that the sufficiency of his responses, outlining their qualifications and expected testimony, would be questioned."[156]

   d. Based on the importance of the experts' testimony to plaintiff's case, the Third Department called Supreme Court's decision to preclude the testimony "drastic" under the circumstances.[157]

e. Plaintiff given another opportunity to correct the inadequacies in the earlier disclosure within 20 days of the court's decision.

B. Practice commentaries for CPLR 3101(d)(1)(i)

1. Professor Siegel advises practitioners that:

> Sound practice for any party demanding expert data is to follow through on its demand, making sure that the opponent not only responds within a reasonable time, but also with adequate data. The longer the time that passes without a response, the better of course is the defendant's chance to succeed on a preclusion motion. But the absence of a response for a prolonged time should not lead the defendant to assume too much. The view of cases like *Qian* is that the defendant is under an obligation to broach the issues of timeliness and adequacy before the trial.[158]

2. It is also recommended that where the expert for whom the disclosure is allegedly inadequate is indispensable to an opponent's case, a preclusion motion should be made as soon as possible, since an order of preclusion will dispose of the action.[159]

V. Effect of Expert Preclusion on Subsequent Trials

A. Law of the case

1. *Noble v. Cole*[160]

a. Plaintiff's expert precluded for CPLR 3101(d) violation.

b. First trial ended with hung jury, plaintiff sought order before second trial to have expert permitted to testify.

c. Third Department upheld Supreme Court's denial of such order, ruling that original preclusion was the law of the case, even though disclosure would otherwise have been timely before second action.

2. *Ingelston v. Francis*[161]

a. Supreme Court precluded plaintiff's expert and dismissed the case for failure to make out *prima facie* case without the expert's testimony.

b. Third Department affirmed preclusion but reversed the dismissal after finding that plaintiff could establish a *prima facie* case by calling defendant's expert who had examined her at defendant's request.

c. The case was again scheduled for trial. Plaintiff tried to comply with CPLR 3101(d) before trial by giving the required notice regarding her own expert witness. Supreme Court denied defendants' motion to preclude the witness's testimony at the rescheduled trial. The Third Department reversed, holding that original preclusion order was now the law of the case.

B. *Res judicata*

1. *Kalkan v. Nyack Hospital*[162]

a. Plaintiff's expert precluded in first medical malpractice trial prior to any proof being taken at trial, for failure to comply with the court's order regarding disclosure. Thereafter, the court granted defendants' motions to dismiss the complaint.

b. Second Department upheld preclusion and dismissal of case.

c. Plaintiff commenced a second action within the statute of limitations pursuant to CPLR 205(a). Supreme Court granted defendant's motions to dismiss in the second action.

d. Since plaintiff's noncompliance with Supreme Court's order of preclusion in the first action effectively closed plaintiff's proof, the dismissal of the complaint for noncompliance with CPLR 3101(d)(1)(i) was deemed to be on the merits and, therefore, the Second Department held that the second action was barred by *res judicata*.

VI. Withholding name of medical expert

A. General rule

1. Pursuant to CPLR 3101(d)(1)(i) a party in a malpractice action is allowed to withhold the name of their medical expert, but is still required to otherwise comply with disclosure requests.

B. Treating physicians need not be disclosed under CPLR 3101(d)(1)(i)

1. *Rook v. 60 Key Centre*[163]

2. *Krinsky v. Rachleff*[164]

3. *Bonner v. Lee*[165]
4. *Napierski v. Finn*[166]

C. Interplay between CPLR 3101(d) and CPLR 3121(b)
1. *Galdon v. Ring*[167]
a. Redaction of treating physician's name from CPLR 3121 disclosure was "an appropriate accommodation of the competing purposes of broad disclosure under CPLR 3121(b) and protection of the expert's identity under CPLR 3101(d)(1)(i)."[168]

D. Expert's name can be redacted in affidavit submitted in opposition to motion for summary judgment
1. *Carrasquillo v. Rosencrans*[169]
2. *Napierski, supra*[170]

The Preservation Doctrine—Preserving Issues for Judicial Review in the Civil Context

I. Appellate Review: Facts In Record and Issues Raised Below
A. General rule
1. Facts and arguments not raised before a lower court or administrative body will not be considered on appeal.[171] This general rule regarding preservation derives from the very purpose of appellate courts to correct errors arising from lower courts and tribunals.

B. Overview examples
1. For example, a theory of liability or a defense not advanced in the court of original jurisdiction may ordinarily not be advanced on appeal.[172]

C. Parties
1. This rule applies to both plaintiffs/petitioners[173] and defendants/respondents.[174]

D. Application in Appellate Division and Court of Appeals
1. Applies to appeals heard by both the Appellate Division[175] and the Court of Appeals, although it is more stringently applied in the latter due to the scope of its review powers.[176]

E. Range of application
1. In general, the doctrine encompasses a broad range of subject matter.
2. Constitutional arguments must also be properly raised before the trial court or administrative proceeding.[177] It is unclear the extent to which the litigant must object to preserve a constitutional issue, although something more than a general objection appears to be required.[178]
a. Appellate Division—In *In re Pure Air & Water of Chemung County v. Davidsen*,[179] the Third Department would not consider appellant's contention that the Agriculture and Markets Act unconstitutionally took away the common-law right to sue for private nuisance because such contention was not raised in the petition before Supreme Court.
b. Court of Appeals—While the Court of Appeals had previously held in a line of cases that it would review a constitutional question which was first raised in the Appellate Division, if that question was involved in the Appellate Division's decision,[180] it is now settled that unless the constitutional question was properly raised in the court of original jurisdiction, the Court of Appeals will not review the issue or entertain the appeal as of right. It may reach the issue or entertain the appeal upon a grant of leave to appeal.[181]

II. Failure to Preserve
A. Avoid pitfalls
1. During the course of litigation, an attorney must be careful not to inadvertently waive an issue by failing to act at the appropriate time. Such failure may have tremendous consequences on appeal.

B. Assert a defense
1. A defendant who does not plead a defense nor raise it before the trial court may not raise the defense for the first time on appeal. Thus, the Third Department stated in *Connecticut National Bank v. Peach Lake Plaza*,[182] that where defendant failed to plead or raise before trial court the defense of fraudulent inducement, it could not raise the issue on appeal.

C. Object to pleadings
1. A party must likewise raise any objections to the pleadings in the court of original jurisdiction to preserve this issue for review.[183]

D. Object to evidentiary matters

1. In *Stiglianese v. Vallone*,[184] an action against neighbors for private nuisance based on playing loud music, the First Department refused to consider defendants' contention that the trial court erred in considering plaintiff's journal of noise levels where the journal was admitted into evidence without any objection by defendants.[185]

E. Make a specific objection

1. A party that makes only a general objection will often not preserve an issue for appellate review.[186]

F. Object during summation

1. A party must object during the opposing party's summation to preserve the issue for appellate review.[187]

G. Object to jury charge

1. It is incumbent upon a party to request or except to a charge in order to preserve such challenge for appellate review.[188]
2. Such challenge must be made prior to jury deliberations.[189]
3. With specificity—as the Second Department noted in *Nelson v. City of New Rochelle*,[190] a generalized challenge to that part of the charge defining negligence will not suffice to preserve what the trial court should have charged the jury regarding the Vehicle and Traffic Law.

H. Abandonment on appeal

1. A corollary to the preservation rule is that even where a party properly preserves an issue for appellate review, if such party does not brief all issues mentioned in the notice of appeal, such issues may be determined to be abandoned.[191] It is noted, however, that in rare circumstances a failure to appeal will not prevent a non-appealing party from obtaining relief. Thus, the Court of Appeals determined in *Sharrow v. Dick Corp.*[192] that a new trial should be ordered for the non-appealing defendants to afford complete relief to an appealing third-party defendant.
2. Appellate Division—in *Arvantides v. Arvantides*,[193] the Fourth Department found that although defendant's notice of appeal stated that he was appealing from each and every part of the amended judgment, his failure to address any issues other than the valuation of his dental practice was tantamount to abandonment of the remaining issues on appeal.
3. Court of Appeals—The Court may address questions of law raised before the trial court, although not briefed before the intermediate appellate court, as the Court did in *People ex rel. Matthews v. New York State Division of Parole*,[194] when it allowed the Division of Parole to argue that the Executive Law applied in a parole revocation hearing where, although it made such argument before the trial court, it did not make the argument before the Appellate Division.

III. Exceptions to Preservation Doctrine

A. In general

1. As previously discussed, while the preservation doctrine barring appellate review of issues and facts not raised below appears absolute, there are exceptions that permit appellate courts to correct errors in the absence of a timely objection.
2. Initially, it is noted that as the Second Department stated in *Block v. Magee*,[195] where a litigant "alleges no new facts, but rather raises legal arguments which could not have been avoided by the defendants if they had been raised in the Supreme Court," such arguments may be addressed by the Appellate Division.[196] Other ways to avoid waiver are as follows:

B. Interest of justice

1. With respect to the Appellate Division, the court may reach an unpreserved issue in the interest of justice which involves a fundamental error in the trial court.
   a. Example: in *In re Michael RR (Commissioner of Mental Health)*,[197] the Third Department determined that it would review an unpreserved challenge as to whether the trial court improperly charged the jury that petitioner must establish its case by clear and convincing evidence, rather than by a preponderance of the evidence. In determining that it would reach the issue, the court stated that "the error is of such fundamental magnitude to warrant . . . intervention and reversal."[198]
2. Although the Court of Appeals may not address unpreserved issues in the interest of justice,[199] it may address a question of law

raised for the first time which could not have been "cured by factual showings or legal counterstops" and it is conclusively demonstrated that a party had no case in the trial court.[200]

3. It is noted that in proceedings pursuant to CPLR article 78, judicial review is limited to issues of law and, thus, issues may not be reached in the interest of justice.[201]

C. *Sua sponte*

1. In instances where public policy matters are concerned, a court may correct an error *sua sponte*. Thus, the Court of Appeals stated in *In re Niagara Wheatfield Administrators Association v. Niagara Wheatfield Central School District*[202] that "[w]here a contract provision is arguably void as against public policy, that issue may be raised for the first time at the Appellate Division, by a party, or by the court on its own motion."

