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Trial Lawyers Section Digest

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

Message from the Chair

Evan Goldberg

The nobility and importance of the trial lawyer is not a proper matter for debate. Often serving as scapegoats and objects of scorn, we continue to bravely enter arenas to fight for unpopular causes, victims, and, of course, for the ever-elusive dream of justice. We shape societal expectations of fair play, establish and preserve entitlements and stand as the last hope for the hopeless and disenfranchised. With governmental officials targeting us, with irresponsible media companies mocking us, and with even ordinary citizens mistrusting us, I declare unabashedly that I am proud to be a trial lawyer and even prouder to be the new Chair of the Trial Lawyers Section of the New York State Bar Association.

Apparently I'm not alone. As of the writing of this article, there are over 3,200 members of our Section and the numbers are steadily on the rise. With the recent formation of many new committees, there are exciting opportunities for participation and advancement within the Section, particularly for younger attorneys, student members and practitioners who have resisted the call of their guild for too long. Our newly appointed committee chairs represent the diversity, talent and future of the Trial Lawyers. We also remain thankful for the tireless efforts of our Executive Committee, made up of seasoned, well-respected plaintiffs' and defendants' attorneys, who have a long history of balanced, thoughtful service to the profession.

We certainly started our year off on the right note. The Section's Annual Dinner sold out and, as expected, was a huge success. Our guests included Chief Judge Judith Kaye, Associate Court of Appeals Judge Theodore Jones, Chief Administrative Judge Ann Pfau, Presiding Justices Jonathan Lippman and Gail Prudenti, and a host of Administrative and Supreme Court Justices. At the dinner, I called for our continued support and commitment toward achieving judicial pay increases as the top legislative priority of the NYSBA. I ask each and every one of you to do what you can on either a grass-roots or statewide level to advance that worthy cause. Our esteemed jurists are not only administrators of justice, but are also symbols of the fair dealing which is the very foundation of our legal institutions. Two raises in twenty years for the hardest working and lowest paid judiciary in the nation are an embarrassment. It cannot continue.

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Inside

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In my ever-continuing role as Membership Chair, I recently attended a job fair at one of our area's law schools. What a breath of fresh air! The optimism, enthusiasm and desire for excellence exhibited by the students reminded me of how I felt when I was working toward becoming a lawyer. Too often we focus on the stress and fear of loss attendant to litigation without being thankful for the privilege of being learned counselors and attorneys at law. How much better would it be to allow for pride in ourselves and congratulate each other for our continued efforts on behalf of those who need us? It starts with a positive outlook toward your work, it continues with civility and professionalism practiced in your dealings, and hopefully concludes with a long, satisfying life of achievement and personal satisfaction. Improving the quality of life for trial lawyers and reversing their established decreased life spans should be a goal for us all.

Of course, to take care of ourselves, we must also take care of our "home." Without a thriving industry in which to practice our craft, the rights of our clients and, as a consequence, the greatness of our society, disappear. Ever mindful of this eventuality, our Executive Committee remains vigilant and timely participates in the creation and consideration of legislative proposals affecting trial lawyers, and is always prepared to react to the seemingly unending threats to our profession.

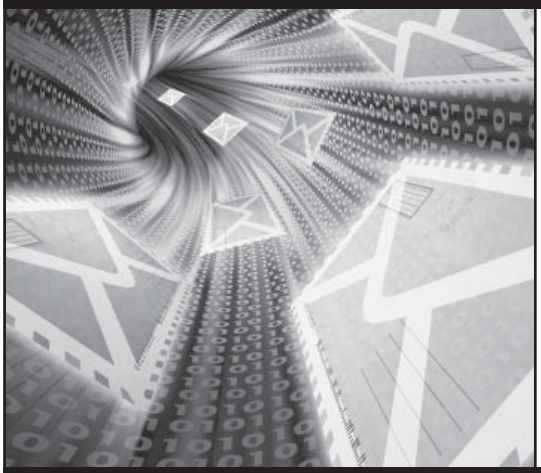
But we can't do it alone. If you're reading this, you're a trial lawyer and that means a lot. We understand you and you understand us. Whatever the stage of your career, I submit that it's time you step up and into your role as part of our community. Be thankful for those who have safeguarded your livelihood and be prepared to offer security to others. Involvement is the key to personal and professional fulfillment. We offer it to you. Look over the listing of committees at the end of this *Digest* or on our Web page (nysba.org/trial) and contact one of the chairs, or simply contact me or another representative to discuss how we may be of service to one another. Both you and your clients will assuredly benefit.

If you're uncertain how to take advantage of the various opportunities that abound, why don't you mull it over on the beach when you come with the Trial Lawyers Section to Bermuda from June 27 to 30, 2008? Our Program Chair, Peter Kopff, has put together a fabulous CLE event complete with academic and practitioner instructors who will satisfy both your need for credits and your desire for excellence in your practice. And the studies show that juries love tans.

I hope to see you there.

Evan Goldberg

Request for Articles



If you have written an article and would like to have it considered for publication in the *Trial Lawyers Section Digest*, please send it to its Editor:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/TrialLawyersDigest

2007 Appellate Decisions

By Steven B. Prystowsky

AGENCY—MANAGING AGENT—CONTROL

JAMC, as putative managing agent of the Port Authority, which does not control the work of plaintiff Fung, a Port Authority employee, cannot invoke the Workers' Compensation Law to bar plaintiff's action:

> The purported managing agency status in the present case does not establish a relationship between JAMC and Fung that would allow JAMC to assert the Workers' Compensation Law defense.
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> * * *
>
> Essential to all of these decisions [special employee] is a working relationship with the injured plaintiff sufficient in kind and degree so that the third party, or the third party's employer, may be deemed plaintiff's employer.
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> * * *
>
> It is not the title of the purported "employer"—in this case, a putative managing agent—that controls, but rather the actual working relationship between that party and the purported "employee." Here, JAMC argues agency but stops conspicuously short of explaining its working relationship with Fung or his employer. The title alone, however, does not suffice.
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> * * *
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> The record reflects that the Port Authority directed, supervised and controlled all aspects of Fung's employment as an electrician.

Fung v. Japan Airlines Company, Ltd., 9 N.Y.3d 351, 850 N.Y.S.2d 359 (2007), *aff'g and modifying* 31 A.D.3d 707, 820 N.Y.S.2d 89 (2d Dep't 2006).

ATTORNEY-CLIENT—*EX PARTE* INTERVIEW—FORMER EMPLOYEE

Ex parte interview of an adversary's former employee are neither unethical nor legally prohibited where counsel advised the former employee not to disclose privileged or confidential information:

> So long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee. Indeed, there is no disciplinary rule prohibiting such conduct.

Siebert v. Intuit, Inc., 8 N.Y.3d 506, 836 N.Y.S.2d 527 (2007).

DAMAGES—FRACTURED TIBIA/41.7 YEAR LIFE EXPECTANCY—$100,000 INADEQUATE

An award of $100,000 for future pain and suffering for a fractured tibia of a man whose life expectancy is 41.7 years deviated materially from what is reasonable compensation under the circumstances and was conditionally increased to $300,000:

> Given the uncontroverted testimony that plaintiff's injuries are permanent and he suffers ongoing pain, that he is likely to develop degenerative arthritis that could possibly require knee replacement surgery, that a future operation to remove the rod and screws is recommended, and that his injury resulted in atrophy of the left thigh, laxity in the ligaments, and limitation of his physical activities, [the award was inadequate].

Watanabe v. Sherpa, 44 A.D.3d 519, 844 N.Y.S.2d 27 (1st Dep't 2007).

DAMAGES—LOSS OF EARNINGS—$1,000,000—EXCESSIVE

The jury's award of $1,000,000 for future loss of earnings for a 24-year-old home health attendant who fractured her elbow was against the weight of the credible evidence, which the court conditionally reduced to $425,000:

> Although plaintiff's expert economist projected future lost earnings of $915,168 over a period of 32.28 years, that projection was based on plaintiff's total inability to work in the future. However, plaintiff's vocational rehabilitation expert admitted that plaintiff was not "totally disabled," and estimated that in a "best case scenario" she probably "lost fifty percent of her work life." Under that scenario, the economist projected that plaintiff's future lost earnings would amount to $356,538 if plaintiff received no pay raises, and $643,891 if plaintiff received

> raises of 3½%. Given the speculative nature of any raises she might receive, we find that an award of $425,000 for future lost earnings would be reasonable under the circumstances.

Flores v. Parkchester Preservation Company, L.P., 42 A.D.3d 735, 839 N.Y.S.2d 735 (1st Dep't 2007).

[EDITOR'S NOTE: The trial court reduced plaintiff's award for past pain and suffering of $200,000 and future pain and suffering of $800,000 to $100,000. The Appellate Division modified and conditionally reduced the awards to $350,000.

The Appellate Division also reduced plaintiff's future medical expenses of $2,658,742 to $250,000, reasoning:

> With regard to future medical expenses, we note that many of the categories of plaintiff's medical expenses appear to overlap, such as pain management, pain medication, physical therapy and steroid injections, and at least two of those categories were not supported by testimony from any physician regarding their actual cost. We also discern numerous uncertainties in the experts' projections, including the possible need for future elbow surgery and the duration of plaintiff's need for physical therapy and steroid injections.]

DAMAGES—PARAPLEGIA/ASSOCIATED COMPLICATIONS—$10,000,000—EXCESSIVE

Award to plaintiff of $10,000,000 for future pain and suffering (35 years) deviated materially from reasonable compensation to the extent in that it exceeded $5,000,000:

> The 45 year-year-old plaintiff was impaled by a steel bar from the scrotum to L2 on his spinal cord, resulting in paraplegia and associated complications. However, the seriousness of the injuries notwithstanding, the award for future pain and suffering deviates materially from what is reasonable compensation to the extent indicated.

Miraglia v. H & L Holding Corp., 36 A.D.3d 456, 828 N.Y.S.2d 329 (1st Dep't 2007).

[EDITOR'S NOTE: Initially the plaintiff was awarded $20,000,000 for past pain and suffering and $55,000,000 for future pain and suffering. Justice Salerno conditionally reduced the amount to $5,000,000 for past pain and suffering and $10,000,000 for future pain and suffering, reasoning as follows:

> This Court's review of the cases set forth in this opinion denotes the factors which are considered in assessing what would be reasonable compensation. This process, now completed, does not however provide a clear picture that permits the application of some formula that identified the limits of compensation for injuries that parallel plaintiff's suffering. It is undisputed that plaintiff who at one time was a strong and vibrant man is now a wheelchair bound paraplegic. The devastating injury he sustained was caused by the pipe that upon entering his body destroyed his bowel requiring a colostomy bag to collect his waste matter and he is required to manage his bladder with catheters. Plaintiff's nerve pain in his legs is continuous and permanent. Such injuries, including those previously described, including the permanency of his injuries and his inability to return to gainful employment, are the factors that this court has applied in determining what would be reasonable compensation. See 5 Misc. 3d 1021(A), 799 N.Y.S.2d 162 (S. Ct., Bronx Cty. 2007).]

INDEMNITY—CONTRACTUAL—SUBCONTRACTOR/GENERAL CONTRACTOR—"ARISING OUT OF THE WORK"—BROAD INTERPRETATION

R & J, a subcontractor who erected a plywood platform scaffold that collapsed, must indemnify the general contractor under its contractual indemnity provision even though (a) it left the job site before the accident and (b) plaintiff was injured while performing electrical work for the general contractor and not R & J, the drywall subcontractor:

> R & J's position, moreover, ignores the express provision of the contract requiring it to "furnish and install all . . . scaffolding" and including that work within the "Scope Of Work" to be performed. Because the liability to plaintiff Urbina "aris[es] out of" the furnishing and installing of the Baker scaffold, it "aris[es] out of the work performed under th[e] contract."
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> * * *
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> The indemnity provision to which R & J agreed is a broad one, as it obligates R & J to indemnify TSI and Court Street against "all claims . . . liability [and] damages . . .

> arising out of the work performed under th[e] contract" and contains no language limiting the scope of that obligation . . . For this reason, we are not persuaded by R & J's argument that the accident did not "aris[e] out of the work" performed under the subcontract by it to use the Baker scaffold. Without deciding the issue of whether a different conclusion would be appropriate if there were evidence that R & J had taken steps to prevent the use of the scaffold by employees of other trades or that plaintiff Urbina knew he was not authorized to use it, we note that there was no such evidence.

Urbina v. 26 Court Street Associates, LLC, 46 A.D.3d 268, 847 N.Y.S.2d 67 (1st Dep't 2007).

[EDITOR'S NOTE: The indemnity clause obligated R & J to "indemnify and hold TSI, the owner of the club and landlord, harmless from all claims, suits, liability, damages, losses and expenses including reasonable attorney's fees arising out of the work performed under this contract to the fullest extent permitted by law."]

INDEMNITY—DEFENSE COSTS OF LITIGATION

Supplier [Mid-South] of bracket control assembly that included defrost timer and related wiring was obligated to pay defense costs of litigation of a refrigerator manufacturer [GE] found liable for breach of warranty although the jury also found that the defrost timer was not defective:

> Here, Mid-South agreed to defend and indemnify GE for all "claims based on strict or product liability relating to Product." Since the defrost timer is a component of Mid-South's product, the language of the indemnification agreement applies.
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> Under the parties' agreement, indemnification was triggered by "any claims based on strict or product liability." There was no requirement that the claim be successful in order to require indemnification of defense costs. The actual fault of the parties is irrelevant. However, since the jury found no defect in the defrost timer, Mid-South's duty to defend and indemnify ended at the verdict and Supreme Court's holding that Mid-South was responsible for all costs associated with defending this action to that point was proper.

Bradley v. Feiden, 8 N.Y.3d 265, 832 N.Y.S.2d 470 (2007).

INSURANCE—ADDITIONAL INSURED—CGL POLICY—DUTY TO DEFEND/COMPLAINT ALLEGATIONS

The standard for determining whether an additional named insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense. Therefore, the insurance carrier, One Beacon, is obligated to provide the additional insured, B.P., a defense in the underlying action regardless of the merits of the claim:

> A duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured "[and, it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions."
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> "The reasonable expectation and purpose of the ordinary business[person] when making an ordinary business contract" will be considered in construing a contract. BP's reasonable expectation, when it forwarded the purchase order to Alfa that required Alfa to name BP as an additional insured, was that it wanted protection from lawsuits arising out of Alfa's work-litigation insurance. Denying BP a defense in the underlying matter would rewrite the policy without regard to BP's reasonable expectations as expressed in the purchase order, and provide a windfall for One Beacon.

BP Air Conditioning Corp. v. One Beacon Insurance Group, 8 N.Y.3d 708, 840 N.Y.S.2d 302 (2007).

[EDITOR'S NOTE: The Court of Appeals, however, modified the Appellate Division's order finding that One Beacon's coverage is primary and BP's coverage under its own policy is excess because the insurance policies were not before the court].

INSURANCE—NO-FAULT—INSURANCE LAW § 5106(A)

Insurance company's failure to timely contest any deficiency in the assignment documents from the hospital precludes the carrier from raising the issue now:

> Upon receipt of a no-fault claim, the regulations shift the burden to the carrier to obtain further verification or deny or pay the claim. When, as here, an insurer does neither, but instead waits to be sued for

> nonpayment, the carrier should bear the consequences of its nonaction. To allow an insurance company to later challenge a hospital's standing as an assignee merely encourages the carrier to ignore the prescribed statutory scheme.
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> * * *
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> Travelers contends that an assignment of benefits is a necessary component of the hospital's prima facie case for recovery of no-fault benefits. Even assuming that this is true, we conclude that an assignment form stating that the patient's signature is "on file" satisfies that burden where the carrier does not timely take action to verify the existence of a valid assignment.

Hospital for Joint Diseases v. Travelers Property Casualty Insurance Company, 9 N.Y.3d 372, 849 N.Y.S.2d 473 (2007).

INTEREST—PREJUDGMENT INTEREST/ COMMON-LAW LIABILITY

Prejudgment interest is to be calculated from the date common-law liability attaches in favor of the plaintiff, either by default, summary judgment, or bifurcated liability trial, even though the plaintiff has yet to establish the existence of a serious injury under the Comprehensive Motor Vehicle Insurance Reparation Act ("No Fault"):

> The language of CPLR 5002 measures interest from "verdict . . . report or decision" to the date of the entry of a final judgment. The terms "verdict," "report" or "decision" generally refer to the date that liability is established, even though the damages verdict is reached at a later time. Courts engage, in effect, in a legal fiction that damages are known and become a fixed obligation from the moment liability is resolved.
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> We hold . . . that serious injury is quintessentially an issue of damages, not liability. In the event a plaintiff at a damages trial fails to sustain the burden of establishing serious injury, the plaintiff is not entitled to any recovery despite proof of common law liability.

Van Nostrand v. Froehlich, 44 A.D.3d 54, 844 N.Y.S.2d 293 (2d Dep't 2007).

[EDITOR'S NOTE: Two judges dissented, maintaining that plaintiff's entitlement to damages cannot be considered to be "fixed in law" until the plaintiff has satisfied the serious injury threshold. Since the threshold was not established until the damage phase of the trial, plaintiff is not entitled to damages when she was awarded common-law liability.]

INTEREST—SETTLEMENT—CPLR 5003-a(e)

Plaintiff is not entitled to interest when defendant did not comply with his CPLR 5003-a(e) demand because he failed to provide a Hold Harmless Stipulation and a W-9 Form:

> Plaintiff's request for interest pursuant to CPLR 5003-a(e) was properly denied on the ground that he failed to timely provide Regional [defendant] with the Hold Harmless Stipulation and W-9 Form. Although neither the open court settlement agreement nor CPLR 5003-a requires the submission of those documents as a condition of payment of the settlement amount, defendant's request for them is supported by statute and case law (see Internal Revenue Code [26 U.S.C.] § 3406 [a][1][A]).

Cely v. O'Brien & Kreitzberg, 45 A.D.3d 368, 845 N.Y.S.2d 292 (1st Dep't 2007).

JUDGMENT—DEFAULT—INQUEST/SERIOUS INJURY PROOF

Plaintiff who was granted a default judgment on the issue of liability in a personal injury action arising from a motor vehicle accident is required to demonstrate that he sustained a "serious injury" at the inquest on damages:

> A defendant's default in cases involving injuries resulting from a motor vehicle accident may fairly be viewed as "establish[ing] only that he [or she] was at fault for the accident, not that the plaintiff suffered a serious injury."

Abbas v. Cole, 44 A.D.3d 31, 840 N.Y.S.2d 388 (2d Dep't 2007).

JUDGMENT—SUMMARY JUDGMENT—GOOD CAUSE—SHORT DELAY

Defendant's counsel's erroneous belief that she had 120 days rather than 60 days to move for summary judgment was insufficient to establish good cause notwithstanding that the motion was only a few days late:

> Notably, the local rules of Supreme Court, New York County and the rules of the individual justices of that county are available, among other places, on-line.

> That the motion was only a few days late does not eliminate the requirement that good cause be demonstrated, and we are not free, for the sake of judicial economy, to consider an untimely summary judgment motion in the absence of a showing of good cause.

Crawford v. Liz Claiborne, Inc., 45 A.D.3d 284, 844 N.Y.S.2d 273 (1st Dep't 2007).