D. Statutory construction

1. Review may be had where the issue was not raised below when it is a question of statutory interpretation. Thus, the Court of Appeals stated in *In re Richardson v. Fiedler Roofing*[203] that an employer's claim for the first time on appeal that a claimant is excluded from workers' compensation coverage when he engages in illegal activity was properly reviewable as it raised solely a question of statutory interpretation.[204]

E. Subject matter jurisdiction

1. It is equally well recognized that the jurisdiction of a court to hear a particular matter is always subject to challenge, may be raised at any time and may not be waived.[205]

IV. Preparing and Preserving the Record

A. General rule

1. Anticipate an appeal from the outset—from the perspective of both appellant and respondent.

2. Analyze the factual and legal issues confronting you.

3. Determine potential successful theories and marshal the facts necessary to prevail on such theories.

B. Develop record from the pleadings and throughout litigation

1. Place in the record the necessary facts and assert the legal predicates in order to prevail.

2. Be cognizant that absent an argument in the record or the facts supporting same, appellate relief may be unavailable.

3. Issues will be considered on appeal, however, where raised although not ruled upon.[206]

4. It is equally important to make a record on motions. The First Department in *Gintell v. Coleman*[207] dismissed defendant's appeal of an order where he failed to make a proper record to allow for review of the order.[208]

5. Do not rely on oral argument to preserve an issue.[209]

C. Tactics for appellate counsel

1. Appellate counsel must be prepared to seek review of issues on an inadequate record and the following steps may be helpful:

a. Consider issues appearing in the record and not just those raised and argued at trial.

b. Demonstrate that a particular legal argument can be resolved on the *existing* record. As previously mentioned, the matter may then be heard by an appellate court if it is one which could not have been countered or obviated had it been raised in the trial court.[210]

The Doctrine of Spoliation

I. Introduction

A. Expansion of the doctrine of spoliation

1. The First Department's decision in *Kirkland v. New York City Housing Authority*[211] expanded New York law regarding the availability and scope of sanctions for spoliation. Prior to *Kirkland*, spoliation had to be willful or contumacious before dismissal of an action could be granted as a sanction. Today, the sanctions of dismissing a claim or granting summary judgment are appropriate when a litigant disposes of evidence before an adversary has an opportunity to inspect it, even if the litigant's actions were negligent rather than intentional. The change in the law has generated a substantial increase in motion practice due to the lower threshold for winning sanctions. Further, the increased availability of such sanctions, including dismissal of claims, has affected not only parties, but their attorneys, insurers and experts who all face expanded financial responsibility for the inadvertent loss of evidence.

II. CPLR 3126

A. The sanctions for nondisclosure are provided by CPLR 3126, which reads as follows:

1. If any party, or a person who at the time a deposition is taken or an examination or inspection is made, is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

a. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

b. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

c. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

2. CPLR 3126 provides trial courts with broad discretion to determine when and to what extent a discovery sanction should be imposed, and such determination must remain undisturbed unless there is a showing of a clear abuse of discretion.[212]

B. Examples of sanctions

1. Resolving the issue(s) based on the nondisclosed evidence against the offending party.[213]

2. Prohibiting the offending party from supporting its claims or defenses by use of the undisclosed evidence.

3. Striking a party's pleadings.[214]

4. CPLR 3126 authorizes additional penalties for nondisclosure pursuant to court's power to issue "such orders . . . as are just":

a. an instruction directing that the jury may draw an adverse inference based on the offending party's failure to disclose;[215]

b. awarding counsel's fees to the prejudiced party;[216]

c. and, under certain circumstances, summary judgment.[217]

III. Spoliation Defined

A. Expansion of the original definition

1. Spoliation is the destruction of evidence.[218] Originally defined as the intentional destruction of evidence arising out of a party's bad faith,[219] the law concerning spoliation has been extended to include the non-intentional or negligent destruction of evidence.[220]

2. The First Department held in *Kirkland*[221] that "[u]nder New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence . . . before the adversary has an opportunity to inspect them."[222] In so holding, the court recognized a trend towards the expansion of sanctions for inadvertent loss of evidence and stated that "such physical evidence often is the most eloquent impartial 'witness' to what really occurred, and further recognize[d] the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission."[223]

3. Third Department—in *Abar v. Freightliner Corp.*,[224] Supreme Court dismissed the third-party complaint against Abar's employer by the manufacturer of a grab rail assembly which had given way as plaintiff hoisted himself up to enter the cab of his truck, causing him to fall and sustain serious back injuries. Plaintiff and his wife commenced a strict liability action against the manufacturer of the assembly which, in turn, initiated a third-party action against plaintiff's employer. At the conclusion of the trial, Supreme Court dismissed the third-party

complaint and the jury returned a verdict for plaintiffs. On appeal defendant argued, *inter alia*, that Supreme Court erred in not striking the testimony of plaintiffs' expert or, alternatively, providing the jury with a spoliation charge based upon the plaintiff's expert's testimony that he observed broken bolts in the grab rail assembly, however, had not preserved them as evidence. Noting that "sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence . . . before his or her adversary had an opportunity to inspect them,"[225] the Third Department held that Supreme Court did not abuse its discretion by denying defendant's request.

The court found that plaintiffs never had possession of the truck or the bolts, and that "there [was] no evidence that plaintiffs' attorneys intentionally misled defendant's attorneys by indicating that they had possession of the broken bolts when, in fact, they did not."[226]

IV. Present Day Spoliation Motion

A. The spoliation motion

1. Recently, parties have begun to deal with an adversary's loss or destruction of evidence by means of a so-called "spoliation motion."[227]

2. The spoliation motion seeks summary judgment against a party who destroys or loses evidence, intentionally or negligently, while having actual or constructive notice of its importance to the litigation.[228]

3. This motion is founded upon the concept that once litigation is foreseeable, a duty arises to protect evidentiary materials.[229]

4. The present day spoliation motion has been viewed as separate and distinct from the traditional CPLR 3126 discovery motion. As stated by the Second Department in *DiDomenico*:

> Separate and apart from CPLR 3126 sanctions is the evolving rule that a spoliator of key physical evidence is properly punished by the striking of its pleading. This sanction has been applied even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation.[230]

B. What must be shown in order to obtain sanctions

1. CPLR 3126 requires a showing that a party willfully or contumaciously failed to disclose or destroyed evidence. Along these same lines, courts have held that the most drastic sanctions of preclusion[231] and striking of pleadings[232] will be imposed only upon a showing of such willful or contumacious conduct.[233]

2. Therefore, the express language of CPLR 3126 does not appear to apply to situations where (1) the spoliation did not occur during the course of the litigation, or (2) where the spoliation was not the result of willful conduct.[234]

3. Such application, however, would clearly be inadequate to remedy the prejudice to a party resulting from the negligent loss of crucial evidence that occurred before litigation had begun.[235]

4. In order to guard against such injustice, courts have expanded remedies for spoliation to include sanctions for less-than-willful spoliation[236] and in situations where the spoliation occurred prior to the commencement of the action.[237]

C. Treatment of the spoliation motion

1. When confronted with a spoliation motion to strike pleadings and for summary judgment, courts measure the conduct of the party alleged to have failed in its duty to preserve evidence, as against any resulting prejudice.[238]

2. Summary judgment, as opposed to some lesser sanction, is only imposed when necessary "as a matter of elementary fairness."[239]

V. The Four Departments

A. First Department

1. As discussed earlier, the First Department in *Kirkland* granted summary judgment as a sanction for a party's negligent loss of evidence.[240] Later, in *Squitieri v. City of New York*,[241] the court expanded upon its decision in *Kirkland*.

2. *Squitieri v. City of New York*

a. In *Squitieri*, plaintiff, a city sanitation worker, was overcome by carbon monoxide fumes while operating a street sweeper. Rendered unconscious, he sustained serious chronic physical and psychological injuries. In 1985, plaintiff commenced an action against defendant, who in turn, in 1993, brought a third-party action against the manufacturer and distributor of the street sweeper. Defendant disposed of the sweeper before it commenced the third-party action, but after it was the subject of pending litigation. Third-party defendants brought a motion for summary judgment, seeking dismissal of defendant's complaint on the ground that defendant's spoliation of evidence had severely impaired their ability to present a defense. Supreme Court denied the motion. On appeal, the First Department reversed holding that:

(1) "Spoliation sanctions . . . are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense."[242]

b. Note: In *Squitieri*, the court applied sanctions against the third-party plaintiff for negligent spoliation occurring *prior* to the commencement of the third-party action.

B. Second Department

1. The Second Department agrees that a sanction may be applied even if the destruction of evidence occurred through negligence rather than willfulness.[243] In addition, the court has also applied sanctions against a spoliator prior to the commencement of an action. As recently stated by that court "[t]he sanction of striking a pleading may be applied 'even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation.'"[244]

C. Third Department

1. The Third Department has recently clearly expressed the view that sanctions are appropriate for negligent spoliation.

2. In *Cummings v. Central Tractor Farm & County*,[245] the court held that although "sanctions are appropriate when 'a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence' . . . courts have also upheld the imposition of such sanctions in cases where a litigant 'negligently disposes of crucial items of evidence involved in an accident before his or her adversary had an opportunity to inspect them.'"[246] Further, the court stated that the sanction of dismissal and summary judgment imposed by Supreme Court was "necessary as a matter of elementary fairness."[247]

D. Fourth Department

1. The Fourth Department, while appearing to refuse to impose sanctions "in the absence of pending litigation or notice of a specific claim"[248] has nevertheless, indicated that summary judgment may be an appropriate sanction when a party has negligently destroyed or lost evidence if such spoliation occurred after the spoliator received notice of the claim or an action was commenced.[249]

VI. Additional Factors in Determining a Spoliation Motion

A. "Elementary fairness"

1. The spoliation motion is based on the concept of "elementary fairness" and as such, the keys to such motions flow from that concept.

2. The alleged spoliator must be shown to be the party that was in fact responsible for the loss or destruction of the evidence.[250] In particular, absent some evidence in the record, a court will not presume that a party was responsible for the spoliation or, more importantly, that the evidence was discarded in an effort to frustrate discovery.[251]

3. The spoliation of evidence must result in prejudice to the adversary. Such prejudice typically includes a party not being able to prove its claim or defense,[252] or the spoliator gaining an unfair advantage as a result of the missing evidence.[253] In other words, the mere fact that some evidence was intentionally or negligently lost or destroyed will not in and of itself suffice, instead, the evidence must be shown to have been crucial to the determination of a key issue.[254]

4. Finally, it appears that some courts have held that a spoliator may have a defense to

intentional and negligent spoliation when evidence is discarded in good faith and pursuant to normal business practices when no litigation was pending.[255]

VII. Practical Steps for Avoiding the Spoliation of Evidence

A. If you are not in control of the evidence that requires preservation:

1. immediately communicate to your opponent that the evidence should be preserved;
2. formally request an opportunity to test, inspect, view, photograph, etc., the evidence;
3. if necessary, use the courts, through discovery motions, as a tool for securing your right to examine evidence; and
4. if the evidence has already been destroyed, make the appropriate motion if applicable.

B. If you are in control of the evidence that may require preservation:

1. ensure that the evidence is preserved by being aware of who possesses it, how it is being stored and what is being done to it;
2. make sure that you communicate to the client that it has a duty to preserve the evidence;
3. ensure that the evidence is not destroyed or altered while being tested, examined, etc., and document all testing and handling of the evidence; and
4. keep a written log or policy on how the evidence is to be handled and by whom.

What Constitutes "Good Cause" Pursuant to CPLR 3212(a)

I. Introduction

A. 1997 Amendment of CPLR 3212(a)

1. In 1997, the Legislature amended CPLR 3212(a)[256] and established an outside time limit for making a motion for summary judgment. CPLR 3212(a) provides that a court can set a deadline for summary judgment motions. However, if that is not done, such motions "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of the court on good cause shown."[257] Previously, the only time limit on these motions was that they could not be made prior to the joinder of issue, a limit still found in CPLR 3212(a).[258]
2. The amendment was a remedial measure designed to eliminate the practice of filing summary judgment motions on the eve of trial "in an attempt to delay a case or to secure transfer of the case to a different judge for trial," a practice which "disrupt[ed] court calendars" and was "inequitable to the party served with a belated . . . motion," since that party "may already have spent time and money preparing for trial."[259]
3. An important component of CPLR 3212(a) is that it enables courts to set their own rules requiring even earlier deadlines. In fact, courts may, and routinely do, set a time limit for summary judgment that can be as early as 30 days after the filing of the note of issue.[260]

II. Good Cause

A. What constitutes good cause?

1. The Court of Appeals has stated that "[a] trial court . . . has discretion in determining whether to consider a motion for summary judgment made more than 120 days after the filing of the note of issue" on "good cause shown."[261]
2. Trial courts are afforded wide latitude in finding good cause.[262]
3. In *Gonzalez*, the Court of Appeals did not define what constitutes good cause. Instead, the Court undertook a fact-specific analysis of the reasons for defendant's delay in filing the motion and concluded that such facts demonstrated good cause.[263]
4. The majority of the decisions from all four departments, relevant to the issue of good cause under CPLR 3212(a), also set forth the facts of a particular case and proceed to conclude that either good cause did or did not exist to permit the late filing.[264]
5. This approach demonstrates that determinations of good cause are necessarily made on a case-by-case basis. Some commentators have opined that this reflects a flexible attitude employed by the courts with regard to forgiving lateness.[265]

B. Third Department

1. In *Rossi v. Arnot Medical Center*,[266] the Third Department held that a court "may exercise its authority to lengthen the time in which to move for summary judgment where . . . it decides to entertain a belated but meritorious motion in the interest of judicial econo-

my and the opposing party has not manifested any prejudice."[267]

2. In *La Hendro v. Nadeau*,[268] the Third Department utilized a somewhat different analysis to affirm the Supreme Court's finding that a defendant demonstrated good cause so as to permit the late filing of a motion for summary judgment.
    a. The court, for the first time, included in its analysis of good cause a review of the moving party's excuse for the delay in the filing.
3. In *La Duke v. Albany Motel Enterprises*,[269] the court also examined the moving party's excuse for seeking the belated motion.
    a. In *La Duke*, the court affirmed the Supreme Court's finding of good cause for a late proffered summary judgment motion holding that "defendants moved for summary judgment only a few days beyond the 120-day period specified in CPLR 3212(a) and provided a reasonable explanation for the delay, and in the absence of any showing of prejudice to plaintiffs, we conclude that Supreme Court did not abuse its discretion."[270]
4. In *Slate v. State of New York*,[271] the court held that "[g]ood cause to entertain a belated motion for summary judgment may be established by demonstrating (1) a reasonable excuse for the delay . . . (2) arguable merit to the motion . . . and (3) the absence of prejudice."[272]
5. The parameters set forth in *Slate* for determining good cause merge the analysis employed by the court in the *Rossi*, *La Hendro* and *La Duke* decisions. In particular, it should be noted that the Third Department requires "arguable merit" with regard to the belated motion, thereby suggesting that "good cause" to entertain a late motion must first be decided before addressing the substantive merits of said motion.

C. First Department
1. The First Department, without setting forth any specific test for determining good cause, generally determines that issue on a case-by-case basis after examining the moving party's excuse for the delay in filing[273] and whether there is prejudice to the non-moving party.[274]
2. An exception appears to be *Keeley v. Berley Realty Corp.*,[275] where the extent of the party's delay in making the motion was the key consideration.
3. In *Milne*, *supra*, however, the First Department found that defendant's CPLR 3212 motion "masquerading as one brought pursuant to CPLR 3211" should not have been dismissed by application of the 120-day time limit since it was clearly meritorious in disposing of the underlying issue, namely that plaintiff failed to establish, *prima facie*, that she sustained the required serious injury under the no-fault law. Therefore, it appears that the First Department by the *Milne* decision, at least suggests that the interests of judicial economy may trump the requirement that the moving party present an excuse for a belated CPLR 3212 motion.

D. Second Department
1. The Second Department has held that courts are "afforded latitude in determining whether good cause exists for permitting late motions for summary judgment, and [courts] may entertain belated but meritorious motions in the interest of judicial economy where the opposing party fails to demonstrate prejudice."[276] Furthermore, the court's analysis in the establishment of good cause appears to center upon the merits of the CPLR 3212 motion.
2. In *Maravalli v. Home Depot U.S.A.*,[277] the Second Department held, without analysis of defendant's excuse for the delay or potential prejudice to plaintiff, that "the mere fact that a summary judgment motion is made on the eve of trial is not in and of itself sufficient reason for denying the motion, especially in a case such as this where the motion is so clearly meritorious."[278]
3. Even in cases where the Second Department has included as part of its good cause analysis the reasons for a party's late filing, the court's focus still revolved around the merits of the summary judgment motion.[279]
4. Conversely, where the court has held that a party seeking to file a late motion pursuant to CPLR 3212(a) did not establish good cause because the party failed to offer an excuse for the delay, those parties were also

found not to have established entitlement to summary judgment as a matter of law.[280]

E. Fourth Department

1. A review of Fourth Department decisions[281] appears to indicate that the court requires some reasonable excuse for the delay in filing the motion in order to constitute good cause and entertain the belated motion.

2. As, for example in *Di Fusco*, defendant sought leave to make a summary judgment motion more than 120 days after the filing of the note of issue and in support of said request stated only that the delay in making the motion had "simply to do with the demands of other matters" being handled by counsel.[282] The Fourth Department reversed the Supreme Court which granted defendant's motion, holding that the Supreme Court had abused its discretion because "[a]ccepting the excuse proffered in this case . . . would be tantamount to having no rule at all."[283] Thus, it appears that the Fourth Department requires some excuse for the delay in filing in order to constitute good cause.

Disclosure of Surveillance Videos

I. Introduction

A. Surveillance videos

1. A strategy of defendants, who suspect that a personal injury plaintiff may be feigning or exaggerating an injury, is to make a surveillance video of the plaintiff carrying on various activities, hoping through this graphic evidence to prove that a plaintiff's injuries aren't as he or she has claimed. In the early 1990s, surveillance tapes became so commonly embroiled in tort cases that courts were routinely called upon to regulate their disclosure. Prior to 1992, the CPLR contained no explicit provision for pretrial discovery of videotape evidence and in fact, there was a spilt in the departments as to which section or sections of the CPLR properly governed such discovery.