[EDITOR'S NOTE: Two justices dissented, finding that good cause was established based upon an ambiguity in the court's preliminary conference.]

JUDGMENT—SUMMARY—120-DAY PERIOD/ FIVE-DAY MAILING PERIOD

Defendant's motion for summary judgment, made 125 days after plaintiff filed his Note of Issue, is untimely notwithstanding plaintiff stipulating to extend the deadline. CPLR 2103(b)(2), which allows five extra days when mailing is the mode of service, is not applicable:

> CPLR 2103(b)(2) . . . provides that "where a period of time prescribed by law is measured from the *service* of a paper and service is by mail, five days shall be added to the prescribed period" (emphasis added). As noted above, CPLR 3212(a) mandates that the 120-day period during which a summary judgment motion must be made begins to run upon the *filing* of the note of issue. Notably, "[p]apers that are required to be filed are considered to have been filed when they are received by the office with which, or by the official with whom, they are to be filed." Because the note of issue filed by plaintiffs was received by the County Clerk on June 28, 2005, "that is the date it was considered filed for purposes of time computation" under CPLR 3212(a). Thus, defendant's motion was untimely.
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> We find that the parties' stipulation is insufficient to excuse the delay. Notably, the Legislature added the 120-day deadline to CPLR 3212(a) in 1996 at the request of the court system to ameliorate the problem of parties filing dilatory summary judgment motions, and the Court of Appeals has stated that it must be "applied as written and intended." By the plain language of the amendment, the 120-day time frame may be extended only "with leave of court on good cause shown."

Coty v. County of Clinton, 42 A.D.3d 612, 839 N.Y.S.2d 825 (3d Dep't 2007).

JUDGMENT—SUMMARY—THIRD-PARTY ACTION—RIGHT TO DISCOVERY

Plaintiff was not entitled to summary judgment where the motion was made before the third-party defendant participated in discovery:

> Under plaintiff's theory of liability, third-party defendant Akosah was the only witness to the alleged negligent acts involving decedent. Nonetheless, Akosah has yet to be deposed or to otherwise participate in discovery. CPLR 1008 grants a third-party defendant all "the rights of a party adverse to the other parties in the action, including the right to counter-claim, cross-claim and appeal." In this appeal by third-party defendant Akosah, questions of fact relating to how decedent was injured, whether Akosah was involved, and whether the nursing home was otherwise negligent precluded a grant of partial summary judgment.

Giandana v. Providence Rest Nursing Home et al., 8 N.Y.3d 895, 832 N.Y.S.2d 476 (2007), *rvsg*. 32 A.D.3d 126, 815 N.Y.S.2d 526 (1st Dep't 2006).

JURISDICTION—CPLR 302(A)—OUT-OF-STATE DEFENDANT/WEBSITE

New York moving company Best Van Lines cannot sue Tim Walker, an Iowa resident, who operates a Web site critical of moving companies, in New York courts because New York does not have personal jurisdiction:

> We must determine whether the conduct of which BVL's claim arose was a "transact[ion of] business" under section 302(a)(1). In other words, were Walker's internet postings or other activities the kind of activity "by which the defendant purposefully avail[ed him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."
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> * * *
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> Walker's "Black List Report" seems to be exactly that—allegedly defamatory statements posted on a website accessible to New York readers. As with the column in *Realuyo [v. Villa Abrille*, 2003 WL 21537754 (S.D.N.Y. 2003)], Walker's listing of BVL on his Black List arises "solely from the aspect of the website from which

anyone—New York or throughout the world—could view and download the allegedly defamatory article."

* * *

Moreover, the nature of Walker's comments does not suggest that they were purposefully directed to New Yorkers rather than a nationwide audience. Material on the Website discussed interstate moving companies located in many states for the putative benefit of potential persons in many states who will undergo household moves.

* * *

We conclude that posting the "Black List Report" does not constitute "transact[ing] business" under section 302(a)(1).

Best Van Lines v. Walker, 490 F.3d 239 (C.A. 2d Cir. 2007).

JURISDICTION—LONG-ARM STATUTE—CPLR 302(a)(1)—ATTORNEY (NY)/CLIENT (CA)

New York courts have jurisdiction over a California corporation sued for legal services by a New York attorney under the long-arm statute even though the California corporation never physically came to New York:

> CPLR 302(a)(1) jurisdiction is proper "even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." Purposeful activities are those with which a defendant through volitional acts, "avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."
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> The quality of defendants' contacts here establishes a transaction of business in New York. Defendants sought out plaintiff in New York and established an ongoing attorney-client relationship with him. Plaintiffs time records and affidavit demonstrate that during the course of the representation, defendants communicated regularly with him in this state. . . . A continuing relationship was also contemplated and created here, as evidenced by defendants' retention letter and the many communications cited in plaintiff's affidavit and time records, even though defendants never entered New York.
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> * * *
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> In conclusion, when defendants projected themselves in New York via telephone to solicit plaintiff's legal services, they necessarily contemplated establishing a continuing attorney-client relationship with him. Having established such a relationship and repeatedly projecting themselves into New York—via telephone, mail, e-mail and facsimile—to advance their legal position in the Oregon action through communications with plaintiff here, defendants purposefully availed themselves of the benefits and protections of New York laws governing lawyers. This lawsuit arises out of defendants' contacts here. Requiring them to defend the present suit properly comports with traditional notions of fair play and substantial justice.

Fischbarg v. Doucet, 9 N.Y.3d 375, 849 N.Y.S.2d 501 (2007).

LEGAL MALPRACTICE—CONSEQUENTIAL DAMAGES

Law firm owes client consequential damages consisting of legal and expert witness fees and related expenses notwithstanding his settling during a second trial for more money than was awarded during the first trial:

> Here, defendants do not dispute that they were negligent in requesting that section 1151 of the Vehicle and Traffic Law be charged. . . . The erroneous charge forced plaintiff to hire new counsel to move to set aside the verdict assigning 50% fault to plaintiff, pursue an appeal from Supreme Court's judgment and retain expert witnesses to testify at the second trial. These steps would not have been necessary but for defendants' negligence.
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> * * *
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> Although plaintiff achieved a $750,000 settlement as a result of the second trial, the sum represented compensatory damages in the underlying personal injury action and was not designed to reimburse plaintiff for the fees and expenses caused by defendants' negligence.

Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 835 N.Y.S.2d 534 (2007).

MALPRACTICE—MEDICAL—STATUTE OF LIMITATIONS—EQUITABLE ESTOPPEL

Plaintiffs, who received the majority of the medical records in 2001 and did not request personal sonogram films until 2003, two weeks before the Statute of Limitations expired, cannot invoke the doctrine of equitable estoppel to toll the Statute of Limitations:

> Plaintiffs had "timely awareness of the facts requiring [them] to make further inquiry before the statute of limitations expired," and an equitable estoppel defense to the statute of limitations is therefore "inappropriate as a matter of law."

Pahlad v. Brustman, 8 N.Y.3d 901, 834 N.Y.S.2d 74 (2007), *aff'g* 33 A.D.2d 3d 518, 823 N.Y.S.2d 61 (1st Dep't 2006).

MASTER SERVANT—ASSAULT—*RESPONDEAT SUPERIOR*

Supreme Court erred in dismissing cross-claim of defendant for damages under the theory of *respondeat superior* against the Old Country Buffet Restaurant (OCB):

> An employer may be held vicariously liable for the intentional or negligent acts of its employees if the employees are acting within the scope of their employment. And the issue whether an act was within the scope of the employment ordinarily is one of fact for the jury.
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> In determining the scope of the employment, "the test has come to be whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions."
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> "Here, [OCB] failed to meet its burden of establishing as a matter of law that the allegedly tortious conduct of its employee[s] was not generally foreseeable and a natural incident of the employment."

McMindes v. Jones, 41 A.D.3d 1196, 839 N.Y.S.2d 365 (4th Dep't 2007).

MASTER SERVANT—SPECIAL EMPLOYEE

Building porter cannot sue managing agent for injuries sustained in the building because he was a special employee of the managing agent even though he received Workers' Compensation benefits from the building owner:

> When an employee elects to receive workers' compensation benefits from his general employer, a special employer is shielded from an action at law commenced by the employee.
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> * * *
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> The key to the determination is "who controls and directs the manner, details and ultimate result of the employer's work."
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> Here, the defendants made a prima facie showing that the plaintiff was a special employee of JPD [managing agent]. They supported their motion with deposition testimony establishing that the plaintiff received his daily work assignments from the building's superintendent, and that the superintendent was both a JPD employee and the plaintiff's only supervisor. Moreover, the superintendent testified at his deposition that his own "boss" or "manager" was also a JPD employee . . . The evidence that JPD had the exclusive authority to supervise and control all aspects of the plaintiff's work and to fire him established JPD's prima facie entitlement to judgment as a matter of law on the ground that it was his special employer.

Ugijanin v. 2 West 45th Street Joint Venture, 43 A.D.3d 911, 841 N.Y.S.2d 611 (2d Dep't 2007).

MOTIONS—FAILURE TO DISCLOSE WITNESS

Defendant was entitled to summary judgment because plaintiff did not establish notice by his wife's affidavit since she was not disclosed as a witness:

> The affidavit of the plaintiff's wife could not be considered in determining this motion because the plaintiff failed to properly disclose his wife as a notice witness in his discovery responses.

Muniz v. New York City Housing Authority, 38 A.D.3d 628, 831 N.Y.S.2d 513 (2d Dep't 2007).

MOTIONS—SUMMARY JUDGMENT—UNSIGNED DEPOSITIONS

Supreme Court erred in considering two non-party witnesses' unsigned depositions:

> The deposition transcripts of two nonparty witnesses, submitted by the defendant without an explanation as to why they were unsigned and unsworn, were not in admissible form and should not have been considered by the court.