2. In 1992, the Court of Appeals in *Di Michel v. South Buffalo Railway Co.*,[284] was called upon to resolve the issue of whether a plaintiff was entitled to discovery of surveillance tapes. The Court held that surveillance videotapes should be treated as "material prepared in anticipation of litigation and as such, are subject to a qualified privilege that can be overcome only by a factual showing of substantial need and undue hardship."[285] Plaintiffs could obtain pretrial disclosure of the videotapes, but only after defendants were allowed to depose plaintiffs.[286]

3. Subsequently, in 1993, the Legislature enacted CPLR 3101(i), which provides as follows:

> In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials complied for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officers law.[287]

4. CPLR 3101(i) not only codified *Di Michel*, but also expanded the decision. CPLR 3101(i) establishes an absolute right of parties to discover videotapes, as well as audiotapes, photographs and related written transcripts.

5. CPLR 3101(i) is, however, silent as to whether a defendant is entitled to depose a plaintiff before releasing videotapes taken of the plaintiff as promulgated in *Di Michel*.

II. Fourth Department—*Di Nardo v. Koronowski*[288]

A. Five years after the Legislature enacted CPLR 3101(i), the Fourth Department in *Di Nardo v. Koronowski* was the first of the appellate departments to be confronted with the question of what affect, if any, the new statute had upon the *Di Michel* deposition timing rule.

1. Reversing the trial court, the court unanimously found that the Legislature enacted CPLR 3101(i) specifically to further a liberal disclosure policy by requiring that surveillance tapes be provided on demand, no matter when such demand is made. Noting that the statute was silent concerning the timing of disclosure, the court determined that the qualified exemption created by the Court of Appeals in *Di Michel*, allowing

defendants to withhold surveillance materials until after a plaintiff's deposition, was eliminated by the new statute.[289]

III. Third Department—*Rotundi v. Massachusetts Mutual Life Insurance Co.*[290]

A. Last year, the Third Department, in *Rotundi v. Massachusetts Mutual Life Insurance Co.* adopted the holding of *Di Nardo* and held that surveillance videos are covered by CPLR 3101(i) and are discoverable upon demand pursuant to CPLR 3120(a).[291]

1. Thus, after *Rotundi*, both the Third and Fourth Departments now hold, in light of the enactment of CPLR 3101(i), that the common-law timing limitation first promulgated by the Court of Appeals in *Di Michel* is no longer applicable to restrict the disclosure of surveillance videos.

IV. Second Department—*Hawkins v. Lucier*[292]

A. The Second Department's decision in *Hawkins v. Lucier* references CPLR 3101(i) and holds that "plaintiffs have an unqualified right to disclosure of videotapes," but in support of this conclusion the court cites to the Court of Appeals decision in *Di Michel*, which held that, pursuant to CPLR 3101(d)(2), a plaintiff has a qualified right to surveillance materials, i.e., only after plaintiff has been deposed.[293]

1. Moreover, the Second Department in its decision, after stating that plaintiff had an unqualified right to the tapes, went on to review the merits of defendant's request that plaintiff submit to a third examination before trial.

2. Although the court agreed with Supreme Court that defendant was not entitled to depose plaintiff again, it is unclear from the decision whether such holding was based on CPLR 3101(i) affording plaintiff an unqualified right to disclosure of surveillance materials, or, because the court found that defendant had failed to make "a detailed showing that the injured plaintiff's prior testimony was inadequate to cover issues raised by the surveillance tapes . . . in order to justify an additional examination before trial."[294]

V. First Department—*Noble v. Ackerman*[295]

A. Has acknowledged that CPLR 3101(i) now governs the discovery of surveillance videotapes,[296] however, has not yet directly addressed the issue of whether the common-law timing limitation set forth in *Di Michel*, is still applicable.

Endnotes

1. Insurance Law § 5101 *et seq.*
2. *Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 299, 727 N.Y.S.2d 378 (2001).
3. *Oberly v. Bangs Ambulance Inc.*, 271 A.D.2d 135, 137, 710 N.Y.S.2d 676 (3d Dep't 2000), *aff'd*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001).
4. *Id.* at 137 (citations omitted).
5. *Blanchard v. Wilcox*, 283 A.D.2d 821, 823, 725 N.Y.S.2d 433 (3d Dep't 2001) (plaintiff's evidentiary submissions in opposition lacking competent medical evidence based on objective findings and diagnostic tests, were insufficient to create a triable factual issue that he sustained a significant limitation of use of a body function or system).
6. 283 A.D.2d 798, 725 N.Y.S.2d 430 (3d Dep't 2001).
7. *Hines v. Capital Dist. Transp. Auth.*, 280 A.D.2d 768, 771, 719 N.Y.S.2d 777 (3d Dep't 2001).
8. *See Blanchard, supra*.
9. S*ee Gaddy v. Eyler*, 79 N.Y.2d 955, 956-957, 582 N.Y.S.2d 990 (1992); *Sorriento v. Daddario*, 282 A.D.2d 957, 724 N.Y.S.2d 957 (3d Dep't 2001).
10. *See Grossman v. Wright*, 268 A.D.2d 79, 83-84, 707 N.Y.S.2d 233 (2d Dep't 2000).
11. *Sorriento*, *supra*, quoting *Eisen v. Walter & Samuels*, 215 A.D.2d 149, 150, 626 N.Y.S.2d 109 (1st Dep't 1995) (citation omitted); *see Tankersley v. Szesnat*, 235 A.D.2d 1010, 1012, 653 N.Y.S.2d 184 (3d Dep't 1997).
12. *Grossman*, *supra*, at 84 (2d Dep't 2000) (citations omitted).
13. *See id.* at 85; CPLR 2106.
14. *Noble v. Ackerman*, 252 A.D.2d 392, 395, 675 N.Y.S.2d 86 (1st Dep't 1998); *see Lesser v. Smart Cab Corp.*, 283 A.D.2d 273, 724 N.Y.S.2d 412 (1st Dep't 2001) (serious injury threshold satisfied where MRI of plaintiff's spine revealed two herniated discs, supporting plaintiff's claim of extreme pain following the accident, together with his physician's testimony that the injury was permanent, despite testimony from defendant's orthopedic surgeon, who did not review the MRI and dismissed plaintiff's complaints of pain as subjective).
15. *See Phillips v. Tissotvanpatot*, 280 A.D.2d 735, 720 N.Y.S.2d 274 (3d Dep't 2001); *Hines v. Capital Dist. Transp. Auth.*, 280 A.D.2d 768, 719 N.Y.S.2d 777 (3d Dep't 2001); *Pierre v. Nanton*, 279 A.D.2d 621, 719 N.Y.S.2d 706 (2d Dep't 2001); *Hicklin v. LaDuca*, 277 A.D.2d 966, 715 N.Y.S.2d 826 (4th Dep't 2000); *Sulimanoff v. Ash Trans. Corp.*, 259 A.D.2d 415, 786 N.Y.S.2d 146 (1st Dep't 1999).
16. *See Gillick v. Knightes*, 279 A.D.2d 752, 753, 719 N.Y.S.2d 335 (3d Dep't 2001); *Brown v. Wagg*, 280 A.D.2d 891, 720 N.Y.S.2d 684 (4th Dep't 2001), *leave denied,* 96 N.Y.2d 711, 727 N.Y.S.2d 627 (2001).
17. *Wiley v. Bednar*, 261 A.D.2d 679, 680, 689 N.Y.S.2d 550 (3d Dep't 1999); *see Gaddy v. Eyler*, 167 A.D.2d 67, 570 N.Y.S.2d 853 (3d Dep't 1991), *aff'd*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992).
18. *See Risbrook v. Coronamos Cab Corp.*, 244 A.D.2d 397, 664 N.Y.S.2d 75 (2d Dep't 1997) (plaintiff's cervical and thoracolumbar spine injuries which resulted in a substantial limitation of motion of her neck and back quantified using objective findings, including a straight-leg-raising test result, and an examination which also revealed a "measurable limitation" of movement of the lumbar spine (defined as flexion and extension at 45%).
19. *Dugan v. Sprung*, 280 A.D.2d 736, 738, 720 N.Y.S.2d 276 (3d Dep't 2001) quoting *Cowley v. Crocker*, 186 A.D.2d 939, 940, 589 N.Y.S.2d 119 (3d Dep't 1992) (citation omitted), *leave denied,* 81 N.Y.2d 703, 595 N.Y.S.2d 398 (1993)).
20. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).
21. S*ee Delpilar v. Browne*, 282 A.D.2d 647, 723 N.Y.S.2d 241 (2d Dep't 2001); *see also Goldin v. Lee*, 275 A.D.2d 341, 712 N.Y.S.2d 154 (2d

Dep't 2000) (plaintiff's physician could not rely on the unsworn magnetic resonance imaging (MRI) reports prepared by another doctor).

22. *See Graham v. Shuttle Bay*, 281 A.D.2d 377, 722 N.Y.S.2d 541 (1st Dep't 2001).
23. *See Pantalone v. Goodman*, 281 A.D.2d 790, 791, 722 N.Y.S.2d 291 (3d Dep't 2001); *Blanchard v. Wilcox*, *supra*; *Barbarulo v. Allery*, 271 A.D.2d 897, 899-900, 707 N.Y.S.2d 268 (3d Dep't 2000); *Bushman v. Di Carlo*, 268 A.D.2d 920, 923, 702 N.Y.S.2d 426 (3d Dep't 2000), *leave denied,* 94 N.Y.2d 764, 708 N.Y.S.2d 53 (2000).
24. 280 A.D.2d 736, 720 N.Y.S.2d 276 (3d Dep't 2001).
25. *Id.* at 737 (citation omitted).
26. 285 A.D.2d 676, 725 N.Y.S.2d 453 (3d Dep't 2001).
27. *Id.* at 4 (citations omitted).
28. *See Gjelaj v. Ludde*, 281 A.D.2d 811, 721 N.Y.S.2d 643 (1st Dep't 2001).
29. 271 A.D.2d 724, 706 N.Y.S.2d 201 (3d Dep't 2000).
30. *Id.* at 725-726.
31. *See Hines v. Capital Dist. Transp. Auth.*, 280 A.D.2d 768, 719 N.Y.S.2d 777 (3d Dep't 2001).
32. *See Asta v. Eivers*, 280 A.D.2d 565, 720 N.Y.S.2d 563 (2d Dep't 2001).
33. *Guzman v. Michael Mgt.*, 266 A.D.2d 508, 509, 698 N.Y.S.2d 719 (2d Dep't 1999) (quoting *Noble v. Ackerman*, 252 A.D.2d 392, 394, 675 N.Y.S.2d 86 (1st Dep't 1998)); *see also Rose v. Furgerson*, 281 A.D.2d 857, 721 N.Y.S.2d 873 (3d Dep't 2001); *Pierre*, *supra*.
34. *See Asta, supra*; *Heath v. Allerton*, 279 A.D.2d 872, 874, 718 N.Y.S.2d 901 (3d Dep't 2001); *see also Anderson v. Persell*, 272 A.D.2d 733, 735, 708 N.Y.S.2d 499 (3d Dep't 2000).
35. *Bennett v. Reed*, 263 A.D.2d 800, 801, 693 N.Y.S.2d 738 (3d Dep't 1999); *see Pantalone v. Goodman*, 281 A.D.2d 790, 792, 722 N.Y.S.2d 291 (3d Dep't 2001).
36. *Pantalone,* 281 A.D.2d at 792.
37. *Cuffy v. City of N.Y.*, 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372 (1987) (citation omitted).
38. *Id*.
39. *Id.* at 261.
40. 279 A.D.2d 232, 720 N.Y.S.2d 214 (3d Dep't 2001).
41. *Id.* at 236.
42. *Id*.
43. 281 A.D.2d 233, 721 N.Y.S.2d 651 (1st Dep't 2001).
44. 249 A.D.2d 513, 672 N.Y.S.2d 122 (2d Dep't 1998).
45. *See Sachanowski v. Wyoming County Sheriff's Dep't,* 244 A.D.2d 908, 665 N.Y.S.2d 197 (4th Dep't 1997), *leave denied,* 92 N.Y.2d 801, 677 N.Y.S.2d 71 (1997).
46. 91 N.Y.2d 198, 668 N.Y.S.2d 542 (1997).
47. 74 N.Y.2d 251, 544 N.Y.S.2d 995 (1989).
48. *Id.* at 259.
49. *Id.* at 260.
50. *See Mastroianni*, *supra*; *see also Tarnaras v. County of Nassau*, 264 A.D.2d 390, 694 N.Y.S.2d 413 (2d Dep't 1999).
51. *See Dickerson v. City of N.Y.,* 258 A.D.2d 433, 684 N.Y.S.2d 584 (2d Dep't 1999), *leave denied,* 93 N.Y.2d 811, 700 N.Y.S.2d 429 (1994); *see also Bain v. New York City Bd. of Educ.*, 268 A.D.2d 451, 702 N.Y.S.2d 334 (2d Dep't 2000).
52. *See Bernardo v. City of Mount Vernon*, 259 A.D.2d 574, 686 N.Y.S.2d 498 (2d Dep't 1999).
53. *McEnaney v. State of N.Y.,* 267 A.D.2d 748, 754, 700 N.Y.S.2d 258 (3d Dep't 1999) (claimant shot and injured while attempting to subdue an armed intruder who was holding students hostage in a college classroom).
54. *See Sachanowski*, *supra*.
55. See *Mastroianni, supra; Tarnaras, supra*.
56. 268 A.D.2d 546, 702 N.Y.S.2d 371 (2d Dep't 2000), *leave denied*, 95 N.Y.2d 759, 714 N.Y.S.2d 709 (2d Dep't 2000).
57. *Kircher*, *supra*.
58. *Id.*
59. 231 A.D.2d 889, 647 N.Y.S.2d 315 (1996).
60. 277 A.D.2d 877, 715 N.Y.S.2d 781 (4th Dep't 2000).
61. 230 A.D.2d 603, 645 N.Y.S.2d 797 (1996).
62. *See Tarnaras*, *supra*.
63. *Bragg v. Genesee County Agric. Soc'y*, 84 N.Y.2d 544, 551-552, 620 N.Y.S.2d 322 (1994).
64. *Ferres v. City of New Rochelle*, 68 N.Y.2d 446, 453, 510 N.Y.S.2d 57 (1986).
65. *Walters v. County of Rensselaer*, 282 A.D. 944, 945, 724 N.Y.S.2d 97, 98-99 (3d Dep't 2001) (plaintiff, who was engaged in fishing, fell after stepping into a hole within the right-of-way of a public highway established and maintained by the municipality).
66. 74 N.Y.2d 39, 544 N.Y.S.2d 308 (1989).
67. 88 N.Y.2d 656, 649 N.Y.S.2d 359 (1996).
68. *Id.* at 662.
69. *Id.* at 664.
70. 165 A.D.2d 121, 566 N.Y.S.2d 227 (1st Dep't 1991), *leave denied*, 78 N.Y.2d 856, 574 N.Y.S.2d 937 (1991).
71. 254 A.D.2d 802, 677 N.Y.S.2d 853 (4th Dep't 1998), *leave denied*, 92 N.Y.2d 817, 684 N.Y.S.2d 488 (1998).
72. *Id.* at 803.
73. 181 A.D.2d 720, 581 N.Y.S.2d 366 (2d Dep't 1992).
74. 163 A.D.2d 502, 557 N.Y.S.2d 956 (2d Dep't 1990), *leave denied*, 78 N.Y.2d 862, 578 N.Y.S.2d 877 (1991),
75. *Id.* at 504.
76. 189 A.D.2d 954, 592 N.Y.S.2d 496 (3d Dep't 1983).
77. 190 A.D.2d 923, 593 N.Y.S.2d 609 (3d Dep't 1993).
78. *Id.* at 924.
79. 278 A.D.2d 576, 718 N.Y.S.2d 415 (3d Dep't 2000).
80. 201 A.D.2d 441, 607 N.Y.S.2d 384 (2d Dep't 1994).
81. 261 A.D.2d 922, 689 N.Y.S.2d 833 (4th Dep't 1999), *leave denied*, 94 N.Y.2d 759, 705 N.Y.S.2d 6 (2000).
82. 237 A.D.2d 342, 670 N.Y.S.2d 778 (2d Dep't 1997).
83. 249 A.D.2d 44, 671 N.Y.S.2d 72 (1st Dep't, 1998).
84. *See Terry v. Young Men's Hebrew Assn. of Washington Hgts.*, 168 A.D.2d 399, 400, 563 N.Y.S.2d 408 (1st Dep't 1990), *aff'd on other grounds,* 78 N.Y.2d 978, 574 N.Y.S.2d 935 (1990).
85. *See Cruz*, *supra*, at 45.
86. 270 A.D.2d 888, 705 N.Y.S.2d 153 (4th Dep't 2000).
87. *Id.* at 888.
88. 256 A.D.2d 507, 683 N.Y.S.2d 548 (2d Dep't 1998).
89. 250 A.D.2d 298, 301, 682 N.Y.S.2d 708 (1998).
90. *Id.* at 301.
91. 87 N.Y.2d 938, 641 N.Y.S.2d 221 (1996).
92. *Id.* at 939 (citations omitted).
93. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49 (1993).
94. *See Rissel v. Nornew Energy Supply, Inc.*, 281 A.D.2d 880, 722 N.Y.S.2d 643 (4th Dep't 2001); *Daley v. City of N.Y. Metro. Transp., Auth.*, 277 A.D.2d 88, 716 N.Y.S.2d 50 (1st Dep't 2000); *Jacome v. New York*, 266 A.D.2d 345, 698 N.Y.S.2d 320 (2d Dep't 1999);

Smith v. Hovnanian Co., 218 A.D.2d 68, 633 N.Y.S.2d 888 (3d Dep't 1995).