McDonald v. Mauss, 38 A.D.3d 727, 832 N.Y.S.2d 291 (2d Dep't 2007).

[EDITOR'S NOTE: In *Chisholm v. Mahoney*, 302 A.D.2d 792, 756 N.Y.S.2d 314 (3d Dep't 2003), the deponent, a non-party, died before executing the transcript. The court allowed the unsigned transcript to be used as part of the papers opposing a summary judgment motion because the stenographer before whom the deposition was taken executed a sworn statement indicating that it was a true and correct transcript.

If a deposition is unsigned, CPLR 3116(a) allows an unsigned deposition transcript to be used if it is sent for review and sufficient time (60 days) passed. In addition, it is advisable to attach a court reporter's certification. *See White Knight Ltd. v. Shea*, 10 A.D.3d 567, 782 N.Y.S.2d 76 (1st Dep't 2004)].

NEGLIGENCE—DUTY—ABUTTING PROPERTY OWNER/FOLIAGE

Defendant homeowner is not liable to plaintiff, who was injured when his vehicle collided with a train at a railroad crossing, for failing to control vegetation that obstructed oncoming drivers' views:

> A landowner is generally not liable for the existence of uncut vegetation obstructing the view of motorists at an intersection.

Clementoni v. Consolidated Rail Corporation, 8 N.Y.3d 963, 836 N.Y.S.2d 507 (2007).

[EDITOR'S NOTE: The court also concluded that another homeowner whose private gravel road intersected with an unmarked grade crossing did not have a duty to warn plaintiff of oncoming trains by erecting signs, gates or warning signals at the crossing.]

NEGLIGENCE—DUTY—BASEBALL PARK OPERATOR

Baseball park operator, who offered free tickets to non-patrons outside the park retrieving foul balls and returning them to the ticket window, has no duty to warn or protect 14-year-old injured while chasing a foul ball hit out of the stadium:

> An owner or occupier of land generally owes no duty to warn or protect others from a dangerous condition on adjacent property unless the owner created or contributed to such a condition.
>
> * * *
>
> Here, plaintiff's theory rests upon defendant's "foul ball return for tickets" promotion. Plaintiff insists that this incentive foreseeably exposed fans—mostly children—to the hazard of chasing foul balls into the street. This argument, however, is one of foreseeability presupposing that a duty exists. The dangers of crossing the street—and individuals electing to cross it in pursuit of foul balls—exist independent of the Ball Club's promotion. This, coupled with the fact that the Ball Club could control neither the public street nor third persons who use it, strongly militates against a finding of duty.
>
> * * *
>
> The Court is mindful that . . . the Ball Club rewarded participants of its promotion with tickets. Important to our resolution, however, is that under the circumstances of this case . . . there are inherent risks associated with crossing the street. Those risks are multiplied when doing so indiscriminately. Moreover, we do not view the Ball Club's promotion as contributing to a dangerous condition, for it only rewarded the *retrieval* of foul balls. We must assume that adults, and children of Leonard's age, will act prudently in doing so.
>
> Even assuming that mere encouragement of retrieving foul balls suffices, under the circumstances, to create—or contribute to—a dangerous condition, a finding of duty would still be inappropriate.
>
> * * *
>
> Injury may befall someone—as in this case—as a result of conduct of a third person on a public road, or a group of fans in a struggle for the ball. The possibilities for injury—and consequently, for liability—are limitless, and the expectation that the stadium control the conduct of third persons is unrealistic.
>
> * * *
>
> Under these circumstances, it is difficult to imagine what steps the stadium operator could have taken that would have sufficed to meet a duty. Thus, we are constrained from imposing a requirement that the stadium exercise control over non-patron, third persons outside its premises over whom it has no actual authority to do so.

Haymon v. Pettit, 9 N.Y.3d 324, 849 N.Y.S.2d 872 (2007).

NEGLIGENCE—DUTY—NEGLIGENT PERFORMANCE OF CONTRACT—NON-CONTRACTING PARTIES—VEHICLE INSPECTION STATION

Company [Good & Fair Carting & Moving, Inc.], that issued a certificate denoting a car was in proper and safe working condition that became disabled on a highway because the half shaft was disconnected and dangling from the vehicle's undercarriage, did not owe any duty of care to plaintiff whose vehicle struck the inspected automobile. The court concluded that two of the three exceptions to general rule stated in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002), were not applicable:

> First, Good & Fair cannot be said to have launched an instrument of harm since there is no reason to believe that the inspection made Corbett's vehicle less safe than it was beforehand. Inspecting the car did not create or exacerbate a dangerous condition. Second, there was no detrimental reliance. The plaintiff driver did not know whether or when the Corbett vehicle had been inspected. He had never seen the vehicle before the accident and had no relationship to its owner. Moreover, as Good & Fair observes, there are vehicles on the road, including many vehicles registered in other states, which have not passed a New York State motor vehicle inspection.

Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253, 848 N.Y.S.2d 585 (2007).

[EDITOR'S NOTE: The third exception to the non-liability rule to non-contracting parties—where the contracting party has entirely displaced the other party's duty of care—was not reached because the Appellate Division correctly determined that it was unpreserved for review.]

NEGLIGENCE—DUTY—NON-OWN/MAINTAIN STAIRWAY—INGRESS/EGRESS

The Transit Authority owed a duty to maintain stairway or warn patrons of any existing dangerous condition where the stairway was used by its passengers "constantly and notoriously" as a means of approach to and from the subway station even though the TA neither owned nor maintained the stairway:

> Where, as here, a stairwell or approach is primarily used as a means of access to and egress from the common carrier, that carrier has a duty to exercise reasonable care to see that such means of approach remain in a safe condition or, where appropriate, to take such precautions or give such warnings as would protect those using such area against unforeseen danger. Whether those means of ingress or egress are used primarily for that purpose would generally be a question of fact.

Bingham v. New York City Transit Authority, 8 N.Y.3d 176, 832 N.Y.S.2d 125 (2007).

NEGLIGENCE—DUTY—SNOW REMOVAL CONTRACTOR

Snow removal contractor Aero, who agreed with JAMC to commence "push and pile" snow removal operations when one inch of snow accumulated, provide "ice/snow control" services, such as salting or sanding at JAMC's request and to be released by JAMC upon the satisfactory completion of the snow removal, did not owe any duty of care to plaintiff who slipped and fell on ice in the JFK Airport parking lot:

> Plaintiffs point to no term of the JAMC/Aero contract that required Aero to salt and sand the parking lot absent JAMC's request to do so, nor to record evidence that such a request was made. Therefore, because Aero owed no duty of care to [plaintiff] Fung, plaintiffs' claim against Aero must fail.

Fung v. Japan Airlines Company, Ltd., 9 N.Y.3d 351, 850 N.Y.S.2d 359 (2007), *aff'g and modifying* 31 A.D.3d 707, 820 N.Y.S.2d 89 (2d Dep't 2006).

NEGLIGENCE—FRANCHISOR/FRANCHISEE

Plaintiff cannot sue franchisor (Papa John's) for the negligence of its franchisee, whose employee struck plaintiff with a bicycle while making deliveries:

> The mere existence of a franchise agreement is insufficient to impose vicarious liability on a franchisor for the acts of its franchisee: there must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee. Here, the franchise agreement expressly states that the franchisee "shall have full responsibility for the conduct and terms of employment for [its] employees and the day-to-day operation of [its] business."

Martinez v. Higher Powered Pizza, Inc., 43 A.D.3d 670, 841 N.Y.S.2d 526 (1st Dep't 2007).

[EDITOR'S NOTE: That Papa John's reserved control to enforce standards in areas such as food quality and preparation, hours of operation, menu items, employee uniform guidelines and packaging requirements does not generally gives rise to a legal obligation.]

NEGLIGENCE—GUILTY PLEA/TRAFFIC INFRACTION

Plaintiff was entitled to partial summary judgment because defendant pleaded guilty to failure to yield the right of way in connection with the accident:

> The guilty plea, as an admission that she committed the act charged, constituted some evidence of negligence. A defendant is generally given an opportunity to explain the circumstances surrounding a guilty plea to a traffic infraction, such as the convenience of entering a plea rather than traveling to Virginia to contest the ticket, but defendant failed to offer any explanation for her plea in response to plaintiff's motion.

Lohraseb v. Miranda, 46 A.D.3d 1266, 848 N.Y.S.2d 440 (3d Dep't 2007).

NEGLIGENCE—LABOR LAW § 240(1)—COMMERCIAL CLEANING (WINDOWS)

Plaintiff, who was injured while engaged in interior window cleaning when he lost his balance and fell backward, injuring his mid-back on the front edge of the desk he stood on to clean the window, is not protected by Labor Law § 240(1). Plaintiff did not meet his burden of showing that an elevation risk existed and that the owner or contractor did not provide adequate safety devices:

> Plaintiff did not testify how high he could reach with his wand and squeegee while standing on the floor. He asserted that he had to stand on the desk, but provided no evidence to show that this was because he was required to work at an elevation to clean the interior of the windows. The desk may have been in plaintiff's way, or it may have been easier for him to reach the top of the windows while standing on the desk, or it may have been quicker for him to climb on the desk than to seek further assistance to move it. To recover under section 240(1), however, plaintiff must establish that he stood on the desk because he was obliged to work at an elevation to wash the interior of the windows. Moreover, summary judgment in favor of the defendants is proper because the evidence in this record demonstrates as a matter of law that plaintiff did not here need protection from the effects of gravity. Prior to his accident, plaintiff had cleaned the interior of eight other windows of exactly the same height as those in Room 810, and the record does not show that he needed a ladder or other protective device. The only "tools" that he testified to having used were a wand, a squeegee and a bottle of soap.

Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675, 839 N.Y.S.2d 714 (2007), *aff'g* 30 A.D.3d 204, 818 N.Y.S.2d 6 (1st Dep't 2006).

[EDITOR'S NOTE: The Court of Appeals noted that it was affirming on the basis of the Appellate Division's alternative rationale, pointing out that "cleaning" is expressly afforded protection under § 240(1) whether or not incidental to any other enumerated activity:

> The crucial consideration under section 240(1) is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240(1); or whether a window's exterior or interior is being cleaned. Rather, liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against.]

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

Plaintiff, who was operating an electric chain fall to hoist stringers on the sixth floor and was injured when threaded rods, which were not being hoisted, tumbled down the elevator shaft, striking him after becoming loose on the eighth floor, has a Labor Law § 240(1) claim:

> The accident clearly falls within the purview of the statute inasmuch as plaintiff was struck by a falling object that had been inadequately secured.
>
> * * *
>
> The Court of Appeals has recognized the hazards as those related to the effects of gravity in two specific construction site situations: first, where there is "a difference between the elevation level of the required work and a lower level," and second, where there is "a difference between the elevation level where the worker is

positioned and the higher level of the material or load being hoisted or secured."

Defendants' assertion that the claim was properly dismissed because the threaded rod that struck Boyle was not being hoisted or secured at the time of the accident is without merit since it is based on a misreading of *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 727 N.Y.S.2d 27 (2001).

* * *

Pursuant to the provisions of § 240(1) they [the rods] should have been completely "secured" or some safety device should have been used in the meantime to prevent the "special hazard" of a gravity-related accident such as "being struck by a falling object that was improperly hoisted or inadequately secured."

Boyle v. 42nd Street Development Project, Inc., 38 A.D.3d 404, 835 N.Y.S.2d 7 (1st Dep't 2007).

[EDITOR'S NOTE: Two justices dissented:

Since it is undisputed that the rod in question was not "being hoisted or a load that required securing for the purposes of the undertaking at the time it fell," Labor Law § 240(1) does not apply. For § 240(1) to apply, a plaintiff must show that the object fell while being hoisted or secured, *because* of the absence or inadequacy of an enumerated safety device.]

NEGLIGENCE—LABOR LAW § 240(1)—LADDER PROPERLY PLACED

Plaintiff, who fell from the third or fourth step of an unsecured eight-foot step ladder while installing steel tubing along the basement ceiling, was entitled to partial summary judgment even though the step ladder was structurally sound:

Where the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to partial summary judgment under Labor Law § 240(1).

* * *

Defendants' assertion that the ladder was structurally sound is not relevant on the issue of whether it was properly placed and defendants' argument that plaintiff's fall was caused by his overreaching or application of a lateral force is mere conjecture, without record support.

Ball v. Cascade Tissue Group–New York, Inc., 36 A.D.3d 1187, 828 N.Y.S.2d 686 (3d Dep't 2007)

NEGLIGENCE—LABOR LAW § 240(1)—LANDLORD'S KNOWLEDGE

Under Labor Law § 240(1) a landlord cannot be held liable to plaintiff-repairman injured while making repairs for a tenant since the tenant failed to obtain the landlord's approval for the work as required under the lease:

Because the work was performed without landlord's knowledge, and in violation of the lease requirement that tenant obtain prior consent, the landlord cannot be held liable under Labor Law § 240(1).

* * *

The existence of a lease, by itself, did not create a nexus between landlord and plaintiff, because the lease did not grant the tenant the authority to undertake work without notifying the landlord.

Morales v. D & A Food Service, 41 A.D.3d 352, 839 N.Y.S.2d 464 (1st Dep't 2007).

[EDITOR'S NOTE: The decision was effectively discredited by *Sanatass v. Consolidated Investing Company*, __ N.Y.3d __, 2008 WL 1817261.]

NEGLIGENCE—LABOR LAW § 240(1)—OWNER—KNOWLEDGE/CONSENT

Plaintiff, who was injured when an industrial air conditioner unit fell while being hoisted, cannot sue owner of building (Consolidated) under Labor Law § 240(1) where the work was being performed without the building owner's consent, which was necessary under the lease:

The motion court properly found that Consolidated is not liable to plaintiff pursuant to the relevant sections of the Labor Law because the air conditioning installation was performed without its consent and in violation of the lease, which required prior written approval for any installations.

Sanatass v. Consolidated Investing Company, 38 A.D.3d 332, 833 N.Y.S.2d 12 (1st Dep't 2007), *revs'd*, __ N.Y.3d __, 2008 WL 1817261.

[EDITOR'S NOTE: The Court of Appeals reversed and followed the reasoning of the two dissenting judges who pointed out that under *Gordon v. Eastern Ry Supply*, 82 N.Y.2d 555, 606 N.Y.S.2d 127 (1993), an owner is liable under Labor Law § 240(1) even if the owner had not contracted for the work and had not benefited from the work :

> Although the lessees' failure to obtain Consolidated's consent may bear on Consolidated's rights under the lease to a defense and indemnification from the lessees, neither that failure nor Consolidated's lack of knowledge of the work are relevant to Consolidated's status as an "owner" for purposes of Labor Law § 240(1).]

NEGLIGENCE—LABOR LAW § 240(1)—PROXIMATE CAUSE

Plaintiff was entitled to partial summary judgment on her Labor Law § 240(1) claim when she fell from the second step of a three-step folding aluminum ladder, which tipped as she proceeded to step down the ladder with her left foot:

> Defendant was required to present "some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of . . . her injuries. Evidence that the ladder was structurally sound and not defective "is not relevant on the issue of whether it was properly placed." . . . Because plaintiff established that a statutory violation was a proximate cause of her injury, she "cannot be solely to blame for it."

Woods v. Design Center, LLC, 42 A.D.3d 876, 839 N.Y.S.2d 880 (4th Dep't 2007).

[EDITOR'S NOTE: Justice Peradotto dissented because plaintiffs failed to establish as a matter of the law that the plaintiff was a covered employee under the statute. The record established that plaintiff's employer leased the premises from defendant and that plaintiff was painting a section of her employer's showroom at the time of the accident. Thus plaintiffs did not meet their initial burden, which requires denial of their motion regardless of the sufficiency of defendant's opposing papers.

The majority rejected the dissenting judge's argument, stating that defendant did not address in Supreme Court or on appeal the issue whether plaintiff was a covered employee and therefore it would be fundamentally unfair to determine this issue *sua sponte*. The majority noted that had defendant raised that issue in Supreme Court, plaintiffs would have been afforded the opportunity to present evidence on the issue whether plaintiff is a covered employee.]

NEGLIGENCE—LABOR LAW § 240(1)—SHAREHOLDER/COOPERATIVE APARTMENT—EXEMPT

Owners of a Park Avenue cooperative apartment, third-party defendants, were not liable to the owners of the cooperative building, defendant/third-party plaintiff, for injuries sustained by plaintiff painter whose company third-party defendants hired to paint the apartment:

> The third-party defendants established a *prima facie* entitlement to summary judgment by demonstrating, as a matter of law, that they were not negligent and that they were exempt from liability under Labor Law § 240(1) because they came under the exception contained in that statute for the "owners of one and two-family dwellings who contract for but do not direct or control the work." The third-party defendants also demonstrated that there was no agreement in effect requiring them to indemnify 975 Park Avenue or Greenthal Management.

Maciejewski v. 975 Park Avenue Corporation, 37 A.D.3d 773, 831 N.Y.S.2d 226 (2d Dep't 2007).

NEGLIGENCE—LABOR LAW § 240(1)—SOLE PROXIMATE CAUSE—FACTUAL QUESTION

Plaintiff's fall from a ladder that had "sticky glue all over it from the wallpaper paste" which occurred while plaintiff was removing wallpaper raises a question whether his conduct was the sole proximate cause of his fall. The Supreme Court erred in granting plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action.

> Here, there is an issue of fact as to whether the plaintiff's conduct in allowing the steps and feet of the ladder to become slippery, as a result of the coating of accumulating wallpaper paste, was the sole proximate cause of the accident.

Kozlowski v. Grammercy House Owners Corp., 46 A.D.3d 756, 848 N.Y.S.2d 336 (2d Dep't 2007)

NEGLIGENCE—PREMISES—CONSTRUCTIVE NOTICE

Defendant was not entitled to summary judgment where it failed to provide inspection details such as the time when it last inspected the aisle where plaintiff alleged she slipped and fell:

> The testimony from defendant's store manager regarding the store's general maintenance procedures failed to satisfy defendant's burden of making a prima facie case of entitlement to summary judgment on the basis that it lacked constructive notice of the alleged water hazard. There were insufficient details provided regarding the last time the aisle had been checked prior to the accident or about the actions of defendant's staff on the date of the accident.

Baptiste v. 1626 Meat Corp., 45 A.D.3d 259, 844 N.Y.S.2d 271 (1st Dep't 2007).

NEGLIGENCE—PREMISES—CONSTRUCTIVE NOTICE

Defendants' failure to make out a *prima facie* showing of their entitlement to summary judgment as a matter of law warranted reversal:

> Defendants, owners and managers of the premises, failed to establish that they lacked constructive notice of the allegedly defective floor tiles as a matter of law.

Lennard v. Mendik Realty Corp., 8 N.Y.3d 909, 834 N.Y.S.2d 57 (2007), *rvs'g* 33 A.D.3d 527, 823 N.Y.S.2d 373 (1st Dep't 2006).

[EDITOR'S NOTE: This decision re-enforces the rule that for a defendant to obtain summary judgment in a slip and fall case, the defendant must submit evidence showing that the allegedly dangerous condition existed for an insufficient length of time for the defendant to have discovered and remedied it.

The First Department, in a 3-2 decision, found that the affidavit of plaintiff's co-worker that she had seen the loose floor tile in the bathroom at least three months before the accident was insufficient to raise a factual issue whether the landlord had constructive notice of the condition for such period of time that, in the exercise of reasonable care, it should have corrected it.

The dissenting judges found a question of fact because defendant's current building manager, who submitted an affidavit, had no personal knowledge about building or maintenance practices when the accident occurred and testified that no report was generated about the alleged condition. In addition, defendants failed to perform a record search. There was testimony that building employees were in the bathroom for cleaning and unclogging drains, if necessary. According to the dissenters, a jury could, under these circumstances, infer that the condition of loose floor tiles in the bathroom was visible and apparent and had existed for a sufficient length of time before the accident to charge defendants with constructive notice of the defect in ample time to remedy it.]

NEGLIGENCE—PREMISES—DOG BITE/OFF PROPERTY

Landlord is not liable to plaintiff for injuries sustained by her son when he was attacked in plaintiff's yard by a dog owned by defendant's tenant:

> The incident did not occur on defendant's property and therefore defendant owed no duty of care to plaintiff's son.

Ruffin v. Dykes, 37 A.D.3d 1191, 830 N.Y.S.2d 426 (4th Dep't 2007).

NEGLIGENCE—PREMISES—DUTY—FAILURE TO PROVIDE EMERGENCY LIGHTING

CSX, which owned an auto yard where non-CSX employees loaded automobiles, previously removed from railroad cars, onto trucks to transfer them to car dealerships, is not liable to auto hauler employee injured because a power outage not caused by CSX darkened the auto yard:

> Absent a hazardous condition or other circumstance giving rise to an obligation to provide exterior lighting for a particular area, landowners are generally not required "to illuminate their property during all hours of darkness" . . . The railroad yard was dark at the time of plaintiff's injury due to a power outage—a problem CSX did not cause or control and that was known to plaintiff when he entered the property. Thus, plaintiff has failed to come forward with any proof that his injury, caused when he tripped on the ramp of another truck, was attributable to negligence on the part of CSX.

Miller v. Consolidated Rail Corporation, 9 N.Y.3d 973, 848 N.Y.S.2d 599 (2007).

NEGLIGENCE—PREMISES—TREE WELLS

Plaintiff, who stepped into a tree well on the sidewalk and tripped on one of the cobblestones, cannot sue property owner since property owners do not have to maintain tree wells under NYC Administrative Code § 7-210:

> Administrative Code § 18-104 entrusts the Department of Parks and Recreation with "exclusive jurisdiction" over "[t]he planting, care and cultivation of all trees and other forms of vegetation in streets." The "care" of the trees would necessarily entail the tree wells, which

encompass soil and roots. Moreover, the statute makes evident that the trees are "in streets," and thus something separate and distinct from streets.

Vucetovic v. Epson Downs, Inc., 45 A.D.3d 28, 841 N.Y.S.2d 301 (1st Dep't 2007).

[EDITOR'S NOTE: Justices Gonzalez and Andrias dissented. They interpreted § 7-210 as covering all portions of the sidewalk, including tree wells. In addition, the dissenters found support in Vehicle & Traffic Law § 144, which defines sidewalk as "[t]hat portion of a street between curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use of pedestrians." Obviously . . . tree wells that lie within the physical boundaries of a sidewalk would fall within the scope of the term "sidewalk."]

NEGLIGENCE—SUPERVISORY CONTROL—CONSTRUCTION SITE

The Appellate Division erred in dismissing plaintiff's action against owner and contractor at construction site at the 14th Street subway station when she tripped over a drag line cord which was used by contractors to pull wires through conduits to the location of an installation. The drag line had apparently been pulled from the conduit on the column and left strewn across the platform:

> Triable issues of fact exist as to whether the hazardous condition that caused the injured plaintiff's fall was the result of negligence and as to whether the owner and contractor defendants exercised the requisite supervisory or safety control over defendant Villafane Electric Corporation's work on the property so as to preclude summary judgment dismissing the complaint as to those defendants.

Corsino v. New York City Transit Authority, 9 N.Y.3d 978, 849 N.Y.S.2d 18 (2007), *rvs'g* 42 A.D.3d 325, 839 N.Y.S.2d 490 (1st Dep't 2007).

[EDITOR'S NOTE: The Appellate Division by a vote of three to two granted defendants' summary judgment. The majority found that the Transit Authority and its contractor did not create the allegedly hazardous condition and did not have actual or constructive notice of the condition. In addition, they found that the subcontractor, Villafane, was not negligent in failing to install a cover plate over the conduit. The two dissenting justices held there was a question of fact based upon plaintiff's expert's affidavit that since vandalism was a known danger when work is performed on a New York City subway platform, the subcontractor could have avoided the danger had it installed inexpensive cover plates over the conduit and/or secured the drag line inside the conduit "at a location out of reach of any vandals and in a manner that it would not come loose with the vibrations of trains entering and exiting the station."]

NOTICE OF CLAIM—AMENDING TIMELY NOTICE OF CLAIM

The court improperly granted the New York City Housing Authority summary judgment dismissing plaintiff's complaint for failing to serve a timely Notice of Claim where (a) it rejected claimant's Notice of Claim for insufficient particularity of the Housing Authority's negligence and (b) claimant submitted a second Notice of Claim within 17 days correcting the earlier deficiency by alleging broken/crowded/chipped stairs covered with debris:

> The facts here indicate that rather than filing a late second notice of claim, the plaintiff amended a timely notice of claim without prejudice to NYCHA.
>
> * * *
>
> The facts of this case warranted an exercise of discretion by the motion court to allow a *nunc pro tunc* correction of a good faith error, which correction was made in such timely fashion that, as a matter of law, it could not have prejudiced the defendant. NYCHA's characterization of the plaintiff's corrected claim form as a second notice of claim is merely a disingenuous attempt to place the issue within subdivision 5 (application for leave to serve late notice) or General Municipal Law § 50-e rather than subdivision 6 (mistake, omission, irregularity or defect, as to which amendment is permitted at any stage of the proceeding).

Goodwin v. New York City Housing Authority, 42 A.D.3d 63, 834 N.Y.S.2d 181 (1st Dep't 2007).

PRE-TRIAL DISCOVERY—MEDICAL AUTHORIZATION

Defendant is entitled to authorizations for records of plaintiff's medical condition before her present accident where plaintiff claims loss of enjoyment of life:

> Here, the plaintiff affirmatively placed her entire medical condition in controversy through the broad allegations of physical injury and mental anguish contained in her bill of particulars. In addition, the nature and severity of the plaintiff's previous injuries and medical conditions are material and necessary

> to the issue of damages, if any, recoverable for a claimed loss of enjoyment of life due to her current foot injury. Thus, the Supreme Court erred in denying those branches of the defendants' motion which were to compel the plaintiff to provide certain medical authorizations for the release of her medical and hospital records relating to her current condition.

Diamond v. Ross Orthopedic Group, P.C., 41 A.D.3d 768, 839 N.Y.S.2d 211 (2d Dep't 2007).

PRE-TRIAL DISCOVERY—PREMISES ACCIDENT—SIMILAR ACCIDENTS—MATERIAL OR NECESSARY

In an action for damages for plaintiff's slip and fall on snow and ice, Supreme Court erred in directing defendants to provide plaintiff with all documents of similar accidents at their premises for the three-year period prior to the accident:

> The court's directive was overly broad. In addition, the documents were not material or necessary to the prosecution of the action (*see* CPLR 3101[a], 3120[1]). Discovery of evidence of prior similar accidents, while material in cases where a defect is alleged in the design or creation of a product or structure, is irrelevant and inappropriate in cases such as this, where no inherent defect is alleged. Since the plaintiff did not allege any design defect, these documents were irrelevant to prove that the snow and ice upon which she slipped and fell was a dangerous condition or that the defendants had notice of that condition.

Daniels v. Fairfield Presidential Management Corp., 43 A.D.3d 386, 840 N.Y.S.2d 431 (2d Dep't 2007).

PRODUCTS LIABILITY—BREACH OF WARRANTY—NOT FIT FOR ITS INTENDED PURPOSE

Jury verdict that manufacturer and retailer of refrigerator breached its implied warranty of merchantability for fire that originated in the refrigerator/freezer destroying plaintiff's house was improperly vacated by the Appellate Division notwithstanding that the jury exonerated them by finding that the refrigerator/freezer's defrost timer, alleged by plaintiffs to be defective, was not defective:

> For a breach of warranty of merchantability claim, to support a verdict for plaintiff, the jury needed to find that the product was not "fit for the ordinary purposes for which such goods are used." Such a verdict may be sustainable solely on circumstantial evidence.
>
> * * *
>
> Although the proof adduced at trial primarily focused on an alleged defect in the defrost timer, there was also evidence that the fire originated in the refrigerator/freezer . . . Surely, a jury could rationally conclude that such an appliance was not fit for its intended purpose, regardless of whether the defrost timer was defective, and thus that GE breached the implied warranty of merchantability.
>
> The verdict sheet, as well as the jury instructions, specifically tied the strict products liability claim—but not the breach of warranty claim—to the defrost timer. Thus, a rational jury could have found that the defrost timer claim should be rejected, while also placing the source of the fire in the freezer. Since the jury was not asked whether the refrigerator was free from defect—only if the defrost timer was defective—the Appellate Division's opinion that the jury could not rationally find that the refrigerator was not defective, yet was nevertheless not fit to be used for its ordinary purposes, cannot be sustained here. There was sufficient evidence presented to support the claim that the refrigerator was not fit for its ordinary purpose.