95. 282 A.D.2d 791, 723 N.Y.S.2d 243 (3d Dep't 2001).
96. *Id.* at 793.
97. 271 A.D.2d 911, 706 N.Y.S.2d 512 (2000).
98. 247 A.D.2d 294, 669 N.Y.S.2d 287 (1998).
99. *Id.* at 295 (quoting *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219 (1991)).
100. 184 A.D.2d 474, 585 N.Y.S.2d 432 (1st Dep't 1992).
101. 239 A.D.2d 312, 657 N.Y.S.2d 999 (2d Dep't 1997).
102. 266 A.D.2d 347, 698 N.Y.S.2d 315 (2d Dep't 1999).
103. 281 A.D.2d 881, 721 N.Y.S.2d 891 (4th Dep't 2001).
104. 270 A.D.2d 60, 704 N.Y.S.2d 233 (1st Dep't 2000), *rev'd*, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001).
105. 256 A.D.2d 1141, 682 N.Y.S.2d 751 (1998), *aff'd*, 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001).
106. *Narducci*, *supra.*
107. *Id.* at 267.
108. *Id.* at 268 (emphasis supplied).
109. *Id.* at 268.
110. 1 NY PJI 2:70 at 206 (2d ed.).
111. 1A NY PJI 2:70 at 323 (3d ed.).
112. *See DiMaggio v. M. O'Connor Constr. Co.*, 175 Misc. 2d 253, 255-256, 688 N.Y.S.2d 449 (Sup. Ct., Kings Co. 1998).
113. 1A NY PJI 2:70 at 323 (3d ed. 2000).
114. 1A NY PJI 2:71 at 330 (3d ed. 2000).
115. 284 A.D.2d 634, 725 N.Y.S.2d 752 (3d Dep't 2001) (jury determines that defendant was negligent but not proximate cause of plaintiff's injuries).
116. 93 N.Y.2d 554, 558, 693 N.Y.S.2d 493 (1999).
117. *Id.* at 558 (emphasis added).
118. *Id.* at 560 n. 2.
119. 25 Harv. L. Rev. 103, 223, 303 (1911-1912).
120. *See* Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765 (1997).
121. 1A NY PJI 2:70, comment at 328 (3d ed. 2000) (quoting *Bacon v. Celeste*, 30 A.D.2d 324, 292 N.Y.S.2d 54 (1st Dep't 1968)).
122. 273 A.D.2d 431, 710 N.Y.S.2d 108 (2d Dep't 2000).
123. *Id.* at 432-433.
124. *Id.* at 433.
125. 213 A.D.2d 815, 623 N.Y.S.2d 402 (3d Dep't 1995).
126. *Id.* at 818; *see Nicastro v. Park*, 113 A.D.2d 129, 134, 495 N.Y.S.2d 184 (2d Dep't 1985).
127. 268 A.D.2d 86, 87-88, 706 N.Y.S.2d 419 (1st Dep't 2000), *appeal dismissed,* 95 N.Y.2d 885, 715 N.Y.S.2d 372 (2000), *leave denied,* 95 N.Y.2d 769, 722 N.Y.S.2d 473 (2000).
128. *Id.* at 88.
129. *Id.* at 90-91.
130. 278 A.D.2d 216, 717 N.Y.S.2d 276 (2d Dep't 2000).
131. 279 A.D.2d 784, 718 N.Y.S.2d 713 (3d Dep't 2001).
132. *Loftus, Inc. v. White*, 85 N.Y.2d 874, 876, 626 N.Y.S.2d 56 (1995) (citation omitted).
133. 205 A.D.2d 959, 960-961, 613 N.Y.S.2d 499 (3d Dep't 1994).
134. *Id.* at 961.
135. *Id.* at 960.
136. 213 A.D.2d 606, 624 N.Y.S.2d 252 (2d Dep't 1995).
137. *Id.* at 606.
138. *Id. See* 1 NY PJI 2:70.
139. *Id.* at 606.
140. For a case similar to *Liebgott* in the Fourth Department *see Brazie v. Williams*, 221 A.D.2d 993, 994, 634 N.Y.S.2d 274 (1995) (trial court's "*the* proximate cause" instruction cured by correct instruction in recap charge).
141. *Burdell v. Buckingham Mfg. Co.*, (Sup. Ct., Broome Co., March 30, 1996, Monserrate, J).
142. 194 A.D.2d 580, 598 N.Y.S.2d 801 (2d Dep't 1999).
143. *Id.* at 582, quoting *Lillis v. D'Souza*, 174 A.D.2d 976, 572 N.Y.S.2d 136 (4th Dep't 1991), *leave denied,* 78 N.Y.2d 858, 575 N.Y.S.2d 454 (1991); *See Cutsogeorge v. Hertz Corp.*, 264 A.D.2d 752, 754, 695 N.Y.S.2d 375 (2d Dep't 1999).
144. 243 A.D.2d 448, 449, 663 N.Y.S.2d 67 (2d Dep't 1997).
145. *Id.* at 449 (citations omitted).
146. 281 A.D.2d 623, 722 N.Y.S.2d 563, 564 (2d Dep't 2001).
147. *Id.* at 564.
148. 283 A.D.2d 256, 724 N.Y.S.2d 610, 611 (1st Dep't 2001); *McDermott v. Alvey*, 198 A.D.2d 95, 603 N.Y.S.2d 162 (1st Dep't 1993).
149. 280 A.D.2d 787, 720 N.Y.S.2d 622 (3rd Dep't 2001); *Hansel v. Lamb*, 257 A.D.2d 795, 684 N.Y.S.2d 20 (3d Dep't 1999).
150. 209 A.D.2d 979, 620 N.Y.S.2d 199 (4th Dep't 1994).
151. 190 A.D.2d 896, 595 N.Y.S.2d 120 (3d Dep't 1993).
152. 178 A.D.2d 576, 577 N.Y.S.2d 474 (2d Dep't 1991).
153. 189 A.D.2d 1004, 592 N.Y.S.2d 525 (3d Dep't 1993).
154. 195 A.D.2d 819, 600 N.Y.S.2d 516 (3d Dep't 1993), *leave denied in part, appeal dismissed in part*, 82 N.Y.2d 885, 610 N.Y.S.2d 140 (1995).
155. 256 A.D.2d 782, 681 N.Y.S.2d 408 (3d Dep't 1998).
156. *Id.* at 783.
157. *Id.*
158. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3103:29A at 10.
159. *Id.*
160. 267 A.D.2d 702, 699 N.Y.S.2d 527 (3d Dep't 1999).
161. 217 A.D.2d 843, 629 N.Y.S.2d 517 (3d Dep't 1995).
162. 227 A.D.2d 382, 625 N.Y.S.2d 56 (2d Dep't 1996), *leave denied*, 88 N.Y.2d 814, 652 N.Y.S.2d 16 (1996).
163. 239 A.D.2d 926, 660 N.Y.S.2d 238 (1st Dep't 1997).
164. 276 A.D.2d 748, 715 N.Y.S.2d 712 (2d Dep't 2000).
165. 255 A.D.2d 1005, 679 N.Y.S.2d 775 (4th Dep't 1998).
166. 229 A.D.2d 869, 870, 646 N.Y.S.2d 415 (3d Dep't 1996).
167. 261 A.D.2d 928, 690 N.Y.S.2d 794 (4th Dep't 1999).
168. *Id.* (quoting *Wagner v. Kingston Hosp.*, 182 A.D.2d 616, 582 N.Y.S.2d 214 (2d Dep't 1992)).
169. 208 A.D.2d 488, 617 N.Y.S.2d 51 (2d Dep't 1994).
170. 229 A.D.2d 869, 870, 646 N.Y.S.2d 415 (3d Dep't 1996).
171. *See, e.g., Cummins v. County of Onondaga*, 84 N.Y.2d 322, 326, 618 N.Y.S.2d 615 (1994) (plaintiff's theory not advanced before trial court and, therefore, unpreserved for appellate review); *see Bouchard v. Champlain Enterprises*, 279 A.D.2d 935, 719 N.Y.S.2d 741 (3d Dep't 2001); *see also* CPLR 4017, 4110-b, 5501(a)(3)(4).
172. *See, e.g., Patrick Pontiac Nissan v. Jotric Land Dev.*, 269 A.D.2d 803, 703 N.Y.S.2d 630 (4th Dep't 2000) (plaintiff's failure to plead cause of action for reformation precluded review on appeal that reformation was appropriate remedy); *Serge El Co. v. Manshul Const. Corp*, 257 A.D.2d 478, 479, 684 N.Y.S.2d 204 (1st Dep't

1999) (defense of reliance upon contractual provisions waived by raising them for the first time on appeal).

173. *See Deso v. London & Lancashire Indem. Co. of Am.*, 3 N.Y.2d 127, 131, 164 N.Y.S.2d 689 (1957); *Karay Rest. v. Tax Appeals Tribunal*, 274 A.D.2d 854, 711 N.Y.S.2d 853 (3d Dep't 2000).

174. *See In re Atiba (Kim B)*, 275 A.D.2d 320, 712 N.Y.S.2d 560 (2d Dep't 2000).

175. *See In re Quinn S.*, 284 A.D.2d 1015, 727 N.Y.S.2d 670 (4th Dep't 2001).

176. *See In re Barbara C.*, 64 N.Y.2d 866, 868, 487 N.Y.S.2d 549 (1985); *see, e.g.*, *Soho Alliance v. New York City Bd. of Standards and Appeals*, 95 N.Y.2d 437, 718 N.Y.S.2d 261 (2000).

177. *See, e.g.*, *In re Jennifer WW (Anthony WW)*, 274 A.D.2d 778, 710 N.Y.S.2d 733 (3d Dep't 2000), *leave denied,* 95 N.Y.2d 295, 716 N.Y.S.2d 39 (2000).

178. *See* Cohen & Karger, *Powers of the New York Court of Appeals* § 169 (rev. ed. 1952).

179. 246 A.D.2d 786, 668 N.Y.S.2d 248 (1998), *appeal dismissed* 91 N.Y.2d 955, 671 N.Y.S.2d 716 (1998), *leave denied,* 92 N.Y.2d 807, 678 N.Y.S.2d 593 (1998).

180. *See* Cohen & Karger, *Powers of the New York Court of Appeals* § 102 at 622 (3d ed.).

181. *See In re Shannon B.* 70 N.Y.2d 458, 462, 522 N.Y.S.2d 488 (1987).

182. 204 A.D.2d 909, 612 N.Y.S.2d 494 (1994).

183. *See Altz v. Leiberson*, 233 N.Y. 16, 19, 134 N.E. 703 (1922).

184. 255 A.D.2d 167, 680 N.Y.S.2d 224 (1st Dep't 1998).

185. *See also Rodgers v. 72nd Associates*, 269 A.D.2d 258, 703 N.Y.S.2d 456 (1st Dep't 2000).

186. *See, e.g.*, *Hamilton v. Raftopoulos*, 176 A.D.2d 916, 917, 575 N.Y.S.2d 531 (2d Dep't 1991), *leave denied,* 79 N.Y.2d 753, 580 N.Y.S.2d 742 (1992) (plaintiff's general objection to jury charge insufficient to preserve issue).