Bradley v. Feiden, 8 N.Y.3d 265, 832 N.Y.S.2d 470 (2007).

PRODUCTS LIABILITY—MATTRESSES—MULTIPLE CHEMICAL SENSITIVITY (MCS)

The Supreme Court erred in failing to dismiss plaintiffs' claim against seller of mattresses, which they allege caused MCS after a two-week exposure, because the evidence lacks scientific support for a causal link between those chemicals found and MCS:

> Although these reports [plaintiff's medical reports] showed some evidence of injury to plaintiffs, they demonstrated no defect in the bedding, did not eliminate other potential cause of plaintiffs' injuries, and failed to rebut Bloomingdale's proof that no other customer (or Simmons customer or employee) had ever complained of a similar reaction to the products.
>
> * * *

> Plaintiffs' contention that the temporal relationship between their acquisition of the bedding and the onset of their injuries, in conjunction with their scientific proof, was sufficient to defeat summary judgment is without merit, absent proof of causation.

Spierer v. Bloomingdale's, A Division of Federated Department Stores, Inc., 43 A.D.3d 664, 841 N.Y.S.2d 299 (1st Dep't 2007).

SPOLIATION—NOTICE TO PRESERVE—TWO-YEAR WAIT—PHOTOGRAPH

Where claimant photographed the alleged defective chair that collapsed and his expert was present at the manufacturer's expert's inspection in another forum (Supreme Court), the Court of Claims improvidently exercised its discretion in precluding defendant from offering any evidence at trial on the condition of the chair when, after making the chair available, defendant was unable to produce it because it had been misplaced or destroyed by an outside contractor:

> Although defendant unquestionably was remiss, the failure to preserve the chair reflects no intentional misconduct. Under all the relevant circumstances, neither striking the answer nor precluding defendant from offering evidence at trial is warranted. Although some lesser sanction—be it missing evidence charge or some other sanction—appears to be appropriate, that is a matter best left to the discretion of the trial court and should be made on the basis of the record before it at the time.

Quinn v. City University of New York, 43 A.D.3d 679, 841 N.Y.S.2d 306 (1st Dep't 2007).

STATUTE OF LIMITATIONS—WRONGFUL DEATH—TOLLING

The two-year Statute of Limitations to commence a wrongful death action was not tolled during the pendency of the application for letters of Administration where the distributee is an adult:

> They [plaintiffs] argue a toll should be applied for the period that the application of the administrator for Nisha's estate for letters of administration was pending. However, this court recently held that there is no toll for that period of time.
>
> * * *
>
> Nisha was survived by adult distributees, and the plaintiffs failed to demonstrate that none were eligible to receive letters of administration.

Wilson v. New York City Health and Hospitals Corp., 36 A.D.3d 902, 829 N.Y.S.2d 178 (2d Dep't 2007).

[EDITOR'S NOTE: There is an exception when the decedent is survived by a distributee who is an infant. Under *Hernandez v. New York City Health & Hosps. Corp.*, 78 N.Y.2d 687, 578 N.Y.S.2d 510 (1991), the Court of Appeals held that where decedent's sole distributee is an infant, the wrongful death limitations period is tolled until appointment of a guardian or the infant distributee reaches the age of majority, whichever occurs first.]

TORTS—SPOLIATION—THIRD-PARTY NEGLIGENCE

The City of New York, which negligently destroyed evidence after receiving a court order to preserve it, cannot be sued for negligent spoliation of evidence:

> In a third-party spoliation case, because the content of the lost evidence is unknown, there is no way of ascertaining to what extent the proof would have benefited either the plaintiff or defendant in the underlying lawsuit and it is therefore impossible to identify which party, if any, was actually harmed . . . As a general rule, New York courts have been reluctant to embrace claims that rely on hypothetical theories or speculative assumptions about the nature of the harm incurred or the extent of plaintiff's damages.
>
> * * *
>
> The complexities inherent in any multiple party negligence action would be compounded in a spoliation claim since litigation emphasizing the impact of destruction of evidence would afford the jury no reasonable means of determining how liability might have been apportioned among tortfeasors in the original litigation or of assessing plaintiff's own comparative fault, if any.

Ortega v. City of New York, 9 N.Y.3d 69, 845 N.Y.S.2d 773 (2007).

[EDITOR'S NOTE: The court also was persuaded that as a public policy factor recognizing the tort had the potential to create significant liability for municipalities in New York State since the municipalities perform "a myriad of functions—including towing and warehousing vehicles involved in accidents—which could give rise to spoliation claims."]

TRIAL—FAIR TRIAL—JUDGE'S CONDUCT

Trial judge's improper conduct, including giving plaintiff's counsel significantly more leeway in cross-examining witnesses than she gave defense counsel and in admonishing defense counsel at a substantially more frequent rate than she did the plaintiff's counsel, warranted a new trial since the jury could not have considered the issues at trial in a fair, calm and unprejudiced manner:

> [A]ll litigants, regardless of the merits of their case, are entitled to a fair trial. A trial judge should at all times maintain an impartial attitude and exercise a high degree of patience and forebearance. A trial judge may not so far inject himself [or herself] into the proceedings that the jury could not review the case in the calm and untrammeled spirit necessary to effect justice.

DeCrescenzo v. Gonzalez, 46 A.D.3d 607, 847 N.Y.S.2d 236 (2d Dep't 2007).

TRIAL—HIGH-LOW AGREEMENT—FAILURE TO DISCLOSE—REVERSIBLE ERROR

In a multi-defendant action, the failure to disclose to all the parties the existence of a high-low agreement prejudiced the determination of the rights and liabilities of the non-agreeing defendant at trial warranting a new trial on liability and damages:

> Here, Garlock [non-agreeing defendant held 60% responsible], was deprived of its right to a fair trial by Supreme Court's failure to disclose the existence of the high-low agreement. The agreement furnished plaintiffs with an incentive to maximize Garlock's liability while minimizing Niagara's [agreeing defendant], because the potential amount of damages plaintiffs could recover from Niagara was capped at $185,000 . . . Had the agreement been disclosed, Garlock could have adjusted its trial strategy accordingly and evaluated the risks of going to trial with the knowledge that plaintiffs had an added incentive of making Garlock the target defendant.
>
> Non-disclosure also deprived Garlock of the opportunity to, among other things, seek appropriate procedural and evidentiary rulings from the trial court and argue the significance of the high-low agreement to the jury.
>
> * * *
>
> To ensure that all parties to a litigation are treated fairly, we hold that whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of that agreement and its terms to the court and the non-agreeing defendant(s).

In re Eighth Judicial District Asbestos Litigation, 8 N.Y.3d 717, 840 N.Y.S.2d 546 (2007).

[EDITOR'S NOTE: In *Cunha v. Shapiro*, 42 A.D.3d 95, 837 N.Y.S.2d 160 (2d Dep't 2007), Justice Dillon, writing for a unanimous court, held that a high-low agreement is a settlement of the action when a jury renders a verdict outside the range of the agreement and triggers its threshold or ceiling. When the jury renders a verdict within its high-low limits, the agreement is moot.

In addition, the high-low constitutes a settlement and plaintiff must exchange a general release and stipulation of discontinuance to commence the defendant 21-day time period before plaintiff may file a judgment with interest costs and disbursements under CPLR 5003-a.]

TRIAL—INCONSISTENT VERDICT

The jury's finding plaintiff (a) comparatively negligent but her negligence not a substantial cause of her injuries and (b) 25 percent at fault is inconsistent:

> The jury's verdict was inherently inconsistent and, as defense counsel objected to the verdict at a time when the jury could have cured or clarified the inconsistency, the court should have directed the jury to either reconsider the verdict or ordered a new trial.

Dubec v. New York City Housing Authority, 39 A.D.3d 410, 834 N.Y.S.2d 165 (1st Dep't 2007).

TRIAL—OPINION EVIDENCE—NOVEL SCIENTIFIC PRINCIPLES—*FRYE* HEARING

The trial judge abused his discretion in precluding qualified, expert testimony on the reliability of eyewitness identifications where that testimony is (1) relevant to the witness' identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror:

> Here, defendant's expert offered testimony at the *Frye* hearing that four factors which may influence the reliability of eyewitness identifications are generally

> accepted in the scientific community. In support of the expert's testimony, a survey demonstrating acceptance of these factors by an overwhelming majority of the experts in this particular field was introduced at the hearing. The methodology and results of this survey were criticized by the People's expert witness. We agree that the survey alone is not dispositive of the *Frye* issue; however, as to three of these factors—correlation between confidence and accuracy of identification, the effect of post-event information on accuracy of identification and confidence malleability—the defense expert's testimony contained sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field. Accordingly, defendant met his burden under *Frye*. As such, testimony as to these factors should not have been precluded.

People v. Legrand, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007).

TRIAL—REBUTTAL WITNESS—CRASH-TEST VIDEO

The trial court's refusal to allow plaintiff's expert to testify as a rebuttal witness after defendant's crash-test video was properly admitted into evidence despite certain dissimilarities between the accident conditions and the conditions under which the test was conducted was an abuse of discretion, warranting reversal:

> Contrary to the trial court's ruling, plaintiff could not have been expected to introduce testimony regarding the video during his expert's direct testimony since the video, a defense exhibit, had not even been admitted into evidence at that point.
>
> * * *
>
> However, "extensive" those cross-examinations were, the simple fact is that the defense experts did not concede on cross-examination the validity of plaintiff's many objections to the crash test video. Plaintiff's expert, however, would have testified not only about the dissimilarities between the test conditions and those at the time of the accident but also about numerous errors and discrepancies he observed in the video.
>
> * * *
>
> Only "[b]y effective exploitation of the dissimilarities between the [video] and the [accident]" could plaintiff have minimized the significance to be attached to the crash test video. Plaintiff was deprived of this opportunity, and thus it was an abuse of discretion for the trial court to deny plaintiff the right to present rebuttal testimony on this key issue.