187. *See Meyers v. Levine*, 273 A.D.2d 449, 711 N.Y.S.2d 742 (2d Dep't 2000).

188. *See Harris v. Armstrong*, 64 N.Y.2d 700, 702, 485 N.Y.S.2d 523 (1984); *see also Hageman v. Santasiero*, 277 A.D.2d 1049, 716 N.Y.S.2d 485 (4th Dep't 2000).

189. *See* CPLR 4110-b.

190. 154 A.D.2d 661, 662, 546 N.Y.S.2d 661 (1989).

191. *See McPheeters v. McPheeters*, 284 A.D.2d 968, 726 N.Y.S.2d 530 (4th Dep't 2001).

192. 86 N.Y.2d 54, 62, 629 N.Y.S.2d 980 (1995).

193. 106 A.D.2d 853, 483 N.Y.S.2d 550 (1984), *modified on other grounds*, 64 N.Y.2d 1033, 489 N.Y.S.2d 58 (1985).

194. 95 N.Y.2d 640, 644 n. 2, 722 N.Y.S.2d 213 (2001).

195. 146 A.D.2d 730, 732-733, 537 N.Y.S.2d 215 (2d Dep't 1989).

196. *See Insurance Co. of N. Am. v. Kaplun*, 274 A.D.2d 293, 713 N.Y.S.2d 214 (2d Dep't 2000).

197. 233 A.D.2d 30, 31, 663 N.Y.S.2d 317 (1997), *leave dismissed*, 91 N.Y.2d 921, 669 N.Y.S.2d 263 (1998), 92 N.Y.2d 886, 678 N.Y.S.2d 587 (1998).

198. *Id.* at 31.

199. *See Merrill v. Albany Med. Hosp.*, 71 N.Y.2d 990, 991, 529 N.Y.S.2d 272 (1988).

200. *Telaro v. Telaro*, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920 (1969).

201. *See Khan v. New York State Dep't of Health*, ___ A.D.2d ___, 731 N.Y.S.2d 82 (3d Dep't 2001).

202. 44 N.Y.2d 68, 72, 404 N.Y.S.2d 82 (1978).

203. 67 N.Y.2d 246, 250, 502 N.Y.S.2d 125 (1986).

204. *See Bleecker St. Mgt. v. New York State Div. of Hous. & Cmty. Renewal*, 284 A.D.2d 174, 727 N.Y.S.2d 76 (1st Dep't 2001).

205. *See Robinson v. Oceanic Steam Nav. Co.*, 112 N.Y. 315, 324 (1889); *Woodin v. Lane*, 119 A.D.2d 969, 970, 501 N.Y.S.2d 495 (3d Dep't 1986).

206. *See Security Mut. Life Ins. Co. v. Arenstein*, 26 N.Y.2d 379, 384, 310 N.Y.S.2d 491 (1970).

207. 136 A.D.2d 515, 517, 523 N.Y.S.2d 830 (1988).

208. *See also Wald v. Marine Midland Bus. Loans*, 270 A.D.2d 73, 704 N.Y.S.2d 564 (1st Dep't 2001).

209. *See Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 944, 473 N.Y.S.2d 397 (1st Dep't 1984), *aff'd,* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984) (court refused to rely on unrecorded statement advanced before it at oral argument to support litigant's position).

210. *See Insurance Co. of N. Am.*, *supra*; *Block*, *supra*.

211. 236 A.D.2d 170, 666 N.Y.S.2d 609 (1997).

212. *See Puccia v. Farley*, 261 A.D.2d 83, 699 N.Y.S.2d 576 (3d Dep't 1999).

213. *See Osterhoudt v. Wal-Mart Stores*, 273 A.D.2d 673, 709 N.Y.S.2d 685 (3d Dep't 2000) (notice issue resolved in plaintiff's favor, defendant's answer struck in its entirety).

214. *See Cummings v. Central Tractor Farm & Country*, 281 A.D.2d 792, 722 N.Y.S.2d 285 (3d Dep't 2001).

215. *See* 1 NY PJI 1:77, 1:77.1.

216. *See Rankin v. Miller*, 252 A.D.2d 863, 675 N.Y.S.2d 717 (3d Dep't 1998).

217. *See Kirkland*, *supra*.

218. *Id*.

219. *Black's Law Dictionary,* p. 1409 (7th ed. 1999).

220. *See Cummings*, *supra*.

221. *Kirkland, supra.*

222. *Id.* at 173 (citation omitted).

223. *Id.* at 173.

224. 208 A.D.2d 999, 617 N.Y.S.2d 209 (1994).

225. *Id.* at 1001.

226. *Id.* at 1002.

227. *See Judicial Departments Differ on Application of Spoliation Motion When Key Evidence is Destroyed*, 73 N.Y. St. B. Ass'n. J. 40.

228. *Id.*; *see, e.g.*, *Cummings*, *supra*; *Sage Realty Corp. v. Proskauer Rose LLP*, 275 A.D.2d 11, 675 N.Y.S.2d 14 (1st Dep't 2000).

229. *DiDomenico v. C & S Aeromatik Supplies*, 252 A.D.2d 41, 682 N.Y.S.2d 452 (2d Dep't 1998).

230. *Id.* at 53.

231. CPLR 3126(2).

232. CPLR 3126(3).

233. *See Fraracci v. Lasouska*, 283 A.D.2d 735, 724 N.Y.S.2d 218 (3d Dep't 2001); *Tawedros v. St. Vincent's Hosp. of N.Y.*, 281 A.D.2d 184, 721 N.Y.S.2d 237 (1st Dep't 2001).

234. 73 N.Y. St. B. Ass'n. J. 40.

235. *Id.*

236. *See Cummings*, *supra*; *Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp.*, 221 A.D.2d 243, 63 N.Y.S.2d 493 (1st Dep't 1995).

237. *See Cummings*, *supra*.

238. *See, e.g.*, *Cummings*, *supra,* at 793-94 *Sage Realty Corp. v. Proskauer Rose LLP*, *supra,* at 17.

239. C*ummings*, *supra,* at 794; *Sage Realty Corp.*, *supra,* at 18.

240. *Kirkland*, *supra,* at 175.

241. 248 A.D.2d 201, 669 N.Y.S.2d 589 (1st Dep't 1998).

242. *Id.* at 203 (citation omitted).

243. *See DiDomenico*, *supra,* at 53.

244. *New York Central Mutual Fire Ins. Co. v. Turnerson's Elec.*, 280 A.D.2d 652, 653, 721 N.Y.S.2d 92 (2d Dep't 2001) (quoting *DiDomenico*, *supra,* at 53).

245. 84 N.Y.2d 322, 326, 618 N.Y.S.2d 615 (1994).

246. *Cummings*, *supra,* at 793 (quoting *Abar.*, *supra,* at 1001 (citation omitted)).

247. *Cummings*, *supra*, at 794.

248. *See Rogala v. Syracuse Hous. Auth.*, 272 A.D.2d 888, 888-89, 707 N.Y.S.2d 572 (4th Dep't 2000); *Hoag v. Chase Pitkin Home & Garden Ctr.*, 267 A.D.2d 1083, 701 N.Y.S.2d 569 (4th Dep't 1999); *Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068, 693 N.Y.S.2d 787 (4th Dep't 1999).

249. *See Hoag*, *supra*.

250. *See Hartford Fire Ins. Co. v. Regenerative Build. Constr.*, 271 A.D.2d 862, 706 N.Y.S.2d 236 (3d Dep't 2000).

251. *Id.* at 864.

252. *See Sage Realty Corp.*, *supra.*

253. *See Tawedros*, *supra*.

254. *See Longo v. Armor Elev. Co.*, 278 A.D.2d 127, 720 N.Y.S.2d 443 (1st Dep't 2000); *Atlantic Mut. Ins. Co. v. Sea Transfer Trucking Corp.*, 264 A.D.2d 659, 696 N.Y.S.2d 114 (1st Dep't 1999).

255. *See Conderman*, *supra*; *Schidzick v. Lear Siegler Inc.*, 222 A.D.2d 841, 842, 653 N.Y.S.2d 323 (3d Dep't 1995).

256. *See* 1996 N.Y. Laws ch. 492, § 1.

257. *Id.*; *see Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 128-129, 711 N.Y.S.2d 131 (2000).

258. *See Henbest & Morrisey v. W.H. Ins. Agency*, 259 A.D.2d 829, 686 N.Y.S.2d 207 (3d Dep't 1999).

259. Summary Judgment Motions—Timelines, Memorandum in Support, New York State Senate, 1996 McKinney's Session Laws of New York 2432, 2433.

260. CPLR 3212(a); *see Fainberg v. Dalton Kent Sec. Group*, 268 A.D.2d 247, 248, 701 N.Y.S.2d 41 (1st Dep't 2000).

261. *See Gonzalez, supra,* at 128-129; *see* CPLR 3212(a).

262. *See La Hendro v. Nadeau*, 281 A.D.2d 717, 718, 722 N.Y.S.2d 80 (3d Dep't 2001); *Medina v. Barbaro*, 279 A.D.2d 615, 615, 720 N.Y.S.2d 165 (2d Dep't 2001); *Cibener v. City of N.Y.*, 268 A.D.2d 334, 334, 701 N.Y.S.2d 405 (1st Dep't 2000).

263. *See Gonzalez, supra,* at 129.

264. *See, e.g.*, *La Duke v. Albany Motel Enterprises*, 282 A.D.2d 974, 724 N.Y.S.2d 507 (3d Dep't 2001); *Medina*, *supra*, at 615-616; *Welch Foods v. Wilson*, 277 A.D.2d 882, 883, 716 N.Y.S.2d 243 (4th Dep't 2000); *Milne v. Cheema*, 270 A.D.2d 165, 166, 706 N.Y.S.2d 84 (1st Dep't 2000).

265. *See* Siegel, McKinney's Practice Commentaries, CPLR C3212:12 (Supp. 2001).

266. 252 A.D.2d 778, 676 N.Y.S.2d 699 (1998).

267. *Id.* at 779-780; *see also McKay v. Ciani*, 280 A.D.2d 808, 720 N.Y.S.2d 601 (3d Dep't 2001).

268. 281 A.D.2d 717, 722 N.Y.S.2d 80 (3d Dep't 2001).

269. 282 A.D.2d 974, 724 N.Y.S.2d 507 (3d Dep't 2001).

270. *Id.* at 974.

271. 284 A.D.2d 767, 728 N.Y.S.2d 523 (3d Dep't 2001).

272. *Id.* at 524 (citations omitted)

273. *See Cibener*, *supra*; *Fainberg*, *supra*; *Torres v. New York City Transit Auth.*, 267 A.D.2d 77, 699 N.Y.S.2d 387 (1999).

274. *See Fainberg*, *supra*.

275. 271 A.D.2d 299, 707 N.Y.S.2d 68 (1st Dep't 2000).

276. *Medina*, *supra.*

277. 266 A.D.2d 437, 698 N.Y.S.2d 708 (2d Dep't 1999).

278. *Id.*

279. *See, e.g.*, *Zwecker v. Clinch*, 279 A.D.2d 572, 720 N.Y.S.2d 150 (2d Dep't 2001); *Hanley v. East Moriches Union Free Sch. Dist. II*, 275 A.D.2d 389, 712 N.Y.S.2d 617 (2d Dep't 2000), *leave denied,* 95 N.Y.2d 769, 722 N.Y.S.2d 472 (2000).

280. *See, e.g.*, *Caiola v. Allcity Ins. Co.*, 277 A.D.2d 273, 684 N.Y.S.2d 266 (2d Dep't 2000); *Harrison v. City of N.Y.*, 275 A.D.2d 391, 713 N.Y.S.2d 59 (2d Dep't 2000), *leave dismissed,* 92 N.Y.2d 872, 677 N.Y.S.2d 775 (2000); *but see Chambers v. Maury Povich Show*, 285 A.D.2d 440, 726 N.Y.S.2d 725 (2d Dep't 2001).

281. *See, e.g.*, *Welch Foods*, *supra*; *Di Fusco v. Wal-Mart Disc. Cities*, 255 A.D.2d 937, 680 N.Y.S.2d 377 (4th Dep't 1998).

282. *Di Fusco*, *supra*, at 937.

283. *Id.*

284. 80 N.Y.2d 184, 590 N.Y.S.2d 1, *cert. denied sub nom. Poole v. Consolidated Rail Corp.*, 510 U.S. 816 (1993).

285. *Id.* at 196.

286. *Id.*

287. CPLR 3101(i).

288. 252 A.D.2d 69, 684 N.Y.S.2d 736 (1998), *leave denied, nor.* 688 N.Y.S.2d 372 (1998).

289. *Id.* at 72.

290. 263 A.D.2d 84, 702 N.Y.S.2d 150 (2000).

291. *Id.* at 87.

292. 255 A.D.2d 553, 680 N.Y.S.2d 671 (1998).

293. *Id.* at 553-554.

294. *Id.* at 554 (citation omitted).

295. 252 A.D.2d 392, 395-396, 675 N.Y.S.2d 86 (1st Dep't 1998).

296. *See Noble v. Ackerman*, 252 A.D.2d 392, 395-396, 675 N.Y.S.2d 86 (1st Dep't 1998); *Rodriguez v. New York City Hous. Auth.*, 209 A.D.2d 260, 262, 618 N.Y.S.2d 352 (1st Dep't 1994).

Presiding Justice Anthony V. Cardona is a graduate of Christian Brothers Academy, Manhattan College and Albany Law School. He was elected to the Albany County Family Court in 1984 and the Supreme Court in 1990. During 1992-93, he served as Administrative Judge of the seven-county Third Judicial District. On September 8, 1993, Justice Cardona was appointed to the Appellate Division, Third Judicial Department. He was designated by the Governor to be that Court's Presiding Justice on January 1, 1994 and has been a member of the Administrative Board of the Courts since that time. In addition to hearing civil and criminal appeals from the trial courts, as Presiding Justice, he is responsible for overseeing the administration of the courts in the 28 counties comprising the Third Judicial Department. He has lectured in the areas of family law, matrimonial law, ethics, appellate advocacy and the judicial processes in the state.

Section Committees & Chairpersons

The Trial Lawyers Section encourages members to participate in its programs and to contact the Section Officers listed on the back page or the Committee Chairs for further information.

Committee on Arbitration and Alternatives to Dispute Resolution

Vacant

Committee on Continuing Legal Education

David M. Gouldin
P.O. Box F-1706
Binghamton, NY 13902
607/584-5706

Arlene Zalayet
200 Old Country Road
Suite 375
Mineola, NY 11501
516/294-4499

Committee on Internet Coordination

Vacant

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
15 Plattekill Avenue
New Paltz, NY 12561
845/255-7782

Committee on Products Liability, Construction and Motor Vehicle Law

Peter Tamigi
120 Mineola Boulevard
Mineola, NY 11501
516/746-7371

Committee on Trial Advocacy Competition

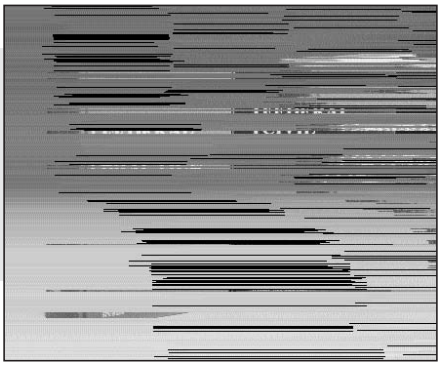
Stephen O'Leary, Jr.
88-14 Sutphin Boulevard
Jamaica, NY 11435
718/657-5757

Committee on *Trial Lawyers Section Digest*

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

Federal Civil Practice

Editor-in-Chief
Georgene M. Vairo
Professor of Law and William M. Rains Fellow
Loyola Law School
Los Angeles, CA



1989; Supp. 2000 • 1,038 pp., hardbound • PN: 4100
List Price: $130 (incls. $9.63 tax)
Mmbr. Price: $105 (incls. $7.78 tax)
(Prices include 2000 cumulative supplement)

When *Federal Civil Practice* was first released, its stated aim was to "make the vast and complex subject of federal practice comprehensible to every practicing attorney." That it is one of the most successful reference texts ever published by the New York State Bar Association is evidence that the goal of this book has been accomplished to a great degree.

Written by more than 30 of New York State's leading practitioners, judges and law professors, and designed as a text of first reference, *Federal Civil Practice* is an invaluable guide for new or inexperienced federal court practitioners, who may find the multi-volume treatises on this topic inaccessible as sources of information for quick reference. The more experienced practitioner will benefit from the practical advice and strategies discussed by some of the leading federal court practitioners in New York State.

Each chapter of *Federal Civil Practice* provides the reader with an overview of the topics presented, practical advice and a clear exposition of legal principles. "How to do it" checklists and sample forms are contained in many chapters. A thorough index and references to further legal authority greatly increase the utility of this book.

Each cumulative supplement to *Federal Civil Practice* provides practitioners with an analysis of the various statutory and rules changes, case citation updates and additional exhibits and forms.

Contents

Cosponsored by the Commercial and Federal Litigation Section and the Committee on Continuing Legal Education of the New York State Bar Association.

2000 Supplement

The 2000 supplement updates case and statutory references and provides commentary regarding new developments in the law. Once again, the supplement is edited by Professor Georgene Vairo and prepared by experienced practitioners and judges.

2000 • 704 pp., softbound • PN: 51000
List Price: $70 (incls. $5.19 tax)
Mmbr. Price: $60 (incls. $4.44 tax)

" . . . one of the most thorough, thoughtful and careful analyses of federal practice that I have ever studied."
Honorable John F. Keenan
United States District Court
Southern District

To order
Call 1-800-582-2452
Source code: cl1445

New York State Bar Association

Publication of Articles

The *Digest* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted on a 3 1/2" diskette (preferably in WordPerfect or Microsoft Word) along with two laser-printed originals. Please submit articles to Steven B. Prystowsky, Esq., 120 Broadway, New York, N.Y. 10271.

Unless stated to the contrary, all published articles and materials represent the views of the author(s) only and should not be regarded as representing the views of the Section officers, Executive Committee or Section members or substantive approval of the contents therein.

TRIAL LAWYERS SECTION DIGEST

Liaison
Steven B. Prystowsky
120 Broadway
New York, NY 10271

Contributors
Jonathan A. Dachs
250 Old Country Road
Mineola, NY 11501

Harry Steinberg
14 Wall Street
New York, NY 10005

Section Officers

Chair
Margaret Comard Lynch
403 New Karner Road
P.O. Box 12849
Albany, NY 12212
518/464-0600

Vice-Chair
Hon. Seymour Boyers
80 Pine Street
New York, NY 10005
212/943-1090

Secretary
Edward C. Cosgrove
237 Main Street, Suite 1000
Buffalo, NY 14203
716/854-2211

The *Digest* is published for members of the Trial Lawyers Section of the New York State Bar Association. Members of the Section receive a subscription free of charge.

©2001 by the New York State Bar Association.

ISSN 1530-3985

Trial Lawyers Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155