Vinci v. Ford Motor Company, 45 A.D.3d 335, 846 N.Y.S.2d 9 (1st Dep't 2007).

[EDITOR'S NOTE: Two justices dissented, stating that while the better course would have been for the trial judge to allow plaintiff to recall his expert as a rebuttal witness with respect to the crash test, they did not believe that plaintiff demonstrated that the outcome of the trial would have been different had the evidence been admitted in light of the extensive cross-examination of the defense experts, during which plaintiff's counsel did in fact bring out all the issues which plaintiff claims the expert would have raised.

The majority and dissenters disagreed concerning the effect of plaintiff's cross-examination of defendant's expert.]

WORKERS' COMPENSATION—GRAVE INJURY—TRAUMATIC AMPUTATION/LEFT INDEX FINGER

Plaintiff's loss of both interphalangeal joints and the PIP joint, leaving a "painful amputation stump," constitutes loss of a finger and a grave injury:

> The plaintiff has lost both interphalangeal joints of the index finger. In view of the foregoing, it is our determination that the plaintiff has suffered the loss of his index finger.
>
> * * *
>
> The third-party defendant's contention that the "painful amputation stump" that remains precludes a finding that the plaintiff has suffered a loss of his index finger constitutes a forced and unnatural interpretation of the statutory language. The existence of the "painful amputation stump" underscores the seriousness of the plaintiff's disability.

Castillo v. 711 Group, Inc., 41 A.D.3d 77, 833 N.Y.S.2d 642 (2d Dep't 2007), *aff'd*, 10 N.Y.3d 735, 853 N.Y.S.2d 273, (2008).

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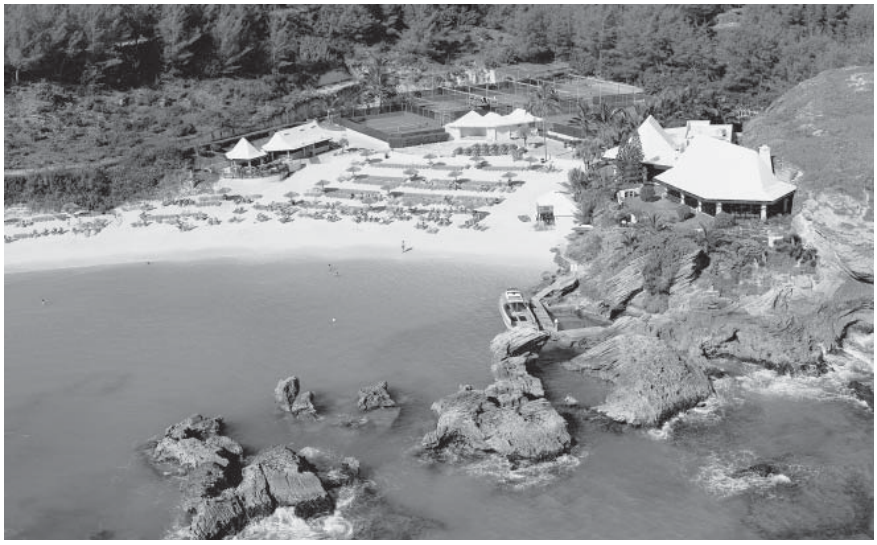

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For more information, go to www.nysba.org/TrialBermudaMtg2008 or call (518) 463-3200

SCHEDULE OF EVENTS

Friday, June 27

3:00 - 6:30 p.m.	**Registration** - Atlantic Window//Poinciana Foyer
3:30 - 5:00 p.m.	**Executive Committee Meeting** - Gardenia III Room
6:00 - 7:30 p.m.	**Welcome Reception** - Great South Lawn
7:30 p.m.	**Dinner** on your own

Saturday, June 28

7:00 - 10:00 a.m.	**Breakfast** on your own
8:00 - 9:00 a.m.	**Executive Committee Breakfast Meeting** - Gardenia I Room
8:00 a.m.	**Registration** - Atlantic Window/Poinciana Foyer
9:05 - 11:55 a.m.	**GENERAL SESSION** - Poinciana I Room
9:05 - 9:20 a.m.	**New York State Bar Association Welcome** **BERNICE K. LEBER, ESQ., PRESIDENT,** **New York State Bar Association** Arent Fox PLLC New York, New York **Trial Lawyers Section Welcome** **EVAN M. GOLDBERG, ESQ., SECTION CHAIR** Trolman Glaser & Lichtman PC New York, New York
9:20 - 10:10 a.m.	**New York Practice and CPLR Update** **PROFESSOR PATRICK M. CONNORS, ESQ.** Albany Law School Albany, New York
10:10 - 10:20 a.m.	**Break**
10:20 - 11:10 a.m.	**Ethics for Practitioners** **PROFESSOR PATRICK M. CONNORS, ESQ.** Albany Law School Albany, New York
11:10 - 12:00 noon	**Courtroom Persuasion in the 21st Century: Modern Argument Structure, Storytelling Techniques, Technology and Demonstrative Presentation** **W. RUSSELL CORKER, ESQ.** Shayne, Dachs, Corker, Sauer & Dachs, LLP Mineola, New York
12 noon - 1 p.m.	**Lunch** on your own
12:30 p.m.	**Golf - Riddell's Bay Golf & Country Club** 18 hole par 70 - 5688 yards. With tight fairways and small narrow greens, accuracy is the key to this course. Built in 1922, this is the oldest course on the island. Pre-paid fee of **$195.00** per person includes boxed lunch, transportation, greens fee and golf cart. Meet at the Main Entrance (Front Door) of the Hotel promptly at 12:30 p.m. for shuttles to course. **Pre-registration is required.** **Golf Chair: W. Robert Devine, Esq.**

SCHEDULE OF EVENTS

7:00 - 8:00 p.m. **Cocktail Reception** - Pool Gallery

8:00 p.m. **Dinner** on your own

Sunday, June 29

7:00 - 10:00 a.m. **Breakfast** on your own

8:00 a.m. **Registration** - Atlantic Window//Poinciana Foyer

9:00 a.m. - 12 noon **GENERAL SESSION** - Poinciana I Room

9:00 - 9:10 a.m. **Concluding Remarks**
PETER C. KOPFF, ESQ., PROGRAM CHAIR
Kopff, Nardelli & Dopf, LLP
New York, New York

9:10 - 10:00 a.m. **Sports-Related Liability: You Can't Win Them All**

HAROLD L. SCHWAB, ESQ.
Lester Schwab Katz & Dwyer, LLP
New York, New York

10:00 - 10:10 a.m. **Refreshment Break**

10:10 - 11:00 a.m. **Obtaining the Medical Information You Need to Prove Your Case: The Do's and Don'ts of Interacting with Medical Professionals *and* Office-Based Surgery Guidelines: Standard of Care in 2009**

CATHERINE A. MIRABEL, ESQ.
Fager and Amsler LLP
East Meadow, New York

11:00 - 11:50 a.m. **Jury Selection & Cross Examination**

MARVIN SALENGER, ESQ.
Salenger Sack Schwartz & Kimmel, LLP
Woodbury, New York

12:00 - 1:00 p.m. **Lunch** on your own

12:30 p.m. **Golf - Fairmont Southampton Golf Course**
18 challenging par 3 holes. Pre-paid fee of **$116.00** per person includes boxed lunch, greens fee and golf cart. Walk to the course or catch a complimentary trolley to the Pro Shop. **Pre-registration is required.**

Golf Chair: W. Robert Devine, Esq.

7:00 - 10:00 p.m. **Dinner** - Poolside
Join us for dinner poolside on our final evening in Bermuda.

Monday, June 30

Departure

For more information, go to www.nysba.org/TrialBermudaMtg2008 or call (518) 463-3200

Trial Lawyers Section

ANNUAL DINNER

Chair Evan Goldberg introducing members of the judiciary; Outgoing Chair David Howe, Vice Chair Mark Moretti

New York City Comptroller William C. Thompson, Jr., Evan Goldberg

Miles J. Goldberg, Chair Evan M. Goldberg, Chief Judge Judith Kaye

"Who Here Is Suing the City of New York?" David Howe, Evan Goldberg, Mark Moretti

Chief Judge Judith Kaye, Peter Overzat, Jeffrey Lichtman, Tina Wells, Michael Madonna, David Corley, Dennis Bellovin, Justice Barry Salman, Justice Stanley Green, Administrative Judge Philip Minardo

Mark Moretti, City Comptroller William C. Thompson, Jr., Richard Dawson, Justice Stanley Green, Justice Philip Minardo, Chief Judge Judith Kaye

Sold-out room at the Water Club, New York City

Wednesday, January 30, 2008
The Water Club, New York City
(Joint wth the Torts, Insurance and Compensation Law Section)

Incoming Chair Evan Goldberg receiving the Trial Lawyers Gavel from outgoing Chair David Howe

NYC Comptroller William C. Thompson, Jr.

Turning over the reins: Evan Goldberg, David Howe

Administrative Judge Philip Minardo, Chief Judge Judith Kaye, Justice Nelson Roman, Tina Wells, Michael Madonna, Dennis Bellovin, Administrative Judge Barry Salman, Justice Stanley Green

Vice-Chair Mark Moretti presenting outgoing Chair David Howe with plaque

Administrative Judge Barry Salman, Justice Stanley Green, Chief Judge Judith Kaye, Peter Overzat, Tina Wells, Michael Madonna

Outgoing Chair David Howe, accepting plaque from Vice Chair Mark Moretti

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The *Digest* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted electronically(preferably in WordPerfect or Microsoft Word) along with two printed originals. Please submit articles to:

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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.

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